THE LEGAL RAMIFICATIONS OF HYBRID WARFARE

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ABSTRACT

Law conditions how we conceive of and conduct war. By drawing a line between war and peace and between permissible and impermissible uses of force, the legal framework governing warfare stabilizes mutual expectations among the warring parties as to their future behavior on the battlefield. Hybrid Warfare is a notion that has the potential to change future conceptualization of conflicts. This re-conceptualization also involves a need to rethink the law paradigms applicable to modern conflicts, which do not neatly fit the categorization outlined jus ad bellum (right to wage war) and jus in bello (the conduct of parties engaged in an armed conflict). Law therefore, constitutes an integral and critical element of hybrid warfare. This article seeks to contribute to the growing developments in the field of hybrid warfare by critically analysing the legal dynamics of hybrid warfare within international law.

Keywords: hybrid warfare, international law, lawfare, war, law of armed conflict & use of force.

I) INTRODUCTION

Hybrid warfare is a strategy which blends conventional and irregular means of warfare. Alternately termed non-linear war, active measures, or conflict in 'the grey zone', a universally agreed definition has yet to emerge for the term hybrid warfare. It is generally understood to refer to the highly integrated use of a diverse range of military and non-military measures in pursuit of an overarching strategic objective. This understanding is echoed in the Wales Summit Declaration[1] issued by the Heads of State and Government of the member countries of NATO on September 5, 2014.

A state engaging in hybrid warfare foments instability in another state's domestic affairs, prioritizing non-kinetic military means such as cyber and influence operations in concert with

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[1] Wales Summit Declaration. Available at: https://www.nato.int/cps/en/natohq/official_texts_112964.htm. We will ensure that NATO is able to effectively address the specific challenges posed by hybrid warfare threats, where a wide range of overt and covert military, paramilitary, and civilian measures are employed in a highly integrated design. It is essential that the Alliance possesses the necessary tools and procedures required to deter and respond effectively to hybrid warfare threats, and the capabilities to reinforce national forces.

economic pressure, support for local opposition groups, disinformation, and criminal activity. It may involve the covert deployment of unmarked troops or irregular combatants, though hybrid warfare's reliance on cyber capabilities and non-state proxies are distinctive. The strategic benefit of hybrid warfare is to obscure the involvement of an aggressor state. Even the thinnest veneer of deniability may delay or fragment opposition to actions that otherwise invite a vocal, sometimes forceful, international response[2].

The subject of hybrid warfare has attracted considerable attention in recent years. Much of that interest has been prompted by the expansion of Islamic State (IS) in Iraq and Syria and Russia's aggressive foreign policy over the past decade. Russia's embrace of hybrid warfare has been credited to Chief of the General Staff of the Russian military, Valery Gerasimov. In what is widely considered as an exposé of Russian thinking on hybrid warfare, in 2013, Gerasimov articulated his view of hybrid warfare as an asymmetrical response to the spread of liberal democracy in a globalized world[3]. A corollary to Clauswitz's conception of war as politics by other means[4], Gerasimov observed 'the role of non-military means of achieving political and strategic goals has grown, and, in many cases, they have exceeded the power of force of weapons in their effectiveness'[5]. Consequently, he advocated the 'broad use of political, economic, informational, humanitarian, and other non-military measures applied in coordination with the protest potential of the population to be supplemented by military means of a concealed character'[6].

Observers may disagree about which cases should be classified as hybrid war. Russia's 2008 invasion of Georgia and the resulting annexation of Abkhazia and South Ossetia, its actions in

[2] For additional background on hybrid warfare *See* Jen Stoltenberg, Keynote Speech by NATO Secretary General at the Opening of the NATO Transformation Seminar (Mar. 25, 2015), *available at*http://www.nato.int/cps/en/natohq/opinions_118435.htm; Michael Kofman, *Russian Hybrid Warfare and Other Dark Arts*, War on the Rocks (Mar. 11, 2016), http://warontherocks.com/2016/03/russian-hybrid-warfare-and-other-dark-arts/; Frank Hoffman, *Hybrid Warfare and Challenges*, Joint Force Quarterly 34–39 (2009); Aurel Sari, *Legal Aspects of Hybrid Warfare*, Lawfare (Oct. 2, 2015), https://lawfareblog.com/legal-aspects-hybrid-warfare.

[3] General Valery Gerasimov, *The Value of Science Is in the Foresight: New Challenges Demand Rethinking the Forms and Methods of Carrying out Combat Operations*, Voyenno-Promyshlennyy Kurier (original in Russian), (Feb. 26, 2013), http://vpk-news.ru/articles/14632 (last visited Nov. 27, 2017). An English version can be found at Robert Coalson (trans.), Military Review (Jan.—Feb. 2016), http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20160228_art008.pdf. For an alternate take on Gerasimov's work, see Charles K. Bartles, *Getting Gerasimov Right*, Military Review (Jan.–Feb, 2016), *available at* http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20160228_art009.pdf.

[4] Carl von Clausewitz, On War (Michael Howard & Peter Pare trans., Oxford University Press 2007).

[5] Gersimov, *supra* note 3, in Coalson, *supra* note 3, at 24.

[6] *Ibid.*

2013 and 2014 to seize and annex Crimea, and its deployment of 'little green men' leading to the declaration of the Donetsk People's Republic in Eastern Ukraine are the clearest examples of hybrid warfare applied to full effect[7]. However, hybrid war need not result in the annexation of territory. A disinformation campaign fomenting anti-government riots followed by a cyber-attack crippling Estonia's digital infrastructure in 2007, orchestration of elaborate coup attempts in Macedonia in 2016 and Montenegro in 2017, support for right-wing political parties in France and Germany, and interference in the 2016 U.S. election all fit within Gerasimov's description of hybrid warfare[8]. Rather than merely a descriptor for isolated cases or a constellation of tactics, hybrid warfare is better understood as a grand strategy aimed at destabilizing the existing liberal order.

