Lawfare

Lawfare:
Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments

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PREFACE

My Ph.D. advisor, Dr. Don K. Rowney, and Dr. Heinz Buhlman of Bowling Green State University first introduced me to Greg Peterson and the Robert H. Jackson Center in early 2005. I was intrigued by the part Robert Jackson played in the Nuremberg Trial and his hope that international law would allow us to confront one of the greatest menaces of his time, aggressive war. My interests leaned more to the Soviet perspective however. Years later, as I was discussing my theories with Dr. Albert U. Mitchum Jr., Political Advisor to the commander of Air Combat Command, Langley Air Force Base, Virginia, he introduced me to the concept of lawfare. The culmination of these two concepts is the work you have before you. It soon became clear that the term "lawfare," as currently used by the US military and foreign relations personnel, was not a new term but a concept arguably perfected by the Soviets. This study attempts to demonstrate how the Soviet Union and later the Russian Federation utilized lawfare to manipulate and exploit the international legal system to supplement military and political objectives. The Soviets built a tried and true dual system of leading edge legitimacy and lawfare by promoting the definition of aggression and aggressive war. Unfortunately, aggressive war is not only still with us but remains undefined under the Rome Statute. The debate is ongoing. I hope this work in some small way contributes to Robert Jackson's goal of confronting that menace.

In order to try to understand the Soviet perspective, I spent a great deal of the summer of 2007 at Moscow State University and many of the Russian archives. The results of the countless hours spent in those archives are the majority of the primary documents referenced in the manuscript. That trip was made immensely less daunting by the assistance of Ludmila Alexandrovna Moshkareva. Ludmila accompanied me to the archives and supplemented my elementary command of Russian to make the process much more productive. Upon my return, I met Jim Toppin and Janet Traub. Jim's assistance was invaluable for both my language skills and translation. Although I worked with several people while translating the materials, any mistakes are all my own.

Finally, my family. To Mark, Nathan and Aubrey, your support is greatly appreciated. But this would not have been possible without the support of my daughter Ashley. I appreciate her support more than she knows and look forward to her many future successes.

INTRODUCTION

> With fighting going on all over the globe – including in India, Pakistan, Cyprus, the Congo, Cambodia, Vietnam and the Middle East – it was clear that it was easier to commit aggression than to define it.
> —Benjamin Ferencz[1]

In 1933, E.A. Jelf, in "What is 'War'? And What is 'Aggressive War'?" prophetically concluded that "the aggressor is the party who in the particular case has international law or the rules of morality against him. An aggressive war is a war waged by that party in pursuit of his aims."[2] Since that time, many have espoused the definition of aggression and aggressive war. None more so, however, than the Soviet Union and subsequently the Russian Federation.[3]

One might ask why the Soviet Union so adamantly promoted a definition of aggression and aggressive war while, as many have noted, conducting military actions that appeared to violate the very definition they espoused in international treaties and conventions.[4] This manuscript proposes that through the use of treaties to supplement military strategy, the Soviet Union and Russian Federation practiced a program of "lawfare" long before the term became known. Lawfare is the manipulation or

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[1] Benjamin Ferencz, "The United Nations Consensus Definition Of Aggression: Sieve Or Substance?" Presented at the Washington Conference on Law and the World, October 1955. www.benferencz.org/arts/13.html. (accessed 30 July 2008).

[2] E.A. Jelf, "What is 'War'? And What is 'Aggressive War'?" *Transactions of the Grotius Society* 19, Problems of Peace and War, Papers Read before the Society in the Year 1933. (1933):112.

[3] The term "Soviet Union" is used throughout this manuscript to mean the Union of Soviet Socialist Republics (USSR), a constitutional socialist state existing from 1922-1991. The Russian Soviet Federated Socialist Republic (RSFSR) was the largest of the Soviet republics of the Soviet Union. After the dissolution of the Soviet Union in 1991, the RSFSR became the Russian Federation.

[4] For the purposes of this study, the generic term "treaty" will be used from hereon as defined by the United Nations as a generic term encompassing all instruments binding at international law between international entities intended to create legal rights and duties in written form. See United Nationals Treaty Collection Reference Guide. http://untreaty.un.org/English/guide.asp.

exploitation of the international legal system to supplement military and political objectives.

The first use of the term lawfare is attributed to John Carlson and Neville Yeomans in "Whither Goeth the Law - Humanity or Barbarity." While examining the demise and re-emergence of humanitarian law, they concluded, "[l]awfare replaces warfare and the duel is with words rather than swords."[5] The concept was recently picked up by the US military as one of the greatest potential threats against the United States.[6] Colonel Charles J. Dunlap Jr. clarified the term as the use of law as a weapon of war.[7] Dunlap placed the argument in the context of the use of humanitarian law, or his preference, the law of armed conflict, against the United States. This angle has been pursued further by the Council on Foreign Relations, which defined lawfare, and specifically its use as an asymmetrical weapon, as "a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives."[8] This definition was generated from an 18 March 2003 Roundtable on National Security convened by the Council on Foreign Relations, at which lawfare was presented as a tool used against the United States.

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[5] John Carlson and Neville Yeomans, "Whither Goeth the Law - Humanity or Barbarity," in M. Smith and D. Crossley, eds. *The Way Out - Radical Alternatives in Australia* (Melbourne: Lansdowne Press, 1975). Paper at http://www.laceweb.org.au/whi.htm. (accessed 5 January 2009).

[6] Charles J. Dunlap, Jr., Colonel, USAF, "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts," Prepared for the Humanitarian Challenges in Military Intervention Conference Carr Center for Human Rights Policy Kennedy School of Government, Harvard University. Washington, D.C., November 29, 2001. http://www.duke.edu/~pfeaver/dunlap.pdf. (accessed 26 December 2008). Dunlap looked at lawfare from the perspective of a weapon that can be employed against the United States by a weaker power. See also his more recent article "Lawfare amid Warfare," *Washington Times*, 3 August 2007. http://www.washingtontimes.com/news/2007/aug/03/lawfare-amid-warfare/. His focus was on the use of lawfare by international groups claiming violations of humanitarian law by the United States.

