# Legal Aspects of Grey Zone and Hybrid Threats: A Primer

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Is legal uncertainty within the existing structure of international law truly responsible for a grey zone that hostile actors can exploit by employing hybrid tactics? The legal uncertainty arguably exists at the intersection between legal justifications required for resorting to an armed force against external forces in *jus ad bellum* and the applicability of the legal regime of *jus in bello* that governs the conduct of hostilities in international or non-international armed conflict. However, the development of jurisprudence over the course of years goes some way to clarify threshold legal questions for the law of armed conflict – the hostile action either amounts to a use of force prohibited under international law or does not when it can be justified as a lawful exercise of sovereignty or in the exercise of the right of self-defense; the state is either engaging in an international or non-international armed conflict, or in a peacetime law enforcement operation. The legality of action may be disputed, but that does not mean that there is legal uncertainty as to how the relevant rules of international law apply. The ability of hostile actors to exploit a grey zone by employing hybrid tactics does not derive from legal lacunae in which they can operate with impunity but rather represents structural problems of international law. This chapter critically considers how the existing structure of international law contributes to the growth of hybrid threats as a strategic choice of hostile actors, causing law-abiding states to suffer a disadvantage to the detriment of their security.

## 1. Introduction

Grey zone strategies and tactics are nothing new in the modern history of warfare.[1] With the rise of guerrilla tactics, irregular warfare bolstered de-colonization efforts in the 1950s to 60s, which led to the relaxation of combatant qualification by setting out conditions on which guerrilla fighters could enjoy prisoner of war status.[2] The proliferation of insurgent movements generated low-

1 William Murray and Peter Mansoor (eds), *Hybrid Warfare: Fighting Complex Opponents from the Ancient World to the Present* (Cambridge University Press 2012); John P. Cann, 'Low-Intensity Conflict, Insurgency, Terrorism and Revolutionary War' in M. Hughes *et al.* (eds), *Palgrave Advances in Modern Military History* (Palgrave Macmillan 2006) 107.

2 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (June 8, 1977) 1125 UNTS 3, Article 44(3). For details, see Georges Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979-IV) 165 *Recueil des Cours* 353, 417–426; Frits Kalshoven, 'Reaffirmation and Development of International Humanitarian Law

intensity conflicts in different parts of the world in the 1980s, challenging the traditional notion of armed conflict in an inter-state context.[3] Hybrid threats involving a combination of the conventional mode of warfare with more diverse, irregular mode of hostilities capable of unleashing a high degree of destructive force, have added complexities to twenty-first century warfare. Such threats manifested in the Southern Lebanon War in 2006,[4] the seizure of Crimea by Russia in 2014,[5] and the use of maritime militia by China for its assertive territorial and maritime claims in the South China Sea.[6]

These evolutions in military tactics and operational maneuver are important considerations for developing military doctrines and ensuring combat readiness. Yet the international legal order is not necessarily disrupted as long as international law affords states adequate means to adapt their behavior and to regulate the conduct of hostilities accordingly. Normative problems instead arise if the hybridization of warfare is instrumental to or results from the uncertainty or inefficacy of the law itself. It is therefore imperative to ask – is legal uncertainty within the existing structure of international law truly responsible for a grey zone that enables hostile actors to operate below the threshold of open conflict by posing hybrid threats?

This chapter critically considers how the existing structure of international law contributes to the growth of hybrid threats as a strategic choice of hostile actors. To that end, this chapter first reviews the legal regimes of jus ad bellum and jus in bello as the current legal framework of warfare, with a particular focus on threshold legal questions under these regimes (Section 2). The chapter will then identify critical flaws in the current legal framework of warfare due to misalignment of different legal thresholds (Section 3). However, the strategic exploitability of this flaw has deeper roots in the structural problems of international law when three conditions for enabling recalcitrant states to operate in a grey zone by posing hybrid threats are present (Section 4). The chapter concludes with an observation that hybrid threats are likely to remain a preferred mode of offensive operations that recalcitrant states engage against law-abiding states by exploiting flaws in the current legal system of warfare until international law itself is adapted to the new reality of international relations.

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Applicable in Armed Conflicts:: The Diplomatic Conference, Geneva, 1974-1977, Part I: Combatants and Civilians' (1977) 8 *Netherlands Yearbook of International Law* 107, 122–134.

3 See e.g. Lewis B. Ware *et al.*, *Low-Intensity Conflict in the Third World* (Air University Press 1988).

4 See e.g. Frank G. Hoffman, *Conflict in the 21st Century: The Rise of Hybrid Warfare* (Potomac Institute for Policy Studies 2007) 35–42; Stephen D. Biddle and Jeffrey A. Friedman, *The 2006 Lebanon Campaign and the Future of Warfare: Implications for Army and Defense Policy* (US Army War College Strategic Studies Institute 2008).

