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14. ABSTRACT The People's Republic of China (PRC) uses lawfare in the South China Sea and across the world in order to advance its national interests. The United States lacks a coherent, unified national strategy for the use of lawfare. In an era of Great Power Competition the United States cannot cede the field to the PRC in this important arena. Nowhere is this more apparent than in the South China Sea, where the PRC uses lawfare to slowly but surely reshape the status quo in its favor. By implementing a Combined Joint Task Force to focus on the operational employment of lawfare in the South China Sea the United States can retake the initiative in this important area. Doing so would allow the United States to more efficiently coordinate efforts among international partners; would serve as a focal point for expertise on questions of lawfare and the South China Sea; and would allow the United States to conduct information operations, an important aspect of effective lawfare.					
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A Combined Joint Task Force as a Platform for Lawfare in the South China Sea

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INTRODUCTION

The People's Republic of China (PRC) lists lawfare as one of its three main tenets of warfare, and has consistently used lawfare to erode the status quo and rules-based international order in its favor. This strategy is as insidious as it is subtle and effective. By focusing on concerted operations below the threshold of conflict the PRC seeks to hamstring adversaries' ability to respond in a coherent way. Rather than doing so in an imperceptible way, they aim to change the status quo in diverse but coordinated ways that rely on all elements of national power. This is quintessential salami slicing - each of these methods in isolation may not warrant a response, like publication of the Nine Dash Line on Chinese passports, making official (and intentionally vague) proclamations of national sovereignty over the South China Sea (SCS), or informally conscripting small fishing vessels into an unofficial maritime militia. However in the aggregate and over time the PRC will continue to seek to leverage these methods as the foundation of Chinese hegemony in the Western Pacific and beyond. While this may be a strategic question "[o]perational art serves both as a bridge and as an interface between strategy and tactics."¹ Where lawfare guides the PRC, so too may it guide unified opposition to the PRC and maintenance of the rules-based international order slowly built by the United States and its allies over the decades since World War II.

The United States should institute a Combined Joint Task Force initially focused on the SCS. This would be in order to leverage lawfare to its maximal effectiveness, and to get the most efficient operational return at the lowest cost and achieve the desired end-state of a free and open SCS consistent with customary international law. This would allow United States Indo-Pacific Command (INDOPACOM) and the United States Government (USG) writ large to

¹ Dr. Milan Vego, *Joint Operational Warfare: Theory and Practice* (Newport, RI: Naval War College, 2009), I-3.

effectively focus its resources and allies and partners on this complex problem. This includes the ability to undertake public messaging expeditiously and efficiently and to translate operations into the accomplishment of lawfare-based operational objectives. Exemplar benefits include, but are not limited to, avoiding duplication of effort; coordinating multifaceted reinforcement of the rules-based international order; expanding beyond freedom of navigation operations (FONOPS) to support the rules-based international order; sensitizing potential adversaries to more active involvement in the region by the United States and its allies and partners; prepositioning military assets in the region; deterring active conflict through strength and dynamic alliances; and generally strengthening alliances, partnerships, and friendships in the region.

What is Lawfare?

Lawfare has been defined as the intentional use of the law or the legal system in order to achieve strategic effects; or ‘the strategy of using – or misusing – law as a substitute for military means to achieve an operational objective.’² While the term has come into more common usage in recent years, concepts of lawfare have been leveraged just as long as any other element of warfare. Historical examples include military conscriptions in ancient times or shifting treaties or non-aggression pacts leading up to and during the Peloponnesian War. In many ways lawfare is another method to ‘win without fighting’ – working to shape and prepare the environment to and create conditions on the ground to meet strategic ends without kinetic conflict.

