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# The Kremlin's *Malign Legal Operations* on the Black Sea: Analyzing the Exploitation of Public International Law Against Ukraine

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*The views expressed are written solely in the author's personal capacity and do not represent those of the United States government or National University of Kyiv-Mohyla Academy in any capacity.*

## Abstract

This article seeks to analyze the asymmetric manipulation and exploitation of legal domains to achieve political objectives. A multidisciplinary analysis is offered to explore the perversion of the law to shape legitimacy, contain adversaries, justify violations, escape obligations, and ultimately to advantageously revise the international and domestic rule of law. Colloquially known as *lawfare*, this article offers a discourse analysis of the term and asserts that a more doctrinally appropriate phrase exists to describe this phenomenon; *Malign Legal Operations* (MALOPs). Furthermore, this article asserts that MALOPs are the root of contemporary *hybrid warfare* and that all other *hybrid* means are secondary. In particular, the Russian Federation's behavior towards Ukraine in the Black Sea region is used as a case study to determine the extent of these MALOPs and to explore what measures can be taken to defend the rule of law. The primary example offered is Russia's November 25th, 2018 attack on three Ukrainian Naval vessels in the Kerch Strait and its capture of 24 sailors. Supplementary examples include the annexation of Crimea, manipulations of the Montreux Convention, and Russia's overall aggression towards Ukraine.

**Key Words:** Malign Legal Operations, lawfare, international law, international relations, Ukraine, Russia, hybrid warfare



***Malign Legal Operations (MALOPs):*** *The exploitation of legal domains by employing disinformation to shape legitimacy, justify violations, escape legal obligations, contain adversaries, and ultimately to advantageously revise the rule of law.*

On November 25th, 2018, The Russian Federation forcibly stopped three Ukrainian ships from transiting the Kerch Strait into the Sea of Azov. It was the Ukrainian Navy's second attempt to transit the strait since the Crimean Bridge, which links occupied Crimea to Russia, was completed over the summer. While the first transit was a success, this attempt resulted in the illegal seizure of military personnel and equipment.



*Ukraine's Three Seized Ships in Russian Custody Source: Associated Press*

Despite notifying the Russian Federation about this planned movement from Odesa to Ukraine's Azov port of Mariupol, Russian Federal Security Service (FSB) vessels ordered the ships to stop due to an unexpected closure of the strait. The waterway was physically blocked by a tanker and the Ukrainian vessels were eventually rammed. They were then fired upon while entering international waters during their return to Odesa, resulting in the injury of two Ukrainian sailors.<sup>1</sup> Their ships were boarded and seized, with all 24 sailors taken captive and tried as criminals for border violations. These sailors remained in Moscow for almost ten months and were charged with "conspiracy by a group of persons or an organized group to illegally cross the border using violence or the threat to use violence," (Part 3 of Article 322 of the Russian Criminal Code) and faced up to six years in prison if convicted. Ukraine's Foreign Ministry formally responded on April 16th, 2019, by requesting immediate relief from the International Tribunal for the Law of the Sea (ITLOS) against the Russian Federation under the auspices of the United Nations Convention on the Law of the Sea (UNCLOS). ITLOS deliberated on the issue and declared that Russia must return the sailors and ships to Ukraine immediately. Russia objected the decision and refused to release the men, waiting instead to negotiate a swap of 35 prisoners with Ukraine's newly elected President Zelensky, which occurred in September of 2019.

While this episode marked a substantial escalation between Russia and Ukraine, this article asserts that the Kerch incident was simply one significant event in a long line of Russian provocations. Specifically, in the case of Crimea and the Sea of Azov, the Russian Federation depends heavily upon the use, misuse, and manipulation of

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<sup>1</sup> Danylo Bilyk, "What You Need to Know about the Conflict in the Sea of Azov," DW News, 2018, accessed December 12, 2019. <https://www.dw.com/en/what-you-need-to-know-about-the-conflict-in-the-sea-of-azov/a-46461361>.

the legal domain. This strategy is used to achieve “fait accompli”<sup>2</sup> whereby geopolitical objectives are achieved and consolidated before neither the target nor the international community may deliver a proportional response. These tactics have become a key to modern hybrid operations which utilize the asymmetric blurring of diplomatic, information, military, and economic means to avoid attribution or proportional retribution under Public International Law (PIL).<sup>3</sup>

This research was conducted primarily as an inductive, qualitative analysis of open-source media and government reports in addition to the analysis of applicable international law as it pertains to specific cases in the Black Sea Region. This paper advances three primary arguments;

- 1) that *Malign Legal Operations* (MALOPs), (a. k. a. *lawfare*) is a particularly dangerous tactic used increasingly as a 21st century method for achieving geopolitical objectives while avoiding accountability, and that MALOPs are the root of contemporary hybrid warfare,
- 2) that the Russian Federation relies heavily upon MALOPs to achieve strategic victories against Ukraine, particularly in the Black Sea Region, and
- 3) that these MALOPs not only result in damage to the rule of law in Ukraine, but to the international legal system itself.

### Exploring Lawfare: A Discourse Analysis

While the term *lawfare* is relatively new, the concept is as old as law itself. In his 2016 book, *Lawfare*, Orde Kittrie uses the example of Hugo Grotius, who many consider to be the founding father of international law, seeking creative ways to justify armed conflict under the Law of Nations. He was asked by the Dutch government to produce a strategy whereby the law could be used to create a *casus belli* justification against Portugal for its blocking of Dutch trade in the Indian Ocean.<sup>4</sup> Kittrie traced the term itself back to 1975, when John Carlson and Neville Yeomans authored a paper highlighting the increasingly adversarial nature of legal systems and their use of *lawfare* to settle disputes via pen rather than sword. The term faded, however, and was not resurrected until 2001 by U. S. Major General Charles Dunlap in an essay he wrote as a Colonel about the realities of 21st century warfare. After several iterations, Dunlap ultimately defined the term in 2011 as “the strategy of using—or misusing—law as a substitute for traditional military

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2     Fait Accompli: Mid 19th century: from French, literally ‘accomplished fact.’ a thing that has already happened or been decided before those affected hear about it, leaving them with no option but to accept.” — Oxford Dictionary

3     Peter Pindjak, “Deterring Hybrid Warfare: A Chance for NATO and the EU to Work Together?” NATO Review Magazine, accessed December 15, 2018, <https://www.nato.int/docu/review/2014/Also-in-2014/Deterring-hybrid-warfare/EN/index.htm>.

4     F. Kittrie, Orde. *Lawfare: Law as a Weapon of War. Disputatio*, 2016, 4. <https://doi.org/10.1093/acprof:oso/9780190263577.001.0001>.

means to achieve an operational objective.”<sup>5</sup> He later broadened the term in 2017 by adding that “belligerents, and particularly those unable to challenge America’s high-tech military capabilities, are attempting to use law as a form of ‘asymmetric’ warfare.”<sup>6</sup> In his writings, General Dunlap offered the example of the United States buying and contractually denying the rights to satellite imagery of Afghanistan in 2001 to keep it out of the hands of the enemy. This is an example of using law as a substitute for force, which can be classified as *responsible lawfare*. The General makes a point to highlight that *lawfare* does not contain “intrinsic evil,” but rather he asserts that responsible *lawfare* in lieu of military force is not only right, but proper. Phillip Carter, a lawyer and former U. S. Army Officer featured in Kittrie’s book, opined that “I would far prefer to have motions and discovery requests fired at me than incoming mortar or rocket-propelled grenade fire.”<sup>7</sup> To highlight the differences in philosophy between “use” and “misuse,” General Dunlap noted “lawfare is much like a tool or weapon that can be used properly in accordance with the higher virtues of the rule of law—or not. It all depends on who is wielding it, how they do it, and why.”<sup>8</sup> Kittrie further refined and narrowed Dunlap’s definition of *lawfare* by adding two criteria that must be satisfied for an action to be considered as “the use of law as a weapon of war.” The first is that the particular *lawfare* application must be in-lieu of what would otherwise be a kinetic strike on a target. The second is that the intent must be to “weaken or destroy an adversary against which the *lawfare* is being deployed.”<sup>9</sup>

One issue with these definitions is that they are limited to the war fighting domain and the use of force. Dunlap’s conceptualization defines *lawfare* as the application of law to achieve battlefield effects while Kittrie expands upon it to include a wartime intent. Where, then, is there room to consider the exploitation of legal systems to achieve geopolitical objectives? Doctor Aurel Sari of the University of Exeter Centre for International Law highlighted this challenge in a 2019 paper titled “Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats” by noting the restrictive nature of these definitions in a time where the line between *war* and *not-war* is increasingly blurred. “The instrumental use of international law is not confined to war. States regularly employ law and legal arguments to pursue their interests outside the context of active hostilities, for example as China does in the South China Seas. As traditionally understood, *lawfare* fails to capture the instrumentalization of law beyond armed

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5 Charles J. Dunlap Jr., “Lawfare Today: A Perspective,” *Yale Journal of International Affairs*, no. Winter Issue (2011): 146–54, <http://yalejournal.org/wp-content/uploads/2011/01/083111dunlap.pdf>.

