

U.S. V. PRC: COMPARATIVE APPROACHES TO LAWFARE IN THE SOUTH CHINA SEA

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This article provides a comprehensive analysis of maritime territorial disputes in the South China Sea through the lens of lawfare—the strategic use of legal means to achieve military and political objectives. The research examines these disputes, focusing on claimed historic rights and the contentious Nine-Dash Line asserted by China. It analyzes China’s military ambitions and compares them with the United States’ stance on ensuring freedom of navigation and adherence to international law. Central to this study is the role of international law, particularly the United Nations Convention on the Law of the Sea (UNCLOS), and the differing perceptions of this legal framework by China and the United States.

The 2016 ruling by the Permanent Court of Arbitration serves as a crucial point of analysis, highlighting China’s non-participation and subsequent rejection of the decision, which challenged its extensive maritime claims. The thesis explores the concept of lawfare, detailing China’s strategies, including land reclamation, domestic legislation, and military actions, as well as its broader strategy against Taiwan. It also examines and compares the United States’ approach to lawfare and critiques from various perspectives. Finally, the thesis proposes strategies for the United States to enhance its lawfare approach.

I. INTRODUCTION

The South China Sea, a critical maritime region, has become a focal point of international tension and geopolitical conflict. This area, rich in resources and strategically vital, is claimed by several countries including China, Vietnam, the Philippines, Malaysia, Brunei, and Taiwan. The overlapping claims, particularly those involving China’s expansive Nine-Dash Line, have heightened tensions and led to a complex geopolitical struggle that threatens regional stability and global maritime security.

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The historical backdrop of these disputes is epitomized by the concept of “historic rights” and the infamous “Nine-Dash Line” claimed by China. This demarcation, which extends deep into the South China Sea and into neighboring countries’ Exclusive Economic Zones, overlaps with areas claimed by other nations and has been a source of contention in the region. China’s strategic objectives in the South China Sea, including the establishment and expansion of military bases on reclaimed islands, further exacerbate the tensions.

The United States, while neither a claimant in the South China Sea nor a signatory to the United Nations Convention on the Law of the Sea (UNCLOS), plays a significant role in the dynamics of the South China Sea disputes. The United States’ strategic interest in the South China Sea and the outcome of these disputes directly contrasts with the interests of China. For example, the United States advocates for full freedom of navigation rights in the South China Sea in accordance with international law, while China aims to prevent such access and claims the entire South China Sea as its own. This has led to a delicate balance of power and frequent diplomatic and military interactions in the region.

International law, particularly the UNCLOS, serves as a critical framework for addressing these disputes. However, the differing perceptions and interpretations of international law by the claimant countries, especially China and the Philippines, complicate the resolution of these conflicts.¹ China’s non-participation in the 2016 Permanent Court of Arbitration (PCA) proceedings and subsequent rejection of the ruling underscore the challenges in enforcing international law in such disputes.

A notable aspect of the South China Sea conflict is the use of “lawfare,” or the strategic use of legal means to achieve military and political objectives. Both China and the United States employ lawfare tactics, though their strategies and objectives differ significantly. China’s approach includes land reclamation, domestic legislation, and military presence, while the United States focuses on promoting international law and conducting Freedom of Navigation Operations (FONOPS).

The United States faces the challenge of improving its lawfare strategy to effectively counter China’s actions and uphold international norms. This involves potential steps such as ratifying UNCLOS, increasing FONOPS, bolstering treaty alliances, and developing a comprehensive lawfare strategy that integrates diplomatic, military, and legal efforts.

¹ The 2016 ruling by the Permanent Court of Arbitration (PCA), which rejected China’s extensive claims in the South China Sea, was a landmark decision.

This thesis explores the comparative approaches of the United States and China to lawfare in the South China Sea. It examines the historical context of the disputes, the strategic goals of the claimants, and the role of international law. It further analyzes the 2016 PCA ruling and its implications, as well as the distinct lawfare strategies employed by China and the United States. The study concludes by proposing ways in which the United States can enhance its lawfare approach, advocating for the ratification of UNCLOS, increased FONOPS, strengthened alliances, and a comprehensive lawfare strategy.

II. MARITIME TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA

The critical importance of the South China Sea as it relates to international trade and commerce cannot be overstated. An estimated 40 percent of global trade passes through the South China Sea annually.² The South China Sea, comprised of 3.5 million square kilometers and containing between 28 and 213 billion barrels of hydrocarbon deposits, is the source of various competing territorial claims involving China, the Philippines, Vietnam, Malaysia, Taiwan, and other Southeast Asian states.³ Contrary to international law, China claims the entire South China Sea as its own. As a peer competitor to the United States, China considers maintaining sea control of the South China Sea a matter of paramount strategic importance in any future plans to take military action against Taiwan.

A. *Claimants in the South China Sea*

Throughout history, the South China Sea has been the home of many competing maritime claims. More recently and in the 1950s, “rival claims to the legal titles and control over the islands in the South China Sea have come to exist between China, Taiwan, and several Southeast Asian countries, with Vietnam over the Paracels and the Spratlys; with the Philippines, Malaysia, Brunei over the Spratlys; and with the Philippines over the Scarborough Shoal.”⁴ Notably, Taiwan’s maritime claims in the South China Sea virtually mirror those of China. In fact, Taiwan sided with China’s position that Itu Aba is an island, not a rock, during its 2016 Permanent Court of Arbitration dispute with the Philippines.

Japan and Indonesia also have competing maritime claims against China in the South China Sea. In 1951 and after the end of World War II, Japan renounced its claims to the features in the South China Sea in the Treaty of San

² Douglas Guilfoyle, *The Rule of Law and Maritime Security: Understanding lawfare in the South China Sea*, 95(5) INT’L AFFS. 999, 1005 (2019).

³ Anne Hsiu-An Hsiao, *China and the South China Sea “Lawfare,”* 52(2) ISSUES & STUDS. 1, 2 (2016).

⁴ *Id.* at 4.

Francisco.⁵ In 1958 and after the first United Nations Convention on the Law of the Sea (UNCLOS I), China made its first declaration to the international community over “China’s Territorial Sea” by claiming sovereignty over the Spratly Islands, Paracel Islands, Pratas Islands, Penghu Islands, Macclesfield Bank, and other features in the South China Sea.⁶

B. Historic Rights

In claiming the entire swath of the South China Sea as its own, China consistently alludes to its “historic rights” therein. In arguing that the Spratly and Paracel Islands belong to China, China cites maps and charts drafted during the 14th and 17th centuries that depict islands in the South China Sea as Chinese territory.⁷ China alluded to “historic rights” in the South China Sea in its domestic 1999 Exclusive Economic Zone (EEZ) and Continental Shelf Law and its 2011 Note Verbale, but did not clarify whether it claims sovereignty over its waters, all islands inside the South China Sea, or both.⁸

The United States Department of State views China’s “historic rights” claim as a savings clause—a claim that is not backed up by credible evidence or references.⁹ According to the United States Department of State, China’s claim has no legal basis in international law because there is no “uniform understanding of what the term means” nor is it addressed—expressly or impliedly—in the UNCLOS.¹⁰

C. Nine-Dash Line

Unquestionably the most controversial and disputed of China’s maritime claims in the South China Sea is its declaration of the Nine-Dash Line (Figure 1). The origin of the Nine-Dash Line can be traced back to 1948 where it was published by the Republic of China’s Interior Ministry in Taiwan.¹¹ The Nine-Dash Line encompasses 2,000,000 square kilometers, 80 percent of the South

⁵ Steve Lorteau, *China’s South China Sea Claims as “Unprecedented”*: Sceptical Remarks, 55 CAN. Y.B. INT’L L. 72, 80 (2018).