This concept fits naturally with the Chinese school of thought as it relates to competition and conflict, as well as with Chinese conception of the law more generally. The thread runs through from Sun Tzu in the fifth century BC, to the outlining of the Three Warfares in 1963, to

² Charlie Dunlop, JD, “Out to Sea with the CCP: A Contemporary Example of Lawfare with China,” *Duke University’s Lawfire*, May 8, 2021, <https://sites.duke.edu/lawfire/2021/05/08/out-to-sea-with-the-ccp-a-contemporary-example-of-lawfare-with-china/>.

the cornerstone strategic primer “Unrestricted Warfare” in 1999, to the South China Sea (and beyond) today (and beyond).³ From this perspective, conflict is not a binary – a state of being either ‘at war’ or ‘at peace.’ Rather, in a constant and global state of competition, the ‘battlefield’ is more like life in the fast lane – everywhere, all the time. Often likened to the difference between the games of checkers or chess and the game of go, the goal is not necessarily ‘victory’ in the binary sense, but the gradual accrual of tactical, operational, and strategic *relative* advantage over the course of the interaction. When it comes to lawfare, this concept answers the question of ‘How can the PRC be winning if we’re not fighting?’ To use the South China Sea as the primary example, the PRC is using lawfare to gradually accrue tactical, operational, and strategic advantages relative to the US and its allies, and relative to the rules-based international order.

While the term ‘The Three Lawfares’ may seem like a misnomer to Western or American ears, it reflects the more nuanced Chinese view of competition and conflict. The Three Warfares concept represents a part of what the United States might call gray zone operations, or operations short of war. It consists of Public Opinion Warfare, Psychological Warfare, and Legal Warfare.⁴ It is telling that the Three Warfares are all non-kinetic in nature and are intended to “replace or supplement traditional military activities.”⁵ PRC scholarship and military doctrine on the topic indicate that lawfare “should begin before the outbreak of physical hostilities” in a way to shape

³ Jill I. Goldenziel, “Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare,” *Cornell Law Review* 106 (2021): 1092-93.

⁴ Goldenziel, “Law as a Battlefield,” 1092-93.

⁵ Goldenziel, “Law as a Battlefield,” 1092.

the battlefield or, ideally, to prevent an area of operations from becoming a battlefield in the first place.⁶

Lawfare and Customary International Law

Lawfare presents the opportunity for the PRC to have a significant impact on customary international law. While there is no standard internationally-known definition of the term, a sufficient working definition is “the general and consistent practice of states followed by them from a sense of legal obligation.”⁷ Sources of that ‘legal obligation’ can spring either from formally ratified treaties, or from longstanding custom and usage in the international arena. The United States follows the framework of the United Nations Convention on the Law of the Sea (UNCLOS). While the United States has not formally ratified UNCLOS,⁸ the official US position has long been that “the convention’s provisions concerning traditional uses of the ocean generally reflect customary international law that is binding on all states, including the United States.”⁹ Most relevant to the SCS, UNCLOS defines ‘territorial waters’ as extending 12 nautical miles from a nation’s coastline;¹⁰ exclusive economic zones (EEZs) as extending 200 nautical miles from a nation’s coastline,¹¹ and ‘island’ as a naturally formed area of land that is above water at high tide and able to sustain human habitation of economic life on its own, and may enjoy its own EEZ.¹² A coastal nation exercises full sovereignty over its territorial waters (including the airspace over it), and has the exclusive right to regulate and authorize foreign

⁶ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (New York: Oxford University Press, 2016), 165.

⁷ Restatement (Third) of the Foreign Relations Law of the United States, §102(2) (1987).

⁸ “Statement on United States Actions Concerning the Conference on the Law of the Sea,” Ronald Reagan, July 9, 1982, White House.

⁹ Dr. Jung H. Park, “Foreign Press Center’s Briefing on China’s Maritime Claims in the South China Sea,” January 24, 2022, United States Department of State, <https://www.state.gov/briefings-foreign-press-centers/chinas-maritime-claims-in-the-south-china-sea>.

¹⁰ United Nations Convention on the Law of the Sea, art. 55.

