Report

The Practice, Promise and Peril of EU Lawfare

| Steven Blockmans |

May 2024

RKK ICDS
RAHVUSVAHELINE KAITSEUURINGUTE KESKUS
INTERNATIONAL CENTRE FOR DEFENCE AND SECURITY
EESTI • ESTONIA

Title: The Practice, Promise and Peril of EU Lawfare
Authors: Blockmans, Steven
Publication date: May 2024
Category: Report

Cover page photo: pixabay.com (Author: WilliamCho)

Keywords: rules-based international order; lawfare; European Union; foreign policy objectives; sanctions, extraterritoriality; US; China; Russia; Turkey; Ukraine

ISSN 2228-0529
ISBN 978-9916-709-31-3(PDF)
978-9916-709-30-6 (print)

63/4 Narva Rd., 10120 Tallinn, Estonia
info@icds.ee, www.icds.ee

Contents

Acknowledgements

The author is thankful to Daniel Gros, Christophe Hillion, Weinian Hu, Matthew D. Johnson, Kristi Raik, Kataryna Wolczuk, and ten officials of the European Union, member states and US Office of Foreign Assets Control who wished to remain anonymous, for their useful comments on (parts of) earlier drafts of this report.

About the Author

Steven Blockmans

Dr Steven Blockmans is Senior Research Fellow, and previously Research Director, at the Centre for European Policy Studies (CEPS) and Senior Fellow at the International Centre for Defence and Security (ICDS). He is also a visiting professor at the College of Europe (Bruges & Natolin), and editor-in-chief of the European Foreign Affairs Review. He is a frequent commentator on EU affairs at major media outlets and regularly briefs senior policy practitioners from the European Union, its member states and G20 country governments. He has testified at the foreign affairs and international trade committees of the European Parliament and the UK House of Commons. He was also a member of a track 1,5 process between the EU and Russia. He is the author of Tough Love: the EU's relations with the Western Balkans (Springer 2007) and The Obsolescence of the European Neighbourhood Policy (Rowman & Littlefield 2017) and has (co-)edited more than 20 books, including The EU's Role in Global Governance (Oxford University Press 2013), The EU's Common Foreign and Security Policy (Edward Elgar 2018) and a trilogy Democracy in the EU (Rowman & Littlefield 2020). He served as rapporteur of high-level task forces on the European Defence Union (2015), EU Institutional Reform (2017), and the European External Action Service (2021). He was a tenured professor in EU external relations law and governance at the University of Amsterdam (2012-2022), the head of research at the Asser Institute in The Hague (2010-2012), a visiting professor at the Law Faculty of the University of Leuven (2010-2014), and a long-term expert on legal approximation in the framework of an EU-sponsored project in support of the Ministry of European Integration of Albania (2007-2009).

Executive Summary

Power generates law and its interpretation, irrespective of whether it serves the cause of international justice. Despite its many shortcomings, the rules-based international order (RBIO) tries to advance that cause. But as a concept, the RBIO is now being rejected by China, Russia and parts of the so-called "Global South" for what they claim is the Western hegemonism and liberal values that underpin it. The fact that these countries have voluntarily signed up to the international covenants that enshrine the legal doctrines to strengthen the sovereign rights of weaker countries, especially in the context of economic relations, makes it hard to sympathise with the argument that the RBIO should be replaced by another concept, especially one that is advanced by autocracies. The RBIO has been partially shaped by the European Union (EU), a community of law that encodes the aspiration of "good global governance" in its constitutional DNA. With the waning "Brussels effect"—the soft power of EU law in shaping international rules and standards, the EU should consider how to instrumentalise the law to protect and promote its foreign policy interests, first and foremost the protection and promotion of the RBIO. This report unpacks the notion of "lawfare" and conducts a comparative analysis of such practices by the US, China, Russia, Ukraine, Turkey and others to assess the promise and peril of the EU using the power of the law to its strategic advantage.

Policy Recommendations

- It is appropriate to conceive of lawfare both as "soft-power geopolitics" and as a form of asymmetric warfare that is particularly attractive to political actors deficient in hard power. The goal is to deter third parties from undermining the RBIO and to respond to breaches while stopping short of sparking a retaliation that would incur intolerable costs.

- The EU should identify important lessons from its rapid and comprehensive response to Russia's full-scale invasion of Ukraine, especially as it concerns the use of the weapon of law in defence of international justice and the RBIO. In the realm of economic security, trade-offs also need to be established for the use of lawfare in relations with the US, China and regional powers such as Turkey.

- In view of the more conflictual geopolitical environment of tomorrow in which adversaries and capricious allies are likely to increasingly use negative lawfare to chip away at the RBIO and European strategic autonomy, the EU should increase its own resilience and that of candidate countries. A more consistent and assertive use of EU lawfare will demand a more integrated approach of the member states with their supranational institutions and services.

- The opportunity to invest energy in this endeavour presents itself quite naturally with the start of the EU's new institutional cycle after the June 2024 elections for the European Parliament. The June European Council should include the use of lawfare in its Strategic Agenda for 2024–29. The Commission President-designate should also do so in the political priorities for the next European Commission. In December, the European Council should task the new High Representative/Vice-President to include the use of positive lawfare when presenting the successor of the 2016 EU Global Strategy to the Council in June 2025. A designated sub-strategy on EU lawfare should be ready by the end of 2025, so that reflections can be factored into the negotiations for the next multi-annual financial framework (2028–35).

List of Abbreviations

AFSL	Anti-Foreign Sanctions Law
AIIB	Asian Infrastructure Investment Bank
AUMF	Authorisation to Use Military Force
BRI	Belt and Road Initiative
CBAM	Carbon Border Adjustment Tax
CCP	China's Communist Party
CJEU	Court of Justice of the European Union
CLOUD Act	Clarifying Lawful Overseas Use of Data Act
COJUR	EU Council's Working Party on Public International Law
COVID-19	coronavirus disease 2019
ECCHR	European Centre for Constitutional and Human Rights
ECHR	European Court of Human Rights
EEAS	European External Action Service
EEZ	Exclusive Economic Zone
EU	European Union
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICJ	International Court of Justice
ICPA	International Centre for the Prosecution of the Crime of Aggression against Ukraine
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ITLOS	International Tribunal for the Law of the Sea
JIT	Joint Investigation Team
LFR	Law on Foreign Relations
MFN	most-favoured nation
NSL	National Security Law
OPCW	Organisation for the Prohibition of Chemical Weapons
PKK	Kurdistan's Workers Party
PRC	People's Republic of China
RBIO	rules-based international order
SCA	Stored Communications Act
SME	small and medium enterprises
SOE	state-owned enterprise
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States
USSR	Union of the Soviet Socialist Republics
WTO	World Trade Organisation

Introduction

The rules-based international order (RBIO) which has allowed the European Union (EU) to grow and prosper is under threat. This is not a new phenomenon. Understood here as a multilateral system of international organisations and treaties with near-universal coverage, the order established in the wake of World War II has always suffered from the absence of any central executive authority or global legislative institution to agree on changes in governing rules or to pronounce upon disputes about interpretation. As a result, ambiguities have proliferated because of irregularities in state practice, especially regarding peace and security. In fact, many violations of international law have served as precedents for the establishment of new norms. What's more, the veto in the United Nations Security Council (UNSC) has given the permanent members, and indirectly their allies, a pass with respect to compliance with international law.

What is new is that the RBIO, as a concept, is now being rejected by China, Russia and parts of the so-called Global South for what these countries claim is the Western hegemonism and liberal values that underpin it.[1] But the fact that the People's Republic of China (PRC), Russia (as the successor of the Soviet Union), and much of de-colonised Africa, Asia-Pacific and the Caribbean have voluntarily signed up to the international covenants that enshrine the legal doctrines to strengthen the sovereign rights of weaker countries, especially in the context of economic relations, makes it hard to sympathise with the argument that the RBIO should be replaced by another concept, especially one that is advanced by authoritarian states. While these countries remain invested in multilateralism and open markets, their adherence to existing rules and fora has been increasingly selective. Communist-led China, in particular, has been trying to capture the United Nations while running parallel processes that revolve around its own economic and foreign policy interests and allow for interference in other countries' jurisdictions.[2] The creation of the Asian Infrastructure Investment Bank (AIIB) and the extension of the application of Chinese investment law along the Belt and Road are well-known examples.

Power generates law and its interpretation, irrespective of whether it serves the cause of international justice

Power generates law and its interpretation, irrespective of whether it serves the cause of international justice. Despite its many shortcomings, the RBIO as we know it does try to advance that cause. The advent of international criminal justice is a perfect illustration. And while the great powers have excluded themselves from the jurisdiction of the International Criminal Court (ICC), they have not shied away from adopting UNSC resolutions setting up ad hoc tribunals to subject others to it (e.g., former Yugoslavia, Rwanda).

The RBIO has been partially shaped by the EU, a community of law that encodes in its constitutional DNA the aspiration of "good global governance" among its foreign policy objectives (Article 21 of the Treaty on European Union or TEU). Yet, the much-touted 'Brussels effect' – the impact of EU law in shaping international rules and standards, has been waning for years. Nowadays, the EU's normative power is mostly felt in anti-trust law, consumer standards and data protection regulations.[3] With the centres of economic

[1] See, e.g., "The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law," Ministry of Foreign Affairs of the Russian Federation and Ministry of Foreign Affairs of the People's Republic of China, at Beijing on 25 June 2016.

[2] Matthew D. Johnson, "Analyzing the Global Extrusion of CCP Political-Legal Institutions," Charles University/ Sinopsis, Briefing paper, 2024 (on file with the author).

[3] Anu Bradford, *The Brussels Effect* (New York: Oxford University Press, 2020).

innovation and consumption concentrated in the US and China, and the dangers posed by deglobalisation and a new type of cold war,[4] hope is fading that the EU on its own could set world standards in sectors that are fuelling the fourth industrial revolution (e.g., artificial intelligence, decarbonisation) and which will determine the distribution of economic power around the globe.

To defend its interests in this rapidly evolving international arena, the EU should consider more hard-nosed ways of instrumentalising the power of law

To defend its interests in this rapidly evolving international arena, the EU should consider more hard-nosed ways of instrumentalising the power of law. It should study the "lawfare" handbooks developed in the US, China and Russia and use elements to its strategic advantage, i.e., in the pursuit of its own foreign and security policy goals, in particular the protection and promotion of the RBIO.

This report will start by offering semantic clarifications about the multidimensional notion of lawfare (Section 2) and illustrate these by examining recent practices by the US, China, Russia and others to weaponise the law to serve sovereign interests and obtain strategic advantages (Section 3). The analysis then turns to the EU's evolving yet still faltering sanctions policy response in meeting the challenges posed by its systemic rivals – as indeed some allies – (Section 4) in order to refine the argument that the EU should make more strategic use of "positive" expressions of lawfare (Section 5).

1. Conceptual Clarifications

Issues of law and lawfare are recurrent features of foreign policy debates, especially in the United States since 9/11 and more recently also in China. Contradicting claims about a law-oriented foreign policy, Washington, Beijing and more regional power houses, including the EU, advance a variety of arguments that rely either directly or indirectly on a version of exceptionalism to depart from the prevailing international law. Russia's approach is different, but sprouts from a similar civilisational conviction as China's.

The idea of American exceptionalism is well known: the belief that Washington is a shining city on a hill, that democracy is a superior system of government to autocracy, and that the US is the only sheriff worthy and able to enforce the law around the world.[5] Washington continues to do so out of enlightened self-interest: the US lent a big helping hand in the post-World War II construction of the RBIO and is intent on defending it against adversaries who question its authority in running a unipolar world.

In Russia, a different approach to international law is derived from the powerful idea of the country's civilisational distinctness from the West. Late medieval Russian culture was explicitly informed by non-contractual values and lacked the tradition of reciprocity.[6]

In Russia, a different approach to international law is derived from the powerful idea of the country's civilisational distinctness from the West

These traits cut through the smokescreen of Bolshevik legalism and underpin the post-Soviet practice of keeping a distance from international law. A combination of absolute statism and Orthodox messianism in restoring the *Russkyi mir* (Russian world) to its former glory is key to the understanding of the Putinist disdain for the principle of self-determination of peoples, human rights law, and the laws of war and peace. What's more, "Russia's official rhetoric regarding international law also reveals that notions like 'peacekeepers', 'genocide' and occasionally 'international law' itself are used like in a simulacrum or concave

[4] Nouriel Roubini, "The Coming Greater Depression of the 2020s," *Project Syndicate*, 28 April 2020.

[5] See, e.g., James W. Ceaser, "The Origins and Character of American Exceptionalism," *American Political Thought* 1, no. 1 (2012): 3-28.

[6] See, e.g., Lauri Mälksoo, *Russian Approaches to International Law* (Oxford: Oxford University Press: 2015), 33.

mirror to Western uses".[7] The Russian state's misinterpretations of the law are therefore not the proverbial exception but rather the rule. The weaponisation of international law is best illustrated in the Kremlin's approach to the "border problem" with Ukraine after the dissolution of the USSR.[8]

China's version of exceptionalism is also derived from history, but is expressed differently in the invocation of international law

China's version of exceptionalism is also derived from history, but is expressed differently in the invocation of international law. It can be seen in what Xi Jinping calls the "Global Civilization Initiative".[9] Beijing views itself as the world's first ancient civilisation with a 5,000-year continuous history. The PRC is now openly proclaiming that its model can be one for the world. Such arguments do not renounce international law but condition its applicability to Beijing's own hegemonic behaviour while insisting on the implementation of the black letter of the law in relation to the alleged unlawful conduct of adversaries. In this context, the concept of lawfare is expressed through Xi's push for "foreign-related rule-by-law" to protect and promote China's security interests.

We will return to this three-body problem for the EU in the following sections. But not before acknowledging the Union's own version of exceptionalism. Despite the idea of a "European way of life" being embodied by a designated Commissioner in the European Commission led by President Ursula von der Leyen, it has been largely rejected by the commentariat for its neo-colonial overtones.[10] EU exceptionalism is better understood in legal terms, encapsulated in the principle of "supremacy" of EU law. In contrast to the previously mentioned treaty-based cosmopolitan approach to the Union's role in the world, the Court of Justice of the EU (CJEU) has consistently defended the autonomy of the EU legal order in the international realm. In doing so, the CJEU effectively borrows the *Solange*-doctrine employed against its own jurisdiction by constitutional courts of certain member states: "so long as" international frameworks do not offer a level of judicial protection guaranteed at the domestic level, the CJEU let EU rules and procedures prevail.[11] The fact that the CJEU has at times even chosen to ignore *jus cogens*[12] – i.e., peremptory norms of international law – has earned it a bad reputation among public international lawyers.[13] That said, the EU has not developed a consistent practice of lawfare. Any expression of it has been on an ad hoc basis (see the following sections).

The term "lawfare" is a neologism and a play on words that needs to be deconstructed to explain the linguistic power of the notion. Unpacking the pun creates an interesting and perhaps surprising equivalence between law and war.[14] The linkage of law to war has been manifested before in the idea of a "just war" and the elaboration of the laws of war (*jus ad bellum* and *jus in bello*). Both words carry political power and it is their linguistic combination that constitutes the basis of the use of law as a weapon.

The term lawfare was coined in 2001 by US Major General Charles Dunlap,[15] who envisioned an ideologically neutral description

[7] Ibid., 185.

[8] Kataryna Wolczuk and Rilka Dragneva, "Russia's Longstanding Problem with Ukraine's Borders," Chatham House Explainer, 24 August 2022.

[9] "Full text of Xi Jinping's keynote address at the CPC in Dialogue with World Political Parties High-Level Meeting," *Xinhua*, 16 March 2023.

[10] See, e.g., Shada Islam, "The taboos are falling fast as the EU embraces the far-right racist approach to migration," *The Guardian*, 15 February 2023.

[11] Ramses A. Wessel and Steven Blockmans (eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Hague: T.M.C. Asser Press, 2013), 297–312.

[12] Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council, joined Cases C-402/05 P and C-415/05 P (2008), ECLI:EU:C:2008:461.

[13] See, e.g., Erika de Wet, "*Jus Cogens* and Obligations *Erga Omnes*," in *The Oxford Handbook on Human Rights*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013).

[14] Susan W. Tiefenbrun, "Semiotic Definition of "Lawfare"," *Case Western Reserve Journal of International Law* 43, no. 1 (2010): 29-60.

[15] Charles J. Dunlap (Jr.), "Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts," Humanitarian Challenges in Military Interventions Conference, Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, 29 November 2001.

of how law might be used in armed conflict.[16] It emphasises that although law may be manipulated by some belligerents for nefarious purposes, it can still serve to limit human suffering in war.

In practice, however, the term "lawfare" has also been used outside situations of armed conflict (see Section 3). The US, for instance, has effectively deployed financial, insurance and energy law to boost its power in a dollarised world economy and check that of its adversaries. In fact, transatlantic allies were among the first to feel the stick when European companies were forced to stop trading with Iran or risk the ire of the Treasury Department.[17]

The terminology of lawfare was adopted by both advocates of reliance on international law as constraints on state power and by those who sought to denigrate invocations of international law as obstructive tactics

The terminology of lawfare was adopted by both advocates of reliance on international law as constraints on state power and by those who sought to denigrate invocations of international law as obstructive tactics that interfered with the protection of security in a post-9/11 world.

In reaction to the Goldstone Report,[18] named after the South African judge who served as the first chief prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda, and who led a fact-finding mission created by the UN Human Rights Council to investigate violations of human rights and international humanitarian law (IHL, *jus in bello*) related to the 2008–09 war in Gaza, the infamous 'Lawfare Project' was launched. This non-profit litigation fund viewed reliance on international law within the UN setting in a manner highly critical of Israel as a new form of "asymmetric warfare" that needed to be countered to avoid delegitimising Israel as a sovereign and democratic state.[19]

A different dimension of the discursive and operational space of lawfare is inhabited by peace activists and rights groups to condition the behaviour of states, and especially global and regional powers, by reference to authoritative limits on national discretion as enshrined in the UN Charter.[20] In the same vein, inter-state litigation also falls in this category, such as South Africa's recent application to the International Court of Justice (ICJ) to order Israel to cease its military operations in Gaza pending further proceedings on whether the Jewish state has actually violated its obligations under the Genocide Convention.[21]

The various uses of the term "lawfare" (use and abuse of the legal system to destroy the enemy in the context of armed conflict and to block adversaries in peace time; the misuse of hate speech laws and libel law procedures to erode the very principles of free speech and rule of law; etc.) have led to terminological confusion and semantic controversy.[22] While military lawyers apply a strict definition to the strategy of conflict as the pursuit of warfare by other means –

Lawfare is an instrumental use of the law to achieve or block foreign policy outcomes

i.e., by way of the law – this report adheres to the definition offered by professors Orde Kittrie and Richard Falk, who regard lawfare as applicable in a broader setting, namely as **instrumental use of the law to achieve or**

[16] Charles J. Dunlap (Jr.), "Does Lawfare Need an Apologia?," *Case Western Reserve Journal of International Law* 43, no. 1 (2010): 121-143.

[17] Tobias Stoll et al., *Extraterritorial Sanctions on Trade and Investments and European Responses* (Brussels: European Union, 2020).

[18] United Nations Human Rights Council, "Human Rights in Palestine and Other Occupied Arab Territories. Report of the United Nations Fact-Finding Mission on the Gaza Conflict," A/HRC/12/48, 25 September 2009.

[19] The pro-Jewish advocacy has also successfully targeted international corporations to stop antisemitic practices. See The Lawfare Project.

[20] With 193 parties, the UN Charter is binding on 99 percent of countries around the world that have ratified it.

[21] International Court of Justice, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)," press release No. 2023/77, 29 December 2023. For more, see Section 5.1, below.

[22] Jens Meierhenrich, *Lawfare: A Genealogy* (Cambridge: Cambridge University Press, 2019).

block foreign policy outcomes.[23] The LAWFARE website, published in cooperation with the Brookings Institution, also uses the term in this neutral, instrumental way.[24]

Lawfare can operate positively or negatively on any level of social interaction, domestically and internationally. When activists seek to encourage divestment from companies doing business associated with unlawful behaviour, it is positive lawfare. When such initiatives are blocked by opponents invoking a legal technicality to frustrate efforts to seek justice, invoking law becomes negative lawfare.

The focus of this report is on state actors and international organisations as the prime subjects of the RBIO. In particular, the paper seeks to examine the potential and limits of the use of lawfare by the European Union. As a supranational organisation that has grown accustomed to defending and promoting its own autonomy on the international legal plane,[25] the EU also regularly finds itself in the dock (e.g., several complaints against it for [alleged] infringement of World Trade Organization [WTO] law)[26] and even in the crosshairs of litigants who seek to enforce international criminal law upon it.[27] By examining the methods and effects of lawfare by the US, Russia, China and regional powers, this report attempts to identify lessons that the EU should learn before drawing up a lawfare strategy of its own. This report culminates in an application of this comparative analysis to the unique nature of and role played by the EU on the international stage.

2. Recent Practice

2.1. Positive Uses of Lawfare

Positive uses of lawfare support the quest for compliance with international law. To state this reflects a certain degree of subjectivity, since the development and enforcement of international law is a largely uncoordinated affair among different international institutions. In the eyes of the current beholder, positive uses of lawfare insist that universally applicable law, such as typically laid down in treaties and conventions hatched in the context of the United Nations, the Bretton Woods institutions and other multilateral fora, as well as judgments, opinions and court orders by

Positive uses of lawfare support the quest for compliance with international law

[23] Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford: Oxford University Press, 2016); Richard Falk, "Positive and Negative Forms of 'Lawfare'," *Foreign Policy Journal*, 24 February 2015.

[24] LAWFARE, last accessed 6 May 2024.

[25] There is ample academic literature on the matter, helpfully synthesised by Ramses A. Wessel and Joris Larik (eds.), *EU External Relations Law Text, Cases and Materials,* Second Edition (United Kingdom: Hart Publishing, 2020). More specifically, see Enzo Cannizzaro, "Nine Theses on Autonomy: Making Sense of a Controversial Principle," *European Papers – A Journal on Law and Integration* 8, no. 3 (2023): 1317-1331; Jed Odermatt, "The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?" in *Structural Principles in EU External Relations Law*, ed. Marise Cremona (Hart Publishing, 2018), 291–316; Cristina Contartese, "The Autonomy of the EU Legal Order in the CJEU's External Relations Case-Law: From the 'essential' to the 'specific characteristics' of the Union and back again," *Common Market Law Review* 54, no. 6 (2017): 1627.

[26] See the overview compiled by the Directorate General for Trade of the European Commission, "WTO disputes - Cases involving the EU," last accessed 6 May 2024.

[27] See, e.g., the November 2022 Communication from the European Center for Constitutional and Human Rights (ECCHR), with the support of Sea-Watch, to the ICC concerning the commission of crimes against humanity against migrants and refugees who have been intercepted at sea and systematically returned to and detained in Libya. The non-profits are urging the ICC to investigate the individual criminal responsibility of high-ranking officials of EU member states and EU agencies regarding multiple severe deprivations of liberty that began with interceptions at sea between 2018 and 2021. Alleged co-perpetrators include European politicians such as former Italian Interior Minister Matteo Salvini and former Prime Minister of Malta Joseph Muscat, former EU High Representative Federica Mogherini, former Executive Director of Frontex Fabrice Leggeri, Italian and Maltese Rescue Coordination Centre's members, and EUNAV FOR MED and EEAS officials. See European Center for Constitutional and Human Rights, "Interceptions at sea and returns of migrants and refugees to Libya constitute a crime against humanity," 30 November 2022.

the highest international judicial authorities, be upheld to the extent that it serves values of peace, justice and human dignity. In the context of the resolution of armed conflict, this includes support for transitional justice whereby international criminal law procedures are used to impose accountability on leaders of sovereign states.