[7] Ibid.

[8] "Lawfare, the Latest in Asymmetries," Council on Foreign Relations, March 18, 2003. http://www.cfr.org/publication/5772/lawfare_the_latest_in_asymmetries.html. (accessed 26 December 2008). Also see Radhika Withana, *Power, Politics, Law: International Law and State Behaviour During International Crises* (Leiden; Boston: Martinus Nijhoff Publishers, 2008). Withana suggested the influence of international law on state behavior involving the possibility of the use of force plays a decisive role. Her work looked at the relationship between international law and state behavior when an international crisis involves the threat or use of force.

Chadwick Austin and Antony Barone Kolenc examined this concept further, applying it directly to the International Criminal Court (ICC). For their purposes, they defined lawfare as "exploiting judicial processes to achieve political or military objectives."[9] They focused on asymmetric methods used by others to exploit the ICC in relation to the United States, specifically, misusing the investigative process, filing questionable or fraudulent complaints and manipulating the mass media.[10]

The media was often used (either legitimately or illegitimately) to propose to the public that a state was fighting illegally or immorally and to damage the public support needed to wage war. Although called "media warfare" by Austin and Kolenc as well as the Chinese People's Liberation Army colonels in *Unrestricted Warfare* described below, use of the media is simply a prominent part of old-fashioned propaganda, which arguably was perfected by the Soviet Union.

Propaganda, for our purposes, is "the attempt to transmit social and political values in the hope of affecting people's thinking, emotions, and thereby behavior."[11] Austin and Kolenc noted that "The practice of "media warfare" works hand-in-hand with the type of asymmetric exploitation of the ICC that could occur in the future."[12] For the purposes of this work our discussion of propaganda is limited to its use by the Soviet Union and the Russian Federation to proliferate the concept of lawfare as it relates to aggression and aggressive war.

Media warfare was also mentioned in the Chinese book *Unrestricted Warfare*.[13] Two Chinese People's Liberation Army colonels developed the concept of lawfare to the point that it created enough interest to catch the eye of the United States Military. Though not utilizing the term lawfare, they concluded that warfare with military forces is no longer the way to achieve national security or protect national interests. They claimed warfare transcends the military domain and increasingly falls into the

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[9] W. Chadwick Austin and Antony Barone Kolenc, "Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare," 39 *Vanderbilt Journal of Transnational Law*, no. 2, 291 (1 March 2006).

[10] Ibid.

[11] Peter Kenez, *The Birth of the Propaganda State: Soviet Methods of Mass Mobilization, 1917-1929* (Cambridge [Cambridgeshire]; New York: Cambridge University Press, 1985).

[12] Austin and Kolenc.

[13] Qiao Liang and Wang Xiangsui, *Unrestricted Warfare*, (Beijing: PLA Literature and Arts Publishing House, 1999). http://www.terrorism.com/documents/TRC-Analysis/unrestricted.pdf. (accessed 20 February 2009).

realm of politicians and other non-military.[14] They looked at warfare as it is reintroduced in many forms today, in fact, they called it "non-military war" and listed many examples besides media warfare: psychological warfare, network warfare, technological warfare, fabrication warfare, economic aid warfare, cultural warfare and international law warfare. They described international law warfare as "seizing the earliest opportunity to set up regulations."[15] They explained that use of the forms of warfare by a weaker country against a stronger one amounted to asymmetric warfare. They concluded about asymmetry, "of all rules, this is the only one which encourages people to break rules so as to use rules."[16] Austin and Kolenc said it another way, "misuse of the ICC could provide asymmetric warriors the sling with which David can slay Goliath. A nation built on law can be undone by law."[17]

After applying these various definitions to the scenarios presented in this manuscript, it became evident that lawfare, at least as deployed by the Soviet Union, was primarily a supplement to military strategy and was used with a strategic intent and political motivation to manipulate the legal system, international bodies and other states. Clausewitz reminded us that military and political objectives are inextricably intertwined. For the purposes of supplementing the current concept of lawfare, the definition proposed by this manuscript is manipulation or exploitation of the international legal system to supplement military and political objectives.

Lawfare was not the sole domain of the Soviet Union or the Russian Federation. What makes the Soviet Union and the Russian Federation stand out is their use of lawfare earlier and with a greater degree of consistent strategic implementation than others. They continued to operate on a dual front, both legally in international bodies and through international law, and illegally or quasi-legally, by manipulating the system to supplement their military agenda. With a consistent definition for aggression and aggressive war in place, a degree of predictability to future actions of other states and international bodies such as the UN could be achieved. Even when situations arose quickly, such as Hungary in 1956, there was a set strategy in place. Typically, high-level discussions were followed by insertion of advisors into the state. A subsequent "invitation" was issued to the Red Army to intervene against a counter-revolution. A public claim was made that the Soviet Union was supporting the government under the principle of self-determination, or some other

[14] Ibid., 221.
[15] Ibid., 55.
[16] Ibid., 212.
[17] Austin and Kolenc. V. Conclusion.

exception to the definition set forth in treaties and the UN. Finally, the media was employed to supplement the strategy.