5 See e.g. András Rácz, *Russia's Hybrid War in Ukraine: Breaking the Enemy's Ability to Resist* (Finnish Institute of International Affairs, 2015), chapter 4; Ines Gillich, 'Illegally Evading Attribution? Russia's Use of Unmarked Troops in Crimea and International Humanitarian Law' (2015) 48 *Vanderbilt Journal of International Law* 1191.

6 See e.g. Andrew S. Erickson and Ryan D. Martinson, *China's Maritime Gray Zone Operations* (US Naval Institute 2023); Rob McLaughlin, 'The Law of the Sea and PRC Gray-Zone Operations in the South China Sea' (2022) 116 *American Journal of International Law* 821; James Kraska and Michael Monti, 'The Law of Naval Warfare and China's Maritime Militia' (2015) 91 *International Law Studies* 450.

## 2. The Current Legal Framework of Warfare

In international relations, the use of violence is regulated in a series of dichotomous legal structures. These structures emerged largely from strategic considerations that prevailed at different times in history. But there are also normative reasons that reflect incongruous readiness on the part of sovereign states to subject themselves to the system of international law. A combination of these strategic considerations and normative clarification through jurisprudence developed by international adjudications has added complications to the dichotomous legal structures governing the use of violence in international relations.

### 2.1. The Distinction between Jus ad Bellum and Jus in Bello

The idea of just war, distinguishing permissible wars from those fought without a just cause, has existed from the early times of human history. It has been advanced, espoused, and debated among priests, theologists, jurists, and scholars in different parts of the world.[7] With the emergence of positive international law, these ideas became discredited and abandoned in recognition of the sovereign's unrestricted freedom to pursue its self-preservation by means of self-help and in the exercise of the right of intervention against weaker states.[8] Nevertheless, states were generally inclined to avoid a declaration of war and sought a justifying cause for the use of force short of war.[9] With the modern efforts to prevent wars emerged the body of law that requires justification for the use of force in international relations (jus ad bellum).

Equally rooted in historical origins is the idea that war must be fought with restraint in accordance with the modern law and customs of war.[10] Francis Lieber codified these ideas and practices, which President Lincoln issued as General Order No 100 of 1863 as a field manual for the American Civil War.[11] The idea of humanizing warfare also motivated the Red Cross movement, with the adoption of the 1864 Geneva Convention and the subsequent development of the Geneva law for the protection of victims of war.[12] These initiatives inspired states to use international agreements

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7 See e.g. Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn Cambridge University Press 2017) 67-71; Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995) 245–250; Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan Press 1947) 1–114; Joachim von Elbe, 'The Evolution of the Concept of the Just War in International Law' (1939) 33 *American Journal of International Law* 665, 669–685.

8 P. H. Winfield, 'The History of Intervention in International Law' (1922–23) *British Year Book of International Law* 130; Ellery C. Stowell, *Intervention in International Law* (John Byrne and Co 1921) 317–355.

9 See e.g. Albert E. Hindmarsh, *Force in Peace: Force Short of War in International Relations* (Harvard University Press 1933) 84–89; Ahmed M. Rifaat, *International Aggression* (Almqvist and Wiksell International 1979) 19–20; Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1963) 26–28.

10 For diverse origins and practices in different parts of the world, see e.g. Samuel C Duckett White, *The Laws of Yesterday's Wars* (Brill 2021); Leslie C Green, 'The Law of War in Historical Perspective' (1998) 72 *International Law Studies* 39.

11 General Order No 100: Instructions for the Government of Armies of the United States in the Field (April 24, 1863).

12 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (August 22, 1864)

as a means of prohibiting the use of inhumane weapons and restricting the methods of warfare,[13] which formed the basis for developing the law governing the conduct of hostilities (jus in bello).

These two strands of legal development did not merge even when the use of force in international relations was outlawed under Article 2(4) of the United Nations (UN) Charter in the aftermath of World War II.[14] Indeed, major codification efforts for the law of war took place soon after the UN's establishment, with the adoption of the four Geneva Conventions in 1949.[15] The dual structure created as a result has meant that there is an obligation to comply with jus in bello whether or not the use of force is justifiable under jus ad bellum and, as will be discussed below, whether it is directed against another state in international armed conflict or against a non-state actor in non-international armed conflict. In other words, the legality or legitimacy of the use of force has no impact on the applicability of jus in bello to all the belligerent parties involved.[16] Resort to violence in international relations must be justified under both bodies of law. As will be discussed in Section 3, there is a potential for discrepancy between these two legal regimes when the threshold for triggering the application of each legal regime is misaligned.