In the literature on lawfare, examples are invariably drawn from the Israel-Palestine conflict, especially since Palestine obtained "non-member observer state" status in the United Nations General Assembly in 2012. This opened the door for Palestine to accede to the Rome Statute in 2015 and request the ICC Prosecutor "to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court's jurisdiction, committed in all parts of the territory of the State of Palestine", including the occupied Palestinian territory and East Jerusalem.[28] In March 2021, the prosecutor confirmed the initiation of an investigation by his office into the situation in Palestine, which now also includes scrutinising all information received about alleged war crimes and crimes against humanity committed by the Israeli Defence Forces in Gaza, as well as the crimes committed by Hamas terrorists (nationals of a party to the Rome Statute) in Israel on 7 October 2023.

Other recent textbook examples can be found in the judicial offensive pursued by Ukraine in response to Russia's unprovoked and unjustified war against it. Two international courts were immediately activated – the ICJ and the ICC (see below) – as well as a regional court, the European Court of Human Rights (ECHR).[29] Based on universal jurisdiction laws, enforcement bodies in Germany, Poland, the three Baltic States, Czechia, Romania, Spain, Sweden, Slovakia and others in a growing list[30] have also launched preliminary investigations,[31] while the UN Human Rights Council has launched an independent international commission of inquiry to gather evidence "for future legal proceedings"[32] – not forgetting of course Ukraine's own judicial efforts spearheaded by its Prosecutor General. The EU has supported most of these actions and initiated others.[33] Illustrative are the judicial avenues to the ICJ, the ICC and the diplomatic track to set up a tribunal for the crime of aggression. These will be unpacked in the next three sub-sections as pertinent examples of the positive use of lawfare.

2.1.1. Proceedings by Ukraine before the ICJ

On 27 February 2022, three days after Russia's full-scale invasion began, Ukraine instituted proceedings before the ICJ on allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide.[34] Remarkably, Russia consented to the Court's jurisdiction to deal with the allegations of such egregious violations of the use of force since, like Ukraine, it had ratified the 1948 Genocide Convention.[35] Moreover, President Vladimir Putin, in his infamous speech on 24 February 2022, had argued

[28] International Criminal Court, "Information for victims, State of Palestine," last accessed 6 May 2024.

[29] Ukraine has four inter-state cases pending at the ECHR against Russia, including one jointly with the Netherlands. There are also over 7,400 individual applications pending concerning the events in Crimea, eastern Ukraine and the Sea of Azov, as well as Russia's military operations on the territory of Ukraine since 24 February 2022. On the latter, see Justina Batura and Isabella Risini, "Of Parties, Third Parties, and Treaty Interpretation: Ukraine v. Russia (X) before the European Court of Human Rights," *EJIL: Talk!*, 26 September 2022. The EU is not (yet) a party to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and cannot intervene as a third party in the proceedings brought by Ukraine against Russia. Individual EU member states have intervened though.

[30] For updates, see Julia Crawford and Thierry Cruvellier, "Ukraine responds to warfare with "lawfare"," *JusticeInfo.net*, 25 March 2022.

[31] Six EU member states have pooled national prosecutors together in a joint investigations team with Ukraine: Lithuania and Poland initiated the agreement and were later joined by Estonia, Latvia, Slovakia and Romania. Europol and the ICC are participating, as is the US under a separate memorandum of understanding.

[32] Its report is expected in March 2024. See United Nations Human Rights Council, "Independent International Commission of Inquiry on Ukraine," last accessed 6 May 2024.

[33] The EU has offered advice to the Ukrainian Prosecutor General and delivered sophisticated material for recording witness statements; Eurojust has a database to collect relevant evidence; the EU Military Assistance Mission also assists in collecting evidence; the Atrocities Crimes Advisory Group (which includes the US) tries to politically steer (inter)national investigations; etc.

[34] See "Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)," Case 182, 27 February 2022 (institution of proceedings).

[35] Article 36(1) of the Statute of the International Court of Justice and jurisdictional Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide.

that the Russian Federation had been forced to intervene militarily to stop an ongoing genocide perpetrated by Ukraine against the Russian-speaking part of its population.[36] In its application, Ukraine contended, among other things, that "the Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis recognised the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic', and then declared and implemented a 'special military operation' against Ukraine".[37] Ukraine emphatically denied that such genocide had occurred and stated that it submitted the application "to establish that Russia has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide".[38] Ukraine also accused Russia of planning acts of genocide in Ukraine and contended that Russia "is intentionally killing and inflicting serious injury on members of the Ukrainian nationality – the actus reus of genocide under Article II of the [Genocide] Convention".[39]

In the course of the proceedings so far, all EU member states, with the exception of Hungary, have supported Ukraine by filing formal interventions under Article 63 of the Statute of the ICJ. These interventions have been coordinated by the EU Council's Working Party on Public International Law (COJUR). In parallel, the EU itself has submitted information relevant to the case, not pursuant to the Genocide Convention but to the situation in Donbas.[40]

Even if the ICJ in its provisional measures ruling thought that Ukraine's argument was "plausible" and ordered Russia to stop its invasion,[41] the Court in the jurisdictional phase of the judgment declared only a part of the claim admissible.[42] While the ICJ dismissed all of Russia's procedural objections and thus decided that it would hear the case, the Court upheld Russia's substantive objections, namely that false allegations of genocide and subsequent uses of force fall outside the scope of the Genocide Convention. The ICJ will therefore only decide whether Ukraine is responsible for violating the Genocide Convention.

This seriously undermined the creative litigation strategy of Ukraine and its backers, i.e., to invite the Court to hear a genocide case in reverse.[43] Ukraine, the victim of armed aggression, now finds itself in the dock as a result of a positive lawfare strategy gone wrong.

Since the ICJ's judgment in this case, which may still be years away, will no longer directly raise any issues of Russia's responsibilities under the Genocide Convention, this in turn entails that Ukraine will not be able to rely on this case to obtain commensurate reparations derived from the seizure of Russian Central Bank assets frozen by third states, mainly in the EU.[44]

Ukraine will now have to consider whether it wants to continue the case to prove that it did not commit genocide; the inference being there was no justification for Russia to use force against it on account of that claim. Kyiv might also think about bringing a fresh genocide case to the Court, one that takes account of the extent and nature of the military onslaught and occupation by the Russian Federation – aspects which could not have been predicted at the time of Ukraine's original application to the ICJ.[45] In a comprehensive lawfare strategy, it may make sense to do both, while pursuing alternative judicial tracks.

[36] "Address by the President of the Russian Federation," Kremlin, 24 February 2022.

[37] International Court of Justice, "Ukraine institutes proceedings against the Russian Federation and requests the Court to indicate provisional measures," 27 February 2022.

[38] bid.

[39] Ibid.

[40] See the lecture of Frank Hoffmeister, Chief Legal Officer of the European External Action Service (EEAS), at NUPI on 3 November 2022: Frank Hoffmeister, "The EU's response to Russia's aggression in Ukraine," Norwegian Institute of International Affairs, YouTube video, 1:26:04, 3 November 2022.

[41] "Allegations of genocide under the Convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation)," International Court of Justice, Provisional Measures, Order of 16 March 2022.

[42] "Allegations of genocide under the Convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation)," International Court of Justice, Provisional objections, 2 February 2024.

[43] Marko Milanovic, "ICJ Delivers Preliminary Objections Judgment in the Ukraine v. Russia Genocide Case, Ukraine Loses on the Most Important Aspects," *EJIL: Talk!*, 2 February 2024.

[44] Ibid.; For more, see Section 4.1 below.

[45] Marc Weller, "Time for Another Ukrainian Genocide Case?," *EJIL: Talk!*, 6 February 2024.

2.1.2. Proceedings by Ukraine before the ICC

Since 1998, by way of the Rome Statute, the ICC has been investigating and trying individual criminal responsibility for genocide, war crimes, crimes against humanity and aggression. Russia has not accepted the jurisdiction of the ICC, but this did not deter 43 states who have, including 27 EU member states (therefore including Hungary), from inviting the ICC prosecutor to investigate war crimes on the territory of Ukraine.[46] In reaction to his positive response, the collective support from EU member states has been substantial, with more than 40 experts seconded to the office of the ICC Prosecutor and over €8 million given in additional support of the ICC.[47] EU member states have also provided forensic support to the ICC and the Ukrainian authorities by channelling experts through the ICC's forensic rotation model. What's more, all member states, with the exception of Hungary,[48] deem themselves bound to execute the international arrest warrants that were issued on 17 March 2023 by the Second Pre-Trial Chamber of the ICC against Putin and Children's Rights Commissioner Maria Lvova-Belova for the alleged war crime of unlawful deportation of children from Ukraine to the Russian Federation; and the arrest warrants issued on 5 March 2024 against two top Russian military commanders, each allegedly responsible for the war crimes of directing attacks at civilian objects and of causing excessive incidental harm to civilians or damage to civilian objects, as well as the crime against humanity of "inhumane acts".

Although the ICC is not immune to criticism – it has long been accused of being "strong with the weak and weak with the strong"[49] – this is a major change in the Court's policy, as it is the first warrant ever issued against the sitting leader of a permanent member of the UNSC. In some respects, this is a gamble, given the many obstacles that stand between this historic event and a possible conviction of Putin. But this arrest warrant also makes the ICC newly relevant, as until now, the main perpetrator of the war of aggression against Ukraine has escaped any form of accountability.

The problem is therefore not one of principle, but of implementation. The ICC does not conduct trials in absentia and has no powers to arrest suspects. Only the 123 states that are party to the Rome Statute are legally bound to cooperate with the Court. In principle, this means that Putin's presence would automatically oblige local authorities in signatory states to arrest him. The few precedents show, however, that such an obligation is rarely respected. For example, former Sudanese President Omar al-Bashir has been under an arrest warrant since 2009 but has been able to travel untroubled in a number of ICC member states. Some states are also maintaining an ambiguous relationship with Russia, suggesting that they are unlikely to make such a politically sensitive arrest, as shown in the position adopted by the Hungarian government. While making such an arrest is the only legal course of action available, the warrant does create problems for Putin. The foremost are political in nature. By issuing an arrest warrant, the ICC has cast a shadow on his international standing, even if Chinese President Xi Jinping's trip to Moscow one week after the publication of the ICC's arrest warrants softened his isolation. It also seriously discredited his humanitarian claims: the invasion of Donbas was officially aimed at liberating the Russian-speaking minority from an alleged genocide by the Ukrainian government, though this dubious argument has been turned on its head by Ukraine to successfully bring Russia before the ICJ. Thirdly, it prevents any normalisation of relations with states that have ratified the Rome Statute. Yet, this, regrettably also narrows the

[46] Ukraine is not a party to the Rome Statute, but it has twice exercised its prerogatives under Article 12(3) to accept the ICC's jurisdiction over alleged crimes occurring on its territory. The first declaration applied from 21 November 2013 to 22 February 2014. The second declaration extended this time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014 onwards. More information about the referrals and the ongoing investigations: "Situation in Ukraine," International Criminal Court, ICC-01/22 opened 2 March 2022.

[47] Sweden in EU - Swedish Presidency of the Council of the European Union (@SwedeninEu), "EU Member States' support for the International Criminal Court (ICC) and its investigation into the situation in Ukraine," Twitter post, 7:16 p.m., 20 March 2023.

[48] "Hungary would not arrest Putin, says PM Orban's chief of staff," *Reuters*, 23 March 2023.

[49] Laurel Hart, "The International Criminal Court: Biased or Simply Misunderstood?," United Nations Association – UK, 28 October 2018.

path to a negotiated end to the war: for EU member states and like-minded countries, it is problematic to consider peace negotiations with a head of state who has been issued an ICC arrest warrant. To them, the arrest warrant confirms that the war in Ukraine will not be resolved with Putin; it will only be resolved by, or after, his departure from power.

For EU member states and like-minded countries, it is problematic to consider peace negotiations with a head of state who has been issued an ICC arrest warrant

This prospect raises a second legal obstacle to the implementation of the arrest warrant. As a sitting head of state, Putin in principle enjoys protection in the form of immunity, long-recognised under international law. The question would undoubtedly be different if he were ousted from power, as his protection would be considerably weaker. But the question of immunity remains a critical issue for the effective implementation of the mandate. The ICC has indicted two sitting leaders before: Sudanese President Omar al-Bashir and Libyan leader Muammar Qaddafi. Qaddafi was later murdered by his people, while al-Bashir remained in office for another decade until deposed in a coup d'état and was subsequently prosecuted in Sudan. Before the recent outbreak of violence, the Sudanese government had been discussing handing him over to the ICC. Serbian President Slobodan Milosevic was the first head of state to ever be indicted for war crimes and face trial before the ICTY. The immunity of heads of state is therefore not absolute and is gradually being revised to hold them accountable for the most serious of human rights violations. Still, history shows how difficult it is to bring an incumbent head of state to trial.

Anybody who is charged with war crimes could face arrest at any point in their life, and Putin could well die an outcast

The chances of the ICC arrest warrant being effectively executed are slim, especially if Putin remains in power. But these charges have no statute of limitations. Anybody who is charged with war crimes could face arrest at any point in their life, and Putin could well die an outcast. Milosevic, Ratko Mladic and Radovan Karadzic were fugitives for more than a decade before they were eventually brought to justice. If the burden of defending or protecting war criminals becomes too great, then a future Russian government could turn Putin over to the ICC. No doubt, there will in the future be efforts to entice the Russian government to turn him over.

In any case, the publication of the arrest warrant, along with the resolutions adopted by an overwhelming majority of the UN General Assembly (UNGA), clarifies the situation and bestows pariah status on Putin. Exceptional at Nuremberg, international criminal justice is gradually becoming generalised. Since it now addresses the leader of a permanent member of the Security Council, it is further expanding its mandate. Small steps forward on such an important issue could seem slow but they are by far the most effective way of achieving international cooperation. Moreover, the warrant and the accusations contained therein are warnings to leaders of other countries and support the cause of human rights advocates across the world. In short, this is a welcome development and a prime example of how lawfare can positively contribute to the pursuit of justice and uphold the RBIO.

Such a glowing assessment can unfortunately not yet be given for the creation of a special tribunal to deal with the crime of aggression.

2.1.3. The Creation of a Special Tribunal to Deal with the Crime of Aggression

In its judgment, the International Military Tribunal at Nuremberg declared:

> To initiate a war of aggression (…) is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[50]

If the crime of aggression would not have been committed, there would be none of the other more than 100,000 incidents of

[50] International Military Tribunal (Nuremberg) Judgment of 1 October 1946, in the trial of German major war criminals.

war crimes registered so far by the Ukrainian Prosecutor General. As part of Ukraine's lawfare strategy, President Volodymyr Zelensky and his administration have insisted that Putin and his top henchmen should find themselves in the dock.[51]

The decision taken by Russia's political and military leaderships (and their Belarusian enablers) to attack Ukraine constitutes an ongoing attack on the RBIO, which is anchored in universally applicable provisions of the United Nations Charter

The decision taken by Russia's political and military leaderships (and their Belarusian enablers) to attack Ukraine was not just the linchpin for other atrocities in Ukraine; it also constitutes an ongoing attack on the RBIO, which is anchored in universally applicable provisions of the United Nations Charter.

The response of the international community against this shameless attack, including through the prosecution of the crime of aggression, is therefore of crucial importance in seeking justice for the Ukrainian people, in facilitating the claim for reparations and any future reconciliation, and for the future of the RBIO in deterring other international actors from imitating Russia's illegal aggression. Ensuring accountability for the crime of aggression committed against Ukraine would also signal to Russian society and its political and business elites that it is no longer feasible for the Russian Federation under Putin's leadership to return to "business as usual".

The crime of aggression is not granted the same treatment under the ICC's Rome Statute as the other three core international crimes (genocide, crimes against humanity and war crimes). Whereas the ICC exercises jurisdiction over the crime of aggression, it is limited to states that are party to the Rome Statute, which Russia is not. Suggestions have been made to amend the Rome Statute of the ICC to allow for the future prosecution of the crime of aggression committed by nationals of states not party to it but no formal amendment to this effect has been tabled. If such an amendment were to be submitted, it would take years for it to be adopted and to enter into force.[52] The question of retroactive application would also have to be addressed.

The only way to ensure accountability for Russia's crime of aggression against Ukraine in a reasonable timeframe is therefore an approach outside of the ICC system, complemented by parallel efforts to amend the ICC's Rome Statute in order to avoid similar accountability gaps in the future.

While there is widespread support for closing the accountability gap, there is also significant disagreement as to how to do that. Ukraine, a handful of EU member states, a couple of candidate countries and some farther-flung states have staunchly supported the establishment of a special tribunal for the crime of aggression created through an agreement between Ukraine and the United Nations, endorsed by a General Assembly Resolution authorising the UN Secretary-General to set up such a mechanism.[53] Such a special tribunal could work similarly to the Special Court for Sierra Leone.[54]

The concerns lie, however, in the international legitimacy of such a tribunal,[55] and the ensuing splintering of international criminal justice systems, if the votes that are mustered for the initiative do not surpass the (dwindling) numbers, especially among countries in the so-called Global South, in support of the adoption

[51] Alexandra Sharp, "Zelensky Renews Call for Special Tribunal to Prosecute Putin," *Foreign Policy*, 4 May 2023.

[52] The adoption of the Kampala Amendments on the Crime of Aggression to the Rome Statute in 2010 took place after more than a decade of negotiation. But even then, Art. 121(4) of the Rome Statute states that "[…] an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eights of them". The ICC has 123 state parties, so 108 states would need to ratify the relevant amendment before it would apply.

[53] "FAQs on A Special Tribunal for the Crime of Aggression against Ukraine," Permanent Mission of Estonia to the United Nations, 20 January 2023.

[54] Oona A. Hathaway, Maggie Mills and Heather Zimmerman, "The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly," *Just Security*, 5 May 2023.

[55] See Kai Ambos, "A Ukraine Special Tribunal with Legitimacy Problems?," *Verfassungsblog*, 6 January 2023.

of earlier UNGA Resolutions regarding Russia's war against Ukraine.[56]

This is why the administration of US President Joe Biden, followed by the foreign ministers of Canada, France, Germany, Italy, Japan, the UK and the US, alongside the High Representative of the European Union, assembled at a G7 meeting in Japan,[57] have instead endorsed the creation of a court "rooted in Ukraine's judicial system, but that also includes international elements".[58] Ukraine, however, has rejected any "hybrid" formats, which would complicate indicting Putin as long as he is in office. Also, possible restrictions in Ukraine's Constitution on setting up such a hybrid court have been cited as arguments militating against the proposal of the G7.[59]

Another option would be a treaty among like-minded states creating a special tribunal to prosecute aggression against Ukraine. But there are potential jurisdictional and immunity issues with this model, as well as a risk of such a court being seen as politically selective.

While the most suitable and legally sound avenue to establishing a special court to prosecute the crime of aggression against Ukraine remains a subject of ongoing debate among experts[60] and diplomats,[61] the EU, in particular the Commission and the EEAS, with the backing of the US and the ICC, have in the meantime provided support for the establishment of a centre to build cases against crimes of aggression in the context of the Russian war against Ukraine. Driven by the perceived need to start collecting data, interviewing victims and building evidence files before the war ends, the creation of the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA)[62] in July 2023 was indeed an important practical step forward in the process of investigation and future prosecution, be it before national courts, a dedicated tribunal or the ICC for crimes within its jurisdiction. After all, the war in Ukraine is the most documented in history. At the same time, the crime of aggression has rarely been prosecuted, which means that there is no standard practice. Preparing case strategies is therefore of the utmost importance to ensure a swift start when the format for prosecution has been agreed on internationally.

The ICPA is the first platform of its kind in judicial history, operating in the middle of an armed conflict, and has distinctly European characteristics. Fully funded by the European Commission's Service for Foreign Policy Instruments, covering an initial amount of €8.3 million, and embedded within Eurojust (the EU agency for criminal justice and cooperation) in The Hague, the ICPA enables independent prosecutors from different countries to work together in the same location on a daily basis, benefitting from the host agency's expertise in the Genocide Network Secretariat and operational, technical and logistical support (including the Core International Crimes Evidence Database) to efficiently exchange evidence and agree on a common investigative and prosecution strategy. In the start-up phase, the ICPA operates a joint investigation team (JIT) comprising prosecutorial experts in Ukraine, Lithuania, Latvia, Estonia, Poland, Slovakia

[56] United Nations General Assembly, "Aggression against Ukraine," A/ES-11/L.1, 1 March 2022. Among other statements, it said that the General Assembly "deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter"; 141 states voted in favour of the Resolution, with five voting against, 35 abstentions, and 12 states absent or not voting. Those voting against were Belarus, North Korea, Eritrea, Russia and Syria. This was the first of a series of General Assembly Resolutions that have been adopted since Russia's February 2022 invasion, with many of these repeating the recognition of Russia's acts as aggression, but being supported by smaller numbers of UN members.

[57] United States Department of State, "G7 Japan 2023 Foreign Ministers' Communiqué," 18 April 2023.

[58] This would involve Ukraine having jurisdiction over the crime of aggression, as applied by both Ukrainian and international judges and prosecutors.

[59] Alexander Komarov and Oona A. Hathaway, "The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law," *Just Security*, 11 April 2023.

[60] See Carrie McDougall, "The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine," *Journal of Conflict and Security Law* 28, no. 2 (Summer 2023): 203–230.

[61] See "Political Declaration," Governments of Ukraine, the Netherlands and the European Commission, Ministerial Conference on Restoring Justice for Ukraine, The Hague, 2 April 2024.

[62] International Centre for the Prosecution of the Crime of Aggression against Ukraine, last accessed 6 May 2024.

and Romania. Following a memorandum of understanding with the JIT members, the US has appointed a Special Prosecutor for the Crime of Aggression, who will be supporting the ICPA's activities. The memorandum of understanding establishing the ICPA also provides for the participation of the Office of the Prosecutor of the ICC.

At the time of writing, some 40 states – including 26 EU member states (not Hungary) – had backed the ICPA. These low numbers do not augur well for the creation of a special tribunal before the end of the war, especially if the aim is to strengthen the RBIO rather than contribute to its further fragmentation. For now, the best strategy for supporters of the ICPA is therefore to double down on efforts to widen the participation of other countries and organisations and commit to providing the ICC with information to help the prosecutor draw up a list of charges, rather than investing more time and treasure in the creation of a special tribunal which is likely to be supported by fewer countries around the world.

2.2. Negative Uses of Lawfare

As a counterpoint to the previous examples of positive lawfare in the pursuit of international justice stand the traditionally punitive legal actions by those "who rely on hard power to sustain oppressive structures".[63]

More often than not, great and regional powers cannot help seeing themselves as being above the law and instrumentalising legal instruments and procedures for geopolitical advantage, thereby violating the generally applicable international rules

This is not to say that all negative uses of lawfare are in and of themselves unlawful. When employed within existing legal frameworks and/or before internationally recognised courts and tribunals, such actions may be perfectly legal. Yet, more often than not, great and regional powers cannot help seeing themselves as being above the law and **instrumentalising legal instruments and procedures for geopolitical advantage, thereby violating the generally applicable international rules**. It is the latter element which leads this report to qualify such uses of lawfare as negative.

