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Hamstringing a Hegemon: Examining the Effectiveness of Lawfare in the South China Sea Disputes

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Philippine Navy Special Forces Sailor (Chief Warrant Officer 2 Troy Roat/Public Domain)

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INTRODUCTION

The South China Sea is the locus of a tense political struggle for territorial control between an increasingly aggressive regional power and a host of small states and their own respective sets of allies. In such a scenario, we can expect that China, the hegemonic state, will attempt to steer the discussions towards bilateral negotiations since its power projection and military capabilities tend to carry greater leverage against weaker states when talks are conducted on a one-on-one basis. In an international system characterized by the absence of a global government, power bends the arc of contention towards the hegemon.

On the other hand, small states in the region like the Philippines, Vietnam, and Brunei have a plethora of strategies and tactics for dealing with regional powers.[1] Their menu of options ranges from direct military balancing on one end and appeasing and bandwagoning on the other.[2, 3] This analysis will focus on the strategy that was chosen by the Philippines against China, which will be characterized as "lawfare." The paper will proceed as follows: First, it will seek to define the concept of "lawfare" as a strategy and then map out the conditions under which it can succeed and fail. Second, it will apply the framework that was developed in the initial section to the conflict between China and the Philippines in the South China Sea. Finally, the consequences of lawfare use will be assessed, with the end goal of understanding how the Philippines' victory in the Permanent Court of Arbitration (PCA) inexplicably led to reticence and bandwagoning, a case of historic success morphing into strategic retreat.

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CONCEPTUALIZING LAWFARE AS A STRATEGY OF REPOSITIONING

Lawfare, as a strategy for attaining national policy objectives, was initially characterized as perfidious. For example, Dunlap defined it as a strategy where "the rule of law is…hijacked into just another way of fighting, to the detriment of humanitarian values as well as the law itself."[4] As a tool of war, it was considered an "unfair" strategy that sought to manipulate or misuse legal rules in order to "handcuff" one's adversary.[5] Legal arguments in this context were characterized as bereft of any valid or substantive content, deployed merely to hamstring the actions of opponents, obfuscate their military operations, or discredit them before the eyes of world opinion. In the words of Rivkin and Casey,[6] it was the "growing use of international law claims, usually *factually or legally meritless*, as a tool of war" (emphasis added). It is a dishonest tactic that "exploits the vulnerabilities of 'law abiding' states."[7]

Related to this rather nefarious view of lawfare is the belief that it is a "weapon of the weak", a method employed by states with limited capabilities as a *substitute* for a test of military wills and capabilities. For example, Scheffer considered it to be a "particular form of asymmetrical warfare using the rule of law, or a particular interpretation of law, to thwart the use of the military power of far superior means."[8] Power disparity is central to its use: militarily superior entities have limited use for lawfare. It is employed by states who cannot win a "hard" war, and thus they resort to the "soft weapon of international law and sovereignty bashing treaties" in order to win on the altar of law what it cannot achieve in the theater of war.[9]