¹¹ United Nations Convention on the Law of the Sea, art. 3.

¹² United Nations Convention on the Law of the Sea, art. 121.

vessels' passage therein.¹³ In its EEZ, a coastal state has special rights to explore, exploit, and manage natural resources therein, but may not regulate transit of other nations' transit passage.¹⁴ Certainly it would be contrary to UNCLOS, and contrary to customary international law, for one nation to regulate another nation's use of its own EEZ. Yet, as will be further described below, this is exactly the position the PRC has taken in the South China Sea.

Lawfare and Customary International Law in the South China Sea

In a deliberate attempt to slowly erode customary international law, the PRC has claimed sovereignty over an expansive area in the SCS, within an area colloquially known as the Nine-Dash Line.¹⁵ Their Nine-Dash line overlaps with the EEZs of the Philippines, Vietnam, Malaysia, Brunei, and Indonesia.¹⁶ PRC affronts to the international rules-based order include, but are not limited to, building up and militarizing geographic features in the South China Sea; interfering with coastal nations' rightful use of their own EEZs; deploying Chinese law enforcement craft to other nations' EEZs; and engaging in illegal fishing activities in other nations' EEZs.¹⁷ This ostensibly gives parties unity of interest in reinforcing the rules-based international order and supporting the definitions of territorial waters and EEZ as laid out in UNCLOS.

Customary international law is based on generally accepted custom and practice. The aggressive and assertive position the PRC has taken vis-à-vis sovereignty in the SCS requires a response from the international community. To fail to respond and to let Chinese assertions go unchallenged would risk a transformation of the status quo to one that de facto recognizes

¹³ United Nations Convention on the Law of the Sea, art. 3.

¹⁴ United Nations Convention on the Law of the Sea, art. 55.

¹⁵ Ben Dolven, "China Primer: South China Sea Disputes," *Congressional Research Service*, December 19, 2022, <https://crsreports.congress.gov/product/pdf/IF/IF10607>.

¹⁶ The Center for Preventive Action, "Territorial Disputes in the South China Sea," *Council on Foreign Relations*, May 4, 2022, <https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea>.

¹⁷ Dolven, "China Primer."

Chinese claims.¹⁸ This is especially true when the PRC makes intentionally vague claims relating to their purported sovereignty, as will be further discussed *infra*.

A coherent, comprehensive response to the excessive maritime claims of the PRC and their offensive use of lawfare requires a whole of government approach on the part of the United States and its allies. In order to accomplish this most effectively, the United States should establish a Combined Joint Task Force with lawfare-centric operational objectives, such as encouraging the use of the South China Sea in all manners consistent with UNCLOS. This would allow the US to more efficiently consolidate efforts between various stakeholders, expand operations beyond the execution of freedom of navigation operations (FONOPS), and conduct more effective messaging campaigns to support US-led and UNCLOS-based interpretations of sovereignty in the South China Sea.

US Freedom of Navigation Operations (FONOPS) alone are insufficient to contest Chinese claims

Since the US pivot to Asia and the focus on Great Power Competition, FONOPs have been perhaps the most prominent tool in the American toolkit for contesting the PRC's excessive maritime claims.¹⁹ The FONOP Program "consists of complementary diplomatic and operational efforts to safeguard lawful commerce and the global mobility of U.S. forces."²⁰ It consists of operational challenges to excessive maritime claims, or "unlawful attempts by coastal States to restrict the rights and freedoms of navigation and overflight as well as other lawful uses of the

¹⁸ Jeff Smith, "UNCLOS: China, India, and the United States Navigate an Unsettled Regime," *The Heritage Foundation*, April 30, 2021, <https://www.heritage.org/global-politics/report/unclos-china-india-and-the-united-states-navigate-unsettled-regime>.

¹⁹ The Center for Preventive Action, "Military Confrontation in the South China Sea," *Council on Foreign Relations*, May 21, 2020, <https://www.cfr.org/report/military-confrontation-south-china-sea>.

