

## Hybrid CoE Research Report 3

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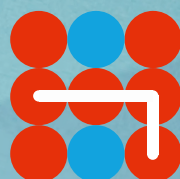
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# Hybrid threats and the law: Building legal resilience

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AUREL SARI



Hybrid CoE



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**Hybrid CoE Research Reports** are thorough, in-depth studies providing a deep understanding of hybrid threats and phenomena relating to them. Research Reports build on an original idea and follow academic research report standards, presenting new research findings. They provide either policy-relevant recommendations or practical conclusions.

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The responsibility for the views expressed ultimately rests with the authors.

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## Executive summary

This Hybrid CoE Research Report addresses the legal dimension of hybrid threats. It argues that from a hybrid threat perspective, the law is best understood as an instrument and as a domain of strategic competition. State and non-state actors routinely employ law to pursue their strategic interests. This is not remarkable, but underlines that law may be utilized for hostile purposes and represent a hybrid threat in its own right. At the same time, the law is more than just rules. It is a dynamic *system* of rules, actions, processes and institutions. As such, it constitutes a domain of competition: a normative and physical environment in which activities, functions and operations are undertaken to achieve desired strategic effects.

The conceptual approach adopted in this report is meant to bring greater clarity to the relationship between law and hybrid threats. While it has been recognized for some time that hybrid threats have significant legal implications, it is just as important to acknowledge the existence of distinct *legal* threats. Hostile actors go to great lengths to harness law and legality in pursuit of their goals, including at the expense of democratic societies. This underscores the need for the EU, NATO and their member states to approach the legal dimension of hybrid threats in a more strategic and systematic fashion.

To pave the way for this, the report provides an overview of the legal threat landscape. Due to their sovereign status, states retain a position of legal pre-eminence that is unrivalled by non-state actors. In assessing the legal threats they pose, it is necessary to go beyond the dichotomy of revisionist versus status quo powers. A review of the activities of key actors such as China and Russia reveals that law is a core component of their grand strategy. They employ law to pursue two overarching goals: to exert control and project influence;

and to legitimize their acts and delegitimize their opponents. This involves the use of a broad range of tactics, including attempts to evade accountability through denials and proxies, exploitation of gaps and other weaknesses in the applicable legal regimes, engaging in acts of legal persuasion, shaping international legal frameworks in ways conducive to their interests, and targeting systemic vulnerabilities of democratic societies, including their openness and other core values.

The report argues that navigating the legal threat landscape demands a strategic approach, one that recognizes the systematic nature of the threat, matches the level of effort expended by hostile powers and accepts the need to compete more effectively in the legal domain. Adopting a legal resilience perspective offers useful guidance in developing such an approach. Specifically, a legal resilience perspective provides an opportunity to better integrate legal considerations into policy processes, and to give more concrete meaning to broad objectives such as upholding the rules-based international order.

The report develops a set of recommendations for putting legal resilience into practice, organized around seven headings.

(1) Understanding the legal threat landscape is essential to prevail in an environment of persistent competition. However, legal threats and vulnerabilities are actor-specific. The EU, NATO and the member states should therefore develop an in-depth understanding of how hostile actors manoeuvre across the legal domain by identifying and assessing their intent, capabilities, objectives and tactics. With the help of a threat matrix, these actor-specific assessments should be used to categorize and prioritize legal threats and vulnerabilities in the form of a legal threat register.



(2) Vulnerabilities identified as part of this process must be mitigated. Legal risk registers should therefore feed into an appropriate programme of legislative and policy activity at the national and international level. Given the cross-cutting nature of many vulnerabilities, consistency, complementary and avoiding a piecemeal approach is key.

(3) Law makes a critical contribution to enhancing resilience in other domains, for example by serving as a framework for the adoption of measures designed to counter hybrid threats, such as sanctions. Adopting a legal resilience perspective should encourage the EU, NATO and relevant national authorities to consider, within their respective competences, the role that law plays in this area in a more comprehensive manner. Amongst other things, they should map how existing regulatory frameworks support the resilience objectives pursued in key policy areas, assess the performance of these legal frameworks against common criteria, and identify shortcomings in the law, including gaps in the regulatory framework that hybrid threat actors may exploit.

(4) Not all legal vulnerabilities are known in advance and not all known weaknesses can be mitigated effectively. An element of uncertainty and unpredictability will always remain. This underscores the need for legal preparedness and capacity-building. Legal preparedness entails the ability to anticipate, detect, identify, assess and respond to hybrid threats in the legal domain. In addition to developing these abilities, the EU, NATO and their member States should also develop the capacity to deal with legal contingencies, namely unforeseen or rapidly evolving events that challenge core legal interests and require critical legal input.

(5) Legal preparedness and capacity-building demands the involvement of multiple stakeholders and expert communities. In practical terms, this means that legal resilience should not be treated as a purely legal endeavour. EU, NATO and national decision-makers should foster close cooperation between different branches of government, as well as across the local, regional, national and international levels.

(6) To draw together these different strands of activities, the EU, NATO and the member states should develop national and institutional legal resilience strategies. The purpose of such strategies is to formulate a comprehensive and forward-looking policy for countering the legal challenges and vulnerabilities associated with hybrid threats. Much like national security strategies, legal resilience strategies are best conceived as top-level documents that provide guidance and serve as an overall policy framework for navigating the legal domain.

(7) The threat perceptions, vulnerabilities and legal frameworks of the EU, NATO and their member states differ substantially. Strengthening legal resilience therefore requires coordination across multiple levels. Establishing a centre of excellence dedicated to legal resilience could help to overcome some of the challenges this presents. Tasked with doctrine development, experimentation, identifying lessons learned, improving interoperability and developing capabilities, such a centre would be an ideal vehicle for injecting a much-needed strategic approach and for providing practical support to strengthen individual and collective mechanisms for legal resilience.



# 1. Introduction

This Hybrid CoE Research Report offers an account of the legal dimension of hybrid threats. Its purpose is to provide practitioners with a conceptual framework for understanding the relationship between the law and hybrid threats. It suggests that in the present context, law is best seen both as an instrument and as a domain of strategic competition. The report also develops a set of recommendations for harnessing law as a means to increase societal resilience and to strengthen the resilience of the legal system itself. To this end, it offers an overview of the legal threat landscape, focusing on hybrid threat actors, effects, tactics and vulnerabilities, and recommends the adoption of a series of policy instruments, including a legal threat register and legal resilience strategies.

## 1.1 Law and hybrid threats

The fact that hybrid threats have legal implications has been recognized for some time. Conceptual work undertaken by NATO in 2010 identified several legal challenges posed by hybrid threats, including the legal complexity of the operating environment and the danger that hostile actors might utilize the legal domain to disrupt Allied operations.<sup>1</sup> A food-for-thought paper prepared by the European External Action Service in 2015 acknowledged that hybrid threat actors may undermine the core principles of international law

and that the rule of law is a key element of building resilience against hybrid threats.<sup>2</sup> One of the action points arising from the Joint Framework on Countering Hybrid Threats adopted by the EU in 2016 was to examine the applicability of Article 222 of the Treaty on the Functioning of the European Union (TFEU)<sup>3</sup> and Article 42(7) of the Treaty on European Union (TEU)<sup>4</sup> to serious hybrid attacks.<sup>5</sup>

While the relevant statements and policy documents adopted by the EU and NATO reveal an awareness of the legal dimension of hybrid threats, they lack a systematic appraisal of the role that law plays in this context. The EU approaches the subject primarily from a regulatory perspective: for the most part, it treats the law as a normative framework for taking policy action against hybrid threats. The EU institutions have relied heavily on legislative measures as a means of increasing resilience in specific sectors, for example in relation to finance and money laundering.<sup>6</sup> They have also acknowledged that the Union's response to hybrid threats must be in full compliance with international law.<sup>7</sup> While providing a basis for policy action is an important function of the law, this technocratic approach fails to recognize its wider role and impact. It overlooks the fact that hostile actors utilize domestic and international law to advance their strategic interests, and that the law itself is therefore both a target and a medium of strategic

1 Supreme Headquarters Allied Powers Europe and Allied Command Transformation, *Bi-SC Input to a New NATO Capstone Concept for the Military Contribution to Countering Hybrid Threats*, 25 August 2010, 6.

2 European External Action Service, *Food-for-Thought Paper "Countering Hybrid Threats"*, 8887/15, 13 May 2015, 3 and 5.

3 Treaty on the Functioning of the European Union [2012] OJ C 326, 47.

4 Treaty on European Union [2012] OJ C 326, 13.

5 European Commission and High Representative of the Union for Foreign Affairs and Security Policy, *Joint Communication: Joint Framework on Countering Hybrid Threats - A European Union Response*, JOIN(2016) 18 final, 6 April 2016, 17. Subsequently, the Council formally acknowledged 'the possibility for the Member States to invoke the Solidarity Clause (Article 222 TFEU) in addressing a severe crisis resulting from hybrid activity' in *Council Conclusions on Complementary Efforts to Enhance Resilience and Counter Hybrid Threats*, 14972/19 (10 December 2019). See also Aurel Sari, 'The Mutual Assistance Clauses of the North Atlantic and EU Treaties: The Challenge of Hybrid Threats', *Harvard National Security Journal*, Volume 10 (2019): 405–460.

6 European Commission and High Representative of the Union for Foreign Affairs and Security Policy, *Report on the Implementation of the 2016 Joint Framework on Countering Hybrid Threats and the 2018 Joint Communication on Increasing Resilience and Bolstering Capabilities to address Hybrid Threats*, SWD(2019) 200 final, 28 May 2019, 21.

7 Council of the European Union, *Council Conclusions on EU Strategy for Cooperation in the Indo-Pacific*, 7914/21, 16 April 2021, 8.

competition. Due to its operational focus, NATO is more alert to the strategic dimension of the law,<sup>8</sup> as displayed in its Brussels Summit Communiqué adopted in June 2021.<sup>9</sup> However, whether such a more holistic approach has been sufficiently internalized across the Alliance is a different matter.

The recent adoption of a conceptual model of the hybrid threat landscape by the Joint Research Centre of the European Commission and the European Centre of Excellence for Countering Hybrid Threats (Hybrid CoE) presents an opportunity for developing a more systematic understanding of the legal dimension of hybrid threats.<sup>10</sup> The conceptual model was designed to serve as a framework for understanding hybrid threats and to support the design of effective measures to counter them.<sup>11</sup> To this end, the model identifies four components or 'pillars' of the hybrid threat landscape: actors and their strategic objectives; the tools applied by these actors; domains targeted by hybrid threats; and three distinct phases of hybrid threat activity.<sup>12</sup> Crucially, the model recognizes law as one of the tools employed by hostile actors and as one of the domains they may target as part of a campaign of hybrid threats.<sup>13</sup> The present Hybrid CoE Research Report builds on this model to develop a more granular understanding of the role that the law plays as an instrument and domain of hybrid competition.

## 1.2. The legal resilience perspective

In addition to building on the hybrid threats conceptual model, this Research Report also relies on other work carried out under the auspices of Hybrid CoE. The Centre has taken a sustained interest in the legal dimension of hybrid threats since its launch in 2017. In November of that year, Hybrid CoE convened a seminar on the subject of resilient legislation.<sup>14</sup> These initial discussions inspired the notion of *legal resilience* as a way of framing the Centre's approach to the legal aspects of hybrid threats.<sup>15</sup> In May 2018, the Centre convened a two-day workshop to explore the notion of legal resilience in greater depth,<sup>16</sup> followed by a three-day conference hosted in April 2019 by the Exeter Centre for International Law in the United Kingdom.<sup>17</sup> The latter event also served as the backdrop for the first meeting of Hybrid CoE's newly established pool of legal experts. In parallel with these events, the Centre published a series of research papers, including on the role of law as a tool of influence,<sup>18</sup> the politics of international legal competition,<sup>19</sup> the Kerch Strait incident between Russia and Ukraine,<sup>20</sup> the impact of non-state actors,<sup>21</sup> and a handbook on maritime hybrid threats, featuring a discussion of ten fictional legal scenarios.<sup>22</sup> In 2020, Hybrid CoE drew together some of the different strands of this work in a

8 Cf. Rodrigo Vázquez Benítez, 'Legal Operations: The Use of Law as an Instrument of Power in the Context of Hybrid Threats and Strategic Competition', *NATO Legal Gazette*, Issue 41 (2020): 138–144, [https://www.act.nato.int/application/files/5316/0195/2156/legal\\_gazette\\_41.pdf](https://www.act.nato.int/application/files/5316/0195/2156/legal_gazette_41.pdf).

[Unless otherwise indicated, all links were last accessed on 1 September 2021.]

9 Brussels Summit Communiqué Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Brussels

14 June 2021, Press Release (2021) 086, 14 June 2021. See Michael Schmitt, *International Law at NATO's Brussels Summit*, EJIL: Talk, 30 June 2021, <https://www.ejiltalk.org/international-law-at-natos-brussels-summit/>.

10 European Commission and European Centre of Excellence for Countering Hybrid Threats, *The Landscape of Hybrid Threats: A Conceptual Model (Public Version)* (2021), [https://www.hybridcoe.fi/wp-content/uploads/2021/02/conceptual\\_framework-reference-version-shortened-good\\_cover\\_-publication\\_office.pdf](https://www.hybridcoe.fi/wp-content/uploads/2021/02/conceptual_framework-reference-version-shortened-good_cover_-publication_office.pdf).

11 Id., 6.

12 Id., 10.

13 Id., 30–31.

14 Hybrid CoE, Network on Legal Resilience Launched, 27 November 2017, <https://www.hybridcoe.fi/news/network-on-legal-resilience-launched/>.

15 See Aurel Sari, 'Legal Resilience in an Era of Grey Zone Conflicts and Hybrid Threats', *Cambridge Review of International Affairs*, Volume 33, Issue 6 (2020): 846–867.

16 Hybrid CoE, Workshop on Legal Resilience Gathers Member States Together, 4 May 2018, <https://www.hybridcoe.fi/news/workshop-on-legal-resilience-gathers-member-states-together/>.

17 Legal Resilience in an Era of Hybrid Threats, <http://www.legalresilience.co.uk/>.

18 Tiina Ferm, *Laws in the Era of Hybrid Threats*, Hybrid CoE Strategic Analysis 3 (Hybrid CoE, 29 December 2017), <https://www.hybridcoe.fi/publications/hybrid-coe-strategic-analysis-3-laws-in-the-era-of-hybrid-threats/>.

19 Aurel Sari, *Blurred Lines: Hybrid Threats and the Politics of International Law*, Hybrid CoE Strategic Analysis 4 (Hybrid CoE, 29 January 2018), <https://www.hybridcoe.fi/publications/hybrid-coe-strategic-analysis-4-blurred-lines-hybrid-threats-and-the-politics-of-international-law/>.

20 Dmitry Gorenburg, *The Kerch Strait Skirmish: A Law of the Sea Perspective*, Hybrid CoE Strategic Analysis 14 (Hybrid CoE, 4 January 2019), <https://www.hybridcoe.fi/publications/hybrid-coe-strategic-analysis-14-the-kerch-strait-skirmish-a-law-of-the-sea-perspective/>.

21 Agata Kleczkowska, *States vs. Non-State Actors – A Public International Law Perspective*, Hybrid CoE Strategic Analysis 20 (Hybrid CoE, 29 January 2020), <https://www.hybridcoe.fi/publications/hybrid-coe-strategic-analysis-20-states-vs-non-state-actors-a-public-international-law-perspective/>.

22 Tiia Lohela and Valentin Schatz (eds), *Handbook on Maritime Hybrid Threats – 10 Scenarios and Legal Scans*, Hybrid CoE Working Paper 5 (Hybrid CoE, 22 November 2019), <https://www.hybridcoe.fi/publications/hybrid-coe-working-paper-5-handbook-on-maritime-hybrid-threats-10-scenarios-and-legal-scans/>.

trend report on hybrid threats and the law.<sup>23</sup> More recently, it hosted a series of online workshops to explore the legal implications of the coronavirus pandemic.

Drawing on the legal resilience perspective, the aim of this report is to sharpen the conceptual toolbox for understanding and navigating the legal landscape of hybrid threats. While it seeks to provide a detailed overview of the field and a set of practical recommendations, it does not claim to offer a comprehensive treatment of the subject or an off-the-shelf strategy for countering the legal challenges involved. Rather, it aims to pave the way for a more strategic approach to the subject.

### 1.3. Structure of this Research Report

In chapter 2, the report explores the legal dimension of hybrid threats from an analytical perspective. Relying on the hybrid threat conceptual model, it suggests that law is best seen both as an instrument and as a domain of hybrid competition. This promotes a more nuanced understanding of the role that law plays in this context and how it

relates to other instruments and domains, such as cyberspace, diplomacy and the information sphere. To develop this approach in greater depth, chapter 3 provides an overview of the legal threat landscape, as seen from an EU and NATO perspective, focusing on hybrid threat actors, legal effects and tactics. The chapter also identifies some of the legal vulnerabilities that the EU, NATO and their member states are exposed to.

Chapter 4 introduces the legal resilience perspective. After situating the notion within the broader discourse on resilience, it distinguishes between two elements of legal resilience: the use of law as a policy tool in rendering other social systems more resilient (*resilience through law*) and the resilience of a legal system against malign influence (*resilience of the law*). This duality reflects the dual nature of law as an instrument and domain of hybrid competition. Chapter 5 makes the case for adopting legal resilience as the overall policy goal for countering the legal challenges presented by hybrid threats, and develops a set of practical recommendations on how to go about this. The report concludes with some closing remarks in chapter 6.