II) THE CHANGING CHARACTER OF WARFARE: THE CONCEPT OF HYBRID WARFARE

Until the middle of the twentieth century, war in a formal sense was a relationship between sovereign nation States[9]. Since war belonged to the sphere of inter-State relations, the rules governing the conduct of warfare fell within the scope of international law. By contrast, acts of violence emanating from non-State actors remained subject to the rules of ordinary domestic law[10], unless the law of war was extended to such disturbances through the recognition of

[7] Douglas C., 'Hybrid Warfare: Aggression and Coercion in the Gray Zone', *ASIL Insights*, Vol21, Issue 14. 29 Nov. 2017.

[8] For information on the facts underlying these various examples *see* Max Fisher, *In D.N.C. Hack, Echoes of Russia's New Approach to Power*, N.Y. Times (July 25, 2016), http://www.nytimes.com/2016/07/26/world/europe/russia-dnc-putin-strategy.html?_r=0; David E. Sanger, *White House Confirms Pre-Election Warning to Russia Over Hacking*, N.Y. Times (Nov. 16, 2016), http://www.nytimes.com/2016/11/17/us/politics/white-house-confirms-pre-election-warning-to-russia-over-hacking.html; Andrew Higgins, *Finger Pointed at Russian in Alleged Coup Plot in Montenegro*, N.Y. Times (Nov. 26, 2016), http://www.nytimes.com/2016/11/26/world/europe/finger-pointed-at-russians-in-alleged-coup-plot-in-montenegro.html.

[9] E. d. Vattel, The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns (Carnegie, Washington, 1916), at 235 ("It is the sovereign power alone...which has the right to make war").

[10] H. W. Halleck, International Law or Rules Regulating the Intercourse of States in Peace and War (Van Nostrand, New York, 1861), at 386 ("the hostile acts of individuals, or of bands of men, without the authority or sanction of their own government, are not legitimate acts of war, and, therefore, are punishable according to the nature or character of the offense committed").

belligerency[11]. By distinguishing war in a material sense from war in a legal sense[12], international law during the nineteenth and early twentieth century imposed a binary legal framework on warfare, based on a strict separation between war and peace, international and internal, State and non-State, regular and irregular[13]. This is not to say that these distinctions reflected the actual practice of warfare. Far from it. Throughout this period, States and their adversaries used force across the entire spectrum of conflict, relying on a mix of symmetric and asymmetric methods[14]. Thus, hybrid warfare is not a novel phenomenon[15]. However, international law remained blind to this more complex reality[16], as States refused to extend the applicability of the law of war to irregular adversaries not acting on behalf of a recognized belligerent[17]. During the course of the twentieth century, the binary distinctions on which the traditional legal framework of warfare rested began to decay. The certainty that characterized the law gave way to uncertainty, leaving the law of war in its current state of flux[18].

The adoption of Common Article 3 of the Geneva Conventions of 1949 extended the law of war beyond the realm of inter-State relations[19]. As some delegates present at the diplomatic

[11] L. Moir, "The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949" International and Comparative Law Quarterly, 47 (1998) 337–361.

[12] L. Oppenheim, International Law: A Treatise, Vol. II (War and Neutrality), 1st (Longmans Green and Co., London, 1906), at §§ 54–58 and 93.

[13] See G. Schwarzenberger, "Jus Pacis Ac Belli?: Prolegomena to a Sociology of International Law" American Journal of International Law, 37 (1943) 460–479.

[14] This is reflected in such concepts as "small wars" and "imperial policing". See C. E. Callwell, Small Wars: Their Principles and Practice, 3rd (HMSO, London, 1906) and C. W. Gwynn, Imperial Policing, 2nd (Macmillan, London, 1939).

[15] See W. Murray and P. R. Mansoor (eds), Hybrid Warfare: Fighting Complex Opponents from the Ancient World to the Present (Cambridge University Press, New York, 2012). However, this is not to deny the novelty of the legal challenges that hybrid warfare presents. See A. Sari, "Hybrid Warfare, Law and the Fulda Gap", in M. N. Schmitt, et al. (eds), Complex Battle Spaces (Oxford University Press, Oxford, 2017), available at https://ssrn.com/abstract=2927773.

[16] For an illustration of the simplicity of this legal landscape, see War Office, Manual of Military Law, 4th (HMSO, London, 1899) at 2–3.

[17] This reluctance is reflected in the debates surrounding the permissibility of irregular resistance to enemy forces in the context of regular war, as recounted by J. M. Spaight, War Rights on Land (Macmillan, London, 1911), at 47–56.

[18] Sari, *Op.cit* note 2.

[19] For an overview of the negotiation of Common Art. 3, see G. Best, War and Law Since 1945 (Clarendon, Oxford, 1994), at 168–179.

conference in Geneva feared[20], this move precipitated the erosion of the traditional legal boundaries of war. The majority of the negotiating States agreed that Common Article 3 should not apply to acts of banditry and rioting[21], but only to 'proper armed conflicts' involving a 'certain degree of organization' on part of the rebels[22]. Yet these vague notions provide no firm guidance as to where the dividing line between mere disturbances of the peace and 'proper' non-international armed conflicts lies[23]. While international tribunals have developed more detailed criteria to assist in this matter[24], their application remains fraught with difficulty[25]. The emergence of the law of non- international armed conflict has thus blurred the line between war and peace. At the same time, it has also eliminated the notion of war as a matter belonging exclusively to the international sphere. States have extended the applicability of the law of war to non-State actors only partially. In particular, they have declined to confer combatant status on individuals fighting on behalf of non- State adversaries[26], but have retained the freedom to subject such individuals to the full force of their penal laws[27]. Accordingly, since non-

[20] Plenary Meeting, July 28, 1949, Federal Political Department, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, Sec. B (Bern, 1949), at 327–330 (Burma).