²⁰ Department of Defense, *Annual Freedom of Navigation Report, Fiscal Year 2022*, (Washington, DC: Department of Defense, 2023), 2
https://policy.defense.gov/Portals/11/Documents/FON%20Program%20Report_FY2022.pdf?ver=8of4c3mCAOnzfa4AfTYIyg%3d%3d.

sea.”²¹ The term FONOP generally describes diplomatic messaging coordinated with military operations to assert navigation and overflight rights and freedoms around the world and in direct confrontation with claims the US deems to be excessive and beyond the scope of UNCLOS.²² For example, if a coastal nation demands advanced notice for transit through its EEZ (notice to which it is not entitled under customary international law), the US may intentionally transit that area without providing that notice, and would assert its right to do so under customary international law.

The PRC’s claims with regard to the Nine-Dash Line and the South China Sea are intentionally vague. They assert that while they have sovereignty over the SCS, they permit passage of vessels engaged in commerce through their territorial waters.²³ They have also referenced undefined bilateral agreements for the proposition that they have decided to permit other coastal states (like the Philippines) to engage in commercial activity in the SCS.²⁴ This nuanced position allows the PRC to claim sovereignty in the SCS in contravention of UNCLOS and customary international law, and set conditions in the area of responsibility (AOR) that mirror their claims. Coastal states in the AOR seem to have little incentive to challenge this status quo, as their more immediate interests are being served by Chinese ‘permission’ to operate within the SCS.

This assertion is illustrated by the United Nations’ only relevant decision relating to the SCS. UNCLOS calls for arbitration of disputes by a Tribunal of the Permanent Court of Arbitration in the Hague.²⁵ The Philippines filed a claim with the Tribunal contesting Chinese

²¹ Department of Defense, *Annual Freedom of Navigation Report, FY 2022, 2.*

²² Department of Defense, *Annual Freedom of Navigation Report, FY 2022, 2.*

²³ Radio Free Asia Staff, “China Accuses US Navy of ‘Violating its Sovereignty’ in South China Sea,” Radio Free Asia, November 29, 2022, <https://www.rfa.org/english/news/southchinasea/uss-chancellorsville-11292022013704.html>.

²⁴ Goldenziel, “Law as a Battlefield,” 1112.

²⁵ Goldenziel, “Law as a Battlefield,” 1110.

claims of sovereignty in the Philippines' EEZ.²⁶ From the outset the PRC refused to participate in the proceedings and refused to recognize the validity of the Tribunal.²⁷ The Tribunal decided against China and determined that their claims of sovereignty in the SCS are without merit, and they are subject to limitations of territorial waters and EEZ as set forth in UNCLOS.²⁸ The PRC initiated a coordinated media and public affairs campaign denouncing the decision as invalid and without effect.²⁹ They went as far as taking out a video billboard in the middle of Times Square denouncing the decision and taking statements of British officials out of context to effectively use as propaganda.³⁰ (To view the video, click [here](#)).

The ruling itself is noteworthy in its support for the American interpretation of customary international law. However lack of meaningful compliance with the decision actually undermines the authority of the Tribunal and threatens to slowly change the customary usage and therefore sovereignty in the SCS.³¹ This is arguably a worse state of affairs than had the case not been brought in the first place. The PRC still maintains its claims of sovereignty over the SCS, has not abandoned the artificial islands at issue in the arbitration, continues to patrol the area with Chinese Coast Guard vessels, and continues to harass naval and merchant vessels operating in the area.³² Over time the PRC will argue that this status quo has become 'custom' relevant to customary international law.³³ The PRC would argue that since the dispute is one of sovereignty between neighboring nations, the relative positions of those coastal nations should be the

²⁶ Goldenziel, "Law as a Battlefield," 1110.

²⁷ Goldenziel, "Law as a Battlefield," 1110.

