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## Operational Legal Advisors as Champions of Legal Resiliency in the **FIGHT AGAINST HYBRID THREATS**

By Lieutenant Colonel Sandra O'Hern



This article will examine how increasingly the law is being used as an instrument of power and its own operational domain, particularly within the context of hybrid warfare and as an element of strategic power competition.

**T**he Russian Federation's invasion of Ukraine on 24 February 2022 brought to the forefront for many in the legal field just how crucial the rule of law and legal frameworks are in great power competition, strategy, and military operations. It highlighted on the global stage the primary role of hybridity in a major conflict and how the law can be both a target and an enabler of hostile actors. In fact, the very justifications used by Russian President Vladimir V. Putin for his 'Special Operation' invoked multiple legal bases to include allegations of violations of the Minsk Agreements by Ukraine, human rights abuses, to include genocide, and the legal obligation to protect ethnic Russian speaking populations in the breakaway states of Luhansk and Donetsk in the eastern Donbas region of Ukraine from Nazification and to preserve their rights to self-determination.<sup>[1]</sup> While no evidence of the aforementioned violations was ever presented to any

international legal fora, the actions by Russia underscore how legal regimes and rationale can be twisted to effectively pursue strategic objectives. Malign legal operations<sup>[2]</sup> such as those employed by the Russian Federation, other authoritarian regimes, and even non-state actors are not limited to strategic level actions occurring on the global scale, they can directly or indirectly impact operations and organizational activities at any level. To this end, it is important for military legal advisors to understand how the law can be both targeted and used as a weapon.

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As legal practitioners we tend to have a common understanding of what constitutes the traditional practice of law, its purpose, and where it fits in within the broader operation of an organization. Within the military, most of us probably think of day-to-day legal practice as consisting primarily of military justice, civil law, and operational law. Of course, this practice can get more complex with these broad categories often intersecting in innumerable ways to successfully support the organization's mission. Regardless of how complex our practice might be, as military legal advisors, we tend to view the law as a tool to support the military mission, as an important enabling function that works in concert with many other support functions to successfully execute military operations. We do not, however, generally view the law as an operational domain in and of itself or as a national instrument of power similar to the traditional instruments of diplomatic, information, military or economic (DIME).[3] This article will examine how increasingly the law is being used as an instrument of power and its own operational domain, particularly within the context of hybrid warfare and as an element of strategic power competition. Specifically, how near peer competitors manipulate legal frameworks to achieve strategic objectives through exploiting legal vulnerabilities and shaping legitimacy. More importantly, this article will explore how military legal practitioners can play an important role in this evolving threat environment to include ways practitioners can recognize, assess, and counter these threats.

## The Legal Operational Domain and the Weaponization of the Law

As military members, we learn early on in our careers about the traditional DIME approach to achieving strategic objectives. We are most familiar with the military instruments of power, or the use of force by one party to impose its will on another in the conventional operational domains of air, land, maritime, space, and cyberspace.[4] Traditionally, the application of military force, or threat of force, would be integrated with the other instruments of power to effectively achieve the desired political or strategic goals. While still a valid framework, the threat environment today has changed drastically requiring a significant shift

in our approach to national security and how we work with our international partners and allies. With the rise in recent years of threats from non-state actors such as ISIS and authoritarian governments like Russia, Iran, and China, the efficacy of conventional force and the DIME instruments are limited. The impact of the traditional approach even in its expanded whole-of government version that adds financial, intelligence, and law enforcement (DIMEFIL) elements is limited in the face of an ever-complicated operating environment.[5] In particular, the actions by adversaries that fall below the threshold of actual conflict, also known as hybrid warfare or gray zone conflict, have increased as “the globalized, digitized and hyper-connected world in which power is diffused beyond traditional nation states is changing the effectiveness of traditional DIMEFIL instruments ability to prevent, deter or defeat these hybrid threats.”[6] Adversaries who successfully operate in the gray zone do so by manipulating and weaponizing non-military instruments such as information, psychology, and even legal frameworks often using a centralized approach to destabilize. As a result, liberal democracies must open the aperture to unconventional approaches to include instruments of soft power and statecraft to include the use of domestic and international legal tools.