### 2.2. Use of Force Thresholds under Jus ad Bellum

The prohibition of the use or threat of force in international relations, as enshrined in Article 2(4) of the UN Charter, is central to the modern legal regime of the jus ad bellum. This principle is well established under customary international law,[17] prohibiting any use of force in international

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129 CTS 361; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (July 6, 1906) 202 CTS 144; Geneva Convention Relative to the Treatment of Prisoners of War (July 27, 1929) 118 LNTS 343; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (July 27, 1929) 118 LNTS 303.

13 Declaration (IV, 2) on the Use of Projectiles the Objects of Which is the Diffusion of Asphyxiating or Deleterious Gases (July 29, 1899) 187 CTS 453; Declaration (IV, 3) Concerning Expanding Bullets (July 29, 1899) 187 CTS 459; Regulations Respecting the Laws and Customs of War on Land Article 25, annexed to Convention (IV) Respecting the Laws and Customs of War on Land (October 18, 1907) 205 CTS 277; Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, (October 18, 1907) 205 CTS 331.

14 Charter of the United Nations (June 26, 1945) 1 UNTS XVI, Article 2(4).

15 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (August 12, 1949) 75 UNTS 31 (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (August 12, 1949) 75 UNTS 85 (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War (August 12, 1949) 75 UNTS 135 (Geneva Convention III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (August 12, 1949) 75 UNTS 287 (Geneva Convention IV).

16 Bryan Peeler, *The Persistence of Reciprocity in International Humanitarian Law* (Cambridge University Press 2019); Sean Watts, 'Reciprocity and the Law of War' (2009) 50 *Harvard International Law Journal* 365. For challenges in the context of non-international armed conflict, see Marco Sassòli and Yuval Shany, 'Should the Obligations of States and Armed Groups under International Humanitarian Law Really Be Equal?' (2011) 93 *International Review of the Red Cross* 425.

17 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) (Merits)* [1986] ICJ Rep. 14, paras 188–190.

relations unless it is justifiable as an exercise of the right of self-defense or authorized by the UN Security Council. Although the use of force does not encompass mere political or economic coercion,[18] the precise parameters of what amounts to a use of force prohibited under this principle have been subject to debate.[19] The boundaries of the prohibition are becoming increasingly obscure due to the emergence of non-traditional means to cause disruptive effects, such as cyber-attacks.[20]

The International Court of Justice has done little to help clarify the principle's boundary in its application to international disputes.[21] In *Costa Rica v. Nicaragua*, for example, the Court failed to pronounce that Nicaragua's military presence in a disputed territory was a breach of the principle; instead, it merely acknowledged that '[t]he fact that Nicaragua considered that its activities were taking place on its own territory does not exclude the possibility of characterizing them as an unlawful use of force'.[22] The Fact-Finding Commission in Georgia defined the prohibition of the use of force as covering 'all physical force which surpasses a minimum threshold of intensity',[23] which contributed to the view that small-scale or targeted forcible acts below a minimum threshold of intensity would not fall within the scope of the prohibition.[24] These developments have created legal ambiguity, which recalcitrant states may exploit by pursuing small-scale and targeted military operations to avoid concerted condemnation.

These problems are further compounded when the parameters of what amounts to a use of force are not aligned with those of armed attack as a threshold requirement for exercising the right of self-defense. As the International Court of Justice established in *Nicaragua v. US*, armed attacks are the 'most grave forms of the use of force' and must be distinguished from the use of force of a

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18 Oliver Dörr and Albrecht Randelzhofer, 'Article 2(4)' in Bruno Simma *et al.* (eds), *The Charter of the United Nations: A Commentary* (3rd ed Oxford University Press 2012) 200, 208–10.

19 See e.g. Lianne J. M Boer, '"Echoes of Times Past": On the Paradoxical Nature of Article 2(4)' (2015) 20 *Journal of Conflict and Security Law* 5; John D Becker, 'The Continuing Relevance of Article 2(4): A Consideration of the Status of the U.N. Charter's Limitations on the Use of Force' (2004) 32 *Denver Journal of International Law and Policy* 583; Belatchew Asrat, *Prohibition of Force under the UN Charter: A Study of Article 2(4)* (Iustus Förlag 1991) 35–46.

20 See Michael N. Schmitt, 'Grey Zones in the International Law of Cyberspace' (2017) 42 *Yale Journal of International Law Online.*

21 Claus Kreß, 'The International Court of Justice and the "Principle of Non-Use of Force"' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 561; John Norton Moore, 'Jus ad Bellum Before the International Court of Justice' (2012) 52 *Virginia Journal of International Law* 903.

22 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* [2015] ICJ Rep. 665, para. 97.