6 Charles J. Dunlap Jr., “Lawfare 101: A Primer,” *Military Review*, vol. 8, 2017, <https://sites.duke.edu/lawfire/>.

7 F. Kittrie, *Lawfare: Law as a Weapon of War*, 3.

8 Dunlap Jr., “Lawfare Today: A Perspective.”

9 F. Kittrie, *Lawfare: Law as a Weapon of War*, 8.

conflict and for purposes other than strictly military gains.”<sup>10</sup> NATO, in 2019, offered its own definition of the concept under the title “legal operations,” and it broadened the discussion to include the use of law to alter legitimacy;

*Legal Operations: “The (ab)use of law by actors to either legitimize their own actions, positively impact their capabilities, or prop-up its strategic interests; or to delegitimize the actions of their opponents, negatively impact their capabilities or undermine its strategic interests.” — NATO SHAPE Allied Command Operations Office of Legal Affairs*

Furthermore, in her 2010 article titled “Lawfare and the Definition of Aggression,” Doctor Christi Bartman offered a holistic view of the term that aptly captured the murkier and more revanchist extremes sought by modern great-power competitors that pursue a revisionist agenda towards legal systems. Her definition breaks from the mold first cast by Dunlap’s strictly military approach to the term.

*“Lawfare, as used by the Soviet Union and Russian Federation, is the manipulation or exploitation of the international legal system to supplement military and political objectives legally, politically, and equally as important, through the use of propaganda.”<sup>11</sup>*

In analyzing Dunlap’s definition, Kittrie’s caveats, NATO’s observations, and Bartman’s alternative view, one can quickly surmise that there exists, to a certain extent, a hierarchy of *lawfare*. Dunlap and Kittrie offer operational to tactical views whereby the law is used instrumentally for battlefield effects. NATO paints the problem with broad strokes that appropriately allows for a multitude of applications. Finally, Bartman offers a strategic view of this concept that allows for military applications but exists also as a geopolitical doctrine to be used below the threshold for military force (or to justify the use of force). Furthermore, her definition suggests that *lawfare* acts against and subverts the international system itself versus simply applying legal mechanisms within the system to achieve desired outcomes. Each of these definitions, however, in some way fails to consider the modern realities of this concept. Dunlap constrains the term to military applications and Bartman considers only exploitations of international law rather than the entire legal domain. Furthermore, while it is well served as a colloquial “bumper sticker” or political term to describe this phenomenon, even the term *lawfare* itself is a misattribution of the term *warfare*. As Carl Von Clausewitz taught us, “there

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10 Aurel Sari, “Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats,” *SSRN Electronic Journal*, 2019, <https://doi.org/10.2139/ssrn.3315682>.

11 Christi Scott Bartman, “Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us,” *Case Western Reserve Journal of International Law* 43, no. 2 (2010): 423–45.

is only one means in war: combat.”<sup>12</sup> The term *lawfare*, as a portmanteau of *law* and *warfare*, is contradictory in that the term is defined as the substitution of combat with legal mechanisms by means of a word that itself is exclusive to combat. It is for this reason that the doctrinally incorrect term, *lawfare*, will be avoided in this article’s observations of the perversion of legal domains.

### Malign Legal Operations and Hybrid Warfare

A new term, *Malign Legal Operations* (MALOPs), shall be applied for the purposes of this research. It can be said that the practitioners of MALOPs *exploit legal domains by employing disinformation to shape legitimacy, justify violations, escape legal obligations, contain adversaries, and ultimately to advantageously revise the rule of law*. This term was adopted by the author to incorporate all previous definitions that describe the abuses of legal domains, both international and domestic, which seek to achieve political objectives (to include military). Not only does the application of this definition allow for battlefield success, but it describes practitioners’ revisionist approaches to discredit and delegitimize the very legal systems that it targets.

MALOPs, however, are simply one instrument in the all-encompassing great-power competition that many contemporary strategists have come to call “hybrid warfare.” In 2007, retired U. S. Lieutenant Colonel Mark Hoffman published an article titled “Conflict in the 21st Century: The Rise of Hybrid Wars” in which he observed the mixture of conventional and unconventional operations in the 2006 Israeli-Hezbollah war. He defined the term “hybrid warfare” as a methodology that “Incorporates a range of different modes of warfare including conventional capabilities, irregular tactics and formations, terrorist acts including indiscriminate violence and coercion, and criminal disorder.”<sup>13</sup> This definition quickly became and remains the subject of intense Western academic, political, and military focus. It has undergone considerable revision to consider all possible tools of influence, in particular non-military, to achieve objectives below the threshold of (and including) armed conflict. In 2015, the London-based International Institute for Strategic Studies (IISS) published a far-reaching analysis of global military capabilities. They proposed one of the best descriptions for contemporary “hybrid warfare” that has yet been offered.

*“the use of military and non-military tools in an integrated campaign designed to achieve surprise, seize the initiative and gain psychological as well as physical advantages utilizing diplomatic means; sophisticated and rapid information, electronic and cyber*

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<sup>12</sup> Clausewitz 1976, 96.

<sup>13</sup> Frank G. Hoffman, “The Rise of Hybrid Wars,” 2007, <http://www.potomacinstitute.org/>.

*operations; covert and occasionally overt military and intelligence action; and economic pressure.”*<sup>14</sup>

In 2017, Mr. Christopher Chivvis of the RAND cooperation offered testimony to the Armed Services Committee of the United States House of Representatives titled “Understanding Russian ‘Hybrid Warfare,’ And What Can Be Done About It.” He skillfully summarized the Kremlin’s behavior without assigning any specific or overly restrictive definition. His report, however, was incomplete in one regard. The cornerstone of this behavior remained missing as there was no mention of the law, legal asymmetry, or the instrumental manipulation of the law. According to Mark Voyger, the editor of *NATO at 70 and the Baltic States* and author of an included section titled “Russian lawfare: Russia’s weaponization of international and domestic law,” the exploitation of legal systems is an inextricable part of these hybrid operations and receives considerably less attention than other elements.<sup>15</sup> This lack of attention is concerning, because these tactics are arguably the most dangerous of all hybrid threats and should be considered a foundational tenant in contemporary hybrid operations. This is not only because the exploitation of legal domains provides asymmetric means to attack a more traditionally powerful adversary, but because MALOPs undermine and revise the rule of law itself in ways that are advantageous to the practitioner. Nations or international systems built upon the rule of law are thereby susceptible to being undone by it. Of the myriad definitions that can be found to describe the “hybrid” phenomenon, there is one word consistently and inexplicably missing; *law*. This issue was noted in April of 2018 by the Council of Europe (CoE) in their draft resolution 14523.

*“...there is no universally agreed definition of “hybrid war” and there is no “law of hybrid war”. However, it is commonly agreed that the main feature of this phenomenon is “legal asymmetry”, as hybrid adversaries, as a rule, deny their responsibility for hybrid operations and try to escape the legal consequences of their actions. They exploit lacunas [gaps] in the law and legal complexity, operate across legal boundaries and in under-regulated spaces, exploit legal thresholds, are prepared to commit substantial violations of the law and generate confusion and ambiguity to mask their actions.”*<sup>16</sup>

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14 International Institute for Strategic Studies, “The Military Balance 2015,” *The Military Balance*, 2016, <https://doi.org/10.1080/04597222.2016.1127567>.

15 Mark Voyger, *NATO at 70 and the Baltic States: Strengthening the Euro-Atlantic Alliance in an Age of Non-Linear Threats*, Estonia (Tartu: Baltic Defense College, 2019), [http://www.baltdefcol.org/files/files/publications/NATO\\_AT\\_70\\_AND\\_THE\\_BALTIC\\_STATES.pdf](http://www.baltdefcol.org/files/files/publications/NATO_AT_70_AND_THE_BALTIC_STATES.pdf).

16 The Council of Europe, “Legal Challenges Related to Hybrid War and Human Rights Obligations,” 2018, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24762>.

According to Voyger, one key aspect of this concept that cannot be ignored is that it is inherently overt. The very purpose is not to hide in the shadows but rather to make aggressive and boisterous declarations of legal opinions and positions (regardless of legitimacy). Dr. Bartman also noted this with her observation that propaganda is a critical aspect to her conception of *lawfare*. While the underlying intent of a legal position may be shrouded in secrecy, even malintent is brought to light as the ultimate goal of a particular MALOPs campaign comes to a conclusion. Understanding this, China makes no secret about its instrumental use of PIL. In 1999, two Chinese Colonels introduced the concept of “Unrestricted Warfare,” which entailed identifying the weakness in an adversary and building custom approaches comprised of all available means to achieve the state’s objectives. Then, in 2003, the Chinese Communist Party (CCP) and People’s Liberation Army (PLA) introduced the “Three Warfares.” This strategy encompassed Psychological, Media, and Legal Warfare.