As a self-declared sheriff responsible for enforcing compliance by others with the RBIO, the US has on various occasions set this supposedly altruistic mission aside to promote its own interests. The neoconservative movement, which began in the 1960s with a disdain for the increasingly pacifist foreign policy of the Democratic Party in response to protests against the war in Vietnam, and that peaked in influence during the administration of President George W. Bush, was clear about its refusal to tie the pursuit of US foreign policy goals to respect for international law. Neocon visions of American grand strategy regarded it as naïve and unhelpful to introduce international law dimensions into policy debates about the use of force.[64] Using international fora and judicial processes was seen as nothing more than a "strategy of the weak" that should not be allowed to alter the behaviour of the strong.[65]

While the United States and other great and regional powers are naturally inclined to let *realpolitik* prevail over international norms and procedures when push comes to shove, for Putin's Russia, Xi's China, and Recep Tayyip Erdogan's Turkey law is an even more malleable instrument to crush dissent at home and create legal fictions abroad. From great power exploitation of the largely peaceful and ungoverned global spaces (outer space, the ozone layer, cyberspace, the deep-sea bed and the poles) – such as Russia's 2007 abuse of cyberspace to launch an attack on Estonia[66] – to China's denial of the Permanent Court of Arbitration's ruling on historic rights under the United Nations Convention on the Law of the

[63] Falk, "Positive and Negative Forms of 'Lawfare'."

[64] Ibid.

[65] "National Defense Strategy of the United State of America, March 2005," adopted under Donald Rumsfeld: "Our strength as a nation-state will continue to be challenged by those who employ a strategy of the weak, using international fora, judicial processes and terrorism."

[66] Apart from the non-binding UN norms of responsible state behaviour in cyberspace, no comprehensive regulatory regime exists and no collective targets have been set yet.

Sea (UNCLOS) when artificially creating islands in the South China Sea[67] and Turkey's drilling activities in the Exclusive Economic Zone of Cyprus, autocratically ruled adversaries of the EU have long been chipping away at the RBIO and the EU's emerging strategic autonomy. The US may set itself apart from these rivals because it is a democratically governed state with an independent judicial backstop, but it too has been using the law to promote its foreign policy objectives, railroading the values espoused by their European allies and as enshrined in the basic covenants that form the glue of the RBIO that Washington otherwise seeks to protect.

The sections below will look more closely at these third countries' practices with negative lawfare or what may be termed "coercive diplomacy", not at the capture and/or duplication of multilateral frameworks. Needless to say, this is not an exhaustive overview and treatment of the issues at hand. The examples have been chosen largely in function of the ultimate objective of this report, which is to provide elements to delineate a future EU lawfare strategy.[68]

2.2.1. US use of Lawfare for Geopolitical Advantage

The United States has employed lawfare in various ways, leveraging its legal system, economic might and the dollar's status as an international reserve currency, always to achieve geopolitical objectives, often in support of the RBIO. The classification of US practice under the heading of "negative lawfare" should therefore be treated with caution and evaluated on a case-by-case basis.

The use of lawfare by the US is deeply rooted in its legal and policy frameworks, with various statutes, executive orders and international agreements providing the legal bases for these strategic actions. One key aspect is the reliance on domestic laws, such as the 1917 'Trading with the Enemy Act' (since amended) and the 1977 'International Emergency Economic Powers Act', which grant the president broad authority to impose economic sanctions in response to perceived threats to national security or foreign policy interests.[69] These legal instruments have been used to justify sanctions against countries such as Iran, North Korea and Venezuela.

The use of lawfare by the US is deeply rooted in its legal and policy frameworks

The best-known example of lawfare by the US, used to both positive and negative ends, is the adoption and enforcement of targeted and secondary sanctions. Through executive orders and legislative actions, the US government can impose extraterritorial sanctions on individuals, entities and other states, citing legal justifications such as national security concerns, human rights abuses or violations of international law. Its most important weapon is available to no other state – the dollar's status as the global reserve currency. The rationale for this type of lawfare rests on the premise that foreign states and non-state actors use the American financial system and therefore become vulnerable to prosecution under US law.

The application of American economic sanctions to subsidiaries of US-based corporations established in Europe can be traced back to a 1961–65 case involving an effort by the administration of President Lyndon Johnson to impose its embargo on trade with China on the French subsidiary of the Fruehauf-Seymour Group.[70] Several states made diplomatic protests at these extraterritorial jurisdiction

[67] "The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)," Permanent Court of Arbitration, Case No. 2013-19, award of 12 July 2016.

[68] Insofar as the ungoverned global spaces are concerned, see Sieglinde Gstöhl and Joris Larik, "Introduction: The European Union and the Governance of Contested Global Spaces," *Journal of European Integration* 45, no. 8 (December 2023): 1107-1124; Simon Schunz, "Becoming a 'Spacifier' – Why the European Union needs a 'Global Spaces' Strategy and What it Could Look Like," College of Europe Policy Brief no. 3.23, December 2023.

[69] Christopher A. Casey, Dianne E. Rennack and Jennifer K. Elsea, "The International Emergency Economic Powers Act: Origins, Evolution, and Use," Congressional Research Service, Report R45618, updated 30 January 2024.

[70] United States v. Freuhauf et al., 365 U.S. 146 (1961), 20 February 1961; followed by "French Court Decision on Jurisdiction Over Subsidiaries of Foreign Companies; East-West Trade," *International Legal Materials* 5, no. 3 (May 1966): 476.

claims.[71] The issue flared up again in the early 1980s when the US tried to punish the Soviet Union for the imposition of martial law in Poland by requiring European companies like Alsthom-Atlantique to cease work on the construction of the Siberia-Western Europe natural gas pipeline and thus prevent the export of Western technologies to the communist bloc.[72] Though no court directly held the US pipeline regulations of the time unlawful, they were withdrawn under pressure from the European Community and its member states, which issued several joint démarches.[73]

The adoption of legislation in the US imposing sanctions on Cuba, Iran and Libya has drawn opposition in view of the extraterritorial reach of these measures. The extension of sanctions against Cuba in the Cuban Democracy Act of 1992, for example, prohibited the granting of licences under the US Cuban Assets Control Regulations for certain transactions between US-owned or controlled firms in the UK and Cuba. This led to the adoption of an order under the 1980 Protection of Trading Interests Act by the UK government.[74]

Amending the 1992 legislation, the adoption of the Helms-Burton Act in March 1996 tightened sanctions by providing, inter alia, for the institution of legal proceedings before US courts against foreign persons or companies deemed to be "trafficking" in property expropriated by Cuba from US nationals.[75] In addition, the Act enabled the US to deny entry into the country of senior executives (and their spouses and minor children) of companies alleged by the State Department to be "trafficking".

Together with the 1996 D'Amato Act,[76] intended to impose sanctions on persons or entities participating in the development of the petroleum resources of Iran or Libya, this legislation was challenged by many states and the European Community and later the EU,[77] not just for its purported violation of international law,[78] but also for the threat of litigation and heavy damages.[79] The European Union, in particular, took a strong stance on the US approach,[80] with the adoption of a so-called blocking regulation[81] and a threat to bring the Helms-Burton Act before a WTO dispute settlement panel. This attempt was deflected by an undertaking by President Bill Clinton, who had been reluctant to sign the Act

[71] See, e.g., *Report of the Fifty-First Conference Held at Tokyo, August 16th to August 22nd, 1964* (London: International Law Association, 1964), 565.

[72] See Alan Vaughan Lowe and Colin Warbrick (eds.), "Extraterritorial Jurisdiction and Extradition," *International and Comparative Law Quarterly* 36, no. 2 (April 1987): 398.

[73] EC, "*Aides Mémoires* of 14 March and 28 April 1983," on file with the author.

[74] Geoffrey Marston, "United Kingdom Materials on International Law 1993," *British Yearbook of International* Law 64, no. 1 (1993): 643.

[75] "United States: Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act)," *International Legal Materials* 35, no. 2 (March 1996): 357. This part of the legislation was suspended by President Bill Clinton for the second half of 1996.

[76] "United States: Iran and Libya Sanctions Act of 1996," *International Legal Materials* 35, no. 5 (September 1996): 1273.

[77] See, e.g., *Report of the Fifty-First Conference*, 565; EC, "*Aides Mémoires*."; the letter to the Congressional Committee considering changes in the US export control legislation, see Seymour J. Rubin, "Organization of American States: Inter-American Juridical Committee Opinion Examining the U.S. Helms-Burton Act," *International Legal Materials* 35, no. 5 (September 1996): 1329; "Decision of the Council and the Commission of 10 April 1995 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws (95/145/EC, ECSC)," *Official Journal of the European Communities*, L 95/45 (27 April 1995); a démarche of the European Community, reproduced in Geoffrey Marston, "United Kingdom Materials on International Law 1992," *British Yearbook of International Law* 63, no. 1 (1992): 725; European Commission, Press Release WE 27/96 of 18 July 1996 (on file with author).

[78] "OAS Resolution on Free Trade and Investment in the Hemisphere," Organization of American States, Doc. OEA/SER.P AG/doc.3375/96, 4 June 1996 (approved).

[79] See Vaughan Lowe, "US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts," *International and Comparative Law Quarterly* 46, no. 2 (1997): 378.

[80] See the letter to the Congressional Committee considering changes in the US export control legislation, reproduced in Rubin, "Organization of American States: Inter-American Juridical Committee Opinion," 1329; "Decision of the Council and the Commission."; a *démarche* of the European Community, reproduced in Marston, "United Kingdom Materials," 725; European Commission, Press Release WE 27/96 of 18 July 1996 (on file with author).

[81] "Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom," *Official Journal of the European Communities* 39, L 309/1 (29 November 1996).

in the first place, to continue to issue waivers deferring the effectiveness of its provisions.[82]

Less trigger-happy than some of his predecessors, President Barack Obama preferred to use the power of America's extraterritorial jurisdiction. The Treasury Secretary was Obama's "favorite combatant commander".[83] Of geopolitical importance was the sanctions war that the US waged to (successfully) force Iran to the negotiating table and reverse its alleged quest for a nuclear weapon.[84]

The administration of President Donald Trump also took up the sanctions instrument with much enthusiasm. Following the crackdown on the pro-democracy movement in Hong Kong, the US has targeted Carrie Lam, Hong Kong's chief executive and some of her colleagues. Lam said that she faced difficulties using credit cards.[85] The most spectacular use of extraterritoriality by the Trump administration was in the arrest of Meng Wanzhou, chief financial officer of Huawei Technologies, who was detained upon arrival in Vancouver, Canada on 1 December 2018 on an American extradition request for fraud and conspiracy to commit fraud in order to circumvent US sanctions against Iran.[86]

In the realm of economic security, the United States has used tariffs and trade restrictions, justified under domestic but not necessarily international trade laws, serving as means to protect American industries, address perceived unfair trade practices and assert economic dominance. Among those targeted was again Huawei, this time by US laws that prevent the sale of American computer chips to the Chinese tech giant, making it much more difficult for the company to roll out its 5G technology around the world.[87]

In the realm of economic security, the United States has used tariffs and trade restrictions, justified under domestic but not necessarily international trade laws

The 2018 US Clarifying Lawful Overseas Use of Data Act (CLOUD Act) amended the 1986 Stored Communications Act (SCA) and gave American law enforcement authorities the power to request data stored by most major cloud providers, even if it is electronically stored communications data located outside the United States.[88] This extraterritorial jurisdiction has raised concerns about the safety of (personal) data stored on the cloud and potential conflicts with the EU's General Data Protection Regulation.[89]

In the context of counterterrorism, the US has relied on the 'Authorization for Use of Military Force' (AUMF) passed by Congress in

[82] "European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act," *International Legal Materials* 36, no. 3 (May 1997): 529. On 18 May 1998, the Understanding with respect to the Disciplines for the Strengthening of Investment Protection was reached, whereby the EU agreed to suspend action in the WTO in exchange for an EU-wide exemption by the US from the extraterritorial elements of the Helms Burton Act. See Stefaan Smis and Kim van der Borght, "The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts," The *American Journal of International Law* 93, no. 1 (January 1999): 227-236.

[83] Annie Lowrey, "Aiming Financial Weapons from Treasury War Room," *New York Times*, 3 June 2014.

[84] United States Department of State, "Iran Sanctions," last accessed 6 May 2024.

[85] Iain Marlow and Natalie Lung, "Hong Kong Leader Carrie Lam Has Credit Card Trouble After U.S. Sanctions," *Bloomberg*, 18 August 2020.

[86] Robert Fife and Steven Chase, "Canada arrests Huawei's global chief financial officer in Vancouver," *Globe and Mail*, 5 December 2018.

[87] David Shepardson, Karen Freifeld and Alexandra Alper, "U.S. moves to cut Huawei off from global chip suppliers as China eyes retaliation," *Reuters*, 15 May 2020.

[88] United State House of Representative, "H.R.4943 - CLOUD Act," 115th Congress (2017-2018), 2 June 2018 (introduced in House). The CLOUD Act is balanced by a number of safeguards intended to prevent abuse. For example, an SCA order seeking the stored contents of communications must be for specific data and will only be granted where the government can establish "probable cause" that a particular criminal offence has been committed and that there is "reasonable belief" or justification that the information sought is "relevant and material" to that ongoing criminal investigation. It thus does not allow mass and indiscriminate collection of communications data. In addition, service providers have the right to challenge these SCA orders where they conflict with domestic law.

[89] "Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)," *Official Journal of the European Union* 59, L 119/1, 4 May 2016.

the aftermath of the 9/11 attacks.[90] The AUMF provides the legal foundation for military action against those responsible for the attacks and associated forces. This authorisation has been cited to justify military interventions and targeted drone strikes in countries such as Afghanistan, Pakistan, Yemen and Somalia, with the US administration arguing that it was acting in self-defence against imminent threats. However, the legal framework surrounding the protracted "war on terror" has been the subject of much controversy, raising concerns about due process, transparency and accountability, most (in)famously over the existence of the Guantanamo Bay detention camp and the interrogation practices employed there.[91] Concerns over the expansive interpretation of the AUMF have raised the need for re-evaluation in the changing landscape of global threats.

Critics argue that the selective application of international law by the United States has undermined the credibility of the legal frameworks. The perception that powerful nations exploit legal mechanisms for their own interests, at times to the detriment of the principles of fairness and equity, indeed poses a challenge to the legitimacy of the international legal order. It goes without saying though that someone else's wrong does not create a right. In other words, the perception of selective application of the law by the US does not justify actions by Russia, China and others to undermine the RBIO.

2.2.2. The Strategic use of Lawfare by Russia

The strategic manipulation of legal systems for (geo)political advantage was a hallmark of the Soviet Union's playbook during the Cold War. Operating in a highly ideological and authoritarian framework, the USSR skilfully deployed legal mechanisms to suppress opposition, control its narrative and advance its political objectives.[92]

The strategic manipulation of legal systems for (geo)political advantage was a hallmark of the Soviet Union's playbook during the Cold War

Internally, the Soviet regime exploited legal processes to quash opposition and maintain strict control over its citizens. The legal system was weaponised to silence dissidents, with laws against "anti-Soviet activities" serving as a catch-all concept to stifle any perceived threats to the state. Show trials, where individuals were subjected to orchestrated legal proceedings without genuine due process, were used to eliminate perceived enemies and send a chilling message to potential dissenters. Soviet leaders effectively harnessed the legal apparatus to create an illusion of legality while systematically undermining the rule of law.

Externally, the USSR employed legal strategies to advance its interests on the international stage. The manipulation of international organisations and treaties allowed the Soviet Union to project an image of compliance with international norms while pursuing its expansionist agenda. Legal justifications were often crafted to legitimise actions such as the invasion of Hungary in 1956 or the intervention in Afghanistan in 1979, providing a semblance of legality to actions that were in reality gross violations of sovereignty.

Moreover, the Soviet Union engaged in a form of ideological lawfare by promoting its legal system and principles abroad. It sought to influence international legal discourse through organisations like the International Association of Democratic Lawyers,[93] aligning legal professionals with socialist ideologies and creating a narrative that portrayed the Soviet legal system as a progressive alternative to Western models.

[90] "Authorization for Use of Military Force," US Congress, S.J.Res.23, 18 September 2001.

[91] From the abundant academic literature on the issue, see, e.g., Richard Ashby Wilson (ed.), *Human Rights in the 'War on Terror'* (Cambridge: Cambridge University Press, 2005); Lisa Hajjar, "The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US "War on Terror"," *Law & Social Inquiry* 44, no. 4 (2019): 922-956.

[92] See, e.g., Sheila Fitzpatrick, *Tear off the Masks! Identity and Imposture in Twentieth-Century Russia* (Princeton University Press, 2008); Christi Bartman, "Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Governments" (PhD diss., Bowling Green State University, 2009).

[93] International Association of Democratic Lawyers.

Following in the footsteps of the USSR, Russia uses lawfare as an important tool in its geopolitical arsenal.[94] Putin's administration has employed this strategy to not only project power but also to shape global narratives, manipulate legal systems, and advance Russia's political, military and economic interests. Examining the multifaceted dimensions of Russia's use of lawfare reveals a sophisticated and adaptive approach to modern conflict.

One of the prominent arenas where Russia engages in lawfare is the manipulation of international legal fora. The Kremlin strategically navigates institutions such as the United Nations to shield itself from international criticism and accountability. Through diplomatic manoeuvring, strategic alliances and the use of its veto power in the UNSC, Russia has consistently thwarted efforts to hold it responsible for actions such as human rights abuses and violations of international law.

Russia has demonstrated a penchant for weaponising legal processes in hybrid warfare scenarios, where military and non-military tactics converge

Russia has demonstrated a penchant for weaponising legal processes in hybrid warfare scenarios, where military and non-military tactics converge. The annexation of Crimea exemplifies this approach, blending overt military force with covert operations and the exploitation of legal ambiguities to justify its actions, asserting a right to protect ethnic Russians and Russian speakers in the region.[95] The orchestration of a controversial referendum in Crimea provided a veneer of legality to Russia's actions, creating a narrative that portrayed the annexation as an expression of self-determination, while advancing the Kremlin's strategic objectives.

Nowhere is Russia's legal trickery more in evidence than in its long-standing approach to the "border problem" with Ukraine, which reveals an "unmistakable pattern" of negative lawfare.[96] According to Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, having a defined territory is one of four fundamental aspects of statehood.[97] For Russia, which has always been uncomfortable with Ukraine's independence, the formal agreements concluded between the two countries (in the context of the creation in 1991 of the Commonwealth of Independent States, the 1994 Trilateral Agreement with the US, the Budapest Memorandum, the 1995 Sochi Agreements on the basing rights of Russia's Black Sea Fleet at Sevastopol, the 1997 Treaty of Friendship, Cooperation and Partnership, and the 2003 Treaty on the Russia-Ukraine State Border) were never implemented through effective border demarcation and delineation measures and provided a Potemkin facade for covert and increasingly open violations of its neighbour's sovereignty and territorial integrity. In fact, the treaties served as tools to "mortgage Ukraine's independence",[98] with Russia leveraging its energy and trade dominance to exert pressure and extract concessions from Kyiv in securing Moscow's regional ambitions, including the prolonging of the lease of the deep-sea port in Sevastopol and the participation of Ukraine in the 2000 Eurasian Economic Community and the 2003 Common Economic Space.[99]

Indeed, "Moscow's nihilistic attitude to the agreements signed with Ukraine" has been on full display since the 2014 annexation of Crimea.[100] The signature of the Minsk Protocols in 2014 and 2015 was forced upon Ukraine at gunpoint, which would render them illegal under Article 52 of the Vienna Convention on the Law of Treaties. And yet the West, notably France and Germany as intermediaries in the Minsk Process, allowed Russia to erect two new legal smokescreens to keep Ukraine's

[94] Mälksoo, *Russian Approaches to International Law*.

[95] See Eleanor Knott, *Kin Majorities: identity and citizenship in Crimea and Moldova* (Montreal: McGill-Queen's University Press, 2022).

[96] Wolczuk and Dragneva, "Russia's Longstanding Problem."

[97] The other ones being: having a population, a government exerting control and the capacity to enter into international relations with other states. The political existence of a state is independent of international recognition by other states (Article 3).

[98] James Sherr, "The Mortgaging of Ukraine's Independence," Chatham House Briefing Paper, August 2010.

[99] Wolczuk and Dragneva, "Russia's Longstanding Problem."

[100] Ibid.

sovereignty and territorial integrity in limbo. Stuffed with fuzzy commitments, lacking clear timetables and not even mentioning Russia as a party to (let alone as the instigator of) the armed conflict, the Minsk agreements left the door open for the Kremlin to use the newly established legal threshold to continue its war of attrition against Ukraine.[101] As noted by Wolczuk and Dragneva:

> Russia has treated the international rule book on bilateral and multilateral agreements in an instrumental way, expecting compliance from Ukraine while actively, repeatedly, and violently breaking its own commitments. In Russia's opinion, this is what an "independent foreign policy" looks like and this relentless pattern augurs badly for the future.

On the domestic front, Russia employs an array of legal tools to suppress dissent and control the narrative. Legislation targeting so-called foreign agents has been used to stifle non-profits critical of the government, forcing them to register as foreign entities and subjecting them to stringent reporting requirements.

On the domestic front, Russia employs an array of legal tools to suppress dissent and control the narrative

This not only chokes the operational capacity of these organisations but also tarnishes their reputations in the eyes of the Russian public. Similarly, laws against "extremism" have been manipulated to silence political opposition, branding dissenting voices as threats to national security and providing a legal pretext for crackdowns on protests and demonstrations. These domestic expressions of lawfare have inspired autocratic regimes elsewhere, including some EU member states,[102] to adopt the same tactics and instruments. It is a stinging example of Russia's soft power.

As mentioned in passing, cyber warfare is another integral component of Russia's strategy, exploiting legal ambiguities in cyberspace to conduct disruptive operations. The Kremlin has been implicated in numerous cyberattacks, employing hacking and disinformation campaigns to influence elections, undermine democratic processes and sow discord in rival nations.[103] By operating in the grey areas of international law related to cyber activities, Russia has managed to carry out these operations with relative impunity. The proliferation of cyber threats by other states and non-state actors is necessitating a re-evaluation of existing legal structures to counter such activities effectively.[104]

There has been a discernible trend towards increased collaboration between Russia and China in the strategic use of lawfare, reflecting a shared perception of countering Western hegemonism

In recent years, there has been a discernible trend towards increased collaboration between Russia and China in the strategic use of lawfare, reflecting a shared perception of countering Western hegemonism. Both nations have found common ground in leveraging legal mechanisms to challenge existing norms and promote alternative visions of international order. On a 2023 trip to Moscow, Xi Jinping told Putin, in front of the cameras, that Russia and China were together driving changes to the global order not seen for 100 years.[105] This collaborative approach not only underscores the evolving dynamics of international relations but also raises questions about the effectiveness of existing legal mechanisms in the face of concerted efforts by these two major powers in reshaping the geopolitical landscape that,

[101] Allan Duncan, "The Minsk Conundrum Western Policy and Russia's War in Eastern Ukraine," Chatham House Research Paper, May 2020.

[102] See Péter Fazekas, "Orbán Government Uses 'Sovereignty Protection Authority' to Target Opposition," *Eurasia Daily Monitor* 21, no. 16 (1 February 2024).

[103] See Jim Sciutto, *The Shadow War. Inside Russia's and China's Secret Operations to Defeat America* (New York: HarperCollins Publishers, 2019).

[104] Esther Brimmer, "Global Agenda: Navigating Contested Global Spaces," Council on Foreign Relations blog, 22 December 2016; Hanna Smith, "The Geopolitics of Cyberspace and the European Union's Changing Identity," *Journal of European Integration* 45, no. 8 (6 December 2023): 1219-1234.

[105] For the precise quote, see, e.g., Simone McCarthy, "No Path to Peace: Five Takeaways from Xi and Putin's Talks in Moscow," *CNN*, 22 March 2023: "Together, we should push forward these changes that have not happened for 100 years".

even when premised on the centrality of the United Nations, comes with efforts to capture the organisation and create parallel processes.