<sup>23</sup> Aurel Sari, *Hybrid Threats and the Law: Concepts, Trends and Implications*, Hybrid CoE Trend Report 3 (Hybrid CoE 9 April 2020), <https://www.hybridcoe.fi/publications/hybrid-coe-trend-report-3-hybrid-threats-and-the-law-concepts-trends-and-implications/>.

## 2. Law as an instrument and domain of strategic competition

Despite the widespread use of the term, many commentators remain critical of the notion of hybrid threats.<sup>24</sup> It has often been said that the core feature of the concept – the synergistic use of multiple levers of power across different domains – is not novel at all.<sup>25</sup> This point can be quickly dismissed. Hybrid threats are not a new phenomenon, but they do not have to be in order to pose a formidable security challenge. Nor should it be overlooked that technological developments, particularly in the field of information and communication technology, have created vulnerabilities and opened up new vectors for malign interference that are qualitatively and quantitatively different from those of old. Another common objection is that the synergistic use of diverse foreign policy instruments is not confined to hostile actors, but is simply the hallmark of good statecraft. As a NATO study once noted, hybrid threats can be understood as the hostile employment of the ‘comprehensive approach,’<sup>26</sup> a concept which calls for the coherent application of political, civilian and military instruments.<sup>27</sup> Indeed, for decades, the EU has aspired to develop a common foreign and security policy to match its economic weight and to ensure that the different strands of its external relations complement one another. In matters of external relations, the EU may be described as a hybrid actor *par excellence*. Yet if that is so, what distinguishes the Western way of hybridity from others?

This question has significant implications for our understanding of the legal dimension of hybrid threats. Can we simply equate the comprehensive approach championed in the West with adherence to the rule of law and associate hybrid threats with rule-breaking – or is there more at play? The present chapter seeks to answer this question with reference to the hybrid threats conceptual model.

### 2.1. Salient elements of hybrid threats

The notion of hybrid threats is a composite. While the ‘hybrid’ part of the term tends to attract most of the attention, the ‘threat’ element is just as important. A threat is commonly understood as a perceived possibility of harm or as a declared intention to cause harm.<sup>28</sup> Threats are associated with agency and intentionality: unlike mere risks, threats are deliberate and are directed by one actor against another.<sup>29</sup> Threats thus involve harm, actorness, intent and perception.

Clearly, not every synergistic use of different levers of power amounts to a hybrid threat. Whether or not action by a particular actor constitutes a threat depends on whether or not the actor engages (or is perceived to engage) in that activity with the intention of causing harm. Hybrid threats are actor-specific.

The element of harm lies at the heart of the conceptual model developed by the Joint Research

24 E.g. Murat Caliskan, ‘Hybrid Warfare through the Lens of Strategic Theory’, *Defense and Security Analysis*, Volume 35, Issue 1 (2019): 40–58.

25 E.g. Merle Maigre, *Nothing New in Hybrid Warfare: The Estonian Experience and Recommendations for NATO* (German Marshall Fund, 2015).

26 Headquarters, Supreme Allied Commander Transformation, *Assessing Emerging Security Challenges in the Globalised Environment: The Countering Hybrid Threats (CHT) Experiment, Final Experiment Report (FER)* (2015), 29 September 2011, 27.

27 Cf. North Atlantic Treaty Organization, *Allied Joint Doctrine*, AJP-01 (2017), 2.7.

28 J. Reid Meloy, Stephen D. Hart and Jens Hoffmann, ‘Threat Assessment and Threat Management’, in *International Handbook of Threat Assessment*, ed. J. Reid Meloy and Jens Hoffmann (Oxford University Press, New York, 2014) 3–17, 3.

29 Fabrizio Battistelli and Maria Grazia Galantino, ‘Dangers, Risks and Threats: An Alternative Conceptualization to the Catch-all Concept of Risk’, *Current Sociology*, Volume 67, Issue 1 (2019): 64–78.

Centre and Hybrid CoE. According to this model, hybrid threats involve situations where

a hostile actor deliberately combines and synchronizes action, specifically targeting the systemic vulnerabilities in democratic societies in ways that have roots in tactics with which authoritarian states, revisionist powers, rogue states and non-state networks that are seeking to undermine [the] democratic state system have been trying to maintain their power, exert control and weaken opponents.<sup>30</sup>

In other words, the notion of hybrid threats refers to coordinated and synchronized action conducted by a state or non-state actor across multiple domains to deliberately target democratic states' and institutions' vulnerabilities. Hybrid threats are designed to remain below the threshold of detection and attribution, typically by blurring and exploiting the interfaces between the external and internal, legal and illegal, and peace and war.<sup>31</sup>

Accordingly, the concept combines five main elements. First, an actor pursuing a strategic objective. The status of the actor, particularly whether it is a state or non-state actor, is immaterial. What matters is the presence of an agent acting deliberately and in pursuit of its strategic interests.<sup>32</sup> Second, the synergistic use of multiple tools. This may involve simultaneous action in separate domains, for example the conduct of an information campaign to justify ongoing military deployments.<sup>33</sup> Synergistic effects may also be pursued asynchronously, for example by shaping the information environment in anticipation of other activities. Third, the targeting of the systemic vulnerabilities of democratic societies. The conceptual model lists thirteen domains that may be targeted by hybrid threat actors, including the economy, critical infra-

structure and the cultural sphere.<sup>34</sup> All states, not just those subject to a democratic system of government, are exposed to systemic vulnerabilities across these domains. There is therefore no necessary connection between these vulnerabilities and democracy other than the fact that the conceptual model adopts the perspective of democratic states and is concerned only with their systemic vulnerabilities.<sup>35</sup> In other words, the model is partial towards democratic societies. Fourth, tools and tactics that are usually associated with authoritarian states and other non-democratic actors. These include the suppression of political dissent, subversion and interference, clientelism, acts of coercion and control of the media.<sup>36</sup> More often than not, hybrid threats are covert in character in an attempt to hide the hostile actor's involvement and true intent. Finally, the use of these tools and tactics is designed to cause harm to democratic societies by maintaining the hostile actor's power, exerting its control, or weakening the targeted society.

## 2.2. Law as a hybrid threat?

Looking at the conceptual model from a legal perspective, several observations may be made about the legal dimension of hybrid threats.

Evidently, law can be used for strategic purposes. States often enter into legal relationships to advance their strategic interests, whether explicitly or implicitly. They conclude treaties of alliance to formalize reciprocal commitments, such as the North Atlantic Treaty or the now defunct Warsaw Pact.<sup>37</sup> They establish international institutions, such as the United Nations, to jointly exercise governance functions. They articulate principles of behaviour, such as those set out in the Outer Space Treaty,<sup>38</sup> to foster predictability. The deployment of law and legal arguments in pursuit of

30 European Commission and Hybrid CoE, *The Landscape of Hybrid Threats* (n. 10), 11.

31 European Centre of Excellence for Countering Hybrid Threats, 'Hybrid Threats as a Concept', <https://www.hybridcoe.fi/hybrid-threats-as-a-phenomenon/>.

32 European Commission and Hybrid CoE, *The Landscape of Hybrid Threats* (n. 10), 15–16.

33 E.g. Elina Lange-Ionatamishvili, *Analysis of Russia's Information Campaign against Ukraine* (NATO Strategic Communications Centre of Excellence, 2014).

34 European Commission and Hybrid CoE, *The Landscape of Hybrid Threats*, (n. 10), 26–33.

35 Cf. id., 10.

36 Id., 33–35.

37 North Atlantic Treaty, 4 April 1949, 34 UNTS 244; Treaty of Friendship, Co-operation and Mutual Assistance, 14 May 1955, 219 UNTS 23.

38 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 27 January 1967, 610 UNTS 205.

strategic objectives is a routine feature of international relations.

It is also clear that states employ law to complement their activities in other domains. This interplay between legal and non-legal measures is illustrated by China's multilayered approach to the South China Sea. China claims to enjoy sovereign rights over certain land features and their adjacent waters in the South China Sea.<sup>39</sup> To bolster these claims and to increase its 'discursive power' in the international arena,<sup>40</sup> China relies on its domestic law.<sup>41</sup> Domestic law also provides it with a basis for maintaining a continuous presence on some of these land features and to carry out extensive land reclamation or 'island-building' activities.<sup>42</sup> This presence, in turn, allows China to consolidate its control, assert further sovereign entitlements, and prevent other nations from accessing the waters concerned.<sup>43</sup> The different strands of China's approach – legal claims, *faits accomplis*, projecting power – complement each other to produce synergistic effects.

Law can also be a systemic vulnerability, in so far as certain rules or features of a legal system, such as gaps and uncertainties in the law, may lend themselves to exploitation by hostile actors. Freedom of expression illustrates the point. In democratic societies, freedom of expression ranks among one of the most basic civil rights.<sup>44</sup> Since this right is not limited to the dissemination of accurate information and ideas, but extends to those that 'offend, shock or disturb,'<sup>45</sup> the falsity

of information on its own does not provide legitimate grounds for restricting the exercise of free speech.<sup>46</sup> This presents democratic societies with a profound challenge in their fight against misinformation and disinformation. Any regulatory curtailment of the freedom of expression must be limited to what is necessary,<sup>47</sup> and thus strike a precarious balance between ineffectiveness and overreach. Erring on either side plays into the hands of hostile actors: ineffective intervention will not stem the tide of misinformation and disinformation, whereas regulatory overreach is likely to deepen political divisions in society. Not only that, but any regulatory intervention presents authoritarian systems with an opportunity to draw parallels between the measures adopted by democracies and their own restrictions on free speech.<sup>48</sup>

The latter point underlines that law plays a key role in enabling, facilitating and sustaining the illiberal measures typically associated with authoritarian systems. As classic studies of the subject have shown,<sup>49</sup> authoritarian regimes do not dispense with law altogether, but employ it as an instrument of power to ensure their own stability, survival and prosperity. Authoritarian uses of law range from creeping illiberalism at the lower end to full-blown 'legalized authoritarianism' at the other.<sup>50</sup> Contemporary examples of authoritarian legalism include Russia's legislation on 'undesirable organizations', adopted in May 2015.<sup>51</sup> The law authorizes the Prosecutor General of the Russian Federation

39 'Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea', *Chinese Journal of International Law*, Volume 15, Issue 4 (2016): 903–904. See also Jianming Shen, 'China's Sovereignty over the South China Sea Islands: A Historical Perspective', *Chinese Journal of International Law*, Volume 1, Issue 1 (2002): 94–157.

40 Zhao Qinghai, 'US Maritime Threats to China and Thoughts on China's Countermeasures', *China International Studies* 51 (2015): 80–93, 92.

41 People's Republic of China, Declaration, 25 August 2006, in United Nations, *Multilateral Treaties Deposited with the Secretary-General*, Vol. III, Part I, Chapters XXII to XXIX, and Part II, UN Doc. ST/LEG/SER.E/26 (2009), 450.

42 *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award (2016) (Perm. Ct. Arb.), paras 852–890. See also Daniel Andreeff, 'Legal Implications of China's Land Reclamation Projects on the Spratly Islands', *New York University Journal of International Law and Politics*, Volume 47, Issue 4 (2015): 855–910.

43 See Patrick M. Butchard, 'Digest of State Practice, 1 July–31 December 2019', *Journal on the Use of Force and International Law*, Volume 7, Issue 1 (2020): 156–224, 220–221.

44 Article 19, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; Article 10, ECHR. See Ashutosh Bhagwat and James Weinstein, 'Freedom of Expression and Democracy', in *The Oxford Handbook of Freedom of Speech*, ed. Adrienne Stone and Frederick Schauer (Oxford University Press, Oxford, 2021), 83–105.

45 *Handyside v. United Kingdom*, App. No. 5493/72, Judgment, 7 December 1976 (1976) 1 EHRR 737, para. 49.

46 Human Rights Committee, *General Comment No. 34: Article 19 (Freedom of Opinion and Expression)*, CCPR/C/GC/34, 12 September 2011, para. 49.

See also Section II.D, *EU Code of Practice on Disinformation*, 26 September 2018, [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=54454](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454).

47 *Baka v. Hungary*, App. No. 20261/12, Judgment, 23 June 2016 (2016) 1 EHRR 737, para. 158.

48 E.g. Lu Yu, 'Social Media Ban of Trump Shows Hypocritical US Standard on Freedom of Speech', *Global Times*, 10 January 2021, <https://www.globaltimes.cn/page/202101/1212376.shtml>.

49 Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford University Press, Oxford, 1941); Franz Neumann, *Behemoth: The Structure and Practice of National Socialism* (Victor Gollancz, London, 1942), 359–374.

50 Jacques Delisle, 'Authoritarian Legality in East Asia: What, Why, and Whither?', in *Authoritarian Legality in Asia: Formation, Development and Transition*, ed. Hualing Fu and Weitseng Chen (Cambridge University Press, Cambridge, 2020) 17, 17–25.

51 Федеральный закон от 23.05.2015 № 129-ФЗ О внесении изменений в отдельные законодательные акты Российской Федерации [Federal Law of 23 May 2015 No 129-FZ On Amending Certain Legislative Acts of the Russian Federation], <http://publication.pravo.gov.ru/Document/View/0001201505230001>.



to designate certain foreign and international non-governmental organizations as ‘undesirable’ and to ban them from operating in Russia. This legislation, which forms part of a broader pattern of anti-pluralist laws,<sup>52</sup> is widely seen as an attempt to stifle political dissent.<sup>53</sup> It has been condemned as incompatible with Russia’s international obligations by the European Parliament and by the Parliamentary Assembly of the Council of Europe, amongst others.<sup>54</sup>

Based on the foregoing, it is also clear to see that authoritarian regimes employ law to maintain their grip on power, to exert control, and to weaken democratic societies. For example, in 2020 the Russian Constitution was revised to impose more stringent term limits on the office of the President. However, the amendments exempt current and former incumbents of the post from these limits, allowing sitting President Vladimir Putin to potentially serve another two terms in office.<sup>55</sup> As pointed out earlier, China uses law to consolidate its control over the South China Sea.<sup>56</sup> China also actively targets elements of the rule of law in Western societies. On 26 March 2021, the Chinese Ministry of Foreign Affairs announced the imposition of sanctions on Essex Court Chambers, a leading set of lawyers in London.<sup>57</sup> The sanctions were imposed after four members of the Chambers were instructed to prepare a legal opinion, which found that there was a credible case that acts carried out by the Chinese

Government against the Uyghur people amount to crimes against humanity and genocide.<sup>58</sup> The four professional bodies of barristers and advocates of the United Kingdom and Ireland condemned the Chinese sanctions as an ‘unjustifiable interference with the professional role of lawyers and an attack upon the rule of law internationally’.<sup>59</sup>

## 2.3. Relationship with lawfare

Looking at the hybrid threats conceptual model from a legal perspective confirms not only that hybrid threats have legal implications, but also that the law itself may constitute a hybrid threat, as defined in the conceptual model. It might seem unusual to describe the law in these terms. We 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.

When the discussion turns to the use of law as part of a hybrid threat campaign, it is frequently portrayed as an exercise of ‘lawfare’.<sup>60</sup> Originally, lawfare has been defined as a ‘method of warfare where law is used as a means of realizing a military objective’.<sup>61</sup> A common example is the use of civilians to shield military objectives from attack. While employing human shields is prohibited by international law,<sup>62</sup> actors such as Hamas and Islamic State use this tactic as a way of obtaining an

52 See Amnesty International, *Serious Deterioration of Human Rights in Russia: An Update to the Council of Europe* (2021).

53 E.g. Maria Lipman, ‘At the Turning Point to Repression’, *Russian Politics & Law*, Volume 54, Issue 4 (2016): 341–350; Geir Flikke, ‘Resurgent Authoritarianism: The Case of Russia’s new NGO Legislation’, *Post-Soviet Affairs*, Volume 32, Issue 2 (2016): 103–131.

54 European Parliament, Resolution on the Russian ‘Foreign Agents’ Law, 19 December 2019 (2019/2982(RSP)); Parliamentary Assembly of the Council of Europe, Resolution 2362 (2021) on Restrictions on NGO activities in Council of Europe member States, 27 January 2021.

55 See William Partlett, *Russia’s 2020 Constitutional Amendments: A Comparative Perspective* (Melbourne Legal Studies Research Paper Series No. 887, 2021), 11–12. See also European Commission for Democracy Through Law (Venice Commission), *Russian Federation Interim Opinion on Constitutional Amendments and the Procedure for their Adoption*, Opinion No. 992/2020, 21 March 2021.

56 Douglas Guilfoyle, ‘The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea’, *International Affairs*, Volume 95, Issue 5 (2019): 999–1017, 1000.

57 Ministry of Foreign Affairs of the People’s Republic of China, Foreign Ministry Spokesperson Announces Sanctions on Relevant UK Individuals and Entities, 26 March 2021, [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2535\\_665405/t1864366.shtml](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1864366.shtml).

58 Alison Macdonald, Jackie McArthur, Naomi Hart and Lorraine Aboagye, *International Criminal Responsibility for Crimes Against Humanity and Genocide against the Uyghur Population in the Xinjiang Uyghur Autonomous Region*, 26 January 2021, [https://14ee1ae3-14ee-4012-91cf-a6a3b7dc3d8b.usrfiles.com/ugd/14ee1a\\_3f31c56ca64a461592ffc2690c9bb737.pdf](https://14ee1ae3-14ee-4012-91cf-a6a3b7dc3d8b.usrfiles.com/ugd/14ee1a_3f31c56ca64a461592ffc2690c9bb737.pdf).

