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SYMPOSIUM FIGHTING IN THE LAW'S GAPS

ARTICLES

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Legal and Policy Considerations
John Cherry & Durward Johnson

Legal Challenges or “GAPS” by Countering Hybrid Warfare—Building Resilience
in *Jus Ante Bellum*
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Challenges in Regulating Lethal Autonomous Weapons Under International Law
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MAINTAINING COMMAND AND CONTROL (C2) OF LETHAL AUTONOMOUS WEAPON SYSTEMS: LEGAL AND POLICY CONSIDERATIONS

John Cherry & Durward Johnson*

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* Lieutenant Colonel John Cherry (USMC) is Deputy Chair and Military Professor of International Law in the Stockton Center for International Law at the U.S. Naval War College and was also a member of the U.S. delegation to the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapon Systems. Lieutenant Colonel Durward Johnson (USA) serves as Military Professor of International Law and Associate Director for the Law of Land Warfare in the Stockton Center for International Law at the U.S. Naval War College. We would like to thank Professor Pete Pedrozo and the Stockton Center for International Law for their assistance on this project. The views expressed here are the authors' own and do not represent those of the U.S. Naval War College, the Department of the Navy, the Department of Defense, or any part of the U.S. government.

I. INTRODUCTION

There exists a tremendous volume of scholarship and debate addressing the law of armed conflict¹ and autonomous weapon systems. Most of the arguments focus on their inherent legality and the adequacy of existing law to regulate these systems.

The United States has long maintained that autonomous weapon systems are *not* prohibited *per se* by the law of armed conflict. The U.S. considers that such advances in technology can enhance compliance with the law and reduce harm to the civilian population during armed conflict. Weapon systems with advanced levels of autonomy could reduce misidentification of military targets, better detect potential collateral damage, and prove more distinct in target engagement. Additionally, and of particular interest to this Article, the U.S. government and other governments around the world have implemented policies and procedures that regulate the acquisition, development, testing, and employment of autonomous weapon systems to ensure their compliance with the law of armed conflict.

This Article is designed to provide a practical approach to the legal debate surrounding lethal autonomous weapon systems and their employment in armed conflict. It suggests that existing U.S. regulations, policies, and processes established for the procurement, development, legal and policy review, and ultimately, use of these weapon systems, ensure compliance with the law of armed conflict. This Article concludes that the existing law of armed conflict, coupled with responsible state policy and practice, provide sufficient command and control, also known as C2, to ensure the legal and responsible use of lethal autonomous weapon systems in armed conflict.²

II. WHAT IS AUTONOMY?

The confluence of autonomy, artificial intelligence, and international law is wrought with confusion, making communication about trends involving autonomy in weapons, and their impact on international law, particularly challenging.³ This is true even if we disassociate the technology

1. The law of armed conflict is also known as international humanitarian law or the law of war.

2. CHAIRMAN, JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, 40 (2020) [hereinafter DOD DICTIONARY] (“[C]ommand and control—The exercise of authority and direction by a properly designated commander over assigned and attached forces in the accomplishment of the mission. Also called C2.”).

3. Paul Scharre & Michael C. Horowitz, *An Introduction to Autonomy in Weapon Systems* 4 (Feb. 2015) (Working Paper) (Ctr. for a New American Security), <https://www.jstor.org/stable/resrep06106>.

from a weapon system or the law. “Even setting aside the notion of weapons for a moment, the term ‘autonomous robot’ conjures up wildly different images, ranging from a household Roomba to the sci-fi Terminator.”⁴ While the United States Department of Defense (DoD) is not necessarily concerned with house cleaning, nor is there an army of Terminator-like machines standing at the ready for combat deployment, the DoD has a keen interest in advanced technologies and their current and future impacts on combat operations. U.S. government entities such as the Joint Artificial Intelligence Center⁵ (JAIC) and the Defense Innovation Board⁶ (DIB) were established to ensure the United States remains a leader in technology and weapon systems. The missions of these organizations include harnessing the potential game-changing power of artificial intelligence (AI)⁷, and to provide independent advice and recommendations on innovative means to address future challenges through the prism of three focus areas: people and culture, technology and capabilities, and practices and operations.⁸ Specifically focusing on autonomy, the Autonomy Community of Interest (COI)⁹, supported by the Office of Technical Intelligence, noted in a 2015 assessment:

U.S. and foreign technology and capability development is pushing existing human-machine systems to the edge of their abilities by introducing extreme timescales, high levels of complexity, severe risk to warfighters, and increasing costs. While these trends and the challenges they pose to the U.S. Department of Defense (DoD) do not appear likely to abate, autonomy has the potential to enable U.S. forces to break out of current limitations by allowing systems to understand the environment, to make decisions, and to act more effectively and with greater independence from humans. In doing so, autonomy can augment or replace humans to enhance performance, to reduce risk to warfighters, and to decrease costs.¹⁰

The COI provides an optimistic, yet possibly very real view of the potential of autonomy in combat operations. But to understand the COI’s vision, one must understand the spectrum of autonomy.

4. *Id.*

5. See Joint Artificial Intelligence Center, <https://dodcio.defense.gov/About-DoD-CIO/Organization/JAIC/> (last visited Nov. 1, 2020) [hereinafter JAIC].

6. See Defense Innovation Board, <https://innovation.defense.gov/About1/> (last visited Nov. 1, 2020) [hereinafter DIB].

7. JAIC, *supra* note 5.

8. DIB, *supra* note 6.

9. See Defense Innovation Marketplace, <https://defenseinnovationmarketplace.dtic.mil/communities-of-interest/autonomy/> (last visited Nov. 1, 2020).

10. U.S. DEP’T OF DEF., TECHNICAL ASSESSMENT: AUTONOMY, iii (2015), https://defenseinnovationmarketplace.dtic.mil/wp-content/uploads/2018/02/OTI_TechnicalAssessment-AutonomyPublicRelease_vF.pdf.

Autonomy is the ability of a machine to perform a task without human input.¹¹ It is distinct from automation, which is simply using a machine to perform a particular process, while autonomy describes a system capable of operating independently for some period without direct human intervention.¹² Determining a system's degree, or amount, of autonomy is important for understanding the challenges and opportunities that come with autonomous systems.¹³

In October of 2016, the Joint Chiefs of Staff, Joint Concept for Robotic and Autonomous Systems (JCRAS), defined autonomy as:

[t]he level of independence that humans grant a system to execute a given task. It is the condition or quality of being self-governing to achieve an assigned task based on the system's own situational awareness (integrated sensing, perceiving, analyzing), planning, and decision-making. Autonomy refers to a spectrum of automation in which independent decision-making can be tailored for a specific mission, level of risk, and degree of human-machine teaming.¹⁴

There are three basic dimensions of autonomy: the type of task the machine is performing; the relationship of the human to the machine while performing that task; and the sophistication of the machine's decision-making when performing the task. These dimensions are independent, and a machine can be "more autonomous" by increasing the amount of autonomy along any of these spectrums.¹⁵ There are degrees of autonomy within these tasks, or dimensions, that dictate the human-machine relationship.

The first degree is semi-autonomous operation in which the machine performs a task and then waits for the human user to take an action before continuing. The system can sense the environment and develop a course of action, but the system cannot continue without human approval. This degree of autonomy is also known as "human *in* the loop."¹⁶ An automobile collision warning system¹⁷ is an example of a semi-autonomous system. In supervised autonomous operation, or "human *on* the loop," the machine can sense,

11. Scharre & Horowitz *supra* note 3, at 5.

12. Linell A. Letendre, *Lethal Autonomous Weapon Systems: Translating Geek Speak for Lawyers*, 96 INT'L L. STUD. 274, 278 (2020).

13. Scharre & Horowitz, *supra* note 3, at 5.

14. ANDREW FEICKERT ET AL., CONG. RESEARCH SERV., R45392, U.S. GROUND FORCES ROBOTICS AND AUTONOMOUS SYSTEMS (RAS) AND ARTIFICIAL INTELLIGENCE (AI): CONSIDERATIONS FOR CONGRESS 2 (2018).

15. PAUL SCHARRE, ARMY OF NONE: AUTONOMOUS WEAPONS AND THE FUTURE OF WAR 27-8 (2018).

16. *Id.* at 28-9 (*emphasis added*).

17. Schlomo Zilberstein, *Building Strong Semi-Autonomous Systems*, in PROC. OF THE TWENTY-NINTH AAAI CONF. ON A.I., at 4088 (2015).

decide, and act on its own once put into operation, but a human user can observe the machine's behavior and intervene to stop the action if necessary.¹⁸ Supervised autonomous robotic surgery¹⁹ is an example of a supervised-autonomous system. In the last degree, fully autonomous operation, the system can sense, decide, and act without human intervention. The human is “out of the loop” in that the machine operates without communicating back to the human user.²⁰ A Roomba vacuum²¹ is an example of a fully autonomous system.

While the idea of fully autonomous machines has inspired excitement and intrigue for decades, a system's increase in complexity and autonomy is often coupled with the user's inability to fully understand the system's processes. “‘Autonomous’ is often used to refer to systems sophisticated enough that their internal cognitive processes are less intelligible to the user, who understands the task the system is supposed to perform, but not necessarily *how* the system will perform the task.”²² This concept is similar to “commander's intent” in the military environment.²³

For example, a Marine commander communicates the mission and the goals of that mission to her platoon, but, like the autonomous system, the Marines in the platoon have flexibility in *how* they execute that mission. Of course, both the platoon and the system operate within pre-defined parameters. In addition to the mission order and intent of the commander, the Marines must comply with the law of armed conflict, applicable rules of engagement, and other orders and standing operating procedures organic to an operational unit. Likewise, an autonomous system's program in a self-driving car, for example, may include geographic restrictions, safety mechanisms to trigger positive human control, and cyber hacking protections.²⁴ While the self-driving car and the Marine platoon have flexibility in the execution of their respective missions, both are guided by “rules” or “intent” to better accomplish that mission. As should be apparent,

18. SCHARRE, *supra* note 15, at 29 (2018) (*emphasis added*).

19. See Azad Shademan et al., *Supervised Autonomous Robotic Soft Tissue Surgery*, 8 SCIENCE TRANSLATION MEDICINE 337 (2016).

20. SCHARRE, *supra* note 15, at 30 (2018) (*emphasis added*).

21. Zilberstein, *supra* note 17, at 4088, 4090 (2015) (noting that a Roomba vacuum could revert to semi-autonomous mode if it becomes trapped and requires human intervention).

22. SCHARRE, *supra* note 15, at 31 (2018) (*emphasis added*).

23. DOD DICTIONARY, *supra* note 2, at 41 (“[C]ommander's intent is defined as a clear and concise expression of the purpose of the operation. The desired military end state that supports mission command provides focus to the staff, and helps subordinate and support commander's act to achieve the commander's desired results without further orders, even when the operation does not unfold as planned”).

24. BILL CANNIS, CONG. RESEARCH SERV., R45985, ISSUES IN AUTONOMOUS VEHICLE TESTING AND DEPLOYMENT, at 11, 17, 22 (2020).

both autonomous systems and military units are subject to established levels of C2. The same holds true for *autonomous weapon systems*.

III. AUTONOMY IN WEAPON SYSTEMS

Definitions abound for autonomous weapon systems among the international legal and policy communities,²⁵ but States have struggled to agree on a common definition.²⁶ While it is not necessary, or even prudent, to develop a universal definition, it is important to identify characteristics common to the systems in question in order to understand how these characteristics impact compliance with the law of armed conflict.

The United States re-issued Department of Defense Directive 3000.09 in 2017 to further develop Department policy for the development and use of autonomous and semi-autonomous weapon systems.²⁷ The Directive also provides guidelines to minimize the probability and consequences of failures in autonomous and semi-autonomous weapon systems that could lead to unintended engagements.²⁸ The policy defines an “autonomous weapon system” as:

[a] weapon system that, once activated, can select and engage targets without further intervention by a human operator. This includes human-supervised autonomous weapon systems that are designed to allow human operators to override operation of the weapon system, but can select and engage targets without further human input after activation.²⁹

The Directive defines “human supervised autonomous weapon system” as a system that is designed to provide human operators with the ability to intervene and terminate engagements, including in the event of a weapon system failure, before unacceptable levels of damage occur.³⁰ As discussed above, this is also known as “human *on* the loop.”³¹

Turning to “human *in* the loop,” the Directive provides more detail in its definition of a “semi-autonomous weapon system” and defines it as:

[a] weapon system that, once activated, is intended to only engage individual targets or specific target groups that have been selected by a

25. Christopher M. Ford, *Autonomous Weapons and International Law*, 69 S. CAR. L. REV. 413, 418 (2016).

26. KELLEY M. SAYLER, CONG. RESEARCH SERV., IF11150, DEFENSE PRIMER: U.S. POLICY ON LETHAL AUTONOMOUS WEAPON SYSTEM (2019).

27. U.S. DEP’T OF DEFENSE, DIR. 3000.09, AUTONOMY IN WEAPON SYSTEMS, ¶ 1 (MAY 8, 2017) [hereinafter DODD 3000.09].

28. *Id.* at 13-14.

29. *Id.*

30. *Id.* at 14.

31. SCHARRE, *supra* note 15, at 29 (*emphasis added*).

human operator. This includes: Semi-autonomous weapon systems that employ autonomy for engagement-related functions including, but not limited to, acquiring, tracking, and identifying potential targets; cueing potential targets to human operators; prioritizing selected targets; timing of when to fire; or providing terminal guidance to home in on selected targets, provided that human control is retained over the decision to select individual targets and specific target groups for engagement.³²

Other states, including the United Kingdom and China, also define autonomous systems. However, the DoD Directive is considered the best and most commonly cited definition for autonomous weapon systems.³³ The U.K. Ministry of Defense includes such a definition in its 2018 Joint Doctrine Publication 0-30.2, Unmanned Aircraft Systems, and defines an autonomous weapon system as:

[a]n autonomous system [that] is capable of understanding higher-level intent and direction. From this understanding and its perception of its environment, such a system is able to take appropriate action to bring about a desired state. It is capable of deciding a course of action, from a number of alternatives, without depending on human oversight and control, although these may still be present.³⁴

Unlike the United Kingdom's more conservative approach to the definition, China took an aggressive stance at the 2018 Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapon Systems (GGE) meetings.³⁵ China did not propose a definition, but submitted a Position Paper to the GGE, noting their views on the characteristics of lethal autonomous weapon systems (LAWS), as follows:

LAWS should be understood as fully autonomous lethal weapon systems. ... In our view, LAWS should include but not be limited to the following 5 basic characteristics. The first is lethality, which means sufficient pay load (charge) and for means to be lethal. The second is autonomy, which means absence of human intervention and control during the entire process of executing a task. Thirdly, impossibility for termination, meaning that once started there is no way to terminate the device. Fourthly, indiscriminate effect, meaning that the device will execute the task of killing and maiming regardless of conditions, scenarios and targets. Fifthly evolution, meaning

32. DODD 3000.09, *supra* note 27, at 14.

33. Rebecca Crootof, *The Killer Robots Are Here: Legal and Policy Implications*, 36 CAR. L. REV. 1839, 1847 (2015).

34. UNITED KINGDOM MINISTRY OF DEFENCE, JOINT DOCTRINE PUBLICATION 0-30.2: UNMANNED AIRCRAFT SYSTEMS at 13 (2018).

35. *See* Rep. of the 2018 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, U.N. Doc. CCW/GGE.1/2018/3 (Oct. 23, 2018) [hereinafter CCW/GGE.1/2018/3].

that through interaction with the environment the device can learn autonomously, expand its functions and capabilities in a way exceeding human expectations.³⁶

Chinese use of these decidedly narrow factors—no human intervention and control during the *entire* process, impossibility of mission termination, and indiscriminate targeting—signals Beijing’s desire to exclude only those weapon systems with advanced levels of autonomy that would seemingly violate the law of armed conflict. According to these Chinese characteristics, a system that involves even limited human involvement, with the capability for distinction between legitimate and illegitimate targets, and includes on-board fail safes, would not be considered a lethal autonomous weapon system.³⁷ When considering the Chinese definition against the backdrop of their 2018 support³⁸ to the Campaign To Stop Killer Robots,³⁹ it seems that both are merely symbols, while the Chinese are implicitly legitimizing the development of semi-autonomous or fully autonomous weapon systems.⁴⁰ China also expresses fears of an arms race, while simultaneously investing heavily in the development of autonomous weapons.⁴¹ The Chinese definition would only impact weapon systems that, by their nature,⁴² would presumably violate the law of armed conflict, and their pledge to the Campaign to Stop Killer Robots is limited to the unlikely use of those weapons. China clearly sets the bar far too low for autonomy in weapon systems, ignoring important technical and legal distinctions among different levels of human involvement.⁴³ This series of ostensibly inconsistent

36. China, *Position Paper*, ¶3 U.N. Doc. CCW/GGE.1/2018/WP.7 (Apr. 11, 2018).

37. Elsa Kania, *China’s Strategic Ambiguity and Shifting Approach to Lethal Autonomous Weapon Systems*, LAWFARE (Apr. 17, 2018, 3:17 PM), <https://www.lawfareblog.com/chinas-strategic-ambiguity-and-shifting-approach-lethal-autonomous-weapons-systems>.

38. *Convergence on Retaining Human Control of Weapon Systems*, CAMPAIGN TO STOP KILLER ROBOTS (Apr 13, 2018), <https://www.stopkillerrobots.org/2018/04/convergence/> (noting that China’s support for a ban is limited to the *use* of fully autonomous weapon systems).

39. *See* CAMPAIGN TO STOP KILLER ROBOTS, <https://www.stopkillerrobots.org/learn/> (last visited Sep. 24, 2020).

40. Kania, *supra* note 37.

41. ZELIN LIU & MICHAEL MOODIE, CONG. RESEARCH SERV., IF11294, INTERNATIONAL DISCUSSIONS CONCERNING LETHAL AUTONOMOUS WEAPON SYSTEMS (2019).

42. U.S. DEP’T OF DEF., LAW OF WAR MANUAL ¶ 5.6.6.1 (rev. ed. Dec. 2016) [hereinafter U.S. DoD MANUAL]; U.S. DEP’T OF THE ARMY & U.S. MARINE CORPS, FM 6-27/MCTP 11-10C, THE COMMANDER’S HANDBOOK ON THE LAW OF LAND WARFARE ¶¶ 2-30, 2-40-44 (Aug. 2019) [hereinafter FM 6-27]; *see generally* 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 29 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC CUSTOMARY LAW STUDY].

43. Crootof, *supra* note 33, at 1847.

approaches suggests that China is maintaining strategic ambiguity about the legality of autonomous systems while it pursues its military goals.⁴⁴

Regardless of the differences among States on how they characterize lethal autonomous weapon systems, the design, acquisition and use of these systems must first be lawful under the law of armed conflict.