The strategic implementation of non-aggression treaties to set the stage for future military action by the Red Army or to restrict action from other armies was practiced repeatedly by the Soviet Union with states such as Finland, Latvia, Estonia, Poland and others. The preconceived binding of other countries, such as those of the Warsaw Pact, to enable the Soviet Union to intervene militarily and at least auspiciously claim it was in adherence to international law and treaty obligations demonstrated the dominion the Soviet Union had over the use of lawfare as a true supplement to military action. Scenarios such as the use of the definition of aggression and aggressive war by the jurists at Nuremberg and continuing propagation before international bodies such as the UN were not, taken by themselves, uses of lawfare. They were an example of strategic employment, within a legal context, to set the stage of their use later to supplement military strategy. This is what set the Soviet Union apart from many other states that also employed the strategy at one time or many times over the last sixty years. The combination of lawfare with propaganda or media manipulation was also perfected by the Soviet Union as evidenced in both the Korean and Vietnam Wars. Strategically, the Soviet military was employed but this time it supplemented the greater role of lawfare and propaganda. Since the definition includes manipulation of the system for both political and military objectives, it is possible to utilize the international legal system for political purposes not associated with imminent or future deployment of troops. Though others define lawfare as a strictly political weapon, or even the valid use of international law, this does not reach the level of its use by the Soviet Union, and we will not define it as such.

Key to lawfare is its use in a manipulative or exploitive fashion. Simply utilizing the international legal system to enforce valid laws would not be considered lawfare for our purposes. The article by Dunlap and the transcript from the Council on Foreign Relations both seem to express the greatest concern for valid legal claims of a humanitarian nature brought by a state or even a few individuals that could undercut American objectives. Therefore the state (for our purposes) that claims the United States violated international law under a given valid circumstance would be making a legal claim, therefore not manipulating the system, but simply seeking redress for a legal wrong.[18] Motives may be political at the same

[18] For another use of lawfare as a legitimate claim, see Craig H. Allen, "Command of the Commons Boasts: An Invitation to Lawfare." in Michael D. Carsten, ed.

time, however. Two examples demonstrate the legitimate use of the international judicial system, and although they also served to make a political statement and sway international opinion, they do not reach the level of lawfare used by the Soviet Union and Russian Federation. They do not demonstrate the preemptive strategic use of the international law system but the reactive use after a wrong, which sets them apart.

One example is the case of the *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran*), which was decided by the International Court of Justice on 24 May 1980. The court ruled Iran violated its obligations under international law to the United States and ordered it to release the US hostages. This was a legitimate use of the international justice system and though it was doubtful the United States thought this would force the release of the hostages, it did serve to sway international opinion and put international pressure on Iran.[19]

Another example of a case where the courts were used by a smaller state against a larger state was the *Case Concerning Military And Paramilitary Activities In And Against Nicaragua (Nicaragua v. United States Of America).*[20] The court rejected the defense of collective security put forth by the United States and ruled the United States violated international law by arming and training the *contra* forces in violation of the US obligation not to intervene in the internal affairs of another state. In fact, the court cited General Assembly Resolution 3314 (XXIX) as evidence that the collective self-defense claim by the United States was

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"Global Legal Challenges: Command of the Commons, Strategic Communications, and Natural Disasters," *International Law Studies*, vol. 83. (Newport, Rhode Island: Naval War College, 2007). At the 2006 Naval War College International Law Department conference on "Global Legal Challenges: Command of the Commons, Strategic Communications, and Natural Disasters," Allen offered his perspective in "Command of the Commons Boasts: An Invitation to Lawfare." After noting that concern for lawfare had found its way into US National Defense Strategy, he laid out a possible asymmetric scenario where a much less powerful state utilized the United Nations General Assembly to restrict access to, in his scenario, control of the sea, which had been claimed by a more powerful state. This tactic could be used whether the less powerful state had a legitimate claim or, as in his scenario, was used as a legal "pushback" in response to a public assertion by the more powerful state regarding its command of the sea. (16-17).

[19] *United States Diplomatic and Consular Staff in Tehran (United States of American v. Iran). Judgment, ICJ Reports 1980,* p. *3.* http://www.icj-cij.org/docket/files/64/6291.pdf. (accessed 1 April 2009).

[20] *Military and Paramilitary Activities in und against Nicaragua (Nicaragua* v. *United States of America). Merits, Judgment. ICJ Reports 1986,* p. 14. http://www.icj-cij.org/docket/files/70/6503.pdf. (accessed 1 April 2009).

not a valid use of force barring an invitation from the victim country. (Notice the Soviet Union in every intervention in this manuscript took care of this objection on the front end by at least "claiming" an invitation.)

Because it would be virtually impossible to codify every use of the international legal system for political purposes, and since they vary in degree to such an extent, this manuscript concentrates on the use of lawfare as a supplement to military strategy. The two cases above were reactions to a situation, not manipulation in advance of the system. They were also valid uses of the international law system.

The Soviet Union proves the perfect case study to demonstrate the use of lawfare. Though not noted for upholding treaties and adherence to rules, the Soviet government was expert at using laws to manipulate the international legal system in its favor as demonstrated by the evidence presented later. This concept, though expertly practiced for decades, has just begun to come to the attention of US military and academics. The Council on Foreign Relations claimed lawfare was a "somewhat new phenomenon, the full effects of its application are not yet known."[21] I argue that this is not a somewhat new phenomenon and has been practiced by the Soviet Union for decades, only under the auspices of aggression and crimes against peace rather than humanitarian law. In fact, Malbone Graham, in 1929, concluded that Soviet treaties at that time were aimed at predicting or controlling another state's behavior by virtue of a legal rule.

This manuscript looks at the use of the terms aggression and aggressive war by the Soviet Union and the Russian Federation as they practiced the art of lawfare through treaties and international public forums from 1933 to 1999. By doing so, it becomes evident that the use of lawfare is not new to the Soviet Union and Russian Federation. The concept was employed by the Soviet Union and the Russian Federation to supplement their foreign policy when it was necessary to "buy time" to prepare their military. It was employed to limit actions that could be taken against the Soviet Union and Russian Federation by other states. International law was utilized when the Soviet Union or Russian Federation was in a weaker military state to restrict the actions of others. Finally, propaganda, practiced as a supplement to lawfare, was used to their advantage to accuse other states of aggressive action in the pubic media.

