

Law as Force in Hybrid Warfare

Description

The Westphalian paradigm of warfare exists in the belief in the dichotomy between open war with stretches of peace in between. This Western perspective of warfare is traditionally linked to conflicts employing force through kinetic means to achieve military objectives, and by extension, political objectives. The existence of nuclear weapons and the specter of nuclear war has made this either/or approach to war and peace more tenuous and gives greater leverage to periods of [unpeace](#) where states continue to pursue their national interests in place of, or in preparation for, future kinetic conflict. The present great-power competition with the People's Republic of China and to a lesser extent the Russian Federation has made irregular warfare and [gray zone operations](#) useful tools in today's complex geopolitical environment where long-established means of typifying force through physical means as enunciated by [Clausewitz](#) is not always a viable option. It is in this setting that hybrid warfare and its implements become significant. This article will discuss hybrid warfare and how the United States can use its advantage in legal resources through the creation of a special team of legal professionals to engage in the hybrid warfare environment.

Origins of hybrid warfare

The clearest articulation of hybrid warfare can be found by one of its most prolific practitioners: the Chinese Communist Party and the [People's Liberation Army](#). Xu Sanfei, the editor of Military Forum and a senior editor in the theory department of Liberation Army News, [explains that hybrid warfare](#)

refers to an act of war that is conducted at the strategic level; that comprehensively employs political, economic, military, diplomatic, public opinion, legal, and other such means; whose boundaries are blurrier, whose forces are more diverse, whose form is more mixed, whose regulation and control is more flexible, and whose objectives are more concealed.

This approach was integrated into the [Three Warfares policy \(ä. ç\\$æ??æ³?\) by the Chinese Communist Party in 2003](#), to be employed as doctrine by the People's Liberation Army. The Three Warfares doctrine applies at its core the [teaching of Sun Tzu](#):

The supreme art of war is to subdue the enemy without fighting.

â??To fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemyâ??s resistance without fighting.â??•

In other words, the objective of the Three Warfares is to achieve the ultimate objective of war identified by [Clausewitz](#): the compulsory submission of the enemy, without violence or physical force. The Three Warfares doctrine achieves this through psychological warfare to affect an adversaryâ??s decision-making process; media warfare to enact continuing influence on an adversaryâ??s attitudes and perceptions; and legal warfare to exploit both domestic and international legal systems to achieve commercial and political objectives and ultimately compulsory subjugation of the enemy.

Law as a tool of hybrid warfare

The term lawfare was [first coined in 2001](#), although the history of the concept dates back to the 17th century with [Hugo Grotius](#), known as the progenitor of international law. The first known exercise of legal warfare is exemplified in Grotiusâ?? legal work [Mare Liberum](#), which was published in 1609.

The term lawfare was formally created and defined by [Maj. Gen. Charles J. Dunlap, Jr., USAF \(retired\) in 2001](#) as:

â??a method of warfare where law is used as a means of realizing a military objective.â??•

Dunlapâ??s definition of lawfare emphasizes the purpose of legal warfare as a military and not political object as noted by Clausewitz. This author submits a more precise definition of lawfare consistent with the nature of hybrid warfare and Clausewitzâ??s observations of war as follows:

â??Employing the rule of law and its instruments and institutions as force to augment or replace physical force to serve a national interest or achieve a political/geopolitical end.â??•

By this definition, lawfare replaces or supplements violence as force and uses institutions and mechanisms of law to achieve political objectives.