23 Independent International Fact-Finding Mission on the Conflict of Georgia, 'Report' (September 2009) vol. II, 242.

24 For discussion, see Tom Ruys, 'The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Minimum" Uses of Force Excluded from UN Charter Article 2(4)?' (2014) 108 *American Journal of International Law* 159; Mary E O'Connell, 'The Prohibition on the Use of Force' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Elgar 2013) 89, 102–107; Olivier Corten, *The Law Against War* (Hart 2010) 50–92.

lesser degree of gravity, such as mere frontier incidents and logistical or other support for rebel activities.[25] Below this high-gravity threshold, response options for states are limited to diplomatic protests, retortion, and countermeasures without involving the use of force.[26] This threshold, set by the International Court of Justice in the development of its jurisprudence, again incentivizes recalcitrant states to engage in low-intensity conflict, depriving the target state of decisive opportunities to act in self-defense.

Recalcitrant states could further obfuscate the application of the jus ad bellum by using private militia groups as a proxy to engage in combat on their behalf. A state is only held responsible for acts of violence committed by non-state actors when their conduct is attributed to the state on the grounds that, for example, they are acting in complete dependence on the state as its de facto organ,[27] are exercising elements of governmental authority,[28] or are otherwise acting on the state's instruction or under its direction and control.[29] The victim state therefore cannot hold another state accountable for the use of force perpetrated by armed groups when they are operating autonomously with varying degrees of state support that falls below these thresholds.[30]

Similar constraints affect the victim state's ability to act in self-defense if, as the International Court of Justice held in its *Palestinian Wall* advisory opinion, the right of self-defense were to be recognized only in the case of armed attack by one state against another, but not in cases where an armed attack emanates from a non-state actor.[31] In *Nicaragua*, the Court conceded that the conduct of armed groups sent by and on behalf of a state into the territory of another state could amount to an armed attack,[32] but as discussed above, only when the scale and effect of their activities meet the high threshold of gravity.[33] However, due to non-state actors' increased ability

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25 *Nicaragua*, *supra* n. 17, paras 191 and 195.

26 *Ibid.*, 127 para. 249. See also International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' [2001] II(2) *Yearbook of the International Law Commission* 31, 131–132.

27 Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001) Annex, Article 4 (hereinafter ASR); *Nicaragua*, *supra* n. 17, para. 109; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep. 43, paras 390–394.

28 ASR, Article 5. For various limiting factors of this attribution ground, see Jennifer Maddocks, 'Outsourcing of Governmental Functions in Contemporary Conflict: Rethinking the Issue of Attribution' (2019) 59 *Virginia Journal of International Law* 47.

29 ASR, Article 8; *Nicaragua*, *supra* n. 17, paras 113–115; *Bosnian Genocide*, *supra* n. 27, paras 396–406.

30 See Kilian Roithmaier, 'Holding States Responsible for Violations of International Humanitarian Law in Proxy Warfare: The Concept of State Complicity in Acts of Non-State Armed Groups' (2023) 14 *European Journal of Legal Studies* 140; Jennifer Maddocks, 'Russia, the Wagner Group, and the Issue of Attribution', (*Articles of War*, April 28, 2021) <https://lieber.westpoint.edu/russia-wagner-group-attribution/> accessed March 11, 2023.

31 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep. 135, para. 139.

32 *Nicaragua*, *supra* n. 17, para. 195 (referring to UNGA Res 3314 'Definition of Aggression' (December 13, 1974) Annex, Article 3(g)).

33 See Abdulqawi A. Yusuf, 'The Notion of "Armed Attack" in the Nicaragua Judgment and Its Influence on Subsequent Case Law' (2012) 25 *Leiden Journal of International Law* 461, 463–470.

to engage in hostilities, an increasing number of states have adopted an expansive view whereby the right to use force in self-defense may be exercised against non-state actors,[34] especially when the territorial state from which they are operating is unwilling or unable to prevent the armed attacks they launch.[35]

The advancement in modern technologies has increased the ease at which individuals, or a group of individuals, may commit acts of violence with far greater the destructive effect than ever before. A combination of the conventional mode of warfare involving regular armed forces with more diverse, irregular modes of hostilities capable of unleashing a high degree of destructive force, has added to the complexities of modern and future warfare.[36]

With the assistance of various technologically advanced means of warfare readily available to them, the greater role of non-state actors is changing the dynamics of modern warfare. While coordinating their operations through a web of de-centralized networks, non-state actors may emulate conventional armed forces in terms of the scale and effects of combat or complement a State's political and military apparatus in the form of a proxy war when their political or military objectives are closely aligned.[37] Such combination of traditional means of warfare and de-centralized operations, described as 'hybrid warfare', allows hostile actors to exploit legal misalignment within the existing structure of international law for a political or military advantage against their opponents.