A study of the Soviet Union's use of international law would not be complete without a short note on the influence of Marxism-Leninism on that process. I address it here to demonstrate the principles from which

[21] "Lawfare, the Latest in Asymmetries."

some of the later concepts such as the Brezhnev Doctrine were drawn and to show that there is more continuity than change in the application of international law by the Soviet Union and the Russian Federation. Under Marxist-Leninist theory, "[i]t is an axiom of Soviet legal scholarship that law is a superstructure of norms reflecting the class organization of society and serving the interests of the dominant class."[22] The state was the organization that advanced those interests.[23] Carrying this one step further, Nicholas Rostow noted, Soviet participation in the League of Nations and United Nations systems made "the Soviet Union a significant contributor to the enforceable superstructure that is international law."[24] This provides an indication of why the Soviet Union was so involved in propagating a definition of aggression and aggressive war. The more involved it became, the more influence it had on both the process and the outcome. This is evidenced throughout the manuscript as the definition changed little from that proposed by the Soviet Union in 1933 to that used in the 1974 General Assembly Resolution 3314 (XXIX).

Although Vladimir Il'ich Lenin recognized the right of self-determination, separatist movements challenged that concept. Joseph Stalin differentiated between "having" and "exercising" the right of self-determination and ultimately secession.[25] Because the communist party was the party of the proletariat and occupied a leading position among socialist states, another communist party could not secede from the Soviet Union. This argument was carried forward as justification for the invasion of Hungary in 1956, Czechoslovakia in 1968 and ultimately, formed the Brezhnev Doctrine.[26]

Nikita Sergeevich Khrushchev defined peaceful coexistence as an aspect of the ongoing international struggle of the proletariat against the

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[22] Nicholas Rostow, "Law and the Use of Force by States: The Brezhnev Doctrine," 7 *Yale Journal of World Publications Ord.* 209, 211 (1980-1981). Rowstow, in fact, outlined the use of Soviet legal theory much the same for Hungary, Czechoslovakia and Afghanistan as will be explained in more detail later in this manuscript. See also Edward McWhinney, "The 'New Thinking' in Soviet International Law: Soviet Doctrines and Practice in the Post-Tunkin Era" 28 *Canadian Yearbook of International Law* 309 (1990) and Alice Erh-Soon Tay and Eugene Kamenka, "Marxism, Socialism and the Theory of Law " *23 Columbia Journal of Transnational Law* 217 (1984-1985).

[23] Vratislav Pechota, "The Contemporary Marxist Theory of International Law," 75 *American Society of International Law Proceedings* 149 (1981).

[24] Rostow, 211.

[25] Ibid., 213-214.

[26] Ibid., 214.

aggressive imperialists.[27] By claiming this policy, Khrushchev not only exempted socialist states from this concept, but he "implicitly claimed for the Soviet government the role of ultimate judge of what is and is not a legal use of force."[28] Until the fall of the Soviet Union, policy and legal concepts were still being couched in terms of Marxist-Leninist theory.

After the fall of the Soviet Union and communism, the words associated with Marxism-Leninism were gone but the underlying strategic use of the principle remained. The 1993 Russian Constitution, in its preamble, did not mention The Great October Socialist Revolution or dictatorship of the proletariat. There was no reference to Marxism-Leninism. However, it did include a reference to self-determination. The excuse to support interventions to suppress counter-revolution in other socialist countries no longer existed but the primary reasons used during Soviet times such as an invitation by the government, self-determination of a nation's people, and self-defense are still viable today. The Russian Federation, as did the Soviet Union, continues to use the international system to its advantage, particularly by positioning itself at the forefront of defining aggressive war, both internally and through international bodies.[29]

In order to assess the use of the terms aggression and aggressive war in the context of military, political and legal settings, I use a mix of historical and legal methodology. Archival documentation of the decision-makers will be coupled with public proceedings, notes and minutes from international bodies. The heaviest focus is on the language of the treaties themselves to demonstrate the consistency with which the definition has been espoused. Press coverage will be added to demonstrate propaganda value. It is not my intent to recreate the historical events but to look at this documentation in the light of military actions to show a consistent, continuous, and calculated use of international law as a form of lawfare.

On a cautionary note, Igor Kavass warned that many of the published

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[27] Ibid., 220.
[28] Ibid.
[29] See Tarja Långström, "Russia in Transition: Reflections on International Law Doctrines" 66 *Nordic Journal of International Law* 475 (1997). The legal textbooks compared were G.I. Tunkin, (ed) *Mezhdunarodnoe pravo*, (Moskva: Yuridicheskaia literature,1982) and J. M. Kolosov and V. I. Kuznezov (eds) *Mezhdunarodnoe pravo*, (Moskva: Isdatel'stvo mezhdunarodnye otnosheniia,1995) for a comparison of two international law textbooks, one before the fall of the Soviet Union, one after. Långström concluded that the presentation of the doctrine of international law might appear to have changed over time, but the "hard juridical core" had experienced less change and exhibited considerable continuity. (504).

materials during the Soviet time were primarily propaganda.[30] He further cautioned, "The soul of the people is deep, and the true values and preferences of these individuals who make up the Soviet society are neither uniform nor easily discernable. Unlike some Western societies, where candor is encouraged, the art of dissembling is a fundamental trait of the Soviet character."[31] That being said, however, it is important to note that due to the public nature of lawfare and propaganda, there will be references throughout the manuscript to the "party line." These references are intentional and meant to demonstrate the use of propaganda at the time. It is also understood in Soviet foreign policy, that the law is created by a small group of individuals. It is not the intent of this manuscript to delve into the personalities of these individuals but to acknowledge that those personalities do play a large role. I have shown the internal decision-making process when it is available, but because the concept of lawfare is intentionally played out on the public stage, the results of those deliberations as they appear in the public domain take precedence.

I have used the transliteration system of the Library of Congress except for well-known names such as Vyshinsky, which are presented in their more common manner. A number of terms, abbreviations and acronyms are also simplified. For example, the Central Committee of the Communist Party of the Soviet Union, or CPSU CC, is simply referred to as the Central Committee. A glossary is included at the end, which will offer further assistance to the reader.