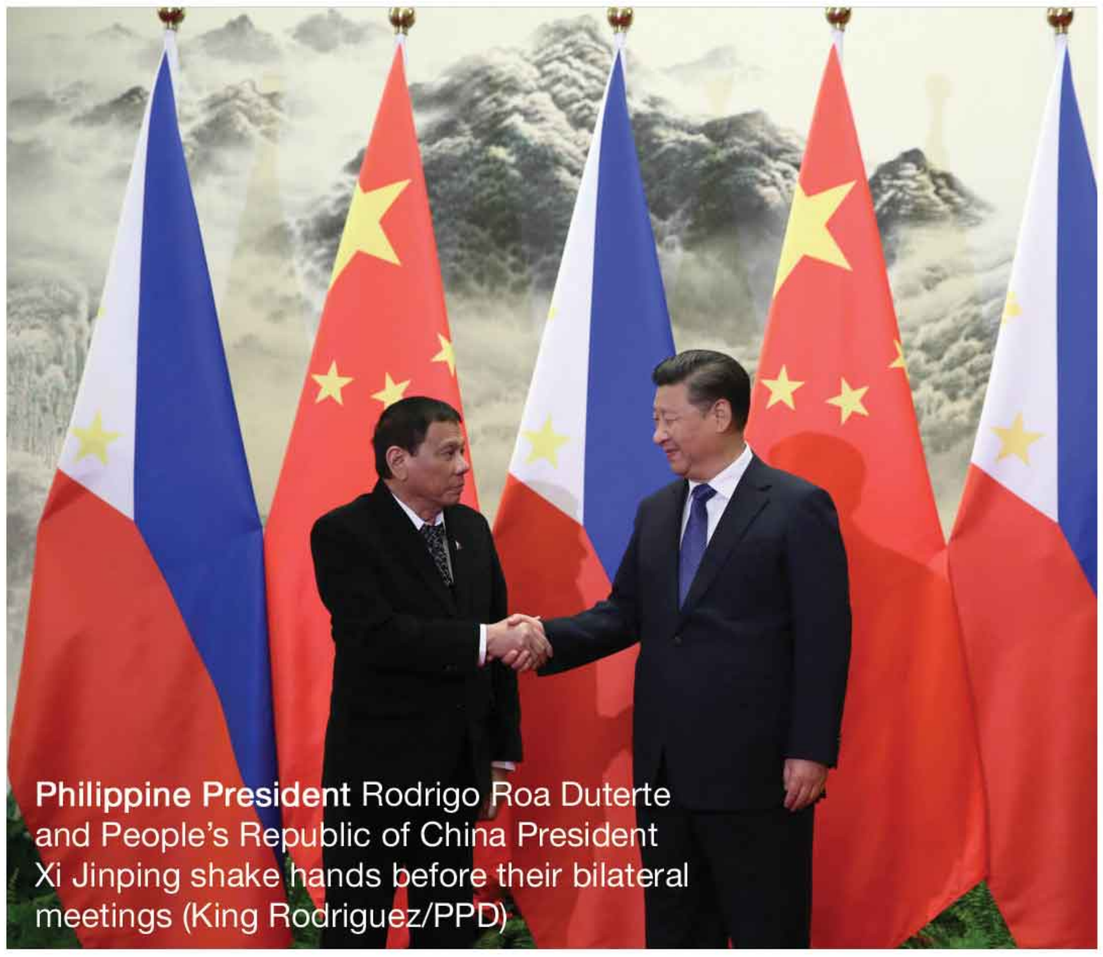
Critics of the concept contend that "lawfare theorists" employ the term in order to attack the positions that they do not favor. In this sense, "lawfulness" is in the eyes of the beholder, in the same way that the word "terrorism" is used by adversaries in armed conflicts to discredit the actions of their opponents. Schabas referred to it as a "word coined within the United States military and subsequently adopted by right-wing ideo-

-logues as a way of *stigmatizing* legitimate recourse to legal remedies" (emphasis added).[10] In other words, lawfare is a term that proponents use to undermine legal positions that they do not like, nothing more than a "rhetorical gambit to attack challenges to the behavior of the military behavior of Israel or the U.S."[11]

However, an emerging trend in the field tends to present a view of lawfare as a "neutral" tool for achieving policy objectives—it is not necessarily pernicious.[12, 13] For example, one of the concept's original proponents now considers lawfare as the "strategy for using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective."[14, 15] This latest treatment allows for the possibility of *the use of valid and substantive argumentation* in order to pursue political or military goals. For Trachtman, the rationale for its use is immaterial: lawfare as a legal activity can be used to "support, undermine, or substitute for other types of warfare."[16] He even mentioned what he considers to be its most attractive form, the use of lawfare "in place of kinetic warfare to prevent or even roll back aggressive war and to restrict unjust actions."[17] Dunlap now agrees that the concept is ideologically neutral, that it is "best conceptualized much as a weapon that can be wielded by either side in a belligerency."[18]

This paper utilizes this instrumentalist view of lawfare: it is a tool that can be wielded in support of any actor's political objectives. Lawfare is just as useful to the militarily-superior state in a conflict just as much as the weaker one. Law can be used to "overmatch an insurgent with an 'anaconda' effect produced by opposing him on too many fronts for him to handle at once".[19] I would argue that lawfare ultimately is a *strategy of re-positioning*: attempts to change the terrain of the environment to one where the user can press fully an advantage, to turn a disadvantaged position around, or to at least to level the playing field. Lawfare, seen in this way, is an attempt to address asymmetries in the political or military terrain towards one's favor. In the context of small states who are often at the weaker end of the "hard power" calculus, lawfare becomes an attractive option, if wielded effectively, to change both the terrain and tenor of battle.