[21] 19th Plenary Meeting, July 29, 1949, Final Record Vol. II, Sec. B (n. 33), at 333 (Venezuela).

[22] *Ibid*, at 335 (Switzerland).

[23] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977, 1125 UNTS 609 (Additional Protocol II), Art. 1(2), distinguishes non-international armed conflicts from "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature", but this does not offer much more clarity.

[24] Prosecutor v. Ljube Boškoski and Johan Tarčulovski (2008) Judgment, July 10, 2008 (ICTY Trial Chamber II), paras 175–205. See A. Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law (Cambridge University Press, Cambridge, 2010), at 117–158 and S. Sivakumaran, The Law of Non-international Armed Conflict (Oxford University Press, Oxford, 2012), at 156–182.

[25]M. Marko and H.-V. Vidan, "A Taxonomy of Armed Conflict", in N. White and C. Henderson (eds), Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum (Edward Elgar, Cheltenham, 2013), 256–314.

[26] Military Prosecutor v. Omar Mahmud Kassem and Others, Apr. 13, 1969 (Israel, Military Court sitting in Ramallah), (1971) 42 International Law Reports 470, at 483; Revisión Constitucional de los artículos 135, 156 y 157 del codigo penal y 174, 175, 178 y 179 del codigo penal militar, Judgment, Apr. 25, 2007 (Constitutional Court of Colombia), sec. 3.3.1.

[27] This principle is confirmed in express terms by Additional Protocol II, Art. 3(1). Among other examples, see also Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 UNTS 212, Art. 22(3).

international armed conflicts never cease to be a problem of internal public order, the line between warfighting and law enforcement in such conflicts has become uncertain.

The changing parameters of warfare have further hastened the erosion of the traditional legal framework. Technology and global interconnectedness have rendered non-State adversaries more lethal and more mobile. Confronted with this new reality on September 11, 2001, the Bush Administration denied that Common Article 3 applied to the fight against Al-Qaeda due to the transnational, rather than non-international, character of the 'war on terror'[28]. In essence, the Administration embraced a pre-1949 legal position which rejected the law of war as irrelevant to hostilities waged against irregular adversaries abroad[29]. In *Hamdan*, the Supreme Court rebuffed this approach and confirmed that the law of war does apply to transnational conflicts[30]. Yet this merely exposed the shortcomings of the legal regime created by Common Article 3 and Additional Protocol II. The conventional rules of the law of non-international armed conflict have little to say about the legal authority to detain adversaries, the principles governing targeting or the geographical scope of hostilities in the context of multiple transnational armed conflicts[31]. The international community responded to this lacuna by extending the applicability of the key rules governing the conduct of hostilities in international armed conflict to non-international armed conflicts, as reflected in State practice[32],

[28] President George W. Bush, Memorandum to the Vice President, Secretary of State, Secretary of Defense, et. al., "Humane Treatment of al Qaeda and Taliban Detainees", Feb. 7, 2002, at 134–135, reprinted in K. J. Greenberg and J. L. Dratel (eds), The Torture Papers: The Road to Abu Ghraib (Cambridge University Press, Cambridge, 2005), 134. For the underpinning legal argument, see Jay Bybee, Assistant Attorney General, US Department of Justice, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, "Application of Treaties and Laws to Al Qaeda and Taliban Detainees", Jan. 22, 2002, at 85–89 reprinted in ibid, at 81.

[29] War Office, Manual of Military Law, 6th (HMSO, London, 1914), at 235 ("It must be emphasized that the rules of International Law apply only to warfare between civilized nations, where both parties understand them and are prepared to carry them out. They do not apply in wars with uncivilized States and tribes, where their place is taken by the discretion of the commander and such rules of justice and humanity as recommend themselves in the particular circumstances of the case"). See also C. Elbridge, "How to Fight Savage Tribes" American Journal of International Law, 21 (1927) 279–288.

[30] Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006), at 2795–2797.

[31] N. K. Modirzadeh, "Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War" Harvard National Security Journal, 5 (2014) 225– 304.

[32] E.g. United States Central Command, Investigation Report on the Airstrike on the Médecins Sans Frontières / Doctors without Borders Trauma Center in Kunduz, Afghanistan on October 3, 2015, Nov. 21, 2015, at 90–95 (applying the concepts of lawful target, combatant, military objective, precautions and proportionality in attack in the context of a non-international armed conflict); Kunduz Case, Judgment, Oct. 6, 2016 (Federal Court of

international agreements[33], the jurisprudence of international courts[34] and authoritative clarifications of the law[35]. This development has resolved some of the uncertainties surrounding the targeting of non-State adversaries[36]. However, it has also set the law of war on a collision course with international human rights law[37].

Furthermore, technological progress and socio-economic developments have gradually blurred the line between the means and methods of warfare adopted by symmetrical and asymmetrical adversaries. Technology has increased the lethality, visibility and geographical reach of non-state actors, who have shown themselves capable of effectively engaging states with irregular and, in some cases, more conventional capabilities[38]. Meanwhile, Russia has demonstrated how states may exploit the vulnerabilities of their peer competitors by employing irregular tactics and information warfare[39].