⁶ *Id.*

⁷ Clare McKendry, All is Fair in Law and War, or is it? Examining the PRC’s Use of “Lawfare” in the South China Sea Disputes (Aug. 23, 2023) (M.A. thesis, University of Guelph) (on file with University of Guelph).

⁸ U.S. DEP’T OF STATE, BUREAU OF OCEANS AND INT’L ENV’T AND SCI. AFFS., LIMITS IN THE SEA REPORT NO. 143 CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA 15 (2014).

⁹ *Id.* at 18.

¹⁰ U.S. DEP’T OF STATE, BUREAU OF OCEANS AND INT’L ENV’T AND SCI. AFFS., LIMITS IN THE SEA REPORT NO. 150 PEOPLE’S REPUBLIC OF CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA 9 (2012) [hereinafter LIMITS ON THE SEA REPORT NO. 150].

¹¹ Priscilla Tacujan, *Chinese Lawfare in the South China Sea: A Threat to Global Interdependence and Regional Stability*, 10 J. POL. RISK 1, 2 (2022).

China Sea that abuts the coastlines of the Philippines, Vietnam, Malaysia, Brunei, and Indonesia.¹² The origins of the Nine-Dash Line are murky at best. Douglas Guilfoyle asserts that the line “did not appear on government maps earlier than 1947 or on private cartographical maps earlier than 1933” but the line “took on a life of its own without the PRC government ever coming to an agreed official position on what it represented.”¹³ Critics of the Nine-Dash line point to the changing nature of the locations of the dashes and the fact that the dashes are not tied to specific geographic locations as reasons why China’s claims are baseless.

Figure 1: Overview map of the South China Sea with key features labeled.¹⁴



¹² *Id.*

¹³ Guilfoyle, *supra* note 2, at 1011.

¹⁴ LIMITS IN THE SEA REPORT NO. 150, *supra* note 10.

Moreover, prominent Chinese scholars Gao and Jia confirmed that the legal implications of the Nine-Dash Line have never been defined and that the line is an assertion of China's sovereignty over the enclosure waters and features.¹⁵ Gao and Jia explain that the Nine-Dash Line has three meanings:

[F]irst, it represents the title to the island groups that it encloses. In other words, within the nine-dash line in the South China Sea, China has sovereignty over the islands and other insular features, and has sovereignty, sovereign rights, and jurisdiction—in accordance with UNCLOS—over the waters and seabed and subsoil adjacent to those islands and insular features. Second, it preserves Chinese historic rights in fishing, navigation, and such other marine activities as oil and gas development in the waters and on the continental shelf surrounded by the line. Third, it is likely to allow for such residual functionality to serve as potential maritime delimitation lines.¹⁶

Richard Heydarian explains that the Nine-Dash Line was drawn by “Chinese cartographers who sought to overcome the country’s national humiliation amid imperial collapse, warlordism, and Western-Japanese imperial encroachment, by drawing crude, expansive maps.”¹⁷ It was not until 2009 that China formally asserted the Nine-Dash Line in response to its neighboring Southeast Asian countries aligning their maritime claims with UNCLOS.¹⁸ Curiously, China asserts non-binding “historic rights” in claiming sovereignty over the South China Sea and the land features inside it.

Unsurprisingly, the United States and the preponderance of the international community disagree with- and do not recognize the Nine-Dash Line. The United States State Department in its Limits in the Seas series issued by the Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific, argues that China’s expansive maritime claims in the South China Sea “are inconsistent with international law as reflected in the 1982 UNCLOS.”¹⁹ Further, the United States Department of State states that China’s excessive maritime claims “gravely undermine the rule of law in the oceans and numerous universally-recognized provisions of international law

¹⁵ Guilfoyle, *supra* note 2, at 1011.

¹⁶ Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status and Implications*, 107(1) AMER. J. INT’L L. 98, 124 (2013).

¹⁷ Richard Javad Heydarian, *Mare Liberum: Aquino, Duterte, and the Philippines’ Evolving Lawfare Strategy in the South China Sea*, 10(2) ASIAN POL. & POL’Y 283, 290 (2018).

¹⁸ *Id.*

¹⁹ LIMITS IN THE SEA REPORT NO. 150, *supra* note 10, at 1.

reflected in the UNCLOS” and that “United States and numerous other States have rejected these claims in favor of the rules-based international maritime order within the South China Sea and worldwide.”²⁰

D. *China’s Military Goals in the South China Sea*

According to Steve Lorteau, China uses a Mahanian approach to reinforce its claims in the South China Sea by rapidly building up its Navy, constructing military bases on artificial islands in the South China Sea, and aggressively posturing and maneuvering its naval vessels against foreign vessels.²¹ Knowing that sea control of the South China Sea in a military invasion of Taiwan is essential, China uses its artificial islands in the South China Sea to advance an area denial strategy in the first island chain to create a hostile environment for foreign navies.²² Many believe that China aims to deny foreign military operations in the South China Sea in order to be the “gatekeeper for maritime and airspace traffic in the South China Sea.”²³ China’s critics believe that China’s claims and assertions of “historic rights” to the South China Sea are the most plausible legal argument because other countries, including the United States, have successfully asserted similar historic rights claims to disputed islands.

E. *United States’ Position on South China Sea Disputes*

Historically, the United States has taken a neutral stance on the various competing maritime claims in the South China Sea. However, in recent years starting in 2010, the United States has been more critical of China’s behavior. In July 2010, then-Secretary of State Hillary Clinton renewed the United States’ South China Sea policy during a speech at the Association of Southeast Asian Nations (ASEAN) Regional Forum: “the United States, like every nation, has a national interest in freedom of navigation, open access to Asia’s maritime commons, and respect for international law in the South China Sea.”²⁴ At the same forum in August 2014, then-Secretary of State John Kerry publicly criticized China’s behavior:

We do care deeply about the way countries behave in pursuing their claims. Intimidation, coercion, or use of force by any one of the claimants—these actions by anybody are unacceptable . . . that is why we questioned China’s decision to begin drilling operations—accompanied by numerous paramilitary and

²⁰ *Id.*

²¹ Lorteau, *supra* note 5, at 100.