This introduction is followed by a brief treaty overview and comments on the general concept of aggression as emphasized by Soviet and Russian scholars, jurists and other legal specialists. Chapters One and Two serve to set the stage for the detailed analysis in the subsequent chapters. Treaty language presented in these chapters will be referenced throughout the work. Chapter Two, "Treaties Prior to WWII" focuses on a brief general history of the definition of the terms as addressed in the Covenant of the League of Nations, the Convention for the Definition of Aggression and other non-aggression treaties. Chapter Three, "The Molotov-Ribbentrop Pact, Poland and Finland," addresses the period of World War II. This chapter emphasizes the League of Nations' branding of the Soviet Union as an aggressor against Finland. Chapter Four, "The Nuremberg Trial and Individual Responsibility," focuses on the Soviet input on the definition of aggression to the trial and the international community. Chapter Five,

[30] Igor I. Kavass, *Soviet Law in English: Research Guide and Bibliography, 1970-1987* (Buffalo, N.Y.: W.S. Hein, 1988), 10.
[31] Ibid., 39.

"The Korean War," analyzes the Korean War and the 1950s. This period is noteworthy because it is a prime example of the use of lawfare and propaganda against an opponent, the United States. Chapter Six, "Hungary," covers the Soviet invasion of Hungary. Special emphasis is placed here on the debate within the UN General Assembly condemning the Soviet Union for aggression in 1956. Chapter Seven, "Czechoslovakia, Vietnam and General Assembly Resolution 3314 (XXIX)," covers those conflicts and concepts over the period of the 1960s and 1970s. Most noteworthy in this chapter is the 1974 General Assembly Resolution 3314 (XXIX) codifying the definition of aggression. Chapter Eight, "Afghanistan," is a good example of a clear contradiction between Soviet understanding of their actions versus the perspective they present in public. The 1980s and 1990s include Chechnya, the 1993 Constitution, the 1996 Criminal Code and the 1996 Draft Code of Crimes Against Peace and Mankind and are covered in Chapter Nine, "Chechnya, International and Internal Codification of Aggression." Chapter Ten concludes with a summary of the political and legal agreements used to define aggression and aggressive war from 1933 to 1999 and the military actions over the same period. It also features the 1999 definition of aggression posed to the International Criminal Court by the Russian Federation. The final analysis will demonstrate how the Soviet Union and Russian Federation utilized lawfare to achieve their political, legal and military objectives while at the same time, utilizing that same set of international laws against the opponent in a very public setting.

CHAPTER ONE

HISTORICAL SETTING

The same year Jelf concluded that the aggressor was the one without international law on its side, the Soviet Union took substantial steps to make sure it had a leading role in drafting those laws and other treaties which would substantially affect it. The Soviet Union posed a draft definition of aggression to the Committee on Security Questions to the General Commission of the Disarmament Conference for the Reduction and Limitation of Armaments on 6 February 1933. The definition was slightly revised on 24 May 1933 but was never finalized. For the purposes of this study, this is the beginning of a long history of the use of international law and treaties by the Soviet Union and Russian Federation to narrowly define the aggressor.[1]

Treaty Overview

During 1932 the Soviet Union signed non-aggression treaties with Finland, Latvia, Estonia and Poland. On 3 July 1933, the Soviet Union was a signatory to the Convention for the Definition of Aggression with other signatories from Romania, Estonia, Latvia, Poland, Turkey, Persia, and Afghanistan. Throughout 1933, the Soviet Union initiated several

[1] E. A. Korovin, Corresponding Member of the USSR Academy of Sciences, noted in the forward to K.A. Baginyan's *The Struggle of the Soviet Union against Aggression*, that this definition was based on broad historical experience with international conflicts of the imperialism era and proletarian revolutions. See K. A. Baginyan, *Borba Sovetskogo Soiuza protiv agressii*, Izdatel'stvo sotcial'no-ekonomichkoi litertury (Moskva, 1959). Baginyan reviews the historical facts and documents of the Soviet Government and people to maintain peace. He used works by Soviet and foreign (many American) jurists, international treaties and agreements, and official documents of the UN. The bibliography is especially helpful for sources from the 1920s - 1950s. As we have cautioned before, it is important to look at the time during which these statements were made. Though some works are quite objective, there is also a strong "party line" tendency, particularly if the work was published for an English reading audience.

treaties defining aggression between itself and countries such as Czechoslovakia, Turkey, Yugoslavia and Lithuania. These definitions focused on the state as the aggressor. The International Conference on Military Trials (the "London Conference" held 26 June – 8 August 1945), to which the Soviet Union was a party, established the London Charter of the International Military Tribunal in 1945, listing a war of aggression as one of the "Crimes Against Peace" to be used to prosecute individuals, in this case, the Nazi leaders. The International Military Tribunal at Nuremberg (Nuremberg Trial) and the International Military Tribunal for the Far East (Tokyo Trial) subsequently utilized the following definition for Crimes Against Peace:

> Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; [2]

In 1974, United Nations General Assembly Resolution 3314 (XXIX) of December 14, 1974 on the Definition of Aggression, with Special Regard to: Indirect Aggression was adopted. Article 3 reads:

> Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression;
>
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
>
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
>
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
>
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
>
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention

[2] Charter of the International Military Tribunal. II. Jurisdiction and General Principles, Article 6 (a). http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm. (accessed 1 August 2008).

of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 5 reads:

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful. [3]

This resolution, once again, focused on the state's role in aggressive acts. In 1996, the International Law Commission submitted The Draft Code of Offences against the Peace and Security of Mankind, which eventually only addressed the individual responsibility for aggression, having deleted the elements of the offense originally proposed in 1991 concerning state action.[4] In 1999 the Russian Federation posed the following definition to the Preparatory Commission of the International Criminal Court for consideration:

For the purposes of the present Statute and subject to prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating, carrying out a war of aggression. [5]

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[3] Definition of Aggression, G. A. Res. 3314 (XXIX) of 14 December 1974, U.N. Doc. A/RES/3314 (XXIX) 14 Dec 1974. http://www1.umn.edu/humanrts/instree/GAres3314.html. (accessed 7 October 2008).