Justice, Germany), paras 46–55 (applying Arts 50, 51, 52 and 57 of Additional Protocol I in the context of a non-international armed conflict).

[33] E.g. Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90, Art. 8(2)(e), as amended by Amendment to Article 8 of the Rome Statute of the International Criminal Court, June 10, 2010, 2868 UNTS 195.

[34] E.g. Prosecutor v. Duško Tadić (1995) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-T, Oct. 2, 1995 (ICTY Trial Chamber), para. 127 (indiscriminate attacks, protection of civilian objects, certain means and methods of warfare); Prosecutor v. Stanislav Galić (2003) Judgment, IT-98-29-T, Dec. 5, 2003 (ICTY Trials Chamber), paras 57–58 (indiscriminate attacks, proportionality, precautions).

[35] J.-M. Henckaerts and L. Doswald-Beck (eds), Customary International Humanitarian Law (Cambridge University Press, Cambridge, 2005), at xxix; International Institute of Humanitarian Law, The Manual on the Law of Non- International Armed Conflict With Commentary (2006); Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2008).

[36] W. H. Boothby, The Law of Targeting (Oxford University Press, Oxford, 2012), at 429–454; Y. Dinstein, Non- International Armed Conflicts in International Law (Cambridge University Press, Cambridge, 2014), at 211–223; S. Sivakumaran, The Law of Non-international Armed Conflict (Oxford University Press, Oxford, 2012), at 336–429.

[37] C. Garraway, "The Law Applies, But Which Law? A Consumer Guide to the Law of War", in M. Evangelista and H. Shue (eds), The American Way of Bombing: Changing Ethical and Legal Norms, From Flying Fortresses to Drones (Cornell University Press, Ithaca, 2014), 87–105, at 100.

[38] The Second Lebanon War offers a leading example. See Stephen D. Biddle & Jeffrey Allan Friedman, The 2006 Lebanon Campaign And The Future Of Warfare: Implications For Army And Defense Policy (2008); Scott C. Farquhar, Back To Basics: A Study Of The Second Lebanon War And Operation Cast Lead (2009). But compare Jan Angstrom, Escalation, Emulation, and the Failure of Hybrid Warfare in Afghanistan, Stud. Conflict & Terrorism 1, 8–15 (2016).

[39]Ulrik Franke, War By Non-Military Means: Understanding Russian Information Warfare (2015); Kier Giles, Handbook Of Russian Information Warfare (2016); Rod Thornton & Manos Karagiannis, The Russian Threat to the Baltic States: The Problems of Shaping Local Defense Mechanisms, 29 J. SLAVIC MIL. STUD. 331 (2016); Timothy Thomas, Russia's Information Warfare Strategy: Can the Nation Cope in Future Conflicts?, 27

Writing in 2005, General James N. Mattis and Lieutenant Colonel (retired) Frank Hofmann argued that future adversaries should be expected to combine conventional and irregular techniques in an 'unprecedented synthesis' best described as a hybrid way of war[40]. In later publications, Hoffman identified the convergence between different domains and modes of warfare, including the physical and psychological, the kinetic and non-kinetic, the military and non- military, as the essence of this hybrid approach[41]. According to Hoffman, future adversaries will blend conventional warfare, irregular tactics, terrorism and criminality in their operations and thereby fuse the 'lethality of state conflict with the fanatical and protracted fervour of irregular warfare'[42]. The hallmark of hybridity, therefore, is the combined use to different modes of warfare to achieve synergistic effects in a single battle space[43]. The majority of commentators embracing the term followed Hoffman's lead and adopted similar definitions of hybrid war[44].

However, conceptually framing hybrid warfare as an innovation in international affairs has drawn criticism. This is because all states engage in some forms of covert action and non-military measures constitute essential tools of diplomacy. Additionally, hybrid warfare

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J. SLAVIC MIL. STUD. 101 (2014). For further studies on the subject, visit the home page of the NATO Strategic Communications Centre of Excellence at http://www.stratcomcoe.org/.

[40] James N. Mattis & Frank G. Hoffman, Future Warfare: The Rise of Hybrid Wars, Issue 131 PROCEEDINGS MAG. 18, 19 (2005). See also NATHAN FREIER, STRATEGIC COMPETITION AND RESISTANCE IN THE 21ST CENTURY: IRREGULAR, CATASTROPHIC, TRADITIONAL, AND HYBRID CHALLENGES IN CONTEXT (2007) (hybrid challenges, which combine traditional, irregular, catastrophic or disruptive challenges, are the norm). For earlier uses of the term, see e.g. Robert G. Walker, SPEC FI: The United States Marine Corps and Special Operations (Dec. 1, 1998) (unpublised MA dissertation, Monterey, California, Naval Postgraduate School) (http://hdl.handle.net/10945/8989).

[41] Frank G. Hoffman, Hybrid Warfare and Challenges, 52 JOINT FORCE Q. 34, 34 (2009).

[42] *Ibid*. at 34–36. See also FRANK G. HOFFMAN, CONFLICT IN THE 21ST CENTURY: THE RISE OF HYBRID WARFARE 28–30 (2007); Frank G. Hoffman, Hybrid Threats: Reconceptualizing the Evolving Character of Modern Conflict, STRATEGIC FOR. 1, 5–6 (2009).

[43] HOFFMAN, CONFLICT IN THE 21ST CENTURY, *op.cit* note 42, at 29.