*“[Chinese] Legal Warfare uses international and domestic law to claim the legal high ground or assert Chinese interests. It can be employed to hamstring an adversary’s operational freedom and shape the operational space. Legal warfare is also intended to build international support and manage possible political repercussions of China’s military actions.”*<sup>17</sup>

This strategy can be seen in execution through China’s creeping annexation of the South China Sea. It claims historic right over the “9-Dash Line” to control legal narratives and employs an army of lawyers and academics to justify its instrumental misapplication of UNCLOS. Since international law is shaped by contemporary geopolitical discourse and underpinned by social realities, the idea is that enough loud voices will slowly change the conversation in favor of the CCP’s objectives.

Moscow, however, has announced no such doctrine and as of yet does not utilize the same “army of academics” to the same extent as the CCP. Instead, it appears to prefer shaping legitimacy through strategic communications and controlling narratives directly from the Kremlin. Publicly releasing a doctrine dedicated to the definition and employment of *Malign Legal Operations* would undermine Russia’s efforts to spread disinformation and would complicate its achievement of objectives through the exploitation of grey areas in legal interpretation. Instead, it locates and exploits legal loopholes, distracts through claims of historic right, and attacks legitimacy to cause confusion. This amounts to an attack on the concept of *Pacta Sunt Servanda*<sup>18</sup> through

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<sup>17</sup> TA Walton, “China’s Three Warfares,” no. January (2012): 1–12, [http://www.delex.com/data/files/Three Warfares.pdf](http://www.delex.com/data/files/Three%20Warfares.pdf).

<sup>18</sup> Commitment to fulfill international obligations in good faith.

the underhanded weaponization and misapplication of *Clausula Rebus Sic Stantibus*<sup>19</sup> to ultimately invoke *Ex Factis Jus Oritur*.<sup>20</sup>

It is the latter principle that the Kremlin employs in conjunction with the previously discussed concept of *Fait Accompli* to conduct *Fait Accompli Attacks*<sup>21</sup> against Ukraine. To further complicate the problem, this behavior is veiled by the deceptive (propaganda) adherence to the rule of law.

According to the Ukrainian Ministry of Foreign Affairs, The Russian Federation's aggressive behavior towards Ukraine has violated numerous international agreements, norms, and principles since the conflict began in 2014 and it takes direct responsibility for none of them.<sup>22</sup> This includes Agreements between Ukraine and the Russian Federation on the state border (2003), use of the Azov Sea and Kerch Strait (2003), the Black Sea Fleet (1999), on Friendship, Cooperation, and Partnership (1997), and the UN Charter itself. By themselves, however, violations of the law do not constitute MALOPs. With respect to violations, it is the process of perverting the law to justify violations that falls into the realm of Malign Legal Operations. Similarly, non-violations that abuse the spirit and intent of legal mechanisms through loopholes or grey areas in interpretation also constitute MALOPs.

In June of 2019, for example, the Parliamentary Assembly of the Council of Europe (PACE) reinstated Russia as a voting member after its voting rights were stripped following the illegal annexation of Crimea in 2014. Eventually, Russia stopped paying its dues which amounted to 7% of the CoE's budget. It also threatened to depart the Council altogether. This decision would block Russian citizens from access to the European Court of Human Rights (ECtHR), and Russians in 2018 accounted for over 20% of all cases heard in the ECtHR. PACE elected to reinstate the Russian Federation's voting rights rather than robbing Russian citizens of a third-party human rights advocate. This is a victory for the Kremlin, which successfully held its own people hostage to extract a concession that also allowed it to escape one of the few forms of accountability it faced following the illegal annexation of Crimea. James Woolsey, lawyer and former director of the U.S. Central Intelligence Agency, generally asserted that those who take an instrumental approach to PIL by weaponizing its substance "contribute to eroding the good that law does and could do in the international arena."<sup>23</sup> This was also explored by Doctor Ti-Chiang in his 1951 book *The International Law of Recognition*, in which he opined;

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19 The notion that a fundamental change in circumstances allows a state to leave international obligations unfulfilled

20 The concept of facts dictating the law, as opposed to *Ex Injuria Jus Non Oritur*, which is the law dictating facts and the belief that any act stemming from an unlawful act is also unlawful.

21 *Fait Accompli Attack*: "To achieve military and political objectives rapidly and then quickly consolidate those gains so that any attempt to reverse the action would entail unacceptable cost and risk." — U.S. Army Training and Doctrine Command, "Multi-Domain Operations 2028."

22 Ukrainian MFA, 2014.

23 Foreward, F. Kittrie 2016

*“International law is based upon social reality. On the one hand, the validity of law, like the validity of grammar, is not dependent upon actual observance in any particular case; on the other hand, continuous breach of the law with impunity may eventually undermine its validity. Continuous toleration of breaches of law by society is an indication that the law no longer corresponds with social facts and that a new law which sanctions the rights originating in illegality is in the making.”*<sup>24</sup>

### **Russian Perceptions of International Law: World Order, or World of Orders?**

The Russian relationship with international law and the Rules-Based International Order (RBIO) has historically been precarious at best. One must take a deep-dive into the geopolitical and cultural history of Eurasia to fully understand Russia’s place on the world stage. Any haphazard attempt to do so within the confines of this article would be disingenuous, and so this short section simply seeks to achieve a modest understanding of Russia’s perception of international law. The goal is to offer a primer for future articles and to shed light on Russia’s self-image with respect to world order so that one may begin to understand their instrumentalism. Geographically, Russia is the largest country on the planet and shares a border with 14 nations, not including its annexed territories or oceanic borders with Japan and the United States. Whether as a Tsarist Empire, Soviet Union, or modern Federation, the Russian territory has throughout history been subject to recurring waves of invading empires intent on competing for land, natural resources, or power. “In the 13th to 15th centuries — when Western Europe was enjoying the benefits of the European Renaissance and the scholar’s resurrection of Roman law was starting in Bologna in the 11th century — Russia was under Mongol subjugation (1240–1480) and isolated from the rest of Europe.”<sup>25</sup> The harsh realities presented by Russia’s vast territory, difficult defensive position, and competing regional interests posed great challenges to Russia’s development as a modern world power. These severe conditions, as noted by Henry Kissinger, were also the catalyst for the development of Russia’s paranoia and strongman geopolitical ideology. “European statesmen came to identify security with a balance of power and with restraints on its exercise. In Russia’s experience of history, restraints on power spelled catastrophe... What in the West was regarded as arbitrary authoritarianism was presented in Russia

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24 Ti-Chiang Chen, *The International Law of Recognition* (New York: Stevens & Sons Limited, 1951), <https://archive.org/details/cu31924016945770/page/n7>.

25 Peter B Maggs, Olga Schwartz, and William Burnham, *Law and Legal System of the Russian Federation, Sixth* (New York: Juris Publishing, Inc., 2015), [https://books.google.co.uk/books?hl=en&lr=&id=JojwCQAAQBAJ&oi=fnd&pg=PR21&dq=Russian+Legal+System&ots=uO\\_Un7Ih5J&sig=LYkZ3kADv7Xg9KD\\_2sGzLnpoUc#v=onepage&q&f=true](https://books.google.co.uk/books?hl=en&lr=&id=JojwCQAAQBAJ&oi=fnd&pg=PR21&dq=Russian+Legal+System&ots=uO_Un7Ih5J&sig=LYkZ3kADv7Xg9KD_2sGzLnpoUc#v=onepage&q&f=true).

as an elemental necessity, the precondition for functioning governance.”<sup>26</sup> Since the initial conceptions of international law arose in Europe, it was really only international as it applied to European states. Furthermore, these initial conceptions reflected the Christian values of European society. What evolved was the language of [European] international law, and this occurred at a time when Russia, by existential necessity, was trailing the renaissance periods of European international discourse. Over time, Russia would of course join the international order and adopt the same legal language in its dealings within the international legal system. Words, however, often mean different things to different people. While Russia did adopt this legal language, it did not necessarily adopt the same interpretations or ideologies. Lauri Mälksoo describes this phenomenon in his book highlighting Russian Approaches to International Law. “It remains possible that when two world leaders from different regions and civilizations meet and refer in their conversations and debates to *international law*, they have historically and culturally different concepts and associations in mind regarding what international law implies.”<sup>27</sup>

Despite these differences, Russia has always remained engaged in international order. Particularly since the 1648 peace of Westphalia, Russia has been pivotal to every European re-ordering event; it repelled both the French and Swedish Empires along with Nazi Germany when, at least in those momentous times, hope for European order was dwindling. In 1933, it led the Convention on the Definition of Aggression which was agreed to by seven other nations and became the lodestar for the modern conceptualization of aggression in international law. One might feel compelled to ask why, then, contemporary Russia seems so quick to dismiss international norms and obligations while simultaneously claiming a strict adherence to international law.<sup>28</sup>

Dr. Bartman, whose discussion of *lawfare* was previously discussed, cited Grigorii Ivanovich Tunkin in much of her work. Tunkin was a leading Soviet scholar, diplomat, and international lawyer whose positions often became the stuff of Soviet policy. Bartman cited him as adeptly summarizing the Soviet view of international law in 1989. “The creation of norms of international law is the process of bringing the wills of States into concordance...[a] normative system making it possible to foresee the reaction of other actors in the inter-States system to particular actions of a State.”<sup>29</sup> This final portion is particularly telling, because it specifies the view that international law can be used to create predictability. It may contain geopolitical competitors within the international legal system just as the USSR had done, as will be discussed, against Finland and so many other states. It is in this vein that a perception of Russia’s aforementioned “strict adherence” is critical, because without it there can be no predictability or containment. American diplomat George Keenan observed this of the USSR in 1946, “Moscow has