This paper also argues that the most effective way of using lawfare is to embed it into an overall *strategy*. It is seldom effective as a discrete tactic or as a substitute for kinetic warfare. Lawfare, especially in offensive contexts, is best utilized as a *complement* to other instruments in pursuit of political and military goals. For example, litigation at various international fora can be used to hamstring the military and political operations of one's opponents as well as to "seize the political initiative."[20] It can be used to "outflank" one's adversaries by parlaying the legitimacy that emanates from legal victories into tactical use (e.g. to attract military allies or prevent a military maneuver). In other words, lawfare used in isolation is often doomed to failure. Legal victories, especially in the anarchical international system, can be hollow wins.[21] In the terrain of the international, what states do *before* and *after* a legal decision is just as important as the moment of receiving a favorable decision from an international tribunal.



Philippine President Rodrigo Roa Duterte and People's Republic of China President Xi Jinping shake hands before their bilateral meetings (King Rodriguez/PPD)

OUTFLANKING A HEGEMON THROUGH LAWFARE IN SOUTHEAST ASIA

Recently, the People's Republic of China (PRC) has become more heavy-handed in advancing its claims in the South China Sea. Offensive realism predicts that when a state becomes more powerful, it tends to become more aggressive. Shirk commented that:

> *China has started throwing its weight around.* It has defied international law and risked violent clashes in the East China and South China Seas...China's assertiveness stems in part, from its growing power; the country boasts the world's second-largest economy and its second-largest military budget" (emphasis added).[22]

Customary international law favors powerful states in instances of territorial disputes. In an anarchical system of sovereign states, claims are usually subjected to tests of will. However, the claim of the state that is able to demonstrate effective control tends to ripen into being the sole legitimate claim because the hard power behind lawfare soon overpowers the other disputants into acquiescence. In time, because of state practices and pronouncements, the issue becomes effectively moot. For example, in the case of the South China Sea, China has now begun to demand that states in the area first solicit the permission of the Chinese government before conducting any activities, including oil exploration.[23]

While China's expansive claims can be traced back to a map that it published in 1947 that contained a diagram of the area surrounded by an eleven-dash line,[24] China's increasingly aggressive lawfare on these land features can be traced back to its 1992 Territorial Sea Law. It provided the statutory foundation for the now "standard" map that encloses the South China on a "9-dash line." China's State Bureau of Surveying and Mapping is the repository of a host of regulations on the proper use of the map based on law, "making any version that does not include the South China Sea as Chinese territory illegal in China."[25]China ramped up its lawfare using two succeeding documents. China sent its now "standard" map that includes the "9-dash line" as part of its submission to the United Nations Commission on the Limits of the Continental Shelf. In 2011, a Foreign Ministry statement addressed to the United Nations contained a line about China's "indisputable sovereignty over the islands in the South China Sea and the adjacent waters."[26] In 2013, it added a tenth dash to cover territories to the east of Taiwan.[27]

The Philippines employed lawfare to strategically re-position itself against a militarily superior enemy. The first was recourse to the compulsory arbitration procedure in Article 9 of the United Nations Convention on the Law of the Sea (UNCLOS), Annex VII. The Philippines made sure to narrowly tailor its legal arguments, conveying that "it does not ask the Tribunal to rule on the territorial aspects of its disputes with China but only seeks "to clarify [the Philippines'] maritime entitlements in the SCS [South China Sea]."[28] Second, it proceeded to improve its bilateral capability balance with the PRC, upgrading its military forces with the end goal of creating a "credible deterrent posture against foreign intrusion or external aggression."[29] Finally, the Philippines reinvigorated its mutual defense relations with the United States through the Rotational Presence Agreement in 2012 and the Enhance Defense Cooperation Agreement in 2014. Taken together, they "conveyed a strong diplomatic signal to Beijing that it would have to take account of American military presence in the Philippines if it was to use force against Manila to resolve their intense territorial dispute in the South China Sea."[30] Effective lawfare demands that it be considered a *complement*, rather than as a *substitute*, for military activities in the pursuit of political objectives.

THE PHILIPPINES' RETREAT FROM LAWFARE TOWARDS BANDWAGONING

On July 12, 2016, the PCA delivered its most awaited ruling on the maritime dispute between the Philippines and the China. Despite China's non-participation in the litigation, the Court ruled that it had jurisdiction to decide on the case. When it was time to decide on the merits, the Court came down on the side of the Philippines on almost every issue.[31]

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First, the PCA ruled that the PRC's historical claims on these territories, which formed the basis of its bold "ten-dash line" in the South China Sea, was bereft of merit in an international legal environment now largely governed by UNCLOS. Second, the Court reviewed the conflicting claims on the nature of the territories under contention and concluded that most of them are not islands but "rocks." Since they are incapable of sustaining life, they are not entitled to a 200-nautical mile Exclusive Economic Zone. Finally, it held that the PRC had intentionally damaged the maritime area by its construction of artificial islands.[32]