Lawfare in most instances focuses on the use of international law and domestic laws and regulations, including its instruments and institutions, to restrict a geopolitical rivalâ??s freedom to operate both militarily and geopolitically in certain domains. Lawfare has been and continues to be exercised in multiple domains by states, non-governmental organizations, and non-state actors. Lawfare had been applied by state actors before the term was coined, and they have continued to employ it after its creation. Consider the following examples:

- The Soviet Union exercised lawfare during the Cold War and prior to launch of Sputnik-1. It asserted the Soviet Union [possessed](#) unlimited sovereignty to all space, including outer space, above its physical territory in an attempt to create customary international law to that end. After the launch of Sputnik-1 the Eisenhower administration used the event as an opportunity to [successfully use lawfare](#) to counter the Soviet Union's narrative and achieve its policy goal of creating a norm of customary law recognizing free access to outer space without the threat of physical force.
- China has been utilizing lawfare in combination with other aspects of the Three Warfares in the [ten-dash line region of the South China Sea](#) and other parts of the maritime domain. The People's Republic of China, through the People's Liberation Army applies the Three Warfares doctrine, including lawfare, to justify its occupation and to rewrite international law to support its claims of sovereignty in the region to the detriment of existing international law, including the right to free access in the maritime domain.
- China continues to utilize the Three Warfares, including lawfare, to annex Taiwan. It utilizes the facets of the Three Warfares, including lawfare, to create messaging and customary international law about the legal status of Taiwan to facilitate its annexation to China. It does so through physical acts, including blockading Taiwan and challenging Taiwan's airspace. China may also be engaged in an ongoing lawfare action related to the [legal status of satellites](#) launched by and for Taiwan.
- The United States executed a lawfare operation at the Conference of Disarmament on August 14, 2018, calling out both the Russian Federation and the People's Republic of China for their continued testing and development of anti-satellite capabilities. [The delegate from the United States noted](#) the continued development and testing of these capabilities by both, while they also rail against the United States and its "weaponization" of outer space and its refusal to support or sign the Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects (PPWT). The lawfare effort by the United States effectively derailed the "space weapon" agenda of both states.
- Two non-governmental organizations exercised lawfare when they asserted India's destructive test of an anti-satellite capability violated a "taboo" or [norms](#) on such testing even though no such norms exist.
- China [employed a lawfare operation against the US](#) in the United Nations [when it filed a notification](#) on December 6, 2021, with the UN Secretary General. The notification invoked [Article V of the Outer Space Treaty](#) and alleged that on two occasions Starlink satellites belonging to

Space X and registered to the United States nearly collided with China's space station. China used the occasion to lament not only a non-governmental space actor but also to admonish the United States in an international body with one of the possible outcomes to [influence international laws, norms, and host country business regulations governing space to disadvantage a United States non-governmental space actor and the Starlink system itself](#). The [United States rebutted the complaint](#) on January 28, 2022.

- The Russian Federation announced on February 21, 2023 it was suspending its obligations under the New START agreement, which it had [agreed to extend with the United States through February 4, 2026](#). The United States announced on June 21, 2023, that it was [employing legal counter measures](#) in response to Russia's actions.

The ability and willingness of the United States to employ hybrid warfare is and will continue to be essential in offering policymakers options to counter hybrid warfare tactics and strategies of the China and other geopolitical adversaries. It will also play a critical role in addressing and preempting geopolitical events where physical force is not an option. This reality necessitates the political will to recognize the existence of hybrid warfare activities, enable capabilities outside of conventional legal and policy thinking, and require specialists who operate outside of mainstream government and political circles to not only think outside of the box, but think without a box.

Tiger teams for special legal operations

A [tiger team is a specialized, cross-functional team](#) that is formed to investigate, provide creative options, and solve a specific problem or critical issue. The term "tiger team" was originated by the military but became prominent when NASA formed a tiger team to address the [incident involving Apollo 13](#) as well as [other NASA endeavors](#). A special legal warfare tiger team could be commissioned to counter and preemptively employ hybrid warfare tactics in furtherance of US national interests in great power competition where gray zone operations are preferred over kinetic methods.

A special legal warfare tiger team would consist of at least five subject matter experts dealing with outer space, maritime, cyberspace, operational law, and national security law. The team would be formed under a "clean room" approach where members are compartmentalized and anonymous to each other. The members would meet and deliberate in a non-localized, secure virtual environment at separate undisclosed locations. Members of the team would be enlisted as contractors and not employees of the federal government or members of the armed forces. The members would preferably have little to no experience within the federal government and would be apolitical so as to mitigate dogmatic bias to the greatest extent possible. The special legal warfare tiger team would potentially operate under the authority of a Cabinet-level official either the National Security Advisor, the

Secretary of Defense, or another designated official.