2.2.3. China's Doctrine of Lawfare

When diplomatic tensions rise, China traditionally tends to employ a variety of economic instruments to try and punish its opponents – in addition to official protests issued by the Ministry of Foreign Affairs.[106]

When diplomatic tensions rise, China traditionally tends to employ a variety of economic instruments to try and punish its opponents

Such measures include launching anti-dumping investigations and subsequently imposing towering tariffs on products that are in high demand in China (e.g., Australian barley and wines),[107] using sanitary and phytosanitary restrictions to halt agri-food imports (e.g., bananas from the Philippines, Australian beef and Norwegian salmon), suspending treaty negotiations (e.g., China-Korea Free Trade Agreement against THAAD missile deployment in Korea), and issuing travel warnings (e.g., for Chinese students in Australia, citing racial incidents).[108] In the wake of the "in principle" conclusion of negotiations over its investment agreement with the EU, China even threatened to "take all necessary measures" to safeguard Chinese firms' "legitimate rights" in response to Sweden's move to exclude Huawei and ZTE from its 5G network rollout.[109]

When confronted with extraterritorial jurisdiction, the tactic of non-compliance with evidence collection and the recognition and enforcement of judgments has been used on the grounds of violations of China's sovereignty and public order. But Chinese state agencies may consider participating in litigation in individual anti-trust or human rights cases. Even though their arguments may not be admitted in foreign courts' deliberations, courts will still listen and become acquainted with Chinese laws, procedures and business contexts.[110] China does not use the argument that its state-owned enterprises (SOEs) would benefit from immunity to America's extraterritorial jurisdiction, in anti-dumping investigations and civil litigation. But China's claim that its SOEs are not public bodies has been dismissed by US courts, some of which have voluntarily granted immunity from prosecution in civil litigation to companies directly controlled by the Chinese central and local governments that are not operating in the US.[111] Chinese companies are generally advised to actively participate in litigation and use US legislation to protect their rights. TikTok/ByteDance, for instance, has successfully counter-sued the US Commerce Department to confront the implementation of, among others, Executive Order 13942, prohibiting transactions with the Chinese company for "any provision of services … to distribute or maintain the TikTok mobile application, constituent code, or application updates through an online mobile application store".[112]

[106] See, e.g., Fergus Hanson, Emilia Currey and Tracy Beattie, "The Chinese Communist Party's Coercive Diplomacy," Australian Strategic Policy Institute, Policy Brief No. 36, September 2020.

[107] See "The worrying precedent in China's quarrel with Australia," *Financial Times*, 29 November 2020.

[108] See Su-Lin Tan, "China-Australia relations: Canberra's plan to scrap research accord labelled 'act of revenge' over trade dispute," *South China Morning Post*, 30 December 2020.

[109] See "China to take counter-measure against Sweden over excluding Huawei, ZTE from 5G rollout," *Global Times*, 21 January 2021.

[110] For example, China's Ministry of Commerce has appeared in court in the "Vitamin C Anti-Monopoly Case" (Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.), referring to the Chinese law on the price fixing of imports and exports by enterprises. Although the Ministry's oral arguments and written opinions were not admitted by the Supreme Court, US federal courts took note of the Chinese government's positions. In many previous cases involving the Chinese government and officials, the Chinese Ministry of Foreign Affairs has submitted written opinions to refer US federal courts to the Chinese government's position.

[111] Qingming Li, "On American Extraterritorial Jurisdiction: Concept, Practice and China's Response," *Chinese Review of International Law* 3 (2019): 3–23 (in Chinese). The author is indebted to Weinian Hu, former research fellow at CEPS, for her invaluable help in navigating Chinese legal acts and doctrine.

[112] See United State Department of Commerce, "Commerce Department Statement on US District Court Ruling on TikTok Preliminary Injunction," 27 September 2020. On 9 June 2021, Biden revoked the executive orders issued by Trump and replaced them with Executive Order 14032, which laid out a process for the federal government to address "unacceptable risk". To date, nothing of consequence has come from this Executive Order. The ANTI-SOCIAL CCP Act, introduced by Senator Marco Rubio at the end of 2022, is still before Congress.

A recent flurry of legislative activity nevertheless points to a more concerted effort at shoring up China's defences – and capacities for legal offensives. In a period of about a decade, Beijing has, among other things, updated existing laws on the (security) screening of foreign investment,[113] promulgated a new export controls law,[114] drawn up an "unreliable entities" list and adopted a statute to block the extraterritorial effect of foreign laws and measures.[115]

Beijing has explicitly adopted the concept of "legal warfare" (*falu zhan*) and applies it in Hong Kong, in the South China Sea, along the Belt and Road, in cyber space, and in actual space.[116] With the ink on the EU-China Comprehensive Agreement on Investment still wet,[117] the PRC's decision to scrap Lithuania's entry from its customs rulebook lent further credence to warnings to take a systemic rival's lawfare tactics and economic coercion seriously.[118]

Beijing has explicitly adopted the concept of "legal warfare" (falu zhan) and applies it in Hong Kong, in the South China Sea, along the Belt and Road, in cyber space, and in actual space

This fits Xi's philosophy of "foreign-related rule-by-law", which he has defined in a sweeping manner by linking it to the defence of China's security and rewiring of the external legal environment:

> We must strengthen rule-by-law thinking [and] methods of using rule-by-law, effectively meet challenges, prevent risks, and synthetically use legislation, law enforcement, the judiciary, and other measures to carry out struggles and resolutely safeguard national sovereignty, dignity, and core interests. We must promote global governance reform and push forward construction of a human community of common destiny.[119]

Rife with opaque and seemingly benign Chinese Communist phraseology such as the construction of a "human community of common destiny" – shorthand for a multilateral system that is dominated by the PRC and therefore the Chinese Communist Party (CCP),[120] the excerpt from Xi's speech at the third annual meeting of the Central Comprehensive Rule-by-Law Commission leaves nothing to be imagined: Xi calls upon all of his administration to prepare for and use the law as a weapon (cf. "struggles").

Indeed, the next step in China's "political-legal extrusion" is the adoption and enforcement of laws intended to punish the governments, citizens and corporations of other countries for activities deemed hostile to China.[121] Over the past few years, the PRC has filled its lawfare toolkit with various new instruments which

[113] Orange Wang, "China's national security screening rules for foreign investments enter force," *South China Morning Post*, 19 January 2021.

[114] See, e.g., Nathan Bush et al., "China's New Export Law," *DLA Piper*, 18 October 2020; updated again in 2023 with the "Catalogue of Technologies Prohibited and Restricted from Export" to further apply trade leverage to countries which the PRC seeks to strike back against or deter. See, e.g., Jing Zhang, Tamer A. Soliman, Jennifer L. Parry and Shelby L. Colson, "Key Changes and Updates to Chinese Export Controls in 2023," Mayer Brown, 1 February 2024.

[115] Beijing has also vowed to invoke Article 5 of the Cybersecurity Law to take measures to monitor, defend and deal with cybersecurity risks and threats originating from within and outside the country.

[116] See Dean Cheng, "Winning Without Fighting: Chinese Legal Warfare," The Heritage Foundation, 21 May 2012.

[117] The "unscrubbed" text was published on 22 January 2021 on the website of the European Commission's DG Trade, see European Commission Directorate-General for Trade, "EU-China agreement in principle," last accessed 6 May 2024.

[118] See Steven Blockmans, "Lithuania, China and EU lawfare to Counter Economic Coercion: Breaking bad?," CEPS Policy Insight No. 2021-20, December 2021. The term "systemic rival" was introduced by the European Commission and High Representative for Foreign Affairs and Security Policy: European Commission, "EU-China: A strategic outlook," JOIN(2019) 5 final, 12 March 2019. See Section 5.2 for more on China's economic coercion and ways to hedge against it.

[119] See "习近平在中央全面依法治国工作会议上强调 坚定不移走中国特色社会主义法治道路 为全面建设社会主义现代化国家提供有力法治保障 [Xi stresses sticking to socialist rule of law with Chinese characteristics]," *Xinhua*, 17 November 2020 (with thanks to Matthew D. Johnson).

[120] See, e.g., Ian Easton, *The Final Struggle: Inside China's Global Strategy* (Eastbridge Books, 2022).

[121] Johnson, "Analyzing the Global Extrusion."

contain extraterritorial provisions for punishing entities outside of China that do not comply with PRC legal norms, such as the Hong Kong National Security Law (NSL), the Data Security Law and the Anti-Foreign Sanctions Law. The confines of this report do not allow for an in-depth review of each of these laws. Suffice it to say that, in theory, the jurisdiction of the CCP's political-legal system already extends beyond China. It is just a matter of time for the PRC's negative lawfare practice to follow.

With regard to national security, Article 8 of the Anti-Secession Law foresees the use of "non-peaceful means" and other necessary measures to defend national sovereignty and territorial integrity should "separative forces" declare Taiwan independent. This provision, in actual fact a vague policy statement, does not in principle qualify for extraterritorial application. In this respect, the language of the Hong Kong NSL, announced in June 2020, provides a somewhat sharper example of China's drive towards the extraterritorial application of domestic law.[122] Article 38 of the NSL is so sweeping that it makes even foreigners speaking overseas vulnerable to prosecution in China for "subversion" (Article 1):

> This Law shall apply to offences under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region.

Remarkably, this provision gives the NSL an even broader reach than mainland criminal law, according to which a foreigner is not liable for an act that is a crime under the law unless either the act or the effect occurs in China. The NSL has no such limitation.

But as with the interpretation of Article 8 of the Anti-Secession Law, Article 4(3) of the International Criminal Judicial Assistance Law and Article 2 of the Provisions of Unreliable Entity List, it is ultimately not the substantive definition of the crimes that count but the institutions that will investigate, prosecute and judge them on that matter. In law enforcement, "counterterrorism" has served as a cover for repressing or monitoring minorities and dissidents. With the creation of new law enforcement institutions for Hong Kong dependent on appointment and appeals procedures that lead back to the PRC's central authorities, the NSL that China has imposed on Hong Kong gives Beijing the means to destroy the freedom and autonomy the territory had enjoyed until well after the 1997 handover from the United Kingdom. Media reports in 2020 suggested that many of the city's business leaders were eager to believe that the NSL would be narrowly applied. But less than a handful of years on, there is little reason to believe that Beijing will apply it with restraint. Xi's power vertical has amply demonstrated its contempt for liberal freedoms. Indeed, the NSL is a harbinger of China's emerging extraterritoriality with a vengeance.[123] Western universities are taking the threat seriously.[124] The main fear is that Chinese students could be reported on and pursued for straying from Beijing's official line – over Taiwan, Hong Kong or the plight of the Uighurs in Xinjiang. This risk has only increased as seminars have moved online, where they can be recorded.

Beijing's ventures into extraterritoriality may have begun with curbing free speech but they are unlikely to end there. When, for instance, disputes occur over investments made in the context of the Belt and Road Initiative (BRI), two "international" commercial courts in China are designated to conduct the arbitration.[125] Going by the canons on conflict of laws and the territoriality-based choice of law rules, courts normally respect the freedom of contractual parties to choose the law of the forum when determining the applicable law at times of dispute. Chinese law prescribes that, where parties to an international contract fail to select the applicable law, the contract will be governed by the law of the state that has the

[122] "Official English translation of the Hong Kong national security law," *Hong Kong Free Press*, 1 July 2020.

[123] See Moritz Rudolf, "The Hong Kong National Security Law. A Harbinger of China's Emerging International Legal Discourse Power," *SWP Comment* No. 56, November 2020.

[124] Patricia Thornton, who teaches Chinese politics at Oxford University, tweeted: "My students will be submitting and presenting work anonymously", as protection against the law. See Patricia M Thornton (@PM_Thornton), Twitter post, 22 September 2020. Professors at US universities have announced similar moves.

[125] One court is in Xi'an to arbitrate commercial disputes from projects on the Silk Road Economic Belt, the other is in Shenzhen for disputes arising from the 21st Century Maritime Silk Road.

closest link to it.[126] In case of disputes regarding BRI-funded projects, Beijing expects that to be Chinese law.[127] Under the present blueprint of the BRI's legal architecture, a lending or any other kind of commercial agreement concluded between China and another country will opt for Chinese jurisdiction as the law of the forum in the event of a dispute.[128] If, however, as its leadership proclaims, China is committed to upholding and modernising the multilateral trade system,[129] then it should mobilise the broad international buy-in for its connectivity and growth strategy to fit the BRI with a legal architecture and dispute settlement mechanism that spurs international solutions rather than imposes Chinese legal constructs.[130]

In June 2023 China passed the Law on Foreign Relations (LFR), which expressly aims to protect its "sovereignty, national security and development interests".[131] The new legislation empowers the Communist Party-state to retaliate against foreign sanctions. Former State Councillor Wang Yi, who – after the 20th Party Congress – was elevated to head of the Central Foreign Affairs Commission, published an essay on the law in the Qiushi journal of the CCP in which he states that the LFR will strengthen the centralised leadership of the Party Central Committee in foreign affairs and rectify shortcomings in the legal system governing foreign relations.[132] This move fits squarely in the CCP's negative lawfare approach and Xi's philosophy of "foreign-related rule-by-law".

The LFR follows on from the adoption of the Anti-Foreign Sanctions Law (AFSL) in 2021,[133] which targets "discriminatory restrictive measures" adopted against China. With the categories for invocation of countersanctions in the AFSL left intentionally vague (cf. the use of "excuses", including another country's own laws, to contain or suppress China), their purpose is to make any action undertaken by any government, citizen or corporation of another country legally subject to reprisals in keeping with Xi's "rule-by-law" maxim.[134] This is all the more so since the law specifies neither the scope of China's "national security and development interests" nor the nature of the acts that may be in violation of the law, which makes its provisions particularly vulnerable to political interpretation by the CCP. Every future foreign sanctions act may therefore be met with a response "in kind" if the State Council perceives them as "discriminatory".

The LFR repeats this language and gives the PRC:

> the right to take, as called for, measures to counter or take restrictive measures against acts that endanger its sovereignty, national security and development interests in violation of international law and fundamental norms governing international relations (Article 33).

[126] See Articles 4 and 6 of the Law on the Laws Applicable to Foreign-related Civil Relations, as well as Article 126 of the Chinese Contract Law and Article 145 of the General Principle of Civil Law.

[127] For a special series of BRI-relevant judgments rendered by Chinese courts, see the website of the 'Guiding Chinese Cases' project of Stanford Law School.

[128] Recognising and enforcing foreign judgment in China is a difficult undertaking, treacherous and cost intensive. See Wenliang Zhang, *Recognition and Enforcement of Foreign Judgments in China: Rules, Practices and Strategies* (Kluwer Law International, 2014).

[129] Dixit China's Ambassador to the EU Zhang Ming, "China supports and upholds multilateral trading system," *EU Observer*, 26 July 2018.

[130] See Steven Blockmans and Weinian Hu, "Systemic Rivalry and Balancing Interests: Chinese Investment Meets EU Law on the Belt and Road," CEPS Policy Insight No. 2019-04, March 2019. In order to achieve a swift and less costly dispute settlement solution, one may not be inclined to seek investor-to-state dispute settlement (ISDS) as a solution. In recent years, the UN Commission on International Trade Law has identified a few concerns with the mechanism, such as consistency, coherence, predictability, correctness of arbitral decisions, cost and duration, which require improvement. Other concerns pertain to arbitrators and decision makers, and cost and duration of ISDS cases. For details, see "Possible Reform of Investor-State Dispute Settlement (ISDS)," United Nations Commission on International Trade Law Working Group III, Thirty-sixth session, 29 October–2 November 2018, Vienna, A/CN.9/WG.III/WP.149.

[131] "The Law on Foreign Relations of the People's Republic of China," adopted at the Third Meeting of the Standing Committee of the 14th National People's Congress on 28 June 2023.

[132] Wang Yi, "贯彻对外关系法，为新时代中国特色大国外交提供坚强法治保障 [Implement the Foreign Relations Law and provide a strong legal guarantee for major-country diplomacy with Chinese characteristics in the new era]," *Qiushi*, 29 June 2023.

[133] See Xu Huang and Sophia Tang, "China Enacts the Anti-Foreign Sanctions Law," *Conflict of Laws*, 21 June 2021. The AFSL is inspired by the EU's Blocking Statute.

[134] See Johnson, "Analyzing the Global Extrusion." He also point out that "it instantly puts foreign companies in a legal grey area with respect to their enforcement of sanctions as defined by the PRC". Which is exactly the point: "fear of being caught upholding the sanctions – as Beijing defines these – of their own countries creates a form of leverage that can be exploited in shaping foreign firm behavior".

Unlike the AFSL, the LFR specifically mentions the BRI and prescribes in Article 37 that the "safety, security, and legitimate rights and interests of Chinese citizens and organisations overseas" must be protected against "any threat or infringement". But that hardly narrows down the extraterritorial application that can be given to the law. Indeed, it is still "less of a legal provision" and "more of a political statement to the world".[135] In fact, the LFR constitutes an upgrade in China's doctrine on lawfare. After all, an investment is viable if it can ensure future returns, which depends upon fickle variables like political stability. The LFR raises the question as to how far China will go to safeguard its citizens and economic interests abroad. Xi's signature project, the BRI, has led to China expanding its economic footprint globally. As such, China increasingly runs the risk of getting entangled in local wrangles when its interests collide with those of others. The PRC has already been leaning on Pakistan to allow Chinese private security companies (PSCs) into the country following a spate of fatal attacks on Chinese nationals.[136] Over the past decade, there has been a boom in the business of PSCs registered in China.[137] History is rife with examples of European armies rising to the occasion to protect the "trade" and commercial interests of the colonial realms. More recently, we have witnessed the disastrous consequences of the Kremlin ceding control to the Wagner Group to attain its strategic objectives in Africa and Ukraine. Countries that are the destination of BRI investment must therefore take note of the ramifications of China's new LFR. The new law asserts that "China respects the sovereignty of recipient countries and does not interfere in their internal affairs or attach any political conditions to its aid" (Article 27), but evidence from practice points to the contrary.[138] The new law is likely to have far-reaching consequences for businesses, states and many other stakeholders. Chinese dissidents could be punished for criticism of the state or even for not being supportive enough of "Chinese interests", whether they are in China or abroad. Businesses, particularly foreign ones, would have to be exceedingly cautious when entering into exchanges with Chinese companies, for fear of accusation of acting against China's development or security interests. The law may also further squeeze Taiwan's space for diplomatic manoeuvres, as countries and companies think twice about legal retaliation and sanctions.

With the AFSL and the LFR, in particular, China has added new weapons to its lawfare arsenal and further consolidated the Communist Party's grip on foreign engagement

While the above-mentioned laws are still settling and waiting to be enforced, it is clear that Beijing is moving its weight from the back to the front foot in dealing with the phenomenon of extraterritorial jurisdiction. With the AFSL and the LFR, in particular, China has added new weapons to its lawfare arsenal and further consolidated the Communist Party's grip on foreign engagement. It will intensify China's competition with countries belonging to the "West". And it is giving licence to regional powers to do the same.

2.2.4. Turkey's Legal Fictions

In recent years, Turkey has increasingly employed negative lawfare tactics to achieve its geopolitical objectives. The most prominent example is Ankara's approach to

[135] Jeff Pao, "China 'Foreign Relations Law' to punish decoupling," *Asia Times*, 1 July 2023.

[136] Adnan Aamir, "China wants own security company to protect assets in Pakistan," *Nikkei Asia*, 28 June 2022.

[137] See, e.g., Helena Legarda and Meia Nouwens, "Guardians of the Belt and Road: The Internationalization of China's Private Security Companies," Mercator Institute for China Studies, 16 August 2018. More recent research has been published by The Jamestown Foundation in the context of the "Guardians of the Belt and Road" project, of which the final paper stands out: Sergey Sukhankin, "Chinese PSCs: Achievements, Prospects, and Future Endeavors," *The Jamestown Foundation*, 20 November 2023.

[138] See the Yuan Wang 5 incident, in which China leaned on an economically enfeebled and debt-strapped Sri Lanka to permit the docking of a research vessel that was equipped to track satellite and missile launches. Significantly, Canada has frozen ties with China-led AIIB and is looking into allegations made by a former bank employee that the CCP had infiltrated the financial institution. See Chrystia Freeland, "Remarks for the Deputy Prime Minister regarding the Asian Infrastructure Investment Bank," 14 June 2023; Bob Pickard (@BobPickard), "I have tendered my resignation as the global comms chief of @AIIB_Official," Twitter post, 14 June 2023, 9:40 a.m.

conflicting maritime claims with neighbouring Greece and Cyprus. Turkey's exploration and drilling activities in the Exclusive Economic Zone (EEZ) of these countries have sparked legal controversies and intensified regional tensions. The UNCLOS establishes the rights and jurisdiction of coastal states over their maritime zones. Much like China's tactics in the South China Sea,[139] Turkey has tried to create precedents, not to build artificial islands but to discover and exploit the hydrocarbon resources within what is internationally recognised as the designated EEZ of the Republic of Cyprus pursuant to Articles 56 and 77 of UNCLOS.[140] Turkey's challenges to Cyprus' EEZ claim are rooted in its rejection of the legitimacy of the Republic of Cyprus and its pursuit of the interests of the Turkish Republic of Northern Cyprus (recognised only by Turkey). Ankara argues that the Greek Cypriot administration's unilateral exploitation of energy resources without the participation of Turkish Cypriots violates their rights.[141] However, this position is widely contested, as it undermines the principles of sovereign equality and non-recognition of territorial gains achieved through force.[142]

In recent years, Turkey has increasingly employed negative lawfare tactics to achieve its geopolitical objectives

Ankara has recently doubled down on its gunboat diplomacy and aggressive legal stance to counterbalance its rivals in the Eastern Mediterranean by signing a controversial maritime agreement with the UN-recognised Government of National Accord in Libya.[143] By strategically crafting the agreement to align with the UNCLOS, Turkey has sought to legitimise its maritime claims within the framework of international law. But the move has been met with scepticism, with many arguing that the agreement disregards the rights of other coastal states and therefore fails to adhere to UNCLOS principles.[144]

The Kurdish question has also been a focal point for Turkey's application of lawfare. The Turkish government has consistently labelled the Kurdistan Workers' Party (PKK) as a terrorist organisation and has employed national counterterrorism laws to suppress political opposition at home and justify military operations against Kurdish groups abroad, most notably in Syria and Iraq. While ostensibly aimed at maintaining national security, these legal measures have been criticised for their broad scope and potential infringement of human rights. The ECHR has on numerous occasions ruled against Turkey for violating the right to freedom of expression and the right to a fair trial in cases involving Kurdish activists.[145] More recently, Erdogan's regime has used the outcast status of the PKK to seek concrete measures from Sweden to target the group before approving its membership bid to NATO.[146] These legal tactics enable Turkey to maintain a hard line against the Kurdish population while portraying its actions as necessary for national security.

In a similar fashion, Turkey has used legal avenues to target individuals that it perceives as threats. The government has sought the extradition of Fethullah Gülen, a cleric living in exile in the United States, accusing him of orchestrating the failed 2016 coup attempt.

[139] See Zachary Paikin et al., "The South China Sea and Indo-Pacific in an Era of "Multipolar" Competition. A more targeted EU response?," JOINT Research Paper No. 14, February 2023.

[140] See Ayla Gürel, Fiona Mullen and Harry Tzimitras, *The Cyprus Hydrocarbons Issue: Context, Positions and Future Scenarios*, PCC Report No. 1 (Nicosia: Peace Research Institute Oslo Cyprus Centre, 2013).

[141] See Yücel Acer, "Turkey's Legal Approach to Maritime Boundary Delimitation in the Eastern Mediterranean Sea," *Insight Turkey* 23, no. 1 (2021): 99–114.

[142] See ample statements by the High Representative on behalf of the EU, and criticism in the Commission's regular enlargement reports assessing Turkey's aligning to EU standards. See also Intissar Fakir, Michael Harari, Ahmet Sözen and Hesham Youssef, *Conflict Resolution in the Mediterranean: Energy as a Potential Game-Changer* (Amsterdam, Nicosia: Diplomeds - The Council for Mediterranean Diplomacy and Friedrich-Ebert-Stiftung, 2023).