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The notion of integrating legal frameworks or elements associated with the law within the instruments or national power structure is not new, nor is the concept of operating within the legal domain to influence or achieve desired ends. However, prioritizing legal operations and legal resilience as viable enablers of national security and the empowering the

role of legal advisers in this context is still gaining traction. The February 2022 invasion of Ukraine by Russia brought to the forefront the critical importance of a rules-based system for democracies and the ease with which the rule of law can be manipulated and trampled by hostile actors. Current actions by Russia and China underscore the importance for military legal practitioners to understand how to navigate the legal operational domain as adversaries use the law for malign purposes.

## Hybridity and the Law

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[T]he inherent complexity, ambiguity and the attributable character of hybrid warfare creates not only new security but also legal challenges for those opponents who adhere to international law within good faith and the commonly agreed frameworks established under and governed by the principles of the rule of law.[7]

To better understand the role the law plays in the evolving and dynamic hybrid warfare context, it is helpful to look briefly at what hybrid warfare is. While there is no official definition of hybrid warfare, it is generally understood to be the fusion of conventional and non-conventional means through military and non-military instruments of power to achieve strategic or political goals. Hybrid warfare operates intentionally below the threshold of actual conflict blurring the lines between war time and peace time.[8] In addition, hybrid warfare operates across traditional operational domains while synchronizing manipulation of political, psychological, social, informational, technology, and other non-military elements, often simultaneously. Actors employing hybrid warfare tactics do so intentionally to create ambiguity, confusion, distrust, and challenges with attribution.[9] Given the complexity and nuance of the hybrid warfare environment, it is easy to see how legal frameworks might be manipulated to justify actions or used as weapon to question the legitimacy of an adversary.

It is worth noting that hybridity is not inherently bad. In fact, nation states and alliances like NATO and the European Union (EU) use hybrid tactics regularly through

synchronizing instruments of power. Hybrid warfare, on the other hand, is problematic in that it focuses on hostile acts that target systemic vulnerabilities in democratic systems and often violates international legal norms or operates on the margins of illegality. By extension, the use of the law as an instrument of power in concert with other tools in a hybrid setting to advance strategic objectives is likewise not intrinsically wrong. So, when does the law go from being a part of a wholistic framework that democracies can use to successfully further goals within a rules-based system to becoming a hostile hybrid threat that violates accepted international law?

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In his research report for the Hybrid Center of Excellence (CoE) in Helsinki, Finland, Professor Aurel Sari, notes that “[w]e normally associate law with the rule of law, not with threats. However, the use of law as an instrument of coercion by authoritarian regimes demonstrates that such a characterization is not misplaced.”[10] Combined with this aspect of coercion, authoritarian regimes will claim to champion principles of international law, sovereignty, and non-intervention but undermine these very precepts when dealing with nation states they believe are within their sphere of influence.[11] In this context, authoritarian regimes will assert legal justifications under both domestic and international law to support their actions or to denounce the actions by other nation states and alliances that they perceive to threaten their security interests as unjust or unlawful. Meanwhile, these same actors will surreptitiously subvert the law to advance their own geopolitical aims. While using duplicitous legal arguments to defend their hostile acts, these regimes will engage in legal gymnastics to explicitly or implicitly manipulate or misapply the law,

exploit loopholes or gaps in legal frameworks, and shape legitimacy to gain political advantage on the international stage and domestically. Given that the legal frameworks and treaties naturally afford room for interpretation and some flexibility as a matter of pragmatism, especially when it comes to international norms, actors can exploit these ambiguities for their benefit making it an ideal domain for hybrid warfare wherein the law can serve as both a weapon and a target. To better understand how actors effectively use the law as an operational domain and instrument of power in a hybrid warfare context, it is helpful to look at recent examples.