59 The Bar Council of England and Wales, The Bar of Ireland, The Bar Council of Northern Ireland and The Faculty of Advocates of Scotland, ‘Statement of the Four Bars on PRC Government sanctions against Barristers’, 27 April 2021, <https://www.barcouncil.org.uk/resource/statement-of-the-four-bars-on-prc-government-sanctions-against-barristers.html>. For its part, Essex Court Chambers removed links to the legal opinion from its website. Cf. Xu Keyue and Li Sikun, ‘A UK chambers’ removal of a legal opinion defaming Xinjiang shows China’s counter-sanctions are an effective deterrent against rumors: experts’, *Global Times*, 29 March 2021, <https://www.globaltimes.cn/page/202103/1219780.shtml>.

60 E.g., Zakhar Tropin, ‘Lawfare as Part of Hybrid Wars: The Experience of Ukraine in Conflict with Russian Federation’, *Security and Defence Quarterly*, Volume 33, Issue 1 (2021): 15–29.

61 Charles Dunlap, *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, 2001), 4.

62 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art 51(7), June 8, 1977, 1125 UNTS 3 (Additional Protocol I). See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (Cambridge University Press, Cambridge, 2005), 337–340.



unlawful battlefield advantage, either by compelling their adversary to abandon an otherwise lawful attack or by exploiting the increased rate of civilian casualties for information purposes.<sup>63</sup>

Understood in its original sense as a battlefield tactic, the notion of lawfare is too narrow to describe the legal dimension of hybrid threats. This is so because state and non-state actors regularly employ law and legal arguments to pursue their strategic interests not just during times of armed conflict, but also outside the context of active hostilities. In fact, even during armed conflict, belligerents often use law to delegitimize their opponent and constrain their legal room for manoeuvre, rather than to achieve a military objective in the strict sense of the word. For example, during their war in 2020, both Armenia and Azerbaijan lodged requests for interim measures against each other before the European Court of Human Rights, accusing the other party of serious violations of the law of armed conflict and of territorial sovereignty.<sup>64</sup> Neither of these requests was designed to achieve an operational effect, and indeed both states followed up on them by launching interstate proceedings against each other after the hostilities came to an end.<sup>65</sup> As traditionally understood, the notion of lawfare does not capture the strategic use of law outside of war and for purposes other than strictly military gains.

Other definitions of lawfare apply the term in a looser sense to refer to the use of law as a means of achieving effects similar or identical to those traditionally sought from conventional military action.<sup>66</sup> However, even such definitions remain too narrow for present purposes, since hybrid threat actors employ the law in a purely non-military context too. While lawfare could be reframed to describe the hostile use of law more generally,

purging the term of any military connotations cuts it loose from its intellectual moorings to leave a hollow shell.<sup>67</sup> Little analytical benefit can be gained from this. Overall, it is preferable not to view the legal dimension of hybrid threats through the prism of lawfare.<sup>68</sup>

## 2.4. Law: an instrument and domain

A more helpful way to conceptualize the role of law in the present context is to distinguish between its role as an instrument and a domain of strategic competition.

Law constitutes a hybrid threat within the meaning of the conceptual model when employed by hostile actors in ways that are harmful to democratic societies. The instrumental use of law is unremarkable, of course. Law is not an end in itself, but a means for the pursuit of other goals. Societies do not adopt rules of law for their own sake, but to create conditions for orderly and predictable social interaction.<sup>69</sup> All actors, both democratic and authoritarian, rely on law to achieve their social and political objectives. However, democratic societies cannot be indifferent to the use of law by other actors that harms their strategic interests, including their fundamental values and system of government. Nor can democratic societies remain indifferent to the instrumental use of law in ways that undermine the integrity of the legal system itself and weaken the rule of law. Accordingly, while law is essentially instrumental in nature, it becomes a hybrid threat when used as a tool to harm democratic societies and their interests.

But the law is more than just rules. It is a system of rules, actions, processes and institutions. Focusing exclusively on the instrumental use of rules

63 Gemunder Center for Defense and Strategy, *Israel's Next Northern War: Operational and Legal Challenges* (Jewish Institute for National Security of America, Washington, D.C., 2018), 28–35; Charles J. Dunlap, 'No Good Options against ISIS Barbarians? Human Shields in 21<sup>st</sup> Century Conflicts', *AJIL Unbound*, Volume 110 (2016): 311–316.

64 European Court of Human Rights Press Release, *Request for interim measures lodged by Armenia against Azerbaijan*, 28 September 2020, ECHR 264 (2020) and *Request for interim measures lodged by Azerbaijan against Armenia concerning the conflict in Nagorno-Karabakh*, 27 October 2020, ECHR 310 (2020).

65 European Court of Human Rights Press Release, *Receipt of applications in two inter-State cases related to the conflict in Nagorno-Karabakh*, 4 February 2020, ECHR 046 (2021).

66 Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press, Oxford, 2016), 8.

67 Cf. Joop Voetelink, 'Reframing Lawfare', in *Netherlands Annual Review of Military Studies (Winning Without Killing: The Strategic and Operational Utility of Non-Kinetic Capabilities in Crises)*, ed. Paul A.L. Ducheine and Frans P.B. Osinga (TMC Asser, The Hague, 2017) 237–254, 247.

68 In this respect, it is also worth noting that the concept is controversial and has been criticized for its use as a polemical device. E.g. David Hughes, 'What Does Lawfare Mean?', *Fordham International Law Journal*, Volume 40, Issue 1 (2016), 1–40; Freya Irani, 'Lawfare', US Military Discourse, and the Colonial Constitution of Law and War', *European Journal of International Security*, Volume 3, Issue 1 (2018): 113–133.

69 Cf. Niklas Luhmann, *Law as a Social System* (Oxford University Press, Oxford, 2004), 142–172.

risks ignoring the dynamic and multifaceted nature of the law as a system. Hybrid threat actors exploit not just rules, but other elements of the legal system too. They also actively target the law itself, seeking to create and sustain rules, actions, processes and institutions that are conducive to their own interests. The law is therefore not merely an instrument, but also a medium and subject of strategic competition.

This second role of the law is best encapsulated by treating it as a domain.<sup>70</sup> Taking inspiration from doctrinal debates, the legal domain can be described as the normative and physical sphere of legal rules, actions, processes and institutions in which activities, functions, and operations are undertaken to achieve desired strategic effects.<sup>71</sup>

This definition identifies the different components of the legal domain, including their normative and physical manifestation, and emphasizes their role as a medium through which actors move to achieve legal and non-legal objectives. Conceptualizing law in this manner offers a unique benefit: it reveals how hostile actors operate across the legal sphere over time, space and diverse jurisdictions. It offers a vantage point for identifying and tracking hostile legal manoeuvres in a way that treating the law merely as an instrument of competition does not. In turn, this should foster a better understanding of the legal vulnerabilities of democratic societies and help develop more effective measures to counter hostile legal operations.

70 Aurel Sari, 'Hybrid Warfare, Law and the Fulda Gap', in *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare*, ed. Christopher M. Ford and Winston S. Williams (Oxford University Press, Oxford, 2019) 161–190, 182–184.

71 See Patrick D. Allen and Dennis P. Gilbert Jr, 'The Information Sphere Domain: Increasing Understanding and Cooperation', in *The Virtual Battlefield: Perspectives on Cyber Warfare*, ed. Christian Czosseck and Kenneth Geers (IOS Press, Amsterdam, 2009) 132–142, 133. The authors define a domain as: 'The sphere of interest and influence in which activities, functions, and operations are undertaken to accomplish missions and exercise control over an opponent in order to achieve desired effects.'

### 3. The landscape of legal threats

As noted earlier, hybrid threats are actor-specific. What amounts to a threat depends largely on the individual circumstances of an actor and how it perceives others, and the effects of their actions. In the legal domain as elsewhere, threat perceptions differ: an assessment made by one party will not necessarily be shared by another. This is true even among close allies. For example, democratic states will watch China's projection of influence and exorbitant claims in the South China Sea with concern. However, for landlocked and even for many sea-faring nations, these concerns mostly revolve around wider questions of regional stability, the security of supply chains, and the health of the rules-based international order. By contrast, for states that undertake freedom of navigation operations in the area, China's legal position takes on more immediate and more operational significance. When *HMS Albion* passed near the Paracel Islands in 2018, China accused the British vessel of infringing on its sovereignty and violating Chinese and international law.<sup>72</sup> The landscape of legal threats looks different to different actors. Nevertheless, certain key features of this landscape are identical or at least substantially similar for the EU, NATO and their member states. The aim of this chapter is to sketch out some of these features.

#### 3.1. Actors

Over the course of recent decades, technological developments and their diffusion across the globe have narrowed the gap between the capabilities

of states and non-state actors.<sup>73</sup> Parallel developments have taken place in the field of law too. Whereas states were once the sole subjects of international law, other actors now contribute to the development of international law in profound ways.<sup>74</sup> However, states have retained their sovereign status and the legal privileges that flow from it. Sovereignty entitles them to prescribe and enforce rules of behaviour at the domestic level and to partake in the creation of international law on equal terms with other states. Coupled with their internal monopoly of coercive authority, this places states in a position of formal legal pre-eminence that so far remains unrivalled by non-state actors.<sup>75</sup> In the legal domain, states are therefore a more potent source of threats than other players.

Authoritarian states are sometimes branded as 'revisionist' or 'rogue' regimes.<sup>76</sup> Such labels can be deceiving in the legal context. Few if any states actively seek to overhaul the international legal order in its entirety. Most are concerned with the relative distribution of power in the international system and their own position within it,<sup>77</sup> pressing for interpretations and incremental change that further their interests rather than for the wholesale transformation of the international legal system. The juxtaposition of revisionism versus the status quo itself is relative. Authoritarian powers tend to promote classic principles of sovereignty, independence and territorial inviolability over human rights and democratic legitimization. From a historical perspective, they can claim, with some justification, to be defending a pluralist tradition of international law against liberal-democratic

72 Tim Kelly, 'British Navy Warship sails near South China Sea Islands, Angering Beijing', 6 September 2018, Reuters.

73 Audrey Kurth Cronin, *Power to the People: How Open Technological Innovation is Arming Tomorrow's Terrorists* (Oxford University Press, New York, 2020).

74 See José E. Alvarez, 'International Organizations: Then and Now', *American Journal of International Law*, Volume 100, Issue 2 (2006): 324–347; and Steve Charnovitz, 'Nongovernmental Organizations and International Law', *The American Journal of International Law*, Volume 100, Issue 2 (2006): 348–372.

75 Kleczkowska (n. 21), 6.

76 E.g. *The National Security Strategy of the United States of America* (The White House, Washington, DC, 2017), 25.

77 Cf. Alexander Cooley, Daniel Nexon and Steven Ward, 'Revising Order or Challenging the Balance of Military Power? An Alternative Typology of Revisionist and Status-quo States', *Review of International Studies*, Volume 45, Issue 4 (2019): 689–708.

interventionism.<sup>78</sup> Indeed, there is little evidence that Russia, for example, is pursuing a strategy of legal revisionism.<sup>79</sup> At times, the shoe is on the other foot. While Russia was able to rely on a well-established legal basis to justify its intervention in the Syrian conflict in support of President Bashar al-Assad,<sup>80</sup> Western governments have struggled to offer a compelling legal justification for their own interventions in the conflict.<sup>81</sup> Authoritarianism does not equal revisionism, and a liberal system of government does not necessarily equal support for the status quo.

To understand how individual actors manoeuvre through the legal domain, it is necessary to go beyond these labels. The legal strategy pursued by hostile powers is shaped by their goals, values and means. For example, Russian leaders frequently profess their support for international law.<sup>82</sup> In doing so, they portray Russia as the defender of universally recognized norms of international law, as enshrined in the United Nations Charter, against a hegemonic West that seeks to impose its own values on the rest of the world under the neo-colonial guise of a 'rules-based international order'.<sup>83</sup> Another recurrent Russian talking point is support for a more democratic and polycentric world order, which Russian leaders contrast with Western unilateralism and unipolarity.<sup>84</sup> These concerns lead Russia to emphasize the principles

of sovereign equality and non-intervention. Russia's normative preferences partly overlap with those of China. Chinese officials regularly profess their commitment to international law and their resolve to uphold sovereignty, territorial integrity and non-interference against all forms of 'new interventionism'.<sup>85</sup> These shared values are reflected in the Joint Declaration on the Promotion of International Law adopted by Russia and China in 2016, which expresses full support for the founding principles of the United Nations and, in a thinly veiled reference to the West, condemns 'the practice of double standards or imposition by some States of their will on other States'.<sup>86</sup>

To a large extent, the commonalities in the Russian and Chinese approach stem from their authoritarian form of government, which leads them to prioritize norms that are conducive to regime survival over rules that may threaten it. Accordingly, Chinese officials have repeatedly invoked the principle of non-intervention to denounce foreign criticism of their crackdown on Hong Kong as unjustified meddling in China's internal affairs.<sup>87</sup> Other parallels are structural. Despite all the principled talk about sovereign equality, both countries see themselves as great powers and act accordingly.<sup>88</sup> Russia disregards the principle of non-intervention in its relations with countries it perceives as falling within its sphere of influence,<sup>89</sup> while China

78 For a sophisticated argument along these lines in favour of restoring the pre-eminence of the core principles of the UN Charter, see Brad R. Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (Oxford University Press, Oxford, 2011).

79 Roy Allison, 'Russian Revisionism, Legal Discourse and the 'Rules-Based' International Order', *Europe-Asia Studies*, Volume 72, Issue 6 (2020): 976–995.

80 Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent', *Leiden Journal of International Law*, Volume 29, Issue 3 (2016): 743–775, 759–766.

81 Laurie O'Connor, 'Legality of the Use of Force in Syria against Islamic State and the Khorasan Group', *Journal on the Use of Force and International Law*, Volume 3, Issue 1 (2016): 70–96.

82 E.g. Vladimir Putin Delivered a Pre-recorded Address to the 75th Anniversary Session of the United Nations General Assembly, 22 September 2020, <http://en.kremlin.ru/events/president/news/64074>.

83 E.g. Foreign Minister Sergey Lavrov's Remarks and Answers to Media Questions during a News Conference following the Video Conference of Foreign Ministers of Russia, India and China, Moscow, June 23, 2020, 23 June 2020, [https://www.mid.ru/en/web/guest/meropriyatiya\\_s\\_uchastiem\\_ministra/-/asset\\_publisher/xK1BhB2bUjd3/content/id/4171520](https://www.mid.ru/en/web/guest/meropriyatiya_s_uchastiem_ministra/-/asset_publisher/xK1BhB2bUjd3/content/id/4171520).

84 E.g. Foreign Minister Sergey Lavrov's remarks and answers to questions at the Masterclass working session held as part of the 2019 Paris Peace Forum, Paris, November 12, 2019, 12 November 2019, [https://www.mid.ru/en/web/guest/meropriyatiya\\_s\\_uchastiem\\_ministra/-/asset\\_publisher/xK1BhB2bUjd3/content/id/3896584](https://www.mid.ru/en/web/guest/meropriyatiya_s_uchastiem_ministra/-/asset_publisher/xK1BhB2bUjd3/content/id/3896584).

85 E.g. Yi Wang, 'China: A Staunch Defender and Builder of the International Rule of Law', *Chinese Journal of International Law*, Volume 13, Issue 4 (2014): 635–638, 637.

86 The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016, [https://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2331698](https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698). See Anthea Roberts, *Is International Law International?* (Oxford University Press, Oxford, 2017), 290–299.

87 E.g. Commissioner's Office: *Interference with Judicial Proceedings in Hong Kong Tramples upon Both the Rule of Law in the HKSAR and International Law*, 19 April 2021, <http://www.fmcoprc.gov.hk/eng/gsxw/t1869730.htm>.

88 See Roland Paris, 'The Right to Dominate: How Old Ideas About Sovereignty Pose New Challenges for World Order', *International Organization*, Volume 74, Issue 3 (2020): 453–489.

89 Roy Allison, 'Russia and the Post-2014 International Legal Order: Revisionism and Realpolitik', *International Affairs*, Volume 93, Issue 3 (2017): 519–543. See also Lauri Mälksoo, 'Post-Soviet Eurasia, *Uti Possidetis* and the Clash Between Universal and Russian-Led Regional Understandings of International Law', *New York University Journal of International Law and Politics*, Volume 53 (2021): 787–820.

combines its condemnation of unilateral sanctions as a grave violation of international law<sup>90</sup> with a newfound enthusiasm to impose unilateral sanctions of its own.<sup>91</sup> Despite these and other parallels, there are differences in style and substance. The historical experience that informs the Russian and the Chinese approach to international law is different.<sup>92</sup> The two countries do not see Western institutions in the same light: NATO, for instance, has so far been a lower priority for China than it has been for Russia. Their different geopolitical positions and goals also lead them to embrace different legal tactics tailored to their individual circumstances: claiming the right to draw straight archipelagic baselines makes sense for China in the South China Sea,<sup>93</sup> while Russia's passportization policy provides it with leverage in its near abroad.<sup>94</sup>

Yet even a cursory review of Russian and Chinese activities in the legal domain highlights that law is a core component of their grand strategy. Law offers a vision and narrative about values, goals and motivations, and serves as a vehicle for ordering at the domestic and the international level.<sup>95</sup> Understanding how and why hostile actors employ law as part of a hybrid threat campaign therefore requires us to better understand their strategic intentions – it is these intentions that give the instrumental use of law meaning.

### 3.2. Effects

The reach of law extends to all areas of society. This affords hostile actors an exceedingly wide range of opportunities to utilize the law in pursuit of their objectives. Rather than attempt to draw up a comprehensive list of all the legal means and

methods at their disposal, it is more fruitful to identify the principal effects that hostile actors seek to achieve in the legal domain, and to illustrate some of the legal tactics they employ to this end.