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26 Kissinger 2015, 52-56

27 Mälksoo 2015, 17

28 Kissinger, *World Order*.

29 Bartman 2010, 428-29

no abstract devotion to UNO [United Nations Organization] ideals. Its attitude to that organization will remain essentially pragmatic and tactical.”<sup>30</sup>

In 2007, Russian President Vladimir Putin gave a speech at the Munich Conference on Security Policy that many considered the emergence of a revisionist post-Soviet Russia. “We are seeing a greater and greater disdain for the basic principles of international law... it is necessary to make sure that international law have a universal character both in the conception and application of its norms.”<sup>31</sup> This demagoguing call for universality aligns with the established notion that international law can be utilized instrumentally to achieve strategic objectives via containment. Mr. Putin also spent time during this speech discussing the merits of multi-polarity through the notion that, while the international rule of law must be universal, there can be no universal hegemon. This narrative continued in 2014; “International relations must be based on international law, which itself should rest on moral principles such as justice, equality and truth. Perhaps most important is respect for one’s partners and their interests.”<sup>32</sup> While again seemingly innocuous, this strategic communication underpins the propaganda that Bartman highlighted as quintessential to her definition of Russian *lawfare*. Finally, it was in 2019 that Mr. Putin confirmed his ultimate intent by highlighting the Kremlin’s revisionist agenda; “There is also the so-called liberal idea, which has outlived its purpose...the liberal idea has become obsolete. It has come into conflict with the interests of the overwhelming majority of the population.”<sup>33</sup> This bold statement suggests that the current Rules-Based International Order, which was born of liberal ideas in the wake of the greatest tragedies in modern history, is now impotent. More importantly, however, is the implication that there is an alternative to this “obsolete idea” in the form of the *Russian World*. In this can be seen a return to earlier views of international law and order. Mälksoo noted this by highlighting Soviet claims of “a regional international law of their own, on a competing universalistic ideological basis.”<sup>34</sup>

While the international legal vernacular may be the same in Russia as in Europe or elsewhere, the illiberal values that underpin Russian governance lead to a distinctly “Russian international law.” This difference in ideology emboldens the Kremlin to not only instrumentally apply international law in a purely strategic way, but to undermine the international system itself in pursuit of a revisionist agenda. Stanislav Valentinovich Chernichenko of the Diplomatic Academy of the Russian Ministry of Foreign Affairs is perhaps the leading expert in post-Soviet Russian international law. He opined in a

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30 George Kennan, “The Long Telegram,” The National Security Archive, 1946.

31 Vladimir Putin, “Putin Speech and the Following Discussion at the 2007 Munich Conference on Security Policy” (Munich, 2007), <http://russialist.org/transcript-putin-speech-and-the-following-discussion-at-the-munich-conference-on-security-policy/>.

32 Putin, 2014.

33 The Kremlin, “Vladimir Putin Interview with The Financial Times,” 2019, <http://en.kremlin.ru/events/president/news/60836>.

34 Mälksoo, *Russian Approaches to International Law*.

2019 journal article that ideological aggression as the use of force should be added to the internationally accepted definition of aggression and went on to further reinforce the dangers of Malign Legal Operations. “The state’s assertion of its interests should not be carried out by perversion or violation of international law.”<sup>35</sup> The question that one must ask, however, is about *whose* international law Mr. Chernichenko seeks to protect.

## Soviet Malign Legal Operations

Perhaps one of the best examples of MALOPs in the last century was the Soviet invasion on Finland on November 30th, 1939. In an effort to annex Finnish territory as a geographic buffer for the protection of Leningrad, Stalin created a complex narrative to manipulate the international legal system and justify its armed aggression. Three separate international agreements were in place to protect Finland’s sovereignty; the Soviet-Finnish Non-Aggression Pact of 1932 and 1934, the Charter of the League of Nations, and the London Convention on the Definition of Aggression in 1933. Of particular interest is the non-aggression pact, which the USSR signed with many border-nations to create a buffer of neutrality and maintain predictability. This itself is a tool of Malign Legal Operations, as the USSR would routinely introduce these pacts to placate and control nations until such time they were prepared to introduce a false-flag for the invalidation of the pact and begin infringing upon sovereignty. In this case, a false-flag *Causus belli*<sup>36</sup> was staged in the form of an “artillery attack” on a Soviet border town on November 26th. Stalin used this as a false pretense to nullify its non-aggression pact with Finland and invaded four days later. The day after the invasion began, the Finnish Democratic Republic (FDR) was established as a Soviet puppet-government in the Soviet-Finnish border town of Terijoki. The USSR recognized the FDR as a legitimate government and conveniently began diplomatic relations with it the very same day. Its invasion of Finland was justified both by its false-claim of attack and the invitation by the FDR to assist in an “internal conflict.” What became known as the “Winter War” ended in March of 1940 after the people of Finland rose up and banded together in the face of Russia’s illegal incursion. The Moscow Peace Treaty resulted in an end to the conflict and the USSR’s annexation of 11% of Finland’s territory. Ultimately, the USSR was expelled from the League of Nations for its aggression. Many celebrated this decision as a victory for the international legal system. Ultimately, the USSR gained exactly what it wanted all along. Aside from its catastrophic combat losses, the USSR paid no price for its aggression and the League of Nations would dissolve just a few short years later. This scenario played out on countless occasions against Hungary,

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35 Stanislav Valentinovich Chernichenko, “Ideological Aggression as the Use of Force in International Law,” *Eurasian Legal Journal* 1 (2019): 21–24.

36 “Occasion of/for war.”

Czechoslovakia, and Afghanistan. It proved so effective that the Russian Federation would adopt this Soviet doctrine against Georgia and Ukraine.<sup>37, 38</sup>

Particularly for Ukraine, one can easily see the correlation in strategy with only names and places changing over time. The existence of international agreements identifying and protecting the sovereignty of Ukraine, partisan movements, Russian-supported fifth-column<sup>39</sup> uprisings, the establishment of regional governments, and finally requests for “international assistance” to the Russian Federation in the name of human rights and self-determination.

### Malign Legal Operations Towards Ukraine

In 1994, Ukraine relinquished its over 2,500 tactical and 176 strategic nuclear weapons in exchange for security assurances from Russia and the West. This document, known as the Budapest Memorandum, included declarations that signatories would not use force against Ukraine, would respect its sovereignty, territorial integrity, and borders, and reaffirmed the signatories’ commitment to refraining from the use of nuclear weapons. Then, in 1997, Ukraine and Russia signed the Treaty on Friendship, Cooperation, and Partnership. It reaffirmed both nation’s commitment to respecting the territory and security of the other. “As friendly, equal, and sovereign states, the [parties] shall base their relations upon mutual respect and trust, strategic partnership, and cooperation.”<sup>40</sup> Just six years later in 2003, Russia began construction of a dam across a portion of the Kerch Strait. Its effect on navigation in the strait was questioned by Ukraine and the international community, especially considering that another agreement reaffirming the Ukrainian-Russian state borders had been signed earlier that year. The result of this transgression was the 2003 “Agreement between the Russian Federation and Ukraine on cooperation in the use of the sea of Azov and the strait of Kerch.” Russia violated these agreements and several others during the 2014 annexation of Crimea, the 2014 invasion of eastern Ukraine, and the 2018 incident near the Kerch Strait.

Furthermore, the weaponization of information within legal domains causes chaos, confusion, and furthers the antagonist’s objectives regardless of the legitimacy of

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37 Maeve Underwood, “A Short History Of The ‘Winter War,’” Imperial War Museums, 2018, <https://www.iwm.org.uk/history/a-short-history-of-the-winter-war>.

38 Bartman, “Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us.”

39 During the Spanish Civil War (1936-1939), Spanish Nationalist General Emilio Mola was asked during a newspaper interview which of his four columns of troops would first attack the besieged city of Madrid. “Quinta Columna,” he replied, referring to a “Fifth Column” of sympathizers inside the city who would covertly fight the Spanish Government.