[44] TIMOTHY MCCULLOH & RICHARD JOHNSON, HYBRID WARFARE 17 (2013) (defining hybrid war theory as form of warfare where one of the parties combines all available resources to produce synergistic effects against a conventionally-based opponent); John J. McCuen, Hybrid Wars, 88 MIL. REV. 107, 108 (2008) (defining hybrid wars as a particular combination of symmetric and asymmetric war); Josef Schroefl & Stuart J. Kaufman, Hybrid Actors, Tactical Variety: Rethinking Asymmetric and Hybrid War, 37 STUD. CONFLICT & TERRORISM 862 (2014) (accepting Hoffman's definition, but proposing to deepen it by drawing attention to the diverse range of actors involved in hybrid warfare); Rod Thornton, The Changing Nature of Modern Warfare, 160 RUSI J. 40, 42 (2015) ("integration is at the heart of hybrid warfare").

resembles operations undertaken by both opposing blocs during the height of the Cold War and by many modern states under the heading of irregular warfare. Commentators remain divided about its value as a conceptual lens for assessing current and future security threats. Those critical of the concept point out that the fusion of different modes of conflict is not a novelty, but is 'as old as warfare itself'[45]. The hybrid warfare concept is said to add little to the existing lexicon of strategic thought[46]. Sceptics further lament that the concept has an 'elastic quality'[47], which has allowed it to become something of a 'catch-all phrase'[48]. At best, this has compromised its analytical utility[49]. At worst, it has turned it into an 'orthodox label' that inhibits creative thought[50]. Many commentators also express doubts about its utility to explain and assist in countering the Russian approach to warfighting. Hybrid warfare theory is said to overestimate Russian capabilities and intentions[51], mistakenly elevate its operations in Ukraine 'to the level of a coherent or preconceived doctrine' [52] and anchor 'analysis to what took place

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[45] MICHAEL KOFMAN & MATTHEW ROJANSKY, A CLOSER LOOK AT RUSSIA'S 'HYBRID WAR' 2 (2015). See also ANTULIO J. ECHEVARRIA II, OPERATING IN THE GRAY ZONE: AN ALTERNATIVE PARADIGM FOR U.S. MILITARY STRATEGY 5–12 (2016); GILES, supra note 20, at 8–9; Russell W. Glenn, Thoughts on "Hybrid" Conflict, Small Wars Journal (Mar. 2, 2009, 6:40 PM), http://smallwarsjournal.com/blog/journal/docs-temp/188-glenn.pdf?q=mag/docs-temp/188-glenn.pdf. For example, see Duncan Hollis, *Russia and the DNC Hack: What Future for a Duty of Non-Intervention?*, Opinio Juris (July 25, 2016), http://opiniojuris.org/2016/07/25/russia-and-the-dnc-hack-a-violation-of-the-duty-of-non-intervention/; Ido Kilovaty, *The Democratic National Committee Hack: Information as Interference*, Just Security (Aug. 1, 2016), https://www.justsecurity.org/32206/democratic-national-committee-hack-information-interference/.

[46] Jyri Raitasalo, Hybrid Warfare: Where's the Beef?, War on the Rocks Blog (Apr. 23, 2015), https://warontherocks.com/2015/04/hybrid-warfare-wheres-the-beef/.

[47] Jan Angstrom, Escalation, Emulation, and the Failure of Hybrid Warfare in Afghanistan, STUD. CONFLICT & TERRORISM 1, 5 (2016).

[48] HEW STRACHAN, THE DIRECTION OF WAR: CONTEMPORARY STRATEGY IN HISTORICAL PERSPECTIVE 82 (2013); Samuel Charap, The Ghost of Hybrid War, 57 SURVIVAL 51, 51 (2015); Bettina Renz, Russia and 'Hybrid Warfare', 22 CONTEMP. POL. 283, 296 (2016).

[49] KOFMAN & ROJANSKY, *op.cit* note 45, at 2.

[50] Andrew Monaghan, The 'War' in Russia's 'Hybrid Warfare', 45 PARAMETERS 65, 72 (2015). See also Renz, *op.cit* note 48, at 297.

[51] Lawrence Freedman, Ukraine and the Art of Limited War, 56 SURVIVAL 7 (2014) ("the advantages of hybrid warfare have been less evident than often claimed"). Commentators also dispute the novelty of Russia's methods: e.g. Mark Galeotti, Hybrid, Ambiguous, and Non-linear? How New is Russia's 'New Way of War'?, 27 SMALL WARS & INSURGENCIES 282, 293–96 (2016).

[52] KOFMAN & ROJANSKY, supra note 45, at 3. See also Charap, supra note 34, 53–56 ("there is no evidence to suggest the emergence of a hybrid-war doctrine"); Roger N. McDermott, Does Russia Have a Gerasimov Doctrine?, 46 PARAMETERS 97, 103–05 (2016) (questioning whether Russia implemented a preconceived operational model in Donbas); Renz, *op.cit* note 48, at 294 (hybrid warfare theory "imbues the Russian political

in February 2014 in Crimea'[53] whilst ignoring the unique features that contributed to the success of that intervention. Sceptics have therefore questioned whether, aside from the introduction of cyber-capabilities and the name itself, there really is anything novel about hybrid war[54]. These points, although not without merit, neglect the wider context. They overlook the fact that hybrid warfare is a symptom of our operating environment in which law has become a strategic enabler. States have lost their grip on the monopoly of violence as non-state actors have grown into potent challengers to a state-based international order. The number of inter-state conflicts has decreased, while the number of internationalized armed conflicts has risen sharply. States on the front lines against the particular hybrid threat posed by Russia have answered the sceptics in the affirmative by investing in strategic thinking on how best to counter hybrid warfare. In April 2017, a group of eleven NATO and European Union member states signed a joint Memorandum of Understanding in Finland establishing the European Centre of Excellence for Countering Hybrid Threats[55]. The Helsinki-based centre, which was officially inaugurated in October 2017, engages in strategic dialogue, research, training, and consultation to illuminate vulnerabilities to hybrid measures and improve resilience against hybrid threats.