### 2.3. Conflict Classification for Jus in Bello

The legal regime that applies to the conduct of hostilities during an armed conflict is also based on a dual structure according to the classification of the conflict. In international armed conflict – the armed conflict between two or more states – the 1949 Geneva Conventions and, if applicable, 1977 Additional Protocol I, from which the primary body of customary international law derives, are set to 'apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.[38] On the other hand, the law applicable to non-international armed conflict – the armed conflict between a state and a non-state actor or between non-state actors – is limited to Article 3

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34 See various views expressed in the Arria-formula meeting convened at the UN Security Council, annexed to Letter dated 8 March 2021 from the Permanent Representative of Mexico to the United Nations addressed to the President of the Security Council, UN Doc. S/2021/247 (March 16, 2021).

35 See e.g. Jutta Brunnée and Stephen J. Toope, 'Self-Defence Against Non-State Actors: Are Powerful States Willing But Unable to Change International Law?' (2018) 67 *International and Comparative Law Quarterly* 263; Ashley S. Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Virginia Journal of International Law* 483.

36 See James N. Mattis and Frank Hoffman, 'Future Warfare: The Rise of Hybrid Wars' (2005) 131 *US Naval Institute Proceedings Magazine* 18.

37 See generally Assaf Moghadam, Vladimir Rauta, and Michel Wyss (eds), *Routledge Handbook of Proxy Wars* (Routledge 2023); Groh L. Tyrone, *Proxy War: The Least Bad Option* (Stanford University Press 2019).

38 Common Article 2 to the Geneva Conventions I to IV.

common to the 1949 Geneva Conventions[39] and, if applicable, 1977 Additional Protocol II,[40] which are supplemented by a growing body of customary international law. The varied range of obligations applicable under these legal regimes is subject to different triggering thresholds.

An international armed conflict arises when 'one or more States have recourse to armed force against another State, regardless of the reasons for or the intensity of the confrontation'.[41] There is no minimum level of intensity required to qualify inter-state hostilities as an international armed conflict.[42] By contrast, a non-international armed conflict does not arise unless the armed group displays some degree of organization and engages in 'protracted armed violence' of a certain level of intensity against government authorities or other organised armed groups.[43] Below this threshold, the state must operate in a law enforcement paradigm under stricter legal constraints, including the obligation to protect various human rights.

The hostile party engaging in hybrid warfare could exploit these different triggering thresholds by deliberately repeating isolated and sporadic acts of violence so that the situation remains below the requisite threshold of intensity for non-international armed conflict. This room for exploitation can be narrowed by attributing the acts of an armed group to a state. Indeed, the International Criminal Tribunal for the Former Yugoslavia has established that the state may be held accountable for the conduct of a non-state armed group when it wields overall control over the group by equipping and financing them or by coordinating and helping in the general planning of their

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39 It reads, in part: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; (2) The wounded and sick shall be collected and cared for'.

40 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (June 8, 1977) 1125 UNTS 609.

41 Knut Dörmann *et al.* (eds), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross 2016), paras 236-240.

42 *Cf.* International Law Association Committee on the Use of Force, 'Final Report on the Meaning of Armed Conflict in International Law' (adopted at The Hague Conference, 2010) 32–33 (requiring belligerent parties to be engaged in fighting of some intensity). But see Dieter Fleck, 'Scope of Application of International Humanitarian Law' in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (4th edn Oxford University Press 2021) 50, 52.

43 See generally Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012) chapter 1; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press, 2010).

military activity.[44] Unlike attribution for the purposes of establishing the international responsibility of the state, there is no need to demonstrate that the state has issued instructions for the commission of specific acts contrary to international law.[45] As such, the state cannot deny its involvement in an international armed conflict when the surrogate armed groups, militia or paramilitary units operate as de facto state organs,[46] or are otherwise acting on their behalf.[47] The state employing hybrid warfare could nonetheless exploit these legal thresholds by deliberately concealing the nature and level of assistance in directing the group of individuals to mount a hostile campaign against the foreign target.[48]

## 3. Hybrid Threats at the Intersection of Jus ad Bellum and Jus in Bello

The development of jurisprudence since the 1986 *Nicaragua* judgment goes some way to clarify threshold legal questions for the law of armed conflict – the hostile action either amounts to a use of force prohibited under international law or does not when it can be justified as a lawful exercise of sovereignty or in the exercise of the right of self-defense; the state is either engaging in an international or non-international armed conflict, or in a peacetime law enforcement operation. However, the different legal thresholds thus emerged under each regime are not well aligned to produce a coherent legal picture that falls squarely within the law of peace or the law of war.

For example, an armed incursion into the border area where sovereign title is contested may trigger a confrontation that is characterized as an international armed conflict between neighboring states. As the Ethiopia-Eritrea Claims Commission confirmed, the law of armed conflict applies irrespective of the status of territory disputed between belligerent parties and each party remains responsible for any damage unlawfully caused to persons or property no matter where the damage takes place.[49] However, the deployment of military forces in such a frontier incident alone, according to the International Court of Justice's judgment in *Nicaragua*, is insufficient to qualify as

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44 *Prosecutor v. Tadić* (Appeals Chamber Judgment) ICTY-94-1-A (July 15, 1999), para. 131.