²² Guilfoyle, *supra* note 2, at 1010.

²³ Lorteau, *supra* note 5, at 107.

²⁴ Hsiao, *supra* note 3, at 15.

military vessels—in an area claimed by both Vietnam and China. It’s also why we expressed concern over continued restrictions on access to Scarborough Reef and interference with the Philippines’ activities at Second Thomas Shoal as well as extensive and accelerating land reclamation activities at several features in the South China Sea.²⁵

In July 2020, the United States Department of State increased its public criticism of China by declaring, “Beijing’s claims to offshore resources across most of the South China Sea are completely unlawful, as is its campaign of bullying to control them” and reiterated the United States’ preference for peaceful resolution of maritime disputes.²⁶

III. THE ROLE OF INTERNATIONAL LAW IN SOUTH CHINA SEA DISPUTES

Douglas Guilfoyle offers that “international law provides tools for mutual cooperation and coexistence, processes whose importance can easily be overlooked given that they operate in the background, underpinning international affairs.”²⁷ Through its words and actions, China continues to be the biggest challenger to the international rules-based order in the region.

A. *China’s Perception Toward International Law*

China’s approach to international law differs from that of the United States and the West in that the “Sino-centric world order was formed by tributary relations between a universal, central kingdom with dependent entities or independent though nominally vassal states of the Emperor.”²⁸ By contrast, the Westphalian system was based on sovereign equality and balance of power between nation states.²⁹ Historically, Chinese societies were ruled by the principles of “Li”—rules of custom and conduct, morality and ethical concepts, a sort of natural law—and “Fa”—legal enactments or positive law.³⁰ Under Confucian principles, Li was preferred over Fa.³¹

China’s modern approach to international law is centered on sovereign equality in international affairs.³² According to Anne Hsiao, China is an emerging

²⁵ *Id.* at 16.

²⁶ Tacujan, *supra* note 11, at 7.

²⁷ Guilfoyle, *supra* note 2, at 1006.

²⁸ Hsiao, *supra* note 3, at 20.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Lorteau, *supra* note 5, at 77.

great power that tries to incrementally change the system, if not the fundamental rules of the game.³³ Fundamentally, China is dissatisfied with the current international order, which it argues favors the West and “assumes the superiority of European or Western civilization and imposes norms and values upon other civilizations.”³⁴ To that end, China employs international law as an “instrument to achieve national policy, including military objectives, such as the role of lawfare envisioned in the Chinese People’s Liberation Army’s three warfares,” which consist of public opinion warfare, psychological warfare, and legal warfare.³⁵ China is suspicious about the influence of the West on international law and believes that the contours of international law were imposed upon China unfairly.³⁶

B. UNCLOS

The current international legal framework as it relates to the law of the sea is the UNCLOS.³⁷ The UNCLOS was “prompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world.”³⁸

1. China’s Position on UNCLOS

Because it did not become a member of the United Nations until 1971, China did not participate in the negotiations of the first two United Nations Conferences of the Law of the Sea of 1958 and 1960 (UNCLOS I and UNCLOS II), respectively. Once China became a member of the United Nations, it fully participated in the negotiations of the third United Nations Conference of the Law of the Sea (UNCLOS III) and ultimately ratified the resultant UNCLOS in 1996. Despite its ratification of the UNCLOS, China has been critical of some of its provisions—particularly the right of foreign warships to conduct innocent passage in its territorial waters, the definition of continental shelf, and the international

³³ Hsiao, *supra* note 3, at 23.

³⁴ *Id.* at 21.

³⁵ *Id.*

³⁶ Lorteau, *supra* note 5, at 23.

³⁷ The UNCLOS, signed in 1982, was the culmination of three United Nations Conferences on the Law of the Sea held between 1958 and 1982, and replaced four conventions on the law of the sea that were incorporated at the conclusion of the first United Nations Conferences on the Law of the Sea in 1958.

³⁸ U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

deep seabed regime.³⁹ China also objects to foreign warships operating inside its EEZ and seeks to regulate foreign commercial and military activity therein.

2. United States Position on UNCLOS

The United States participated in the negotiations of UNCLOS I, II, and III but has never signed the convention and is currently not a party to the UNCLOS, citing objections to provisions relating to deep seabed mineral resources and other sovereignty-related issues that do not align with United States' economic interests.⁴⁰ In 1994 and in response to some states' (including the United States) objections over deep seabed mining provisions of the UNCLOS, signatories and non-signatories to the UNCLOS reached an agreement to assuage these concerns by offering the United States a seat on the Council of the International Seabed Authority. Notwithstanding these concessions, the United States has still not ratified the UNCLOS.

As a result of the United States' failure to ratify the UNCLOS, China has repeatedly criticized the United States and routinely questions its credibility on maritime dispute matters relating to the South China Sea. For example, China's Vice Foreign Minister Xie Feng stated, "the United States wants only the benefits of the Convention without fulfilling its obligations and is saying one thing while doing another" and that the United States "is in no position whatsoever to cite UNCLOS to accuse others."⁴¹

Ever since the UNCLOS was opened for signature, the Executive Branch of the United States including every Secretary of State, Secretary of Defense, Chairman of the Joint Chiefs of Staff, and Secretary of the Navy, has supported the ratification of the UNCLOS. The Department of Defense supports implementation of the UNCLOS because it "would help preserve the Department of Defense's ability to move forces on, over, and under the world's oceans, whenever and wherever needed" and to "establish stable maritime zones; codify innocent passage, transit passage, and archipelagic sea lanes passage rights; recognize unrestricted military activities on the high sea; work against 'jurisdictional creep' by preventing coastal States from expanding their own maritime zones; and reaffirm sovereign immunity of warships, auxiliaries and government aircraft."⁴²

³⁹ Hsiao, *supra* note 3, at 22.

⁴⁰ Office of the Staff Judge Advocate, U.S. Indo-Pacific Command, *The United States Position on the U.N. Convention on the Law of the Sea (UNCLOS)*, 97 INT'L L. STUD. 81, 82 (2021).

⁴¹ McKendry, *supra* note 7, at 62.

⁴² OSJA INDOPACOM, *supra* note 40, at 82.

China has objected to the United States Navy's freedom of navigation operations ("FONOPS"), arguing that FONOPs violate UNCLOS and China's sovereignty. Specifically, China alleges that "FONOPs are not consistent with the universally recognized international law as such programs disregard the sovereignty, security, and maritime rights and interests of many littoral countries, and seriously jeopardizes regional peace and stability."⁴³ Both countries accuse each other of only complying with international law if doing so suits their interests.