[4] M. Cherif Bassiouni & Benjamin B. Ferencz, "The Crime Against Peace and Aggression: From its Origins to the ICC," *International Criminal Law* Vol. 1, Chapter 3.1, (3rd in print 2008, Transnational/Brill), 36. This is one of the most current historical overviews available on the subject.

[5] Proposal of the Russian Federation to the Preparatory Committee for the International Criminal Court. New York. 16-26 February 1999, 26 July–13 August 1999, 29 November–17 December 1999. PCNICC/1999/DP.12.

The ICC was created by the Rome Statute of the International Criminal Court (Rome Statute), which entered into force 1 July 2002.[6] It was designed to "exercise its jurisdiction over persons for the most serious crimes of international concern."[7] Article 5(1) of the Rome Statute lists the crime of aggression as falling within the jurisdiction of the ICC. It qualified it immediately thereafter, however, by stating, "[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime."[8] The Assembly of State Parties established a Special Working Group on the Crime of Aggression (SWGCA) in 2002.[9] The SWGCA was mandated to submit proposals on the crime of aggression to the Assembly of State Parties no earlier than 2009 for consideration as an amendment to the Rome Statute.

This manuscript is situated in the midst of this ongoing debate. As I write, there are conferences being held and new publications coming out monthly on the issue of defining aggression. It is my hope that this analysis will assist in the understanding of the terms of aggression and aggressive war and expand on the understanding and ramifications for their use, both as a means for preventing aggressive war and to better understand how they are used as a form of lawfare. Variations of the definition are applied in separate instances to the state and the individual. Both will be discussed throughout this work as they appear chronologically in the treaties to which the Soviet Union and Russian Federation are a party. They are inextricably woven in the ongoing debate and each is important in its own right as evidenced in the following section. Let us begin with the understanding, as stated by George Ginsburgs, that "As one might expect, the record of Soviet contributions to

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http://untreaty.un.org/cod/icc/documents/aggression/english/1999.dp12.pdf. (accessed 16 January 2008).

[6] The Russian Federation signed the Rome Statute on 13 September 2000 but has not ratified as of this writing.

[7] Rome Statue of the International Criminal Court, Part 1. Establishment of the Court, Article 1, "The Court." http://untreaty.un.org/cod/icc/statute/romefra.htm. U.N. Doc. A/CONF. 183/9 signed 17 July 1998. 2187 UNTS 90. (accessed 16 January 2008).

[8] Ibid., Part 2. Jurisdiction, Admissibility and Applicable Law. Article 5 Crimes within the Jurisdiction of the Court, para 1-2.

[9] "The ICC and the Crime of Aggression," Coalition for the International Criminal Court, FactSheet. http://www.iccnow.org/documents/CICCFS_Crime_of_Aggression_Factsheet_FINAL_eng_1May07.pdf. (accessed 16 January 2008).

the history of international law is neither as rosy as some have painted nor as crimson as others have claimed."[10]

The Ongoing Debate[11]

T. A. Taracouzio, Head of the Slavic Department of the Harvard Law Library, explained in 1934 that the communist concept of law was a combination of the Marxist relationship between "compulsion as a derivative of inequality" and class struggle and oppression.[12] This, coupled with international relations resulting from the cooperation of the masses against capitalism, resulted in a brand of international law that "determines and regulates the inequality of the rights and duties of the internationally organized national laboring classes in their common struggle for proletarian world supremacy."[13] Taracouzio went on to say that treaties became the basic source of international law in the Soviet Union,[14] with a demonstrated preference for bilateral treaties. He grouped these treaties into three categories: those with the Western Powers and Japan, those with the Baltic States, Finland and Poland, and those in the Near East. They differed primarily in the "degree of political aggression, as well as in the degree of economic benefits."[15]

Taracouzio noted the often cited maxim that "[w]ar, for the communist, is nothing but a continuation of the political relationship by the use of different means."[16] He went on to explain that it was "not

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[10] George Ginsburgs, "The View from Without," 62 *American Society of International Law Proceedings*, 196 (1968).

[11] Although a plethora of Americans and others publish on the definition of aggression, this manuscript will focus mainly on Russian sources or authors that contribute to the understanding of the concept from the Russian perspective.

[12] T. A. Taracouzio, "The Effect of Applied Communism on the Principles of International Law." 28 *American Society of International Law Proceedings* 105, 106 (1934).

[13] Ibid., 107. These treaties were generally submissive when concluded with stronger nations, dominating when concluded with weaker nations, and equal when between nations of equal economic, military and political footing. (119)

[14] Ibid., For a thorough discussion of the importance of treaties in Soviet international law and relations, see John Quigley, "The New Soviet Approach to International Law," 7 *Harvard International Law Journal* 1, 2-13 (1965).

[15] Ibid., 115.

[16] Ibid., 116, citing FN 8 Korovin, *Sovremennoe Mezhdunarodnoe pravo*, (Moskva, 1926), 137. The concept was first suggested by Carl von Clausewitz in *Vom Kreige*, his unfinished work first seen in 1832. Specifically, Clausewitz stated, "war is not merely an act of policy but a true political instrument, a

surprising that the flexibility of this definition of war was duly appreciated by the communists. It was admirably adapted to their logical necessities. It permitted aggressive war to appear in the guise of an instigation to self-determination, or, at worst, as an armed class intervention – a mere extension of the class conflict beyond the confines of the USSR."[17] This quote goes a long way to explain actions decades later in Hungary and Afghanistan. As we will see, support of a class struggle in those countries proved more of an excuse for intervention than an opportunity to promote an ideology.