## Weaponizing the Law: Real World Examples

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Russia's invasion of Ukraine, along with other hostile acts by the Russian Federation preceding the February 2022 invasion, illustrate a pattern of using the law and pseudo-legal rationale, in concert with other compelling influences, to destabilize and exert control. In conjunction with a sophisticated information operations campaign, Russia has repeatedly used claims of human rights violations, threats to self-determination, and even genocide of ethnic Russian speaking populations in neighboring Georgia, Moldova, and Ukraine to justify forced occupation or seizure of Abkhazia and South Ossetia (Georgia), Transnistria (Moldova), and Crimea and the Donbas (Ukraine).[12] Specifically, President Putin alleged violations of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide as well as other human rights frameworks to justify the need for the Russian government to protect these minority populations in the targeted regions from the nation states to which they belong. Through a series of coordinated tactics to include manipulation of traditional media, technology, social media, Kremlin-backed referendums, and false legal claims, the Russian government successfully shaped the legitimacy of its operations while simultaneously delegitimizing its targets. The international community's muted response to the Russian government's actions did little to stop the illegal territorial seizures within the borders of Russia's neighboring sovereign states and arguably served as a green-light for further and increasingly

brazen acts of aggression by Russia.[13] By achieving its objectives through using the law as an instrument of power in a hybrid setting, Russia was able to garner all-important domestic support for its actions even in the face of global criticism and was only emboldened by its success to continue this trajectory. In fact, the Russian Federation has shown that approval from the international community is relatively unimportant and, as with any authoritarian regime that needs to remain in power, the support of the domestic population is all that matters even if it comes as a result of deliberate deceit and duplicity.[14]

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### Russia's manipulation of the legal domain is not limited to targeting its regional neighbors.

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Russia's manipulation of the legal domain is not limited to targeting its regional neighbors. For years, the Russian government has targeted dissidents, journalists, political opposition members, or anyone else they deem a threat by requesting Red Notices from the International Criminal Police Organization, or Interpol, for the arrest and extradition of these individuals. These Red Notices are often based on falsified testimony and evidence offered in corrupt Russian courts to secure a conviction either in absentia or when the defendant has managed to flee Russia to escape certain brutal punishment or worse.[15] Russia's use of Red Notices serves as a subterfuge to infiltrate the U.S., and other nation states', domestic legal systems to intimidate and exert control over its perceived threats. While readily availing itself of international criminal legal bodies to extend its domestic legal reach, the Russian government sought to limit the legal action of international organizations such as the European Court of Human Rights through passing a 2020 amendment to the Russian Constitution rendering any foreign decisions or judgment that conflicts with the Constitution as unenforceable.[16] Of course, Russia is not the only authoritarian regime to perfect the art of committing grave human rights violations under a thin veil of legality. Iran frequently uses its domestic laws to falsely detain and



try foreign nationals, journalists, and activists under its espionage and domestic security frameworks. China has taken similar approaches through using its National Security Law along with its National Intelligence Law of 2017 to persecute dissidents, crack down on Hong Kong, and require Chinese citizens to collect information on other citizens.[17] In June 2021, the government passed the Anti Foreign Sanctions Law of the People's Republic of China to thwart foreign sanctions and interference.[18] Authoritarian regimes have perfected the art of using domestic laws to enrich their legal toolbox to achieve strategic goals and home and abroad.