IV. 2016 PERMANENT COURT OF ARBITRATION RULING

In 2013, in response to China's assertion of its Nine-Dash Line and repeated encroachments into islands and features within the Philippine Exclusive Economic Zone (EEZ) and the Philippines' inability to militarily confront China, the Philippines sued China in the Permanent Court of Arbitration (PCA) at The Hague.⁴⁴ In a brilliant use of lawfare against China, the Philippines requested the PCA to rule on the Philippines' entitlements under UNCLOS to the various islands and features within its EEZ including the Spratly Islands, Scarborough Shoal, Mischief Reef, Sabina Shoal, and others.⁴⁵ By using a legal approach to resolve its maritime dispute with China, the Philippines gained the respect of the international community and secured a favorable outcome.⁴⁶

A. *Chinese Non-Participation to PCA Proceedings*

China refused to participate in the PCA, citing "its policy of resolving disputes on territorial and maritime rights only through direct consultation and negotiation with the countries directly involved."⁴⁷ In 2014, China published an extra-judicial position paper arguing that the tribunal lacked jurisdiction over the matters charged by the Philippines because the matters concerned sovereignty over maritime features and "historic titles."⁴⁸ According to China, the Philippines had an obligation to negotiate with China prior to filing an arbitration claim in the PCA, which the Philippines argued that it had.⁴⁹ According to Goldenziel, "China likely was concerned that it would lose both at the jurisdictional phase and on the

⁴³ McKendry, *supra* note 7, at 63.

⁴⁴ Renato Cruz De Castro, *The 12 July 2016 Permanent Court of Arbitration's (PCA) Award: The Philippines' Lawfare versus China's Realpolitik in the South China Sea Dispute*, 8(3) INT'L J. CHINA STUD. 347, 350 (2017).

⁴⁵ *Id.* at 356.

⁴⁶ *Id.* at 350.

⁴⁷ *Id.* at 357.

⁴⁸ Guilfoyle, *supra* note 2, at 1012.

⁴⁹ *Id.* at 1111.

merits, and thought its best strategy was to attempt to debunk the legitimacy of the entire process rather than to participate at all.”⁵⁰

B. PCA Ruling

On October 29, 2015, the PCA ruled in the Philippines’ favor in 14 of its 15 claims against China’s territorial claims in the South China Sea.⁵¹ In so doing, the PCA determined it had jurisdiction over the maritime disputes between the two countries, contrary to China’s position.⁵² Article 280 of the UNCLOS requires parties to settle their disputes by any peaceful means.⁵³ In the event that no settlement has been reached by the parties, Article 287 gives any party to the UNCLOS the right to submit their dispute to a court or tribunal for adjudication under the UNCLOS.⁵⁴ Under the same article and by virtue of being a party to the UNCLOS, China is deemed to have accepted arbitration for any unsettled dispute. Accordingly, the PCA held that China’s decision not to participate in the proceedings did not prevent the PCA from asserting jurisdiction over the case.⁵⁵

In its findings, the PCA held that China’s so-called Nine-Dash Line and related historic rights to the South China Sea have no basis in international law and violate the UNCLOS.⁵⁶ Further, the PCA did not find any evidence that China had ever historically exercised exclusive control over the South China Sea or the resources contained therein.⁵⁷ Moreover, the PCA held that Chinese seafarers and fishermen exercised high seas freedoms of navigation in their previous voyages in the South China Sea and that such voyages did not grant China any historic rights to the South China Sea.⁵⁸

With respect to the hotly-contested Spratly Islands, the PCA ruled that these features were incapable of sustaining human habitation in their natural form and were dependent on human resources and support; therefore, these rocks do not warrant 200 nautical mile EEZs or a continental shelf.⁵⁹ The PCA also found that China destroyed the marine environment by constructing artificial islands on

⁵⁰ Jill I. Goldenziel, *Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare*, 106 CORN. L. REV. 1085, 1111 (2021).

⁵¹ See Award on Jurisdiction and Admissibility (Phil. v. China), PCA Case Rep. 2013-19, ¶ 413 (Perm. Ct. Arb. 2015).

⁵² *Id.*

⁵³ UNCLOS, *supra* note 38, at 129.

⁵⁴ *Id.* at 131.

⁵⁵ Phil. v. China, *supra* note 51.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

top of reefs; violated Philippine sovereign rights by interfering with oil and gas exploration at the Reed Bank; and illegally constructed a facility on Mischief Reef, which sits on the Philippine continental shelf.⁶⁰ Ultimately, the PCA ruling was a stinging defeat to China, especially considering its reliance of international law as an instrument to achieve national policy.

C. *China's Response to Ruling*

From a domestic point of view, China's legal defeat was seen as a national humiliation.⁶¹ In response to the PCA ruling, China "adopted a four Nos" position: no acceptance, no participation, no recognition, and no implementation" throughout the South China Sea arbitral proceedings initiated by the Philippines."⁶² On May 21, 2014, China submitted a Note Verbale to the PCA, vowing to not accept or recognize the PCA's ruling.⁶³ China's Note Verbale put forward three sets of legal arguments as to why China is not bound by the PCA's ruling. First, China argued that the PCA did not have jurisdiction to rule on matters concerning the sovereignty of the maritime features in the South China Sea.⁶⁴ Douglas Guilfoyle found this to be the most persuasive of China's arguments and believes that the PCA has expanded its jurisdiction of disputes outside the scope of the original intent of UNCLOS.⁶⁵ Second, China argued that because it agreed with the Philippines to bilaterally settle their disputes, the Philippines breached their agreement under international law by filing a claim with the PCA.⁶⁶ Third, China argued the subject matter in dispute concerns maritime delimitation, which is outside the scope of the UNCLOS.⁶⁷

On July 13, 2016, China doubled down on its argument that disputes should be handled "based on the consent of the states concerned" and "resolved through agreement by parties directly concerned through negotiation and consultation" instead of third-party arbitration.⁶⁸ After the PCA ruling, China asserted its right to declare an Air Defense Identification Zone (ADIZ) and has continued conducting military patrols in the disputed features in the South China Sea, which have only increased over time.⁶⁹ To date, China has not yet declared an ADIZ over the South China Sea as it has over the East China Sea.

⁶⁰ *Id.*

⁶¹ Goldenziel, *supra* note 50, at 1128.

⁶² Hsiao, *supra* note 3, at 24.

⁶³ *Id.* at 26.

⁶⁴ *Id.*

⁶⁵ Guilfoyle, *supra* note 2, at 1013.

⁶⁶ Hsiao, *supra* note 3, at 26.

⁶⁷ *Id.*

⁶⁸ *Id.* at 27.

⁶⁹ *Id.* at 29.