III) THE LEGAL RAMIFICATIONS OF HYBRID WARFARE UNDER INTERNATIONAL LAW

Understanding the relationship between hybrid warfare and international law governing the use of force is central to countering hybrid threats. Hybrid measures have been employed, with increasing success, to undermine existing international protections for the territorial integrity

leadership with an unrealistic degree of strategic prowess"). See also Kęstutis Kilinskas, Hybrid Warfare: An Orientating or Misleading Concept in Analysing Russia's Military Actions in Ukraine?, 14 LITHUANIAN ANN. STRATEGIC REV. 139 (2016) (Russia's action in Crimea only partly matches the criteria of Hoffman's hybrid warfare concept).

[53] Monaghan, *op.cit* note 50, at 68.

[54] Benjamin Wittes, *What is Hybrid Conflict?*, Lawfare (Sept. 11, 2015), https://lawfareblog.com/what-hybrid-conflict. *See also* Damien Van Puyvelde, *Hybrid War – Does It Even Exist?*, NATO Review, http://www.nato.int/docu/review/2015/Also-in-2015/hybrid-modern-future-warfare-russia-ukraine/EN/ (last visited Nov. 27, 2017).

[55] Press Release, Government of Finland , European Centre of Excellence for Countering Hybrid Threats Established in Helsinki, (Apr. 11, 2017), http://valtioneuvosto.fi/en/article/-/asset_publisher/10616/eurooppalainen-hybridiuhkien-osaamiskeskus-perustettiin-helsinkiin; Press Release, North Atlantic Treaty Organization, NATO Welcomes Opening of European Centre for Countering Hybrid Threats, (Apr. 11, 2017), http://www.nato.int/cps/en/natohq/news_143143.htm.

and political independence of states. Foremost is the ban on aggressive war. Hybrid warfare has created a new vehicle for aggression, the 'supreme international crime'[56]. Outlawed by the Kellogg-Briand Pact[57], enforced during the tribunals at Nuremberg and Tokyo, prohibited in the United Nations Charter (Charter)[58], and reaffirmed in the Kampala amendments to the Rome Statute of the International Criminal Court[59], states endorse with near unanimity the general principle that aggression violates international law.

The Charter prohibits aggression through its ban on uses of force done without legal justification. Article 2(4) guarantees the right of states to be free from any threat or use of force against their territorial integrity or political independence[60]. Prohibited uses of force encompass, but need not reach, the level of an armed attack, the basis for self-defence under Article 51 of the Charter[61] as well as the collective defence provision contained in Article 5 of NATO's Atlantic Charter[62].

Unlawful uses of force that violate Article 2(4)[63] generally require forces engaging in military activities, whether traditional armed forces or non-state armed groups[64]. This framework has proven capable of accounting for changes in the means through which states wage war. For example, in the context of cyber operations, the *Tallinn Manual*, a treatise on the application of existing international law to cyberspace drafted by an international group of experts, affirms that cyber operations may constitute unlawful uses of force if they are attributed to the armed

[56] 22 Nuremberg Trial Proceedings, 30 Sept. 30, 1946, at 426 (The Avalon Project, 2008), *available at*http://avalon.law.yale.edu/imt/09-30-46.asp.
[57] General Treaty for the Renunciation of War (Kellogg-Briand Pact), Aug. 27, 1928, 94 L.N.T.S. 57, *available at* http://avalon.law.yale.edu/subject_menus/kbmenu.asp;
[58] Adopted 26 June 1945 and entered into force 24 October 1945. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.
Available at: http://www.un.org/aboutun/charter/index.html. In addition, the Charter of the United Nations is always reprinted in the most current Volume of the Yearbook of the United Nations.
[59]Kellogg-Briand Pact *op.cit*, note 57; UN Charter *op.cit*, note 58.; Nuremburg Trial Proceedings, *supra* note 9; Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, July 17, 1998, *available at* http://legal.un.org/icc/statute/romefra.htm.
[60] *op.cit*, note 58U.N. Charter art. 2, 1, 4. *See also* G.A. Res. 3314 (XXIX), Definition of Aggression (Dec. 14, 1974), *available at* https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement.
[61] *op.cit*, note 58.
[62] U.N. Charter art. 51; Charter of the North Atlantic Treaty Organization art. 5.
[63] *op.cit*, note 58
[64] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. Rep. 14, 202 195 (June 27); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 2005 I.C.J. Rep.168 (Dec. 19); Legality of the Use or Threat of Nuclear Weapons, 1996 I.C.J. Rep. 226 (July 8).

forces of a state or if their effects mimic those of traditional military operations[65]. In theory then, the Charter's[66] prohibition on the use of force is sufficient to account for hybrid threats when they resemble traditional military activities—for example when unmarked troops engage in hostilities—but also when a state employs cyber capabilities in a hybrid war campaign to damage or disable infrastructure in a way that resembles the use of bombs and bullets.

However, in practice, hybrid measures are designed to avoid being identified as clear violations of the Charter[67] even when they do constitute an unlawful use of force. One way this is achieved is through an emphasis on covert action. States have long engaged in covert operations that may run afoul of Article 2(4)'s prohibition on non-intervention[68]. While reasons for engaging in covert action vary and are often mixed, uses of force may be done covertly at least in part to honour international law in the breach. Maintaining public deniability limits the establishment of *opinio juris* for acts that blatantly violate the Charter[69]—important for maintaining an international system that has prevented major power war since 1945. In the context of hybrid warfare, such benevolent motivations should not be assumed. Covert means are crucial to a hybrid warfare strategy not because covert actions may discourage open violations of the Charter[70] by others, but because it exploits the weakness of an international enforcement regime where the status quo is often inaction, particularly in those cases where aggressor states have sown doubt as to attribution or the legality of their behaviour.