[143] "Memorandum of Understand between the Government of the Republic of Turkey and the Government of National Accord-State of Libya on Delimitation of the Maritime Jurisdiction Areas in the Mediterranean," in Istanbul on 27 November 2019.

[144] See Asli Aydintaşbaş et al., "Deep Sea Rivals: Europe, Turkey, and the New Eastern Mediterranean Conflict Lines," European Council on Foreign Relations, May 2020.

[145] See, e.g., "Hatice Çoban v. Turkey," European Court of Human Rights, Case 36226/11, Judgment of 29 October 2019.

[146] Adam Samson and Richard Milne, "Turkey calls on Sweden to take more 'concrete measures' before joining Nato," *Financial Times*, 1 October 2023.

Ankara's requests have faced opposition in the US, where extradition cases involve detailed examinations of evidence and compliance with human rights standards. The purge of tens of thousands of alleged Gülenists from all branches of government, a crackdown which has been unprecedented in the modern history of Europe, and subsequent constitutional changes concentrating power in the office of the president have earned Erdogan's regime no plaudits in the collective West.[147]

Turkey's use of negative lawfare continues to shape the landscape of international relations, prompting both scrutiny and debate over the ethical and legal implications of such practices, as indeed the future of the RBIO.

3. The EU's Evolving Sanctions Policy

When reacting to violations of the RBIO, the EU tends to quasi-automatically declare its concern. Acknowledging that its pious words need to be backed up with more forceful action for third parties to change their attitudes, the EU's weapon of choice has been sanctions.

Acknowledging that its pious words need to be backed up with more forceful action for third parties to change their attitudes, the EU's weapon of choice has been sanctions

In an effort to close some of the loopholes in order to render sanctions more effective, the EU has been introducing innovative legal add-ons that fall squarely within the playbook of positive lawfare.

3.1. Carpet-bombing Russia with Sanctions

In response to Russia's illegal and unjustified war against Ukraine,[148] member states have agreed to an impressive number of sanctions packages (13 by the second anniversary of the full-scale invasion), rapidly widening the net cast over growing numbers of targeted individuals and institutions. Official talking points of the EU's institutions and member states invariably proclaim that the Union's restrictive measures against Russia represent the largest set of sanctions in its history.[149] Compared to other heavily sanctioned countries such as Iran and North Korea, they are indeed remarkable with respect to the number and variety of targeted sectors, especially when considering that scoping sanctions is always subject to compromise among the 27 member states about the level of pain to inflict on the targets and what shocks can be absorbed at home, as observed in discussions about capping gas prices and restricting the trade in luxury products.

Most member states plead for an incremental approach to the adoption of sanctions to keep something up the EU's sleeve in case of further violations of international law

Most member states plead for an incremental approach to the adoption of sanctions to keep something up the EU's sleeve in case of further violations of international law. The step-by-step approach to wean the EU off from its gas dependency on Russia is a case in point: other, less sizeable imports of hydrocarbons (coal, oil) were phased out first, thus sending warning signals to Russia that the EU was prepared to ramp up the pressure, while leaving member states time to prepare for a major – and ultimately successful

[147] See, e.g., Steven Blockmans, "Turkey's Putsch and Purge: Why and how the EU should re-engage with Ankara," CEPS Commentary, 2 September 2016; Steven Blockmans and Sinem Yilmaz, "How the EU Should Respond to Erdoğan's Constitutional Coup d'Etat," CEPS Commentary, 1 March 2017.

[148] See Section 3.1.2 above.

[149] One instrument that has been underexplored in this context is the EU's relatively new horizontal (i.e., non-country specific) human rights sanctions regime, despite the grave crimes (including genocide) of which Russia stands accused since 24 February 2022. See Steven Blockmans, "The EU's Magnitsky Act: An Innovative Tool Fit for the Enforcement of Human Rights and Rule of Law Worldwide?," in *The Rule of Law's Anatomy in the EU: Foundations and Protections*, Allan Rosas, Juha Raitio and Pekka Pohjankoski (eds.) (Oxford: Hart Publishing, 2023), 207-221.

– energy transition.[150] A similar escalation ladder can be observed in the adoption of financial sanctions, with a handful of Russian banks being targeted before member states agreed to punish the largest operators (Sberbank and Gazprombank, which owned around 60 per cent of the Russian banking sector assets).

A debate on whether or not to use the roughly $300 billion of Russian Central Bank assets frozen in EU bank accounts to pay for reparations in Ukraine has dragged on for more than a year over concerns about possible breaches of international law and the danger of setting a precedent that could come back to haunt Western states for their interventions in conflicts around the world.[151] The European Central Bank has also warned that the move could undermine investor confidence in the euro, leading to capital flight and volatile financial markets. Such concerns should not be blown out of proportion though. It is key that international investors do not perceive such actions as arbitrary and risky. Although legally justifiable as an exceptional derogation from the immunities of state (due to the "*erga omnes*" obligation that rests on all states to ensure Russia stops its blatant violations of international law as codified in the UN Charter and international criminal law), further justification for undertaking such action would stem from the ICJ's Order of 16 March 2022 that Russia immediately suspend its military operations in Ukraine. Retaliatory measures from Russia would only unsettle global markets if China, Saudi Arabia and other economic powerhouses were to bet that their divestment from the eurozone would be worth the economic pain in the short to mid-term. Suffice it to say, the chances that they would make such a decision are low. The euro's resilience as a reserve currency is strong, thanks to the lure of the Single Market and its democratic underpinnings anchored in the rule of law. If confiscation happened simultaneously in all G7 countries, then the risk of the euro losing points on its star rating would be mitigated. To avoid its reserve currency status – and that of the dollar, yen and pound sterling – being undermined, diplomatic channels should be used to persuade other countries (Switzerland in particular) to close ranks with the G7.

To show support for Ukraine ahead of the second anniversary of Russia's full-scale invasion, EU member states have unanimously taken the first step by agreeing to set aside future "windfall profits" (estimated at more than €4 billion per year),[152] which will be booked separately and won't be paid out as dividends to shareholders until the Council unanimously decides to set up a financial contribution to the EU budget that would be raised on these net profits to support Ukraine.[153] Such a levy, the European Commission believes, should be consistent with applicable contractual obligations and in accordance with EU and international law. The money would be transferred to the EU budget and then to Ukraine. Whether the windfall profits could be used to pay for lethal aid to the Ukrainian armed forces, as Commission President von der Leyen has suggested, is still a matter of discussion.

Hence, we have witnessed an evolution towards more comprehensive and intrusive sanction regimes, reflecting trends on the ground and depending on support within member states. Remarkably, the EU thereby still (partially) relies on the standard mechanism for the transmission of sanctions that was formulated by peace scholar Johan Galtung in a seminal study on the UN Security Council's sanctions against Southern Rhodesia in the 1960s.[154] Galtung delineated the expected chain reaction of sanctions, which implies that the economic harm produced by

[150] "The Share of Russian Gas in EU Supplies has Dwindled," *Financial Times*, 11 January 2024: from more than 150 billion cubic metres of piped gas and approximately 25 billion cubic metres in LNG in 2019 to less than 50 billion cubic metres (almost evenly divided between piped gas and LNG) two years after the full-scale invasion of Ukraine.

[151] See Michael Emerson and Steven Blockmans, "The $300 Billion Question – How to Get Russia to Pay for Ukraine's Reconstruction," SCEEUS-CEPS Guest Report No. 4, December 2022; Steven Blockmans, "Freeze, Seize and Tax: That's How to Make Russia (and its Enablers) Pay for Ukraine's Reconstruction," CEPS Commentary, 19 February 2024.

[152] "Euroclear delivers robust performance in Q3 2023," Euroclear, 26 October 2023.

[153] "Council Regulation (EU) 2024/576 of 12 February 2024 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine," *Official Journal of the European Union*, L 576, 14 February 2024.

[154] Johan Galtung, "On the Effects of International Economic Sanctions, with Examples from the Case of Rhodesia," *World Politics* 19, no. 3 (April 1967): 378-416.

sanctions generates popular discontent, which is then channelled to the ruling elite, which in turn is pressured to conform to the sender's demands in order to revert to the previous level of well-being. Thus, the leadership is faced with the choice of either giving in to the sender or being unseated. According to Galtung's formulation, sanctions tools operate analogously to military force because both aim at the "political disintegration of the enemy so that he gives up the pursuit of his goals".[155] The theory foresees that the more intense the value deprivation, the more thorough the political disintegration.[156] This should serve as a warning for the EU to be prepared for the moment when Russia's Putinist power vertical finally collapses, irrespective of the extent to which this result was achieved due to Western sanctions.

The EU's sanctions practice is deeply rooted in its policy frameworks, with Articles 29 TEU and 215 TFEU providing the legal basis for the adoption of restrictive measures, autonomously from a UN Security Council mandate

The EU's sanctions practice is deeply rooted in its policy frameworks, with Articles 29 TEU and 215 TFEU providing the legal basis for the adoption of restrictive measures, autonomously from a UN Security Council mandate. Since the entry into force of the Treaty of Lisbon, which codified in Article 275(2) TFEU the possibility for natural or legal persons targeted by EU sanctions to challenge them before the Court of Justice of the EU, more than 500 rulings and/or orders have been issued in this area. More than a decade of sanctions litigation has led CJEU to refine its approach in order to uphold fundamental rights of targeted persons and entities in the process of blacklisting. In contrast to post-Lisbon jurisprudence on counterterrorism, the great number of sanctions adopted by the Council over the alleged misappropriation of Ukraine's state funds has led to an unprecedented level of judicial scrutiny over the Council's sanctions practice. It is striking that the burden of proof has been set at such a level that the Council has so far not been able to successfully adapt to it.[157] By the end of 2022, 46 out of 50 Ukrainian cases before the CJEU had been annulled, leading in September of that year to the de-listing of Victor Yanukovych and his son. In a pre-emptive move, the Council blacklisted them one month before the Court rendered judgment, this time in connection with Russia's second invasion of Ukraine, mainly for transactions with Donbas separatist authorities and undermining the territorial integrity of Ukraine. As such, the Council has tried to keep its sanctions policy intact, while respecting stringent rule-of-law standards protected by the CJEU.

The strict observance by the EU of fundamental rights standards often denied to people and businesses in their own countries has been abused by the Union's adversaries, especially wealthy kleptocrats, in launching a barrage of legal challenges before the CJEU since February 2022, partially in an attempt to clog the EU's judicial system. In order to withstand competitive legal pressures, the EU will therefore have to smarten up its system of lawfare.

3.2. Introducing: EU Extraterritoriality

New legal ground was broken in the development of EU sanctions policy with the inclusion of an inconspicuous addition with potentially major consequences. The eighth sanctions package against Russia further amended Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine by adding the following point to Article 3(1) – which previously only targeted those directly responsible:

[155] Ibid., 386.

[156] See Clara Portela, "The EU's Use of 'Targeted' Sanctions: Evaluating Effectiveness," CEPS Working Document No. 391, March 2014.

[157] See Celia Challet and Dorin-Ciprian Grumaz, "EU Restrictive Measures and Third Countries' Evidence," *European Foreign Affairs Review* 28, no. 1 (2023): 9-29.

> (h) natural or legal persons, entities or bodies facilitating infringements of the prohibition against circumvention of the provisions of this Regulation, of Council Regulations (EU) No 692/2014, (EU) No 833/2014 or (EU) 2022/263 or of Council Decisions 2014/145/CFSP, 2014/386/CFSP, 2014/512/CFSP or (CFSP) 2022/266.[158]

In essence, the EU has broadened its sanctions designation criteria by introducing an extraterritorial dimension to its regime against Russia as it seeks to prevent individuals or companies, irrespective of their nationality or domicile, from assisting directly targeted persons with the evasion of its prohibitions.[159]

In essence, the EU has broadened its sanctions designation criteria by introducing an extraterritorial dimension to its regime against Russia

This is particularly poignant when considering the relative ineffectiveness of sanctions, which aim to dissuade global companies from operating in target countries. While enterprises such as Ford, Renault, McDonald's, Ikea, and Shell are among the dozens of Western businesses that have completely pulled out from Russia,[160] the vast majority of firms have – despite big promises – stopped short of totally divesting their assets in Russia.[161] Conversely, most Russian energy companies are now pariahs in the EU – except Lukoil, which continues to run hundreds of gas stations, refineries and a trading arm. While the proverbial mills of God may grind slowly yet exceedingly fine, EU sanctions, even when coordinated with G7 partners, have so far not brought about any change of behaviour in the Russian leadership.

The fact that the new rule does not specify who is involved has given Russian analysts (and others) reason to believe that it can indeed be applied extraterritorially, i.e., outside the EU and against persons from third countries: "In practice, this means that foreign counterparties from countries that have not joined the EU sanctions (countries that are not included in the list of states unfriendly to Russia, according to the order of the Government of the Russian Federation No. 430-r of 05.03.2022) risk being blocked."[162]

A similar form of extraterritoriality has been introduced in the eighth sanctions package specifically targeting the maritime transportation of Russian oil if the price of the contract for its purchase exceeds the price cap established by the EU. If such oil is transported by a ship from a third country, then EU legal and natural persons will thenceforth be banned from providing technical, financial, insurance and other services to that ship.[163] This addition was intended to close the backdoor for the evasion of sanctions against Russia. Member states had grown increasingly wary that Turkey, a candidate country that has refused to align with EU sanctions, was abusing a loophole in the customs union to export Western goods to

[158] "Council Regulation (EU) 2022/1905 of 6 October 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine," *Official Journal of the European Union*, L 259 I/76, 6 October 2022.

[159] See also Jan Dunin-Wasowicz, "The Long Arm of EU Sanctions," *EU Law Live*, 25 October 2022.

[160] According to a list compiled by Yale. See Jeffrey Sonnenfeld et al., "Business Retreats and Sanctions Are Crippling the Russian Economy," Social Science Research Network, 20 July 2022, last revised 2 August 2022.

[161] According to research by the University of St. Gallen and IMD, only 9 percent of Western companies had divested from Russia by the end of 2022. See Simon Evenett and Niccolò Pisani, "Less than Nine Percent of Western Firms Have Divested from Russia," Social Science Research Network, 13 January 2023, last revised 14 April 2023: "the study's findings are a big reality check on the narrative that national security concerns and geopolitics is leading to a fundamental unwinding of globalization".

[162] Ivan Timofeev and Dmitry Kiku, "New Stage of EU Sanctions Policy: Extraterritorial Measures," *Valdai Club*, 18 October 2022: "The emergence of a legal mechanism for secondary sanctions within the EU will only add business concerns. The big question is how exactly it will be implemented. However, it is obvious that Brussels, when it comes to Russia, would concentrate in its hands more effective tools for punishing those who circumvent sanctions."

[163] "Council Regulation (EU) 2022/1904 of 6 October 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine," *Official Journal of the European Union*, L 259I/3, 6 October 2022, adding paragraph 7 to Article 3n of "Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine," *Official Journal of the European Union*, L 229/1, 31 July 2014.

Russia, thus fuelling the war against Ukraine.[164] While Turkish officials have pledged that their country would not become a conduit for sanctions evasion, it is doubtful that the new rule has been strong enough a deterrent for other non-EU countries, in particular China, Iran and North Korea, to serve as a route for selling sanctioned goods to Russia.[165]

The big question, indeed, is how the new rules on extraterritoriality will be enforced

The big question, indeed, is how the new rules on extraterritoriality will be enforced. In this respect, two further innovations are worth noting: the addition of the "violation of sanctions" to the list of EU crimes, and the appointment by the European Commission of an International Special Envoy for the Implementation of EU Sanctions. Both new measures have been introduced *à droit constant*, i.e., without having to face resistance from member states about the need to create a new legal basis through treaty change.

3.3. Fighting Circumvention and Other Ways to Boost the Effectiveness of Sanctions

As part of the eighth sanctions package against Russia (adopted in October 2022), the EU introduced a new listing criterion that allows for the sanctioning of individuals who facilitate sanctions circumvention. Subsequently, in its tenth package (adopted in February 2023), the EU also imposed additional reporting obligations for asset freezes: European citizens and legal persons must report to the competent member state authorities any information on funds and economic resources that are owned or controlled by a sanctioned person and have been subject to any move, transfer or alteration in the two weeks preceding the sanctioning of the person in question.

In order to ensure a similar degree of sanctions enforcement throughout the EU and deter attempts to circumvent or violate sanctions, the Council in November 2022 unanimously adopted a decision to add violations of restrictive measures to the list of "EU crimes" (Article 83(1) TFEU). Shortly after that, the Commission presented a proposal for a directive establishing minimum rules on the definition of and penalties for the crime of violating EU restrictive measures, which was provisionally agreed by the European Parliament and the Council at the end of 2023 and published in April 2024.[166] Following a transposition period of 12 months, the national laws of the member states should then be harmonised on the matter, giving the Commission its regular powers to act as the "guardian of the treaties" and ensure even implementation across the European Union.[167]

In a further effort to boost the external dimension of sanctions enforcement, the European Commission in December 2022 also decided to create the position of International Special Envoy for the Implementation of EU Sanctions.[168] David O'Sullivan, a former Secretary-General of the Commission and senior EU diplomat, formally took up this role in January 2023. It is his task to ensure continuous, high-level discussions with third countries to avoid the evasion and circumvention of the unprecedented restrictive measures that have been imposed on Russia since the start of its war against Ukraine. In this context, it is worth noting that the practice of neighbouring countries of the EU (e.g., Serbia, Turkey, Armenia) of keeping civilian air traffic with Russia open does not

[164] Valentina Pop, "EU Presses Turkey to Align on Russia Sanctions," *Financial Times*, 11 October 2022: "The value of exports from Turkey to the country more than doubled year on year in August, rising to $949mn, up from $451mn in August 2021." See also Tom Wilson and Adam Samson, "The Turkish Terminal Helping Disguised Russian Oil Reach Europe," *Financial Times*, 30 January 2024.

[165] Kimberly Donovan and Maia Nikoladze, "The Axis of Evasion: Behind China's Oil Trade with Iran and Russia," *New Atlanticist*, 28 March 2024.

[166] "Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673," *Official Journal of the European Union*, L 1226, 29 April 2024. Depending on the offence, individuals could face a maximum penalty of at least five years in prison. Companies could be liable to penalties of no less than 5 percent of their total worldwide turnover in the business year preceding the fining decision.

[167] In *ultimum remedium* through the infringement procedure before the CJEU (Article 258 TFEU). Denmark and Ireland are not concerned because they have opted out from the area of freedom, security and justice.

[168] "EU appoints David O'Sullivan as International Special Envoy for the Implementation of EU Sanctions," European Commission Representation in Ireland, 13 December 2022.

constitute a "circumvention" of EU sanctions. It is a sovereign right of each state to exercise its freedoms under the conventions of the International Civil Aviation Organization and to choose whether to align with EU sanctions or not. Through its new Special Envoy, the EU exerts political pressure on third countries, but this is not always successful.

Absent a fully fledged EU agency similar to the US Treasury Department's Office of Foreign Assets Control which centrally administers and enforces economic and financial sanctions, policing is left to the member states. Empirical research across Europe reveals a highly fragmented picture that can only be partially explained by a lack of resources at the national level.[169] Going by the currently available data, which are by no means complete, one cannot escape the suspicion that prosecution is de-prioritised in the litigation strategies of certain member states. A more harmonised approach supervised by an EU Agency of Foreign Assets Control could help reduce the mazes in the net. Creating such an executive agency would be an upgrade from the coordination task currently performed by Unit E.5 of the European Commission's DirectorateGeneral for Financial Stability, Financial Services and Capital Markets Union[170] but would probably require Treaty change, for which currently no unity exists among member states, some of which are wary of undermining their significant trade and investment flows with the US and China.[171]

A more harmonised approach supervised by an EU Agency of Foreign Assets Control could help reduce the mazes in the net

Further ideas include expanding the powers of the new Anti-Money Laundering Authority of the EU, which is expected to be operational later in 2024. The European Public Prosecutor's Office, which is responsible for investigating and prosecuting crimes against the financial interests of the EU, may in the future also receive additional powers.

Other additions to the EU's lawfare toolbox can be found in the realm of the Common Commercial Policy. The withdrawal of Russia's most-favoured nation (MFN) treatment, a core aspect of the fundamental principle of non-discrimination at the WTO, constitutes an expression of the unexpected "protean power" exhibited by the EU in the wake of Russia's shock to Europe's security order.[172] The suspension of a member's MFN status is a measure that is rarely invoked either inside or outside the WTO. It implies the denial of most of its privileges as a WTO member through the imposition of higher tariffs or quantitative restrictions. For the EU, the removal of Russia's MFN status is a largely symbolic measure, since it does not have an alternative tariff list for non-MFN trade. But the measure aims to justify the EU trade bans (e.g., on key products in the iron and steel sectors, coal, wood, cement, seafood, liquor, oil, etc.), thereby facilitating potential future WTO litigation, as already threatened by the Kremlin. The move also sends a signal to Russia of potentially more restrictive trade measures to come.

As a footnote to the latter, the EU has sought to contrast its punitive approach to trade with Russia by propping up Ukraine's economy through the temporary suspension of import duties on all Ukrainian exports to the EU, as well as all anti-dumping and safeguard measures applicable to Ukrainian steel exports. These unprecedented gestures of support by the EU in 2022 went well beyond what the rules for the EU-Ukraine Deep and Comprehensive Free Trade Area prescribe, but soon ruffled feathers among constituencies in member states with strong agricultural lobbies. As tensions over Ukraine's grain exports through Poland grew

[169] Duane Morris attorneys track and analyse the latest developments in sanctions and export control enforcement across Europe. Their blog is focused on regulatory and criminal enforcement of sanctions and related export controls across the EU and the UK. See also the work in the context of the European Sanctions and Illicit Finance Monitoring and Analysis Network (Euro SIFMANet).

[170] Following up on the first few sanctions packages adopted against Russia over its full-scale invasion of Ukraine, the Commission in March 2022 also created a "Freeze and Seize" Task Force to ensure EU-level coordination to seize and, where the national law calls for it, confiscate assets of listed sanctioned individuals or companies. This task force works alongside other EU agencies such as Eurojust and Europol, as well as the Russian Elites, Proxies and Oligarchs multilateral task force, to ensure effective cooperation at a global level.

[171] See Stoll et al., "Extraterritorial Sanctions," 77-79.

[172] See Peter J. Katzenstein and Lucia A. Seybert, "Protean Power and Uncertainty: Exploring the Unexpected in World Politics," *International Studies Quarterly* 62, no. 1 (March 2018): 80-93.

since early 2023, they have become a stress test for both countries, as indeed the entire EU, since Hungary, Slovakia and Bulgaria also refused to give up their economic advantages to the point of calling into question one of the most advanced supranational policies (EU trade).[173] The Commission's abdication of responsibility to enforce EU law has been rightly decried.[174] Cynically, member states gave in to continued Polish and French pressure and hollowed out the EU autonomous trade measures when renewing the scheme until June 2025,[175] thereby robbing Ukraine of valuable income at a time when it found itself on the backfoot against the Russian onslaught. These and other incidents (Polish truckers, for instance, have emulated the farmers' protests) have revealed the selfish limits of member-state solidarity with the plight of Ukraine.

The interim conclusion unfortunately is that the EU's sanctions policy remains largely ineffective in changing the behaviour of a dictatorial regime like Putin's

Zooming out, the interim conclusion unfortunately is that the EU's sanctions policy remains largely ineffective in changing the behaviour of a dictatorial regime like Putin's, despite the ground-breaking extensions in the design of restrictive measures and their enforcement. For all the talk these past three decades about the value of "smart" sanctions over the kind of blanket bans that dominated the international landscape up until the mid-1990s, the EU has in reality invested its hope in the "crippling" impact of more old-fashioned embargoes on key sectors of the Russian economy.[176] Ironically, Russia's "dumb" bombs are thus being met with increasingly "dumb" sanctions, with the inherent risk of their disastrous consequences spilling over to the EU. Arguably, a more effective sanctions policy is possible if better integrated in a comprehensive EU approach to lawfare.