40 Ukraine and Russian Federation, “Treaty on Friendship, Cooperation and Partnership Between Ukraine and the Russian Federation,” 1997, <https://treaties.un.org/doc/Publication/UNTS/NoVolume/52240/Part/I-52240-0800002803e6fae.pdf>.

their claims. U. S. Navy Commander Robert De Tolve noted this in his 2012 observations of *lawfare* as it pertains to UNCLOS;

*"...legitimacy of legal claims labeled "lawfare" must be determined on a case by case basis, it is likewise clear that the "sting" of an allegation of illegality can immediately and often irreparably diminish the perceived legitimacy of national security related actions in the eyes of governmental officials as well as their constituents. Therefore, regardless of their ultimate resolution, the underlying claims can instantaneously result in varying degrees of national security "cost" to the extent they succeed in increasing skepticism of or opposition to the national security interests."*<sup>41</sup>

When confronted about its strategic subversion of international law to avoid responsibility for aggressive actions, Russia continuously offers assertions based on twisted interpretations of international agreements to achieve the above effect. For example, Putin explained in 2014 that the revolution meant that Ukraine had taken the form of a new state, thus releasing Russia from any obligation to honor the Budapest Memorandum or any other previous agreements:

*"If it's a revolution, what does that mean? It is difficult to disagree with some of our experts, who believe that in this territory is a new state. Just as it was after the collapse of the Russian Empire, and after the revolution of 1917, a new state occurs. And with the new state and out of respect for that state, we have not signed any binding instruments."*<sup>42</sup>

Then, in 2016, Russian Foreign Minister Sergey Lavrov asserted that the Budapest Memorandum was never violated because "it contains only one obligation: not to use nuclear weapons against Ukraine. No one has made any threats to use nuclear weapons against Ukraine."<sup>43</sup> A cursory glance at the actual memorandum shows that, while agreements on the use of nuclear weapons have indeed not been broken by Russia, almost every other item of the memorandum has. These examples amount to the clear use of disinformation campaigns within legal narratives to not only avoid accountability under PIL, but to twist it in such a way that furthers a geopolitical agenda.

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41 Robert De Tolve, "At What Cost? America's UNCLOS Allergy In The Time of 'Lawfare,'" *Naval Law Review* 61 (2012), <http://www.jag.navy.mil/documents/navylawreview/NLRVolume61.pdf>.

42 Vladimir Putin, "Vladimir Putin Answered Questions from Journalists about the Situation in Ukraine," The Kremlin, 2014, <http://www.kremlin.ru/events/president/news/20366>.

43 Steven Pifer, "Mr. Lavrov, Russia, and the Budapest Memorandum," The Brookings Institute, 2016, <https://www.brookings.edu/blog/order-from-chaos/2016/01/28/mr-lavrov-russia-and-the-budapest-memorandum/>.

The Kremlin also justifies its annexation of Crimea by claiming that the Soviet Union's transfer of Crimea to Ukraine in February of 1954 was illegal and somehow justifies its 2014 aggression. To support this interpretation, Moscow and its media affiliates advance several arguments:

- 1) The USSR's decision was invalid because a quorum was not present for the vote on February 29th, 1954.<sup>44</sup>
- 2) Bounds were overstepped between the Presidium of the Supreme Soviet of the Soviet Union and the Russian Soviet Federative Socialist Republic resulting in the illegal transfer of Crimea to Ukraine.<sup>45</sup>
- 3) The transfer was made under the assumption that the Soviet Socialist Republic of Ukraine would always remain part of the USSR. Ukraine's declaration of independence in conjunction with the dissolution of the USSR nullified the transfer, making it ripe for annexation by the new Russian Federation.<sup>46</sup>

Each of these claims have been heavily disputed by the international community and subsequently labeled fiction.<sup>47</sup> Not only was the 1954 decision legal, but it was not questioned until after Ukraine's independence. In any case, and as discussed above, Russia acknowledged Ukraine's sovereignty and **existing** borders through several treaties and agreements between its independence in 1991 and the invasion in 2014, rendering moot any argument of the 1954 decision's legitimacy. To settle all doubts, one need not look any further than the agreement signed by 11 former Soviet republics on December 21st, 1991, in Almaty, Kazakhstan. It established a Commonwealth of Independent States and formally dissolved the USSR. The agreement stipulated for the "recognizing and respecting each other's territorial integrity and the inviolability of the *existing* borders."<sup>48</sup>

In another example of shaping legitimacy through MALOPs, President Putin vehemently denied the presence of military personnel in Crimea to avoid agitating the United Nations, crossing the threshold for an International Armed Conflict, or provoking a measured response.<sup>49</sup> Russian soldiers in military uniforms were instead

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44 Vladimir Posner, "March 3 in the Program &quot;Posner&quot;-Alexander Zhukov," Posner Online, 2014, <https://pozneronline.ru/2014/02/7071/>.

45 Posner.

46 Pravda.RU, "Our Forever: Decree of 1954 on Transfer of Crimea Will Be Cancelled," Pravda.RA, 2017, <https://www.pravda.ru/news/world/07-11-2017/1352550-crimea-0/>.

47 Dmitry Karaichev, "Myths about the Illegality of the Transfer of Crimea in 1954," ZN.UA, 2013, <https://zn.ua/internal/mify-o-nezakonnosti-peredachi-kryma-v-1954-godu.html>.

48 NYT, "THE END OF THE SOVIET UNION; Text of Declaration: 'Mutual Recognition' and 'an Equal Basis,'" The New York Times, 1991, <https://www.nytimes.com/1991/12/22/world/end-soviet-union-text-declaration-mutual-recognition-equal-basis.html>.

49 Simon Shuster, "Russian Media Try to Deal With Vladimir Putin's Honesty on Crimea," TIME, 2015, <http://time.com/3752827/putin-media-kremlin-crimea-ukraine/>.

inserted without visible insignia. These “polite little green men,”<sup>50</sup> as they came to be known, made international headlines during the initial occupation of Crimea. Only once the annexation of Crimea was complete did Putin admit that Russian troops were operating on the peninsula in a “civil capacity.”<sup>51</sup> Furthermore, he went on to claim in the fall of 2014 “that international relations must be based on international law, which itself should rest on moral principles such as justice, equality, and truth.” This statement was made in defense of the Russian Federation’s behavior by claiming that PIL was upheld through the defense of the Crimean people’s right to self-determination. These examples highlight how effective the Kremlin’s legal disinformation was in the Crimean case and also how committed Moscow is to upholding a deceptive image of support for the universality of international law.

### **Case Study: Russia’s Attack on the Ukrainian Navy Near the Kerch Strait**

Ukraine and Russia share the Azov Sea, and it grants access to the global commons via the Black and Mediterranean Seas. The very next day after Putin’s 2014 annexation of Crimea, he ordered the construction of a bridge spanning the narrowest part of the Azov Sea, known as the Kerch Strait. The eighteen- kilometer bridge would link the cities of Kerch in Crimea to Taman in Russia, making it the longest bridge in all of Europe or Russia. This idea, however, was nothing new. Attempts to connect both sides of the strait were considered or attempted on several occasions by Tsar Nicholas II (1903), Germany (1943), the USSR, and post-Soviet Russia (1994, 2010). Construction began in 2015 and the road-portion was completed in May of 2018 with Putin himself making the inaugural drive across the span. This bridge could now be subversively utilized to fortify Crimea’s economic dependence on Russia in an attempt to consolidate and legitimize its illegal claims to the annexed Ukrainian territory. During construction, the straight was closed on several occasions to all but Russian naval vessels under the guise of construction safety.<sup>52</sup> The reality of the situation set in as Russia would soon be able to leverage the entire Sea of Azov against Ukraine. This determination was circulating around Russian media as early as 2015. It was claimed that Ukraine may operate legally within the Azov Sea, but its access to and from the Black Sea via the Kerch Strait had officially been lost. Their claim was that previous agreements

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50 Michael. Kofman et al., *Lessons from Russia’s Operations in Crimea and Eastern Ukraine*, 2017, <https://doi.org/10.7249/RR1498>.

51 Jeff Simon, “Transcript: Vladimir Putin’s April 17 Q&A,” *The Washington Post*, 2014, [https://www.washingtonpost.com/world/transcript-vladimir-putins-april-17-qanda/2014/04/17/ff77b4a2-c635-11e3-8b9a-8e0977a24aeb\\_story.html?noredirect=on&utm\\_term=.9f9852e2a90e](https://www.washingtonpost.com/world/transcript-vladimir-putins-april-17-qanda/2014/04/17/ff77b4a2-c635-11e3-8b9a-8e0977a24aeb_story.html?noredirect=on&utm_term=.9f9852e2a90e).

52 Matthew Czekaj, “PRESS RELEASE: Russia Announces Closure of Kerch Strait, Cutting Southeastern Ukraine off From Access to Black Sea - Jamestown,” *The Jamestown Foundation*, 2017, <https://jamestown.org/program/russia-announces-closure-of-kerch-strait-cutting-southeastern-ukraine-off-from-access-to-black-sea/>.

were valid under the assumption that Crimea was the territory of Ukraine. With its annexation, they asserted, all previous agreements were null and void.<sup>53</sup>

The 1982 UNCLOS, of which both Ukraine and Russia are signatory members, guarantees freedom of navigation, free passage through international straits, immunity for military vessels, and the protection of territorial waters. Its applicability in the Sea of Azov, however, depends upon one's interpretation of the legal status of that body of water. It is argued by lawyers Valentin Schatz and Dmytro Koval that, during Soviet times, the Sea of Azov was commonly accepted as a territorial bay of the greater Soviet Union. With the fall of the Soviet Union, they assert, two schools of thought emerged.