IV. WEAPONS REVIEWS AND AUTONOMOUS WEAPON SYSTEMS

An initial constraint to the fielding and use of autonomous weapon systems is the obligation for States to review the lawfulness of new weapons by examining the primary purpose or range of circumstances for which the weapon was designed.⁴⁵ As is the case with any new weapon, if an autonomous weapon system cannot comply with the fundamental customary rules of warfare, procuring or using such a weapon would be unlawful. The weapons review obligation found in Article 36 of Additional Protocol I to the Geneva Conventions provides:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to *determine whether its employment would, in some or all circumstances, be prohibited* by this Protocol or by any other rule of international law applicable to the High Contracting Party.⁴⁶ (emphasis added)

States Party to Additional Protocol I are obligated by treaty to conduct a review in compliance with this provision. For States not Party to Additional Protocol I, the requirement for weapons review “is arguably one that applies” because the underlying customary international law prohibitions against the use of unlawful means and methods of warfare form the underlying basis of the rule.⁴⁷ The rule, however, does not provide specifics with regard to the format for the review nor the parameters of such a review. The aim is, nonetheless, to determine “whether the employment of a weapon for its normal or expected use would be prohibited under some or all circumstances.”⁴⁸

44. LIU & MOODIE, *supra* note 41.

45. U.S. DoD MANUAL, *supra* note 42, ¶¶ 6.3.1, 6.6.3.4, 6.7.2.

46. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 36, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

47. INT’L COMM. OF THE RED CROSS (ICRC), A GUIDE TO THE LEGAL REVIEW OF NEW WEAPONS, MEANS AND METHODS OF WARFARE: MEASURES TO IMPLEMENT ARTICLE 36 OF ADDITIONAL PROTOCOL I OF 1977 4 (Jan. 2006) [hereinafter ICRC Guide].

48. INT’L COMM. OF THE RED CROSS (ICRC), COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 art. 36 ¶ 1469 (Yves Sandoz et al. eds., 1987) [hereinafter Commentary on the Additional Protocols].

While the United States is not Party to Additional Protocol I, it has a long-established policy to conduct comprehensive weapons reviews.⁴⁹ In fact, the U.S. policy predates Article 36 of Additional Protocol I.⁵⁰ Weapons reviews under both Article 36 of Additional Protocol I and U.S. policy require a legal determination that any weapon system's design and intended use are not inherently indiscriminate nor are they calculated to cause superfluous injury.⁵¹ The review also requires a determination whether the weapon is already prohibited by a disarmament treaty obligation or other rule of customary international law.⁵²

The fundamental customary rules of warfare found in the law of armed conflict that underly the weapons review obligation first appeared in the preamble to the 1899 Hague Convention⁵³ and is also codified in the 1977 Additional Protocol I of the Geneva Conventions.⁵⁴ Prominent among these is the superfluous injury rule found in Article 35(2) of Additional Protocol I, which prohibits the employment of any weapon "of a nature to cause superfluous injury or unnecessary suffering."⁵⁵ While the United States has not ratified this treaty, the rule is considered customary international law and is referenced in treaties the United States is party to, such as the 1899 and 1907 Hague Regulations,⁵⁶ and in U.S. manuals such as the DoD Law of War Manual.⁵⁷ The United States considers the phrase "calculated to cause superfluous injury" a more accurate reflection of customary international law, and focuses "on the design and intended purpose rather than every remote possibility of weapon injury."⁵⁸ Nonetheless, the rule prohibits weapons designed or used in a way that unnecessarily increase the suffering of those attacked beyond what is justified by military necessity.⁵⁹

49. U.S. DOD MANUAL, *supra* note 42, ¶ 6.2.

50. *Id.* ¶ 6.2.3.

51. *Id.* ¶ 6.2.2.

52. Rep. of the 2019 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, ¶ 17, U.N. Doc. CCW/GGE.1/2019/3 (Sept. 25, 2019), <https://undocs.org/en/CCW/GGE.1/2019/3> [hereinafter 2019 GGE Report on LAWS].

53. Laws and Customs of War on Land (Hague, II), preamble, July 29, 1899, 32 Stat. 1803, T.S. 403 [hereinafter 1899 Hague Regulations].

54. Protocol I, *supra* note 46, art. 35(2), 51(4)(b), 51(5)(b).

55. *Id.* art. 35(2).

56. 1899 Hague Regulations, *supra* note 53; Laws and Customs of War on Land (Hague, IV) art. 23, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

57. U.S. DOD MANUAL, *supra* note 42, ¶ 6.2.2.

58. *Id.* ¶ 6.6.1; *see also* William H. Boothby, WEAPONS AND THE LAW OF ARMED CONFLICT 49 (2d ed. 2016) (citing W. Hays Parks, *Conventional Weapons and Weapons Reviews*, 8 Y.B. INT'L HUM. L. 55, 86-87 n.123 (2005)).

59. U.S. DOD MANUAL, *supra* note 42, ¶ 6.6.2.

The second fundamental prohibition—inherently indiscriminate weapons—derives from the principles of distinction and proportionality, which the United States, as noted in the DoD Law of War Manual, considers customary international law.⁶⁰ In other words, weapons that cannot be directed at a military objective or whose effects cannot be limited as required by the law of armed conflict are prohibited. The customary distinction rule is reflected in Article 51(4)(b) of Additional Protocol I and states that “indiscriminate attacks are ... those which employ a method or means of combat which cannot be directed at a specific military objective.”⁶¹ The customary proportionality rule is reflected in Article 51(5)(b) banning attacks in which the expected collateral damage is excessive compared to the direct military advantage anticipated.⁶²

These fundamental obligations are likely immaterial in determining whether lethal autonomous weapon systems are unlawful by its nature. Being autonomous, by itself, does not unnecessarily increase suffering. The superfluous injury rule is focused on the nature of the injury, not on whether a system can autonomously select and engage a target without human intervention. It would only be relevant if the autonomous system used means that would violate the superfluous injury rule, such as creating fragments intended to penetrate the human body that are undetectable by x-ray.⁶³

The focus of the indiscriminate weapons prohibition is determining whether the employment of lethal autonomous weapon systems is expected to be indiscriminate in *all* circumstances. If the weapons review determines the specific autonomous weapon system being tested cannot under any circumstances be directed at a lawful target, or its effects cannot comply with the rule of proportionality, the platform would be unlawful by its very nature. Yet, it seems illogical that a lethal autonomous weapon system could ever be banned *per se* even if it were unable to distinguish between military objectives and civilians or civilian objects. If that weapon was employed in an area without civilians or civilian objects, it would be unlikely that the

60. *Id.* ¶ 6.7.

61. Protocol I, *supra* note 46, art. 51(4)(b).

62. *Id.* art. 51(5)(b).

63. U.S. DOD MANUAL, *supra* note 42, ¶ 6.11; *See also* SCHARRE, *supra* note 15, at 258 (arguing that the prohibition on weapons intended to cause unnecessary suffering, has little bearing on autonomous weapons).

weapon would be considered inherently indiscriminate,⁶⁴ such as a naval engagement on the high seas or a land engagement in an uninhabited desert.⁶⁵

Some critics go so far as to claim that the rapid developments in robotics and autonomous technology indicate that it is only a matter of time before fully autonomous weapons become an inhumane reality.⁶⁶ Human Rights Watch, in their 2012 report, *Losing Humanity: The Case Against Killer Robots*, claims that, “... robots with complete autonomy would be incapable of meeting international humanitarian law standards. The rules of distinction, proportionality, and military necessity are especially important tools for protecting civilians from the effects of war, and fully autonomous weapons would not be able to abide by those rules.”⁶⁷ It is clear that Human Rights Watch believes that fully autonomous weapon systems are *per se* illegal, but that belief is not supported by the law or their use.⁶⁸ There is a blurring of the distinction between the law of armed conflict’s prohibition on weapons *per se* and on the *use* of otherwise lawful weapons.⁶⁹ Additionally, as Professor Michael Schmitt notes, “... some of the report’s legal analysis fails to take account of likely developments in autonomous weapon systems technology or is based on unfounded assumptions as to the nature of the systems.”⁷⁰ There also exists an assumption that the users of these systems will also forsake their obligations under the law. This assumption is false.

The Campaign to Stop Killer Robots advances arguments similar to Human Rights Watch, calling for a legally binding instrument to prohibit the development, production, and use of weapons systems that select and engage targets based on sensor processing or are inherently unacceptable for ethical or legal reasons.⁷¹ But what are those “legal reasons?” What is “inherently unacceptable” under the law of armed conflict?

64. *Id.* ¶ 6.7.2; see also Michael N. Schmitt & Jeffrey S. Thurnher, *Out of the Loop: Autonomous Weapon Systems and the Law of Armed Conflict*, 4 HARV. NAT’L SEC. J. 231, 246 (2013).

65. Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics*, HARV. NAT’L SEC. J. 1, 11 (2013).

66. *Losing Humanity: The Case Against Killer Robots*, HUMAN RIGHTS WATCH (Nov. 19, 2012), <https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots> [hereinafter *LOSING HUMANITY*].

67. *Id.*

68. See *infra* discussion Part V, about the Harpy, HARM, C-RAM, and the LRASM.

69. Schmitt, *supra* note 65, at 2.

70. *Id.* at 3.

71. Campaign to Stop Killer Robots, *Commentary for the Convention on Conventional Weapons Group of Governmental Experts on lethal autonomous weapon systems*, 4 (May 20, 2020), http://www.article36.org/wp-content/uploads/2020/06/KRC_CommentaryCCW_20May2020.pdf.

Commentators universally agree that the law of armed conflict applies to the use of autonomous weapons.⁷² There is also consensus that the law does not prohibit such weapons, and government attorneys and academic scholars alike stress that a ban of autonomous weapon systems is at best misguided as a matter of law, policy, and military mission accomplishment.⁷³ Most notably, weapon systems enabled with autonomy are currently being lawfully employed by the United States and other countries, clearly demonstrating that this class of weapon is not inherently unlawful.⁷⁴

U.S. policy also requires additional review by senior DoD officials for the development or fielding of autonomy in weapon systems to ensure rigorous standards of performance, capability, reliability and effectiveness.⁷⁵ This policy, Department of Defense Directive 3000.09, *Autonomy in Weapon Systems*, reflects long-standing U.S. practices for developing and acquiring existing weapon systems that include autonomy, and sets guidelines to minimize the probability and consequences of failures in these systems and unintended engagements.⁷⁶ Prior to fielding an autonomous weapon system, senior level review will ensure system capabilities, human-machine interfaces, doctrine, tactics, techniques, and procedures (TTPs), and training have demonstrated the capability to allow commanders and operators to exercise appropriate levels of human judgment in the use of force in the employment of these systems. In addition, the Directive provides for specific hardware and software verification and validation, as well as realistic system development and operational tests and evaluations. The Directive requires that autonomous systems:

- (a) Function as anticipated in realistic operational environments against adaptive adversaries.

72. INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 36-40, REP. NO. 31IC/11/5.1.2 (Oct. 2011), <https://www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>; see Ford, *supra* note 25, at 427.

73. Schmitt & Thurnher, *supra* note 64, at 233.

74. Crootof, *supra* note 33, at 1873; SCHARRE, *supra* note 15, at 50 (The Israeli Harpy loitering munition and the U.S. High-speed Anti-Radiation Missile (HARM) are examples of weapon systems with autonomous features).

75. DoDD 3000.09, *supra* note 27, ¶ 4(d) at 3 (explaining “[a]utonomous or semi-autonomous weapon systems intended to be used in a manner that falls outside the policies in subparagraphs 4.c.(1) through 4.c.(3) must be approved by the Under Secretary of Defense for Policy (USD(P)); the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)); and the CJCS before formal development and again before fielding in accordance with the guidelines in Enclosure 3, References (b) and (c), and other applicable policies and issuances”).

76. *Id.* at 1.

(b) Complete engagements in a timeframe consistent with commander and operator intentions and, if unable to do so, terminate engagements or seek additional human operator input before continuing the engagement.

(c) Are sufficiently robust to minimize failures that could lead to unintended engagements or to loss of control of the system to unauthorized parties.⁷⁷

In addition, weapon systems must be readily understandable to trained operators and provide traceable feedback on system status.⁷⁸ The Directive also requires commanders to use autonomous weapons in a manner consistent with its design, intended purpose, weapon system safety rules, the laws of armed conflict, and rules of engagement.⁷⁹ Thus, a determination on the legality of LAWS turns on how it is employed within the specific parameters of its intended use.

V. AUTONOMOUS WEAPON SYSTEMS AND THE LAW OF ARMED CONFLICT

Legal arguments against the use of autonomous weapon systems are often centered around kinetic engagements involving fully autonomous systems against persons in urban or other complex environments.⁸⁰ While these arguments have merit in a vacuum, States have long understood that operational context is important with respect to the legality of employing weapon systems, particularly those with autonomous functions.

The law of armed conflict continues to be a living, breathing body of law rather than a static set of concepts, repeatedly adapting to changing and uncertain circumstances such as those found in the employment of autonomous technologies.⁸¹ The autonomous weapons' legal debate must be centered around the law of armed conflict's core principles of distinction and proportionality, and the related precautions in attack.⁸²

77. *Id.* ¶ 4(1) (a)-(c), at 2.

78. *Id.* ¶ 4(3) (a)-(b), at 2-3.

79. *Id.* ¶ 10, at 12.

80. Ford, *supra* note 25, at 429.

81. LAURIE A. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES OF THE LAW xix (Concise ed., Wolters Kluwer 2016).

82. NATHAN J. LUCAS, CONG. RESEARCH SERV., R44466, LETHAL AUTONOMOUS WEAPON SYSTEMS: ISSUES FOR CONGRESS, at 20 (2016); Ford, *supra* note 25, at 427; Legality and the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 78 (July 8) (explaining that distinction and proportionality are the core principles that serve as the basis for international humanitarian law).

A. *Distinction*

The basic rule of distinction requires parties to an armed conflict to, at all times, distinguish between civilians and combatants and between civilian objects and military objectives and to direct attacks only against military objectives.⁸³ This rule frequently proves challenging for combatants on the field of battle, so it stands to reason that distinction requirements could also challenge the operation of autonomous weapon systems. Paul Scharre notes that distinction will not only require autonomous weapons to distinguish between discrete military and civilian targets, but also distinguish the target from other “clutter” in the environment.⁸⁴ This environmental, or geographic, aspect to the employment of autonomous systems is an important one. Existing weapon systems with autonomous functions such as the Harpy and HARM⁸⁵, and other systems like the Counter-Rocket Artillery Mortar (C-RAM)⁸⁶ system and Long-Range Anti-Ship Missile (LRASM),⁸⁷ are designed to operate in discrete environments and conduct specific missions. The commander or operator decides to employ these systems to target munitions, radars, or ships while the weapon system, using various levels of autonomy, selects *which* targets to strike. These systems’ pre-defined targets are limited to enemy radar systems, indirect fire munitions, and enemy ships, significantly limiting the possibility of violating the principle of distinction during the operation of the system. Current autonomous systems technology has not yet advanced to recognition of individual combatants or civilians, nor distinguishing civilian objects, such as a truck, from the same civilian object that is being *used* for military purposes. But that does not exclude the use of autonomous technologies in armed conflict. It simply means that, like the weapons systems mentioned above, autonomous weapon systems are constrained to environments in which they can be employed in compliance with the law of armed conflict.⁸⁸ Autonomous weapon systems that cannot

83. ICRC CUSTOMARY LAW STUDY, *supra* note 42, r. 1, r. 7; Protocol I, *supra* note 46, art. 48, 52; U.S. DOD MANUAL, *supra* note 42, ¶¶ 5.4.2, 5.5; FM 6-27, *supra* note 42, ¶ 2-16.

84. SCHARRE, *supra* note 15, at 253 (describing “clutter” as confusing objects in the environment that are not targets).

85. *Id.* at 47-48.

86. *Counter-Rocket, Artillery, Mortar (C-RAM) Intercept Land-based Phalanx Weapon System (LPWS)*, U.S. ARMY, https://asc.army.mil/web/portfolio-item/ms-c-ram_lpws/ (last visited Nov. 1, 2020).

87. *LRASM Long-Range Anti-Ship Missile*, LOCKHEED MARTIN, <https://www.lockheedmartin.com/en-us/products/long-range-anti-ship-missile.html#:~:text=LRASM%20is%20a%20long%20range%2C%20precision-guided%20anti-ship%20missile ,guidance %2C%20day%20or%20night%20in%20all%20weather%20conditions> (last visited Sep. 24, 2020).

88. Kenneth Anderson, Daniel Reisman, & Matthew Waxman, *Adapting the Law of Armed Conflict to Autonomous Weapon Systems*, INT’L L. STUD. 386, at 401 (2014).

distinguish between lawful and unlawful targets cannot be used where the two are co-located; failure to comply with this requirement could result in an indiscriminate attack and a violation of the law of armed conflict.⁸⁹

This begs the question: what if the autonomous system is able to distinguish between the military objective and civilian objects, but the system detects the potential for collateral damage in the execution of the strike? The law of armed conflict would require a commander or operator in a similar position to assess the military advantage to be gained from the attack in light of the expected collateral damage.⁹⁰ The law requires that an autonomous system operate in the same manner; in compliance with the principle of proportionality.

B. *Proportionality*

Proportionality prohibits attacks, “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁹¹ The rule of proportionality is not a balancing test, but rather a systematic approach to ensure the harm to civilian objects or persons is not excessive in relation to the concrete and direct military advantage anticipated from the attack.⁹² Making this determination is both subjective and contextual and can prove difficult for the most seasoned commanders, let alone an autonomous system.⁹³

When considering proportionality and the use of autonomous weapons, there are operational environments such as the high seas⁹⁴, uninhabited deserts, and underseas in which civilians and civilian objects are unlikely. Practically speaking, these locations would generally not require weighing the military advantage against civilian harms and would make it more likely

89. Schmitt, *supra* note 65, at 18.

90. BLANK & NOONE, *supra* note 81, at 36.

91. Protocol I, *supra* note 46, art. 51(5)(b); *see also* ICRC CUSTOMARY LAW STUDY, *supra* note 42, r. 14; *see also* U.S. DOD MANUAL, *supra* note 42, at 241; *see also* FM 6-27, *supra* note 42, ¶¶ 2-71 to -76.

92. Michael N. Schmitt & Eric W. Widmar, “On Target”: *Precision and Balance in the Contemporary Law of Targeting*, 73 J. OF NAT’L SEC. L. & POL’Y 379, 405 (2014) [hereinafter Schmitt & Widmar].

93. *See* Ford, *supra* note 25, at 443.

94. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, §8.6 (Aug. 2017) (In the naval context, targeting is platform based on the nature of the ship (warship, auxiliary) or conduct of the vessel (such as providing intel, opposing visit and search, or breach of blockade)).

that the use of autonomous systems is in compliance with the law of armed conflict.⁹⁵ Alternatively, the use of autonomous weapons would prove more difficult in complex combat environments such as dense urban settings. Considering the complexity of such environments, it is unlikely that autonomous systems will soon be capable of assessing proportionality in a strike. However, as noted by Michael Schmitt and Jeffrey Thurnher, "... it is inappropriate to ask more of machines than the humans whom the law of proportionality was originally designed to address."⁹⁶ Autonomous systems do not have to make these judgment calls, but must be used in ways that comply with the principle.⁹⁷ Similar to the distinction approach discussed above, it stands to reason that the proportionality decision will not be delegated to a machine, but will continue to be made by the commander or operator. Autonomous weapon systems will be employed in compliance with the principle of proportionality, guided by the judgment of commander and operators, by limiting their operations to non-complex environments in which collateral damage is of minimal concern or where proper precautions can be made to reduce or eliminate collateral damage concerns.

C. *Precautions in the Attack*

The legal obligation to take precautions does not fall to the autonomous system. As Paul Scharre notes, "(m)achines are not combatants. People fight wars, not robots."⁹⁸ The DoD Law of War Manual mirrors Scharre's view,

The law of war rules on conducting attacks (such as the rules relating to discrimination and proportionality) impose obligations on persons. These rules do not impose obligations on the weapons themselves ... (or) ... require weapons to make legal determinations, even if the weapon (e.g., through computers, software, and sensors) may be characterized as capable of making factual determinations, such as whether to fire the weapon or to select and engage a target.⁹⁹

To minimize collateral damage prior to an attack certain precautions are required.¹⁰⁰ Feasible precautions are those "practicable or practically possible, taking into account all circumstances prevailing at the time,

95. See Anderson et al., *supra* note 88, at 402.

96. Schmitt & Thurnher, *supra* note 64, at 257.

97. See SCHARRE, *supra* note 15, at 255-56.

98. *Id.* at 269.

99. U.S. DOD MANUAL, *supra* note 42, ¶ 6.5.9.3.

100. *Id.* at 190 ¶ 5.2.3, 1022 ¶ 16.5.3; see also ICRC CUSTOMARY LAW STUDY, *supra* note 42, r. 15; see also TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS, at 476-78 (Michael N. Schmitt ed., 2nd ed. 2007) [hereinafter TALLINN MANUAL 2.0].

including humanitarian and military considerations.”¹⁰¹ What is practical or practicable is understood to be the exercise of “common sense and good faith.”¹⁰² Commanders’ decisions reflect the information available “at the time in which the attacks are decided upon or executed,” which is “a clear rejection of hindsight analysis.”¹⁰³

As such, commanders, not the systems they employ, are required to take constant care to spare the civilian population, civilians, and civilian objects from attack.¹⁰⁴ This duty obligates commanders to take certain precautions when conducting attacks to include ensuring that the object of an attack is a military objective;¹⁰⁵ taking all feasible precautions in the choice of means (weapons) and methods (tactics) of attack to avoid or minimize collateral damage;¹⁰⁶ refraining from conducting attacks which are expected to cause harm to civilians or damage to civilian objects that is excessive in relation to the direct military advantage anticipated;¹⁰⁷ suspending or canceling an attack if it becomes apparent the objective is not a military objective or the strike will violate proportionality;¹⁰⁸ if possible, providing effective advance warnings for attacks that may affect the civilian population;¹⁰⁹ and suspending or cancelling an attack if it becomes apparent the objective is not a military objective or the attack will violate proportionality.¹¹⁰

101. U.S. DOD MANUAL, *supra* note 42, at 192; *see also* ICRC CUSTOMARY LAW STUDY, *supra* note 42, r. 15; *see also* Commentary on the Additional Protocols, *supra* note 48, at 682; *see also* Schmitt & Widmar, *supra* note 92, at 400-04.

102. Commentary on the Additional Protocols, *supra* note 48, at 682; *see also* Schmitt & Widmar, *supra* note 92, at 400.

103. U.S. DOD MANUAL, *supra* note 42, at 194-95; *see also* FM 6-27, *supra* note 42, ¶ 1-27.

104. ICRC CUSTOMARY LAW STUDY, *supra* note 42, r.15; *see also* Protocol I, *supra* note 46, art. 57(1); *see also* U.S. DOD MANUAL, *supra* note 42, at 195; *see also* FM 6-27, *supra* note 42, ¶ 5-30.

105. Protocol I, *supra* note 46, art. 57(2)(a)(i); *see also* ICRC CUSTOMARY LAW STUDY, *supra* note 42, r. 16; *see also* U.S. DOD MANUAL, *supra* note 42, at 185, 190; *see also* FM 6-27, *supra* note 44, ¶¶ 1-44, 2-82.

106. Protocol I, *supra* note 46, art. 57(2)(a)(ii); *see also* ICRC CUSTOMARY LAW STUDY, *supra* note 42, r. 17; *see also* U.S. DoD Manual, *supra* note 42, at 191; *see also* FM 6-27, *supra* note 42, ¶¶ 2-88 to -89.

107. Protocol I, *supra* note 46, art. 57(2)(a)(iii); *see also* ICRC CUSTOMARY LAW STUDY, *supra* note 42, r. 14, r. 18; *see also* U.S. DoD Manual, *supra* note 42, at 241; *see also* FM 6-27, *supra* note 42, ¶ 2-76.

108. Protocol I, *supra* note 46, art. 57(2)(b); *see also* ICRC CUSTOMARY LAW STUDY, *supra* note 42, r. 19; *see also* U.S. DoD Manual, *supra* note 42, at 260; *see also* FM 6-27, *supra* note 42, ¶ 2-76.

109. Protocol I, *supra* note 46, art. 57(2)(c); *see also* ICRC CUSTOMARY LAW STUDY, *supra* note 42, r. 20; *see also* U.S. DOD MANUAL, *supra* note 42, at 255-56; *see also* FM 6-27, *supra* note 42, ¶¶ 2-83 to -86.

110. Protocol I, *supra* note 46, art. 57(2)(b); *see also* ICRC CUSTOMARY LAW STUDY, *supra* note 42, r. 14, r. 19; *see also* U.S. DoD Manual, *supra* note 42, at 260; *see also* FM 6-27, *supra* note 42, ¶ 2-76.

The duty to take constant care, and to suspend disproportionate attacks, rests with the commander. Their duty continues throughout the execution of the mission. While other members of the command can also observe the duty, could an autonomous system be relied upon to take constant care and suspend an attack? Further, can these systems take feasible precautions? While Paul Scharre expresses concern over the “murky” relationship between precautions and autonomous systems, he notes that the duty to take all feasible precautions could be interpreted as requiring a human in or on the loop whenever possible.¹¹¹ However, that approach could be applied to any weapon system that, with additional safeguards, may be employed in better compliance with the law of armed conflict. There is nothing legally objectionable to an autonomous weapon system conducting a feasibility assessment, so long as the commander is reasonably certain that the system is capable of making such an analysis.¹¹²

The United States is not building weapons that are independent of human judgment.¹¹³ Autonomous weapon systems will not operate without restrictions and will be employed in compliance with the law of armed conflict.¹¹⁴ These systems will be limited to select courses of action within the employing commander’s intent, the commander’s understanding of the tactical situation, the weapon system’s performance, and the employment TTPs for that weapon. Restrictions on operation may be temporal, geographic, based on energy supply (such as battery life), or include pre-described limits on target acquisition and engagement. Accordingly, an autonomous system is never completely human-free. System designers, operators, or a commander would, at a minimum, have to program or set the system to function pursuant to specified parameters.¹¹⁵ The joint targeting process – U.S. doctrine that assists commanders in operational and tactical decision-making and overall mission accomplishment – heavily influences all of the aforementioned tactical situations, TTPs, operational restrictions, and target engagement.

VI. JOINT TARGETING PROCESS AND LETHAL AUTONOMOUS WEAPON SYSTEMS

Militaries employ force, including lethal autonomous weapon systems, through their targeting processes. In turn, these processes ensure

111. SCHARRE, *supra* note 15, at 258.

112. *See* Ford, *supra* note 25, at 450.

113. DoDD 3000.09, *supra* note 27, ¶ 4(a).

114. *Id.* ¶ 4(b).

115. Schmitt, *supra* note 65, at 4.

commanders at the strategic, operational, and tactical levels of warfare maintain control and accountability on their means and methods of engagement, to include their compliance with the law of armed conflict.¹¹⁶ Consequently, these processes directly control the manner by which autonomous weapon systems would be employed during military operations considering the purpose and range of circumstances the system was designed. While there is no comprehensive, singular targeting doctrine used by States, the U.S. joint targeting doctrine is a good example of how armed forces may use targeting procedures to manage the use of lethal autonomous weapon systems while ensuring compliance with the law of armed conflict.¹¹⁷ The U.S. joint concept applies at the joint level of command where forces and capabilities are combined from more than one branch of the armed forces under a joint force commander (JFC).¹¹⁸ Below the JFC, each branch of the U.S. armed forces applies the same principles of the joint targeting cycle to conduct their own targeting analysis within their specific domain.¹¹⁹ For example, the U.S. Army nests their targeting process focused on the land domain within the overall joint targeting process.¹²⁰

The United States defines targeting as the process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities.¹²¹ Within the U.S. joint targeting cycle, the guiding principles of the law of armed conflict, such as distinction, proportionality and precautions in attack, are integrated across six phases—(1) Commander’s Objectives, Targeting Guidance, and Intent; (2) Target Development and Prioritization; (3) Capabilities Analysis; (4) Commander’s Decision and Force Assignment; (5) Mission Planning and Force Execution; and (6) Combat Assessment. The targeting cycle is a continuous process that is initiated once planning begins for an operation and does not end until operations are over.¹²² It is an iterative process that is not time-constrained nor rigidly sequential since various phases may be conducted concurrently.¹²³

116. JOINT CHIEFS OF STAFF, JOINT PUBL’N 3-0, JOINT OPERATIONS at I, 12-14 (Oct. 2018) [hereinafter JP 3-0].

117. JOINT CHIEFS OF STAFF, JOINT PUBL’N 3-60, JOINT TARGETING (Jan. 2013), [hereinafter JP 3-60].

118. DOD DICTIONARY, *supra* note 2, at 116.

119. *See e.g.* HEADQUARTERS, DEP’T OF THE ARMY, ATP 3-60, TARGETING (2015); HEADQUARTERS, DEP’T OF THE AIR FORCE, ANNEX 3-60, TARGETING (2019).

120. HEADQUARTERS, DEP’T OF THE ARMY, ATP 3-60, TARGETING (2015).

121. DOD DICTIONARY, *supra* note 2, at 211.

122. JP 3-60, *supra* note 117, at xii.

123. *Id.* at II-3.

Phase 1 — Commander’s Objectives, Targeting Guidance, and Intent— establishes the overall purpose of the military operation. The commander provides clear and concise guidance, to include the specific objectives of the operation and the overall desired end state. The commander’s guidance is shaped by strategic direction from the President and Secretary of Defense.¹²⁴ Phase 1 is a critical first step to ensure the targeting process validates the value and identity of military objectives and the desired effects, both lethal and non-lethal, against those objectives, with appropriate military capabilities through the subsequent phases. Underlying the commander’s guidance are both legal requirements and policy, which form the rules of engagement that delineate the circumstances and limitations U.S. forces will use to initiate and continue combat engagement with its adversaries.¹²⁵ The overall aim of the operation provides crucial context to evaluate whether potential targets are lawful military objectives and to assess the potential military advantage against those targets.¹²⁶

To better understand how this Phase will impact autonomous systems, it is important to explain the rules of engagement and their function in the targeting process. The Dictionary of Military and Associated terms defines rules of engagement as, “[d]irectives issued by competent military authority that delineate the circumstances and limitations under which U.S. forces will initiate and/or continue combat engagement with other forces encountered.”¹²⁷ Rules of engagement are the commander’s primary means of regulating force in armed conflict and those rules clearly extend to the use of autonomous systems.¹²⁸ Rules of engagement are more restrictive than the law of armed conflict, and are heavily influenced by domestic policy, operational goals, and circumstances encountered on the battlefield. They are not intended to serve as tactical or operational guidelines, but rather designed to provide boundaries on the use of force that are neither tactical control measures nor a substitute for the military judgment of commanders and operators.¹²⁹ Specific rules of engagement are a crucial tool in the responsible and legal use of autonomous systems in that these rules can restrict, for

124. *Id.* at II-3 to -4.

125. DOD DICTIONARY, *supra* note 2, at 188.

126. U.S. DOD MANUAL, *supra* note 42, ¶ 5.6; *see also* Protocol I, *supra* note 46, art. 52(2) (“Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”).

127. DOD DICTIONARY, *supra* note 2, at 188.

128. GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 495 (2010).

129. INT’L AND OPERATIONAL LAW DEP’T, THE JUDGE ADVOC. GEN.’S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK, 105-06 (2020).

example, a system's potential targets, geographic range, time on station, and use of munitions.

Phase 2 — Target Development and Prioritization — begins with a systematic examination of potential targets in order to identify those entities, objects or combatants, when successfully engaged, support the achievement of the commander's objectives.¹³⁰ Once the potential targets are identified, they are validated to ensure the potential targets meet the objectives outlined in the commander's guidance and comply with the law of armed conflict and the rules of engagement.¹³¹ It is here where targets are confirmed to be lawful military objectives by nature, purpose, use, location or class of persons.¹³² Autonomous systems could theoretically assist with target development, but whether that system may validate targets and target systems without human intervention would have to satisfy the legal and policy requirements analyzed herein. Once the targets are validated, they are added either to the joint target list upon which there are no target engagement restrictions or the restricted target list that detail specific restrictions on the actions authorized against it due to operational considerations.¹³³ There are numerous operational reasons to restrict actions upon a given target due to second- and third-order effects. One reason may also be the legal obligation to take feasible precautions in planning and conducting attacks.¹³⁴

Phases 3, 4, and 5 are critically important in determining whether LAWS may be employed as a suitable capability, as well as, to ensure compliance with the laws of armed conflict. The following analysis presumes there are no other non-legal considerations that constrain the use of LAWS for the particular operation. As a methodology, the joint targeting process ensures any weapon system used for engagement achieves the designated objectives of the mission, to include being lawful.

Phase 3 — Capabilities Analysis — involves evaluating available capabilities, both forces and weapon systems, to determine appropriate options to engage the targets that were validated as military objectives during phase 2. The primary purpose is to determine how the capabilities available across the joint force may be used to create the desired effects on the

130. JP 3-60, *supra* note 117, at II-5.

131. *Id.* at II-13.

132. U.S. DOD MANUAL, *supra* note 42, ¶ 5.6 (“The term military objective has been used in various treaties as a term of art to mean a person or object that may lawfully be made the object of attack.”); *see also* Protocol I, *supra* note 46, art 52(2).

133. JP 3-60, *supra* note 117, at II-13.

134. U.S. DOD MANUAL, *supra* note 42, ¶¶ 5.11, 5.11.7 (“For example, in seeking to deny an adversary the ability to use a railroad network, it may be possible to disable to railroad network just as effectively by striking the railroad lines away from inhabited areas as by striking the railroad station located near civilians.”); *see also* Protocol I, *supra* note 46, art. 57(2).

prioritized targets while minimizing collateral damage and waste of limited resources.¹³⁵

An important part of assigning capabilities against a target is weaponeering (the process of determining the specific means required to create a desired effect on a given target).¹³⁶ Assuming a lethal autonomous weapon system is an available capability within the joint force inventory, consideration of its employment will be compared against all other capabilities that may satisfy the specific requirement. Just because an autonomous weapon system may be able to create the desired effects does not mean that it will be assigned against that target. The first-, second-, and higher-order effects are identified for each of the potential capabilities in order to generate an understanding of the most efficient means to achieve the desired effects while minimizing potential negative consequences.¹³⁷

As part of this analysis, an estimation on possible collateral damage – incidental injury or death of civilians and damage or destruction of civilian objects – is produced for each potential capability, which are categorized as second-order effects. First-order effects are those against the designated target or target system. The assessment is conducted through collateral damage estimation (CDE) models that inform the targeting staff and commander on the potential collateral damage risk. Each specific capability is matched against a given target to estimate those effects. The process considers performance data on each potential asset, characteristics on the means of delivery of the effect, and operational conditions at the time of employment among other things. These estimates are situation-specific and as conditions change must be reevaluated.¹³⁸

The intent of CDE is to provide a repeatable and structured process to analyze and predict collateral damage to help inform the commander on the best option to minimize civilian harm, which is one method used to help comply with the legal obligation to take feasible precautions in planning and conducting attacks.¹³⁹ Through this process, an autonomous weapon system may or may not be the best capability to minimize civilian harm. If it is seen as a potential option to employ against a particular target, the commander must be satisfied that the autonomous system can achieve the desired effects, without sacrificing the military advantage, while causing the least amount of

135. JP 3-60, *supra* note 117, at II-13.

136. DOD DICTIONARY, *supra* note 2, at 229.

137. JP 3-60, *supra* note 117, at II-14-15.

138. *Id.* at II-15.

139. U.S. DOD MANUAL, *supra* note 42, ¶¶ 5.11, 5.11.6; *see also* Protocol I, *supra* note 46, art. 57(2).

harm to civilians and civilian objects.¹⁴⁰ If a lethal autonomous weapon system can satisfy the requirements in phase 3, then it will be an option to consider during phase 4.

Phase 4—Commander’s Decision and Force Assignment—is the step where the commander either approves, disapproves, or approves with modifications the planned engagements of the prioritized and validated targets using the specific means and methods vetted during the capabilities analysis. In addition to operational considerations, it is here where the legal obligation to apply the principle of proportionality is made.¹⁴¹ The consolidation of all the data and information surrounding the validated targets and the capabilities analysis, to include the CDE, as well as the broader strategy, objectives and military end state inform the commander’s decision as to whether the expected incidental harm to civilians or civilian objects would be excessive in relation to the concrete and direct military advantage anticipated to be gained.¹⁴² If an autonomous weapon system is an option verified during the capabilities analysis in phase 3, the commander may only approve its use against a designated target if reasonably convinced in good faith that the anticipated civilian collateral injury or damage is not expected to be excessive.