V. LAWFARE

The concept of “lawfare” was first popularized by United States Air Force Major General Charles J. Dunlap, Jr., who defined lawfare as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”⁷⁰ Dunlap, in the wake of the September 11, 2001, terrorist attacks, pejoratively coined the term “lawfare” and used examples of “relatively weak United States adversaries using legal principles dishonestly and strategically to ‘handcuff the United States’ in an effort to ‘exploit our values to defeat us.’”⁷¹ According to Joel Trachtman, Dunlap “saw a dual goal of lawfare: (i) to deprive United States forces of certain weapons or tactics and (ii) to undermine the support of the United States public for United States military goals.”⁷²

The definition of lawfare has been transformed over the years since Dunlap’s first mention of it. West and Insisa describe lawfare as “the use of law as a means of accomplishing what might otherwise require the application of traditional military force.”⁷³ Jill Goldenziel defines lawfare as

1) the purposeful use of law taken toward a particular adversary with the goal of achieving a particular strategic, operational, or tactical objective, or 2) the purposeful use of law to bolster the legitimacy of one’s own strategic, operational, or tactical objectives toward a particular adversary, or to weaken the legitimacy of a particular adversary’s particular strategic, operational, or tactical objectives.⁷⁴

J. L. Comaroff argues that lawfare is not just used by weak states or actors against superior adversaries and that “lawfare is the effort to conquer and control indigenous peoples by the coercive use of legal means.”⁷⁵ Regardless of which definition prevails, lawfare, at its core, is a form of hybrid warfare that is

⁷⁰ Major General Charles J. Dunlap, Jr., USAF, *Lawfare Today: A Perspective*, YALE J. INT’L AFFS. 146, 146 (2008).

⁷¹ *Thoughts on “Lawfare”*, LAWFARE (Sep. 8, 2010), <https://bit.ly/4qgCsqa>.

⁷² Joel P. Trachtman, *Integrating Lawfare and Warfare*, 39(2) BOS. COLL. INT’L & COMPAR. L. REV. 267, 275 (2016).

⁷³ Michael J. West & Aurelio Insisa, *Reunifying Taiwan with China through Cross-Straight Lawfare*, 257 CHINA Q. 186, 189 (2024) (quoting Charles J. Dunlap, Jr., *Lawfare 101: A Primer*, MIL. REV. 8, 9 (2017)).

⁷⁴ Goldenziel, *supra* note 50, at 1097.

⁷⁵ John L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, 26(2) L. & SOC. INQUIRY 305, 306 (2001).

employed by countries all across the world “by which offensive action is carried out against the enemy without using the force of arms.”⁷⁶

The concept of lawfare has been further delineated between positive and negative lawfare whereby positive lawfare “attempts to ensure legitimacy and justification for one’s course of action or secure one’s advantage in a strategic operation” whereas negative lawfare “aims to challenge the legitimacy of an opponent, to undermine the opponent’s ability or freedom to act against oneself, to increase the latter’s costs of such action, or simply to win a public relations or moral victory.”⁷⁷

David Kennedy offers the following linkage between war and law:

War is a complex organizational endeavor, whose management places law at the center of military operations. Law structures logistics, command and control, and the interface with all the institutions, public and private, that must be coordinated for military operations to succeed. At least in principle, no ship moves, no weapon is fired, no target selected without review for compliance with regulation. This is less the mark of a military gone soft, than the indication that there is simply no other way to make modern warfare work, internally or externally. Warfare has become rule and regulation.⁷⁸

A. *China’s Use of Lawfare*

Sun Tzu, the infamous Chinese military strategist, wrote “supreme excellence consists in breaking the enemy’s resistance without fighting.”⁷⁹ It is precisely through Sun Tzu’s lens that we should view China’s lawfare strategy. According to Jill Goldenziel, China is the world’s leading practitioner of lawfare.⁸⁰ China’s military doctrine consists of three pillars: psychological warfare, public opinion warfare, and legal warfare.⁸¹ China uses domestic laws and international law to gain “legal principle superiority” over its adversaries and emphasizes coordination between legal and kinetic warfare.⁸² Also, China employs lawfare over other forms of warfare because it is much less costly than

⁷⁶ Julian Chifu, *Fighting with the Legal Framework and Reaching Military Objectives by Using the Law*, in *THE CHANGING FACE OF WARFARE IN THE 21ST CENTURY* 83 (Routledge ed., 1st ed. 2017).

⁷⁷ Hsiao, *supra* note 3, at 4.

⁷⁸ David Kennedy, *Modern War and Modern Law*, 16 *MINN. J. INT’L L.* 471, 475 (2007).

⁷⁹ Sun Tzu, *The Art of War* (Capstone Pub’g trans., 2010).

⁸⁰ Goldenziel, *supra* note 50, at 1085.

⁸¹ West & Insisa, *supra* note 73, at 191.

⁸² Goldenziel, *supra* note 50, at 1093.

traditional warfare and it can be used to “exploit the West’s affection for the rule of law.”⁸³

According to West and Insisa, “Western scholars characterize Chinese lawfare as the use of all aspects of the law, including national law, international law, and the laws of war, in order to secure legal principle superiority and delegitimize an adversary.”⁸⁴ Western critics of China’s use of lawfare believe that China employs tactics of “legal layering,” “rotating arguments,” and the passage of domestic legislation to provide “a veneer of legality as China attempts to change the status quo.”⁸⁵ Further, China believes the rule of law is a Clausewitzian center of gravity for Western powers and believes that undermining the United States’ legal standing in the international community is an important part in its goal to change the international order in its favor.⁸⁶

1. China’s Lawfare Strategy in the South China Sea

Jill Goldenziel believes that “no state in the world currently has a lawfare strategy as sophisticated as China’s.”⁸⁷ Moreover, Goldenziel observes that China’s lawfare tactics are to interpret international law in a light most favorable to China, to issue domestic laws and regulations toward their maximalist assertions of sovereignty, and to use the information domain to publicize to the international community that their maritime claims comply with international law.⁸⁸ China asserts its maritime claims, notwithstanding the 2016 Permanent Court of Arbitration (PCA) ruling, by employing all the tools in its diplomatic, information, military, economic, financial, intelligence, and law enforcement (DIMEFIL) arsenal.⁸⁹ China also employs strategic ambiguity tactics in its legal claims to afford itself maximum maneuver space.⁹⁰ Specifically, China has never officially defined the legal significance of its Nine-Dash Line. It is unclear to the international community how it views the waters (for example, internal waters, territorial waters, EEZ) and land features contained within its Nine-Dash Line.

Priscilla Tacajun believes China’s lawfare strategy, as it pertains to disputes in the South China Seas, is to redefine the terms and application of the UNCLOS, use the information domain to carefully craft strategic messaging in its favor, redefine freedom of navigation, continue land reclamation and artificial

⁸³ Lorteau, *supra* note 5, at 78.

⁸⁴ West & Insisa, *supra* note 73, at 191.

⁸⁵ *Id.*

⁸⁶ Lorteau, *supra* note 5, at 78.

⁸⁷ Goldenziel, *supra* note 50, at 1091.

⁸⁸ *Id.* at 1129.

⁸⁹ McKendry, *supra* note 7, at 86.