²⁸ Goldenziel, "Law as a Battlefield," 1118-19.

²⁹ Goldenziel, "Law as a Battlefield," 1119.

³⁰ Goldenziel, "Law as a Battlefield," 1119.

³¹ Goldenziel, "Law as a Battlefield," 1121.

³² Goldenziel, "Law as a Battlefield," 1123.

³³ Kittrie, *Lawfare*, 166.

controlling consideration, not the position of the US as it seeks to ‘militarize the South China Sea.’³⁴

The issue thus framed, it becomes evident that the PRC will take the alternative positions that 1) it has sovereignty over the entirety of the SCS; 2) any activities that other nations undertake in the SCS are with Chinese acquiescence; and 3) it is the policy of the PRC that the SCS can be used for certain delineated purposes like international commerce, but sovereignty means that the PRC is able to revoke that permission. To mitigate this risk, and to support the desired end state of a free and open SCS consistent with customary international law, a robust, dynamic, multi-pronged and multi-national approach is required to support US and partner assertions that this is the true state of customary international law. A standing Combined Joint Task Force would be the most efficient method of coordinating efforts across various stakeholders within the USG and among international partners.

The problem set in the South China Sea is uniquely well-suited for the institution of a Combined Joint Task Force

According to joint doctrine, a joint task force “may be established when the scope, complexity, or other factors of the operation require capabilities of Services from at least two Military Departments operating under a single joint force commander (JFC).”³⁵ The US has a desired end state in the SCS of ensuring open access in accordance with customary international law and UNCLOS. As outlined above, based on lawfare considerations this is a discrete and

³⁴ Heather Mongilio, “China Protests U.S. South China Sea Freedom of Navigation Operation,” United States Naval Institute News, March 24, 2023, <https://news.usni.org/2023/03/24/china-protests-u-s-south-china-sea-freedom-of-navigation-operation>.

³⁵ Joint Chiefs of Staff, *Joint Publication 3-33: Joint Task Force Headquarters*, JP3 (Washington, DC: Joint Chiefs of Staff, 2018), I-1 https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_33.pdf.

complex problem set that requires a coordinated USG and even private sector response, in coordination with like-minded partners in the region.

The relevant combatant command (COCOM), Indo-Pacific Command (INDOPACOM) covers about half the Earth's surface (100 million square miles),³⁶ as well as more than half the Earth's population in 36 nations.³⁷ INDOPACOM therefore has a variety of interests and areas of focus, including but not limited to the Korean Peninsula, the Taiwan Strait, the South China Sea, and the more general logistical challenges with operating forces over such a large area. The South China Sea, by contrast, covers approximately 1.4 million square miles,³⁸ or less than 1.5% of INDOPACOM's overall AOR.

Besides the fact that the South China Sea AOR is a small fraction of the overall INDOPACOM AOR, the problem set is uniquely lawfare-focused and requires a unique and specialized approach beyond the US execution of FONOPS. Arguably the customs and practices of other coastal nations in the SCS like Philippines, Vietnam, Malaysia, Brunei, and Indonesia, operating in their own EEZs, are more impactful to shaping or reinforcing customary international law than are the activities of the US Navy or Department of Defense thousands of miles from its own shores.

As stated above, the problem set in the South China Sea has to do with more than merely freedom of navigation. The issue, as framed by the United States, is not *solely* that the US Navy should be able to transit anywhere in the world outside of other nations' territorial waters. The issue is that customary international law, as outlined in UNCLOS, is the foundation of the rules-

³⁶ General Charles Q. Brown, "Demystifying the Inco-Pacific Theater," Air University Journal of Indo-Pacific Affairs, March 13, 2020, <https://www.airuniversity.af.edu/JIPA/Display/Article/2392217/demystifying-the-indo-pacific-theater/>.