The commander must also be convinced that the obligation to take feasible precautions in planning and conducting attacks to reduce risk of harm to civilians and civilian objects has been met through the weaponizing and collateral damage estimation conducted during phase 3. At this point, a commander’s decision to approve a lethal autonomous weapon system against a validated target survives so long as the proportionality rule continues to be satisfied up to the point of the actual attack. If at any point during execution of the attack new information is raised concerning changes in expected civilian harm, the commander and subordinate commanders must still exercise due regard to reduce the risk of incidental harm and ensure civilian harm is not excessive in relation to the military advantage anticipated.¹⁴³ Assuming these obligations are met and will continue to be satisfied, the planned targets are transmitted to the combat forces assigned to prosecute those targets, including those units with autonomous weapons capabilities.

140. U.S. DOD MANUAL, *supra* note 42, ¶ 5.11.6; *see also* Protocol I, *supra* note 46, art. 57(2).

141. U.S. DOD MANUAL, *supra* note 42, ¶ 2.4.1.2; *see also* Protocol I, *supra* note 46, art. 51(5)(b).

142. *Id.*

143. U.S. DOD MANUAL, *supra* note 42, ¶¶ 5.10, 5.11.4; *see also* Protocol I, *supra* note 46, art. 57.

Phase 5 — Mission Planning and Force Execution — is the phase where subordinate units who control the capabilities that are to be employed against approved targets begin their own detailed planning and execution. During execution, combat operations are fluid due to changes occurring in the operational environment. To accommodate the inevitable changes, the joint targeting cycle incorporates both deliberate and dynamic targeting. Deliberate targeting refers to those planned targets that are known to exist in the operational environment with the capabilities validated to engage them during phases 2 and 3. They include scheduled targets that are to be engaged at specific times and on-call targets that have no specific delivery time.¹⁴⁴ Dynamic targeting refers to targets of opportunity that are either unscheduled or unanticipated targets. Unscheduled targets are validated targets that were not prioritized on either the joint or restricted target list during phase 2 or were not expected to be available during the current targeting cycle. Unanticipated targets are those that are unknown but appear during current operations.¹⁴⁵

Regardless of whether targets were developed through deliberate or dynamic targeting, both are subject to the process of F2T2EA: find, fix, track, target, engage, and assess during this phase.¹⁴⁶ For those planned targets approved with capabilities matched against them, this process is a method to simply confirm, verify and validate previous decisions and in some cases may require changes or cancellation. It also includes continued compliance with the legal obligation to take precautions in conducting attacks as new information may affect the proportionality assessment or overall risk to civilians or civilian objects.¹⁴⁷ For targets of opportunity that present themselves during current operations, this process provides a method for units executing attacks to quickly validate targets and match capabilities against them using similar standards as if it were conducted through deliberate planning in earlier phases. As is the case for the joint targeting cycle phases, the steps in the F2T2EA process may be accomplished iteratively and in parallel.¹⁴⁸

The find, fix and track steps involve the detection, identification and location of possible targets normally through intelligence, surveillance and reconnaissance (ISR) activities that units conduct throughout current operations. The target step is critical to the entire process as it includes the same methodologies contained in phases 2, 3 and 4. A possible target of

144. JP 3-60, *supra* note 117, at II-2.

145. *Id.* at II-2-3.

146. *Id.* at I-8, II-21.

147. U.S. DOD MANUAL, *supra* note 42, ¶ 5.11; *see also* Protocol I, *supra* note 46, art. 57.

148. JP 3-60, *supra* note 117, at II-21.

opportunity is validated as a lawful military objective, vetted to ensure effects against that target meet the objectives and criteria outlined in the commander's guidance, and certified that the engagement is not otherwise restricted.¹⁴⁹ A capabilities analysis is conducted to match available assets against the target through weaponeering and collateral damage estimation similar to phase 3. Once engagement options are formulated, recommendations are nominated for the commander responsible at this level to approve.¹⁵⁰ As is the case in phase 3, this step requires a proportionality assessment¹⁵¹ and feasible precautions to minimize harm to civilians and civilian objects.¹⁵² Once an approval decision is made, the next step is to engage. During the engage step, the attack is ordered and transmitted to the selected asset.¹⁵³ The final step of this phase is an initial assessment of the action against the target,¹⁵⁴ which supplements the continuous assessment of the effectiveness of operations in achieving the desired objectives during phase 6 of the joint targeting cycle.¹⁵⁵

For dynamic targeting using the F2T2EA process, the same constraints contained in the overall joint targeting cycle apply to ensure command and control on the employment of force. The option to employ a lethal autonomous weapon system would have to meet the same operational and legal criteria as if it were a planned engagement. Whether an autonomous system may perform any or all of the F2T2EA steps would depend on whether the system was designed, tested, and certified to do so while also complying with the law of armed conflict. At a minimum, the commander would have to be satisfied that the autonomous system is likely to cause the least harm to civilians and civilian objects without sacrificing the military advantage.¹⁵⁶ Practically, if a human-controlled capability were available that would likely cause less collateral damage, achieve the desired effects and objectives of the operation and not pose undue risk to friendly forces, the use of a lethal autonomous weapon system would be prohibited as a matter of law. Commanders are obligated to employ only those systems that meet the objectives outlined in the commander's guidance and comply with the law of armed conflict and the rules of engagement. Thus, autonomous weapons may only be lawfully employed in those situations where its use creates the

149. *Id.* at II-29.

150. *Id.* at II-29-30.

151. U.S. DOD MANUAL, *supra* note 42, ¶ 2.4.1.2; *see also* Protocol I, *supra* note 46, art. 51(5)(b).

152. U.S. DOD MANUAL, *supra* note 42, ¶ 5.11; *see also* Protocol I, *supra* note 46, art. 57.

153. JP 3-60, *supra* note 117, at II-29.

154. *Id.* at II-30.

155. *Id.* at II-31, C-6.

156. U.S. DOD MANUAL, *supra* note 42, ¶ 5.11; *see also* Protocol I, *supra* note 46, art. 57.

desired effects that are unattainable by other available capabilities that would cause less collateral damage. Indeed, the use of lethal autonomous weapon systems within the U.S. joint targeting cycle is subject to strict standards to comply with operational and legal constraints.

VII. CONCLUSION

The Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapon Systems includes this guiding principle: “(c)onsideration should be given to the use of emerging technologies in the area of lethal autonomous weapon systems in upholding compliance with IHL and other international legal obligations.”¹⁵⁷ As this Article has demonstrated, the United States has given such consideration by implementing and promoting policies and procedures that regulate the acquisition, development, testing, and employment of autonomous weapon systems to ensure compliance with the law of armed conflict.

Autonomy is not merely important, but essential for modern militaries to conduct many tasks, including identifying targets by radar or delivering precision-guided munitions.¹⁵⁸ And fast-paced growth of autonomous technologies requires ongoing development of internal U.S. policies and procedures to ensure deliberate evaluation of the risks of increased autonomy in weapon systems, as well as mitigate risks from technical, policy, and operational perspectives.

Policies and procedures like DoDD 3000.09, the U.S. joint targeting process, and rules of engagement, and commanders and operators applying appropriate levels of human judgment will continue to support the command and control necessary to ensure the legal and responsible use of lethal autonomous weapon systems in armed conflict.

157. CCW/GGE.1/2018/3, *supra* note 35, at 4.

158. Scharre & Horowitz, *supra* note 3, at 8.

LEGAL CHALLENGES OR “GAPS” BY COUNTERING HYBRID WARFARE – BUILDING RESILIENCE IN *JUS ANTE BELLUM*

Morten M. Fogt*

Abstract

This article is based on practical legal experience with the concept of “hybrid war.” It addresses this much discussed concept, the specific treaty limitations and the currently adopted hybrid countermeasures and then goes into a detailed legal analysis of the challenges and “gaps” that emerge. Both the traditional gray zones of the *jus ad bellum* and *jus in bello* are investigated from a hybrid war perspective as well as the specific legal challenges of confronting and countering a hybrid threat or warfare in peace time and crisis. A legal tetrachotomy is proposed consisting of the *jus ante bellum*, the traditional divide of *the jus ad bellum* and *jus in bello* and, moreover, the *jus post bellum*. It is suggested *that* the North Atlantic Treaty Organization (NATO) build more robust legal resilience in the *jus ante bellum*, *that* legal research in this area is prioritized, *that* NATO look at drafting model SOFAs and reforming the old NATO SOFA of 1951 and thereby take the new peacetime and crisis hybrid challenges into account, as this would reduce the need for and complexity of different multiple bilateral SOFAs, *and that* NATO instigates legal research aiming at harmonizing and aligning the various national peacetime and crisis (emergency or martial) laws and draft

* Lieutenant Colonel of the Danish Army, Chief Legal Advisor, NATO Multinational Division North (MNDN), Latvia/Denmark, Associated Professor in Civil and International Law, Aarhus University, Denmark. The author is grateful for comments on this paper by Professor Geoffrey S. Corn, South Texas College of Law, Houston and for guidance on the status of national law by Major Ingus Puga, Legal Advisor, Head of Legal Department, Mechanized Infantry Brigade, Latvian Land Force; Captain Steven Raidma, Legal Advisor, 1 Estonian Brigade, Estonian Armed Force; Darius Baranauskas, Major, Legal Advisor and Chief Specialist, Law Department, Land Force Headquarters, Lithuanian Armed Force. The views expressed in this Article are those of the author alone and do not necessarily reflect the official policy or position of NATO, the MNDN, the Danish Ministry of Defense or Denmark.

and adopt model laws for NATO states to implement at their convenience. Building legal resilience in *jus ante bellum* should be put on NATO's and other defense alliances' agenda in the future. The article suggests that a NATO Center of Excellence on Legal Resilience should be founded.

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I. INTRODUCTION

The term “Hybrid Threat or Warfare” has become a discourse concept (non-legal concept) permeating the military and legal debate at the strategical, political and higher operational level.¹ It has also been described as, *inter alia*, “ambiguous warfare,” “fourth or fifth-generation warfare,” “non-linear warfare,” “low-intensive asymmetric war,” “unconventional warfare” or “full-spectrum warfare” indicating perhaps something new and different than the normal understanding of conventional “warfare.”² Following the Russian seizure and illegal annexation of Crimea in 2014, the term of choice by NATO has been *hybrid warfare*.³

Common to all possible descriptions of a “Hybrid Threat or Warfare” is that it entails a coordinated combination of a variety of measures at the

1. Frank G. Hoffman, *Hybrid Warfare and Challenges*, JOINT FORCE Q., 1st Quarter 2009, at 34, 34-39.

2. Compare BEN CONNABLE ET. AL., RUSSIA’S HOSTILE MEASURES, COMBATING RUSSIAN GRAY ZONE AGGRESSION AGAINST NATO IN THE CONTACT, BLUNT, AND SURGE LAYERS OF COMPETITION 5-6 (1st ed. 2020) [hereinafter RAND Report Russia’s Hostile Measures 2020] (referring to a wide range of catchphrases adopted such as “*parawar*, *asymmetric war*, *pressure pointing*, *lawfare*, *salami slicing*, *unrestricted warfare*, and *hybrid warfare*”), with Thomas P. Jordan, *The Law of Armed Conflict, Unconventional Warfare and Cyber Attacks*, 6 AM. U. NAT’L SECURITY LAW BRIEF at 37-58 (2006). See also YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 7-17 (6TH ed. 2017) (discussing the term war; the term “war” or “warfare” has numerous meanings and many connotations in national domestic law and remains undefined in international law).

3. RAND Report Russia’s Hostile Measures 2020, *supra* note 2, at xii, 6.

strategical (political), operational, down to the lower tactical level targeted against another state, or a specific part of that state, with the goal of achieving strategical, political and/or military advantages. The aims are usually pre-determined but at the same time flexible and floating; the means employed are multiple and pluralistic, lawful and unlawful, and capable of being reinforced by any sign of success. States or non-state actors alike can conduct an overt or covert hybrid campaign. The multiple, pluralistic, and lawful or unlawful means permit effectively covered actions, which can be supported by an informational denial campaign by states involved. In principle, the toolbox of a "Hybrid Threat or Warfare" is unlimited, and the legal framework and propaganda (also termed "lawfare") is an integrated part.

The decisive question from a legal perspective is not whether this is entirely new or any different from past military doctrine, but instead what challenges does it create for the modern legal framework of domestic national law, Human Rights Law (HRL) and international law, including the Law of Armed Conflict (LOAC). The questions are, *inter alia*, how such a coordinated "hybrid" campaign sufficiently be countered by lawful means; what the specific legal challenges are in peacetime, crisis and armed conflict situations; whether there are legal "gaps," loopholes or gray zones which may be exploited by an adversary and which may be difficult or impossible to mitigate and counter by a law-abiding state(s) being threatened or attacked, and what measures can be taken in order to build more legal resilience in the *jus ante bellum*.

Consequently, a hybrid threat or warfare conducted by overt or covert activities by states, state agents or non-state actors in times of peace, crisis or armed conflict will affect the full-spectrum of the society of the targeted state(s). In particular, it will test the resilience of the civilian society and citizens, the robustness of civilian authorities, agencies, civil police and the military of states and alliances, including the strategic political cohesion of alliances. The lawful response of the state or more states jointly affected will depend on the legal framework in times of peace, crisis or armed conflict, which, however, in many regards may differ, be too restrictive, unclear, resource-demanding, or time-consuming to respect and apply. As the nature of actions and the practice of states, as their agents and non-state actors change, national and international law will (and must) develop. As a result, this analysis will consider to what degree such a legal development has taken or will take place in the future.

The aim of this article is to discuss these and other questions with the focus on peacetime and situations of crisis, the latter situation may include a local or regional Non-International Armed Conflict (NIAC), but often falls

below the threshold for a NIAC and a state-to-state International Armed Conflict (IAC). The analysis proceeds as follows:

First, the phenomenon “Hybrid Threat or Warfare” will be circumscribed in order to understand the threat campaign states have been and, in the future, may be exposed to, *infra* II. Second, the development of the relationship between NATO and Russia will be illustrated by the effect – or better, lack of effect – of the Founding Act on Mutual Relations, Cooperation and Security between NATO and Russia 1997 and the subsequent Russian aggressive foreign policy mirroring some of the features of NATO’s past operations since 1999, *infra* III. Third, a description of the past and current responses by states and state defense alliances to a “Hybrid Threat or Warfare,” such as NATO’s deterrence, reassurance and countermeasures, will cast some light on how states may react and, thus, the legal challenges prompted by those responses, *infra* IV.A. Fourth, an important feature of a “Hybrid Threat or Warfare” as described here is the imbalance between (in principle) law-abiding democratic states and illegal acting autocratic states and/or non-state actors, which due to the legal limitations or the absence thereof decisively shape the possible means and instruments of power available, *infra* IV.B. Fifth, based on the analysis, *infra* I-IV, it is possible to identify and discuss the main legal challenges or “gaps” by countering hybrid warfare, which states have faced in the past, are currently exposed to and will continue to be confronted with in the future, *infra* V. The article ends with some conclusions on the legal questions generated by the possible responses to a “Hybrid Threat or Warfare” in peacetime and in crisis and armed conflict situations, and indicates a possible way ahead, *infra* VI.

As a conclusion and way ahead, it is suggested that NATO must build more robust legal resilience in the *jus ante bellum*, that legal research in this area should be prioritized, that NATO should look at drafting model bilateral or multi-lateral Status of Force Agreements (SOFAs) and at reforming the old NATO SOFA from 1951, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, London, June 19, 1951, taking into account the new peacetime and crisis hybrid challenges in order to reduce the legal complexity prompted by multiple bilateral SOFAs and the “gaps” in the NATO SOFA, and that NATO should instigate legal research aiming at harmonizing and aligning the various national peacetime and crisis (emergency or martial) laws, and draft and adopt model laws for NATO states to implement at their convenience.

II. WHAT TO COUNTER – THE “HYBRID” THREAT OR WARFARE

A precondition for any analysis of the phenomenon “Hybrid Threat or Warfare” and how to counter it and the legal challenges it may pose requires some degree of clarity about the subject under discussion. Since the concept of a “hybrid” threat or warfare is ambiguous, it should be broken down to its core elements. Each element, individually or jointly, may raise legal questions and challenges.

In general, a “hybrid” threat or warfare can be described as a mixture of hybrid orchestrated (organized) non-kinetic and kinetic efforts to achieve a certain political and/or military goal, which may be based on, *inter alia*:

- Organized and controlled actions at the highest political and military level supporting a clear long-term strategic vision;
- unclear distinction between “peace”, “crisis” and “war” and, thus, operating in the various legal “gray zones”;
- hybrid hostile engagement in terms of full-spectrum actions, including cyberspace and information activities;
- denial strategy regarding overall or effective control over non-state actors and motivation of civilians to participate, i.e., in propaganda and cyberattacks;
- protection and shielding non-state actors and civilians participating in unlawful hybrid activities from national and international prosecution;
- use of publicly controlled or influenced media and private economic sector;
- use of trade and economic state sanctions, i.e., export or import restrictions, under the pretext of political and legal justification;
- targeting specific vulnerabilities of all possible counterparties, including defense alliances, individual states, international organizations, non-state actors and foreign populations;
- exploiting existing weaknesses such as lack of *consensus* in democracies and alliances, absence of political willingness to react, reduced capacities to act with a timely response and, thus, relying on late reaction instead of prompt action by opponents;
- exploiting any achieved effects in order to take the hybrid campaign to the next level and re-enforced success immediately in a coordinated manner;
- use of “lawfare” in terms of promoting one’s own actions as legitimate and opponents’ reactions as unlawful.

None of these components of a “hybrid” threat or warfare is new, but the mixture of hybrid-orchestrated efforts to achieve a certain political and/or military goal and their lawful and unlawful employment at any time – in

peace, crisis or armed conflict – is novel in modern times. However, the hybrid threat will surprise and challenge victim states and, in particular, democratic nations and multinational alliances based on *consensus* and a principle rule-of-law society.⁴ The similarity with the Clausewitzian ideas of an artificial boundary between political and military modes of strategic warfare and the statement that war, its threat and actuality, as an instrument, is the mere continuation of politics immediately comes to mind.⁵

This way of conducting foreign policy or using a “hybrid” threat or warfare has evolved over time. Russia has become more sophisticated, utilizing experiences from past conflicts such as the First Chechen War 1994-96,⁶ the Second Chechen War 1999-2009,⁷ the (alleged Russian) information campaign and instigated cyberattack against Estonia in the spring of 2007,⁸

4. See H. Reisinger & A. Golts, *Russia's Hybrid Warfare, Waging War below the Radar of Traditional Collective Defence*, NATO DEFENSE COLLEGE, no. 135, 2 (Nov. 2014) (arguing that the Arab Spring 2011 (also termed the “colour revolutions”) was the main concerns of Russia: “[t]here was fear that ‘democratic change in brotherly Ukraine could therefore spread to Russia.’ It was this fear of ‘regime change’ and a ‘colour revolution’ that prompted the Putin regime to go to war and use *all* means available – if necessary. All this is nothing new. The Kremlin’s growing concern, as autocratic regimes were swept away in the Arab Spring or in colour revolution, was plain for all to see. Such developments were seen as having been inspired and orchestrated by the West, and the Russian leadership felt increasingly cornered with the fear to be ‘next.’”).