*"In the first scenario, these waters are shared internal waters of Russia and Ukraine as they form part of a single bay regime that was "inherited" as a pluri-state bay. In the second scenario, the original bay regime dissolved with Ukraine's independence in 1991, or at some point thereafter, leaving high seas and potentially (if claimed in accordance with the international law of the sea) maritime zones of Russia and Ukraine in Kerch Strait and the Sea of Azov."*<sup>54</sup>

Regardless of which scenario one favors, Russia's claims following the annexation of Crimea indicate that they now favor a territorial waters approach. This tactical and instrumental application of UNCLOS is seen through their claim of a 12 NM swath (and EEZ) around Crimea in the Black and Azov Seas.

With respect to the November 25th incident, the Kremlin claims that the Ukrainian military vessels violated articles 19 and 21 of UNCLOS, stating that they provoked the incident by ignoring calls to stop while conducting an innocent passage of Russia's territorial waters.<sup>55</sup> It has since been reported, however, that Russian cyber-attacks targeted the Ukrainian navy before and during the attack.<sup>56</sup> Evidence also exists, according to the Contact Point Cell of the Ukrainian Naval Forces that localized control over the electromagnetic spectrum was present during the incident to include possible communications jamming and spoofing of the Automatic Vessel Identification System (AIS) in the area of the Strait. These reports of both cyber and electromagnetic

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53 Vladimir Bogdanov, "Ukrainian Fleet Lost Access to the Azov Sea," Russian Gazette, 2015, <https://rg.ru/2015/06/23/flot-site.html>.

54 Valentin J. Schatz and Dmytro Koval, "Russia's Annexation of Crimea and the Passage of Ships Through Kerch Strait: A Law of the Sea Perspective," *Ocean Development & International Law* 0, no. 0 (2019): 1–23, <https://doi.org/10.1080/00908320.2019.1605677>.

55 FSB via Sputnik, "Ukrainian Naval Ships Ignored Calls to Stop, Violated Russian State Border - FSB," Sputnik International, 2018, <https://sputniknews.com/russia/201811261070123720-ukraine-navalships-azov-balcks-sea-kerch/>.

56 Patrick Tucker, "Russia Launched Cyber Attacks Against Ukraine Before Ship Seizures, Firm Says," DefenseOne, 2018, <https://www.defenseone.com/technology/2018/12/russia-launched-cyber-attacks-against-ukraine-ship-seizures-firm-says/153375/>.

interference are evidence that this incident was planned in advance, discrediting the legal disinformation employed against the Ukrainian Navy.

Furthermore, to validate Russia's claim that the waters in-question are territorial, Crimea must first be recognized as the sovereign territory of Russia. Since the same organization that introduced the UNCLOS does not recognize Russia's illegal annexation of Crimea, that organization's laws cannot be twisted and used to defend an illegal position *Ex Factis Jus Oritur*.<sup>57</sup> Analysis by Professor James Kraska of the U. S. Naval War College concluded that UNCLOS would still protect Ukraine's vessels under the auspices of military immunity (Article 32) and the passage of international straits (Articles 38, 42). Even if these waters were considered the territory of Russia, the use of force is not the proper response to non-innocent passage (Article 32), especially when the ships are protected under military immunity.<sup>58</sup>

Furthermore, a review of navigational data from the incident found that the Ukrainian ships did at one-point sail within 12 nautical miles of Russia's Taman coast, but at this time they were attempting to transit the strait as permitted in the 2003 treaty which protected Ukraine's right to pass. It is also important to note the timeline of this incident; it did not occur all at once but rather began around 7:00 am local time and took place sporadically over the course of more than twelve hours. In fact, it was not until the Ukrainian ships attempted to return to Odesa, around 6:00 pm, that they were chased and fired upon. There is also evidence that the actual shooting took place outside of 12 nautical miles and therefore in international waters.<sup>59</sup>

There have been numerous resolutions and preliminary investigations from international organizations on the situation in Ukraine, all of which condemn Russia's actions in the region. Special attention must be paid to whether or not the situation constitutes an International Armed Conflict (IAC), as this would give precedence to International Humanitarian Law, the Law of Armed Conflict, and—in the case of the Kerch Strait—the Law of Naval Warfare. In his analysis, Kraska further noted that this reality would legitimize many of Russia's actions against the Ukrainian ships, to include shooting, boarding, and seizing them. It would also mean, however, that Russia must treat the 24 sailors as prisoners of war rather than as criminals. Russia does not recognize the existence of a war between the two nations and has also withdrawn from the Rome statute, which established the ICC, and suspended further cooperation with the court. Legal scholars continue to debate this situation and the applicability of the

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57 *Ex Factis Jus Oritur*: The legal principle that law arises from the facts. The counter-principle is *Ex Injuria Jus Non Oritur*, which states that law cannot arise from unjust acts.

58 James Kraska, "EJIL: Talk! – The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?," Blog of the European Journal of International Law, 2018, <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/>.

59 Michael Cruickshank, "Investigating The Kerch Strait Incident - Bellingcat," *bellingcat*, 2018, <https://www.bellingcat.com/news/uk-and-europe/2018/11/30/investigating-the-kerch-strait-incident/>.

Laws of the Sea versus Armed Conflict, and it is in this grey area of interpretation that Russia enjoys freedom of movement.

In April of 2019, the Ukrainian Ministry of Foreign Affairs filed a request for relief from ITLOS for its three ships and twenty-four members of the crew to be released by Moscow. They claimed that each day of continued confinement constituted further violation of Ukraine's sovereignty, and that the ships were following UNCLOS as immune military vessels conducting innocent passage of waters claimed by Russia. The Russian FSB, they claimed, violated Articles 32, 58, 95, and 96 of UNCLOS. The twenty-four sailors were not referred to as "Prisoners of War" despite this phraseology being utilized by the Ukrainian President, government officials, and representatives of the international community prior to the ITLOS submission.

While the debate between the applicability of UNCLOS or International Humanitarian Law (IHL) and the Law of Naval Warfare continued, the Ukrainian government made its position clear. What continues to vex many scholars is the legal catch-22 that has been created by these claims. Ukraine posits that their ships enjoyed military immunity in the territorial waters adjacent to Crimea while not recognizing Russia's *Ex Injuria Jus Non Oritur* ownership of Crimea. Furthermore, invoking UNCLOS over IHL reinforces that these two nations are not at war while Ukrainian officials claim that a war exists and the sailors must be treated as Prisoners of War. Invoking UNCLOS, as it has, further legitimizes and reinforces Russia's hold on Crimea and other Ukrainian territories. Invoking IHL, on the other hand, sets a precedent by making Ukraine vulnerable to future aggression and puts the international community in a position to either respond in defense of Ukraine or to turn a "blind eye," delivering concessions that could open the door to further unchecked annexation. This legal grey area and inconsistency in narratives is ripe for manipulation by the Kremlin, which likely takes delight in Ukraine's unenviable position.

On May 25th of 2019, ITLOS released its verdict on Ukraine's request for relief and determined 19-1 that the Russian Federation must release the three ships, cease criminal proceedings on Ukraine's 24 sailors, and return them to Ukraine immediately. Russia, which did not partake in the proceedings but rather submitted statements in its defense, claims that ITLOS did not have jurisdiction over this particular case due to the "military activities exception" provided for in article 298, paragraph 1(b) of UNCLOS. They continued criminal proceedings against the sailors and, two days after the ITLOS verdict, a Moscow court upheld a district court's ruling that the sailors may be kept in jail. Ultimately, the Russian Federation claims that they have differing interpretations of the applicable articles of UNCLOS and therefore their activities were justified. Almost three weeks after the ITLOS verdict, on June 13th, Alexander Molokhov, Head of the Russian Working Group on International Legal Issues at the Permanent Representation of the Republic of Crimea under the President, indicated that Ukraine may be brought before the International Court of Justice and that the incident should be further investigated. "A public Tribunal must give a principled assessment of the

actions of the Ukrainian military, staging a provocation in the Kerch Strait,”<sup>60</sup> Molokhov said. With no proportional accountability thus far, Russia has *de facto* achieved a legal victory just as the Soviets did against Finland and countless other victims of its Malign Legal Operations. Not only that, it continues to spread legal propaganda through its claims of Ukrainian provocation and requests for tribunals. As Commander De Tolve was quoted previously, the “sting” of legal accusations, regardless of their legitimacy, discredits the target and imposes costs upon their national security apparatus. These activities amount to a disregard for *Pacta Sunt Servanda* through the weaponization of *Clausula Rebus Sic Stantibus* and *Ex Factis Jus Oriturto* to achieve *Fait Accompli*. Without any current method to enforce the ITLOS verdict (beyond ongoing sanctions), Russia held the sailors until a prisoner swap was executed between Ukraine and Russia in September of 2019 with each side trading 35 individuals. While this exchange was excellent news for the families of the captive Ukrainians, it served as a concession to Russia by extrajudicially concluding the Kerch incident. The newly elected Ukrainian president Zelensky was able to achieve a swift political victory in returning the captive Ukrainians. Putin, on the other hand, was able to receive 35 of his own while also shaping the legitimacy of its claims that ITLOS did not enjoy jurisdiction over the Kerch case due to the military activities exception. The matter of the three ships is still outstanding as of the writing of this article, however, this issue is unlikely to receive the same attention as was given to the sailors and will likely end unceremoniously and extrajudicially.