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**The dynamic and multi-dimensional nature of the hybrid battlefield lends itself to abuses of the law by actors who seek to probe legal gaps ....**

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In the context of military operations, Russia has often used ambiguities in international legal treaties or even blatant violations of international law to its advantage. For example, between 2014 and 2022, it was able to circumvent military exercise reporting requirements under the Organization for Security and Cooperation in Europe's (OSCE) 2011 Vienna Document by holding snap-drills (72 hours or less in duration) with 13,000 or fewer troops in Belarus along Ukraine's border.[19] The reality is that Russia amassed closer to 100,000 or 150,000 Russian troops arguing only 12,500 were taking part in the exercise at any one time with no assurance that all of the troops returned to Russia after each exercise as required under the Vienna Document.[20] Naturally, this level of troop build-up alarmed Ukraine and NATO, to include allies in the Baltics. The selective application of the Vienna Document allowed the Russian Federation to escape observation and transparency obligations. This abuse of international regulations is particularly egregious in that it happened repeatedly, effectively desensitizing the international community to the point that Russian troop build-up just prior to the 2022 invasion of Ukraine was dismissed as yet another intimidation tactic by Putin and not warranting any immediate international response.[21]

There are countless other examples of the weaponization of the law and shaping of the legal domain for hostile purposes by Russia and other authoritarian governments. The dynamic and multi-dimensional nature of the hybrid battlefield lends itself to abuses of the law by actors who seek to probe legal gaps and constrains liberal democracies self-bound by rules-based systems and values. As a result, operational legal advisors need to shift their mindset beyond traditional legal approaches to solving problems to build resiliency through contemplating counterstrategies to influence operations and legal manipulation by adversaries.

## **A Counter Strategy: Legal Resilience and the Role of the Military Legal Advisor**

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Hybrid warfare complicates the operating environment significantly by efficiently obscuring conventional operational domains both domestic and international as well as attribution of activity by state and non-state actors or proxies all while evolving at the speed of relevance. Furthermore, hybrid warfare operates on a non-linear timeline and can touch all aspects of government and society at once. To defend against legal threats associated with hybridity, this dynamic and complex environment calls for a new approach to how practitioners view and operate within the legal domain and an understanding of its far-reaching effects on other elements and activities.

The concept of resilience, particularly within NATO and the EU, has gained prominence relevant to the hybrid warfare context as the individual and collective capacity to withstand, fight through, and quickly recover from disruption caused by military and non-military threats to security from authoritarian actors and strategic competitors as well as global challenges.[22] This concept takes into account the interdependence of different societal and governmental elements or systems to create an integrated framework of national and collective defense to resist and recover in the current threat environment. Understandably, the invasion of Ukraine makes resilience an even more pressing topic and legal resilience is no exception. The notion that the law is both an instrument and a domain lends itself to the concept

of resilience as it looks at targeting vulnerabilities within the law while taking into account that legal issues frequently cross-cut multiple legal regimes and frameworks and touch multiple systems and organizations.

When it comes to legal resilience and the role of legal practitioners there are several tools that can be used to create a counterstrategy. A basic structure applicable to legal practitioners, particularly in the military, might consist of three primary categories: (1) awareness, assessment, and education; (2) operationalizing legal advisors and the law; and (3) adopting countermeasures.[23]

### *Awareness, Assessment, and Education*

This first component is aimed at understanding the threat landscape as a legal operator and practitioner. This effort involves building an understanding of how hostile actors use the law as an instrument and operate within the legal domain through understanding their intent, capabilities, objectives, and tactics used to achieve their aims. This article highlights a few instances, but there are many more examples occurring daily. Practitioners should approach this assessment systematically and continuously to help gain some clarity in the legal fog of war. For example, any number of activities connected to military operations have legal aspects (humanitarian assistance, information operations, cyber operations, international agreements, etc.) that can be exploited passively or actively. This constant education and assessment can serve to develop a sort of threat matrix from which legal vulnerability themes might emerge to inform practitioners and decision-makers of weaknesses.[24]

### *Operationalizing Legal Advisors and the Law*

The second concept in a legal resilience framework looks at preparing the practitioner for the legal battlefield by developing operational legal advisors and giving them tools to address legal hybrid threats. For military legal practitioners this can involve legal capacity building initiatives. For example, military legal professionals can work to create a common understanding or community of practice surrounding hybrid warfare threats and targeted legal vulnerabilities through workshops, developing

protocols, sharing best practices and lessons learned, or even developing field manuals and handbooks for advising commanders. These activities and products can then be used for red-teaming and exercising to further hone legal acumen in this area. This approach can work not just within the U.S. military legal advisor community but can also include partner and ally legal advisors for a more wholistic approach to understanding and addressing hybrid legal threats as a community. Building a community of practice increases resiliency and enables legal practitioners to better inform commanders at the operational level as well as policy and strategy at higher levels.