³⁷ "About United States Indo-Pacific Command," United States Indo-Pacific Command, accessed April 30, 2023, <https://www.pacom.mil/About-USINDOPACOM/>.

³⁸ Beina Xu, "South China Sea Tensions," *Council on Foreign Relations*, May 14, 2014, <https://www.cfr.org/backgrounder/south-china-sea-tensions>.

based international order at sea. This includes provisions relating to EEZs and the economic activities of coastal states in their own EEZs. For example, the PRC routinely interferes with the Philippines' use of the South China Sea within the Philippines' EEZ. Interference includes but is not limited to unilaterally declaring a fishing ban within the entirety of the SCS,³⁹ disrupting Philippine maritime scientific missions, harassing commercial vessels engaged in energy exploration,⁴⁰ and harassing Philippine fishermen.⁴¹ Indonesian press has made similar claims of Chinese patrol ships harassing Indonesian fishermen,⁴² as have Vietnamese fishermen⁴³ and Malaysian energy exploration vessels.⁴⁴ In some instances the harassment is described as 'routine,' and coastal nations do not always register their complaints or challenge the harassment in an official capacity.⁴⁵

The Utilization of a Combined Joint Task Force would allow for the coordination of interests and efforts among international stakeholders and would strengthen the claim that customary international law means a free and open South China Sea

The lack of a coordinated response as described above creates a significant level of risk with respect to the US and like-minded nations to make a concerted argument relating to

³⁹ Neil Jerome Morales, "Philippines Complains of Chinese Fishing Van and 'Harassment' at Sea," Reuters, May 31, 2022, <https://www.reuters.com/world/asia-pacific/philippines-complains-chinese-fishing-ban-harassment-sea-2022-05-31/>.

⁴⁰ Morales, "Philippines."

⁴¹ Aie Balagtas, "Philippines 'Vigilantly' Monitoring Alleged Harassment by China in Disputed Waters," Radio Free Asia, January 24, 2023, <https://www.rfa.org/english/news/southchinasea/pichinasc-01242023124616.html#:~:text=The%20incident%20was%20the%20first,Coast%20Guard%20issuing%20verbal%20challenges.>

⁴² Radio Free Asia Staff, "Chinese Troops Drive Away Fishing Vessels from Disputed Waters," Radio Free Asia, September 13, 2022, <https://www.rfa.org/english/news/china/chinese-troops-drive-away-fishing-vessels-09132022052956.html>.

⁴³ Tran Thi Minh Ha, "Beaten and Robbed: Vietnamese Fisherman Recounts China Attacks," ABS-CBN News, October 5, 2022, <https://news.abs-cbn.com/overseas/10/05/22/beaten-and-robbed-vietnamese-fisherman-recounts-china-attacks>.

⁴⁴ Asia Maritime Transparency Initiative Staff, "Contest at Kasawari: Another Malaysian Gas Project Faces Pressure," Asia Maritime Transparency Initiative, July 7, 2021, <https://amti.csis.org/contest-at-kasawari-another-malaysian-gas-project-faces-pressure/>.

⁴⁵ Balagtas, "Philippines."

customary international law in the SCS. As described above, challenges to the illegitimate claims of Chinese sovereignty over the SCS are typically unilateral, consisting of the United States or other nations conducting military FONOPs, or coastal nations in the AOR conducting commercial activity within their own EEZs. The PRC challenges FONOPs diplomatically and in the press, and even claims to drive out US ships conducting FONOPs when they are actually following their planned routes.⁴⁶ Economic activity by other coastal states is frequently challenged by the PRC, and has apparently become so routine that it is a matter of course. This is dangerously close to allowing the PRC to argue that their claims and exercise of sovereignty is 'custom' according to customary international law.