Manoeuvring in the legal domain serves two overarching goals. The first exploits the coercive and regulatory function of the law. One of the core purposes of the law is to fix expectations by positing norms of behaviour. Law is an instrument of control: states use it to direct people to behave in certain ways and to demand their compliance. The controversial National Security Law for Hong Kong adopted in 2020 by the Standing Committee of the National People's Congress (NPC) of China offers an example.<sup>96</sup> Amongst other things, the law criminalizes acts aimed at undermining the national unity, basic system and body of central power of the People's Republic of China.<sup>97</sup> The legislation extends to acts committed outside the Hong Kong Special Administrative Region by persons who do not permanently reside there, thus giving it global reach.<sup>98</sup> Overall, the law provides the Chinese authorities with a powerful instrument to curb the pro-democratic leanings of the people of Hong Kong.

Not all legislation is punitive in character. Law just as often sets standards, confers privileges and grants authorities to act. The United Nations Convention on the Law of the Sea, for instance, is a comprehensive regulatory regime that allocates rights and responsibilities with respect to the use of the oceans. China relies on the Convention to argue that foreign military activities taking place in the exclusive economic zone of coastal states without their consent is a violation of international law, and demands that other states desist from such

90 Xie Feng, Commissioner of the Ministry of Foreign Affairs of China in the Hong Kong Special Administrative Region, *Say No to Unilateral Sanctions and Jointly Uphold the International Rule of Law*, 3 December 2020, <http://www.fmccprc.gov.hk/eng/qwsw/t1838003.htm>.

91 Foreign Ministry Spokesperson Announces Sanctions on Relevant EU Entities and Personnel, 23 March 2021, [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2535\\_665405/t1863106.shtml](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1863106.shtml).

92 See Lauri Mälksoo, *Russian Approaches to International Law* (Oxford University Press, Oxford, 2015); Phil C. W. Chan, 'China's Approaches to International Law since the Opium War', *Leiden Journal of International Law*, Volume 27, Issue 4 (2014): 859–892.

93 Cf. Hong Nong, 'The Applicability of the Archipelagic Regime in the South China Sea: A Debate on the Rights of Continental States' Outlying Archipelagos', *Ocean Yearbook Online*, Volume 32, Issue 1 (2018) 80–117.

94 Toru Nagashima, 'Russia's Passportization Policy toward Unrecognized Republics', *Problems of Post-Communism*, Volume 66, Issue 3 (2019): 186–199; Fabian Burkhardt, *Russia's "Passportisation" of the Donbas: The Mass Naturalisation of Ukrainians Is More Than a Foreign Policy Tool*, SWP Comment 2020/C 41 (Stiftung Wissenschaft und Politik, 2020).

95 Cf. Article by Sergey Lavrov, Russian Minister of Foreign Affairs, 'The Law, the Rights and the Rules', Moscow, June 28, 2021, 28 June 2021, [https://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/4801890](https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4801890).

96 Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, L.N. 136 of 2020. For an English translation of the relevant provisions and analysis, see Susan V. Lawrence and Michael F. Martin, *China's National Security Law for Hong Kong: Issues for Congress*, R46473 (Congressional Research Service, 2020).

97 Articles 20–22.

98 Article 38.

activities in its exclusive economic zone.<sup>99</sup> Putting to one side the merits of these arguments,<sup>100</sup> they illustrate how states rely on legal standards favourable to their cause, in this specific case to assert China's freedom to act and to constrain the freedom of movement of others.

The second overarching goal that hostile actors seek to achieve in the legal domain is to legitimize their own acts and to delegitimize their opponents. This objective is closely linked to law's role in fixing expectations. The binding nature of legal rules creates an expectation of compliance and that conduct *prima facie* inconsistent with the applicable rules must be explained and justified.<sup>101</sup> States expend considerable time and effort to offer such justifications. They invoke legal principles to claim compliance with international law, as NATO nations did during their intervention in Kosovo.<sup>102</sup> They rely on precedents to deflect accusations of illegality, as the Russian Federation did in relation to its annexation of Crimea.<sup>103</sup> They launch proceedings before judicial bodies to vindicate their position, as Georgia did against Russia before the European Court of Human Rights.<sup>104</sup> It is exceptionally rare for states to break the law and openly admit to doing so. Even manifest violations of the rules are usually covered by at least a fig leaf of legal justification, however absurd the arguments might be. A great deal of lawyering thus takes the form of a discursive practice, an exercise in persuasion meant to

convince others that the facts are as claimed, that a proposed interpretation of the law is correct, and that the rules fit the facts.<sup>105</sup>

Legal persuasion is designed to justify one's own conduct by demonstrating that it complies with the law or to challenge the legitimacy of an adversary's behaviour by questioning its legality – or a combination of both. If successful, casting doubt on the legality of an adversary's conduct can impose substantial costs on it, for example in the form of a loss of credibility, loss of support and lost freedom of action.<sup>106</sup> At times, such battles of legal persuasion are fought in front of judicial bodies tasked to resolve them with binding effect.<sup>107</sup> But far more often, they are conducted in informal settings before a mix of audiences – domestic and international, expert and lay, friendly and inimical – through instruments ranging from public statements and diplomatic notes to social media posts. The informality, accessibility and range of social media and other communication platforms hands non-state actors a significant advantage in this context, enabling them to deploy legal narratives and counter-narratives against states in a way that formal legal proceedings often would not allow them to do.<sup>108</sup> Much of the discourse of legal persuasion is therefore fast, dispersed, organic, non-expert and concerned with (de)legitimizing, rather than the accuracy or soundness of the legal arguments advanced.

99 See Ren Xiaofeng and Senior Colonel Cheng Xizhong, 'A Chinese Perspective', *Marine Policy*, Volume 29, Issue 2 (2005) 139–146.

100 Cf. Raul Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone', *Chinese Journal of International Law*, Volume 9, Issue 1 (2010): 9–29.

101 Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge, Mass., 1995), 118.

102 E.g. The Secretary of State for Foreign and Commonwealth Affairs (Mr Robin Cook), HC Deb (25 March 1999) vol. 328, col. 538 and The Secretary of State for Defence (Mr George Robertson), id., col. 616–617. See Fernando G. Nuñez-Mietz, 'Legalization and the Legitimation of the Use of Force: Revisiting Kosovo', *International Organization*, Volume 72, Issue 3 (2018): 725–757.

103 Address by the President of the Russian Federation, 18 March 2014, <http://en.kremlin.ru/events/president/news/20603> ('We keep hearing from the United States and Western Europe that Kosovo is some special case. What makes it so special in the eyes of our colleagues? ... This is not even double standards; this is amazing, primitive, blunt cynicism'). See Christian Marxsen, 'The Crimea Crisis: An International Law Perspective', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Volume 74, Issue 2 (2014): 367–391.

104 Remarks by President Zourabichvili on the ECHR Verdict in the *Georgia v. Russia* case, 21 January 2021, [https://www.president.gov.ge/en/News/Article/prezidenti\\_strasburgis\\_sasamarylos\\_mier\\_sakaryvelo\\_samarylebrivad\\_gamarylebulia\\_es\\_dzalian\\_didi\\_mightsevaa\\_chveni\\_kveknisayvis\\_chveni\\_sazogadoebis\\_chveni\\_istoriisa\\_da\\_chveni\\_momavlisvyis](https://www.president.gov.ge/en/News/Article/prezidenti_strasburgis_sasamarylos_mier_sakaryvelo_samarylebrivad_gamarylebulia_es_dzalian_didi_mightsevaa_chveni_kveknisayvis_chveni_sazogadoebis_chveni_istoriisa_da_chveni_momavlisvyis) ('This is very important, because for the first time in our history and for the first time in the history of other countries it happens that Georgia is legally justified, the state is recognized as a victim of this war and it is a great achievement for our country, our society, our history and our future. It is the pillar on which we must now build our future and our union').

105 See David Hughes, 'How States Persuade: An Account of International Legal Argument upon the Use of Force', *Georgetown Journal of International Law*, Volume 50, Issue 4 (2018): 839–946, 846–862.

106 E.g. Avihai Mandelblit, 'Lawfare: The Legal Front of the IDF', *Military and Strategic Affairs*, Volume 4, Issue 1 (2012): 51–57. See also Matthew S. Cohen and Charles D. Freilich, 'The Delegitimization of Israel: Diplomatic Warfare, Sanctions, and Lawfare', *Israel Journal of Foreign Affairs*, Volume 9, Issue 1 (2015): 29–48.

107 E.g. *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award (2016) (Perm. Ct. Arb.).

108 Cf. David Patrikarakos, *War in 140 Characters: How Social Media is Reshaping Conflict in the Twenty-first Century* (Basic Books, New York, 2017), 17–90. See also Thomas Zeitzoff, 'Does Social Media Influence Conflict? Evidence from the 2012 Gaza Conflict', *Journal of Conflict Resolution*, Volume 62, Issue 1 (2018): 29–63.



### 3.3. Tactics

The choice of legal tactics deployed by hostile actors depends on a multitude of factors, including what effects they seek to achieve, the resources available to them and the setting in which they are deployed. A legal soundbite that sits well in a press release may not withstand scrutiny before an international tribunal. Often, a particular legal move may serve multiple complementary purposes, such as exerting control, justifying the actor's position and providing a basis for subsequent action. A few tactics are worth mentioning by way of illustration.

Domestic legal processes, such as legislation, administrative measures and judicial proceedings, constitute one of the most common methods for utilizing law's coercive and regulatory effect. Authoritarian states routinely rely on domestic legislation as a means of suppressing political dissent, exemplified by Russia's law on undesirable organizations and China's National Security Law for Hong Kong. They regularly use the criminal process to silence individual critics, such as Russian opposition leader Alexei Navalny<sup>109</sup> or Belarusian activist Roman Protasevich.<sup>110</sup> They may also employ criminal proceedings to retaliate against foreign governments or to gain leverage over them. Iran engages in a pattern of detaining foreign and dual nationals it accuses of undermining national security or spreading propaganda,<sup>111</sup> often in serious violation of their due process rights.<sup>112</sup> In 2019, the Russian authorities initiated criminal proceedings against several Lithuanian prosecutors, investigators and judges in response to the

*in absentia* trial of former Soviet officers and officials in Lithuania for crimes they allegedly committed during the country's transition to independence in 1991.<sup>113</sup> For years, the Russian government has manipulated the International Police Organization (INTERPOL) notice system to pursue its political opponents abroad,<sup>114</sup> in essence exploiting international law enforcement mechanisms to extend the reach of Russian criminal law. Domestic law may also be used to co-opt private actors. China's National Intelligence Law of 2017 imposes positive legal obligations on citizens and others to facilitate and support the intelligence-gathering activities of the Chinese authorities.<sup>115</sup>

Hostile powers rely on domestic legal processes to shield themselves from the impact of international norms and to mitigate the impact of measures taken against them by foreign governments. One of the amendments introduced to the Russian Constitution in 2020 renders decisions of international bodies that conflict with the Constitution unenforceable in Russia.<sup>116</sup> The amendment serves to neutralize the effect within the Russian legal system of decisions of international organizations, including judgments of the European Court of Human Rights, found by the Russian authorities to be incompatible with the Constitution. Both Russia and China have taken steps to counter the impact of Western sanctions. In January 2021, China's Ministry of Commerce promulgated a set of Blocking Rules designed to retaliate against Western sanctions by blocking the extraterritorial effect of unilateral measures imposed by foreign countries or regions which seek to ban or restrict

109 Daria Litvinova, *Kremlin critic Navalny slapped with new criminal charges*, AP News, 11 August 2021, <https://apnews.com/article/europe-9748ddaebce-064c1cd069f931c0a036c>.

110 Rachel Denber, *Belarus's Shocking New Law in Crushing Dissent: Forcing Down Airliner to Detain Activist Is Latest Lawless Rights Violation*, Human Rights Watch, 24 May 2021, <https://www.hrw.org/news/2021/05/24/belarus-shocking-new-law-crushing-dissent>.

111 Human Rights Watch, *Iran: Targeting of Dual Citizens, Foreigners* (Human Rights Watch, 2018).

112 E.g. Human Rights Council Working Group on Arbitrary Detention, Opinion No. 52/2018 concerning Xiyue Wang (Islamic Republic of Iran), UN Doc. A/HRC/WGAD/2018/52, 21 September 2018.

113 European Parliament Resolution of 28 November 2019 on Recent Actions by the Russian Federation against Lithuanian Judges, Prosecutors and Investigators involved in Investigating the Tragic Events of 13 January 1991 in Vilnius, 2019/2938 (RSP).

114 Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, 'Abusive Use of the Interpol System: The Need for More Stringent Legal Safeguards', Doc. 14277, 29 March 2017. See also David Satter, *Russia's Abuse of Interpol* (Henry Jackson Society, London, 2015).

115 National Intelligence Law of the People's Republic of China, 27 June 2017, [http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-06/27/content\\_2024529.htm](http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-06/27/content_2024529.htm) (in Chinese). See Murray Scot Tanner, *Beijing's New National Intelligence Law: From Defense to Offense*, Lawfare, 17 July 2017, <https://www.lawfareblog.com/beijings-new-national-intelligence-law-defense-offense>. See also Jukka Aukia, *China as a Hybrid Influencer: Non-State Actors as State Proxies*, Hybrid CoE Research Report 1 (2021), 22, <https://www.hybridcoe.fi/publications/hybrid-coe-research-report-1-china-as-a-hybrid-influencer-non-state-actors-as-state-proxies/>.

116 Lauri Mäliksoo, 'International Law and the 2020 Amendments to the Russian Constitution', *American Journal of International Law*, Volume 115, Issue 1 (2021): 78–93, 86–92.



Chinese operators from transacting with operators in third countries or regions.<sup>117</sup> In June 2021, the NPC adopted the Anti-Foreign Sanctions Law of the People's Republic of China, which is designed to provide a legal basis for countering foreign sanctions and interference.<sup>118</sup> The Law authorizes relevant departments of the State Council to place on a sanctions list individuals and organizations that have participated in the formulation, adoption and implementation of restrictive measures against Chinese citizens or organizations in violation of international law, or by interfering with China's internal affairs.<sup>119</sup>

Hostile actors also routinely rely on international legal processes and institutions to exert their influence and to shape the legal environment in ways favourable to their interests. In the immediate aftermath of its war with Georgia in the summer of 2008, the Russian Federation recognized the independence of the two break-away regions of Abkhazia and South Ossetia.<sup>120</sup> Russia proceeded to conclude 78 bilateral agreements with the two entities in the period between 2008 and 2015.<sup>121</sup> The agreements deal with a wide variety of matters, ranging from border protection and military cooperation to financial assistance and environmental protection. Collectively, they order Russia's relationship with the two territories and deepen their dependency on Moscow,<sup>122</sup> whilst reinforcing Russia's hold over Georgia. By shaping the legal terrain, they also increase what Chinese authorities and authors call 'discursive power',<sup>123</sup>

the ability to influence and control ideas and beliefs through persuasion, framing and agenda-setting. In the Agreement between the Russian Federation and the Republic of Abkhazia on Alliance and Strategic Partnership of 2014, the two parties promise to assist each other in the case of an armed attack and to create joint Russian-Abkhaz military formations.<sup>124</sup> In essence, the agreement creates trip-wire forces and provides Russia with discursive ammunition to invoke the right of individual and collective self-defence should it decide to use force in response to an armed attack on Abkhazia.

Another common tactic is to evade accountability for wrongdoing. At its most basic, this involves an attempt to deny or hide the true source of a wrongful act. If wrongdoing cannot be attributed, then the perpetrator cannot be held accountable either. States thus often prefer to undertake dubious action covertly,<sup>125</sup> especially in circumstances where they are unable to offer compelling justification for their conduct in public.<sup>126</sup> This is one of the reasons why cyberspace remains an attractive domain for covert operations. The attribution of cyber operations poses significant legal, factual and technical challenges,<sup>127</sup> all of which assist hostile actors in denying or hiding their involvement in malign cyber activities, and allow them to benefit from a measure of 'plausible deniability'.<sup>128</sup> For the same reasons, acting through proxies exerts an enduring allure, since it enables hostile states to remain in the background.<sup>129</sup> Even where concealing their presence is not possible, states may still

117 Ministry of Commerce, Order No. 1 of 2021 on Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures, 9 January 2021, <http://english.mofcom.gov.cn/article/policyrelease/announcement/202101/20210103029708.shtml>. See Lester Ross, Kenneth Zhou and Tingting Liu, *China Issues Blocking Rules to Counter Foreign Sanctions and Other Measures*, WilmerHale, 12 January 2021, <https://www.wilmerhale.com/en/insights/client-alerts/20210121-china-issues-blocking-rules-to-counter-secondary-sanctions>.

118 Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on June 8, 2021, 8 June 2021, [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2511\\_665403/t1882182.shtml](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1882182.shtml).

119 Anti-Foreign Sanctions Law of the People's Republic of China, 10 June 2021, <http://www.npc.gov.cn/hpc/c30834/202106/d4a714d5813c4ad2a-c54a5f0f78a5270.shtml> (in Chinese).

120 Statement by President of Russia Dmitry Medvedev, 26 August 2008, <http://en.kremlin.ru/events/president/transcripts/1222>.

121 Thomas Ambrosio and William A. Lange, 'The Architecture of Annexation? Russia's Bilateral Agreements with South Ossetia and Abkhazia', *Nationalities Papers*, Volume 44, Issue 5 (2018): 673–693.

122 Cf. Andre W. M. Gerrits and Max Bader, 'Russian Patronage over Abkhazia and South Ossetia: Implications for Conflict Resolution', *East European Politics*, Volume 32, Issue 3 (2016): 297–313.

123 Kejin Zhao, 'China's Rise and Its Discursive Power Strategy', *Chinese Political Science Review* (2016), 1–25, 3–7. See also Alicia Fawcett, *Chinese Discourse Power: China's Use of Information Manipulation in Regional and Global Competition* (Atlantic Council, 2020).