5. Compare KARL VON CLAUSEWITZ, *HINTERLASSENE WERKE ÜBER KRIEG UND KRIEGFÜHRUNG* 24 (2nd ed. 1857) (explaining his most famous dictum, “Der Krieg ist eine blosse Fortsetzung der Politik mit anderen Mitteln; in familiar English translation “war being a mere continuation of policy by other means;”) with George Dimitriu, *Clausewitz and the politics of war: A contemporary theory*, 43 J. OF STRATEGIC STUD. 645, 645 (2018) <https://www.tandfonline.com/doi/full/10.1080/01402390.2018.1529567>, (explaining that “throughout modern theory, Clausewitz’s concept of politics has been misconstrued as referring only to policy in the sense of state policy whereas in fact, for him, ‘politics’ was a much broader concept, including domestic power struggles.”). See also *id.* (stating that based on the re-interpretation of Clausewitz works, “the political logic of war [should be] defined [] as the convergence of the interrelating factors of power struggles and policy objectives”), and *id.* at 673 (explaining it is possible to attune the Clausewitzian dictum of war as being the continuation of politics, providing a contemporary theory that covers “not only major, interstate wars but also small wars, civil wars and what is called today ‘hybrid war’”).

6. See Andrew Higgins, *The War That Continues to Shape Russia, 25 Years Later*, N.Y. TIMES (Dec. 10, 2019), <https://www.nytimes.com/2019/12/10/world/europe/photos-chechen-war-russia.html> (explaining the beginning of the First Chechen War from December 1994 to August 1996); see also Dr. Pavel Felgenhauer, *Russian Strategy in the Chechnya Wars*, https://www.bundesheer.at/pdf_pool/publikationen/felg01.pdf (last visited Aug. 20, 2020).

7. HELION & CO., *Second Chechen War (1999-2009)*, <https://www.helion.co.uk/conflicts/second-chechen-war.php> (last visited Aug. 20, 2020) (explaining that the Second Chechen War lasted from August 1999 to April 2009 was an armed conflict on the territory of Chechnya and the border regions of the North Caucasus between the Russian Federation and the Chechen Republic of Ichkeria, including militants of various Islamist groups).

8. See Rain Ottis, *Analysis of the 2007 Cyber Attacks Against Estonia from the Information Warfare Perspective*, COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE (2007),

the Russian-Georgian War 2008,⁹ the (alleged unlawful) Crimea annexation in 2014 and, currently, the ongoing East Ukrainian conflict (since 2017), to develop its current hybrid warfare. The overt and covert supporting military intervention in the Syrian conflict and more broadly the hybrid informational campaign against NATO, EU Member States and non-EU Member States such as Finland and individual citizens in neighboring countries in the Baltic and Finnish border areas are evidence of such continued hostile activities.¹⁰

In 2013, the Chief of General Staff of the Armed Forces of Russia, Valery Gerasimov, addressed the conflicts in the Middle East, Iraq, Afghanistan and Libya and identified them as exemplars of contemporary hybrid warfare. Seen from the perspectives of the past conflict experiences of US alliances and NATO in the Balkans, Iraq and Afghanistan, the need for a more comprehensive approach as opposed to a purely military approach was unquestionable.¹¹ His paper has become known as the “Gerasimov” doctrine on Russian “hybrid warfare,” and many of its features are reflected in the Russian conduct in the subsequent Crimea and eastern Ukraine conflicts. The important parts of Gerasimov’s statement are the following (in abstract):

In the 21st century we have seen a tendency toward blurring the lines between the states of war and peace. Wars are no longer declared and, having begun, proceed according to an unfamiliar template.

The experience of military conflicts – including those connected with the so-called coloured revolutions in north Africa and the Middle East – confirm that a perfectly thriving state can, in a matter of months and even days, be transformed into an arena of fierce armed conflict, become a victim of foreign intervention, and sink into a web of chaos, humanitarian catastrophe, and civil war.

https://cedco.org/uploads/2018/10/Ottis2008_AnalysisOf2007FromTheInformationWarfarePerspective.pdf.

9. See Jim Nichol, *Russia-Georgia Conflict in August 2008: Context and Implications for U.S. Interests*, CONGRESSIONAL RESEARCH SERVICE (Mar. 3, 2009); see also GEORGIAN JOURNAL, *European Court of Human Rights held final hearing in case of Russian-Georgian war 2008*, (May 24, 2018), <https://www.georgianjournal.ge/politics/34514-european-court-of-human-rights-held-final-hearing-in-case-of-russian-georgian-war-2008.html>.

10. CONNABLE ET. AL., *supra* note 3, at 31-56.

11. See Statement by Gen. David Petraeus, Commander of the U.S. Central Command, at the Landon Lecture (Apr. 27, 2009), <https://www.k-state.edu/landon/speakers/david-petraeus/transcript.html> (discussing that “[f]inally the insurgency and security situation in Afghanistan requires a truly comprehensive approach, one that addresses the root causes and underlying factors that make certain areas fertile fields for the insurgency. An important element of a comprehensive approach is civilian capacity ... As always, military action is necessary but not sufficient. Additional civilian resources will be essential to building on the progress that our troopers and their Afghan partners can achieve on the ground”).

[Lessons of the “Arab Spring”]

Of course, it would be easiest of all to say that the events of the “Arab Spring” are not war and so there are no lessons for us – military men – to learn. But maybe the opposite is true – that precisely these events are typical of warfare in the 21st century.

In terms of the scale of the casualties and destruction, the catastrophic social, economic, and political consequences, such new-type conflicts are comparable with the consequences of any real war.

The very “rules of war” have changed. The role of nonmilitary 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.

....

The focus of applied methods of conflict has altered in the direction of the broad use of political, economic, informational, humanitarian, and other nonmilitary measures – applied in coordination with the protest potential of the population.

All this is supplemented by military means of a concealed character, including carrying out actions of informational conflict and the actions of special operations forces. The open use of forces – often under the guise of peacekeeping and crisis regulation – is resorted to only at a certain stage, primarily for the achievement of final success in the conflict.

....

In conclusion, I would like to say that no matter what forces the enemy has, no matter how well-developed his forces and means of armed conflict may be, forms and methods for overcoming them can be found. He will always have vulnerabilities and that means that adequate means of opposing him exist.

....

We must not copy foreign experience and chase after leading countries, but we must outstrip them and occupy leading positions ourselves.¹²

12. Gen. Valery Gerasimov, VOENNO-PROMYSHLENNYI KUR'ER [MILITARY-INDUSTRIAL COURIER], (Rob Coalson trans., Radio Free Europe/Radio Liberty Feb. 27, 2013), <https://founders.code.com/wp-content/uploads/2016/07/Gerasimov-Doctrine-and-Russian-Non-Linear-War-In-Moscow-s-Shadows.pdf>. Compare also the recent military Chinese strategy of the “Three Warfares” (public opinion warfare, psychological warfare and legal warfare), which is similarly comprehensive with a focus on media and legal justification and, moreover the study of the “Three Warfares” includes a “variety of traditional, ideological, and contemporary precedents, from the ancient Chinese emphasis on the use of ‘strategems’ [] to the U.S. military’s perceived engagement in analogous practices. At a basic level, the primary purpose of the three warfares is to influence and target the adversary’s psychology through the utilization of particular information and the media as ‘weapons,’” both in peace time and war; see Elsa Kania, *The PLA’s Latest Strategic Thinking on the Three Warfares*, 16 CHINA BRIEF no. 13 (Aug. 22, 2016), available at <https://jamestown.org/program/the-plas-latest-strategic-thinking-on-the-three-warfares/>.

In essence, the term “hybrid doctrine” (or “hybrid warfare”) denotes a hybrid use of symmetric and asymmetric military, political, economic, social/cultural/ethnic/infrastructural, informational means. Indeed, a hybrid integration of the comprehensive environment to support military actions or campaigns is a feature forming part of the modern military strategic doctrine in the US¹³ and NATO as well.¹⁴ The comprehensive environment, also termed “engagement space,” can be initially viewed through several conceptual models, where the most common in NATO are the following six domains (so-called PMESII): political, military, economic, social, infrastructure, and information, whereby it is recognized that this list is not exhaustive.¹⁵ NATO sees its own contribution to a Comprehensive Approach as follows:

NATO recognizes that the military alone cannot resolve a crisis or conflict. The Alliance’s Strategic Concept states, “[t]he lessons learned from NATO operations, in particular in Afghanistan and the Western Balkans, make clear that a comprehensive political, civilian and military approach is necessary for effective crisis management. The Alliance will engage

13. See BRIAN M. DUCOTE, CHALLENGING THE APPLICATION OF PMESII-PT IN A COMPLEX ENVIRONMENT 3 U.S. ARMY COMMAND AND GEN. STAFF COLL. SCH. OF ADVANCED MIL. STUD., iii, 3 (2010) (explaining that PMESII-PT is an acronym developed in the military of the United States as a structured, comprehensive approach for a military operation in which the external environment is analyzed. The acronym stands for Political, Military, Economic, Social (religious, cultural, and ethnic composition), Information, Infrastructure, Physical Environment, and Time. Sometimes another tool, known as ASCOPE, is preferred to define an operational environment, which stands for Area, Structure, Capabilities, Organizations, People, and Events. Additionally, U.S. military leaders use METT-TC to reflect mission variables, which are developed from the environmental factors (PMESII) but specifically apply to a given mission. METT-TC stands for Mission, Enemy, Terrain and Weather, Troops and Support, Time Available, and Civilian Considerations: For the view that these types of environmental analysis, all of which are applying linear and sector-specific concepts, are insufficient when used in an operational environment that is holistically asymmetric, which today would include hybrid threat or warfare).

14. See *Allied Command Operations Comprehensive Operations Planning Directive COPD Interim Version 2.0*, NATO UNCLASSIFIED (Oct. 4, 2013) https://www.act.nato.int/images/stories/events/2016/sfpdpe/copd_v20.pdf, [hereinafter COPD Interim V2.0] (explaining the operations planning process (OPP) for the NATO strategic and operational levels, in support of the NATO Crisis Management Process (NCMP) and facilitates a collaborative (parallel at more levels) approach to planning. The COPD 2013 version currently recognizes six domains under the PMESII paradigm within an engagement space; however, others may be included in future Political, Military, Economic, Social, Infrastructure, and Information (PMSEII) domains; see also COPD Interim V2.0 (The Engagement Space) where ACO Directive talks about PMESII plus, which is described as Political (including governance), Military (including security), Economic, Sociocultural, Information, Infrastructure (PMESII), plus technological and environmental elements).

15. COPD Interim V2.0, *supra* note 14, at 1-8 (explaining that the COPD 2013 version currently recognizes these six domains under the PMESII construct within an engagement space, though others may be included in the future. Additionally, the term “PMESII plus” may be used, which adds technological and environmental elements).

actively with other international actors before, during and after crises to encourage collaborative analysis, planning and conduct of activities on the ground, in order to maximise coherence and effectiveness of the overall international effort.”

There is a need for more deliberate and inclusive planning and action through established crisis management procedures that allow for both military and nonmilitary resources and efforts to be marshalled with a greater unity of purpose.¹⁶

Russia labels this NATO military comprehensive doctrine “hybrid warfare.”¹⁷ To summarize, the four key features of the Russian hybrid threat or warfare are as follows:

First, a “hybrid warfare” is instrumental for the strategic and political goals of a state(s) like Russia waging such a campaign – it is a continuation of the clearly defined internal and foreign policy in line with the well-known Clausewitz statement.

Second, it is synchronized at (possibly) all levels and sectors, where it employs a coordinated mix of various asymmetric means – often both lawful and unlawful activities and instruments of power – in peacetime, crisis or armed conflict situations.

Third, it is flexible regarding means and intensity and rapidly adaptable to changes and new developments, opportunities and the victim states’ vulnerabilities – whether it be military, political, economic, environmental, or healthcare related, such as the COVID-19 pandemic.¹⁸

Finally, its main tool is unconventional disinformation and fake news targeted at the entire society as such and, hence, mainly directed against the citizens of the targeted state. However, at the same time, it is directed at its own citizens in order to build civilian resilience against possible hybrid counter campaigns.

16. *Id.* para 1-2 (a)-(b) at p. 1-1.

17. See Gen. Valery Gerasimov, *On the Experience in Syria*, MILITARY INDUSTRIAL COURIER (Mar. 7, 2016), (Jānis Bērziņš trans., Strategy and Economics Blog Mar. 14, 2016) <https://www.berzins.eu/gerasimov-syria/>; see also Aurel Sari, *Hybrid Warfare, Law and the Fulda Gap* (Mar. 5, 2017), in COMPLEX BATTLE SPACES 161-90, 167 n.21 (Christopher Ford & Winston Williams eds., 2019).

18. *Provocation against NATO in Lithuania failed, says NATO chief*, LRT (Apr. 29, 2020) <https://www.lrt.lt/en/news-in-english/19/1168595/provocation-against-nato-in-lithuania-failed-says-nato-chief> (noting “[a] fake letter announcing the alleged withdrawal of allied troops from Lithuania showed state and non-state actors are trying to capitalise on the Covid-19 crisis,” the NATO Secretary General Jens Stoltenberg said ... and “[w]e have seen public statements by both Russian spokespersons and Chinese spokespersons, indicating that NATO allies are not supporting each other at all, that NATO allies are not able to deal with the Covid-19 crisis, that they are not protecting their elderly or that NATO allies are responsible for spreading this virus,” added Stoltenberg”).

Unconventional disinformation starts internally in elementary school history classes and continues throughout adulthood in a systematic influence campaign.¹⁹ In the case of important countermeasures or events closely connected to such measures, the hybrid disinformation activities immediately increase.²⁰ Again, this is not a novelty; evidence of psychological operations on the part of the US (Central Intelligence Agency) go beyond what can be regarded as permitted by international humanitarian law (LOAC) and HRL has been established by the ICJ in the *Nicaragua* case:

The Court concludes that in 1983 an agency of the United States Government supplied to the FDN²¹ a manual on psychological guerrilla warfare which, while expressly discouraging indiscriminate violence against civilians, considered the possible necessity of shooting civilians who were attempting to leave a town; and advised the "neutralization" for propaganda purposes of local judges, officials or notables after the semblance of trial in the presence of the population. The text supplied to the contras also advised the use of professional criminals to perform unspecified "jobs," and the use of provocation at mass demonstrations to produce violence on the part of the authorities so as to make "martyrs."²²

19. Mackenzie Weinger, *What Finland Can Teach the West About Countering Russia's Hybrid Threats*, WORLD POLITIC REVIEW (Feb. 13, 2018) <https://www.worldpoliticsreview.com/articles/24178/what-finland-can-teach-the-west-about-countering-russia-s-hybrid-threats>, (explaining that "[i]n the Cold War era, Finland pursued a process known as 'Finlandization,' which involved trying to accommodate the Kremlin while consolidating ties with the West. During this period, the Finns got an early taste of Moscow's disinformation efforts as Soviet schoolchildren were inculcated with the narrative that Finland was the aggressor in the Winter War.").

20. *Id.* (explaining "[a] website with a Russian '.ru' domain was quickly created for 'The Helsinki Center of Excellence for Countering Hybrid Threats,' an obvious imitation of the Hybrid CoE. When the Hybrid CoE debuted its logo – a simple arrangement of nine blue and red dots – this Russian website posted a similar one featuring a Finnish coat of arms. The contents of the imposter website included a pamphlet titled, 'EU's Infowar on Russia: Putting in Place a Totalitarian Media Regime and Speech Control.'").

21. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U. S.), Judgment, 1986 I.C.J. Rep. 14, 21, ¶ 20 (June 27), <https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf> (explaining "[t]he armed opposition to the new Government in Nicaragua, which originally comprised various movements, subsequently became organized into two main groups: the Fuerza Democrática Nicaragüense (FDN) and the Alianza Revolucionaria Democrática (ARDE). The first of these grew from 1981 onwards into a trained fighting force, operating along the borders with Honduras; the second, formed in 1982, operated along the borders with Costa Rica.").

22. *Id.* ¶ 122 at 68-69; *see also id.* ¶ 118 at 66 (explaining that "[f]urthermore, a section on 'Selective Use of Violence for Propagandistic Effects' begins with the words: 'It is possible to neutralize carefully selected and planned targets, such as court judges, *mesta* judges, police and State Security officials, CDS chiefs, etc. For psychological purposes it is necessary to take extreme precautions, and it is absolutely necessary to gather together the population affected, so that they will be present, take part in the act, and formulate accusations against the oppressor.' In a later section on 'Control of mass concentrations and meetings,' the following guidance is given

The content put into the term “hybrid warfare” or similar expressions vary greatly. However, when considering the legal challenges and “gaps” that arise when refuting “hybrid warfare,” it suffices to focus on the provided explanation of “hybrid warfare” and elaborate on key features. In the absence of a more suitable term, and because the “hybrid threat” and “hybrid warfare” terms are established both in the legal discourse and in the military and political debate, they will be used here.

A hybrid threat or warfare conducted by states in times of peace, crisis and armed conflict will impact not only the strategic (political) level but also the operational and lower tactical military levels and, in addition, test the general resilience of the civilian society and, in particular, the robustness of civilian authorities, agencies and law enforcement by police.

To adapt to this change, NATO’s deterrence, defense and reassurance policies have changed as well.

III. SPECIFIC TREATY LIMITATIONS: THE FOUNDING ACT BETWEEN NATO AND RUSSIA 1997

In principle, both Russia and the NATO alliance should still give mutual effect to the shared principles of the Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation signed on May 27, 1997 in Paris (Founding Act 1997).²³ At the political, and arguably the legal (treaty law) level, the Founding Act 1997 imposes express obligations on the parties that they, “based on an enduring political commitment undertaken at the highest political level, will build together a lasting and inclusive peace in the Euro-Atlantic area on the principles of

(*inter alia*): ‘If possible, professional criminals will be hired to carry out specific selective “jobs.” Specific tasks will be assigned to others, in order to create a “martyr” for the cause, taking the demonstrators to a confrontation with the authorities, in order to bring about uprisings or shootings, which will cause the death of one or more persons, who would become the martyrs, a situation that should be made use of immediately against the régime, in order to create greater conflicts.’”). The court found that this US psychological information campaign was “contrary to general principles of humanitarian law,” however, the acts that may have been committed following the psychological operation were not imputable to the US). *Id.* ¶ 292(9) at 148.