4. Towards a More Integrated and Strategic Use of Lawfare by the EU

4.1. Constraining (F)actors

While the EU has a long history of doing legal battle to defend its autonomy in the international arena,[177] the legal services of the Commission, Council, European Parliament and EEAS have so far preferred to define strategic litigation in their respective siloes, no doubt out of the habit of slugging their competence and other disputes out before the CJEU. Routine court practice in Luxembourg has bred a level of inter-institutional mistrust that has hampered a "whole-of-EU" approach to the defence and promotion of the RBIO. But such rivalries should in theory not stand in the way of developing a more coherent approach to EU lawfare. After all, the Union's main political institutions have shown on multiple occasions that they can strategise and cooperate on the design, negotiation, conclusion and ratification of international agreements (Article 218 TFEU). The exceptions prove the rule.

There are other (f)actors that militate against the development of a comprehensive EU lawfare strategy, such as the fact that not all member states share the same threat perception and are affected in the same way by third countries' breaches of international

[173] Steven Blockmans, "The Impact of Ukrainian Membership on the EU's Institutions and Internal Balance of Power," ICDS Policy Paper, November 2023.

[174] See Peter van Elsuwege, "The Ukrainian Grain Imports Saga," *Verfassungsblog*, 27 April 2023.

[175] The amended regulation tightens the generous regime agreed to in 2022 by beefing up safeguards already included in the currently applicable autonomous trade measures, which includes taking into account any adverse impact on the market of one or several member states, rather than just on the EU market as a whole (as is the case now). A new automatic safeguard was also added for other "sensitive" products, such as poultry, eggs, sugar, oats, maize, groats and honey.

[176] European Commission, "EU solidarity with Ukraine," last accessed 6 May 2024.

[177] See references in n. 11 and 25.

law,[178] or the reality that some member states have a far greater share of companies that are likely to be affected by EU sanctions and vulnerable to third-country retaliation or extraterritorial jurisdiction than others. In the same vein: the realisation that the EU is more vulnerable as an open trade economy than the "single markets" of the US and China, which produce and consume more domestically. The reluctance of most member states to take any measures that could be seen to weaken the transatlantic relationship is another factor in the current geopolitical context, although less so under a Trump(-like) administration. Finally, drawing up and implementing an integrated lawfare strategy would require the supranational institutions of the EU to play a more important role, which member states that aspire to a more intergovernmental mode of EU governance may find hard to stomach.

Drawing up and implementing an integrated lawfare strategy would require the supranational institutions of the EU to play a more important role

The latter argument does not hold much water anymore since the member states agreed to add, within the current Treaty framework, an extraterritorial dimension to the application of EU sanctions law.[179] After years of dithering over ineffective instruments,[180] the EU has passed the Rubicon by deciding that the best defence against lawfare is to plan for offensive EU lawfare. That is not to say that the EU should emulate negative lawfare strategies by others. As a community of law, the EU is bound by its own rulebook, which in Article 21 TEU prescribes the respect for and promotion of international law. Indeed, EU lawfare should violate no domestic or international law and should not ignore any clear-cut violations by third parties. Nor should it support a hyper-aggressive practice whereby every loophole is exploited to promote the EU's common foreign policy interests. The latter is a rather elusive concept, subject to the changing attitudes of member states to geopolitics and geoeconomics. The EU can only be a credible partner in upholding the RBIO insofar as it uses positive lawfare in a consistent and proportional manner.

The EU can only be a credible partner in upholding the RBIO insofar as it uses positive lawfare in a consistent and proportional manner

Regrettably, the member states have shot the EU in the foot on more than one occasion, for instance when denying their Union a common position about the intervention by an ally and some of their own in the domestic affairs of a third state while lecturing countries of the "Global South" about the illegality of the invasion by another power of its neighbour.[181]

[178] European Union External Action Service, "Strategic Compass for Security and Defence," last accessed 6 May 2024. The March 2022 Strategic Compass produced the first-ever common threat assessment, but not before member states in the month before adoption of the document had to thoroughly revise their stance on the Russian threat. As far as the commitment to *jus cogens* is concerns, it is worth noting that there are also the different approaches among member states about universal jurisdiction laws enabling national courts to prosecute alleged perpetrators of war crimes and crimes against humanity regardless of their country of origin, residence or perpetration of the acts. Belgium, Finland, France, Germany, Ireland, the Netherlands, Spain and Sweden are forwarding forward-leaning in this respect, albeit not all to the same degree.

[179] See Section 4.2 above.

[180] Instruments such as the Blocking Statute (see Section 3.2.2 above) and the Instrument in Support of Trade Exchanges, a European-designed special-purpose vehicle that serves as a non-dollarised financial instrument to help facilitate humanitarian trade with Iran after the Trump administration withdrew the US from the nuclear deal and re-imposed secondary sanctions. On the ineffective nature of the instrument, as well as the Blocking Statute, see Georgina Wright, Louise Chetcuti and Cecilia Vidotto Labastie, *Extraterritoriality: A Blind Spot in the EU's Economic Security Strategy* (Paris: Institut Montaigne, January 2024), 50-54.

[181] In an effort to paper over the cracks that had emerged between member states over the US-led invasion of Iraq in 2003, High Representative Javier Solana and his staff took on the task of drafting the first-ever European Security Strategy. See Council of the EU, *European Security Strategy. A Secure Europe in a Better World* (Brussels: European Communities, 2009).

Whereas adversaries have sought to downplay the objective differences between, for instance, the US-led coalition's war against Iraq in 2003, which was preceded by several unanimously supported UNSC resolutions calling on Saddam Hussein to comply with disarmament obligations, and Russia's unauthorised full-scale invasion of Ukraine aimed at territorial conquest, the inconsistency of the EU's positioning on international law pertaining to such matters as war and peace has been condemned as a practice of double standards by foes and friends alike.

If ever there was a test for the EU's commitment to the RBIO, then it surely was presented by Israel's disproportionally violent reaction to Hamas' terrorist attacks of 7 October 2023.[182] The European Union was rightly called out for not supporting South Africa's application to the ICJ to rule against Israel's alleged genocidal practices in Gaza, in marked contrast to the EU's support in Ukraine's genocide case against Russia.[183] It was painfully long after the ICJ on 26 January 2024 first ordered Israel to take all measures within its power to prevent the commission of all acts within the scope of Article II of the Genocide Convention, but just before the adoption of UNSC Resolution 2728 calling for a ceasefire, that unanimity among member states was reached at the European Council meeting of 21–22 March 2024. In no uncertain terms, the EU declared that it was "appalled by the unprecedented loss of civilian lives and the critical humanitarian situation" and called for "an immediate humanitarian pause leading to a sustainable ceasefire, the unconditional release of all hostages and the provision of humanitarian assistance".[184] It "urge(d) the Israeli government not to undertake a ground operation in Rafah, which would worsen the already catastrophic humanitarian situation".[185] The European Council called "(a)ll parties (to) respect international law, including international humanitarian law and international human rights law" and "stresse(d) the importance of respecting and implementing the 26 January 2024 order of the International Court of Justice, which is legally binding. Violations of international humanitarian law need to be thoroughly and independently investigated and accountability ensured".[186] While the EU used robust language to call Israel to order, the message went largely unnoticed. The self-inflicted damage to the EU's reputation and credibility as a defender of the RBIO had already been done, perhaps irrevocably in the Arab-speaking world.[187]

The EU's protection and promotion of international law and justice ought to be more consistent and agile, where the Union strategically wages lawfare and creatively defends itself against it, thereby substantially raising the cost of illegal practices by other subjects of international law

Going forward, the EU's protection and promotion of international law and justice ought to be more consistent and agile, where the Union strategically wages lawfare and creatively defends itself against it, using combinations of international, EU and national law and fora as instruments of power, thereby substantially raising the cost of illegal practices by other subjects of international law.

4.2. The Limits of Going it Alone: Implementing the EU's Economic Security Strategy

The EU has famously been toughening up its enforcement game in recent years; most certainly in nominal terms. The Commission amended its enforcement regulation against

[182] Koert Debeuf and James Moran, "How the EU can raise its game in the Middle East," *EU Observer*, 13 March 2024.

[183] See Gilbert Onyango, "Understanding the EU's Silence on ICJ 'Genocide' Case," *EU Observer*, 17 January 2024; Anthony Dworkin, "Court order: Why Europeans should support the ICJ's decision on South Africa's genocide case against Israel," European Council of Foreign Relations, 26 January 2024.

[184] European Council, "Conclusions – 21 and 22 March 2024," EUCO 7/24, CO EUR 6 CONCL 2, 22 March 2024, para. 20.

[185] Ibid., para. 23.

[186] Ibid., para. 24.

[187] James Lynch, "When Soft Power Is Spent: Gaza, Ukraine, and Europeans' Standing in the Arab World," European Council on Foreign Relations, 4 March 2024.

trade law offenders[188] and appointed a Chief Trade Enforcement Officer whose mandate includes strengthening the implementation of the EU's multilateral, regional and bilateral trade agreements, coordinating dispute settlement proceedings between the EU and non-EU countries (in and outside the context of the WTO), and ensuring that the EU has an effective arsenal of legal tools. To the latter end, the EU has added a raft of shiny new legal tools,[189] including a Carbon Border Adjustment Mechanism (CBAM) to levy taxes on dirty imports into the Single Market, controversial among experts and third countries alike;[190] an Anti-Coercion Instrument against trade bullies;[191] and a Foreign Subsidies Regulation which extends the EU's anti-state aid regime to governments around the world.[192]

The EU now has the legal weaponry to enforce its 2023 Economic Security Strategy in line with international law,[193] at least on paper. Early practice with some of its new unilateral tools has underlined the potential power of the Commission's new tools. For instance, the announcement by the Directorate for the Internal Market, Industry, Entrepreneurship and SMEs of a first public procurement investigation under the Foreign Subsidies Regulation led the Chinese train company bidding to supply electric trains in Bulgaria to immediately pull out of the bidding process. A second investigation, into two Chinese energy companies tendering for contracts in a solar park in Romania, may go the same way.[194] The reason is simple: the level of scrutiny into a company's finances – often opaque in Chinese cases – is so deep and so fast under the terms of the Regulation, that companies would rather pull the plug on the opportunity than pass on the information to the Commission. This is to the chagrin of the China Chamber of Commerce to the EU, which is sure to kick up dust.

The effective use of the EU's new economic security toolbox hinges on tricky commercial and diplomatic judgements

The effective use of the EU's new economic security toolbox hinges on tricky commercial and diplomatic judgements. A good example follows the December 2023 agreement between the EU and the US to extend a truce in their dispute over steel and aluminium until March 2025.[195] The truce dates from 2021, when the Biden administration suspended but refrained from abolishing Trump-era tariffs supposedly imposed to protect national

[188] "Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules," *Official Journal of the European Union*, L 49, 12 February 2021. See also Erika Szyszczak, "EU Enforcement of International Trade Rules," UK Trade Policy Observatory, Briefing Paper No. 55, March 2021.

[189] Chief Trade Enforcement Officer. The EU has also made existing instruments such as anti-dumping and anti-subsidy duties more flexible. For an analytical overview of the upgraded European economic security toolbox, see Tobias Gehrke, "EU Open Strategic Autonomy and the Trappings of Geoeconomics," *European Foreign Affairs Review* 27, Special Issue (2022): 61-78.

[190] Carbon Border Adjustment Mechanism. See also Alan Beattie, "Emission impossible and the trade conundrum of calculating carbon," *Financial Times*, 22 January 2024, with reference to Meagan Reid, "Counting Carbon. "If you can't measure it, you can't manage it"," Silverado Policy Accelerator, 2 February 2022. The CBAM is likely to be challenged at the WTO, see Manoj Kumar and Neha Arora, "India plans to challenge EU carbon tax at WTO," *Reuters*, 17 May 2023.

[191] European Commission, "New tool to enable EU to withstand economic coercion enters into force," 27 December 2023. See also Lukas Schaupp, "The EU's Anti Coercion Instrument between EU Strategic Autonomy and Member State Sovereignty," European University Institute, LAW Working Paper No. 8, December 2023.

[192] European Parliament and the Council of the European Union, "Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market," *Official Journal of the European Union*, 23 December 2022. See, e.g., Jan Blockx and Matteo Pierfrancesco, "The Foreign Subsidies Regulation: Calling Foul While Upping the Ante?," *European Foreign Affairs Review* 28, Special Issue (2023): 53-74.

[193] European Commission, "Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy"," JOIN(2023) 20 final, 20 June 2023: The strategy was complemented in January 2024 with five initiatives improving, inter alia, foreign investment screening, export controls, outbound investments and research security. Venture capital firms should not be funding Chinese companies to develop artificial intelligence, weapons-grade technology and the like, and manufacturers should not be able to skirt export controls by producing the same parts in China, the logic goes. See European Commission, "Commission proposes new initiatives to strengthen economic security," 24 January 2024.

[194] Alan Beattie, "Brussels Tests Out Perhaps its Sharpest Anti-China Tool Yet," *Financial Times*, 8 April 2024.

[195] Alan Beattie, "How Brussels Can Precision-tune its Instruments of Trade Conflict," *Financial Times,* 29 January 2024.

security. The agreement put a quota system in place instead, and the EU accordingly lifted its retaliatory duties. The 2025 end date was chosen to avoid irking the US steel industry during the 2024 Presidential elections and the EU being accused of costing Biden the steel states of Ohio and Pennsylvania. Yet, European Commission officials think that they could have settled the dispute for good in 2023 by signing up to a US plan to target China for its steelmaking overcapacity.[196] But Washington refused to abolish the national security tariffs as part of the deal. In response, the Commission wants to signal irritation. Therefore, it is considering whether to resume a separate WTO case against the steel tariffs that it suspended as part of the truce in 2021.[197] But if it does so and wins the case, then the US could appeal the panel ruling 'into the void',[198] i.e., to the non-functioning WTO Appellate Body that the Trump administration crippled by refusing to appoint new judges – a wound left unattended by Biden. In theory, the EU could then deploy its enforcement regulation to impose retaliatory tariffs on the US anyway. In practice, however, resuming the case would be a substantial move in a finely calibrated game, especially if the WTO's dispute settlement panel were to rule before the November 2024 elections. "It would mean loading the gun, but not yet firing it";[199] the EU standing up for itself and international law, but nevertheless risking tipping Ohio to Trump.

Another development shows the importance of economic resilience when considering the use of positive lawfare. In January 2024, the EU formally asked to suspend the WTO case it brought against China for attempting to use trade restrictions to bully Lithuania out of its plan to increase the diplomatic status afforded to Taiwan.[200] Why? Because China, once it saw that its actions were having no effect, backed away from them. The EU did not have to wield its brand-new Anti-Coercion Instrument since Lithuania had already found substitute export markets.[201] The lesson would appear to be that if Lithuania's economy is strong and flexible enough,[202] then the Single Market should be able to withstand China's economic coercion without the EU having to resort to the law.

Yet, as an open trade economy with many strategic dependencies offering chokepoints to adversaries,[203] the EU has to be careful when deciding how it seeks the confrontation. In July 2023, it had another taste of China's propensity for retaliation, when the PRC unveiled restrictions on the exports of gallium and germanium, two key metals used in chip-making, electric vehicles, telecoms products and weapons systems, in response to the US banning Chinese companies from buying advanced chips and chip-making equipment without a licence and putting pressure on European allies to do the same.[204] For many observers, this appeared to have knocked the EU off balance: Beijing had decided to leverage China's astonishing dominance in the production of many raw materials critical to modern technology in areas at the heart of the EU's green transition.[205] But in practice, the supply disruptions for gallium and germanium did not materialise. Exports of the products continued, albeit with the hassle of requiring new permits. This underscores that the new export rules were carefully designed as a warning to the US, the EU and their allies that China would, and could, retaliate.[206] The signal was lost on the Biden administration, which proceeded with wide-ranging export controls of high-end technology. The PRC's subsequent decision to impose export curbs on graphite sent shockwaves through battery industries and governments who

[196] Ibid.

[197] "United States – Certain Measures on Steel and Aluminium Products," World Trade Organization, DS548, terminated/withdrawn on 17 January 2022.

[198] Peter Ungphakorn, "Technical Note. Appeals 'Into the Void' in WTO Dispute Settlement," *Trade Beta Blog*, 13 February 2021.

[199] Ibid.

[200] World Trade Organization, "China – Measures Concerning Trade in Goods," WT/DS610/12, 26 January 2024. See also Blockmans, "Lithuania, China and EU lawfare."

[201] Alan Beattie, "The Quick and Easy Guide for Countries Resisting Chinese Trade Coercion," *Financial Times*, 9 March 2023.

[202] The results of a deeper analysis at the level of Lithuanian companies were not available to the author at the time of writing.

[203] European Commission, "EU strategic dependencies and capacities: second stage of in-depth reviews," Commission Staff working document, SWD(2022) 41 final, 22 February 2022.

[204] Laure He, "China just stopped exporting two minerals the world's chipmakers need," *CNN,* 22 September 2023.

[205] Sarah Anne Aarup et al., "CHINA'S THREAT ON MINERAL EXPORTS KNOCKS EU OFF BALANCE," *Politico,* 6 July 2023.

[206] Edward White, "US-China tech war reveals vulnerabilities on both sides," *Financial Times*, 30 October 2023.

found themselves exposed to China's market dominance.[207]

Looking ahead, China and the EU need to consider that by using their respective points of leverage – clean tech resources for China, luxury products for Europe – both economies are increasingly driving the other side to sharpen their attention on their own weaknesses. While the EU's search for more strategic autonomy is laudable, the economic merits for it to engage in lawfare are doubtful.

While the EU's search for more strategic autonomy is laudable, the economic merits for it to engage in lawfare are doubtful

Also, it is questionable policy for the EU to expose itself to retaliation by enforcing international law unilaterally.[208] Raising the cost of illegal practices by other subjects of international law need not go at the EU's expense alone and could be achieved in a more multilateral manner, for instance by devising new international laws and institutions ringfencing offenders. Concluding plurilateral agreements such as that with Japan and the US on industrial subsidies and forced technology transfers is one way for the EU to curb unfair trading practices by China,[209] while upholding the spirit of the WTO – even if the US administration is one of the culprits in undermining the global dispute settlement mechanism in trade. Similarly, setting up an International Centre for the Prosecution of the Crime of Aggression against Ukraine (see Section 3.1.4) is another way to document Russia's crimes and prepare litigation strategies while wider international support is racked up for the creation of a special tribunal endorsed by a UNGA Resolution authorising the Secretary-General to set up such a mechanism. But tailoring new rules and tribunals to rein in a rival takes time and is bound to split the international community in the short to medium term. Given the fractious state of multilateralism, it is much more preferable to strengthen the existing international conventions and global governance institutions.

4.3. In Defence of Multilateralism

The aim and method are pure and simple: the EU must cooperate with others to shore up the RBIO that countries like China and Russia are actively seeking to undermine and replace with more authoritarian models.

In terms of institutional reform, in particular of the post-1945 international organisations, a genuine approach to the reallocation of representative rights is required.[210] It is hard to see such a multilateralist reboot materialising without the acceptance of painful trade-offs.

In terms of law-making, a positive lawfare strategy presupposes that the EU works even more actively through the International Law Commission,[211] a UNGA subsidiary body entrusted with the codification and progressive development of rules of public international law, and the OECD's standard-setting bodies.[212] Working with like-minded states on a post-COVID-19 digital Bretton Woods could advance new rules on trade in medical goods and e-commerce.[213] It could also bolster the initial success of the Alliance for Multilateralism,[214] which garnered the support of more than 50 states to reinforce respect for IHL and climate security but which seems to have fallen by the wayside since.

[207] Edward White, William Langley, and Harry Dempsey, "China imposes export curbs on graphite," *Financial Times*, 20 October 2023.

[208] See, e.g., Thomas Verellen and Alexandra Hofer, "The Unilateral Turn in EU Trade and Investment Policy," *European Foreign Affairs Review* 28, Special Issue (2023): 1-14.

[209] European Commission, "Trade/WTO: EU, U.S. and Japan agree on new ways to strengthen global rules on industrial subsidies," 14 January 2020.

[210] There is an abundance of literature on the topic. For a recent analysis, looking forward to the September 2024 UN Summit of the Future, see Reinhold Brender, "In Danger of Falling Short: The EU, the Global South, and the Reform of Multilateralism," Egmont Paper 127, 15 February 2024.

[211] See Teresa Cabrita, "Confirming and Contesting International Law: The European Union and the United Nations International Law Commission" (PhD thesis, University of Amsterdam, January 2023).

[212] See Ron Davies, "The OECD: Promoting Better Policies for Better Lives," European Parliamentary Research Service, October 2014.

[213] Rohinton P. Medhora and Taylor Owen, "A Post-Covid Digital Bretton Woods," *Project Syndicate*, 17 April 2020.

[214] Alliance for Multilateralism, last accessed 6 May 2024.

In terms of dispute settlement, a positive lawfare strategy would include triggering intrusive investigations by international organisations (such as the IAEA in Iran and the OPCW in Syria), summoning votes in the UNGA, and seeking advisory opinions of the ICJ, for example on the legality of Israel's plan to annex much of the West Bank. Such moves would bolster the role played by each of these multilateral institutions, which were created for good reason, should be supported in their respective mandates and should be shielded from the corroding effect of negative lawfare waged by autocratic repeat offenders of international law. The EU's diplomatic support to member states' efforts to evict Russia from the UN Human Rights Council and exclude it from the Council of Europe are shining examples of such positive lawfare. Similarly, EU support for the ICJ and ICC boosts free and fair judgment as it counters Russian disinformation with facts established by the highest judicial institutions with universal jurisdictions.

In cases where member states are split on initiatives to use positive lawfare in an offensive manner, the European Commission could still represent the Union "before" (not "in") international bodies in order to share a set of legal observations aimed at enabling that body to give, if appropriate, an informed opinion on the issues at hand. The CJEU agreed with such an initiative by the Commission before the International Tribunal for the Law of the Sea (ITLOS).[215] The condition attached to such representation is that the Commission consults the Council (presumably its General Secretariat) beforehand.[216]

In the case of Russia's war of choice against Ukraine, the use of all these and other legal avenues and tools is primarily intended to get Ukraine recognised as a victimised sovereign country, to expose its enemy as the perpetrator of serious international crimes – including aggression and genocide, to deter Russia's allies from supporting its war effort, and to make sure that the aggressor pays adequate reparations. Yet, equally important is the aim of defending the RBIO. In response to Russia's flagrant use of negative lawfare, the EU and other supporters of the RBIO must foster greater cooperation to strengthen existing legal frameworks, develop new regulations for emerging threats (in cyberspace, drone warfare, etc.) and enhance mechanisms for holding subjects of international law accountable for violations. In the same way that this war has shaken Europe, it has become a multifaceted legal field bringing together an entire panoply of affected international rules and institutions.

4.4. Cohering European Lawfare Approaches

Russia's full-scale invasion has led to a rally around the EU flag and triggered a barrage of actions that span almost the entire contemporary landscape of international justice, with a speed unprecedented in the history of the European integration process. The EU's version of "shock and awe". Each of the European Union's initiatives in support of the above-mentioned dual objective (defending the victim and the RBIO) has its specific and limited scope of competence. It is only the effective combination of all of them that will produce sufficient pressure to change the course of a hell-bent dictatorial regime and relegate its actions to the history books as an intolerable exception to the prevailing international rules rather than a precedent that hollows them out.