Even in 1934, Taracouzio put "continuation of the political relationship" together with the use of propaganda to form the concept of lawfare. He commented that a "new method of warfare" was being used at this time: socialist propaganda. The logic was that this propaganda promoted free decision by the masses to voluntarily accept the ideas espoused by the Soviet Union, therefore, not violating international law.[18]

Ronald Nelson and Peter Schweizer, in their work *The Soviet Concept of Peace, Peaceful Coexistence and Détente,* noted additionally that it was "essential to understand that when Soviet officials and writers use the term 'peace' (*mir*), it does not equate exclusively to the absence of war or other hostilities nor does it mean harmonious relations between states."[19] These concepts of war and peace can also be seen in what Grigorii Ivanovich Tunkin (1906 - 1993), a world-renowned Russian jurist, called "old international law."

Tunkin gave a glimpse into the reasoning behind the transition from old law to new law in the Soviet Union. He talked of "old international law" and the transition to "new international law" that existed during the period of coexistence of capitalism and socialism between the First and Second World Wars. Of the utmost importance was the principle of non-aggression.[20] Before the Great October Socialist Revolution (1917),

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continuation of political intercourse, carried on with other means." Michael Howard and Peter Paret, eds. and trans. *On War* (Princeton University Press, 1976), 87.

[17] Ibid., 116.

[18] Ibid., 118.

[19] Ronald Roy Nelson and Peter Schweizer, *The Soviet Concepts of Peace, Peaceful Coexistence, and Detente* (Lanham, MD: University Press of America, 1988), x, citing FN 1, J.A. Emerson Vermaat and Hans Bax, "The Soviet Concept of Peace," *Strategic Review*, (Fall 1983): 64.

[20] G. I. Tunkin, *Theory of International Law*, 2nd ed. ([S.l.]: Wildy, Simmons and Hill Pub., 2003), 49. (Russian citation, *Teoriia mezhdunarodnogo prava.* (Moskva: Mezhdunarodnye otnosheniia,1970).

international law recognized the right of states to go to war, *jus ad bellum*, whenever they considered it advisable. "Of course, a particular claim always was found against the State that was attacked in order to justify the aggression, the claims being well-grounded or unfounded."[21]

Aron Naumovich Trainin (1883-1957), Corresponding Member of the Academy of Sciences of the USSR, reflecting on the concept of responsibility of a state in international law, noted criminal sanction was not applicable as a sanction of international law.[22] States were incompatible to individuals, to which criminal sanctions applied.[23] The state was limited initially to compensation for damage caused as its actions.

Prohibition of aggressive war signified a revolution in international law and introduced major changes in a state's international responsibility under international law.[24] By eliminating the "right of a State to go to war," the "right of the victor" also disappeared, along with "conquest" and "indemnities."[25] Under old international law, the only legal relations were between the offending state and the victim state.[26] States could wage war to effectuate their claims and other states had no right to object.[27] Contemporary situations where there were many international ties,

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Tunkin held various posts in the Ministry of Foreign Affairs, including head of the Treaty Law Section from 1952-1965. From 1957-1966 he was a member of the International Law Commission. From 1965 until his death in 1993, he was the Chair of International Law at the Law Faculty of Lomonosov Moscow State University. He published extensively on international law. For other works by Tunkin see the extensive bibliography by W. E. Butler, "The Learned Writings of Professor G. I. Tunkin," 4 *Journal of the History of International Law* 394 (2002).

[21] Ibid., 50.

[22] Ibid., 446.

[23] Ibid., 447. See also Mauro Politi and Giuseppe Nesi, eds. *The International Criminal Court and the Crime of Aggression* (Aldershot, Hants, England; Burlington, Vt.: Ashgate/Dartmouth, 2004). William Schabas, in the chapter "Origins of the Criminalization of Aggression: How Crimes Against Peace Became the 'Supreme International Crime'" 28, noted "Soviet enthusiasm for the prosecution of aggression had never really been in doubt, and the international law arguments in support had been developed by its leading specialist Professor A.N. Trainin." He noted that the British representative to the London Conference pointed out that Trainin had treated aggression as a "crime against peace" and not as a "crime of war" and a compromise in the terminology was agreed to by all.

[24] Ibid, 448.

[25] Ibid.

[26] Ibid.

[27] Ibid., 463.

demonstrated that any war affected the interests and even rights of all states.[28] Principles in international law such as non-aggression were evidence of this. "Under contemporary international law every State has not only the right but to a certain extent also the duty to take measures within the limits permitted by international law for the purpose of ensuring international peace and security and, therefore, to demand that other States have complied with norms of international law relating to the securing of peace."[29]

Trainin, in *Hitlerite Responsibility Under Criminal Law*,[30] thoroughly investigated state acts of aggression and individual criminal responsibility. He examined the difference in levels of material, political, moral and criminal responsibilities. "It should be recognized with complete definiteness that a State can and must bear political responsibility (for example, the disarmament of an aggressor State) and material responsibility (for example, making good the damage caused by war)."[31] However, Trainin explained that the state could not bear criminal responsibility, since the state itself was not capable of intent or carelessness.[32] Individual persons, who could bear criminal responsibility, could not be answerable for international offences since the state was the principal of international juridical relations.[33] "The State cannot be freed from responsibility from crimes in wartime. It is a most serious responsibility, but it is political and material. Criminal responsibility for crimes committed, however, must be borne by concrete physical persons who are guilty of the crimes which have been committed."[34] The perpetrator of an international crime, however, is different in "that he acts not only himself but also with the help of a complex executive machinery."[35] This led to a person that could perpetrate an international crime, such as a violation of a convention, and others that committed