23. In addition to the Founding Act 1997, the NATO states and Russia are bound by other treaties’ obligations such as the Vienna Document 1994 of the Negotiations on Confidence- and Security-Building Measures, Vienna, Austria, 1994, the Conventional Armed Forces in Europe Treaty, Paris, November 19, 1990 and the subsequent Vienna Document 2011 on Confidence- and Security-Building Measures, Organization for Security and Co-operation in Europe, Vienna, Austria, November 30, 2011. See Org. for Sec. & Coop. in Europe [OSCE], *Vienna Document 1994 of the Negotiations on Confidence- and Security-Building Measures*, DOC.FSC/2/95 (Nov. 28, 1994); see also Org. for Sec. & Coop. in Europe [OSCE], *Conventional Armed Forces in Europe Treaty* (CFE Treaty), (Nov. 19, 1990), <https://www.osce.org/files/f/documents/4/9/14087.pdf>; Org. for Sec. & Coop. in Europe [OSCE], *Vienna Document 2011 on Confidence- and Security-Building Measures*, FSC.DOC/1/11 (Nov. 20, 1990).

democracy and cooperative security. NATO and Russia do not consider each other adversaries. They share the goal of overcoming the vestiges of earlier confrontation and competition and of strengthening mutual trust and cooperation. This act reaffirms the determination of NATO and Russia to give concrete substance to their shared commitment ...”²⁴

The most important passage of the Founding Act 1997 regarding NATO’s deterrence, reassurance and countermeasures is contained in paragraph IV. Political-Military Matters:

NATO reiterates that in the current and foreseeable security environment, the Alliance *will carry out its collective defence and other missions* by ensuring the necessary interoperability, integration, and capability for reinforcement *rather than by additional permanent stationing of substantial combat forces...* In this context, reinforcement may take place, when necessary, in the event of defence against a threat of aggression and missions in support of peace consistent with the United Nations Charter ... Russia *will exercise similar restraint* in its conventional force deployments in Europe.²⁵

Whether the Founding Act 1997 merely expresses a political commitment to which states are legally free to respond, or whether it entails binding treaty obligations according to public international law, which may be breached, is a question of interpretation taking into account the wording, object and purpose, context and circumstances at the time of the drafting of the text.²⁶ Decisive for the question of whether states have entered into binding treaty obligations is not the form or title of the statements made but whether states in a written form have agreed on certain rights and obligations.²⁷

24. Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation, NATO-Russ., May 27, 1997, 36 I.L.M. 1006 [hereinafter Founding Act 1997].

25. *Id.* at 1014.

26. Aegean Sea Continental Shelf Case (Greece v. Turk.) Judgment, 1978 I.C.J. 3, ¶ 96 (Dec. 19) (“On the question of form, the Court need only observe that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement (cf. Vienna Convention on the Law of Treaties, arts. 2-3, 11, May 23, 1969, 18232 U.N.T.S. 332 [hereinafter VCLT 1969]) ... On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up”).

27. See VCLT 1969, *supra* note 26, art. 2, ¶ 1; see also Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.) Judgment, 1994 I.C.J. 112, ¶¶ 23, 25 (July 1, 1994) (“The Court would observe, in the first place, that international agreements may take a number of forms and be given a diversity of names ... [T]he Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points

The introductory phase of the Founding Act 1997 refers to an “enduring political commitment,” and the Act entails some more soft statements such as “will work together” and “will help to strengthen,” which *on the one hand*, points to a political undertaking only.²⁸ *On the other hand*, the title “Founding Act” as opposed to a Memorandum of Understanding (MOU), a Letter of Intent or the like, is an important aspect of the agreement.²⁹ Moreover, the closing statements list certain concrete actions and obligations and, hence, rights stemming from these obligations. This indicates a clear intent by the drafters for the parties to be mutually committed and legally bound by the agreement. Even though the legal nature of the Founding Act 1997 has a mixture of both legal and political content, the Founding Act 1997 qualifies as a treaty under international law. This legally binds both parties, the member States of NATO and Russia. As far as it is known, neither the NATO alliance nor Russia has disputed the binding treaty nature of the Founding Act 1997 but rather emphasized the opposite.³⁰

The political and/or legal character of the Founding Act 1997, its content and possible breach can, nevertheless, be disputed and form part of the hybrid information campaign justifying one’s own actions in the sense of “lawfare.” This has *de facto* materialized and recently became evident by the Russian address to the United Nations (UN) in April 2019.

of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement”).

28. Founding Act 1997, *supra* note 24, at 1008 (“Proceeding from the principle that the security of all states in the Euro-Atlantic community is indivisible, NATO and Russia *will work together* . . . NATO and Russia *will help to strengthen*”).

29. *See id.* at 1008-9, 1014-15 (explaining “[t]he present Act reaffirms the determination of NATO and Russia to give concrete substance to their shared commitment . . . To achieve the aims of this Act, NATO and Russia will base their relationship on a shared commitment to the following principles . . . The member States of NATO and Russia will use and improve existing arms control regimes and confidence-building measures to create security relations based on peaceful cooperation. . . NATO and Russia will take the proper steps to ensure its implementation is in according with their procedures”).

30. *See* Statement of the Federation Council of the Federal Assembly of the Russian Federation on the destructive policies of the North Atlantic Treaty Organization (NATO) since its establishment in 1949, at 3, Apr. 10, 2019; Permanent Rep. of Russian Fed’n to the U.N., Letter dated Apr. 16, 2019 from the Permanent Rep. of the Russian Fed’n to the U.N. addressed to the Secretary-General, U.N. Doc. A/73/862-S/2019/331 (May 3, 2019) [hereinafter Russian Federation Council decision 2019] (explaining that “contrary to their commitments, NATO member States placed a premium on expanding eastward, increasing their activities in former Soviet countries and supplanting the principle of universal, equal and indivisible security by building security for themselves at the expense of the security of other States”).

A. *The NATO Legal Narrative: Justification and Vulnerability*

From the NATO Member States' point of view, the Russian aggressive foreign policy, evidenced by the will to use military power and commit a breach of long-standing principles of international law by the illegal "annexation" of Crimea in 2014, and more generally, the Founding Act 1997 have sent nations and the NATO alliance back into times resembling the Cold War.³¹ The Ukraine development is symbolic in this regard. The Russian hybrid threat and warfare against Ukraine led, *on the one hand*, to a suspension of the signing of an association agreement with the European Union and a closer approximation to NATO and, instead, a choice of closer ties to Russia and the Eurasian Economic Union. This, *on the other hand*, sparked the Euromaidan or the "Ukrainian Spring" – a wave of demonstrations and civil unrest in Ukraine – in November 2013 with public pro-EU protests in Maidan Nezalezhnosti (Independence Square) in Kiev. This finally meant the fall of the Ukrainian government, then a counter reaction by Russia in Crimea and provoked unrest and crisis in East Ukraine to consolidate Russian strategic interests. In a possible similar Belarussian scenario or a political move of Finland away from neutrality towards the NATO alliance, the likelihood of an unconventional and conventional Russian hybrid threat or warfare seems high with the current security situation in 2020.³²

31. The difficulty of a Russian and NATO cooperation also became evident by the negotiation and ratification of the Agreement Among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces, Brussels, June 19, 1995 (entered into force on Jan. 13, 1996) [hereinafter NATO-PfP SOFA 1995], where the Russian ratification was accompanied by statements on a certain understanding of the provisions of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, London, June 19, 1951 (entered into force Aug. 23, 1953) [hereinafter NATO SOFA], which were not accepted and regarded legally as reservations to the Agreement by NATO countries. *See* Agreement Among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces, June 19, 1995, (entered into force on Jan. 13, 1996), U.S. DEPT OF ST., <https://www.state.gov/wp-content/uploads/2019/05/210-NATO-PfP-SOFA-Status-Table-website-19.pdf>. (last updated Apr. 9, 2019).

32. Weinger, *supra* note 19 (explaining that "[t]he Russian efforts go beyond negative media stories. As the world is now well aware, Kremlin-linked information operations include bots, trolls, hackers and provocateurs that target individual countries and populations both covertly and overtly. Their specific tactics include breaking into computer systems and trying to weaponize leaks of private emails and other sensitive, potentially embarrassing material, as has been seen during recent elections in the U.S. and France. These tactics have also been used in Finland. In fact, operations against Finland have ramped up in recent years as Moscow has aimed to prevent Helsinki from taking steps that would move it closer to the West, such as strengthening defense cooperation with European allies or even joining NATO").

These Russian hybrid warfare campaigns can to some degree – and admittedly with decisive differences – be seen as a mirror of NATO’s past operations since 1999. Regarding the Russian occupation of Crimea it seems to be without any doubts that there is sufficient evidence that the actions by the Russian military personnel and/or paramilitary forces, satisfies the “sufficient gravity” requirement,³³ therefore the initial and self-evident, continued occupation of Crimea would constitute an “act of aggression.”³⁴ Legally speaking, this creates an unlawful alien occupation and, thus, an IAC even if it is met with limited to no resistance.³⁵

A plausible – but still clearly ungrounded – justification by Russia would be to argue a humanitarian intervention for the protection of the Crimean

33. G.A. Res. 3314 (XXIX), at art. 2 of Annex (Dec. 14, 1974).

34. *Id.* art. 3 ¶¶ a, g. Whether this resolution in its entirety constitutes (binding) customary international law is, however, disputed. In *Nicar. vs. U.S.*, the ICJ found that at least Article 3(g) has this character: “This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.” *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.)*, Judgment, 1986 I.C.J. Rep. 14, 53-54, ¶ 93 (June 27). The old UN 1974 definition (G.A. Res. 3314, *supra* note 32, Art. 1) literally formed the basis of Article 8 Rome Statute of International Criminal Court (ICC Statute), without any novelties. *See* Rome Statute of the Int’l Criminal Ct, entered into force July 1, 2002, 2187 U.N.T.S. 90, 94-98.

35. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter *GC I*]; *see also* Geneva Convention for the Amelioration of the Condition Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter *GC II*]; Geneva Convention Relative to the Treatment of Prisoners of War art 2, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter *GC III*]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter *GC IV*] (“[T]o all cases of partial or total occupation of the territory of a High Contracting State, even if the said occupation meets with no armed resistance”); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art 1, ¶ 3, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *AP I*]. This is the Danish legacy of the Second World War, which was included in the GC I-IV with a view to the German occupation of Denmark. GEOFFREY S. CORN, VICTOR HANSEN, RICHARD B. JACKSON, CHRIS JENKS, ERIC TALBOT JENSEN & JAMES A. SCHOETTLER, JR., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 362-364 (2nd ed. 2019) (“[the] classic example of Denmark in World War II”). As it must be an “alien occupation” in the sense that the occupied state did not consent to the presence of foreign forces, it is debated whether the subsequent “forced” co-operation with the Danish government and authorities until 1943 could be viewed as a consent. The status of the conflict in Denmark under the LOAC until August 1943 is highly disputed. The prevailing view is that there was no state of “war” (armed conflict) before the date of August 29, 1943, where the co-operation ceased and the Danish government stepped down, but the conflict status ensued after. *See* WILLIAM ELDER VON EYBEN, *THI KENDES FOR RET: RETSOPGØRET EFTER BESÆTTELSEN* 15-17 (1968).

population, in which permissibility, *on the one hand*, is highly disputed from a legal standpoint and, *on the other hand*, was not at the time supported by circumstances ruling in Crimea.³⁶ The Kosovo intervention in 1999 by a NATO coalition of the willing states and the subsequent cases brought before the ICJ did show³⁷ how states, for humanitarian purposes, can collectively act in the legal gray zone of *jus ad bellum* and successfully escape judicial verdict by the ICJ over their acts by rejecting consent to jurisdiction and relying on a lack of jurisdiction on various other grounds.³⁸ Hence, the ICJ option was to make the general statement: "Whether or not the Court finds that it has jurisdiction over a dispute, the parties remain in all cases responsible for the acts attributable to them that violate the rights of other States."³⁹ If the states being part of the 1999 NATO coalition of the willing should act as law-abiding states based on democratic and rule-of-law values, they should have stood up legally to their "humanitarian" acts and consented to the ICJ jurisdiction instead. This was clearly not the case in any of the proceedings.⁴⁰

Another far-fetched justification would be the right of self-determination by the Crimean population supported by the subsequent Russian-controlled and much criticized referendum held on March 6, 2014, and the subsequent alleged annexation. The fact that a local population or a majority thereof

36. See for an overview CORN ET AL., *supra* note 35, at 29-31. The question of the permissibility of a humanitarian intervention without a UN mandate is highly disputed in doctrine, and the literature is voluminous.

37. See *id.* at 29-30 (providing a precise account of the facts and connected UNSC resolution surrounding the 11 weeks long NATO bombing campaign in Kosovo as of March 1999).

38. On more occasions, the humanitarian intervention in Kosovo in 1999 by a NATO coalition has been brought to the International Court of Justice by Yugoslavia and, subsequently, Serbia and Montenegro, but the court has been forced to reject the cases due to lack of consent or other grounds for jurisdiction. See generally *Legality of Use of Force (Yugoslavia v. Spain)*, Order, 1999 I.C.J. 761, ¶¶ 30, 34 (June 2) (denying jurisdiction due to lack of compulsive jurisdiction under Article 36(2) ICJ Statute, absence of consent by Spain pursuant to Article 38(5) ICJ Rules of Court, adopted April 14, 1978, and inapplicability of Article IX of the Genocide Convention, which in Article IX provides for the jurisdiction of the ICJ).

39. See *Legality of Use of Force (Yugoslavia v. Fr.)*, Order, 1999 I.C.J. 363, ¶ 36 (June 2); see also *Legality of Use of Force (Serb. & Montenegro v. Fr.)*, Judgment, 2004 I.C.J. 575, ¶ 115 (Dec. 15). In both these cases and in other similar proceedings against states participating in the 1999 Kosovo intervention as well, the ICJ made this statement. See *Yugoslavia v. Fr.*, 1999 I.C.J. 374, ¶ 36; see also *Serb. & Montenegro v. Fr.*, 2004 I.C.J. 619, ¶ 115; *Legality of Use of Force (Yugoslavia v. U.S.)*, Order, 1999, I.C.J. 916, ¶ 31 (June 2).

40. See generally *Yugoslavia v. Fr.*, 1999 I.C.J. at 373, ¶ 30; see also *Yugoslavia v. U.S.*, 1999 I.C.J. at 925, ¶¶ 27-28 ("Whereas the United States observes that it "has not consented to jurisdiction under Article 38, paragraph 5, [of the Rules of Court] and will not do so" [and] [w]hereas it is quite clear that, in the absence of consent by the United States, given pursuant to Article 38, paragraph 5, of the Rules, the Court cannot exercise jurisdiction in the present case, even *prima facie*").

supported or voted for annexation of the occupied state does not change the conflict status and the illegality of the annexation.⁴¹ Whatever the degree of legal unfoundedness, such alleged justifications are possible tools of a “lawfare” information campaign, that attempts to legitimize unlawful actions both legally and politically.

The concern of a Russian military “hybrid” interference in the Baltic region has been voiced continuously in Baltic military circles since the beginning of the 2000s⁴² and may have already been more than just fictitious.⁴³ The frontline of the hybrid campaign is not in central Europe but mainly at the eastern flank of NATO or potential future alliance and/or EU Member States.⁴⁴ After the conflicts and consolidation – seen from the Russian point of view – in the southwest (North and South Caucasus), the midwest (Crimea and East Ukraine) and the still official pro-Russian buffer state of Belarus, the northwestern area in the Baltic states and Poland, including the Russian Kaliningrad enclave, became the obvious focal area of interest. Similarly, the response from NATO was an increased deterrence and reassurance posture allowing for the defense of the highly vulnerable Baltic flank and the narrow corridor to Poland, in particular, the so-called Suwalki gap.

41. See ICRC, 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, Art 2, ¶ 289 (Tristan Ferraro & Lindsey Cameron eds., 2nd ed. 2016) (“The fact that the occupation does not meet with armed resistance does not mean that the Occupying Power is “accepted” by the local population and that the latter does not require legal protection. . . The fact that part of the local population may welcome the foreign forces has no impact on the classification of the situation as an occupation”).

42. During the work of the Danish Advisory and Training Staff (DATS) from 2004-2014 the topic was repeatedly raised by Baltic staff personnel, and a request was made for exercising such conflict scenarios during the build-up and education of the Baltic land forces; the DATS program was set up by Denmark in 2004 in accordance with the Memorandums of Understanding with the three Baltic states. The DATS consisted of a Danish brigade staff posted either permanently or temporarily in Riga, Latvia and subsequently in Haderslev, Denmark. The training activities of DATS were officially closed at the Commanders Conference held on October 22-23, 2014 in Riga, Latvia, where these activities were taken over by what was previously known as the Danish Division, now known as the Multinational Division North Headquarters (MNDN) in Riga, Latvia and Karup/Slagelse, Denmark. From 2007-2014, the present author was part of the DATS as the operation officer, intelligence officer, and LEGAD. See Henrik Laugesen, Philip Christian Ulrich & Nikolaj Slot Simonsen, DANISH ADVISORY AND TRAINING STAFF (DATS): ERFARINGSOPSAMLING OG PRÆSENTATION [EXPERIENCE COLLECTION AND PRESENTATION] (2012) (Neth.); see also RAND Report Russia’s Hostile Measures 2020, *supra* note 2.

43. Sari, *supra* note 17, at 161-62, based on RICHARD SHIRREFF, WAR WITH RUSSIA: AN URGENT WARNING FROM SENIOR MILITARY COMMAND (2016).

44. See PATRICK CULLEN & NJORD WEGGE, MCDC COUNTERING HYBRID WARFARE PROJECT: COUNTERING HYBRID WARFARE (Sean Monaghan ed., 2017).

B. *The Russian Legal Narrative: Justification and Exploitation*

About two years after the conclusion of the Founding Act 1997, Russia evidenced the military action by the NATO coalition – the 1999 Kosovo intervention – in the heart of Europe, which shaped the political and security environment for the future. Seen from the Russian perspective, it was a blatant breach of international law and of the Founding Act 1997,⁴⁵ rejecting the role of NATO: “to enter the twenty-first century in the uniform of a world policeman. Russia will never agree to this.”⁴⁶ In addition, the stationing of NATO forces in Eastern Europe and in the former Soviet area is not only regarded as an aggression against the Russian perceived area of interest, but could, from a Russian perspective, be seen as a violation of the Founding Act 1997.⁴⁷ The enhanced Forward Presence of NATO forces close to the Russian border amount to four battalion-size multinational units, which rotate on a regular basis but still constantly consist of approximately 4,500-6,000 troops, plus additional rotational units and new permanent Headquarters.⁴⁸ To argue

45. See Permanent Rep. of the Russ. Fed’n to the U.N., Letter dated Mar. 30, 1999 to the Secretary-General, paras. 3-4 at 4, U.N. Doc. A/53/888 S/1999/358 (Mar. 30, 1999) (writing that, “to consider the question of the advisability of the maintenance in force for the Russian Federation of the Founding Act on Mutual Relations, Cooperation and Security between the Russian Federation and the North Atlantic Treaty Organization in view of the blatant violation by NATO of the provisions of that document, and to recall temporarily the permanent representative of the Russian Federation to NATO; 4. To demand the holding of a special session of the General Assembly to consider the question of aggression against a State Member of the United Nations and the blatant violation of the Charter of the United Nations by the member States of NATO”).