In the EU's approach to waging lawfare against Russia, such a strategy has come about by default rather than design. In a moment of great distress and incalculable uncertainly, the EU27 galvanised their combined protean power to arm Ukraine and rob Russia of its energy weapon. Hundreds of flanking measures were adopted in support of the beleaguered nation and to punish and weaken the aggressor. This required much inter-institutional coordination and multi-level cooperation. But as a much-dreaded "war fatigue" gradually set in (mainly Western) parts of Europe, divisions between member states widened about new initiatives to punish Russia, slowing down the EU lawfare momentum at a delicate moment in the battle – when US support for Ukraine also hung in the balance.

[215] See "Council of the EU v European Commission," Case C-73/14, 6 October 2015 (Judgement of the Court), paras. 58, 59, 62, 63, 70-73.

[216] Ibid., paras. 84-87.

The evolution of the EU's response to Russia's aggression provides an important lesson: the EU should better strategise its future use of lawfare. And in view of the more conflictual geopolitical environment of tomorrow, in which adversaries like China are likely to increasingly use negative lawfare, the EU should increase its resilience and that of its candidate countries.

The evolution of the EU's response to Russia's aggression provides an important lesson: the EU should better strategise its future use of lawfare

A more comprehensive design and more offensive execution of an EU lawfare strategy will demand a more integrated approach of the member states with their supranational institutions and services.

The opportunity to invest energy in this endeavour presents itself quite naturally with the start of the EU's new institutional cycle after the June 2024 elections for the European Parliament. The June European Council should include the use of lawfare in its Strategic Agenda for 2024–29. The Commission President-designate should do so too in the political priorities for the next European Commission. In December, the European Council should task the new High Representative/Vice-President to include the use of positive lawfare when presenting the follow-up to the 2016 EU Global Strategy to the Council in June 2025. A designated sub-strategy on EU lawfare should be ready by the end of 2025, so that reflections can be factored into the negotiations for the next multi-annual financial framework (2028–35).

Within the structures of the EEAS, which acts under the authority of the High Representative, there already exists an Integrated Approach for Security and Peace Directorate. In the conceptual and operational development of an EU lawfare strategy, it could assist other parts of the house, in particular the legal department (EU External Relations Law and Public International Law Division) and the policy planning department. Coordination with the member states would happen in the COJUR. Inter-service consultation and cooperation with the Commission would have been channelled through the existing structures and include the lawyers. A similar avenue may have to be opened with the external relations specialists of the legal service of the European Parliament.

To be sure, addressing the multifaceted challenge of shoring up the RBIO will require a multidimensional approach that spans not just the legal, but also the political, diplomatic, military, technological and economic dimensions. Countering adversaries' negative lawfare tactics will, for instance, necessitate a proactive approach to shaping the narrative. Efforts to promote transparency, fact-checking and information-sharing can help mitigate the impact of disinformation campaigns. Strengthening the resilience of democratic institutions, both domestically and internationally, is crucial to building trust in our open societies and thwarting attempts at manipulation through legal means.

Strengthening the resilience of democratic institutions, both domestically and internationally, is crucial to building trust in our open societies and thwarting attempts at manipulation through legal means

Conclusions and Recommendations

In complex societies, global and domestic actors have long used or manipulated rules and procedures for their own benefit: law as an instrument to seek justice and/or a means to gain and secure positions of geopolitical advantage. The emergence of new doctrines of lawfare "merely makes this tug of war between those that want to invoke international law and those that believes [*sic*] it unduly burdens statecraft a more systematic reality".[217]

It is appropriate to conceive of lawfare as "soft-power geopolitics" or as a form of asymmetric warfare that is particularly attractive to political actors deficient in hard power. The goal is

[217] Falk, "Positive and Negative Forms of 'Lawfare'."

both to deter third parties from undermining the RBIO and to respond to breaches while stopping short of sparking a retaliation that would incur intolerable costs.

Despite growing evidence that Russia, China and Turkey are waging a shadow war against RBIO – and the European Union as one of its staunchest defenders – the EU has really only just started developing the joint capabilities needed to withstand the below-kinetic-threshold types of assault. In the wake of a threat or attack, the EU will invariably express dismay, perhaps find the internal consensus to adopt a token set of restrictive measures and stress the need for negotiations to defuse the situation. But nothing it does actually deters its rivals, who move on from the new baseline to erode the rules-based multilateralism that is encoded in the EU's DNA.

One option for the EU is to also ignore its legal obligations and retaliate. Tactically, this may serve to obtain a geopolitical advantage and help to bring an adversary back in line, but as a strategy, negative lawfare is short-sighted since it would erode the EU's own constitutional base, add to the narrative that the EU is complicit of double standards under international law, and open the European Union up to legal proceedings and actions for damages by friends and foes alike.

In the face of growing great power rivalry, the EU has rejected the idea of international relations being inevitably conflictual and zero-sum and has emphasised norms-based cooperation and multilateralism in its foreign policy. Yet, if the EU's way of becoming a geopolitical actor currently focuses on three major dimensions – "engaging in a conflict over European *order*; bringing in and strengthening its (still limited) *hard power*; and extending its geographical *borders* while these are being violently contested"[218] – then tensions with its constitutional obligations are certain to grow. Moving to a more forward-leaning position in promoting its foreign policy interests will need to include that the EU remains rooted in universally applicable rules and global governance frameworks.

For the European Union, described by a former German foreign minister as a vegetarian in a world full of carnivores,[219] the lack of systematic engagement with such positive lawfare seems like a missed opportunity: its international actorness is most powerful in terms of geoeconomics and, as a community of law, the EU has ample experience and expertise with doing legal battle to promote its interests in the international arena. Its Single Market and economy are in principle strong and flexible enough to stand up to great power adversaries. It knows what its strategic dependencies are and should work towards reducing critical vulnerabilities. Rather than worry about the economic impact of retaliation, the EU should broaden its global strategy and use the law more adroitly to defend its foreign policy interests, which include resilient rules-based multilateralism, and advance its security objectives. If the risk of conflict is indeed greater in a post-COVID-19 world, and if some portion of future warfare can be shifted to the legal arena, then that should not only be to the EU's tactical advantage but also in its strategic interest.

Rather than worry about the economic impact of retaliation, the EU should broaden its global strategy and use the law more adroitly to defend its foreign policy interests, which include resilient rules-based multi-lateralism, and advance its security objectives

Currently, several EU institutions and member states employ lawfare tactics in a well-intended, partially successful but disjointed manner. Here too, *l'Union fait la force*. What is needed is a coherent EU lawfare strategy: one that takes account of lessons identified and best practices, and that is designed and implemented in an integrated approach by the current and prospective members of the EU family.

[218] Kristi Raik et al., "EU Policy towards Ukraine: Entering Geopolitical Competition over European Order," *The International Spectator* 59, no. 1 (2024): 39-58.

[219] Sigmar Gabriel, "In a world full of carnivores, vegetarians have a very tough time of it," Federal Foreign Office of Germany, 5 January 2018.

Policy Recommendations

- It is appropriate to conceive of lawfare both as "soft-power geopolitics" and as a form of asymmetric warfare that is particularly attractive to political actors deficient in hard power. The goal is to deter third parties from undermining the RBIO and to respond to breaches while stopping short of sparking a retaliation that would incur intolerable costs.

- The EU should identify important lessons from its rapid and comprehensive response to Russia's full-scale invasion of Ukraine, especially as it concerns the use of the weapon of law in defence of international justice and the RBIO. In the realm of economic security, trade-offs also need to be established for the use of lawfare in relations with the US, China and regional powers such as Turkey.

- In view of the more conflictual geopolitical environment of tomorrow in which adversaries and capricious allies are likely to increasingly use negative lawfare to chip away at the RBIO and European strategic autonomy, the EU should increase its own resilience and that of candidate countries. A more consistent and assertive use of EU lawfare will demand a more integrated approach of the member states with their supranational institutions and services.

- The opportunity to invest energy in this endeavour presents itself quite naturally with the start of the EU's new institutional cycle after the June 2024 elections for the European Parliament. The June European Council should include the use of lawfare in its Strategic Agenda for 2024–29. The Commission President-designate should also do so in the political priorities for the next European Commission. In December, the European Council should task the new High Representative/Vice-President to include the use of positive lawfare when presenting the successor of the 2016 EU Global Strategy to the Council in June 2025. A designated sub-strategy on EU lawfare should be ready by the end of 2025, so that reflections can be factored into the negotiations for the next multi-annual financial framework (2028–35).

List of References

Aamir, Adnan. "China wants own security company to protect assets in Pakistan." *Nikkei Asia*, 28 June 2022. https://asia.nikkei.com/Politics/International-relations/China-wants-own-security-company-to-protect-assets-in-Pakistan.

Aarup, Sarah Anne, Stuart Lau, Pieter Haeck and Camille Gijs. "CHINA'S THREAT ON MINERAL EXPORTS KNOCKS EU OFF BALANCE." *Politico,* 6 July 2023. https://www.politico.eu/article/eu-brussels-freezes-as-china-beijing-hits-back-in-trade-fight-germanium-gallium-computer-chips.

Acer, Yücel. "Turkey's Legal Approach to Maritime Boundary Delimitation in the Eastern Mediterranean Sea." *Insight Turkey* 23, no. 1 (2021): 99–114. http://doi.org/10.25253/99.2021231.8.

"Address by the President of the Russian Federation." Kremlin, 24 February 2022. http://en.kremlin.ru/events/president/news/67843.

Ambos, Kai. "A Ukraine Special Tribunal with Legitimacy Problems?" *Verfassungsblog*, 6 January 2023. https://verfassungsblog.de/a-ukraine-special-tribunal-with-legitimacy-problems.

Aydintaşbaş, Asli, Julien Barnes-Dacey, Cinzia Bianco, Hugh Lovatt and Tarek Megerisi. "Deep Sea Rivals: Europe, Turkey, and the New Eastern Mediterranean Conflict Lines." European Council on Foreign Relations, May 2020. https://ecfr.eu/special/eastern_med.

Bartman, Christi. "Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Governments." PhD diss., Bowling Green State University, 2009. https://scholarworks.bgsu.edu/hist_diss/12.

Batura, Justina, and Isabella Risini. "Of Parties, Third Parties, and Treaty Interpretation: Ukraine v. Russia (X) before the European Court of Human Rights." *EJIL: Talk!*, 26 September 2022. https://www.ejiltalk.org/of-parties-third-parties-and-treaty-interpretation-ukraine-v-russia-x-before-the-european-court-of-human-rights.

Beattie, Alan. "Brussels Tests Out Perhaps its Sharpest Anti-China Tool Yet." *Financial Times*, 8 April 2024. https://www.ft.com/content/90306c20-1ddd-4a24-87d5-9eff269ddfbe.

---. "Emission impossible and the trade conundrum of calculating carbon." *Financial Times*, 22 January 2024. https://t.co/5JqITWXDQr.

---. "How Brussels Can Precision-tune its Instruments of Trade Conflict." *Financial Times,* 29 January 2024. https://www.ft.com/content/12acbefd-ad62-4a2f-a14c-53a00002efb0.

---. "The Quick and Easy Guide for Countries Resisting Chinese Trade Coercion." *Financial Times*, 9 March 2023. https://www.ft.com/content/4d41b642-0e86-4771-8370-827c2d389a8d?emailId=2617e601-af06-4f9d-9e4d-1c9e7d3f30c9&segmentId=2785c52b-1c00-edaa-29be-7452cf90b5a2.

Blockmans, Steven. "Freeze, Seize and Tax: That's How to Make Russia (and its Enablers) Pay for Ukraine's Reconstruction." CEPS Commentary, 19 February 2024. https://www.ceps.eu/freeze-seize-and-tax-thats-how-to-make-russia-and-its-enablers-pay-for-ukraines-reconstruction.

---. "Lithuania, China and EU lawfare to Counter Economic Coercion: Breaking bad?" CEPS Policy Insight No. 2021-20, December 2021. https://www.ceps.eu/ceps-publications/lithuania-china-and-eu-lawfare-to-counter-economic-coercion.

---. "The EU's Magnitsky Act: An Innovative Tool Fit for the Enforcement of Human Rights and Rule of Law Worldwide?" In *The Rule of Law's Anatomy in the EU: Foundations and Protections*, edited by Allan Rosas, Juha Raitio and Pekka Pohjankoski. Oxford: Hart Publishing, 2023.

---. "The Impact of Ukrainian Membership on the EU's Institutions and Internal Balance of Power." ICDS Policy Paper, November 2023. https://icds.ee/en/the-impact-of-ukrainian-membership-on-the-eus-institutions-and-internal-balance-of-power.

---. "Turkey's Putsch and Purge: Why and how the EU should re-engage with Ankara." CEPS Commentary, 2 September 2016. https://www.ceps.eu/ceps-publications/turkeys-putsch-and-purge-why-and-how-eu-should-re-engage-ankara.

Blockmans, Steven, and Sinem Yilmaz. "How the EU Should Respond to Erdoğan's Constitutional Coup d'Etat." CEPS Commentary, 1 March 2017. https://www.ceps.eu/ceps-publications/how-the-eu-should-respond-to-erdogans-constitutional-coup-detat.

Blockmans, Steven, and Weinian Hu. "Systemic Rivalry and Balancing Interests: Chinese Investment Meets EU Law on the Belt and Road." CEPS Policy Insight No. 2019-04, March 2019. https://www.ceps.eu/ceps-publications/systemic-rivalry-and-balancing-interests-chinese-investment-meets-eu-law-belt-and-road.

Blockx, Jan, and Matteo Pierfrancesco. "The Foreign Subsidies Regulation: Calling Foul While Upping the Ante?" *European Foreign Affairs Review* 28, Special Issue (2023): 53-74. https://doi.org/10.54648/eerr2023014.

Bradford, Anu. *The Brussels Effect*. New York: Oxford University Press, 2020.

Brender, Reinhold. "In Danger of Falling Short: The EU, the Global South, and the Reform of Multilateralism." Egmont Paper 127, 15 February 2024. https://www.egmontinstitute.be/in-danger-of-falling-short-the-eu-the-global-south-and-the-reform-of-multilateralism.

Brimmer, Esther. "Global Agenda: Navigating Contested Global Spaces." Council on Foreign Relations blog, 22 December 2016. https://www.cfr.org/blog/global-agenda-navigating-contested-global-spaces.

Bush, Nathan, Sammy *Fang,* John *Zhang and* Ray *Xu*. "China's New Export Law." *DLA Piper*, 18 October 2020. https://www.dlapiper.com/en/insights/publications/2020/10/chinas-new-export-control-law.

Cabrita, Teresa. "Confirming and Contesting International Law: The European Union and the United Nations International Law Commission." PhD thesis, University of Amsterdam, January 2023. https://acil.uva.nl/content/news/2023/02/cabrita.html?cb.

Cannizzaro, Enzo. "Nine Theses on Autonomy: Making Sense of a Controversial Principle." *European Papers – A Journal on Law and Integration* 8, no. 3 (2023): 1317-1331. https://www.europeanpapers.eu/sites/default/files/EP_eJ_2023_3.pdf.

Casey, Christopher A., Dianne E. Rennack and Jennifer K. Elsea. "The International Emergency Economic Powers Act: Origins, Evolution, and Use." Congressional Research Service, Report R45618, updated 30 January 2024. https://sgp.fas.org/crs/natsec/R45618.pdf.

Ceaser, James W. "The Origins and Character of American Exceptionalism," *American Political Thought* 1, no. 1 (2012): 3-28. https://doi.org/10.1086/664595.

Challet, Celia, and Dorin-Ciprian Grumaz. "EU Restrictive Measures and Third Countries' Evidence." *European Foreign Affairs Review* 28, no. 1 (2023): 9-29. https://doi.org/10.54648/eerr2023002.

Cheng, Dean. "Winning Without Fighting: Chinese Legal Warfare." The Heritage Foundation, 21 May 2012. https://www.heritage.org/asia/report/winning-without-fighting-chinese-legal-warfare.

"China to take counter-measure against Sweden over excluding Huawei, ZTE from 5G rollout." *Global Times*, 21 January 2021. https://www.globaltimes.cn/page/202101/1213510.shtml.

Contartese, Cristina. "The Autonomy of the EU Legal Order in the CJEU's External Relations Case-Law: From the 'essential' to the 'specific characteristics' of the Union and back again." *Common Market Law Review* 54, no. 6 (2017): 1627. http://dx.doi.org/10.54648/COLA2017145.

Council of the European Union. *European Security Strategy. A Secure Europe in a Better World*. Brussels: European Communities, 2009. https://www.consilium.europa.eu/media/30823/qc7809568enc.pdf.

Crawford, Julia, and Thierry Cruvellier. "Ukraine responds to warfare with "lawfare"." *JusticeInfo.net*, 25 March 2022. https://www.justiceinfo.net/en/89266-ukraine-responds-to-warfare-with-lawfare.html.

Davies, Ron. "The OECD: Promoting Better Policies for Better Lives." European Parliamentary Research Service, October 2014. https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2014)538962.

de Wet, Erika. "*Jus Cogens* and Obligations *Erga Omnes*." In *The Oxford Handbook on Human Rights*, edited by Dinah Shelton. Oxford: Oxford University Press, 2013. https://ssrn.com/abstract=2279563.

Debeuf, Koert, and James Moran. "How the EU can raise its game in the Middle East." *EU Observer*, 13 March 2024. https://euobserver.com/opinion/158216.

Donovan, Kimberly, and Maia Nikoladze. "The Axis of Evasion: Behind China's Oil Trade with Iran and Russia." *New Atlanticist*, 28 March 2024. https://www.atlanticcouncil.org/blogs/new-atlanticist/the-axis-of-evasion-behind-chinas-oil-trade-with-iran-and-russia.

Duncan, Allan. "The Minsk Conundrum Western Policy and Russia's War in Eastern Ukraine." Chatham House Research Paper, May 2020. https://www.chathamhouse.org/2020/05/minsk-conundrum-western-policy-and-russias-war-eastern-ukraine.

Dunin-Wasowicz, Jan. "The Long Arm of EU Sanctions." *EU Law Live*, 25 October 2022. https://eulawlive.com/op-ed-the-long-arm-of-eu-sanctions-by-jan-dunin-wasowicz/.

Dunlap, Charles J. (Jr.). "Does Lawfare Need an Apologia?" *Case Western Reserve Journal of International Law* 43, no. 1 (2010): 121-143. https://scholarship.law.duke.edu/faculty_scholarship/2347.

---. "Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts." Humanitarian Challenges in Military Interventions Conference. Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, 29 November 2001. https://people.duke.edu/~pfeaver/dunlap.pdf.

Dworkin, Anthony. "Court order: Why Europeans should support the ICJ's decision on South Africa's genocide case against Israel." European Council of Foreign Relations, 26 January 2024. https://ecfr.eu/article/court-order-why-europeans-should-support-the-icjs-decision-on-south-africas-genocide-case-against-israel.

Easton, Ian. *The Final Struggle: Inside China's Global Strategy*. Eastbridge Books, 2022.

Emerson, Michael, and Steven Blockmans. "The $300 Billion Question – How to Get Russia to Pay for Ukraine's Reconstruction." SCEEUS-CEPS Guest Report No. 4, December 2022. https://www.ceps.eu/ceps-publications/the-300-billion-question.

"EU appoints David O'Sullivan as International Special Envoy for the Implementation of EU Sanctions." European Commission Representation in Ireland, 13 December 2022. https://ireland.representation.ec.europa.eu/news-and-events/news/eu-appoints-david-osullivan-international-special-envoy-implementation-eu-sanctions-2022-12-13_en.

"Euroclear delivers robust performance in Q3 2023." Euroclear, 26 October 2023. https://www.euroclear.com/newsandinsights/en/press/2023/2023-mr-15-euroclear-delivers-robust-performance-q3-2023.html.

European Center for Constitutional and Human Rights. "Interceptions at sea and returns of migrants and refugees to Libya constitute a crime against humanity." 30 November 2022. https://www.ecchr.eu/en/press-release/das-abfangen-auf-see-von-gefluechteten-und-migranten-und-deren-rueckfuehrung-nach-libyen-sind-ein-verbrechen-gegen-die-menschlichkeit.

European Union. European Commission. "Commission proposes new initiatives to strengthen economic security." 24 January 2024. https://ec.europa.eu/commission/presscorner/detail/en/IP_24_363.

---. "EU solidarity with Ukraine." Last accessed 6 May 2024. https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en.

---. "EU strategic dependencies and capacities: second stage of in-depth reviews." Commission Staff working document, SWD(2022) 41 final, 22 February 2022. https://ec.europa.eu/docsroom/documents/48878/attachments/2/translations/en/renditions/native.

---. "New tool to enable EU to withstand economic coercion enters into force," 27 December 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6804.

European Union External Action Service. "Strategic Compass for Security and Defence." Last accessed 6 May 2024. https://www.eeas.europa.eu/eeas/strategic-compass-security-and-defence-1_en.

Evenett, Simon, and Niccolò Pisani. "Less than Nine Percent of Western Firms Have Divested from Russia." Social Science Research Network, 13 January 2023, last revised 14 April 2023. https://ssrn.com/abstract=4322502.

"FAQs on A Special Tribunal for the Crime of Aggression against Ukraine." Permanent Mission of Estonia to the United Nations, 20 January 2023. https://un.mfa.ee/faqs-on-a-special-tribunal-for-the-crime-of-aggression-against-ukraine.

Fakir, Intissar, Michael Harari, Ahmet Sözen and Hesham Youssef. *Conflict Resolution in the Mediterranean: Energy as a Potential Game-Changer*. Amsterdam, Nicosia: Diplomeds - The Council for Mediterranean Diplomacy and Friedrich-Ebert-Stiftung, 2023. https://library.fes.de/pdf-files/bueros/zypern/20302.pdf.

Falk, Richard. "Positive and Negative Forms of 'Lawfare'." *Foreign Policy Journal*, 24 February 2015. https://www.foreignpolicyjournal.com/2015/02/24/positive-and-negative-forms-of-lawfare.

Fazekas, Péter. "Orbán Government Uses 'Sovereignty Protection Authority' to Target Opposition." *Eurasia Daily Monitor* 21, no. 16 (1 February 2024). https://jamestown.org/program/orban-government-uses-sovereignty-protection-authority-to-target-opposition.

Fife, Robert, and Steven Chase. "Canada arrests Huawei's global chief financial officer in Vancouver." *Globe and Mail*, 5 December 2018. https://www.theglobeandmail.com/canada/article-canada-has-arrested-huaweis-global-chief-financial-officer-in.

Fitzpatrick, Sheila. *Tear off the Masks! Identity and Imposture in Twentieth-Century Russia*. Princeton University Press, 2008.

Freeland, Chrystia. "Remarks for the Deputy Prime Minister regarding the Asian Infrastructure Investment Bank." 14 June 2023. https://deputypm.canada.ca/en/news/speeches/2023/06/14/remarks-deputy-prime-minister-regarding-asian-infrastructure-investment-bank.

"Full text of Xi Jinping's keynote address at the CPC in Dialogue with World Political Parties High-Level Meeting." *Xinhua*, 16 March 2023. https://www.chinadaily.com.cn/a/202303/16/WS6412496da31057c47ebb4b23.html.

Gabriel, Sigmar. "In a world full of carnivores, vegetarians have a very tough time of it." Federal Foreign Office of Germany, 5 January 2018. https://www.auswaertiges-amt.de/en/newsroom/news/gabriel-spiegel/1212494.

Galtung, Johan. "On the Effects of International Economic Sanctions, with Examples from the Case of Rhodesia." *World Politics* 19, no. 3 (April 1967): 378-416. https://doi.org/10.2307/2009785.

Gehrke, Tobias. "EU Open Strategic Autonomy and the Trappings of Geoeconomics." *European Foreign Affairs Review* 27, Special Issue (2022): 61-78. https://doi.org/10.54648/eerr2022012.