⁹⁰ Lorteau, *supra* note 5, at 109.

island building in the South China Sea, pursue bilateral approaches to settle disputes with claimant countries, and avoid being bound by third-party international tribunals.⁹¹

2. Land Reclamation

China has engaged in significant and environmentally-destructive land reclamation and artificial island-building activities in its effort to establish its sovereignty over disputed areas in the South China Sea.⁹² Since 2013, China has created at least six man-made islands through dredging and other artificial means, mostly in the Spratly Islands, and has developed over 3,000 acres of land capable of stationing military assets.⁹³ In the Paracel Islands, China has built over 20 military outposts, thereby pushing out China's defensive perimeter and allowing it to stage missile systems and military aircraft.⁹⁴ In so doing, China has argued, contrary to international law, that these artificial islands should be treated as coastlines for UNCLOS purposes and be afforded 200-mile EEZs instead of 12-mile territorial waters as stipulated in the UNCLOS.⁹⁵

As justification for rejecting and not complying with the PCA's 2016 ruling, which ruled against China in 14 out of 15 claims that the Philippines submitted against China in court, China relies on its preference to resolve territorial disputes with other countries bilaterally to avoid interference by foreign powers such as the United States.⁹⁶ Tacujan argues that "China's insistence for bilateralism may weaken international law because it allows China to set rules that limit the ability of littoral states to contest Beijing's actions, such as a littoral state's right to file protests through official diplomatic channels."⁹⁷

3. Domestic Legislation

China has repeatedly used domestic legislation to extend its control over the South China Sea. The 1986 Fisheries Law virtually bans foreign fishing in the South China Sea and imposes fines and imprisonment for violators.⁹⁸ In 1992, China passed the Law on the Territorial Sea and the Contiguous Zone, which restricts foreign activities within China's territorial waters and requires foreign naval warships to obtain consent from China prior to entering its claimed

⁹¹ Tacujan, *supra* note 11, at 3.

⁹² *Id.* at 5.

⁹³ Guilfoyle, *supra* note 2, at 1000.

⁹⁴ Tacujan, *supra* note 11, at 5.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ McKendry, *supra* note 7, at 68.

territorial waters, contrary to the UNCLOS.⁹⁹ The 1998 Exclusive Economic Zone and Continental Shelf Act attempts to safeguard China's maritime rights and interests by forbidding "any international organization, foreign organization or individual engaging in maritime research in its EEZ and continental shelf without the prior approval of the Chinese government."¹⁰⁰ In the 1998 Law, China once again asserted its "historic rights" in the South China Sea. Most recently, in 2021, China passed its Coast Guard Law, which authorizes the Chinese Coast Guard to detain foreign ships and individuals for up to 60 days for entering its territorial waters.¹⁰¹ In its aim to legitimize its authority and control over the disputed islands in the South China Sea, China has created administrative districts in Sansha City, Xisha District, and Nansha District.¹⁰²

Much like the United States, China believes that its domestic authorities trump conflicting provisions of international law. Specifically, China's Supreme Court has ruled that China has jurisdiction over all areas that it claims under its sovereign control in the South China Sea, as drawn in its Nine-Dash Line.¹⁰³ China views foreign military operations within its EEZ as illegal because they violate their domestic laws. However, China believes that "since foreign states, such as the United States, have no domestic law prohibiting foreign military operations within their EEZ, China, therefore, can conduct military operations within another state's EEZ."¹⁰⁴

4. China's Use of Military

In light of China's ongoing massive buildup of its military, it is no surprise that China uses its military to support and advance its lawfare strategy and enforce its maritime claims. China uses its People's Armed Force Maritime Militia (PAFMM), otherwise known as "little blue men" in creative ways to engage in the "legal preparation of the battlefield."¹⁰⁵ China's PAFMM fleet consists of hundreds of vessels and thousands of civilian mariners who are not uniformed combatants under the Law of Armed Conflict (LOAC), but who may at any given time be incorporated into and commanded by the China's People's Liberation Army Navy (PLAN). Although it is unclear whether PAFMM would comply with the LOAC during armed conflict, China intentionally employs lawfare tactics to blur the legal status of their PAFMM. From an international law

⁹⁹ Lorteau, *supra* note 5, at 92.

¹⁰⁰ McKendry, *supra* note 7, at 67.

¹⁰¹ Chloe Yeung & Karen Hui, *China's New Coast Guard Regulations Up the Ante in Tense South China Sea*, ASIA PAC. FOUND. OF CANADA (July 4, 2024), <http://bit.ly/4gizLkk>.

¹⁰² McKendry, *supra* note 7, at 66.

¹⁰³ Tacujan, *supra* note 11, at 3.

¹⁰⁴ *Id.*

¹⁰⁵ Goldenziel, *supra* note 50, at 1107.

standpoint, PAFMM “do not meet the criteria for combatants because they are not under the command of a person responsible for his subordinates, they do not wear a fixed distinctive sign recognizable at a distance, they do not carry arms openly, and they do not conduct their operations in accordance with the law of war.”¹⁰⁶ Strategically, China uses the PAFMM and civilian fishing vessels to “salami-slice” parts of the South China Sea by effectively taking “small steps to assert its claims in the South China Sea—none of which are *casus belli* on their own—that over time can accumulate to a change in the status quo.”¹⁰⁷

5. China’s Lawfare Strategy Against Taiwan

According to West and Insisa, China employs a lawfare strategy against Taiwan using three foundational principles.¹⁰⁸ First, China considers the relationship between China and Taiwan as an internal dispute between a central and local government in an effort to prevent outside meddling and interference.¹⁰⁹ Second, China aims to eliminate diplomatic recognition of Taiwan and seeks to prevent it from participating in international organizations.¹¹⁰ Third, China seeks to prevent any ability of Taiwan to seek self-determination to become an independent state.¹¹¹

In 2005, China passed the Anti-Secession Law, which provides the Chinese government the authority to use military force to quell any rebellion or secession actions in Taiwan.¹¹² West and Insisa note that the Anti-Secession Law is the “‘foundation’ of an ‘all-round legal struggle’ aimed at ‘eliminating’ the ‘factual existence’ of the [Republic of China]” (Taiwan).¹¹³ In 2019, China passed the National Security Act, which provides broad authorities for the Chinese government to increase criminal penalties for existing national security offenses, criminalize the establishment of organizations in Taiwan for the official use of foreign governments, regulate investments in Taiwanese companies, expand government surveillance of the internet, and other measures.¹¹⁴ In 2020, China passed the Anti-Infiltration Act, which regulates the conduct of foreign actors and their potential influence on Taiwan’s political affairs.¹¹⁵

¹⁰⁶ *Id.* at 1106-07.

¹⁰⁷ *Id.* at 1105.

¹⁰⁸ West & Insisa, *supra* note 73, at 191.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 193.

¹¹³ *Id.*

¹¹⁴ *Id.* at 196.

¹¹⁵ *Id.* at 197.