It was a historic victory; one of those rare instances in which a major power lost in an international tribunal. Not surprisingly, the PRC derided the decision as "ill-founded" and "naturally void". When the case was filed, China accused the Philippines of lawfare in its pe-

jorative sense, "of attempting to deny China's territorial sovereignty and clothes its illegal occupation of China's islands and reefs with a cloak of 'legality'".[33] When the PCA decision was handed down, President Xi Jinping declared that "the Chinese government and the Chinese people firmly oppose [the ruling] and will neither acknowledge nor accept it."[34]

However, the change in administration in the Philippines also brought a change of strategy in the South China Sea. Whereas the former President Benigno Aquino Jr. stridently defended internal and coalitional balancing strategies against the PRC, the new administration under Rodrigo Duterte was intent on charting a new foreign policy path. It resolved early on to mute its historic victory in its external relations. The Foreign Affairs Department released a statement to the press "calling all on those concerned to exercise restraint and sobriety."[35] Foreign Affairs Secretary Perfecto Yasay stated that he is "averse" to the idea of the Philippines releasing a "stronger" statement about the Tribunal's decision.[36] China has explicitly stated that it is willing to more forcefully confront the Philippines if it places the PCA decision at the forefront of its China policy.[37]

The unraveling of the Philippines' lawfare strategy was abetted by the statements of President Duterte at the East Asian Summit that were explicitly derogatory of then-U.S. President Barack Obama.[38] The United States immediately called off a planned bilateral meeting. The strategic reversal seemed complete when President Duterte visited the PRC in October 2016 and agreed with Beijing to resolve their disputes in a bilateral framework, the dispute settlement mechanism favored by China. The switch to rapprochement was stark. Within China, the event was framed as an event that can "bring other estranged neighbors to China's orbit."[39]

The visit seems to provide a textbook example of a shift towards a strategy of *bandwagoning*. Mearsheimer states "badly outgunned by a rival, it makes no sense to resist its demands because the adversary will take what it wants anyway."[40] After President Duterte's visit, Filipinos were allowed to fish around Scarborough Shoal. In December 2016, Foreign Minister Yasay stated that the Philippines will not file a diplomatic protest on China's placement of anti-aircraft and anti-missile systems in the South China Sea: "Let them take whatever action is necessary for the pursuit of their national interest...and we will leave it at that."[41] The shift is now complete: the Philippines' milestone victory has morphed into strategic retreat.

CONCLUSION: LAWFARE'S PERNICIOUS CONSEQUENCES

The Philippine case demonstrates that unless lawfare is adopted as a consistent and complementary strategy, it is unlikely to succeed. Lawfare is adopted by small states as a strategy of re-positioning: it is an attempt to address power asymmetries by shifting the terrain of battle, or changing it all together. However, it is seldom successful as a substitute for kinetic military power. The Philippines under the Aquino administration (2010-2016) seemed to have understood this.

The Philippines' lawfare produced a ruling in its favor that has been described as a "milestone" decision.[42] However, instead of reinforcing the sound lawfare-based strategy that had been put in place, the Duterte administration feared intensified Chinese aggression. This contention is not unfounded: the PRC responded to the Philippines lawfare strategy by sending more ships to the disputed Scarborough Shoal, overwhelming the Philippines' meager fleet. It forced the Philippines to withdraw from the islands where three Chinese ships are now permanently stationed.[43] Foreign Secretary Yasay stated that the Philippines was content with enjoying some benefits it has reaped because of its bilateral agreements with the PRC and that "other countries could deal with other issues," like the Chinese introduction of anti-missile systems in the area, via bilateral talks.[44]

However, to believe that China would change its behavior and plans for the area, including those that it claims are "illegal occupied by the Philippines," due to the shift to a bandwagoning strategy seem misplaced. Even if the Philippines currently benefits in the short-term, bandwagoning relationships are characterized by a concession that the "formidable new partner will gain a disproportionate share of the spoils."[45] Shifting to this strategy has very seldom been effective. Great powers are programmed for offense and "are likely to interpret any power concession by another state as a sign of weakness."[46] "The strong do

what they can and the weak suffer what they must", said Thucydides. This is indeed where the Philippines currently stands: suffering what it must. From lawfare and a historic high, it has placed itself in a situation of increasing reliance on the mercy of the region's hegemon.

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