Other hybrid measures are simply not accounted for by the Charter's prohibition on the use of force. For example, economic measures traditionally do not violate Article 2(4)[71]. Disinformation and criminal activity generally also fall below this threshold. However, actions not constituting a use of force may still be unlawful as a form of interference. Sovereign non-interference is implicit in the doctrine of sovereign equality, enshrined in Article 2(1) of the Charter. The United Nations General Assembly (GA) has opined on the concept. In a 1965 declaration, the GA described interference as 'the subordination of the exercise of (a state's)

[65] Tallinn Manual on the International Law Applicable to Cyber Warfare, ch. 1 (Michael N. Schmitt ed., 2013).
[66] *op.cit,* note 58.
[67] *Ibid.*
[68] Alexandra H. Perina, *Black Holes and Open Secrets: The Impact of Covert Action on International Law*, 53 Colum. J. Int'l. L. 3 (2015).
[69] *op.cit,* note 58.
[70] *Ibid.*
[71] Though the issue has garnered significant debate. *See* M. McDougal & F. Feliciano, *Law and Minimum World Public Order*, 3 UCLA Pac. Basin L.J. 21, 124 n.6 (1961). *See also* D. Bowett, *International Law and Economic Coercion,* 16 Va. J.Int'l L. 245, 245–49 (1976).

sovereign rights up to and including the violent overthrow of a state's government'[72]. In a 1970 declaration, the GA highlighted the ban on intervention in the internal or external affairs of any other state along with 'all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements'[73].

Interference may be understood as a lesser-included offense of intervention. The controlling expression is contained in the International Court of Justice's (ICJ) *Nicaragua*[74] decision. In *Nicaragua*[75], the Court emphasized the right of all states to decide upon issues inherent to state sovereignty, to include a state's political, economic, social and cultural system and the formulation of its foreign policy. When those choices are influenced by methods of coercion, including through subversion or indirect force, that constitutes unlawful interference[76].

The Charter framework, therefore, is at least conceptually sufficient to address hybrid measures short of the use of force. However, since *Nicaragua*[77], the contours of what constitutes coercive interference have remained murky[78]. Lack of clarity and a threshold that has placed interference nearly on par with intervention[79] have left gaps that hybrid measures may exploit. No single element of a hybrid campaign may present a clear case of coercive interference when viewed in isolation. However, constant, coordinated interference intended to destabilize a government may violate the spirit, if not the formalistic letter, of the Charter's protections for the political independence of states. While a state with robust civic institutions may be able to withstand a trumpet blast of false news stories, riots, and strategic leaks of information intended to undermine elections, smaller states in particular may find themselves overwhelmed. As such, it is important that coercive acts be recognized, scrutinized, and subject to a swift and coordinated response where necessary by those states and international and non-governmental

[72] G.A. Res. 20/2131, Declaration on the Inadmissibility of Intervention and Interference in the Domestic Affairs of States (Dec. 21, 1965), *available at* http://www.un-documents.net/a20r2131.htm.
[73] G.A. Res. 25/2625, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations (Oct. 24, 1970), *available at* http://www.un-documents.net/a25r2625.htm.
[74] *Nicaragua. v. U.S.*, 1986 I.C.J. Rep. at 202
[75] *Ibid*.
[76] *Ibid.*
[77] *Ibid.*
[78] T. J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AJIL 405, 405–13 (1985).
[79] As one treatise interprets it, "the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question." L. Openheim, International Law 432 (9th ed. 2008). Others have interpreted this standard as a sort of cause-in-fact test whereby observers ask, but for the interference, would the impacted state have taken a particular course of action. M. Wood, *Non-Intervention (Non-Interference in Domestic Affairs)*, The Princeton Encyclopedia of Self-Determination, http://pesd.princeton.edu/?q=node/258.

institutions seeking to uphold protections on political independence enshrined in the Charter[80]. Likewise, coercive acts must be distinguished from actions taken transparently and lawfully by states, which may exert diplomatic pressure without constituting illegal interference.

IV) TOWARDS A COMPREHENSIVE LEGAL APPROACH TO HYBRID WARFARE

As seen from the preceding analyses, the issue of whether hybrid warfare is a new category of war or not, and hence what it should be categorized as, is a challenge. However, the real challenge comes from a different direction. This is because one of the characteristic features of hybrid warfare, at least of the type practiced by Russia, is that it is designed to operate 'under our reaction threshold'[81]. Where the political and military reaction threshold lies depends partly on legal criteria. The critical element is the concept of 'armed attack', in Article 51 of the Charter. To remain under the political and military reaction threshold envisaged in Charter, hybrid warfare must remain under the corresponding legal threshold of armed attack. Consequently, hybrid warfare seeks to exploit such legal thresholds, fault-lines and gaps. There are plenty of these to go around. Consider the dividing lines between intervention, use of force, armed attack or between situations of internal disturbances and tensions, non-international armed conflicts or international armed conflicts. Or consider the distinction between overall control and effective control, or between combatant and non-combatant. Of course, none of these thresholds and fault-lines are new. Hybrid warfare thrives on them, but does not create them. What is new, arguably, is hybrid warfare's systematic exploitation for strategic ends within the changed environment. This poses a series of legal challenges and so far the legal aspects of hybrid warfare have received only limited attention.