B. United States' Use of Lawfare

The United States is a nation of laws, and warfare waged by its military forces is intended to be supported by law. In addition to the United States Constitution, international law and treaties, and domestic authorities, the Department of Defense Law of War Manual is the foundational agency regulation governing the conduct of the armed forces of the United States. As the most powerful economy and military in the world, the United States has a plethora of strategic DIMEFIL tools to advance its interests. The United States prides itself on its domestic democratic institutions and makes full use of international institutions to support its interests and preserve the post-World War II rules-based international order. Additionally, the United States is the primary funder of the world's most prominent international organizations such as the United Nations, the World Bank, and the International Monetary Fund.¹¹⁶

1. United States' Lawfare Strategy in the South China Sea

During the time period leading up to the 1995 Mischief Reef dispute between China and the Philippines, the United States took a neutral stance on territorial disputes in the South China Sea. In February 1995 and as a result of this dispute, the United States "reiterated its neutral position on the legal merits of the competing claims to the islands and other features in the South China Sea, but stressed its serious concern about any maritime claim or restriction on maritime activity therein that was not consistent with international law."¹¹⁷ Within the last decade and as a result of China's emergence as a global economic and military power, the United States has taken a more assertive and confrontational position against China and its maritime claims in the South China Sea.

The United States is not a signatory to the UNCLOS but acts in accordance with the treaty, which the United States deems consistent with customary international law.¹¹⁸ The United States military "conducts routine [FONOPS by sailing within 12 nautical miles of contested features] in the South China Sea, but has avoided the type of conflict with China that might escalate into kinetic operations, and allowed China's island-building to progress undeterred."¹¹⁹ In addition to conducting FONOPS, the United States Pacific Fleet uses the information domain to counter China's assertions and tactics in the South

¹¹⁶ Goldenziel, *supra* note 50, at 1138.

¹¹⁷ Hsiao, *supra* note 3, at 14.

¹¹⁸ OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 13.1.1 (31 July 2023), <http://bit.ly/45SzFvZ>.

¹¹⁹ Goldenziel, *supra* note 50, at 1089.

China Sea. In response to challenges by China, the United States regularly asserts that it will “fly, sail, and operate wherever international law allows”¹²⁰

Like China, the United States employs domestic legislation in furtherance of its national security. For example, the 2019 National Defense Authorization Act bars Chinese-manufactured technology to be used in United States defense systems for fear that such technology would be used for spying and surveillance. This provision primarily affected Chinese technology giant, Huawei.¹²¹

Additionally, the United States uses its criminal and civil court systems to go after foreign actors who threaten its national security. For example, the United States Department of Justice uses a wide variety of statutes, including material support of terrorism, immigration offenses, and export controls to prosecute wrongdoers in furtherance of national security.¹²² In 2020, the United States Justice Department sued Huawei in federal civil court under the Racketeer Influenced and Corrupt Organization Act and charged Huawei for stealing trade secrets and sensitive technologies from United States companies.¹²³

2. Critics of the United States Approach to Lawfare

Legal scholars Orde Kittrie and Jill Goldenziel argue that the United States’ use of lawfare against China in the South China Sea is inadequate and woefully behind that of China. Kittrie argues that the United States “lacks the capabilities to combat lawfare by its rivals, most notably the PRC, which is ‘waging lawfare much more diligently and systematically than the United States.’”¹²⁴ Goldenziel provides, “[t]he [United States] has no counterpart to [Chinese lawfare] programs, in doctrine or in manpower[, n]o agency within the [United States] government has an office dedicated to lawfare,” and “[m]ilitary lawyers are not trained in lawfare, nor are the vast majority of military officers and commanders.”¹²⁵ Although all United States’ executive branch actions must comply with the law, the United States does not consider lawfare to be a pillar of their warfare strategy nor does it prioritize its practice. In fact, the term “lawfare”

¹²⁰ Commander, U.S. 7th Fleet Public Affairs, United States Navy Destroyer Conducts Freedom of Navigation Operation in the South China Sea, U.S. Navy (May 10, 2024), <http://bit.ly/4pqrRtg>.

¹²¹ Goldenziel, *supra* note 50, at 1089.

¹²² Scott Ingram, *Replacing the “Sword of War” with “Scales of Justice”: Henfield’s Case and the Origins of Lawfare in the United States*, 9 J. NAT’L. SEC. L. & POL’Y 483, 505 (2018).

¹²³ “Chinese Telecommunications Conglomerate Huawei and Subsidiaries Charged in Racketeering Conspiracy and Conspiracy to Steal Trade Secrets,” United States Department of Justice (13 February 2020), <http://bit.ly/4mKMAGg>.

¹²⁴ McKendry, *supra* note 7, at 19.

¹²⁵ Goldenziel, *supra* note 50, at 1090.

is better understood by academics than those sitting in government. Critically, the fact that the United States has not ratified the UNCLOS, despite recognizing it as customary international law, diminishes its credibility when challenging China's violations of the UNCLOS.

Some scholars have observed similarities between China's approaches to maritime claims in the South China Sea with those of the United States in previous centuries. For example, Lorteau likens China's strategic ambiguity to the United States when it passed the Guano Islands Act in 1856, which allowed United States citizens to take possession of any unclaimed island containing guano deposits (seabird, seal, or cave-dwelling bat excrements that were used for fertilizing purposes).¹²⁶ Lorteau alludes to the Caribbean Sea having the same strategic importance to the United States against the British as the South China Sea is to China.¹²⁷ Lastly, the United States' occupation and administration of Johnston Island in the North Pacific Ocean has been compared to China's occupation and administration over the Spratly and Paracel Islands that were purportedly discovered by Chinese explorers in the thirteenth century.¹²⁸

VI. HOW THE UNITED STATES CAN IMPROVE ITS LAWFARE APPROACH

The United States should improve its lawfare approach in the South China Sea and globally by ratifying the UNCLOS, increasing the frequency of FONOPS, bolstering its relationships with allies and partners, and developing an integrated whole-of-government lawfare strategy.

A. Ratify UNCLOS

As a foundational matter, the fact that the United States is not a signatory to the UNCLOS undermines its credibility as the vanguard of a free and open Indo-Pacific, whereas its two biggest rivals in the region, China and Russia, are both signatories to the UNCLOS. As a practical matter and because it is not a party to the UNCLOS, the United States would not be able to file a claim with the PCA like the Philippines successfully did against China. Goldenziel points out that "when the [United States] declines to ratify a treaty but says that it will follow customary international law, as it does with UNCLOS, the [United States] could work to delineate and publicize the [United States'] position so as to bolster relevant legal norms."¹²⁹ Further, Trachtman questions, "if we could trust an international tribunal to apply law that the United States has accepted with the

¹²⁶ Lorteau, *supra* note 5, at 109.

¹²⁷ *Id.* at 74.

¹²⁸ *Id.* at 105.