The utilization of a Combined Joint Task Force among stakeholder nations would allow for the coordinated exercise of collective rights under customary international law and UNCLOS, as well as individual rights of the coastal states in the AOR. Where coastal states may lack the resources or the wherewithal to respond frequent Chinese interference with economic activity, the increased resources that would result from a CJTF would exponentially increase interested parties' ability to conduct effective lawfare and challenge Chinese attempts to change the status quo. As indicated *infra*, it is important that this be done in areas beyond FONOPs or transit of military vessels. A CJTF would allow for the focused expansion of this mission set in coordination with interested parties in the AOR, and would better allow the United States to

⁴⁶ Kari Soo Lindberg, "US Navy Denies China's Claim That It Drove Away Destroyer," Bloomberg, March 23, 2023, <https://www.bloomberg.com/news/articles/2023-03-23/us-navy-denies-china-s-claim-that-it-drove-away-destroyer#xj4y7vzkg>.

more efficiently bring to bear other elements of national power, including diplomacy, private industry, and even the civilian legal field.⁴⁷

Even more specifically, the utilization of a Lead Nation Command structure would allow the United States to manage the operational direction of the CJTF, and deconflict, coordinate, and tailor operations in accordance with multinational partners' interests.⁴⁸ The CJTF Commander could structure the combined force in a way that would allow CJTF partner nations to be assigned particular operations that meet and advance their interests and do not hamper other CJTF partner nations' claims. This would have the overall effect of maximizing US preeminence in shaping international law in the SCS.⁴⁹

The utilization of a CJTF should form the nucleus expertise and coordination within the USG with respect to the issue of lawfare and the South China Sea

The initiation of a CJTF within this AOR would serve as a springboard to coordinate interagency USG processes to more effectively conduct lawfare in the SCS. One may argue that a Combined Joint Interagency Task Force would be best suited towards these ends. While this may be an area for future expansion, at its earlier stages the authorities exist within the framework of a CJTF to accomplish interagency objectives within the optional J-9 directorate.⁵⁰ Currently the United States' conception of lawfare is limited and its approach to lawfare is unsystematic and largely defensive.⁵¹ Through a J-9 directorate, a properly aligned CJTF would have access to expertise and personnel (with differing and complimentary authorities) across the USG, the fifty states, and even the civilian sector, where private industries and attorneys have

⁴⁷ Kittrie, *Lawfare*, 335 .

⁴⁸ James Donnellan, "Joint Forces and Joint Task Force (JTF) Organization," lecture, United States Naval War College, Newport, RI, February 23, 2022.

⁴⁹ Kittrie, *Lawfare*, 195.

⁵⁰ Joint Chiefs of Staff, *Joint Task Force Headquarters*, XIII-1.

⁵¹ Kittrie, *Lawfare*, 28.

demonstrated a more robust understanding of the potential for lawfare to shape an operating environment and achieve tangible results.⁵²

As a hypothetical example, take a scenario where the Chinese Coast Guard prevents a Malaysian vessel from fishing in Malaysia's EEZ. Through coordination with the CJTF J-9, the next time that vessel gets underway it could be nominally contracted with a US-based fishing corporation and/or under the supervision of the US Navy. Specially designated individuals onboard would be sensitized to gathering evidence and identifying actions on the part of the Chinese vessels for use in a civil lawsuit in federal court in the United States. Jurisdictional requirements would be worked out in advance by the selection (or even creation) of the appropriate corporate entities. Or the suit may be brought in another forum like Malaysia if, after analysis, it is determined to be more advantageous. While the Chinese government is unlikely to accept such a lawsuit, such a response would actually support the narrative that the PRC does not respect the international rules-based order or customary international law.