124 Treaty between the Russian Federation and the Republic of Abkhazia on Alliance and Strategic Partnership, 24 November 2021, <http://kremlin.ru/supplement/4783> (in Russian).

125 Douglas Cantwell, *Hybrid Warfare: Aggression and Coercion in the Gray Zone*, ASIL Insights, 29 November 2017, <https://www.asil.org/insights/volume/21/issue/14/hybrid-warfare-aggression-and-coercion-gray-zone>.

126 See Michael Poznansky, 'Feigning Compliance: Covert Action and International Law', *International Studies Quarterly*, Volume 63, Issue 1 (2019): 72–84.

127 François Delerue, *Cyber Operations and International Law* (Cambridge University Press, Cambridge, 2020), 51.

128 Cf. Rory Cormac and Richard J. Aldrich, 'Grey is the New Black: Covert Action and Implausible Deniability', *International Affairs*, Volume 94, Issue 3 (2018): 477–494.

129 Andrew Mumford, *Proxy Warfare* (Policy Press, Cambridge, 2013), 41–44.

prefer to act through surrogates in order to externalize the risks and costs of their actions.<sup>130</sup> China's maritime militias illustrate the point.<sup>131</sup> From a legal perspective, the principal benefit of relying on proxies whose formal status and relationship to the hostile state actor is unclear is that this creates considerable legal uncertainty,<sup>132</sup> which in turn renders it more difficult for the targeted states to mobilize the law in response.

Proxies and surrogates may offer other benefits too, for instance by amplifying government messages. In 2018, the Chinese Society of International Law published a 500-page 'critical study' of the arbitral award rendered in the *South China Sea Arbitration* between the Philippines and China in a not-too-subtle attempt to shore up the legal position of the People's Republic.<sup>133</sup> More recently, lawyers and firms based in Russia and the contested areas of eastern Ukraine have submitted thousands of claims against Ukraine before the European Court of Human Rights in an apparently coordinated campaign, accusing the government in Kiev of human rights violations in Donbas.<sup>134</sup>

Hostile actors exploit weaknesses in the law, such as legal gaps and ambiguities. Influence operations and other non-physical interference in the public sphere of democratic societies benefit from the fact that, for the most part, such activities fall through the gaps of international law. Hostile interference that does not cause actual or potential

physical damage or injury is not caught by Article 2(4) of the United Nations Charter, which prohibits the use of force in international relations. While it may fall foul of the principle of non-intervention, which proscribes interference that seeks to coerce the targeted state in matters in which it is permitted to decide freely,<sup>135</sup> the boundaries of this principle are not fully settled. It is generally accepted that falsifying election records or sabotaging democratic processes may amount to coercive intervention prohibited by the principle,<sup>136</sup> but whether spreading disinformation, stealing sensitive data or sowing political discord does so too is open to debate.<sup>137</sup> This leaves hostile actors considerable leeway to engage in such activities without the risk of manifestly breaking the law. Areas of legal uncertainty also provide opportunities for norm entrepreneurship. China, together with Russia and other like-minded states, promotes the development of new norms for cyberspace with a particular emphasis on information security, cyber sovereignty and the right to develop its own model of cyber regulation.<sup>138</sup> These priorities reflect China's preoccupation with controlling its domestic information environment and its desire to shape the international regulatory framework of cyberspace in ways that facilitate this objective.<sup>139</sup>

Finally, hostile states routinely engage in acts of legal persuasion to justify their conduct and to delegitimize their adversaries. Often, the claims

130 Andreas Krieg and Jean-Marc Rickli, *Surrogate Warfare: The Transformation of War in the Twenty-First Century* (Georgetown University Press, Washington, DC, 2019), 56–84.

131 Conor M. Kennedy and Andrew S. Erickson, *China Maritime Report No. 1: China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA* (U.S. Naval War College, Newport, RI, 2017). See also Ryan D. Martinson and Andrew S. Erickson, *Manila's Images Are Revealing the Secrets of China's Maritime Militia: Details of the Ships Haunting Disputed Rocks Show China's Plans*, Foreign Policy, 19 April 2021, <https://foreignpolicy.com/2021/04/19/manilas-images-are-revealing-the-secrets-of-chinas-maritime-militia/>.

132 Cf. Jonathan G. Odom, 'Guerrillas in the Sea Mist: China's Maritime Militia and International Law', *Asia-Pacific Journal of Ocean Law and Policy*, Volume 3, Issue 1 (2018): 31–94.

133 Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study', *Chinese Journal of International Law*, Volume 17, Issue 2 (2018): 207–748. See Douglas Guilfoyle, *A New Twist in the South China Sea Arbitration: The Chinese Society of International Law's Critical Study*, EJIL: Talk, 25 May 2018, <https://www.ejiltalk.org/a-new-twist-in-the-south-china-sea-arbitration-the-chinese-society-of-international-laws-critical-study/>.

134 Valeria Yehoshyna, *Ukraine Targeted At European Court In Hail Of Claims From Russia, Donbas*, RFE/RL Investigation Finds Radio Free Europe/Radio Liberty, 8 April 2021, <https://www.rferl.org/a/ukraine-targeted-european-court-russia-donbas-rferl-investigation/31193899.html>.

135 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, (Merits) (1986) ICJ Rep. 14, para. 205.

136 Michael N. Schmitt, 'Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law', *Chicago Journal of International Law*, Volume 19, Issue 1 (2018): 30–66. But see Jens David Ohlin, *Election Interference: International Law and the Future of Democracy* (Cambridge University Press, Cambridge, 2020), 67–89.

137 E.g. see Björnstjern Baade, 'Fake News and International Law', *European Journal of International Law*, Volume 29, Issue 4 (2019), 1357–1376; Ido Kilovaty, 'Doxfare—Politically Motivated Leaks and the Future of the Norm on Non-Intervention in the Era of Weaponized Information', *Harvard National Security Journal*, Volume 9, Issue 1 (2018): 146–179.

138 See Remarks by H.E. Xi Jinping, President of the People's Republic of China at the Opening Ceremony of the Second World Internet Conference, Wuzhen, 16 December 2015, [https://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/zjyh\\_665391/t1327570.shtml](https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zjyh_665391/t1327570.shtml); Ministry of Foreign Affairs and Cyberspace Administration of China, *International Strategy of Cooperation on Cyberspace*, 1 March 2017, [http://www.xinhuanet.com/english/china/2017-03/01/c\\_136094371.htm](http://www.xinhuanet.com/english/china/2017-03/01/c_136094371.htm). See Zhang Xinbao, 'China's Strategy for International Cooperation on Cyberspace', *Chinese Journal of International Law*, Volume 16, Issue 3 (2017): 377–386.

139 On Chinese norm entrepreneurship in cyberspace, see Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (Oxford University Press, New York, 2019), 150–152.

advanced do not stand up to closer scrutiny, especially when made outside of formal settings. When adopting the decrees recognizing Abkhazia and South Ossetia as independent states in August 2008, Russian President Dmitry Medvedev claimed to be guided by the United Nations Charter, the Declaration on the Principles of International Law Governing Friendly Relations between States of 1970, and the Helsinki Final Act of 1975.<sup>140</sup> Given that all of these instruments demand respect for the territorial integrity of states and none permit secession, it is difficult to see how they lend support to Russia's actions. The EU and NATO both condemned the unilateral recognition of Abkhazia and South Ossetia.<sup>141</sup> Chinese officials regularly invoke the principle of non-intervention in response to Western disapproval of China's human rights record, often loudly accusing Western states of being in 'violation of international law and the basic norms governing international relations'.<sup>142</sup> The principle of non-intervention prohibits coercive acts, but mere criticisms of a government's human rights record are not coercive in nature.<sup>143</sup> In any event, alleged violations by a state of its human rights commitments are not matters solely within its reserved domain of domestic jurisdiction protected by the principle of non-intervention.

At times, states go further and bend the law and the facts to suit their objectives. On 24 May 2021, the Belarusian authorities induced a Ryanair flight between Athens and Vilnius to land at Minsk Airport after informing the pilot that there was a bomb on board the aircraft. Pursuant to the Convention on International Civil Aviation,<sup>144</sup>

a state may require civil aircraft flying above its territory to land at a designated airport 'if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention'. In the present case, the evidence presented by the Belarusian authorities in support of a genuine bomb threat is highly dubious,<sup>145</sup> suggesting that the threat was a ruse designed to gain custody of Roman Protasevich after the plane had made an emergency landing. If so, their actions almost certainly violated international law.<sup>146</sup> Russia was quick to defend its ally, asserting that the Belarusian aviation authorities complied with international standards.<sup>147</sup>

It is important to underline that whilst some of the tactics employed by hybrid threat actors may breach their international obligations, this is not always the case. International law tolerates many acts that may be considered hostile but do not violate international law. For example, any state is perfectly entitled to respond to an unfriendly act committed against it through an act of retorsion, that is an unfriendly act of its own, in a manner consistent with international law. Declaring foreign diplomatic personnel persona non grata offers an example.<sup>148</sup> Similarly, attempts by authoritarian states to develop new norms through the ordinary law-making processes of international law are, in principle, perfectly permissible. In fact, authoritarian and democratic states often resort to the same legal tactics. For example, the Moscow Arbitration Court has held that giving effect within the Russian legal order to economic sanctions imposed by the EU on the Russian Federation would run counter to the public order of Russia.<sup>149</sup> In a similar vein,

140 Statement by President of Russia Dmitry Medvedev (n. 120).

141 *Extraordinary European Council Presidency Conclusions*, 12594/08, 1 September 2008; Statement by the North Atlantic Council on the Russian Recognition of South Ossetia and Abkhazia regions of Georgia, Press Release (2008) 108, 27 August 2008, [https://www.nato.int/cps/en/natohq/news\\_43517.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/news_43517.htm?selectedLocale=en).

142 E.g. Embassy of the People's Republic of China in the United Kingdom, Embassy Spokesperson's Remarks on the Passing of a so-called Motion on Xinjiang-related Issues at the House of Commons of the UK, 23 April 2021, <http://www.chinese-embassy.org.uk/eng/PressandMedia/Spokepersons/t1870944.htm>.

143 Maziar Jamnejad and Michael Wood, 'The Principle of Non-intervention', *Leiden Journal of International Law*, Volume 22, Issue 2 (2009): 345–381.

144 Article 3bis(b), Convention on International Civil Aviation, 7 December 1944, 15 UNTS 297.

145 Reuters, 'Belarus points to Hamas bomb threat in plane diversion, Hamas rejects claim', 24 May 2021, <https://www.reuters.com/world/europe/belarus-points-hamas-bomb-threat-plane-diversion-hamas-rejects-claim-2021-05-24/>.

146 See Cameron Miles, *Belarus and the Hijacking of Ryanair Flight FR4978: A Preliminary International Law Analysis*, Lawfare, 24 May 2021, <https://www.lawfareblog.com/belarus-and-hijacking-ryanair-flight-fr4978-preliminary-international-law-analysis>.

147 Comment by Foreign Ministry Spokeswoman Maria Zakharova on the developments around the Ryanair flight in Minsk, 24 May 2021, [https://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/4742118](https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4742118).

148 See Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (3rd edn, Oxford University Press, Oxford, 2008), 61–73.

149 Decision of the Moscow Arbitration Court in the case of NA40-191025/17-149-1807, 17 January 2018, <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=MARB&n=1570213&dst=0&hash=0#08534216047054722> (in Russian).

the New York Supreme Court denied the enforcement of a judgment by a Chinese court on the basis that the Chinese judgment ‘was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law in the United States.’<sup>150</sup> It bears repeating that the legal dimension of hybrid threats does not necessarily coincide with illegality.

### 3.4. Vulnerabilities

A vulnerability is a system feature susceptible to suffering or causing harm when exposed to damaging influence.<sup>151</sup> Simply put, a vulnerability is a risk factor. In the present context, it has been a long-standing concern that hybrid actors may exploit EU and NATO legal vulnerabilities. Policy documents warn that hostile powers may capitalize on the lack of legal interoperability and consensus among Western nations, circumvent legal thresholds in an attempt to avoid triggering the application of mutual assistance commitments, above all Article 5 of the North Atlantic Treaty, or take advantage of ambiguity to avoid accountability.<sup>152</sup> These concerns are echoed by the Parliamentary Assembly of the Council of Europe. According to the Assembly, hybrid adversaries ‘exploit lacunae in the law and the complexity of legal systems, operate across legal boundaries and in under-regulated spaces, exploit legal thresholds, are prepared to commit substantial violations of the law and generate confusion and ambiguity to mask their actions.’<sup>153</sup>

A comprehensive assessment of the legal vulnerabilities faced by the EU, NATO and their member states requires mapping which features of their legal systems are susceptible to damaging influence and what harm this susceptibility may cause. Such an assessment is complicated by at least two

factors. First, a system’s vulnerability may lead to harm within the same domain or in a different one. Thus, hostile actors may exploit weaknesses in the law to accomplish harmful effects both within the legal system itself or in completely different fields. We saw how gaps in the law may prompt hostile powers to engage in norm entrepreneurship to develop the law in ways that favour their own strategic interests. By contrast, the blurred contours of the principle of non-intervention enable hostile actors to undertake influence operations that wreak havoc in the information environment, but without necessarily harming the international legal order. Second, susceptibility to damage and harm are contextual and to some extent relative notions. Just like threats, they are a matter of perception. From a zero-sum perspective, any relative gain made by a hostile power may be seen as harmful. Paradoxically, a perceived strength may also be a source of weakness. Freedom of expression, as mentioned earlier, is a core value of liberal democracies and often flaunted as one of their strengths compared to authoritarian regimes. However, freedom of expression can be exploited by hostile actors – for instance by enabling them to propagate information and beliefs that are not prohibited, but are nevertheless harmful to the targeted society or beneficial to the hostile actor<sup>154</sup> – and therefore also represents a substantial weakness.

While the notion of vulnerabilities is useful for assessing the health of liberal democracies under pressure from hybrid threats, the preceding points underline that any such assessment must be clear about its own methodological choices. Since vulnerabilities are at least in part a matter of perception, the analytical vantage point from which they are measured is key. The hybrid threat conceptual model refers to actions that target ‘systemic vul-

150 *Shanghai Yongrun Inv. Mgt. Co., Ltd. v Kashi Galaxy Venture Capital Co., Ltd.*, 2021 NY Slip Op 31459(U), 30 April 2021 Supreme Court, New York County.  
151 Cf. Omar D. Cardona, ‘The Need for Rethinking the Concepts of Vulnerability and Risk from a Holistic Perspective: A Necessary Review and Criticism for Effective Risk Management’, in *Mapping Vulnerability: Disasters, Development and People*, ed. Greg Bankoff, Georg Frerks and Dorothea Hillhorst (Earthscan, London, 2004) 37–51, 37.

152 See in particular Supreme Headquarters Allied Powers Europe and Allied Command Transformation (n. 1); Headquarters, Supreme Allied Commander Transformation (n. 26); European External Action Service (n. 2) and European Commission and High Representative of the Union for Foreign Affairs and Security Policy (n. 5).

153 Council of Europe Parliamentary Assembly, Resolution 2217 (2018), Legal Challenges related to Hybrid War and Human Rights Obligations, 26 April 2018.

154 E.g. Miriam Matthews, Katya Migacheva and Ryan Andrew Brown, *Superspreaders of Malign and Subversive Information on COVID-19: Russian and Chinese Efforts Targeting the United States* (RAND, Santa Monica, CA, 2021); East StratCom Task Force, *EEAS Special Report Update: Short Assessment of Narratives and Disinformation Around the COVID-19 Pandemic (Update December 2020 – April 2021)* (European External Action Service, Brussels, 2021).

nerabilities in democratic societies'.<sup>155</sup> This puts the focus firmly on democratic societies, but the model does not elaborate on what their systemic vulnerabilities are. Approaching the question from a legal perspective, two such overarching vulnerabilities come into view.

The first of these relates to the instrumental nature of the law. The fact that the law serves social ends that are contestable means that it is susceptible to becoming hostage to partisan political projects. The instrumental nature of the law thus becomes a systemic vulnerability for liberal democracies when hostile powers employ the law at their expense. The use of domestic legislation by authoritarian regimes to target political dissidents abroad is a case in point.

While in principle any rule of law can be instrumentalized for hostile purposes, in practice, hybrid threats often follow recurrent patterns and gravitate towards certain areas of the law. For example, hostile powers seeking to avoid open military confrontation frequently use low-level coercion instead to achieve incremental gains that are difficult to prevent and reverse.<sup>156</sup> According to the United States Department of Defense,

China continues to exercise low-intensity coercion to advance its claims in the East and South China Seas. During periods of tension, official statements and state media seek to portray China as reactive. China uses an opportunistically timed progression of incremental but intensifying steps to attempt to increase effective control over disputed areas and avoid escalation to military conflict.<sup>157</sup>

Such tactics feed concerns, voiced repeatedly in the West, that hybrid actors may circumvent the

legal thresholds governing the use of force set out in the United Nations Charter.<sup>158</sup>

The second systemic vulnerability relates to the substantive values enshrined in the law. In the Western political tradition, the idea of law is inseparable from the broader notion of the rule of law. At its core, the rule of law implies the absence of arbitrary government and that no one is above the law.<sup>159</sup> It also implies that laws should be prospective, open and clear, that the rules should be relatively stable and courts independent.<sup>160</sup> Thicker notions of the rule of law go further and proclaim that individual citizens enjoy political rights which the legal system should reflect.<sup>161</sup> On these accounts, respect for fundamental human rights is an integral element of the rule of law.<sup>162</sup>

While most definitions of the rule of law oscillate between thinner and thicker versions, there is no denying that in the West, the concept is closely related to liberal values and democracy. The preamble of the North Atlantic Treaty describes the 'principles of democracy, individual liberty and the rule of law' as the foundations on which the freedom, common heritage and civilization of its signatories are based.<sup>163</sup> The preamble of the Treaty on European Union confirms the attachment of the member states to 'the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.<sup>164</sup> The preamble of the Statute of the Council of Europe meanwhile refers to 'individual freedom, political liberty and the rule of law' as 'principles which form the basis of all genuine democracy'.<sup>165</sup>

The Western understanding of the rule of law, in particular its close connection with liberalism and democracy, is not shared universally.<sup>166</sup> In recent decades, China has embarked on an ambitious programme of domestic legal reform in what

155 European Commission and Hybrid CoE (n. 10), 11.

156 *The National Security Strategy of the United States of America* (The White House, Washington, DC, 2017), 27–28.