## The Impact of Malign Legal Operations on the Black Sea

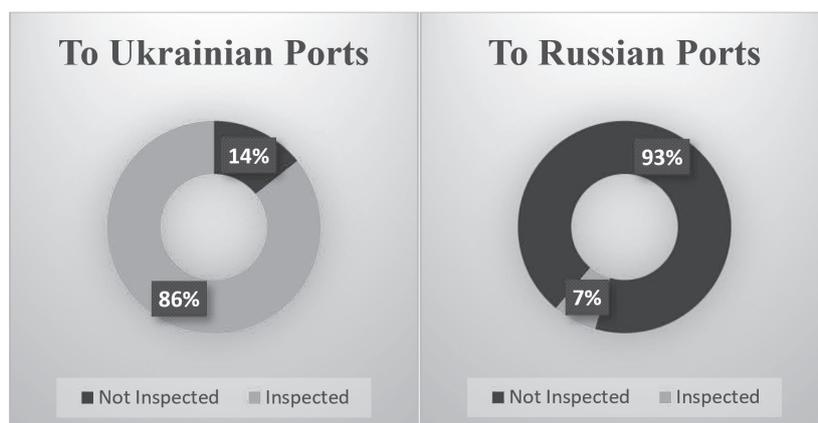
Specifically for Ukraine, its shipping from the Azov Sea port of Mariupol has reduced 63.5% since the war began in 2014 and 18.5% since 2017 alone.<sup>61</sup> Furthermore, the bridge was built in such a way that some Ukrainian ships cannot sail beneath it. Those Ukrainian and international vessels that do manage to navigate the strait often spend days waiting for Russia’s mandatory and illegal inspections, creating a backlog and deterring future business. According to the Ukrainian Naval Forces Contact Point Cell, the Russian Federal Security Service cites the prevention of terrorist activities, weapon’s smuggling, illegal migration, and ensuring the navigational safety and security of the Crimean bridge as the primary reasons for halting and inspecting incoming ships.

Between July and November of 2018, the average wait time for ships destined for the Ukrainian Sea of Azov ports of Mariupol and Berdiansk was 79 hours while ships sailing to Russian ports waited on average less than 9 hours. The wait times during this window have resulted in approximately 1900 days of lost time, which equates to around

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60 RIA, “Lawyer Calls Provocation in Kerch Strait a Reason for Lawsuit against Ukraine,” RIA Novosti Crimea, 2019, <https://crimea.ria.ru/society/20190613/1116835704.html>.

61 Nolan Peterson, “An Embattled Ukrainian Port City Braces for Russian ‘Economic Warfare,’” The Daily Signal, 2018, <https://www.dailysignal.com/2018/12/05/an-embattled-ukrainian-port-city-braces-for-russian-economic-warfare/>.



*Jul-Nov 2018: Russian Federation Inspections of Vessels Transiting the Kerch Strait. Source: Ukrainian Naval Forces Contact Point Cell*

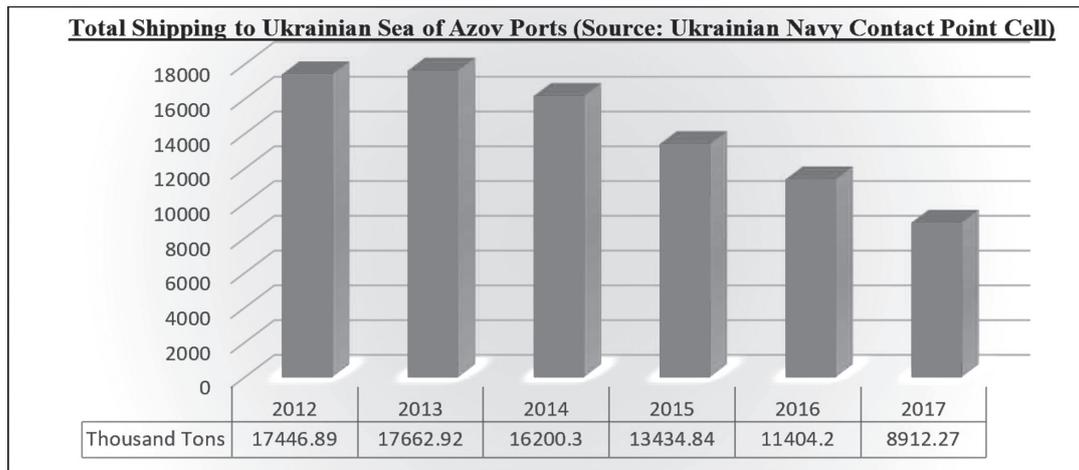
\$13 million in costs to commercial operators. This discrimination violates Article 25 of UNCLOS, specifically a clause which Russia manipulates to justify its economic strangling of Ukraine's Sea of Azov ports. "The coastal State may, *without discrimination in form or in fact among foreign ships*, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published."<sup>62</sup> All of the above factors have reduced the average number of commercial shipping carriers to Ukrainian ports by 144 vessels. The economic impact on Ukraine is staggering, especially when considered as part of Russia's greater economic and energy warfare against the country. The above violations are justified via continued disinformation in legal narratives surrounding the Sea of Azov to include their claims for necessary "safety and security" stops.<sup>63</sup>

### Emerging Examples: Submarine Malign Legal Operations

A final case and emerging example of MALOPs on the Black Sea involves Russia's recent combat rotation of its Black Sea diesel-electric submarine fleet. Officially, six of these Improved Kilo-Class submarines are assigned to the fleet but only four (Novorossiysk, Rostov-on-Don, Stary Oskol, & Krasnodar) have been based in the Crimean port of Sevastopol since 2017. The other two (Velikiy Novogorod & Kolpino) sailed directly from St. Petersburg to Russia's naval base in Tartus, Syria, to take part in continued combat operations in support of the Assad regime. The 1936 Montreux Convention, which Turkey continues to enforce over UNCLOS to ensure its control over the Bosphorus and

62 Office of Legal Affairs—United Nations, "United Nations Convention on the Law of the Sea," 1982, [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/UNCLOS-TOC.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm).

63 David Saha, Vitaliy Kravchuk, and Veronika Movchan, "The Impact of the New Kerch Strait Bridge on Ukraine's Trade," accessed December 15, 2018, [https://www.beratergruppe-ukraine.de/wordpress/wp-content/uploads/2018/03/PB\\_02\\_2018\\_en.pdf](https://www.beratergruppe-ukraine.de/wordpress/wp-content/uploads/2018/03/PB_02_2018_en.pdf).



Dardanelles straits, includes verbiage that dictates when military vessels may pass to and from the Black Sea. Specifically, Article 12 addresses the rare circumstances when submarines may pass;

*“Black Sea Powers shall have the right to send through the [Bosporus & Dardanelles] Straits, for the purpose of rejoining their base, submarines constructed or purchased outside the Black Sea, provided that adequate notice of the laying down or purchase of such submarines shall have been given to Turkey. Submarines belonging to the said Powers shall also be entitled to pass through the Straits to be repaired in dockyards outside the Black Sea...”<sup>64</sup>*

Submarines may enter The Black Sea if joining their fleet from initial production or if returning from major repairs. Similarly, submarines may depart the Black Sea only if repairs are required that cannot be completed on-site. The spirit and intent of the 1936 Montreux convention was for Turkey to ensure dominance over the straits, to give the USSR control over the Black Sea, but also to appeal to the West by restraining the USSR from utilizing the sea as an expeditionary launching point, effectively containing them to The Black Sea.

In March of 2019, however, two of the Russian Navy’s Black Sea submarines sailed south into the Mediterranean (Krasnodar and Stary Oskol) towards Syria and were replaced by the Black Sea submarines previously engaged in combat operations in Tartus (Velikiy Novogorod & Kolpino). It was announced that, at the end of 2020, these two submarines will depart Syria towards St. Petersburg for repairs. Prior to this, the only well-known article 12 example was in 2009 when the submarine Alrosa was forced to return to Russia after experiencing a fire.

It is clear in the most recent cases that Russia is exploiting legal loopholes in the Montreux convention meant to allow for repairs. Instead, they have rotated two

64 League of Nations, “1936 Montreux Convention,” 1936, [http://sam.baskent.edu.tr/belge/Montreux\\_ENG.pdf](http://sam.baskent.edu.tr/belge/Montreux_ENG.pdf).

submarines into combat operations which will remain for over a year and a half before returning to St. Petersburg for the repairs that it claims will take place. While this may not be in direct violation of Article 12, there can be little question that it is in violation of the spirit and intent of the convention with the sole purpose of positively affecting its combat capabilities in an expeditionary manner. Furthermore, there is a dock at the Russian port of Tartus, Syria, that they can also claim will provide the repairs necessary to satisfy Article 12. The idea of manipulating the Montreux Convention for the purpose of increasing combat lethality is not new. Alexander Shishkin, Russian Naval-Engineer, suggested this exact MALOPs approach in 2018. “Probably, if you wish, *you could find loopholes that allow bypassing the provisions* of Article 12. Say, notify Turkey of the urgent need to repair the black sea boats at Tartus, in Cyprus or in Egypt due to congestion of the Crimean ship repair yards.”<sup>65</sup> He continued on to recommend against such brazen behavior due to the swift manner in which the international community will cry foul. The Kremlin, however, bet against this response. So far, it seems, they were right—their behavior has essentially gone unnoticed.<sup>66</sup>

## Combatting Malign Legal Operations

To defeat MALOPs, victims must pursue three main efforts; **identify, disrupt, and consolidate**. This section will offer a brief overview of these efforts for further elaboration in subsequent publications.