46. See Permanent Rep. of the Russ. Fed’n to the U.N., Letter dated Mar. 31, 1999 from the Permanent Rep. of the Russ. Fed’n to the U.N. addressed to the Secretary-General of the Conf. on Disarmament transmitting a statement made by Mr. B.N. Yeltsin, President of the Russian Federation, on 24 March 1999 in connection with the military action by NATO in Yugoslavia, at 2, U.N. Doc. CD/1583 (Apr. 1, 1999) (“NATO’s military action against sovereign Yugoslavia, which is nothing other than naked aggression, has caused profound indignation in Russia. The United Nations Security Council alone has the right to decide which measures, including force, should be taken to uphold or restore international peace and security. The Security Council has taken no such decisions concerning Yugoslavia. Not only the Charter of the United Nations, but also the Founding Act on Mutual Relations, Cooperation and Security between Russia and NATO, have been breached. A dangerous precedent has been set for the revival of the policy of imposing one’s will by force, and the entire modern international legal order has been jeopardized. In fact, what is involved is an attempt by NATO to enter the twenty-first century in the uniform of a world policeman. Russia will never agree to this”).

47. Founding Act 1997, *supra* note 24, para. IV at 8 (“...rather than by additional permanent stationing of substantial combat forces”); see *supra* Part III; and see also, *NATO Breaks Treaty to Establish Permanent Forces in Baltic, Military & Intelligence*, SPUTNIK (last updated May 29, 2015, 14:47 GMT), <https://sputniknews.com/military/201505281022656291>.

48. See generally DEREK E. MIX, CONG. RESEARCH SERV., R46139, ESTONIA, LATVIA, AND LITHUANIA: BACKGROUND AND U.S.-BALTIC RELATIONS 14 (2020) (detailing account of the enhanced Forward Presence forces as of Oct. 2019) [hereinafter U.S. CONGRESSIONAL RESEARCH 2020].

from the side of NATO that this is not a permanent stationing of troops, but rather rotational, seems legally less convincing and *de facto* circumventive.⁴⁹

The Russian legal narrative since then is best explained in the Russian address to the UN in April 2019 as a response to the recent NATO summit in Washington in April 2019:

The meeting of the North Atlantic Council held in Washington, D.C. on 3 and 4 April 2019 confirmed that confrontation with Russia was a key factor for NATO to consolidate its ranks and for the continued existence of NATO in principle. As a cold war relic, NATO demonstrates an inability to respond appropriately to real challenges and, in its current form, continues to justify its *raison d'être* by the need for protection from a mythical threat from the East. Every stage of NATO expansion inevitably leads to the creation of new dividing lines in Europe, threatening European and global security and the well-being of all nationals of Euro-Atlantic States without exception.

The myth of NATO as a defensive alliance was definitively destroyed during the NATO military operation launched against the Federal Republic of Yugoslavia on 24 March, 1999. In statement No. 143-SF, issued by the Federation Council of the Federal Assembly of the Russian Federation on 31 March, 1999 in connection with NATO aggression against the Federal Republic of Yugoslavia, that military operation was described as an act of aggression against a sovereign State.

Subsequent military operations in Afghanistan and Libya, in which many NATO member States were actively engaged, did not contribute towards resolving the internal conflicts and problems of those countries but rather led to chaos and to numerous civilian casualties. NATO member States seek to replace a world based on universal norms of international law agreed by consensus with a kind of "rule-based order," resulting in countless crises and conflicts in various regions of the world. . . .

Having stepped up its activities in the previously calm Baltic region, NATO is now ramping up its military presence in the Black Sea region. NATO's support to Georgia during the tragic events of August 2008 and now also to Ukraine . . . is encouraging new misadventures by the leadership of those two countries – confident of their impunity . . .

The Federation Council of the Federal Assembly of the Russian Federation believes that, in the light of this aggravated situation, dialogue between politicians and the military of Russia and NATO could play a positive role. It is regrettable that previously existing formats and channels of communication were terminated unilaterally by NATO. Cooperation has

49. *See id.* (describing how "NATO continues to resist calls to deploy troops permanently in countries that joined the alliance after the collapse of the Soviet Union due to concerns in some member states that doing so could violate the terms of the 1997 NATO-Russia Founding Act. Accordingly, the enhanced NATO presence has been referred to as *continuous but rotational* rather than *permanent*").

been completely discontinued in several areas of security for all Euro-Atlantic States. The destructive policy of ultimatums and sanctions being applied by NATO member States are a road to nowhere.⁵⁰

In short, from the Russian side, it was alleged *that* NATO has been in breach of the Founding Act 1997 by expanding to the east, *that* NATO has grossly violated international law and the UN Charter⁵¹ by conducting the 1999 Kosovo intervention and thereby definitively destroying the myth of NATO as a defensive alliance, *that* NATO is seeking to replace international law with a kind of “rule-based order” in various countries, *and that* NATO is deteriorating the security situation by stepping up its activities in, for example, the previously calm Baltic region.

All added together, from a Russian perspective this picture of NATO as an illegal aggressor would justify Russian countermeasures in the form of hybrid threats and warfare.

C. *Self-Imposed Legal Vulnerability and Risk of Hybrid Threats and Warfare*

The high-level political intention is clearly expressed in the Founding Act 1997 *in fine*:

[In order] [t]o enhance their partnership and ensure this partnership is grounded to the greatest extent possible in practical activities and direct cooperation, NATO’s and Russia’s respective military authorities will explore the further development of a concept for joint NATO-Russia peacekeeping operations. This initiative should build upon the positive experience of working together in Bosnia and Herzegovina, and the lessons learned there will be used in the establishment of Combined Joint Task Forces⁵²

With the current situation in 2020, this seems – at least for the foreseeable future – out of reach.

In this critical international security climate, it is vital that the NATO member States and the alliance as such, in addition to other states and defense alliances as well, which are facing current or possible hybrid threats and warfare, carefully consider whether their own positions and acts are legally justified and defensible, and whether they ultimately are ready to stand trial for those positions and acts. The best defense against a hybrid information campaign and propaganda “lawfare” is to uphold the international rule of law strictly by own conduct and statements.

50. Russian Federation Council decision 2019, *supra* note 30, at 3-5.

51. U.N. Charter art. 1.

52. Founding Act 1997, *supra* note 24, pt. I at 9.

If this is not done states' democratic and rule-of-law-based values will be undermined. A critical opposition at home and abroad will not just be likely, but almost certain. The legal vulnerabilities will likely be laid out in the open by the free press to be legally exploited as part of a hybrid information campaign and mirrored in future hybrid threats and warfare operations. This seems to be the most important self-imposed legal vulnerability, which seems widely overlooked and perhaps even ignored in the past. If not mitigated in the future, such vulnerability will increase the risk of hybrid threats and warfare and constitute a critical obstacle for countering such risks and building legal resilience.

IV. POSSIBLE RESPONSES: THE NATO DETERRENCE, REASSURANCE AND COUNTERMEASURES

The transformation of NATO, which since the end of the Cold War and until approximately 2014 has had the principal focus on operations "out of area," lead to a re-focus on "in area" activities, deterrence and reassurance measures to counter hybrid threats and warfare.⁵³ This raises a number of well-known but also new legal questions.⁵⁴ Before these are addressed in detail, *infra* Part V, the current NATO responses and the principal imbalance between law-abiding states and illegal acting states and non-state actors should be described and emphasized to build the foundation for the legal analysis and the prospects of building legal resilience.

A. Oversight of NATO Deterrence, Reassurance and Countermeasures

With the changed European security situation, the continued credibility of the collective self-defense guarantee in Article 5 of the NATO Treaty required new deterrence and reassurance actions.⁵⁵ The Article 5 of the NATO Treaty's ultimate security guarantee of the alliance will only be the last option in a long chain of measures, which all depend on *consensus* within

53. See Mário Nicolini & Jakub Janda, "In the Area or Out of Business:" Building Resilience to Hybrid Attacks, 25 POL. Q. INT'L AFF. 77 (2016).

54. Sascha-Dominik Bachmann & Gerhard Kemp, Aggression as "Organized Hypocrisy?" – How the War on Terrorism and Hybrid Threats Challenge the Nuremberg Legacy, 30 WINDSOR Y.B. ACCESS TO JUST. 235, 253 (2012) ("The repercussions for international lawyers in terms of possible responses to such challenges are significant and have not yet been discussed in terms of their full possible impact for the way we define war and peace within the concept of armed attack and individual and collective self-defence in terms of Articles 51, 2 (4) United Nations Charter, Article 5 NATO Treaty etc").

55. North Atlantic Treaty art. 5, Apr. 4, 1949, TIAS 1964, 34 U.N.T.S. 243.

the NATO alliance.⁵⁶ The application of this chain of measures is conditioned sufficiently and timely on a well-functioning political, operational and legal framework.

The reaction of NATO to a changed security environment after 2014 was a Readiness Action Plan (RAP) designed to ensure that the alliance is ready to respond swiftly and firmly to new security challenges from the east and south.⁵⁷ Since the NATO alliance states reduction and built-down of military capacities based on the Founding Act 1997, the RAP, instigated at the 2014 Wales Summit, constitutes a decisive change and the most significant reinforcement of NATO's collective defense in all three domains (air, sea and land) since the end of the Cold War.⁵⁸

The deterrence and reassurance measures include, *inter alia*, multinational Base Line Activities and Current Operations (BACO), air policing and increased exercise and training in areas, which serve as a tripwire for an effect on and actions by NATO member States. In addition, the NATO command structure has been changed and reinforced.⁵⁹ In particular, according to online or public information available, the Headquarters Multinational Corps Northeast (HQ MNC-NE) has become the NATO land headquarters responsible for North-East Europe, including the Baltic region. Since June 2017 (CREVAL Saber Strike 2017), they have been operating as a High-Readiness Force Headquarters and are stated to be fully trained to react at very short notice and take charge of NATO allied operations as a Land Component Command. As such, HQ MNC-NE execute command and control over the NATO ground troops already deployed on the eastern flank of the NATO alliance, specifically in Estonia, Latvia, Lithuania, Poland, Slovakia and Hungary.⁶⁰ The NATO ground forces include two

56. *Enlargement*, NATO, https://www.nato.int/cps/en/natohq/topics_49212.htm (last updated May 5, 2020)(discussing the recent enlargement of NATO, which consists of 30 member States with North Macedonia being the latest to join as of March 27, 2020. Bosnia and Herzegovina were invited to join the Membership Action Plan (MAP) in April 2010. At the 2008 Bucharest NATO Summit, the Allies agreed that Georgia and Ukraine will become members of NATO in the future).

57. Nicolini & Janda, *supra* note 53, at 78.

58. *Readiness Action Plan*, NATO, https://www.nato.int/cps/en/natohq/topics_119353.htm (last updated March 23, 2020).

59. *See id.* (noting the Multinational Div. Se. Headquarters (HQ MND-SE) in Bucharest, Rom., achieved Full Operational Capability (FOC) on Mar. 22, 2018); *see also Multinational Divisions*, NATO, <https://mncne.nato.int/forces/divisions> (last visited Nov. 7, 2020) (noting the Multinational Div. Ne. Headquarters (HQ MND-NE) in Elbląg, Pol., reached FOC on Dec. 6, 2018; and the Multinational Div. N. Headquarters (HQ MND-N) were established by the Framework Nations in Mar. 2019).

60. *See* Thomas Blankenburg, Chief LEGAD, MNC NE, *Rechtsberatung bei multinationalen Verbänden – Erfahrungen aus der Praxis*, in 41 FORUM INNERE FÜHRUNG, MULTINATIONALITÄT

Multinational Division Headquarters (North East and North), four enhanced Forward Presence battlegroups (eFP forces) and six NATO Force Integration Units (NFIUs).⁶¹ If need be, HQ MNC-NE are ready to command and control many more, including the NATO Response Force (NRF) and since the NATO 2014 Wales Summit its flagship, the spearhead force known as the Very High Readiness Joint Task Force or VJTF Brigade.

To further support its deterrence and reassurance measures, NATO has strengthened its cooperation and coordination with partners such as Finland, Sweden, Ukraine and the European Union (EU) to counter hybrid threats and warfare. Moreover, separate multi-national defense cooperation have been established in 2018 with particular focus on Northern Europe and the Baltic area in the form of the UK led Joint Expeditionary Force (JEF) consisting of a pool of high-readiness forces from Denmark, Estonia, Finland, Latvia, Lithuania, the Netherlands, Norway and Sweden capable of countering “sub-threshold” hostile activity. The JEF came out of a shared concern that Russia’s more aggressive posture, since acting against Ukraine in 2014 and persistent malign influence operations designed to weaken western societies, would pose a serious challenge to the security of Northern Europe.⁶²

In addition, NATO Centers of Excellence (CoE) have been built up in cooperation with partner nations, such as the European Centre of Excellence for Countering Hybrid Threats, Helsinki, the Strategic Communications Centre of Excellence, Riga, the Cooperative Cyber Defence Centre of Excellence, Tallinn and the Energy Security Centre of Excellence in Vilnius.

A comprehensive approach utilizing the knowledge of Centers of Excellence and focusing not mainly on military deterrence and reassurance but also on improving political, media and legal resilience will be the most effective path to counter a well-organized and high-intensive hybrid campaign.⁶³ In particular, the internal security and resilience in states, which

UND INTEGRATION IM MILITÄRISCHEN BEREICH 219 (Sebastian Graf von Kielmansegg et al. eds., 2018) (Ger.) (discussing MNC NE tasks, LEGAD organization and related legal issues).

61. NATO’s enhanced Forward Presence is made up of four battlegroups in Estonia, Latvia, Lithuania and Poland, which battlegroups are multinational and combat-ready with the purpose of demonstrating the strength of the transatlantic bond and consist of approximately 1,100-1,500 troops each. See RAND Report Russia’s Hostile Measures 2020, *supra* note 2, at xviii-xix. The first six, now increased to eight, NATO Force Integration Units (NFIUs) – which are small headquarters – were established in September 2015 in Central and Eastern Europe with the task of facilitating readiness and the rapid deployment of forces. The last two NFIUs in Hungary and Slovakia were inaugurated on Nov. 18, 2016 and Jan. 24, 2017, respectively.

62. *UK-led Joint Expeditionary Force*, MINISTRY NAT’L DEF. REP. LITH., https://kam.lt/en/international_cooperation_1089/jef.html. (last visited Aug. 28, 2020).

63. Nicolini & Janda *supra* note 53, at 80 (“As NATO gears up for its next summit, the Alliance’s vulnerabilities must be seen and addressed in a truly comprehensive manner. What is sorely missing is an appropriate political-military framework highlighting the internal security dimension of the challenges that NATO confronts in the post-Crimea world. Military capabilities,

are the main targets of the hybrid threat or warfare, require not only military flexible responses but also a political possibility to react or be pro-active within the national and international legal framework.

B. *The Imbalance Between Law-Abiding States and Illegal-Acting States – A Legal Vulnerability*

One of, or perhaps the most vital challenge when countering a hybrid threat or warfare described above is the difference in the strategic and political decision-making process and the adherence or systematical non-adherence to the rule of law both internally and externally.⁶⁴ This creates an imbalance between, *on the one hand*, illegally acting states or non-state actors and, *on the other hand*, in principle law-abiding states and alliances, where the legal vulnerabilities of the latter group of states are exploited and often the main target area of a hybrid campaign. The disinformation, fake news and psychological media campaigns are instrumental in this regard.⁶⁵

The target states of hybrid campaigns are often democratic countries based on, *inter alia*, a fundamental rule of law in society, a free press and compliance with international and domestic HRL. In principle, these and other fundamental values are valid and protected at all times and may only be derogated from in exceptional circumstances such as emergency, crisis and armed conflict, when strict legal conditions are met or the special regime of the LOAC partly takes over. Even in cases of an armed conflict – a Non International Armed Conflict (NIAC) or an international state-to-state armed conflict (IAC) – the majority and convincing view is that the human rights law regime still applies and complements the *lex specialis jus in bello* regime, where possible and appropriate.⁶⁶ Henceforth, in case of conflict, the LOAC

while essential, are only one part of the appropriate response. Indeed, a classical military attack by Russia is neither the most likely nor the most lethal threat to NATO . . . It is in the Baltics, with large Russian-speaking minorities that are prone to outside manipulation, that Putin is likely to turn up the dial on hybrid war. Counting on Russia-friendly NATO nations, and relying on the fact that Russia's involvement may be difficult to prove, Putin's Russia will seek to prevent the invocation of Article 5 when requested by the attacked nations").

64. See *supra* Part II on hybrid threats and warfare and its exploitation of legal gray-zones or "gaps" and – in some cases – intentional violation of international law.

65. See Sascha-Dominik Bachmann & Håkan Gunneriusson, *Russia's Hybrid Warfare in the East: The Integral Nature of the Information Sphere*, 16 GEO. J. INT'L AFF., 198 (2015).

66. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, 240, ¶ 25 (July 8), <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>. (stating "[t]he Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, . . . In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities").

as *lex specialis* will prevail.⁶⁷ In particular, the peacetime crisis situations, in areas covered by a NIAC but where no or less intensive hostilities take place and even in an IAC, which extend to a peaceful alien occupation, the human rights law regime will be the predominant body of law applicable.⁶⁸

The “attacking” states or non-state actors using the hybrid tool and methods are often autocratic states or illegally acting non-states parties, where activities and conduct in violation of HRL and international law, including the LOAC, are done either overtly or covertly. For these states, the rule of law in society, a free (and not state-controlled and influenced) press, compliance with HRL and the rights of individuals as against the state authorities are values of far less importance, especially when compared to the interests of the state as such and its strategic political goals. The principal focus by such states acting as hybrid threat or warfare aggressors is either to conceal their “illegal” operations or justify these as legitimate reactions or humanitarian interventions for the better good of the people concerned. For some illegal non-state organized actors, blatant violations of HRL, international and domestic laws are an integrated overt part of their *modus operandi*. This includes violent and radical Islamic groups like Al Qaeda and its main successor first appearing in 2013, the Islamic State in Iraq and the Levant (ISIL), also called Islamic State in Iraq and Syria (ISIS), and, since June 2014, just the Islamic State (IS).⁶⁹

Compare Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 178, ¶ 106 (July 9), with CORN ET AL., *supra* note 35, at 74-76, and GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 23 (2d ed. 2016), and YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 27 (3d ed. 2016).