157 Office of the Secretary of Defense, *Military and Security Developments Involving the People's Republic of China 2018* (Department of Defense, Arlington, VA, 2018), 16.

158 Articles 2(4) and 51, UN Charter.

159 Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan, London, 1885), 172 and 177–178.

160 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 1979), 214–218.

161 Ronald Dworkin, *A Matter of Principle* (Harvard University Press, Cambridge, MA, 1985), 11–12.

162 Tom Bingham, *The Rule of Law* (Allen Lane, London, 2010), 67.

163 Preamble, North Atlantic Treaty.

164 Preamble, TEU.

165 Preamble, Statute of the Council of Europe, 5 May 1949, ETS No 1.

166 The rejection of the Western model of liberal democracy is at the heart of the Russian vision of a pluralist international legal system based on mutual co-existence. See Sergey Lavrov, 'The Law, the Rights and the Rules', 28 June 2021, [https://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/ckNonkJE02Bw/content/id/4801890](https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/ckNonkJE02Bw/content/id/4801890).

has been described as a long march towards the rule of law.<sup>167</sup> The ultimate aim of these reforms is to build a socialist legal system with Chinese characteristics,<sup>168</sup> one based on a high degree of unity between the law and the Chinese Communist Party.<sup>169</sup> While China's system of authoritarian legality does not exclude citizens' rights or 'quasi-democratic' institutions,<sup>170</sup> its rule of law model differs markedly from the Western one. Law is not a constraint on the Party, but a conduit for its leadership.<sup>171</sup> There are signs that China is increasingly seeking to transpose this model into the international arena, or at least neutralize competing aspects of international law. In the recent past, China has mostly kept a low profile in the international human rights system, whilst seeking to weaken its accountability mechanisms.<sup>172</sup> Faced with increased international scrutiny in relation to Hong Kong and Xinjiang, the Chinese authorities are now becoming more vocal in their attempts to subordinate human rights norms to the principle of sovereignty and non-interference, including by building coalitions with like-minded states.<sup>173</sup> At the same time, they are also counter-attacking democratic states more aggressively, accusing Western nations of violating their obligations in

relation to the human rights of minorities, immigrants and indigenous populations.<sup>174</sup>

China's newfound assertiveness in the human rights field should be seen against the backdrop of its efforts to increase its influence in and over international institutions. Taking advantage of the Trump Administration's disengagement from multilateral fora, China has actively sought to expand its influence over key international organizations, including by attaining positions of leadership, building coalitions and leveraging funding arrangements.<sup>175</sup> These developments fuel concerns that China is positioning itself to promote its own model of the rule of law at the international level with greater vigour than has been the case so far.<sup>176</sup> The threat that China and other authoritarian regimes pose to democracy and liberal norms at the international level is exacerbated by the risk of democratic backsliding at home, that is the decline of liberal democratic regime attributes and a corresponding turn towards autocratization in some nations.<sup>177</sup> Democratic backsliding not only weakens the normative fabric of the EU and NATO, but also undermines their strategic cohesion, offering authoritarian regimes an opportunity to exploit internal divisions within the West to their benefit.<sup>178</sup>

167 R. P. Peerenboom, *China's Long March Toward Rule of Law* (Cambridge University Press, Cambridge, 2002). See also Zou Keyuan, *China's Legal Reform: Towards the Rule of Law* (Nijhoff, Leiden, 2006).

168 Lin Li, *The Chinese Road of the Rule of Law* (China Social Sciences Press and Springer, Beijing and Singapore, 2018), 155–175.  
169 Id., 287–311.

170 Mary Elizabeth Gallagher, *Authoritarian Legality in China: Law, Workers, and the State* (Cambridge University Press, Cambridge, 2017), 31–36.

171 Rogier Creemers and Susan Trevaskes, 'Ideology and Organisation in Chinese Law', in *Law and the Party in China: Ideology and Organisation*, ed. Rogier Creemers and Susan Trevaskes (Cambridge University Press, Cambridge, 2021) 1, 2.

172 See Sonya Sceats and Shaun Breslin, *China and the International Human Rights System* (Chatham House, 2012).

173 Foreign Ministry Spokesperson's Remarks on the Statement by Friendly Countries in Support of China at the 47th Session of the Human Rights Council, 22 June 2021, [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1885874.shtml](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1885874.shtml).

174 Id. All of these tactics were on prominent display during the most recent sessions of the United Nations Human Rights Council: see remarks by China and Belarus during the 3rd Meeting, 47th Regular Session of the Human Rights Council, 22 June 2021, <https://media.un.org/en/asset/k1x/k1x4ck2245>.

175 House of Commons Foreign Affairs Committee, *In the Room: The UK's Role in Multilateral Diplomacy*, First Report, together with Formal Minutes, Session 2021–22, HC 199 (2021), 7–12.

176 Moritz Rudolf, *Xi Jinping Thought on the Rule of Law: New Substance in the Conflict of Systems with China*, SWP Comment 2021/C 28 (Stiftung Wissenschaft und Politik, 2021), 7.

177 Anna Lührmann and Staffan I. Lindberg, 'A Third Wave of Autocratization is Here: What is New About It?', *Democratization*, Volume 26, Issue 7 (2019): 1095–1113. See Nazifa Alizada et al., *Democracy Report 2021: Autocratization Turns Viral* (V-Dem Institute, Gothenburg, 2021).

178 Cf. Robin Emmott and Angeliki Koutantou, *Greece blocks EU Statement on China Human Rights at UN*, Reuters, 18 June 2017, <https://www.reuters.com/article/us-eu-un-rights-idUSKBN1990FP>; John Chalmers and Robin Emmott, *Hungary blocks EU Statement criticising China over Hong Kong*, *Diplomats say*, Reuters, 16 April 2021, <https://www.reuters.com/world/asia-pacific/hungary-blocks-eu-statement-criticising-china-over-hong-kong-diplomats-say-2021-04-16/>. See also European Commission and Hybrid CoE (n. 10), 6, which identifies 'undermining public trust in democratic institutions, deepening unhealthy polarization both nationally and internationally [and] challenging the core values of democratic societies' as core objectives of hybrid threat actors.



## 4. Resilience and the law

Resilience has become a popular concept in recent years. As an inherently elastic idea capable of accommodating a range of meanings,<sup>179</sup> it seems to offer an antidote to the risk, complexity and uncertainty that permeate the world.<sup>180</sup> In everyday usage, resilience refers to the ‘action or an act of rebounding or springing back; rebound, recoil’ or to ‘the power of resuming an original shape or position after compression, bending, etc.’<sup>181</sup> In other words, it describes the capacity of an object or material to resume its initial shape once forces it has been subjected to are relaxed. Often traced back to the field of ecology,<sup>182</sup> resilience thinking has been adopted in many disciplines.<sup>183</sup> It has also emerged as a prominent feature of EU and NATO policy.

An implicit reference to resilience is written into Article 3 of the North Atlantic Treaty, which requires the Allies to ‘maintain and develop their individual and collective capacity to resist armed attack’. Within NATO, resilience is thus seen as underpinning the Alliance’s deterrence and defence mission.<sup>184</sup> This places a heavy emphasis on civil preparedness as a means of protecting and maintaining critical civilian services essential for

sustaining military operations. In 2016, Allied leaders committed themselves to strengthening their continuity of government, continuity of essential services, and security of critical civilian infrastructure.<sup>185</sup> More recently, concerns over the impact of political disunity among the Allies and the ability of hostile powers to exploit such divisions have prompted calls within NATO for a wider approach to resilience, one which extends to societal resilience and hostile interference with democratic institutions and processes.<sup>186</sup>

In the EU, resilience has emerged as something of a leitmotif of the Union’s external action and its approach to countering hybrid threats. The Global Strategy for the EU’s Foreign and Security Policy adopted in 2016 puts resilience at the centre of its engagement with third countries.<sup>187</sup> Strengthening resilience has featured as a goal of the Union’s efforts to counter hybrid threats in areas such as cybersecurity and the information sector.<sup>188</sup> The coronavirus pandemic has further reinforced the emphasis on the internal resilience of the EU. It is telling that the EU’s financial programme for mitigating the economic and social impact of the pandemic is entitled the ‘Recovery and Resilience

179 Sandra Walklate, Ross McGarry and Gabe Mythen, ‘Searching for Resilience: A Conceptual Excavation’, *Armed Forces and Society*, Volume 40, Issue 3 (2014): 408–410.

180 David Chandler, *Resilience: The Governance of Complexity* (Routledge, Abingdon, 2014).

181 Oxford English Dictionary Online (Oxford University Press, December 2018).

182 E.g. Jeremy Walker and Melinda Cooper, ‘Genealogies of Resilience: From Systems Ecology to the Political Economy of Crisis Adaptation’, *Security Dialogue*, Volume 42, Issue 2 (2011): 143–160. See C. S. Holling, ‘Resilience and Stability of Ecological Systems’, *Annual Review of Ecology and Systematics*, Volume 4, Issue 1 (1973): 1–23, 14.

183 E.g. Steven M. Southwick et al., ‘Resilience Definitions, Theory, and Challenges: Interdisciplinary Perspectives’, *European Journal of Psychotraumatology*, Volume 5 (2014): 25338; Ran Bhamra, Samir Dani and Kevin Burnard, ‘Resilience: The Concept, A Literature Review and Future Directions’, *International Journal of Production Research*, Volume 49, Issue 18 (2011): 5375–5393.

184 Jamie Shea, *Resilience: A Core Element of Collective Defence*, NATO Review, 30 March 2016, <https://www.nato.int/docu/review/2016/also-in-2016/nato-defence-cyber-resilience/en/index.htm>; Wolf-Diether Roepke and Hasit Thankey, *Resilience: The First Line of Defence*, NATO Review, 27 February 2019, <https://www.nato.int/docu/review/articles/2019/02/27/resilience-the-first-line-of-defence/index.html>.

185 Commitment to Enhance Resilience, Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Warsaw, 8–9 July 2016, Press Release (2016) 118, 8 July 2016.

186 NATO 2030: *United for a New Era – Analysis and Recommendations of the Reflection Group Appointed by the NATO Secretary General* (NATO, 2020).

187 *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union’s Foreign And Security Policy* (European External Action Service, 2016). See also European Commission and High Representative of the Union for Foreign Affairs and Security Policy, *Joint Communication: A Strategic Approach to Resilience in the EU’s External Action*, JOIN(2017) 21 final, 7 June 2017. See Ana E. Juncos, ‘Resilience as the New EU Foreign Policy Paradigm: A Pragmatist Turn?’, *European Security*, Volume 26, Issue 1 (2017): 1–18.

188 European Commission and High Representative of the Union for Foreign Affairs and Security Policy, *Joint Communication: Increasing Resilience and Bolstering Capabilities to address Hybrid Threats*, JOIN(2018) 16 final, 13 June 2018.



Facility'.<sup>189</sup> Recent years have also seen greater weight accorded to the link between resilience, democratic values and a rules-based international order.<sup>190</sup>

While the EU, NATO and their individual member states all appear to be moving in the direction of a more holistic understanding of resilience, this has not yet translated into a systematic engagement with the question of resilience and the law. For the most part, legislative and other legal measures are treated as enablers of societal resilience, with only piecemeal attention given to the resilience of the law as such.<sup>191</sup> Given the pervasive legal implications of hybrid threats and the prominence of the resilience perspective, there are clear benefits to adopting a more methodical approach. The purpose of the present chapter is to introduce the notion of legal resilience as a way of reframing the relationship between law and resilience.

#### 4.1. Legal resilience

Over the last two decades, resilience thinking has made important inroads into legal scholarship.<sup>192</sup> However, despite the growing popularity of the concept, its reception in legal practice and literature has been uneven. Resilience has proven fashionable with lawyers working on environmental matters.<sup>193</sup> Other experts have explored how the law may contribute to the resilience of systems other than the natural environment, for instance in the area of disaster management.<sup>194</sup> In both cases, legal rules are treated as instruments which may enhance the resilience of other social systems.

A third strand of scholarship is concerned with the resilience of the law itself. Save for a handful of exceptions,<sup>195</sup> most of the writing falling into this category invokes the notion of resilience in a narrow sense to describe the resistance of specific legal rules and regimes to internal or external shocks. Examples include work on the constitutional foundations of the EU<sup>196</sup> and the Paris Agreement on climate change.<sup>197</sup>

Only a small number of authors have investigated how resilience theory, as originally developed in the socio-ecological literature, maps onto the law more generally. Among these, J. B. Ruhl has set out to identify which design principles make legal systems more resilient and adaptive,<sup>198</sup> leading him to formulate two key insights of interest here. First, according to Ruhl, the resilience of a legal system says nothing about the desirability of its substantive content.<sup>199</sup> Bad law may be resilient just as much as good law. Resilience should not be treated as a self-evident value in the legal context. Second, the use of law as an instrument to render other social systems more resilient must be distinguished from the resilience of the legal system itself.<sup>200</sup> Accordingly, there are two sides to legal resilience: resilience *through* law and resilience *of* the law.

Leaning on these insights and other work in the field, legal resilience may be defined as the capacity of a legal system to contribute to the resilience of other natural or social systems and its capacity to resist, recover from and adapt to internal and external disturbances whilst maintaining its key features.

189 See [https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility\\_en](https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en).

190 *The European Union's Global Strategy: Three Years on, Moving Forward* (European External Action Service, 2019), 8. See Nathalie Tocci, 'Resilience and the Role of the European Union in the World', *Contemporary Security Policy*, Volume 41, Issue 2 (2020): 176–194, 187–191.

191 E.g. the EU has mapped the various measures undertaken by the Union to enhance resilience and counter hybrid threats, which usefully includes references to legal measures: see European Commission and High Representative of the Union for Foreign Affairs and Security Policy, *Joint Staff Working Document: Mapping of Measures Related to Enhancing Resilience and Countering Hybrid Threats* SWD(2020) 152 final, 24 July 2020. However, this is not the same as systematically mapping the legal threat landscape itself.

192 Tracy-Lynn Humby, 'Law and Resilience: Mapping the Literature', *Seattle Journal of Environmental Law*, Volume 4, Issue 1 (2014): 86–128.

193 E.g. *Social-Ecological Resilience and Law*, ed. Ahjond S. Garmestani and Craig R. Allen (Columbia University Press, New York, 2014); Mary Jane Angelo, 'Stumbling Toward Success: A Story of Adaptive Law and Ecological Resilience', *Nebraska Law Review*, Volume 87, Issue 4 (2008): 950–994.

194 E.g. *Law and the Management of Disasters: The Challenge of Resilience*, ed. Alexia Herwig and Marta Simoncini (Routledge, Abingdon, 2017).

195 E.g. Tatiana Borisova, 'The Institutional Resilience of Russian Law through 1905–1917 Revolutions', *Russian Law Journal*, Volume 5, Issue 4 (2017): 108–128.

196 Christina Eckes, 'International Sanctions against Individuals: A Test Case for the Resilience of the European Union's Constitutional Foundations', *European Public Law*, Volume 15, Issue 3 (2009): 351–378.

197 Rafael Leal-Arcas and Antonio Morelli, 'The Resilience of the Paris Agreement: Negotiating and Implementing the Climate Regime', *Georgetown Environmental Law Review*, Volume 31, Issue 1 (2018): 2–66.

198 J. B. Ruhl, 'General Design Principles for Resilience and Adaptive Capacity in Legal Systems – With Applications to Climate Change Adaptation', *North Carolina Law Review*, Volume 89, Issue 5 (2010): 1373–1401.

199 *Id.*, 1382.