### *IDENTIFY*

1. **MALOPs Literacy:** Understanding the nature of the problem and making diplomats, lawmakers, peacebuilders, politicians, commanders, and other government servants aware of the issue is the first and most important step of this process. This article seeks to achieve such literacy by offering both a term to properly describe this phenomenon and through a robust discourse analysis.
2. **Intelligence:** MALOPs, by nature, are inherently overt. The true intent of the behavior may be mired in secrecy, but legal exploitation and manipulations can be seen well in advance. For MALOPs to be successful, the practitioner must spread disinformation to shape legitimacy and must also confidently put forth legal positions. For example, on February 28th, 2014, Russian Member of Parliament Sergey Mironov introduced draft law 462741–6 within the Russian government which allowed for the annexation of territory in another state “When it is not possible to conclude an international treaty because of the absence of efficient sovereign state government in the foreign state.” This draft law was cancelled on March 20th after Crimea was absorbed via other means. While it was only 17 days between the introduction of the draft law and the sham Crimean referendum,

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65 Alexander Shishkin, “Russian Submarines Are Prevented from Operating in the Mediterranean Sea,” *Vzhlyad*, 2018, <https://vz.ru/world/2018/5/28/924562.html>.

66 Devrim Yaylali 2019.

both Ukraine and the international community could have seen the annexation coming in advance. The use of automated web-scraping bot-technology in conjunction with data analytics could provide a daily gazette of both ongoing and potential cases of lawfare solely with information openly available via the internet.

3. **Counsel:** It is no longer sufficient for the legal counselors to decision makers to offer assessments of legality alone. Legal counsel must become warfighters and advise politicians, military commanders, and diplomats not only how the legal domain can be exploited against a particular operation or decision, but also how the legal domain can be positively leveraged to achieve objectives. Legal counselors are no longer (if ever they have been) administrative staff members but rather operational planners with significant roles in geopolitical decision making.

#### *DISRUPT*

1. **Decide at Speed of Relevance:** Often times, the best response to a case of MALOPs is not legal at all, but rather the clever force-posturing and placement of military forces to deter continued exploitation. The very goal of MALOPs, however, is to achieve *fait accompli* and consolidate gains such that no response is possible. It is for this reason that decision makers must act upon information received during the *identify* step as quickly as possible. This effort runs counter to many legal practices whereby facts are gathered and presented in a clear and methodical manner. To combat MALOPs, defenders and their legal counsel must be willing to take smart risk and execute defensive plans with occasionally incomplete or inaccurate information.
2. **Cleansing Legitimacy:** The foundation of MALOPs is the careful crafting and dissemination of disinformation to shape legitimacy and control legal narratives. It is therefore imperative for MALOPs defenders to cleanse these narratives and to offer indisputable evidence of the malicious practitioner's intent. This is a highly delicate process, as any attempt to cleanse or correct narratives could easily be twisted to further shape legitimacy for the benefit of the offender.
3. **Accountability:** This step includes both defensive and offensive accountability. Defensively, countering MALOPs requires a great deal of transparency. The practitioners of these methods rely on corruption to ensure that their operations are protected. The primary means of defending against MALOPs is to shine a light on the problem, and the offenders often seek to disincentivize this process by creating the conditions for this expository light to also expose the defender's malevolent behavior and corrupt practices. As such, MALOPs defenders must have their proverbial house in order.

There also exists the need for offensive accountability. This includes the documentation and public identification of MALOPs as they occur. For example, the previously highlighted case of Russian submarine manipulations of the Montreux

Convention has gone largely unaddressed because the activity does not amount to a direct violation of the convention's text. This is a mistake, and Russia must be held publicly to account for this behavior. It amounts to abuse of the spirit and intent of the convention, and if tracked properly can highlight the significant threat posed by these Malign Legal Operations.

### *CONSOLIDATE*

1. **Red-Teaming:** It is critical for all those concerned by this phenomenon to consider how the legal domain may be used against them and how legitimacy may be shaped to the adversary's advantage. This process involves the creation of independent teams within an organization with the goal of thinking and acting like the adversary in order to identify what legal gaps, loopholes, and mechanisms are ripe for exploitation. This includes the manipulation of specific cultural and societal norms within disinformation campaigns against a legal position or the rule of law.
2. **Close Gaps and Loopholes:** Once identified through red-teaming, defenders must assess these weaknesses and set about working to close or remedy loopholes. Continuing with the Montreux Convention example, the treaty allows for the revision of Article 12 given that it is initiated with agreement from at least two high-contracting parties to the treaty. In this example, verbiage could be included indicating that submarines undergoing repair must sail directly for their intended point of dry dock and the conduct of combat or purely military operations during this process will result in violation of the treaty. Even if it is not politically possible to close this loophole, it should not preclude affected parties from attempting to remedy this abuse in the name of offensive accountability for MALOPs.
3. **Legal Resilience:** Operations that seek to deliberately undermine and revise the rule of law must be met with elastic institutions that can recover to their neutral positions without forced revision or capitulation. This legal resilience is a philosophy as much as it is a key task for MALOPs defenders and takes the form of a commitment to the rule of law and defending not just the letter of the law, but its spirit and intent.

## **Conclusion**

Malign Legal Operations, as the Russian Federation demonstrates, are a highly effective tool. Not only do they permit practitioners to achieve geopolitical objectives without declarations of war or the overt use of armed force, but it allows them to justify the use of force while discrediting the very institutions that are intended to delimit acceptable and legal actions. By operating in such a way that renders international law irrelevant and showing that illegal activities are possible without serious repercussions, Russia is proving to other would-be hostile actors that this behavior is tolerable. According to the Ukrainian Foreign Ministry, more than 13,000 have been killed, 30,000 wounded,

and over 1.5 million displaced since the conflict began in 2014. The world risks more fatalities and more of the same legal manipulations unless it recognizes them for what they are. In the Black Sea—just like Crimea and elsewhere—those actions are *Malign Legal Operations*. While a majority of research in this field focuses on the employment of legal manipulations in lieu of military force, the Russian Federation takes this to an extreme by manipulating the international legal system itself for geopolitical gain. While there is no question that all states take similar approaches from time to time, nowhere can be found such a deliberate strategy of exploitation and disregard for the rule of law as is employed by the Kremlin. In reality, what has been observed here is not simply a strategy, but a battle of fundamental ideologies and approaches to law and order as summarized by the concept of *Malign Legal Operations*.

It is this concept that most completely summarizes the 21st century “hybrid” problem. It parts the sea of symptomatic issues such as cyber threats, economic pressure, false-flag operations, election interference, and so on in order to strike at the heart of what is really occurring; a return to a multi-polar world, *realpolitik*, and great-power competition. This reality hearkens to realism in international relations whereby states will do *everything that they can get away with* to achieve geopolitical objectives. The key phrase here is “get away with,” because that inextricably ties this “hybrid” problem to law and its mechanisms (or lack thereof) for holding actors accountable. The true face of multi-polarity is not a competition of great powers within a single international legal system underpinned by shared principles. Rather, true multi-polarity consists of competing simulacrums of international order based upon vastly different interpretations of what order *ought to be* while using the same *language of international law* as first developed in Europe.<sup>67</sup>

This article sought to analyze the discourse surrounding contemporary conceptions of legal manipulations such as *lawfare*, to define *Malign Legal Operations*, to explore the concept through the analysis of Russia’s rising tensions towards Ukraine in the Black Sea region, and finally to briefly discuss methods for combatting this malicious behavior. There remains little question that Russia is operating with a revisionist agenda towards the rule of law, both international and domestic. If left unchecked, this behavior is the most dangerous of all hybrid threats. The inaction of states, whether due to a lack of political willpower, corruption, principled pragmatism, or any other reason, represents an existential threat to the post-World War II order and its underlying principles of human rights and self-determination. There should be no question that Russia will

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67 Mälksoo 2015 “ISBN”: “9780191789625”; abstract: “This paper points to the intimate relationship between international legal writing and history. It typifies modes of engagement with history in international law in order to contrast, rather impressionistically, a traditional approach with a set of present-day critiques. It proposes that the distinction between professional historiography and legal work proper is in some way misleading; while there are significant differences in terms of their respective objectives and styles, legal work inevitably requires a positioned engagement with the past, thus producing (or contributing to the production of

continue its skillful and aggressive use of Malign Legal Operations for as long as the international community permits it.

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