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### *Adopting Countermeasures*

This element of the scheme necessarily intersects with and flows from the first two concepts of building awareness and operationalization by actively addressing legal gaps and vulnerabilities. By its nature, the legal resilience perspective affords decision-makers the opportunity to better integrate legal considerations into policy processes.[25] It goes without saying that legal implications are baked into strategic power competition and while efforts tied to this concept might necessarily be more inter-disciplinary in nature and often occur at the strategic level, policies, practices, and procedures can also be developed at the organizational level to enhance legal resilience. For example, organizations might look at where legal vulnerabilities might exist within their operations by perhaps proactively addressing disinformation through social media or promoting documented conspicuous compliance with law of war principles for service members to pre-empt accusations. The point is that countermeasures are not just in the hands of politicians and national policy makers at the highest levels and out of reach of every day legal practitioners. Actions can and should be taken at all levels for a more powerful defense of the legal domain.

## Conclusion

Current events and the increase in hostile hybrid activity emphasize the important role legal considerations play as both a tool or instrument of power and as an operational domain that practitioners and decision-makers can use to counter malign operations. Our adversaries have shown that the law can also serve as a hybrid threat in and of itself used to achieve strategic goals. To navigate the current hybrid threat environment and build legal resiliency, practitioners and policymakers need to recognize and prioritize the role of legal systems at every level. While there is no one-size-fits-all solution, understanding the problem and enabling legal practitioners to play a part in the solution will strengthen overall resistance to and the ability to defend against hostile hybrid threats.

## Glossary

- **CoE:** Center of Excellence
- **DIME:** diplomatic, informational, military and economic
- **DIMEFIL:** diplomatic, informational, military, economic, financial, intelligence, and law enforcement
- **EU:** European Union
- **JAG:** judge advocate general
- **NATO:** North Atlantic Treaty Organization
- **OSCE:** Organization for Security and Cooperation

### About the Author



#### Lieutenant Colonel Sandra O'Hern, USAF

(B.A., Marquette University, Milwaukee, Wisconsin; J.D., Marquette University Law School, Milwaukee, Wisconsin) is an Individual Mobilization Augmentee Assistant Staff Judge Advocate attached to Air and International Law Division, Operations and International Law Directorate, Office of The Judge Advocate General, the Pentagon, Arlington, Virginia.

**For more on this topic,** check out the author's interview on [The AFJAGS Podcast Episode 74, Pursuit Of Power: A Look At Russia & Ukraine Through An Ops Law Lens](#)