The special legal warfare tiger team would make use of creative legal specialists outside of the mainstream political and government environment to foster a flexible and agile approach when formulating policy recommendations to geopolitical issues and problems. The team would have the flexibility and freedom from ideological influence to take a clean sheet approach to postulate innovative lawfare and hybrid warfare tactics and strategies. Autonomy from political and ideological influence would permit the special legal warfare tiger team to address geopolitical problems and offer strategies that might otherwise be disregarded or considered unviable options in traditional political and government brainstorming sessions.

An example of how a special legal warfare tiger team might provide legal and policy alternatives to address international incidents can be seen in the United States' response to Russia's intercept of one of its defunct signal intelligence satellites using a direct-ascent anti-satellite weapon on November 15, 2021. The United States responded to this event with messaging that [the intercept was a "test" consistent with Russia's narrative](#). Because the nature of the incident was characterized as a "test," the US government, [including the Office of the Secretary of Defense](#), was unable to find legal recourse as the [Outer Space Treaty does not prohibit the testing of weapons in outer space](#). This messaging limited the US response to finger-wagging over [the creation of orbital debris, the "weaponization of outer space," and the effect of the "test" on long-term sustainability](#). This messaging also preempted the United States from carrying out further lawfare operations that could have been used to the political advantage of the US in international forums.

Alternatively, a special legal warfare tiger team, outside of mainstream political influence and taking a clean-sheet approach to the problem, could have dismissed the messaging of the intercept as a test. Alternatively, the special legal warfare tiger team could have advised policy makers to adopt political messaging asserting the intercept was a "demonstration" of an anti-satellite weapon capability and capacity instead of a test, further advising policy makers that as a demonstration of an anti-satellite weapon capability, Russia used outer space in an aggressive, non-peaceful manner" giving the US leverage to assert Russia's action was inconsistent with and a technical violation of the ["peaceful purposes" provision in the preamble](#) of the Outer Space Treaty.

The special legal warfare tiger team could further advise the Department of State be directed to use this messaging to mount a lawfare operation in the United Nations. This operation, which would have been carried out by the US Ambassador to the United Nations, would have called into question Russia's actions and its compliance with the letter and the spirit of international law. The United States would have also been enabled to call a special session of the United Nations Security Council where the US could admonish the Russian Federation and place the People's Republic of China in

the awkward position of defending an ally by using its veto power to defeat any resolution denouncing Russia.

Utilizing law as force

Western contemporary strategic thinking may dismiss the potential of the concept of a special legal warfare tiger team and the legitimacy of lawfare and hybrid warfare in general. Nonetheless, the role of hybrid warfare in great power competition should not be rejected outright as it is a reality that geopolitical adversaries, particularly the People's Republic of China, recognize and will continue to exploit against the United States and the West.

A legal tiger team would offer policymakers and warfighters alternatives to physical force to achieve political objectives that might not be recommended or considered through established approaches. Most of all, special legal warfare tiger teams could give the United States superiority in the lawfare and hybrid warfare environment.

Law is an adversarial pursuit, and it is not just a tool in hybrid warfare: it is force. The United States should take advantage of this reality given it benefits from the largest per capita population of legal professionals in the world and engage select legal professionals to deliver novel lawfare recommendations and operations in the current hybrid warfare environment to meet or preempt geopolitical challenges facing the United States.

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Image caption: JUPITER-C EXPLORER 1 Launches Jan. 31, 1959. After Russia's launch of Sputnik-1 in October 1957 the launch of Sputnik-1 the Eisenhower administration used the event as an opportunity to successfully use lawfare to counter the Soviet Union's narrative and achieve its policy goal of creating a norm of customary law recognizing free access to outer space without the threat of physical force. (Courtesy NASA)

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