Gstöhl, Sieglinde, and Joris Larik. "Introduction: The European Union and the Governance of Contested Global Spaces." *Journal of European Integration* 45, no. 8 (December 2023): 1107-1124. http://dx.doi.org/10.1080/07036337.2023.2270770.

Gürel, Ayla, Fiona Mullen and Harry Tzimitras. *The Cyprus Hydrocarbons Issue: Context, Positions and Future Scenarios*. PCC Report No. 1. Nicosia: Peace Research Institute Oslo Cyprus Centre, 2013. https://www.prio.org/publications/7365.

Hajjar, Lisa. "The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US "War on Terror"." *Law & Social Inquiry* 44, no. 4 (2019): 922-956. https://doi.org/10.1017/lsi.2018.26.

Hanson, Fergus, Emilia Currey and Tracy Beattie. "The Chinese Communist Party's Coercive Diplomacy." Australian Strategic Policy Institute, Policy Brief No. 36, September 2020. https://www.aspi.org.au/report/chinese-communist-partys-coercive-diplomacy.

Hart, Laurel. "The International Criminal Court: Biased or Simply Misunderstood?" United Nations Association – UK, 28 October 2018. https://una.org.uk/magazine/2018-1/international-criminal-court-biased-or-simply-misunderstood.

Hathaway, Oona A., Maggie Mills and Heather Zimmerman. "The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly." *Just Security*, 5 May 2023. https://www.justsecurity.org/86450/the-legal-authority-to-create-a-special-tribunal-to-try-the-crime-of-aggression-upon-the-request-of-the-un-general-assembly.

He, Laure. "China just stopped exporting two minerals the world's chipmakers need." *CNN,* 22 September 2023. https://edition.cnn.com/2023/09/21/economy/china-chip-material-exports-drop-intl-hnk/index.html.

Hoffmeister, Frank. "The EU's response to Russia's aggression in Ukraine." Norwegian Institute of International Affairs, YouTube video, 1:26:04, 3 November 2022. https://www.nupi.no/en/events/2022/the-eu-s-response-to-russia-s-aggression-in-ukraine.

Huang, Xu, and Sophia Tang. "China Enacts the Anti-Foreign Sanctions Law." *Conflict of Laws*, 21 June 2021. https://conflictoflaws.net/2021/china-enacts-the-anti-foreign-sanctions-law.

"Hungary would not arrest Putin, says PM Orban's chief of staff." *Reuters*, 23 March 2023. https://www.reuters.com/world/europe/hungary-would-not-arrest-putin-says-pm-orbans-chief-staff-2023-03-23/.

International Criminal Court. "Information for victims, State of Palestine." Last accessed 6 May 2024. https://www.icc-cpi.int/victims/state-palestine.

Islam, Shada. "The taboos are falling fast as the EU embraces the far-right racist approach to migration." *The Guardian*, 15 February 2023. https://www.theguardian.com/world/commentisfree/2023/feb/15/eu-far-right-migration-fortress-europe.

Johnson, Matthew D. "Analyzing the Global Extrusion of CCP Political-Legal Institutions." Charles University/Sinopsis, Briefing paper, 2024 (On file with the author).

Katzenstein, Peter J. and Lucia A. Seybert. "Protean Power and Uncertainty: Exploring the Unexpected in World Politics." *International Studies Quarterly* 62, no. 1 (March 2018): 80-93. https://doi.org/10.1093/isq/sqx092.

Kittrie, Orde F. *Lawfare: Law as a Weapon of War*. Oxford: Oxford University Press, 2016.

Knott, Eleanor. *Kin Majorities: identity and citizenship in Crimea and Moldova*. Montreal: McGill-Queen's University Press, 2022.

Komarov, Alexander, and Oona A. Hathaway. "The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law." *Just Security*, 11 April 2023. https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law.

Kumar, Manoj, and Neha Arora. "India plans to challenge EU carbon tax at WTO." *Reuters*, 17 May 2023. https://www.reuters.com/world/india/india-plans-challenge-eu-carbon-tax-wto-sources-2023-05-16.

Legarda, Helena, and Meia Nouwens. "Guardians of the Belt and Road: The Internationalization of China's Private Security Companies." Mercator Institute for China Studies, 16 August 2018. https://www.merics.org/en/report/guardians-belt-and-road.

Li, Qingming. "On American Extraterritorial Jurisdiction: Concept, Practice and China's Response." *Chinese Review of International Law* 3 (2019): 3–23 (in Chinese).

Lowe, Vaughan. "US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts." *International and Comparative Law Quarterly* 46, no. 2 (1997): 378. https://doi.org/10.1017/S0020589300060474.

Lowe, Vaughan, and Colin Warbrick (Eds.). "Extraterritorial Jurisdiction and Extradition." *International and Comparative Law Quarterly* 36, no. 2 (April 1987): 398. https://doi.org/10.1093/iclqaj/36.2.398.

Lowrey, Annie. "Aiming Financial Weapons from Treasury War Room." *New York Times*, 3 June 2014. https://www.nytimes.com/2014/06/04/business/aiming-financial-weapons-from-war-room-at-treasury.html.

Lynch, James. "When Soft Power Is Spent: Gaza, Ukraine, and Europeans' Standing in the Arab World." European Council on Foreign Relations, 4 March 2024. https://ecfr.eu/article/when-soft-power-is-spent-gaza-ukraine-and-europeans-standing-in-the-arab-world.

Marlow, Iain, and Natalie Lung. "Hong Kong Leader Carrie Lam Has Credit Card Trouble After U.S. Sanctions." *Bloomberg*, 18 August 2020. https://www.bloomberg.com/news/articles/2020-08-18/hong-kong-s-leader-has-credit-card-trouble-after-u-s-sanctions.

Marston, Geoffrey. "United Kingdom Materials on International Law 1992." *British Yearbook of International Law* 63, no. 1 (1992): 725. https://doi.org/10.1093/bybil/63.1.615.

---. "United Kingdom Materials on International Law 1993." *British Yearbook of International* Law 64, no. 1 (1993): 643. https://doi.org/10.1093/bybil/64.1.579.

McCarthy, Simone. "No Path to Peace: Five Takeaways from Xi and Putin's Talks in Moscow." *CNN*, 22 March 2023. https://edition.cnn.com/2023/03/22/europe/china-xi-russia-putin-talks-five-takeaways-intl-hnk-mic/index.html.

McDougall, Carrie. "The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine." *Journal of Conflict and Security Law* 28, no. 2 (Summer 2023): 203–230. https://doi.org/10.1093/jcsl/krad004.

Medhora, Rohinton P., and Taylor Owen. "A Post-Covid Digital Bretton Woods." *Project Syndicate*, 17 April 2020. https://www.project-syndicate.org/onpoint/digital-bretton-woods-new-global-governance-model-by-rohinton-p-medhora-and-taylor-owen-2020-04.

Meierhenrich, Jens. *Lawfare: A Genealogy*. Cambridge: Cambridge University Press, 2019.

Milanovic, Marko. "ICJ Delivers Preliminary Objections Judgment in the Ukraine v. Russia Genocide Case, Ukraine Loses on the Most Important Aspects." *EJIL: Talk!*, 2 February 2024. https://www.ejiltalk.org/icj-delivers-preliminary-objections-judgment-in-the-ukraine-v-russia-genocide-case-ukraine-loses-on-the-most-important-aspects.

Ming, Zhang. "China supports and upholds multilateral trading system." *EU Observer*, 26 July 2018. https://euobserver.com/stakeholders/142470.

Mälksoo, Lauri. *Russian Approaches to International Law*. Oxford: Oxford University Press: 2015.

Odermatt, Jed. "The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?" In *Structural Principles in EU External Relations Law*, edited by Marise Cremona. Hart Publishing, 2018.

Onyango, Gilbert. "Understanding the EU's Silence on ICJ 'Genocide' Case." *EU Observer*, 17 January 2024. https://euobserver.com/africa/157935.

Paikin, Zachary, Gilang Kembara, Andrew Mantong and Steven Blockmans. "The South China Sea and Indo-Pacific in an Era of "Multipolar" Competition. A more targeted EU response?" JOINT Research Paper No. 14, February 2023. https://www.ceps.eu/ceps-publications/the-south-china-sea-and-indo-pacific-in-an-era-of-multipolar-competition.

Pao, Jeff. "China 'Foreign Relations Law' to punish decoupling." *Asia Times*, 1 July 2023. https://asiatimes.com/2023/07/china-foreign-relations-law-to-punish-decoupling.

Pop, Valentina. "EU Presses Turkey to Align on Russia Sanctions." *Financial Times*, 11 October 2022. https://www.ft.com/content/eb64609f-862c-4fc9-ac90-8cf93e209229

Portela, Clara. "The EU's Use of 'Targeted' Sanctions: Evaluating Effectiveness." CEPS Working Document No. 391, March 2014. https://www.researchgate.net/publication/271325000_The_EU's_Use_of_'Targeted'_Sanctions_Evaluating_effectiveness.

Raik, Kristi, Steven Blockmans, Anna Osypchuk and Anton Suslov. "EU Policy towards Ukraine: Entering Geopolitical Competition over European Order." *The International Spectator* 59, no. 1 (2024): 39-58. https://doi.org/10.1080/03932729.2023.2296576.

Reid, Meagan. "Counting Carbon. "If you can't measure it, you can't manage it"." Silverado Policy Accelerator, 2 February 2022. https://silverado.org/news/counting-carbon-Silverado.

Report of the Fifty-First Conference Held at Tokyo, August 16th to August 22nd, 1964. London: International Law Association, 1964.

Roubini, Nouriel. "The Coming Greater Depression of the 2020s." *Project Syndicate*, 28 April 2020. https://www.project-syndicate.org/commentary/greater-depression-covid19-headwinds-by-nouriel-roubini-2020-04?utm_source=Project+Syndicate+Newsletter&utm_campaign=64d8372856-sunday_newsletter_03_05_2020&utm_medium=email&utm_term=0_73bad5b7d8-64d8372856-93839929&mc_cid=64d8372856&mc_eid=8c66b647be.

Rubin, Seymour J. "Organization of American States: Inter-American Juridical Committee Opinion Examining the U.S. Helms-Burton Act." *International Legal Materials* 35, no. 5 (September 1996): 1329. https://doi.org/10.1017/S0020782900024542.

Rudolf, Moritz. "The Hong Kong National Security Law. A Harbinger of China's Emerging International Legal Discourse Power." *SWP Comment* No. 56, November 2020. https://www.swp-berlin.org/10.18449/2020C56.

Samson, Adam, and Richard Milne. "Turkey calls on Sweden to take more 'concrete measures' before joining Nato." *Financial Times*, 1 October 2023. https://www.ft.com/content/8a61e886-b1c0-490b-a737-f5c841504a82.

Schaupp, Lukas. "The EU's Anti Coercion Instrument between EU Strategic Autonomy and Member State Sovereignty." European University Institute, LAW Working Paper No. 8, December 2023. https://cadmus.eui.eu/handle/1814/76168.

Schunz, Simon. "Becoming a 'Spacifier' – Why the European Union needs a 'Global Spaces' Strategy and What it Could Look Like." College of Europe Policy Brief no. 3.23, December 2023. https://www.coleurope.eu/sites/default/files/research-paper/Schunz_CEPOB_3-2023.pdf.

Sciutto, Jim. *The Shadow War. Inside Russia's and China's Secret Operations to Defeat America.* New York: HarperCollins Publishers, 2019.

Sharp, Alexandra. "Zelensky Renews Call for Special Tribunal to Prosecute Putin." *Foreign Policy*, 4 May 2023. https://foreignpolicy.com/2023/05/04/zelensky-hague-speech-putin-ukraine-russia-icc-special-tribunal-nuremberg.

Shepardson, David, Karen Freifeld and Alexandra Alper. "U.S. moves to cut Huawei off from global chip suppliers as China eyes retaliation." *Reuters*, 15 May 2020. https://www.reuters.com/article/idUSKBN22R1IP.

Sherr, James. "The Mortgaging of Ukraine's Independence." Chatham House Briefing Paper, August 2010. https://www.chathamhouse.org/sites/default/files/public/Research/Russia%20and%20Eurasia/bp0810_sherr.pdf.

Smis, Stefaan, and Kim van der Borght. "The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts." The *American Journal of International Law* 93, no. 1 (January 1999): 227-236. https://www.jstor.org/stable/i350363.

Smith, Hanna. "The Geopolitics of Cyberspace and the European Union's Changing Identity." *Journal of European Integration* 45, no. 8 (6 December 2023): 1219-1234. https://doi.org/10.1080/07036337.2023.2277329.

Sonnenfeld, Jeffrey, Steven Tian, Franek Sokolowski, Michal Wyrebkowski and Mateusz Kasprowicz. "Business Retreats and Sanctions Are Crippling the Russian Economy." Social Science Research Network, 20 July 2022, last revised 2 August 2022. https://ssrn.com/abstract=4167193.

Stoll, Tobias, Steven Blockmans, Jan Hagemejer, Christopher A. Hartwell, Henner Gött, Kateryna Karunska, Andreas Maurer. *Extraterritorial Sanctions on Trade and Investments and European Responses*. Brussels: European Union, 2020. https://www.ceps.eu/wp-content/uploads/2021/01/EXPO_STU2020653618_EN.pdf.

Sukhankin, Sergey. "Chinese PSCs: Achievements, Prospects, and Future Endeavors." *The Jamestown Foundation*, 20 November 2023. https://jamestown.org/program/chinese-pscs-achievements-prospects-and-future-endeavors/?mc_cid=cf1dedccad&mc_eid=923f96b358.

Szyszczak, Erika. "EU Enforcement of International Trade Rules." UK Trade Policy Observatory, Briefing Paper No. 55, March 2021. https://blogs.sussex.ac.uk/uktpo/publications/eu-enforcement-of-international-trade-rules.

Tan, Su-Lin. "China-Australia relations: Canberra's plan to scrap research accord labelled 'act of revenge' over trade dispute." *South China Morning Post*, 30 December 2020. https://www.scmp.com/economy/china-economy/article/3115827/china-australia-relations-canberras-plan-scrap-research.

"The Share of Russian Gas in EU Supplies has Dwindled." *Financial Times*, 11 January 2024. https://www.ft.com/content/46d2f5a7-37ab-4196-bd00-754b9dfe7fb0.

"The worrying precedent in China's quarrel with Australia." *Financial Times*, 29 November 2020. https://www.ft.com/content/ad0b272e-12d4-42f4-9db6-6b5de768f297.

Tiefenbrun, Susan W. "Semiotic Definition of "Lawfare"." *Case Western Reserve Journal of International Law* 43, no. 1 (2010): 29-60. https://scholarlycommons.law.case.edu/jil/vol43/iss1/3.

Timofeev, Ivan, and Dmitry Kiku. "New Stage of EU Sanctions Policy: Extraterritorial Measures." *Valdai Club*, 18 October 2022. https://valdaiclub.com/a/highlights/new-stage-of-eu-sanctions-policy-extraterritorial.

Ungphakorn, Peter. "Technical Note. Appeals 'Into the Void' in WTO Dispute Settlement." *Trade Beta Blog*, 13 February 2021. https://tradebetablog.wordpress.com/technical-note-appeals-into-the-void-in-wto-dispute-settlement.

United State Department of Commerce. "Commerce Department Statement on US District Court Ruling on TikTok Preliminary Injunction." 27 September 2020. https://2017-2021.commerce.gov/news/press-releases/2020/09/commerce-department-statement-us-district-court-ruling-tiktok.html.

United States Department of Defence. "National Defense Strategy of the United State of America, March 2005." https://history.defense.gov/Historical-Sources/National-Defense-Strategy.

United States Department of State. "G7 Japan 2023 Foreign Ministers' Communiqué." 18 April 2023. https://www.state.gov/g7-japan-2023-foreign-ministers-communique.

---. "Iran Sanctions." Last accessed 6 May 2024. https://www.state.gov/iran-sanctions.

van Elsuwege, Peter. "The Ukrainian Grain Imports Saga." *Verfassungsblog*, 27 April 2023. https://verfassungsblog.de/the-ukrainian-grain-imports-saga.

Verellen, Thomas, and Alexandra Hofer. "The Unilateral Turn in EU Trade and Investment Policy." *European Foreign Affairs Review* 28, Special Issue (2023): 1-14. https://doi.org/10.54648/eerr2023011.

Wang, Orange. "China's national security screening rules for foreign investments enter force." *South China Morning Post*, 19 January 2021. https://www.scmp.com/economy/china-economy/article/3118371/chinas-national-security-screening-rules-foreign-investments.

Weller, Marc. "Time for Another Ukrainian Genocide Case?" *EJIL: Talk!*, 6 February 2024. https://www.ejiltalk.org/time-for-another-ukrainian-genocide-case.

Wessel, Ramses A., and Joris Larik (Eds.). *EU External Relations Law Text, Cases and Materials,* Second Edition. United Kingdom: Hart Publishing, 2020.

Wessel, Ramses A., and Steven Blockmans (Eds.). *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations*. Hague: T.M.C. Asser Press, 2013.

White, Edward. "US-China tech war reveals vulnerabilities on both sides." *Financial Times*, 30 October 2023. https://www.ft.com/content/0b43bf8d-e13b-4603-80c9-d2cddf920770.

White, Edward, William Langley and Harry Dempsey. "China imposes export curbs on graphite." *Financial Times*, 20 October 2023. https://www.ft.com/content/8af8c05c-8e54-40e9-9051-5a0b2b036c32?emailId=9ba832ac-522c-4ef2-bc67-07abf5220793&segmentId=2785c52b-1c00-edaa-29be-7452cf90b5a2.

Wilson Richard Ashby (Ed.). *Human Rights in the 'War on Terror'*. Cambridge: Cambridge University Press, 2005.

Wilson, Tom, and Adam Samson. "The Turkish Terminal Helping Disguised Russian Oil Reach Europe." *Financial Times*, 30 January 2024. https://www.ft.com/content/e5be1cac-3901-4066-a036-f78546b55eaf?segmentId=114a04fe-353d-37db-f705-204c9a0a157b.

Wolczuk, Kataryna, and Rilka Dragneva. "Russia's Longstanding Problem with Ukraine's Borders." Chatham House Explainer, 24 August 2022. https://www.chathamhouse.org/2022/08/russias-longstanding-problem-ukraines-borders.

Wright, Georgina, Louise Chetcuti and Cecilia Vidotto Labastie. *Extraterritoriality: A Blind Spot in the EU's Economic Security Strategy*. Paris: Institut Montaigne, January 2024.

Yi, Wang. "贯彻对外关系法，为新时代中国特色大国外交提供坚强法治保障 [Implement the Foreign Relations Law and provide a strong legal guarantee for major-country diplomacy with Chinese characteristics in the new era]." *Qiushi*, 29 June 2023. http://www.qstheory.cn/qshyjx/2023-06/29/c_1129723078.htm.

Zhang, Jing, Tamer A. Soliman, Jennifer L. Parry and Shelby L. Colson. "Key Changes and Updates to Chinese Export Controls in 2023." Mayer Brown, 1 February 2024. https://www.mayerbrown.com/en/insights/publications/2024/02/key-changes-and-updates-to-chinese-export-controls-in-2023.

Zhang, Wenliang. *Recognition and Enforcement of Foreign Judgments in China: Rules, Practices and Strategies*. Kluwer Law International, 2014.

"习近平在中央全面依法治国工作会议上强调 坚定不移走中国特色社会主义法治道路 为全面建设社会主义现代化国家提供有力法治保障 [Xi stresses sticking to socialist rule of law with Chinese characteristics]." *Xinhua*, 17 November 2020. https://archive.vn/9opaG.

RECENT ICDS PUBLICATIONS

REPORTS

Lawrence, Tony, and Tomas Jermalavičius, with a contribution by Jan Hyllander. ***The Newest Allies: Sweden and Finland in NATO***. March 2024.

Raik, Kristi, and Eero Kristjan Sild. ***Europe's Broken Order and the Prospect of a New Cold War***. October 2023.

Iwama, Yoko, Tetsuo Kotani, Sugio Takahashi, Tony Lawrence, and Henrik Praks. ***Allies Help Those Who Help Themselves: How Estonia and Japan Approach Deterrence***. September 2023.

Jermalavičius, Tomas, and Alice Billon-Galland. ***British Power in Baltic Weather: The UK's Role in Nordic-Baltic Security and UK-Estonia Defence Cooperation***. July 2023.

Gretskiy, Igor. ***Is There Life in the Desert? Russian Civil Society After the Full-Scale Invasion of Ukraine***. May 2023.

POLICY PAPERS

Akhvlediani, Tinatin, and Veronika Movchan. "**The Impact of Ukraine's Accession on the EU's Economy: The Value Added of Ukraine**." February 2024.

Maigre, Merle. "**An E-Integration Marathon: The Potential Impact of Ukrainian Membership on the EU's Digitalisation and Cybersecurity**." January 2024.

Raik, Kristi, and Steven Blockmans. "**Accelerator for a Geopolitical Europe: Potential Impact of Ukraine's Membership on EU Foreign, Security, and Defence Policy**." November 2023.

Blockmans, Steven. "**The Impact of Ukrainian Membership on the EU's Institutions and Internal Balance of Power**." November 2023.

Emerson, Michael. "**The Potential Impact of Ukrainian Accession on the EU's Budget – and the Importance of Control Valves**." September 2023.

ANALYSES

Crippa, Lorenzo. "**Putin's Henchmen: The Russian National Guard in the Invasion of Ukraine**." March 2024.

Arjakas, Merili. "**No Gain Without Pain: Estonia's views on EU enlargement**." March 2024.

Andersen, T. "**Renewable Power: How China Came to Dominate the Electric Vehicle and Battery Industry**." February 2024.

Hosaka, Sanshiro. "**A Forbidden Zone of 'No Limits' Friendship: Possibilities and Constraints in Sino-Russia**." January 2024.

Arjakas, Merili. "**A Tale of Two Populists: The Foreign Policy of PiS and Fidesz**." October 2023.

Peterson, Annabel. "**From Shadows to Spotlight: The Kremlin's Not-So-Covert Gambit for Ukraine**." October 2023.

Leveque, Arthur. "**The New Geopolitical Landscape in the EU's Eastern Neighbourhood: Fragmentation of Economic Ties Post February 2022**." September 2023.

Teperik, Dmitri. "**The Glass of Societal Resilience – Half Empty or Half Full? Perceptions of Socio-Economic Threats and Wellbeing in Estonia**." September 2023.

BRIEFS

Polyakov, Leonid. "**The Evolution of Grand Strategy**" (Russia's War in Ukraine Series Brief #2). April 2024.

Stavytskyy, Anrdiy. "**Mobilisation in Wartime**" (Russia's War in Ukraine Series Brief #1). March 2024.

Jater, Arianna. "**AI Unleashed or Tamed? Decoding Europe's Bold Leap with the AI Act**." March 2024.

Maria. "**China's Digital Silk Road: Outlines and Implications for Europe**." February 2024.

Verville, Francesca, and Catarina Buchatskiy. "**In a State of Denial: The Air War in Ukraine**." October 2023.

Adeoti, Kristin. "**New Frontiers: Estonia's Foreign Policy in Africa**." October 2023.

Lawrence, Tony, Toms Rostoks, Margarita *Šešelgytė, Henrik Larsen,* Mārtiņš Vargulis, Gintaras Bagdonas, and Iro S*ärkkä*. "**NATO's Vilnius Summit**" (Series of ICDS Briefs). July 2023.

Watkins, Peter. "**British Nuclear Policy**." May 2023.

All ICDS publications are available from https://icds.ee/category/publications/.


ICDS.Tallinn


@ICDS _ Tallinn


ICDS-Tallinn


www.icds.ee

International Centre for Defence and Security
63/4 Narva Rd., 10120 Tallinn, Estonia
info@icds.ee

ISSN 2228-0529
ISBN 978-9916-709-31-3(PDF)
978-9916-709-30-6 (print)