200 *Id.*

This definition reflects the distinction drawn between the two aspects of legal resilience underlined by Ruhl – resilience mediated through law and resilience of the law itself. The definition describes legal resilience as a capacity, rather than a process. Law may be more or less resilient. Resilience is therefore a property of legal systems, whilst efforts to maintain or increase this property are best seen as an ongoing process. For the purposes of this definition, legal systems are understood as a set of related rules, procedures and institutions. Accordingly, a legal system may refer to a specific legal regime or branch of law, the domestic legal order of a state, the internal law of an international organization or the international legal system as a whole. Alternatively, it may also refer to rules, procedures and institutions that are connected more loosely by functional or thematic ties, but without forming a distinct legal regime or branch of law, such as the law of disaster management. Finally, the definition recognizes that resilience may entail different strategies for coping with shocks. It therefore describes legal resilience as the capacity to resist, recover from and adapt to disturbance, whether that disturbance originates from within the law or stems from extra-legal sources. Such disturbances will have exceeded a legal system's capacity to cope if the system is unable to sustain the core features that make up its identity, for example its substantive content, structure or function. These features are referred to as a legal system's persistence criteria.<sup>201</sup>

It is important to underline that legal resilience so defined merely describes a property that legal systems may possess to varying degrees. Legal resilience is not a theory of the relationship between law and other social systems, nor a blueprint for strengthening the rule of law. Instead, legal resilience is best understood as a perspective for thinking about the law's ability

to withstand shocks and to deal with pressure for change.<sup>202</sup>

## 4.2. Legal resilience and hybrid threats

Adopting a legal resilience perspective offers two distinct benefits in the present context. The first of these is analytical: legal resilience shines a spotlight on the capacity of the law to cope with the harms caused by hybrid threats. This focuses attention, first, on what kind of support the law may lend to other systems in addressing their respective vulnerabilities and strengthening their coping mechanisms and, second, on law's own vulnerabilities and coping mechanisms. This broadly corresponds to the dual role of the law as an instrument of hybrid threats and as a domain of strategic competition. However, some care and clarifications are required in adopting a legal resilience perspective, as the concept gives rise to certain methodological dilemmas.<sup>203</sup>

Resilience is a property of systems. The identity of the system is critical to any resilience analysis. However, in the field of law, system boundaries are not always easy to demarcate. Law is predominantly structured along hierarchical, functional and thematic lines and operates on multiple scales, including the individual, communal, regional, national, transnational and global.<sup>204</sup> Most functional regimes, such as consumer law, span several jurisdictions and have national, regional and international dimensions.<sup>205</sup> To complicate matters, legal questions often cut across multiple legal regimes and orders. This suggests that a disturbance-driven, rather than a system-driven, analysis may often be more appropriate. This involves relying on the hybrid threat to define the boundaries of the legal system to be assessed: if the threat engages multiple jurisdictions and legal regimes, then legal resilience is a matter of their collective

201 See D. Gabbay and J. M. Moravcsik, 'Sameness and Individuation', *The Journal of Philosophy*, Volume 70, Issue 16 (1973): 513–526, 517.

202 Cf. Brian H. Walker and David Salt, *Resilience Thinking: Sustaining Ecosystems and People in a Changing World* (Island Press, Washington, D.C., 2006), 1–14. See also Theo Brinkel, 'The Resilient Mind-Set and Deterrence', in *Netherlands Annual Review of Military Studies (Winning Without Killing: The Strategic and Operational Utility of Non-Kinetic Capabilities in Crises)*, ed. Paul A.L. Ducheine and Frans P.B. Ozinga (TMC Asser, The Hague, 2017) 19.

203 See also Lennart Olsson et al., 'A Social Science Perspective on Resilience', in *The Routledge Handbook of International Resilience*, ed. David Chandler and Jon Coaffee (Routledge, London, 2014) 49–61; Debra J. Davidson, 'The Applicability of the Concept of Resilience to Social Systems: Some Sources of Optimism and Nagging Doubts', *Society and Natural Resources*, Volume 23, Issue 12 (2010): 1135–1149.

204 Cf. Sandra Walklate, Ross McGarry and Gabe Mythen, 'Searching for Resilience: A Conceptual Excavation', *Armed Forces and Society*, Volume 40, Issue 3 (2014): 408–427.

205 Hans W. Micklitz and Mateja Durovic, *Internationalization of Consumer Law: A Game Changer* (Springer, Berlin, 2017); Geraint G. Howells et al., *Handbook of Research on International Consumer Law* (Edward Elgar, Cheltenham, 2010).

capacity to resist, recover from or adapt to that threat.

The notion of an original stable state, that is a legal system's position of 'normalcy' before it suffers a disturbance, constitutes another source of difficulty. Examples can be found where a legal regime may be said to have flipped from one stable configuration to another as a result of shocks. The transition of the law of state immunity from an absolute to restrictive doctrine of immunity<sup>206</sup> may be re-told as a legal system losing its resilience in the face of sustained disturbance, eventually flipping over into a new stable state. However, the idea of an equilibrium becomes less compelling when legal change is gradual and evolutionary in nature, rather than abrupt and radical. There can be no doubt that the growth of human rights law has weakened the state-centric features of international law,<sup>207</sup> but this has not involved any obvious 'flip' from one equilibrium to another. Indeed, it is more convincing to describe the impact of human rights on general international law as a process of gradual adaptation, rather than as a sudden switch into a new configuration brought about by disturbances that exceeded the state-centric model's resilience.

Selecting a legal system's persistence criteria has significant methodological implications too. In her analysis of Russian law, Tatiana Borisova argues that the traditional equilibrium of the Russian legal system rested on the relationship between the sovereign, the people and a class of legal intermediaries.<sup>208</sup> Although the 1905 and 1917 revolutions upset this equilibrium, Borisova suggests that Russian law nevertheless proved highly resilient, since the Soviet authorities quickly rediscovered its value as an instrument of state power. This argument locates the Russian legal system's resilience in its continuing utility as an instrument of social control, despite the fact that its substantive content, processes and institutions

proved far less resilient to the dramatic changes set in motion by the October Revolution.<sup>209</sup>

What these points demonstrate is that legal resilience is very much in the eye of the beholder. It is far from obvious how key elements of the concept – the notion of a legal system, stable equilibria, disturbance and persistence criteria – should be applied in specific cases. Adopting a legal resilience perspective thus involves a series of choices. These not only frame the analysis, but also shape its outcome, depending on whether changes in the law are seen as transitions from one stable state to another or as successful adaptations. This is not to suggest that legal resilience analysis is erratic, but to stress that it is contingent on the observer's vantage point. For example, seen from a Soviet perspective, the post-communist transformation of socialist legal systems illustrates their lack of resilience, whereas from a post-Soviet perspective, the same transformation may demonstrate the long-term resilience of pre-existing legal traditions.<sup>210</sup> The Soviet and post-Soviet perspectives contradict each other, but their respective assessment of the law's resilience may both be correct within the confines of their own methodological horizons. It is not that resilience theory leads to inconsistent results, but that it can tell multiple stories, depending on the analytical reference points.

The lesson for present purposes is that the methodological choices which inform the legal resilience perspective involve the exercise of political judgement. This aligns with the conceptual model of hybrid threats: whether hybrid activities constitute a threat is a matter of harm and perception. The same holds true for legal resilience: whether legal stability is celebrated as a sign of law's resilience or condemned as its failure to adapt, or conversely whether legal change is hailed as a legal system's successful adaptation or lamented as its lack of resilience, depends on whether stability and change are perceived as

206 See Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, Oxford University Press, Oxford, 2015), 25–49; Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press, Cambridge, 2012), 6–32.

207 *The Impact of Human Rights Law on General International Law*, ed. Menno T. Kamminga and Martin Scheinin (Oxford University Press, Oxford, 2009).

208 Borisova (n. 195).

209 E.g. Becky L. Glass and Margaret K. Stolee, 'Family Law in Soviet Russia, 1917–1945', *Journal of Marriage and Family*, Volume 49, Issue 4 (1987): 893–902.

210 Cf. David Stark, 'On Resilience', *Social Sciences* 3 (2014): 60–70, 62.

positive or as harmful developments. As David Alexander has observed, one person's resilience may be another's vulnerability.<sup>211</sup>

Legal resilience therefore is not solely an analytical concept, but also a normative one.<sup>212</sup> Making judgements about the value of legal resilience seems unavoidable.<sup>213</sup> This normative dimension actually represents the second benefit of adopting a legal resilience perspective. In essence, legal resilience is a status quo strategy. For actors that seek to safeguard the existing features of a legal

system and their own status within it, legal resilience is a value worth pursuing. A legal resilience perspective encourages democratic states to reinforce the capacity of domestic and international rules, processes and institutions to withstand the challenges posed by hostile actors and to make systematic use of the law to strengthen their societal resilience against hybrid threats. Adopting a legal resilience perspective thus provides the authorities of democratic states with a framework for setting and pursuing legal policy goals.

211 D. E. Alexander, 'Resilience and Disaster Risk Reduction: An Etymological Journey', *Natural Hazards and Earth System Sciences*, Volume 13, Issue 11 (2013): 2707–2716. See also Simin Davoudi, 'Resilience: A Bridging Concept or a Dead End?', *Planning Theory and Practice*, Volume 13, Issue 2 (2012): 299–333, 305–306.

212 Henrik Thorén and Lennart Olsson, 'Is Resilience a Normative Concept?', *Resilience*, Volume 6, Issue 2 (2018): 112–128. See also Richard A. Barnes, 'The Capacity of Property Rights to Accommodate Social-Ecological Resilience', *Ecology and Society*, Volume 18, Issue 1 (2013).

213 See also Andrea M. Keessen et al., 'The Concept of Resilience from a Normative Perspective: Examples from Dutch Adaptation Strategies', *Ecology and Society*, Volume 18, Issue 2 (2013).

## 5. Putting legal resilience into practice

Both friendly and hostile powers treat the law as a medium through which to pursue their strategic interests. Law is therefore an integral, not merely an incidental, aspect of strategic competition. Many of the legal challenges associated with hybrid threats reflect the fact that the instrumentalization of the law for contested purposes is inevitable. Seen from this perspective, some of these challenges and vulnerabilities reveal themselves as enduring policy dilemmas, rather than as oversights, gaps or design failures that a more thoughtful legislator might have avoided.

For example, a narrow interpretation of the right of self-defence, as advanced by the International Court of Justice,<sup>214</sup> has the advantage of minimizing recourse to forcible self-help in a decentralized international system, but may leave states with limited options to counter low-level acts of aggression effectively. By contrast, a wide interpretation of that right, as adopted by the United States of America,<sup>215</sup> leaves a broader range of options on the table, but opens the door to the more liberal use of force for all states, including actual and potential adversaries, and thus carries with it the risk of escalation. There is no single regulatory solution that is optimal for all states under all circumstances. As this example demonstrates, it is not always possible to resolve legal vulnerabilities conclusively and without unintended consequences.<sup>216</sup> Closing down a legal loophole may simply channel hostile activity elsewhere. This is not to suggest that legal gaps and uncertainties can never be rectified or that their adverse effects cannot be mitigated. Nor is it to deny that certain legal vulnerabilities present more pressing problems than others. Rather, the point

is that law's susceptibility to hostile instrumentalization can never be totally eliminated. Law is, by definition, a competitive space.

These considerations have significant implications. They suggest that a technocratic mindset which treats the legal challenges posed by hybrid threats as a technical problem waiting to be fixed is overly simplistic. Confronting these challenges not only demands solving specific legal problems and vulnerabilities, to the extent that they can be resolved, but it also requires the EU, NATO and their member states to make a sustained and ongoing effort to defend their interests in the legal sphere and to promote their vision of international order. Most of all, it requires a strategic approach that is conscious of the systematic nature of the threat, matches the level of effort expended by hostile powers, and recognizes the need to compete more effectively.

For the reasons set out earlier, a resilience mindset fits such a strategic approach very well. However, legal resilience is a broad and high-level objective. Putting it into practice demands detailed planning and concrete steps. The following sections offer some recommendations on how to go about this, organized around seven headings. (1) Understanding the legal threat landscape is the essential starting point for legal resilience. (2) It enables the competent authorities to identify and prioritize national and institutional legal vulnerabilities with the aim of adopting appropriate countermeasures. (3) It also enables them to identify more methodically the gaps and weaknesses in the law's contribution to societal resilience. (4) However, legal vulnerabilities and weaknesses cannot be eliminated comprehensively. An element

214 See *Nicaragua* (n. 135).

215 United States Department of Defense, *Law of War Manual* (updated edn, December 2016), § 1.11.15.12. See also William H. Taft IV, 'Self-Defense and the Oil Platforms Decision', *Yale Journal of International Law*, Volume 29, Issue 2 (2004): 295–306, 299–302; Abraham D. Sofaer, 'Terrorism, the Law, and the National Defense', *Military Law Review*, Volume 126 (1989): 89–123, 93–96.

216 See Helmut Philipp Aust, 'Hybrid Warfare and the Turn to Resilience: Back to the Cold War?', *Humanitäres Völkerrecht*, Volume 3, Issue 3-4 (2020): 293–310, 304–306.

of uncertainty and unpredictability will always remain when it comes to hybrid threats. This highlights a more general need to enhance legal preparedness and to build capacity to compete more effectively in the legal domain. (5) Given the multimodal nature of hybrid threats, legal preparedness and capacity-building cannot be left to lawyers alone, but requires input from multiple stakeholders and expert communities. (6) To tie these different efforts together in a coherent approach, the EU, NATO and the member states should adopt 'legal resilience strategies', a new type of policy instrument designed to serve as an overall policy framework for navigating the legal threat landscape. (7) In addition, they should also consider the establishment of a dedicated centre of excellence for legal resilience to support these efforts.

## 5.1. Understanding the legal threat landscape

Since threats and vulnerabilities are actor-specific, it is vital for the EU, NATO and the member states to develop an in-depth understanding of the legal threat landscape – both as seen from their individual national and institutional perspective, and as it appears to them collectively. The starting point for this is to understand how hostile actors manoeuvre across the legal domain by identifying and assessing their intent, capabilities, objectives and the tactics they employ to achieve their aims. The goal is to build up as clear and detailed a picture as possible about the way in which adversaries utilize the law to their advantage, either directly or indirectly. As we have seen in the case of Russia and China, much of this information is readily available, but it remains fragmented. It needs to be brought together for the purposes of a more systematic assessment of the intent, capabilities, objectives and tactics of individual actors. Once completed, such assessments should be collated and kept under periodic review.

Based on these actor-specific assessments, a set of thematic areas and legal vulnerabilities will come

into sharper focus. Although the exposure of different democratic societies to hybrid threats varies, tactics commonly employed against them include hostile information operations, election interference, support for extremist groups, economic dependency and leverage, industrial espionage, humanitarian aid and assistance, energy dependence, foreign investment and cyber operations. All of these tactics have legal aspects that hostile actors may actively or passively exploit. With the help of a threat matrix, these legal aspects and corresponding activities should be categorized and prioritized in the form of a legal threat register, based on factors such as their modus operandi, the objectives they pursue, the nature and severity of their impact and the areas of law affected. The register should also identify and describe the legal vulnerabilities that these legal threats exploit or give rise to. The legal threat register should be kept under continuous review in the light of the evolution of the hybrid threat landscape.

## 5.2. Addressing legal vulnerabilities

Vulnerabilities identified as part of a legal risk register should be mitigated. For example, the law of the United Kingdom prohibits any person from carrying on the business of 'consultant lobbying' unless they are registered for that purpose.<sup>217</sup> Consultant lobbying is defined as a commercial activity and therefore does not cover the conduct of foreign officials or government employees.<sup>218</sup> Nor does it apply to covert influencing, to lobbying activities targeting members of Parliament and local authorities, or to social media campaigns directed from abroad.<sup>219</sup> As the United Kingdom's Electoral Commission notes, 'anyone outside the UK can [...] pay for adverts on digital and social media platforms to target voters in the UK'.<sup>220</sup> For some time, calls have been made to tighten the rules.<sup>221</sup> The Foreign Agents Registration Act of the United States requires persons acting on behalf of foreign powers in a political or quasi-political

217 Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014, 2014 c. 4, sec. 1.

218 Office of the Registrar of Consultant Lobbyists, *Guidance on the Requirements for Registration* (London, 2015), 13.

219 See Bob Seely, *Foreign Interference Unchecked: Models for a UK Foreign Lobbying Act* (The Henry Jackson Society, 2021), 12–13.

220 The Electoral Commission, *Report: Digital Campaigning – Increasing Transparency for Voters* (2018).

221 Deborah Haynes, 'Call for law to curb "creeping influence" from hostile foreign powers', 2 February 2019, Sky News, <https://news.sky.com/story/call-for-law-to-curb-creeping-influence-from-hostile-foreign-powers-11635716>.

capacity to disclose their relationship and information about their activities.<sup>222</sup> More recently, Australia has amended its electoral legislation to protect the Australian election system from foreign influence, including by establishing public registers for key non-party political actors and prohibiting donations from foreign governments and state-owned enterprises being used to finance public debate in the country.<sup>223</sup> Adopting similar legislation in the United Kingdom would subject political activities carried out on behalf of foreign entities to greater transparency and thus address a known legal vulnerability.

Developing legal threat registers offers an opportunity to map, categorize and prioritize legal vulnerabilities more systematically. This is important, as it avoids the pitfalls of a piecemeal approach that considers legal vulnerabilities in relation to specific sectors and thereby risks losing sight of the overall legal landscape, in particular the overall impact that hybrid threats may have on the rule of law. However, understanding the problem and addressing it are not the same thing. Having identified national and institutional legal vulnerabilities, the EU, NATO and the member states must take concrete steps to resolve or mitigate them. Legal risk registers and the vulnerabilities they identify should therefore feed into an appropriate programme of legislative and policy activity. In this context, it is important to bear in mind that measures taken in the interest of safeguarding the public from harm can have a severe impact on individual liberties and basic democratic principles, as the widespread use of emergency powers in response to the coronavirus pandemic demonstrates.<sup>224</sup> Concerns have been expressed that appeals to resilience entail a tendency to securitize the response to hybrid threats, including the legal

response,<sup>225</sup> with potentially dire consequences for rule of law principles. National authorities must be careful not to undermine individual freedoms and democratic principles in the name of safeguarding them.

### 5.3. Enhancing societal resilience

The definition of legal resilience proposed in this report recognizes that law makes a critical contribution to enhancing resilience in other domains. Accordingly, in the present context, the law serves as a normative basis and framework for adopting a wide range of regulatory and institutional measures that contribute to countering hybrid threats.<sup>226</sup> For example, in 2008, the Council of the European Union adopted a directive on the identification and designation of European critical infrastructures.<sup>227</sup> It directs each member state to identify European critical infrastructures and to ensure that their operators have suitable security plans in place to ensure their protection against major threats. In 2016, the European Parliament and the Council adopted Directive (EU) 2016/1148 aimed at achieving a high common level of security of network and information systems within the European Union.<sup>228</sup> Amongst other things, the Directive requires all member states to adopt a national strategy on the security of network and information systems, and to ensure that operators of essential services take appropriate and proportionate technical and organizational measures to manage the risks posed to the security of such systems. To give effect to their obligations, the member states have adopted national implementing legislation.<sup>229</sup> While the imposition of higher standards has been welcomed, concerns remain that the resulting regulatory landscape

222 22 U.S.C. ch. 11.