Firstly, hybrid warfare presents a challenge to the rule of law. Serious and blatant violations of international law, and attempts to cover them with legal fig leaves, expose and deepen the international legal order's structural weaknesses. All the more so if such violations involve a permanent member of the Security Council.

[80] Douglas C., 'Hybrid Warfare: Aggression and Coercion in the Gray Zone', *ASIL Insights*, Vol21, Issue 14. 29 Nov. 2017.
[81] Towards the Next Strategic Defence and Security Review: Part Three – Defence. Available at the UK Parliament Website: https://publications.parliament.uk/pa/cm201415/cmselect/cmdfence/1127/112705.htm#n11

Secondly, it raises questions about the legal framework of non-kinetic military operations. The law of armed conflict is very much geared towards regulating kinetic effects, yet both military doctrine and practice increasingly sees the armed forces employing a broad spectrum of non-kinetic means and methods. This casts doubt on the conceptual foundations of the regulatory framework of warfare, which is based on the (admittedly problematic) distinction between war and peace. General Gerasimov, noted how the 21st century has seen 'a tendency toward blurring the lines between the states of war and peace'[82] and brought about the growing importance of non-military means for achieving strategic goals. In his recent remarks at Chatham House, General Houghton suggested that 'there is no longer a simple distinction between war and peace. We are in a state of permanent engagement in a global competition'[83]. Recently, Michael Fallon, UK Secretary of State for Defence, described hybrid warfare as 'blurring the lines between what is, and what is not, considered an act of war'[84]. For a set of rules built on the dividing line between war and peace, the blurring that Gerasimov, Houghton and Fallon talk about is a rather troublesome prospect.

Finally, hybrid warfare also places renewed emphasis on some of the classic legal debates of recent years. These include controversies surrounding the classification of armed conflict, the standards governing attribution of conduct and the legal geography of non-international armed conflict. Among these controversies, attribution is clearly a key area of interest because active denial of their involvement in hybrid operations is one of the primary methods for States to avoid crossing their adversary's reaction threshold.

Clearly, the legal challenges posed by hybrid warfare are multifaceted. An effective response to these challenges must therefore be comprehensive and multifaceted too, involving action both at the strategic and at the operational level. As far as the rule of law is concerned, the task is to find ways of compelling compliance with core principles of the international legal order in the face of great power *realpolitik* and the descent into darkness in parts of the Middle East. This task is made more difficult by the legal confusion that hybrid warfare seeks to foster in order to mask blatant breaches of the law and thereby prevent a unified response. Legal

[82] In Moscow Shadows: The 'Gerasimov Doctrine' and Russian Non-Linear War. Available at: https://inmoscowsshadows.wordpress.com/2014/07/06/the-gerasimov-doctrine-and-russian-non-linear-war/
[83] Chat ham House: The Limits on War and Preserving Peace. Available at: https://www.chathamhouse.org/about/structure/international-law-programme/limits-on-war-and-preserving-peace-project
[84] UK Gov't: Micheal Fallon, 'Defence Secretary's speech to RUSI on the SDSR 2015'. Available at: https://www.gov.uk/government/speeches/defence-secretarys-speech-to-rusi-on-the-sdsr-2015

arguments and claims are increasingly competing in a deeply contested and tribalized information domain.

With regards to legal thresholds and their exploitation, one response would be to focus attention on clarifying where those dividing lines lie in an attempt to reduce legal uncertainty. However, this is not an effective response because those thresholds and lines exist not because they are the result of legislative oversight or incompetence, but because they reflect underlying political choices and stalemates[85]. There are 'grey area's in the law because States do not want, or could not agree, that all of it is black and white. Consequently, combating legal uncertainty at best offers only a partial solution. Developing sound policy and doctrine would seem to be a more realistic way of maintaining unity of effort. Moreover, there is also an argument for looking at legal uncertainty as an opportunity, rather than as a liability, especially in the context of multinational operations. The same applies to the classic legal debates mentioned earlier, including the question of attribution[86].

All these considerations seem to point to a single conclusion: hybrid warfare greatly politicizes the law and legal argument. Needless to say, law exists in a political environment and serves political purposes. That is a given. To offer any added social value, law cannot become the same as politics, but must retain some distance to it. The instrumental use of law as a tool of hybrid warfare threatens to obliterate that distance. Thus, the legal aspects of hybrid warfare means a stance on 'lawfare' must be taken. Lawfare, once defined by General Charles Dunlap as the use or abuse of law 'as a substitute for traditional military means to achieve an operational objective'. In an environment of legal uncertainty and contestation, it is imperative to determine what constitutes an acceptable use of law in war and what constitutes an unacceptable abuse. The answer is critical, since it will guide not only the assessment of an adversary's actions, but also the nature and range of the response to hybrid threats.

V) CONCLUSION

[85] Aurel S., '*Hybrid Warfare: Legal Challenges and Solutions'*. Available at: http://www.aurelsari.co.uk/2015/10/hybrid-warfare-legal-challenges-and-solutions/
[86] *Ibid.*

A complete understanding of hybrid war as a strategic concept requires that it be properly situated within the existing regime governing the use of force under international law. Addressing legal aspects of hybrid conflict in turn requires proper acknowledgment of hybrid campaigns that amount to aggression and more robust theorizing on what hybrid measures constitute coercive interference. In that sense, efforts like the establishment of the European Centre of Excellence for Countering Hybrid Threats are a welcome development. Its supporters should ensure that the growing body of work around hybrid warfare incorporates the established lexicon of international law, an important step towards clearing the fog of war in the grey zone. In conclusion, the foregoing underlines the need for legal policy, that is a policy for the strategic use of law and legal arguments in support of operational objectives.