This novel and offensive use of lawfare is but one example of potentially limitless ways to wage offensive lawfare and seek incremental gains vis-à-vis the PRC in the SCS. It is likely a shadow of the creativity that could be brought to bear by the private legal sector if coordinated through the CJTF J-9 and given the opportunity to pursue its profit motive while simultaneously advancing US and international interests. The same reasons identified *supra* that demonstrate the need for a CJTF in the first place also suggest the need for a new and innovative approach. The offensive waging of lawfare is a novel concept and therefore presents the opportunity to be creative and to use new and innovative structures and collaborations rather than relying on past experiences that may not be translatable. Starting this effort as part of a CJTF would mirror the

⁵² Kittrie, *Lawfare*, 40.

development (and ideally the success) of Joint Interagency Task Force-South, which grew out of a Department of Defense Joint Task Force⁵³ and is largely seen as the ‘gold standard’ for interagency cooperation.

The utilization of a CJTF would allow the United States to more efficiently conduct Information Operations, a uniquely important factor in lawfare

As posited above, in the context of defending customary international law as defined by UNCLOS, public perception matters. That which is tolerated or accepted by other nations is an element of what is ‘customary.’⁵⁴ As the PRC appears to have identified, messaging is uniquely important in such a scenario. Leveraging a whole of government and private industry approach would allow for wider dissemination of the US and multinational position with respect to customary international law in the SCS.

While of course INDOPACOM currently has its own Public Affairs Communication and Outreach Branch,⁵⁵ it suffers from the same problem of scope as does the rest of INDOPACOM. The mandate of their AOR is extremely broad and has a varied focus. Additionally they are headquartered in Hawaii, thousands of nautical miles and multiple time zones from the SCS. A CJTF Headquarters-level Public Affairs Office, again in coordination with a CJTF J-9, would

⁵³ Evan Munsing and Christopher J Lamb, “Joint Interagency Task Force–South: The Best Known, Least Understood Interagency Success,” (Washington, DC: National Defense University Press, 2011), 30-31.

⁵⁴ Kittrie, *Lawfare*, 168.

⁵⁵ “Public Affairs Communication and Outreach,” United States Indo-Pacific Command, accessed April 30, 2023, <https://www.pacom.mil/Contact/Directory/J0/Public-Affairs-J01PA/>.

allow for broader dissemination of US and partner nation messaging in defense of customary international law and a free and open SCS.

Counterargument – Institution of a Combined Joint Task Force would support the Chinese narrative that the United States is militarizing the South China Sea

Some may argue that the institution of a CJTF would support the Chinese narrative that the United States is seeking to militarize the SCS – a common Chinese refrain following US FONOPs.⁵⁶ Responding to an American-led CJTF, the PRC may have the opportunity to argue that the perceived need to institute such a task force suggest that the United States is attempting to challenge the status quo and customary international law of Chinese sovereignty in the SCS. In response to claims that the PRC is actually inappropriately militarizing the SCS through the construction and arming of artificial islands, they would respond that they are simply using their own territory in pursuit of their national interests, as is their right under customary international law.

Such a claim is unlikely to be persuasive in an international context, especially if partners in the region with competing claims in the SCS assert and enforce those claims as part of a CJTF. Additionally as described *supra*, one of the purposes of the CJTF would be to expand operations beyond the strictly military and to allow the US and partner nations to exercise their economic rights under customary international law. Especially with effective IO campaigning as described above, the United States would be able to demonstrate that it is in fact attempting to

⁵⁶ Mongilio, “China.”

de-militarize the SCS and to allow rightful parties to use it for economic purposes consistent with customary international law.

CONCLUSION

Whether or not the United States does the same, the PRC is engaging in lawfare as a method of forwarding their policy objectives. They have done so to considerable effect in the SCS. There, in many ways they have been able to unilaterally shape what are the 'customs' as described by customary international law. This is because, as a practical matter, the other coastal states of the SCS lack either the wherewithal, resources, or unilateral interest to do so.

Considering the fact that lawfare is an extremely effective way of working towards a desired end state in a non-kinetic and relatively low-cost fashion, the United States and its allies cannot cede this important ground to the PRC. For those reasons, as well as those previously discussed, the United States should institute a Combined Joint Task Force for the purpose of engaging in lawfare in the South China Sea.

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