223 Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018, No. 147, 2018.

224 E.g. Joelle Grogan, 'States of Emergency', *European Journal of Law Reform*, Issue 4 (2020): 338–354; Stephen Thomson and Eric C Ip, 'COVID-19 Emergency Measures and the Impending Authoritarian Pandemic', *Journal of Law and the Biosciences*, Volume 7, Issue 1 (2020): 1–33.

225 Aust (n. 216), 309–310.

226 E.g. Sandra Kalniete and Tomass Pildegovičs, 'Strengthening the EU's Resilience to Hybrid Threats', *European View*, Volume 20, Issue 1 (2021): 23–33, 26–29.

227 Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection [2008] OJ L 345/75. Generally, see Marjolein B. A. van Asselt, Ellen Vos and Isabelle Wildhaber, 'Some Reflections on EU Governance of Critical Infrastructure Risks', *European Journal of Risk Regulation*, Volume 6, Issue 2 (2017): 185–190.

228 Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union [2016] OJ L 194/1.

229 E.g. The Network and Information Systems Regulations 2018, No. 506 (United Kingdom).



remains too fragmented.<sup>230</sup> Similar fears have been expressed in other sectors too.<sup>231</sup>

Here too, adopting a legal resilience perspective should encourage the EU, NATO and relevant national authorities to consider, within their respective competences, the role that law plays in this area in a more systematic manner. This involves mapping how existing regulatory frameworks support the resilience objectives pursued in key policy areas, such as food security;<sup>232</sup> assessing the performance of these legal frameworks against common criteria, including their comprehensiveness, effectiveness and robustness; and identifying shortcomings in the law, including gaps in the regulatory framework that hybrid threat actors may exploit. NATO, for example, has identified seven baseline requirements for civil preparedness: assured continuity of government and critical government services; resilient energy supplies; ability to deal effectively with uncontrolled movement of people; resilient food and water resources; ability to deal with mass casualties; resilient civil communications systems; and resilient civil transportation systems.<sup>233</sup> For the Alliance, mapping and assessing the legal dimension of these seven baseline requirements would be a key legal resilience task.

#### 5.4. Developing legal preparedness

Not all legal vulnerabilities are known or can be identified as such in advance. In fact, experience demonstrates that competition in the legal sphere can be fast-paced and unpredictable. Before the Salisbury poisoning incident, few would have anticipated that the Chemical Weapons Convention would become the subject of a legal scuffle between the United Kingdom and Russia. Even where legal flashpoints can be predicted in advance, the exact circumstances that may trig-

ger a standoff in the legal sphere can seldom be foretold with certainty. For instance, bearing in mind Crimea's geographical position, it should not have come as a surprise to find Russia and Ukraine engaged in a dispute involving the law of the sea. Yet neither the timing of the Kerch Strait incident nor the way it has played out could have been forecast by most observers. Moreover, not all legal and societal vulnerabilities can be resolved by way of legislative action. For example, as long as hostile powers employ a comprehensive array of violent and non-violent tactics,<sup>234</sup> the legal thresholds governing the use of force will remain a critical flashpoint. States subject to hybrid threats cannot revise these thresholds unilaterally by legislative fiat in order to reduce their exposure to hostile manipulation. Instead, they must be prepared to counter hostile acts that exploit the applicable legal thresholds.

The persistent and amorphous nature of hybrid threats thus underscores the need for legal preparedness and capacity-building. Legal preparedness entails the ability to anticipate, detect, identify, assess and respond to hybrid threats in the legal domain.<sup>235</sup> As noted earlier, an in-depth understanding of the legal environment is a critical precondition. While legal risk registers make a significant contribution in this respect, they are not suited to providing the level of situational awareness that detecting, assessing and responding to hybrid legal threats in real-time may require, in particular in situations where hostile actors employ law and legal arguments as part of an information operation. The point is illustrated by the *HMS Defender* incident of 23 June 2021, where misinformation and diverging accounts of the facts clouded the legal assessment of the situation, while competing legal arguments fed prominently into the opposing political narratives put forward by

230 House of Lords and House of Commons Joint Committee on the National Security Strategy, *Cyber Security of the UK's Critical National Infrastructure*, Third Report of Session 2017–19, 12 November 2018, 21.

231 E.g. Graeme T. Laurie and Kathryn G. Hunter, 'Mapping, Assessing and Improving Legal Preparedness for Pandemic Flu in the United Kingdom', *Medical Law International*, Volume 10, Issue 2 (2009): 101–137.

232 E.g. Article 1(2)(b)(i), Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health (Animal Health Law) [2016] OJ L 84/1.

233 Commitment to Enhance Resilience (n. 185). See Lorenz Meyer-Minnemann, 'Resilience and Alliance Security: The Warsaw Commitment to Enhance Resilience', in *Forward Resilience: Protecting Society in an Interconnected World*, ed. Daniel S. Hamilton (Center for Transatlantic Relations, Paul H. Nitze School of Advanced International Studies, Washington, D.C., 2016) 91–98.

234 See Michael N. Schmitt and Andru E. Wall, 'The International Law of Unconventional Statecraft', *Harvard National Security Journal*, Volume 5, Issue 2 (2014): 349–376.

235 Cf. Benítez (n. 8), 141.

Russia and the United Kingdom.<sup>236</sup> The net result is that appeals to the law became heavily contested and politicized, potentially undermining their effectiveness in justifying the British action, especially in front of lay audiences.

If legal persuasion is a critical aspect of influence and information operations, as discussed earlier and highlighted by the *HMS Defender* incident, then the EU, NATO and the member states must be prepared to deal with legal contingencies, that is unforeseen or rapidly evolving events that challenge their core legal interests and require critical legal input. Inspiration may be drawn from the principles of civil emergency management.<sup>237</sup> Thus, the response to legal contingencies may be divided into three phases: a preparation phase which involves the establishment of appropriate response mechanisms, the allocation of responsibilities among expert communities and departments, the preparation of contingency plans and regular training and exercising; a response phase which involves coordinated action to mitigate the immediate risks and prevent further damage or escalation; and a recovery phase which involves longer-term measures to restore the status quo, reduce vulnerabilities, adapt in the light of lessons learned and take other appropriate measures to limit an adversary's capacity to gain an advantage from the instrumentalization of the law.

### 5.5. Collaboration, complementarity and inter-operability

Due to the multi-layered and cross-cutting nature of the law, legal resilience can seldom be advanced unilaterally. In most cases, countering the legal challenges posed by hybrid threats demands concerted action on multiple levels. This is obvious in the case of collective action taken at the interna-

tional level, such as economic sanctions. However, even at the domestic level, effective resistance, recovery from and adaptation to hybrid threats typically requires coordination and cooperation among various subject matter experts and stakeholders. The legal framework created by the EU for imposing restrictive measures on individuals and entities involved in cyberattacks against the Union or its member states illustrates the point.<sup>238</sup> As noted earlier, one of the attractions of cyberspace is that it facilitates covert action.<sup>239</sup> Accordingly, before sanctions can be imposed in response to cyberattacks, those attacks need to be attributed to the actors responsible for them, which demands actionable intelligence. Legislative measures on their own are rarely sufficient to deter and counter hybrid threats.

Proponents of resilience thinking often underline its inter-disciplinary nature and its potential to serve as a bridging concept that can stimulate dialogue and collaboration among disciplines.<sup>240</sup> Simply put, adopting a legal resilience perspective highlights that societal resilience has a legal dimension and that law has a resilience aspect. In practical terms, this means that legal resilience is not a purely legal endeavour, making it imperative for policymakers to foster close cooperation between different branches of government and across the local, regional, national and international levels. Developing a legal threat register and strengthening legal preparedness requires input from legal experts specializing in a range of fields, both domestic and international, complemented by an equally wide range of non-legal experts. As no branch of government is likely to have this breadth of expertise available in-house, legal resilience must be addressed on a cross-departmental basis, even if a particular ministry or unit is in the lead.<sup>241</sup> While the actor-specificity of hybrid threats

236 David Turns, *Misinformation around HMS Defender incident makes legal aspects more difficult to evaluate*, 8 July 2021, <https://www.cranfield.ac.uk/press/news-2021/misinformation-around-hms-defender-incident-makes-legal-aspects-more-difficult-to-evaluate>. See also Paula Anna Jenner, *The Incident of the HMS Defender off the Coast of Crimea*, EJIL: Talk, 28 July 2021, <https://www.ejiltalk.org/the-incident-of-the-hms-defender-off-the-coast-of-crimea/>.

237 Cf. Cabinet Office, *Responding to Emergencies: The UK Central Government Response Concept of Operations* (London, 2013).

238 Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States [2019] OJ L 129/I/1; Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States [2019] OJ L 129/I/13.

239 Chapter 3.3.

240 E.g. Katrina Brown, *Resilience, Development and Global Change* (Routledge, London, 2016), 69–99; Simone A. Beichler et al., 'The Role played by Social-Ecological Resilience as a Method of Integration in Interdisciplinary Research', *Ecology and Society*, Volume 19, Issue 3 (2014).

241 E.g. in the case of the State of Israel, some of the activities falling within the present context are coordinated through the Ministry of Justice. See Ministry of Justice, *The Department for International Agreements and International Litigation*, <https://www.justice.gov.il/En/Units/HumanRightsAndForeign-Relations/Pages/default.aspx>.

means that the EU, NATO and their member states must each prepare their own legal threat registers, their interdependence and the shared nature of many of these threats requires them to not only coordinate their approaches, but also to adopt collective solutions where appropriate and necessary. Legal resilience strategies and the establishment of a dedicated centre of excellence, both discussed below, could play a key role in this regard.

## 5.6. Legal resilience strategies

To draw together these different strands of activities and to provide them with strategic direction, the EU, NATO and the member states should consider developing national and institutional legal resilience strategies. The purpose of such strategies is to formulate a comprehensive and forward-looking policy for countering the legal challenges and vulnerabilities associated with hybrid threats. Much like national security strategies, legal resilience strategies are best conceived as top-level documents that provide guidance and serve as an overall policy framework for navigating the legal domain. Their purpose is to articulate a preferred vision of the legal future and a roadmap for overcoming the challenges and barriers that stand in the way of realizing it. This requires formulating interests, identifying threats and setting objectives. Legal resilience strategies thus provide an opportunity to engage diverse stakeholders and expert communities in the formulation of strategic-level legal policy and to feed the latter into other relevant processes, including legislative programmes and the execution of national security policies.

One key aspect of legal resilience relates to the capacity of legal systems to resist shocks and to recover from their adverse effects. Legal resilience strategies should therefore consider how to strengthen the rule of law, both at the domestic and at the international level, and to protect it from abuse and exploitation by hostile actors. At the same time, increasing the capacity for resistance and recovery is not sufficient. As James Crawford has warned, any legal system will only survive ‘if it has the capacity to change and develop over

time.’<sup>242</sup> Compliance is difficult to secure if the law is perceived as illegitimate or unworkable. This brings into play another critical aspect of legal resilience, which is the ability of legal systems to adapt. The EU, NATO and the member states need to give careful thought to the right combination of resistance and adaptation: what are the legal red lines that are not open to discussion, and what are the areas where compromise and concessions are possible or even necessary? Where, for example, do forced labour, Crimea, election interference, multipolarity or Hong Kong lie on that spectrum?

## 5.7. A dedicated centre of excellence

There is no getting away from the fact that there can be no one-size-fits-all approach to enhancing legal resilience. Given the different threat perceptions, vulnerabilities and legal frameworks of the EU, NATO and their member states, strengthening legal resilience has to be both an individual and a collective task. Such a multilevel approach presents challenges. The potential for inconsistency, and a general lack of jointness, is a real concern. At the same time, it also presents an opportunity to harness the benefits of diversity, in particular through collaboration, sharing of best practice, and redundancy. Accordingly, the EU, NATO and the member nations should pursue legal resilience within their own legal orders, mandates and competences, but must also find ways of collaborating more closely. Much of this is already happening, for example in the field of law enforcement and military mobility. However, given the cross-cutting nature of the law, legal resilience is an inter-agency, cross-departmental and inter-institutional matter. It is therefore difficult to see where overall responsibility for taking a truly strategic approach to legal resilience should lie, other than at the highest political level. If so, detailed work will inevitably have to be delegated down again.

Against this background, the time has come to seriously consider the establishment of a centre of excellence dedicated to legal resilience. There is no shortage of centres of excellence and proposing a new one for law may not be greeted with unbridled

<sup>242</sup> James Crawford, ‘The Current Political Discourse Concerning International Law’, *Modern Law Review*, Volume 81, Issue 1 (2018): 1–22.

enthusiasm everywhere. Yet, considering the significance of the rule of law for liberal democracies and the severity of the threats arising in the legal domain, it is both surprising and alarming that such a centre is nowhere to be seen. Tasked with doctrine development, experimentation, identifying lessons learned, improving interoperability and developing capabilities, a dedicated centre of excellence would be an ideal vehicle for injecting a

much-needed strategic approach and to lend practical support to the EU, NATO and the member states in strengthening their individual and collective mechanisms for legal resilience. A focus on legal resilience, rather than a more general mandate on the rule of law, would avoid overlap with existing institutions and bodies, for instance within the Council of Europe, and add real value.

## 6. Conclusion

The aim of this Hybrid CoE Research Report was to develop a conceptual framework for understanding the legal dimension of hybrid threats. Building on the model of the hybrid threat landscape proposed by the Joint Research Centre of the European Commission and Hybrid CoE,<sup>243</sup> the report has argued that hybrid threats do not simply have a legal aspect, but that the law itself can constitute a hybrid threat. This may strike some as little short of scaremongering: does describing the law as a threat not take the hybrid threat perspective too far, leading to the unnecessary securitization of the rule of law? The report answers in the negative. Through numerous examples, it has shown that states and non-state actors employ the law as a means of pursuing their strategic interests. This should not come as a surprise. It reflects the simple fact that law and power are intertwined. Law is an instrument for the projection of power and a sphere of struggle. From a hybrid threat perspective, law is therefore best conceived both as an instrument and as a domain of strategic competition.

Political realists are likely to agree with these observations, but may be inclined to dismiss them as self-evident. This is a mistake for two reasons. First, it runs the risk of underestimating the role that law plays in sustaining authoritarian regimes and the efforts that hostile actors expend to harness law and legality to advance their interests, often at the expense of democratic states. It is telling how Chinese officials described the recent adoption of China's anti-sanctions law as part of the country's efforts to enrich its 'legal toolkit'.<sup>244</sup> This language not only betrays an instrumentalist mindset but, more importantly, it hints at a strategic approach that recognizes the importance of legal tools for pursuing policy goals, and system-

atically addresses perceived gaps and weaknesses in the applicable legal frameworks. Second, it also runs the risk of neglecting the contribution that law may make in countering the effects of hybrid threats. For democratic societies committed to the rule of law, legal tools and frameworks are just as important an instrument for advancing their strategic interests as they are for authoritarian states and other hostile actors. At the same time, they are also an embodiment of their core values, a blueprint for their preferred future, and thus a key component of their discursive positioning.<sup>245</sup>

These considerations highlight the need for democratic societies to approach the legal dimension of hybrid threats in a more strategic and systematic fashion. The present report has suggested that a legal resilience perspective may guide the development of such an approach. Legal resilience offers a framework for assessing and enhancing the capacity of legal systems to mitigate the challenges posed by hybrid threats. It is both an analytical tool and a policy agenda. It draws attention to the contribution that law makes in rendering other social systems more resilient and brings into focus the legal system's distinct vulnerabilities and its mechanisms for coping with hybrid threats. Beyond these analytical benefits, a legal resilience perspective also aligns closely with the normative underpinnings of the EU and NATO. In their Commitment to Enhance Resilience, NATO leaders declared in 2016 that the 'foundation of our resilience lies in our shared commitment to the principles of individual liberty, democracy, human rights, and the rule of law'.<sup>246</sup> A legal resilience perspective underscores the need to safeguard the liberal and democratic character of the law against authoritarian encroachment and backsliding.

243 European Commission and Hybrid CoE (n. 10).

244 Ministry of Foreign Affairs of the People's Republic of China (n. 118).

245 Cf. James Rogers, *Discursive Statecraft: Preparing for National Positioning Operations* (Council on Geostrategy, London, 2021).

246 Commitment to Enhance Resilience (n. 185), para. 9.

Nevertheless, it would be a mistake to turn to resilience and expect a ready-made master plan for countering the legal effects of hybrid threats. Adopting a legal resilience perspective should be treated as a starting point for a more strategic approach, not as a finish line. Perhaps most importantly, a legal resilience perspective provides an opportunity to develop and implement more robust legal policies by integrating legal considerations into other policy planning processes, and to give more concrete meaning to broad strategic objectives such as upholding the rules-based

international order. Nor should the deterrent effect of legal resilience be overlooked: tackling legal vulnerabilities not only denies their utility to hybrid adversaries, but greater legal preparedness also imposes additional costs on hybrid actors. This report has offered several concrete suggestions as to what steps the EU, NATO and their individual member states could take to implement a legal resilience perspective, including by creating legal threat registers and developing individual and collective legal resilience strategies.



## **Author**

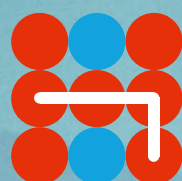
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