45 Note, however, that with regard to 'individuals or groups not organised into military structures', the *Tadić* Tribunal considered it 'necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved *ex post facto* by the State at issue: *Tadić*, *supra* n. 44, para. 137.

46 *Tadić*, *supra* n. 44, para. 144 ('private individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as *de facto* State organs').

47 See also *Prosecutor v. Bosco Ntganda* (Trial Chamber Judgment) ICC-01/04-02/06 (July 8, 2019) para. 128; *Prosecutor v. Jean-Pierre Bemba Gombo* (Trial Chamber III) ICC-01/05-01/08 (March 21, 2016) para. 130; *Prosecutor v. Germain Katanga* (Trial Chamber II) ICC-01/04-01/07 (March 7, 2014) para. 1178; *Prosecutor v. Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06 (March 14, 2012), para. 541.

48 It should be noted, however, that the ICTY also suggested that '[w]here the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold': *Tadić*, *supra* n. 44, para. 140.

49 Eritrea Ethiopia Claims Commission, *Partial Award: Central Front Ethiopia's Claim 2* (April 28, 2004), paras 27–29.

an armed attack that justifies the use of force by the other side of the border dispute as an exercise of the right of self-defense.[50] The defending state's response options are thus limited to non-forcible means, including countermeasures involving a breach of its international legal obligations towards the other party to the dispute, despite the fact that the situation itself is characterized as an international armed conflict.

The defending state may adopt the position that the right of self-defense can be exercised against any use of force by equating it as an armed attack irrespective of its scale or gravity.[51] This position is better aligned with the low threshold for the classification of an international armed conflict. The recalcitrant state can nevertheless create and exploit a legal grey zone by engaging non-state actors, such as militias and hackers. The situation may still be classified as an international armed conflict when the recalcitrant state does so by supporting or coordinating hostile activities. However, the recalcitrant state does not incur international responsibility for the activities carried out by the non-state actors unless there is evidence of direct control that meets the high threshold of attribution under the law of state responsibility as discussed above. The defending state would thus be unable to seek redress, as a breach of the principle prohibiting the use of force or a violation of its sovereignty, for the hostile activities engaged by armed groups with the support of the recalcitrant state but otherwise without any direction or control.[52] Its right to act in self-defense would also be denied unless the defending state is allowed to exercise the right of self-defense against non-state actors.

The legal characterization of the situation becomes even more tenuous when non-state actors engage in non-conventional modes of operation, acting as the recalcitrant state's surrogate armed groups without that state exercising any substantial degree of control over them. General appeals for mobilization would be insufficient to establish state responsibility for hostile activities or the state's involvement in an armed conflict. In the absence of any evidence suggesting state support by equipping, financing, or coordinating their hostile activity, the defending state has no choice but to treat hostile activities as criminal conduct and to take law enforcement action against them. Such a situation cannot be characterized as a non-international armed conflict unless and until hostile activities are conducted in a coordinated and organized manner and reach a high level of intensity. When the defending state escalates its response by taking military action within the recalcitrant state's territory, such action requires justification under the jus ad bellum.

The complex legal picture depicted above is the result of legal clarification through the development of jurisprudence. Each of these rules has been developed independently without a centralized process of law-making and has set a varying legal threshold based on its own rationale that stands to reason – for example, the right to use force in self-defense is reserved for the most

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50 *Nicaragua*, *supra* n. 17, para. 195.

51 As adopted by the United States: Office of the General Counsel, US Department of Defense, *Law of War Manual* (revised ed, 2016) § 1.11.5.2

52 For criticisms of such an arbitrary outcome, see Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 *International Law Studies* 295, 317–331; Kubo Mačák, *Internationalized Armed Conflicts in International Law* (Oxford University Press 2018) 44–47.

grave forms of the use of force so that armed confrontation does not unnecessarily spiral out of control; the intensity of hostilities and the degree of control over non-state actors are set to low so that a greater number of people can enjoy the protective benefits of international humanitarian law. When jointed together, however, flaws emerge from the application of these legal regimes where nebulous threshold criteria are misaligned.

The "low intensity of violence" threshold for classifying armed confrontation as an international armed conflict is not aligned with the "armed attack" threshold as the requisite condition for military action in self-defense. The "certain intensity of violence" threshold for a non-international armed conflict is not aligned with the parameters of what amounts to a use of force in international relations, as opposed to law enforcement action. The "effective control" threshold for attributing the hostile conduct of non-state actors to the supporting state is not aligned with the "overall control" threshold, according to which the supporting state becomes a party to the international armed conflict.