[28] Ibid. 464.
[29] Ibid.
[30] A. N. Trainin, A. I. A. Vyshinsky, and Andrew Rothstein, *Hitlerite Responsibility under Criminal Law* (London, New York [etc.]: Hutchinson & Co., 1945). First published in Russian for the Institute of Law, Academy of Sciences of the U.S.S.R. under *Ugolovnaia otvetstvennost' gitlerovtsev*, ed. A. Ia. Vyshinsky (Moscow, 1944).
[31] Ibid., 72.
[32] Ibid., 73.
[33] Ibid., 76.
[34] Ibid., 77-78.
[35] Ibid., 79-80.

common crimes such as murder.[36] "Thus the perpetrator in the sense of national criminal law and the perpetrator in the sense of international criminal law are not completely identical figures."[37]

The concepts espoused by the Russian jurists Tunkin and Trainin continued in the new Russian Federation international criminal law literature. In the 1950s the theory of peaceful coexistence was developed and applied by Tunkin to international law.[38] Peaceful coexistence involved respect for "sovereignty, nonaggression, noninterference in internal affairs and equality of states."[39] In his publication of 1967, *Crimes Against Peace and Humanity,* P. S. Romashkin devoted a chapter to "Aggression – the Most Serious Crime Against Peace and Humanity."[40]

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[36] Ibid. 80.

[37] Ibid., 81. See also Mohammed Gomaa, "The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime," in Mauro Politi and Giuseppe Nesi, eds. *The International Criminal Court and the Crime of Aggression*. Gomaa, Legal Advisor to the Egyptian Delegation to the UN and member of the Egyptian Delegation in the Preparatory Commission for the Establishment of an International Criminal Court, in his article "The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime," addressed the idea of "State" versus "Individual" thoroughly. He noted the "attribution of a wrongful act to a State is the attribution of a conduct by the individual to that State." He suggested the State must be declared as an aggressor (pursuant to the Charter of the United Nations and the definition of aggression annexed to G.A. Res. 3314), before an individual can be tried by the ICC on the basis of that legal nexus. (65) In fact, in a report to the International Law Commission (ILC) it was stated, "A State can commit aggression only with the active participation of the individuals who have the necessary authority or power to plan, prepare, initiate or wage aggression." (66, FN 36 citing the Report of the ILC, 6 May – 26 July 1996, U.N. GAOR, 51st Sess. Supp. N0. 10 U.N.Doc A/51/10. 84.)

[38] John Quigley, Notes and Comments, "*Perestroika* and International Law," 82 *American Journal of International Law* 788, 789 (1988).

[39] Ibid., 790, see also FN 17 citing Edward McWhinney, *The International Law of Détente,* 27 (1978), John N. Hazard, "Codifying Peaceful Co-Existence," 55 *American Journal of International Law* 109 (1961); Hazard, "Co-Existence Codification Reconsidered," 57 *American Journal of International Law* 88 (1963); Hazard, "New Personalities to Create New Laws," 58 *American Journal of International Law* 952 (1964); Hazard, "Co-Existence Law Bows Out," 59 *American Journal of International Law* 59 (1965); Alwyn V. Freeman, "Some Aspects of Soviet Influence on International Law," 62 *American Journal of International Law* 710, 715 (1968).

[40] P. S. Romashkin, *Prestupleniia protiv mira i checlovechestva,* Izdatelstvo "Nauka", (Moskva 1967). Another work of the time, was I. K. Koblyakov, *USSR: For Peace Against Aggression 1933 – 1941*, (Moscow; Progress Publishers, 1976)

Although most definitely from the Soviet perspective, Romashkin concisely listed the efforts, up to the time of publication, to define aggression and aggressive war. He noted propaganda also played a part to justify the preparation for aggression.[41]

Soviet literature continued to address the concept of aggression. D. Donskoi, in *Aggression, Outside the Law*, wrote a detailed legal analysis of the definition of aggression. He concluded that any adopted definition of aggression would not put an end to aggressive acts, "But a definition freely adopted by states in carrying out of their sovereign rights, draws its force in the conviction that the observance of this definition responds to the interests of all and each separately. In this case the definition, like other legal principles, is valuable in that it calls attention to the factors that logically affect a solution."[42]

In *Criminal Responsibility for Aggression,* A.G. Kubalnik and O.V. Malakhova echoed the sentiment that one of the most acute questions of international criminal law was not the definition of aggression as an international crime but also as a crime against peace for which individuals bear responsibility. They noted that both the measures taken to suppress aggression by introducing a ban on the waging of aggressive war, and measures to establish criminal responsibility of persons planning, developing, and waging aggressive war were necessary. [43] In outlining the history of international law and specifically aggressive war, they reference the same individuals referenced by many of their American counterparts, among them Benjamin Ferencz.

Translation into English from the first printing in Russian also in 1976. Although biased from the point of the Soviet Union, it is important to realize that not only were the officials of the Soviet government proponents of the use of international law and propaganda, Soviet scholars also contributed to the effort.

[41] Ibid., 33.

[42] D. Donskoi, *Agressiia--Vne Zakona* (1976).121. Igor Ivanovich Lukashuk gave a strong review of aggression in international law from its very beginnings in the 16th century up to the 1974 definition in Igor Ivanovich Lukashuk, Chapter V, Crimes Against Peace, 1. International Illegality and Criminality of Aggression in George Ginsburgs and V. N. Kudriavtsev, *The Nuremberg Trial and International Law* (Dordrecht; Boston: M. Nijhoff; Kluwer Academic Publishers, 1990), 131. Another good summary is Evgeny N. Nasinovsky, "The Impact of Fifty Years of Soviet Theory and Practice on International Law," 62 *American Society of International Law* 189 (1968). See Kazimierz Grzybowski, "Soviet Theory of International Law for the Seventies," 77 *American Journal of International Law* 872 (1983) for a discussion of that period.

[43] A.G. Kibalnik and O.V. Malakhova, *Ugolovnaia Otvetstvennost' za Agressii*. (Stavropol' 2003), 4.