¹²⁹ Goldenziel, *supra* note 50, at 1163.

integrity and legal regularity of our domestic courts, why would we not accept the jurisdiction of that tribunal as a way *ex ante* to show our audiences that we intend to comply with the law, and as a way *ex post* to definitively legitimize our actions?"¹³⁰ Therefore, the United States should finally ratify the UNCLOS.

B. *Continue and Increase FONOPS*

The United States has regularly conducted FONOPS all across the world since 1979 and intends to do so for the foreseeable future.¹³¹ Tacujan points out because 40% of the world's oceans lie within any country's EEZ, preserving the freedom of navigation within EEZs is essential to the global economy and to international peace and security.¹³² By claiming the South China Sea as its own, China aims to restrict the freedom of navigation of countries guaranteed under the UNCLOS, which impacts military operations of other countries and the free flow of international commerce. Therefore, it is critical for the United States, as the vanguard of the rules-based international order, to continue and increase the frequency of FONOPS to challenge China's excessive claims in the South China Sea.

In practice, I have observed the United States Navy apply an overly timid approach in challenging China's excessive maritime claims in and around the South China Sea. Specifically, the United States Navy applies more restrictive measures than what is promulgated in the Department of State's Limits in the Seas publications in an effort not to provoke its adversaries. By taking such apprehensive measures, the United States is essentially capitulating to China's strategic goals in the South China Sea. For example, the United States has allowed China to build artificial islands with military bases in the South China Sea and militarily bully the Philippines, its treaty ally, within the Philippine EEZ with impunity. Instead, the United States Navy should take a more assertive stance in and around the South China Sea by matching its navigational boundaries with the official boundaries laid out in the Department of State's Limits in the Seas publications, while complying with the UNCLOS.

C. *Bolster Treaty Alliances and Partnerships*

In the Indo-Pacific region, the United States has treaty alliances with Australia, Japan, Republic of Korea, the Philippines, and Thailand. Considering the strategic military and economic importance of the Indo-Pacific region to the United States and its enduring alliances in Southeast Asia, it is critical for the

¹³⁰ Trachtman, *supra* note 72, at 275.

¹³¹ Tacujan, *supra* note 11, at 7.

¹³² *Id.*

United States to continue to invest and develop these alliances instead of isolating itself and turning away from its position as the global leader and partner of choice for countries in the region. Further, the United States should increase the frequency and scope of its theatre security cooperation engagements and exercises with its partners and allies in the Indo-Pacific region. Whereas China and Russia are aiming to upend the rules-based international order and shift it in their favor, the United States has an affirmative duty to stand strong to preserve this order, which it can only do alongside its allies and partners.

D. *Develop an Integrated Lawfare Strategy*

Compared to China's comprehensive lawfare strategy, the lawfare strategy of the United States pales in comparison. The United States should progress from its piecemeal approach to lawfare and develop a whole-of-government approach. Notably, neither the 2022 National Security Strategy nor the National Defense Strategy mention lawfare. Goldenziel opines, "with its widely respected and highly developed judicial system and some of the best law schools and lawyers in the world,"¹³³ the United States should develop an articulate lawfare strategy across the interagency and continue to iterate it in order to effectively counter China's lawfare strategy. The United States Departments of Defense, Justice, State, Treasury, and Commerce are the most important stakeholders in such a strategy and should coordinate a coherent and centralized United States lawfare strategy. This strategy should also extend to the allies and partner of the United States in preserving the rules-based international order.

As part of its lawfare strategy, the United States should develop an integrated information lawfare strategy to use the information space to set the narrative in favor of the United States and its allies and partners, especially during contentious interactions with Chinese military forces in the South China Sea. The United States Indo-Pacific Command (USINDOPACOM) Office of the Staff Judge Advocate already has a public-facing website in support of its theatre campaign plan with links to its quarterly *Legal Vigilance Dispatch* publication, bi-lateral memoranda, legal articles, and tactical aids. However, USINDOPACOM and the Department of Defense can and should do more to advance its legal position and arguments into national strategic policy documents such as the National Security Strategy and the National Defense Strategy. Additionally, USINDOPACOM and United States Pacific Fleet should incorporate its lawfare approach through Theatre Security Cooperation engagements with its Southeast Asian partners and allies.

¹³³ Goldenziel, *supra* note 50, at 1098.

Goldenziel proposes the creation of a central lawfare office within the United States executive branch as “part of the National Security Staff, or an interagency effort, to avoid bureaucratic wrangling over the office’s function and assure interagency coordination.”¹³⁴ Further, the DoD should incorporate advanced lawfare training in its curriculum to military commanders beyond what legal advisors already provide within the executive branch at the tactical, operational, and strategic levels of war. Lastly, a cadre of specially-trained lawfare experts could “create publications and send experts to advance the interpretations of international law favored by the U.S.” and “advocate for our partners and allies to resolve disputes in legal fora whenever possible to bolster their use.”¹³⁵

VII. CONCLUSION

The South China Sea stands as a critical maritime region where overlapping territorial claims, historical narratives, and strategic interests converge to create a complex geopolitical landscape. This thesis has provided a comprehensive examination of these disputes, focusing on the comparative approaches to lawfare by the United States and China.

China’s assertive claims, underpinned by historic rights and the Nine-Dash Line, highlight its ambitions to dominate this vital region. The United States, on the other hand, seeks to maintain freedom of navigation rights and uphold the international rules-based order, presenting a stark contrast to China’s strategy. The role of the UNCLOS is central to these disputes, yet the differing interpretations by China and the United States underscore the challenges in achieving a consensus.

The 2016 Permanent Court of Arbitration ruling, which rejected China’s extensive claims, demonstrated the potential of international legal frameworks to address such conflicts. However, China’s non-participation and subsequent rejection of the ruling highlight the limitations of international law enforcement. Lawfare, as a strategic tool, has been employed by both China and the United States to further their respective goals. China’s multifaceted approach, including land reclamation, domestic legislation, and military actions, contrasts with the United States’ efforts to reinforce international norms through FONOPS and legal advocacy.

For the United States to effectively counter China’s actions and promote stability in the South China Sea, several strategic steps are necessary. Ratifying

¹³⁴ *Id.* at 1165.

¹³⁵ *Id.* at 1166.

UNCLOS would bolster the legal foundation of its position, while increasing FONOPS would assert its commitment to freedom of navigation. Strengthening alliances and partnerships in the region and developing an integrated lawfare strategy that combines diplomatic, legal, and military efforts are essential for a comprehensive approach.

This thesis underscores the importance of understanding the historical, legal, and strategic dimensions of the South China Sea disputes. By analyzing the comparative lawfare strategies of China and the United States, it offers insights into the intricate dynamics at play and provides actionable recommendations for policymakers. Navigating the complexities of the South China Sea requires a nuanced and multifaceted approach, one that balances strategic interests with the principles of international law to ensure peace and stability in this critical region.