As the two legal regimes must be observed at the same time, the state may find itself in a situation where it is involved in an international armed conflict but unable to justify its forcible response to hostile activities under the jus ad bellum. In other situations, the state may consider itself constrained to take law enforcement action against hybrid threats when military action would have been justifiable had the threats been demonstrably emanating from the supporting state.

Flaws in the current legal framework of warfare thus manifest themselves at the intersection between the legal regime of the jus ad bellum that provides legal justifications for resorting to an armed force against external threats and the legal regime of the *jus in bello* that governs the conduct of hostilities in international or non-international armed conflict. The misalignment of nebulous threshold criteria under the two legal regimes creates a disparity between the hostile intent on the part of a recalcitrant state, the legal characterization of the situation, and the availability of legal justification for military action based on the perceived reality on the part of a defending state. However, this disparity alone is not entirely responsible for a legal grey zone that is vulnerable to exploitation in hybrid warfare. The strategic exploitability of this disparity cannot be fully appreciated without considering how these legal regimes apply in the sovereignty-based structure of international law.

## 4. Grey Zone as the Structural Problem of International Law

The ability of hostile actors to exploit a grey zone by employing hybrid tactics does not derive from the indeterminacy of the rules but represents structural problems of international law. The indeterminacy of rules is inherent in any system of legal regulation and, as such, is not in itself a problem in a legal system where judicial resolution is readily available for interpretive disputes.[53] Rather, problems lie with the sovereignty-based structure of international law, where the

[53] Julia Black, *Rules and Regulators* (Clarendon Press 1997) 6–45.

compliance with applicable rules depends primarily on their national implementation in good faith.[54] As a legal system built on the consent and practice among sovereign states its normative strength as a tool for international governance hinges upon the extent to which the relevant rules of international law are internalized in the domestic legal system and decision-making processes. This fundamental premise on which international relations rest has the potential to create a space that malicious actors can exploit particularly against law-abiding nations. The misalignment of legal thresholds at the intersection of the jus ad bellum and the jus in bello, as discussed above, contributes to the exploitability of this legal system against the nations that abide by their legal commitments. Yet, in itself, misalignment is insufficient to create a grey zone that is vulnerable to exploitation in hybrid warfare. There are three conditions that enable recalcitrant states to operate in a grey zone by posing hybrid threats.

First, the target state must have a well-developed legal system in which its international law obligations are systematically internalized. The ability to exploit flaws in the current legal framework of warfare is to a large extent attributed to the target state's commitment to and implementation of international law in good faith. When recalcitrant states take advantage of this commitment to the rule of law, law-compliant states face marked disadvantages in the range of tactical maneuvers that may be available against hostile actors. The target state could be prevented from taking forcible measures against hybrid threats when, for example, the hostile activities are not perceived to be grave enough to constitute an armed attack or there are political and strategic concerns about the possible escalation of hostilities. Proactive military action to deter hybrid threats, when it involves attacks directed against the recalcitrant state, has the risk of legitimizing the latter's open involvement in the armed conflict as an exercise of the right of self-defense. The recalcitrant state may also count on the lack of readiness on the part of the adversary's allies to act in collective self-defense because of the haphazard process of collective decision-making especially where, as is the case with NATO,[55] the decision to invoke collective defense is contingent upon the consensus of all member states.

The defending state may instead decide to take law enforcement action to deal with malicious activities conducted by non-state actors. In that case, the ability to use lethal force as a means of apprehending offenders is restricted under the requirements of domestic law. This means that the defending state observing stricter limits on the use of force pursuant to law enforcement paradigms is more likely to be vulnerable to hybrid threats unless its domestic legislation allows for flexible escalation in the mode of operation as appropriate to the level and type of hostilities it faces. When operating in a law enforcement mode, defending forces may only resort to the minimum use of force that is proportionate to the threat involved and only to the extent reasonably necessary to halt the attack.[56] These domestic law constraints cause difficulties in responding effectively to

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[54] See generally Robert Kolb, *Good Faith in International Law* (Hart 2017).

[55] Michael N. Schmitt, 'The North Atlantic Alliance and Collective Defense at 70: Confession and Response Revisited' (2019) 34 *Emory International Law Review* 85, 112; Aurel Sari, 'The Mutual Assistance Clauses of the North Atlantic and EU Treaties: The Challenge of Hybrid Threats' (2019) 10 *Harvard National Security Journal* 405, 415.

[56] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted at the Eighth UN

coordinated attacks in an organized manner.