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## Endnotes

- [1] Brad Fisher, *Russia's Invasion of Ukraine and the Doctrine of Malign Legal Operations*, SPECIAL ISSUE ACCESS TO JUST. IN EASTERN EUROPE, Dec. 2022, at 29-30, <https://ajee-journal.com/russia-s-invasion-of-ukraine-and-the-doctrine-of-malign-legal-operations>. Provides an in-depth analysis of the years leading up to the 2022 invasion since the annexation of Crimea in 2014 arguing that Russia used the Minsk agreements as a trap to violate Ukraine's sovereignty through the creation of special-status regions in exchange for a reduction in covert aggression under the guise of maintaining regional stability. The Russian Federation sought to control the arbitration process while avoiding responsibility as the aggressor and labeling its covert aggression within Ukraine's borders as an internal conflict.
- [2] Fisher coins the term 'Malign Legal Operations' or MALOPS as more accurate than the oft overused or diluted term 'lawfare' to specifically describe "the exploitation of legal systems by employing disinformation to shape perceptions of legitimacy, justify violations, escape legal obligations, contain adversaries, or to advantageously revise the rule of law." *Id.* at 25.
- [3] Dep't of Def., Joint Doctrine Note 1-18, *Strategy*, (Apr. 25, 2018).
- [4] *Id.* at II-6.
- [5] Katerina Oskarsson, *The Effectiveness of DIMEFIL Instruments of Power in the Gray Zone*, 1 OPEN PUBLICATIONS, No. 2, 2017, at 7.
- [6] *Id.* at 6.
- [7] Sascha Dov Bachmann & Andres B Munoz Mosquera, *Lawfare and hybrid warfare – how Russia is using the law as a weapon*, 102 AMICUS CURIAE 28 (2015).
- [8] Arsalan Bilal, *Hybrid Warfare – New Threats, Complexity, and 'Trust' as the Antidote*, NATO REV. (Nov. 30, 2021), <https://www.nato.int/docu/review/articles/2021/11/30/hybrid-warfare-new-threats-complexity-and-trust-as-the-antidote/index.html>.
- [9] *Id.*
- [10] Aurel Sari, *Hybrid threat and the law: Building legal resilience*, HYBRID CoE RSCH. REP. 3, (Nov. 2021), at 15, <https://www.hybridcoe.fi/publications/hybrid-coe-research-report-3-hybrid-threats-and-the-law-building-legal-resilience/>.
- [11] *Id.* at 19-20. (Discusses how Russia claims to be the defender of international law against a hegemonic, unilateral West that seeks to impose its will under the guise of advancing a rules-based system. Notably, China denounced foreign criticism of its crackdown on Hong Kong and unilateral sanctions as unjust and a violation of international law and interventionism by the West while imposing unilateral sanctions of its own).
- [12] Fisher, *supra* note 1.
- [13] Peter Dickinson, *The 2008 Russo-Georgian War: Putin's green light*, ATLANTIC COUNCIL, (Aug. 7, 2021), <https://www.atlanticcouncil.org/blogs/ukrainealert/the-2008-russo-georgian-war-putins-green-light/>. (Acknowledging that while the international community attempted to pressure Russia through diplomatic avenues including attempts to negotiate a ceasefire, issuing condemnations, and calls to "reset" relations with Russia, these attempts were too weak and failed to deter further aggression).
- [14] *Id.* at 30.
- [15] Natasha Bertrand, *How Russia Persecutes Its Dissidents Using U.S. Courts*, THE ATLANTIC (July 30, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-russia-persecutes-its-dissidents-using-us-courts/566309/>.
- [16] Sari, *supra* note 10, at 22.
- [17] *Id.*
- [18] *Id.* at 23.
- [19] Fisher, *supra* note 1, at 37.
- [20] Lee Litzenberger, *Beyond Zapad 2017: Russia's Destabilizing Approach to Military Exercises*, WAR ON THE ROCKS (Nov. 28, 2017), <https://warontherocks.com/2017/11/beyond-zapad-2017-russias-destabilizing-approach-military-exercises/>.
- [21] Fisher, *supra* note 1, at 37.
- [22] Anna Dowd & Cynthia Cook, *Bolstering Collective Resilience in Europe*, CENTER FOR STRATEGIC & INT'L STUD. (Dec. 9, 2022), <https://www.csis.org/analysis/bolstering-collective-resilience-europe>
- [23] Both Fisher and Sari outline detailed multi-step legal resilience strategies in their writing that are distilled into a more simplified scheme for the purposes of this article. As a result, the roadmap outlined incorporates elements from both authors' legal resilience frameworks to be more relevant to military lawyers but does not provide a detailed analysis of the more comprehensive approaches offered by the two authors.
- [24] Sari, *supra* note 10, at 35.
- [25] *Id.* at 15.