The second condition upon which a legal grey zone emerges for malicious exploitation is that the recalcitrant state engages militia groups to conduct hostile activities in peacetime, but with strategic goals that go beyond criminal activities. The objective of hybrid tactics is to achieve strategic goals by using a degree and form of force that is legally insufficient to permit the target state to respond effectively.[57] Such a strategy provides an incentive for the recalcitrant state to encourage its population to take part in hostilities in support of its national interest, but without clear evidence of control over their activities. To that end, the government may appeal to the strong sentiment of nationalism by way of motivating the self-organization and coordination of hostile activities directed against the target state.

Technological advances offer the third condition that helps self-organized militia engage in hostilities at various levels of intensity and in different domains such as maritime and cyber space. As Frank Hoffman observes, hybrid warfare is not just a blend of regular and irregular warfare. Rather, the fusion of technologically advanced capabilities with fanatical and protracted fervour of irregular tactics lies at the core of this concept.[58] Technologically advanced capabilities readily available to both government and non-government sectors have increased the ability of individuals, or a group of individuals, to engage in various non-military forms of warfare in a way that surpasses the organizational, sectoral or geographical boundaries that have been embedded in modern statecraft.

In addition, modern technologies, such as information technology and artificial intelligence-enabled deep fake technology, have provided clandestine actors with the ability to deny their involvement or to make it difficult to establish their involvement in hostile activities.[59] Plausible deniability that results therefrom makes hybrid warfare appealing as a 'tool of obfuscation', for example, to advance national interest over disputed territory or waters by forceful presence or incursion, without risking open conflict involving confrontation of military forces. The clandestine nature of militia activities thanks to these modern technologies defies the premise upon which states agree to implement international law in good faith.

The structural problems of international law, when these three conditions are present, pose challenges to the rules-based international order. Recalcitrant states enjoy the increased ability to engage in covert operations through surrogate armed groups in a non-conventional mode of hostilities to achieve their strategic goals. Defending states, on the other hand, find themselves constrained to act within the legal framework applicable to the type of situation as they perceive

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Congress on the Prevention of Crime and the Treatment of Offenders, 27 August – 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 (1991) 112-16.

57 Aurel Sari, 'Hybrid Warfare, Law, and the Fulda Gap' in Christopher M. Ford and Winston S. Williams (eds), *Complex Battlespaces* (Oxford University Press 2019) 161, 179–182.

58 Frank G. Hoffman, 'Hybrid Warfare and Challenges' (2009) 52 *Joint Force Quarterly* 34, 37–38.

59 Hitoshi Nasu, 'Deepfake Technology in the Age of Information Warfare' (*Articles of War*, March 1, 2022), available at https://lieber.westpoint.edu/deepfake-technology-age-information-warfare/.

it. As this problem persists or even grows, Shane Reeves and Robert Barnsby have warned, states 'may begin to see this area of international law as more of an anachronistic nuisance than a legal imperative'.[60] When the law of armed conflict is seen as ineffectual, political and military incentives to comply with humanitarian obligations will also dissipate.

## 5. Conclusion

The modality of warfare has evolved and continues to change as various capabilities are developed, combined and re-configured to enable armed forces, regular or irregular, to achieve their tactical and strategic goals. With the greater availability of technologically advanced capabilities, hybrid warfare is likely to remain a preferred mode of offensive operations for recalcitrant states that are prepared to operate at the edges of legality. It may be employed as a 'tool of obfuscation' to achieve fait accompli by taking over disputed territory or waters without risking open conflict involving confrontation of military forces. A grey zone could also be built over time to maintain persistent threats aiming at incremental revision to the existing international order by exploiting ambiguity and plausible deniability of the operation.

This chapter has demonstrated that the legal regime of the jus ad bellum that provides legal justifications for resorting to an armed force against external threats is misaligned with the legal regime of the *jus in bello* that governs the conduct of hostilities in international or non-international armed conflict. The disparity created as a result provides room for strategic exploitation (1) when a recalcitrant state takes advantage of the target state's internal compliance mechanisms for the good faith implementation of international law; (2) by engaging non-state actors to conduct hostile activities for strategic purposes; and (3) with technologically advanced capabilities that enable them to operate in a clandestine yet highly harmful manner at various levels of intensity and in different domains.

This analysis has demonstrated the vulnerability of international legal system when hybrid tactics are employed in a way that exploits flaws in the current legal framework of warfare which has been built through the development of jurisprudence. The malicious exploitation of this vulnerability has the potential to undermine the system of international law, as a tool to regulate state behavior, premised on the national implementation of rules in good faith. There is therefore a good reason to regard grey zone situations created by hybrid threats as challenges to the rules-based international order. If hybrid threats continue to be posed or become widespread, international law will need to be adapted to the new reality of international relations in a way that reduces room for exploitation and allows for flexible escalation in the mode of operation as appropriate to the level and type of hostilities confronting the state.

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60 Shane R. Reeves and Robert E. Barnsby, 'The New Griffin of War: Hybrid International Armed Conflicts' (2013) *Harvard International Review* 16, 17.