67. The strict *lex specialis* view that the LOAC applies, excludes the entire HRL as traditionally maintained by the US, which has been softening in line with the ICJ complementary approach. See SOLIS, *supra* note 66, at 28-29; see also *id.* at 28: “... the U.S. position has, without announcement, softened perceptibly;” *id.* at 29: “a dramatic shift”; CORN ET AL., *supra* note 35, at 75: “Recently, the U.S. position ... has evolved, with an acknowledgement that while the LOAC may be controlling where it specifically addresses an issue, human rights treaties can be applicable in situations of armed conflict where the LOAC is silent.”

68. See generally *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, 243, ¶ 216 (Dec. 19), <https://www.icj-cij.org/public/files/case-related/116/116-20051219-JUD-01-00-EN.pdf> (referring to *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 66, “It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable ‘in respect of acts done by a State in the exercise of its jurisdiction outside its own territory’, particularly in occupied territories”).

69. See *Islamic State in Iraq and the Levant*, BRITANNICA, <https://www.britannica.com/topic/Islamic-State-in-Iraq-and-the-Levant> (last visited Dec. 15, 2020); see also Joyce Chempkemoi, *Where is the Levant?*, WORLDATLAS (July 24, 2018), <https://www.worldatlas.com/articles/where-is-the-levant.html> (the historical term “Levant” denotes a vast geographical region situated in the Eastern Mediterranean, which has no fixed boundaries and comprises of the

From a legal point of view, the means used in hybrid warfare may result in various violations with different degrees of gravity of domestic law, HRL and international law, including the *jus ad bellum* and *jus in bello*. The latter also entails obligations in peacetime and includes an obligation both to respect and “to ensure respect” in all circumstances. As stated by the ICJ in *Nicaragua*, a hybrid informational campaign must not encourage persons or groups to violate the LOAC:

The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances,” since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in *Nicaragua* to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.⁷⁰

The feature of a “Hybrid Threat or Warfare” leads to an imbalance between (in principle) law-abiding states *on the one hand* and illegal acting states and/or non-state actors *on the other hand*, although admittedly, the question of the *de lege lata* content of international law raises many complex challenges, “gaps” and gray zones. States can choose strictly to adhere to international law and apply a cautious interpretation thereof, including the *jus ad bellum* and *jus in bello*, to be on the “safe” side of the law. Another option is to operate in the legal gray zones of uncertainty or simply to disregard prevailing views and exploit legal uncertainties or “gaps.” The legal constraints (in terms of acts prescribed or commanded by law) and restraints (in terms of acts prohibited by law) or the uncertainty about the existence or absence thereof (gray-zones or gaps) decisively shape the possible instruments of power available in peace, crisis and times of an armed conflict, *inter alia*, when they can be used and the intensity by which they can be employed. The result is a palette of legal constraints, restraints, gray-zones and gaps, which creates unavoidable vulnerabilities within the *jus ante bellum* in peacetime and crisis when facing an adversary conducting an illegal hybrid campaign without such limitations.

countries and regions of Iraq, Syria, Lebanon, Cyprus, Turkey (Hatay Province), Israel, Jordan, and Palestine).

70. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.), Judgment, 1986 I.C.J. Rep. 14, 114, ¶ 220 (June 27).

V. LEGAL CHALLENGES OR “GAPS”

The main legal challenges or “gaps” for states being victims of a hybrid threat or warfare are – apart from the well-known “gray zones” of international law and international humanitarian law (LOAC) – the legal constraints and restraints in peacetime and crisis. This will test the legal resilience of democratic states or alliances of such states. These legal constraints and restraints will be present when a hybrid threat and warfare deliberately are conducted under the threshold for a NIAC or an IAC. This avoids any possible activation of individual or collective state self-defense under Article 5 of the NATO Treaty or other defense alliance treaties.⁷¹ A defense alliance confronted with a hybrid threat or warfare, in such a scenario below the threshold of an armed attack, will have to rely on peacetime cooperation and resilience regarding national law enforcement and crisis management.

For NATO, the principle of resilience is anchored in Article 3 of the NATO Treaty, which requires individual and collective military and civil preparation and defense planning to “resist [an] armed attack” since,

[i]n order to achieve the objectives of this Treaty more effectively, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist [an] armed attack.⁷²

Whereas the NATO Treaty is silent on defense measures against an aggression below the threshold of an armed attack, Article 6 of the Rio Pact 1947 covering the territory of American States addresses countermeasures in this and other situations which may endanger the peace as follows:

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which

71. North Atlantic Treaty, *supra* note 55; see Part I para. 3, Inter-American Reciprocal Assistance and Solidarity, Mar. 6, 1945 [hereinafter Act of Chapultepec]; see also Inter-American Treaty of Reciprocal Assistance, Rio de Janeiro art. 3, para. 1, Sept. 2 1947, [hereinafter The Rio Pact]; see also art. V, Security Treaty with US, Australia and New Zealand, Sept. 1951 [hereinafter ANZUS Pact]; see also the Southeast Asia Treaty Organization, Sept. 1954 (dissolved in 1977) [hereinafter SEATO Treaty].

72. See ANZUS Pact, *supra* note 71, art. 2 (discussing similar resilience principles); see also SEATO Treaty, *supra* note 71, art. 2.

should be taken for the common defense and for the maintenance of the peace and security of the Continent.⁷³

During the years of the Cold War, the overall resilience of the NATO state societies was well considered and comprehensively planned by joint military, civil emergency and civil defense preparations, which included the full spectrum of societies. However, even though legal interoperability, legitimacy and resilience have been considered during this period and are considered today, with the current hybrid threat and warfare more emphasis should be put on legal resilience. In particular, within state alliances such as NATO and partner nations, a coordinated and aligned or harmonized legal framework would increase resilience.⁷⁴ As the dynamics of hybrid threats and warfare evolve, so must the legal framework and resilience.⁷⁵

The main suggestion and argument presented here is that building legal resilience must be given high priority especially in democratic “rule of law”-based societies, *that* domestic law and HRL must be prepared and by possible derogations adapted to meet the legal challenges in crisis (emergency) situations, *that* multinational alliances require legal approximation and harmonization of domestic laws in peacetime, crisis and armed conflict *and that* alignment of views on important international law issues, where existing differences may decisively hamper the possibility of effectively countering “aggressions” in terms of hybrid threats and warfare,

73. The Rio Pact, *supra* note 71.

74. Nicolini & Janda, *supra* note 53, at 83 (explaining that “[t]his battle begins at home. The role of nations is central. All NATO members subscribed to the Washington Treaty, which includes the Article 3 commitment ... This commitment to resilience takes on a new meaning in our hyper-connected age. Each nation has to identify its own vulnerabilities to subversion, corruption, disinformation, economic pressure or cyberattack. It must monitor developments on a continuous basis and seek to close these vulnerabilities through democratic means. In other words, the realisation that NATO is under attack through hybrid means, and that it will need to activate a common response, must come from individual members”); *see also* Steve Hill & David Lemetayer, *Legal Issues of Multinational Military Operations: An Alliance Perspective*, 55 MIL. L. & L. WAR REV. 13, 23 (arguing that NATO should focus on both legal interoperability and “Building Legitimacy” as “NATO’s ability to conduct operations depends on the readiness of participation nations ... to maintain their support for those operations. It is essential in maintaining that support that NATO be seen as acting in accordance with its values. The legitimacy of NATO’s operations depends on adherence to law”).

75. Bachmann & Kemp, *supra* note 54, at 254 (“[c]oncluding, one can observe that Hybrid Threats, low threshold regional conflicts, as well as asymmetric conflict scenarios which have little in common with traditional 20th century warfare, will be more frequent in this century and will require means and ways of ‘flexible responsiveness’ through escalating levels of confrontation and assets deployed. Future military roles and operations taking place in so-called ‘steady state’ environment conflict scenarios will be more flexible in terms of choice of military assets and objectives, but also more frequent. The present concepts of ‘crisis management’ responses will develop further into more pronounced military roles and responsibilities of a more ‘dynamic’ nature.”).

should be made. This means that a greater emphasis should be placed on designing the *jus ante bellum* to cope with hybrid threats and warfare than in the past.

The legal issues for a hybrid campaign and for countering such a campaign are *first*, the well-known gray zones, *infra* V.B, which in particular includes the *jus ad bellum* threshold and justification and, furthermore, the threshold “trigger” for an armed conflict and the applicability of the *jus in bello*, either in a NAIC or an IAC. *Second*, some specific gray zones in terms of legal constraints and restraints crystalize in cases of hybrid threat or warfare, where the legality of a full-spectrum hybrid campaign and countermeasures against such a hybrid threat or warfare in times of peace, crisis or armed conflict is put to an ultimate test, *infra* V.C. Before the discussion of these issues, the following section, *infra* V.A, introduces a fourfold legal distinction to allow more focus on the legal framework before and after an armed conflict (war).

A. *A Legal Tetrachotomy: Jus ante Bellum, Jus ad Bellum, Jus in Bello and Jus post Bellum*

The traditional legal distinction developed during the 20th century is a dichotomy of the two legal regimes – the *jus ad bellum* (right to war) and the *jus in bello* (right in war).⁷⁶

By any legal discussion of the law applicable in the different situations of peace, NIAC or IAC, the distinction between *jus ad bellum* and *jus in bello* must be kept in mind. Even an illegal use of force by states contrary to *jus ad bellum* will activate the law governing the conduct of hostilities (*jus in bello*) and its protective regime in case the requirements for the existence of an armed conflict are satisfied. The two regimes of *jus ad bellum* and *jus in bello* are mutually independent. States can grossly violate the *jus ad bellum* but at the same time act in full compliance with the *jus in bello* and *vice versa*. The cardinal principle of distinction between *jus ad bellum* and *jus in bello* imposes equal obligations on all belligerents, that is, all sides to an armed conflict, regardless of a possible violation of the *jus ad bellum* by states or domestic (national) law of a state on which territory a NIAC takes place, must apply the LOAC.⁷⁷ This principle of “equality of belligerents” has, however, a decisive legal gap regarding the personal status of non-state actors in NIAC

76. Carsten Stahn, *Jus Post Bellum: Mapping the Discipline(s)*, 23 AM. U. INT’L L. REV. 311-12 (2008).

77. See Emily Crawford & Alison Pert, INTERNATIONAL HUMANITARIAN LAW 31-33 (Cambridge Univ. Press 2015); see also NICHOLAS TSAGOURIAS & ALASDAIR MORRISON, INTERNATIONAL HUMANITARIAN LAW, CASES, MATERIALS AND COMMENTARY 1 (2018); see expressly AP I, *supra* note 35.

situations, where governmental forces of the territorial state and per invitation foreign armed forces are involved. The state armed forces will be lawfully engaged in an internal armed conflict, whereas the opposing non-state actors face criminal prosecution for their acts even though conducted in full compliance with the LOAC.

According to the *jus ad bellum*, once an illegal initiated armed conflict comes to an end, the applicability of *jus in bello* ceases and the peacetime *jus post bellum* (right after war) sets in, which seeks a transfer of the situation from a state of armed conflict (war) to peacetime normality. However, such a difficult transfer to peaceful conditions governed by the *jus post bellum* in terms of the domestic law of the states concerned, crisis (emergency or martial) law and HRL will also reactivate the risk of hybrid threats and warfare in peacetime and crisis. This hybrid campaign was perhaps the main initiator and source of the armed conflict from the very beginning. The *jus post bellum* should, as such, include as an integrated part, the *lex pacificatoria*, the peace settlement and agreements. An important part of the *jus post bellum* is thus the preparedness to counter a continued or re-launched hybrid campaign and a robust legal resilience in this critical transformation phase.⁷⁸ In this regard, the legal challenges of the *jus post bellum* are therefore similar to those of the *jus ante bellum* (right before war), where the latter denotes the law applicable in peacetime or crisis prior to a possible armed conflict.⁷⁹

Out of necessity and past conflict experience, a tendency has developed to approach the law that governs the use of force in the transition phase from conflict to peace in recent years, which leads to a trichotomy of *jus ad bellum*, *jus in bello* and *jus post bellum*. A key feature of any hybrid threat and warfare is that it mostly operates under the threshold of any armed conflict, therefore the law governing this critical phase prior to conflict (war) should be separated. This adds another law to the threefold distinction – the *jus ante*

78. See Jens Muir Iverson, *The Function of Jus Post Bellum in International Law* (Sept. 21, 2017), <https://openaccess.leidenuniv.nl/bitstream/handle/1887/55949/intro.pdf?sequence=3>, (arguing for the hybrid approach to the *jus post bellum*, this thesis emphasizes the functional goals of *jus post bellum*, while maintaining an awareness of temporal context).

79. The term "*jus ante bellum*" has no firmly established meaning and is as a legal concept used differently. See Garrett Wallace Brown & Alexandra Bohm, *Introducing Jus ante Bellum as a cosmopolitan approach to humanitarian intervention*, 22 *European Journal of Int'l Relations* 897 (2016) (who by the *jus ante bellum* refers to principles of global (distributive) justice and argues that if states have the right to conduct humanitarian interventions, they must be based on *jus ante bellum* principles and be obligations of states to prevent humanitarian crisis as well); see also *id.* at 902 (explaining that "[i]n this regard, *jus ante bellum* proposes that if we have duties to kill in order to save distant strangers from violence, then we also have duties to alleviate the suffering of distant strangers from structural conditions that have a significant probability of leading to large-scale crisis and conflict").

bellum. Just as the *jus post bellum* has been re-discovered and became a topic of research, the *jus ante bellum* will be an important area to develop and analyze further in the future.⁸⁰ This result is not a trichotomy, but a *legal tetrachotomy* in the sense of a segmentation of the legal regimes into four parts.

There are no longer just two sets of legal rules, the law of peace and the law of war. The law of peace includes various stages of stability, instability, crises, emergency and transition, which are governed by distinct legal regimes. Still, the law of war remains a dichotomy regarding the rules of warfare (armed conflict) between states (LOAC applicable to an IAC), and between state versus non-state actors or between non-state actors (LOAC applicable to a NIAC), even though the developing customary international law on the conduct of hostilities in many respects bridges the gap between the two LOAC regimes.

In contrast to the traditional focus areas of the *jus ad bellum* and *jus in bello*, the *jus ante bellum* and its sister part, the *jus post bellum*, find less international regulation. The legal core content of the *jus ante bellum* cannot simply be deducted from a few legal sources of public international law such as the prohibition on aggressive use of force in the UN Charter or a set of treaties governing conduct of hostilities such as the GC I-IV and their additional protocols supplemented by well-developed customary international law and specific treaty law. Even though much remains disputed in the *jus ad bellum* and gaps are existing in the *jus in bello*, the cardinal principles are well-established and apply to all states and non-state actors alike. This universal legal character is absent in the *jus ante bellum* and *jus post bellum*, which are predominantly based on multiple legal sources of domestic national law, HRL, international agreements on defense alliances, post conflict peace settlements, agreed deployment and presence of deterrence forces before war or presence of peace-keeping or peace-enforcing forces in transition phases under and after war and co-operation

80. See Stahn, *supra* note 76, at 314, referring to Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, 1887 (W. Hastie trans., Lawbook Exchange 2003), at 218-22; see also DINSTEIN, *supra* note 2, at 15-16 (noting that there are peacetime rules applicable in war and war time rules applicable in certain peace time settings (including crisis), but an independent third legal status category between peace (including *jus ante bellum* and *jus post bellum*) and war (*jus in bello*) is without merits in international law, nor is it justified to speak loosely of a status mix in the sense of a twilight zone between war and peace." Legally speaking, there are only two matrixes in international relations – war and peace – with no undistributed middle ground).

with civilian authorities and civil police of host nations regarding law enforcement.⁸¹

Although there are important similarities, differences between the *jus ante bellum* and *jus post bellum* remain. The *jus ante bellum* will seek to provide a legal framework to avoid crisis and war and to prepare in case an armed conflict should materialize. The *jus post bellum* seeks to restore peace and stability by creating a "just peace" or at least an accepted and/or standing peace without a return to crisis or war.

B. Well-Known Legal "Gray Zones" in a Hybrid War Perspective

There are many legal areas of uncertainty in international law and international humanitarian law, which crystalize by a hybrid threat and warfare described and depicted above, *supra* II. In general, these well-known legal "gray zones" are characterized by unclear and/or disputed issues to which there are either two or more well-founded or plausible solutions.

The *jus ad bellum* as the legal bases for the use of force are potentially many and mostly disputed. This gives excellent leeway for justifications and legal information operations as part of a hybrid campaign. Disregarding of what the legal basis for a use of force might be or allegedly could be, the hybrid threat or warfare will usually be designed to avoid a direct large-scale confrontation state-to-state and an international armed conflict (IAC), as this would not serve the strategic political objectives of the state waging the hybrid campaign. Only as an *ultima ratio* solution, the minor local or regional armed conflict with another state is likely to be provoked if this is believed to support strategic goals and not further escalate the conflict. A non-international armed conflict (NIAC), which can be contained and controlled in intensity and be covered by a denial policy of a possible state interference, may fit within the strategic political goals and can, thus, form an integrated and anticipated part of the hybrid warfare campaign. Henceforth, the avoidance of crossing the threshold for an armed conflict regarding both an IAC with a possible invocation of a collective self-defense and a NIAC will be critical focal points for any hybrid threat and warfare.

81. Stahn, *supra* note 76, (explaining that transitions from conflict to peace are governed by a conglomerate of rules and principles from different areas of law. International military forces, for instance, which are traditionally bound by wartime obligations, may be bound to respect certain peacetime standards (such as *habeas corpus guarantees*), when exercising public authority in a post-conflict environment. Civilian authorities, by contrast, may invoke certain conflict-related exceptions from peacetime standards, in order to maintain orderly government. This is no different from a crisis situation before an armed conflict) (footnotes omitted).

a. The *Jus ad Bellum* Gray Zones: Threshold and Justification

The *jus ad bellum* remains a highly disputed area of international public law. The gray zones or “gaps” concern, *inter alia*, the content and extent of the inherent right to individual or collective state self-defense as partly codified in Article 51 of the UN Charter, the conditions for invoking collective self-defense by alliance states, the extent of permissive use of force under a given United Nations Security Council (UNSC) mandate under Chapter VII of the UN Charter, or the existence of a right to use force outside the scope of state self-defense and without the existence of the UNSC mandate.

For the hybrid scenario, the *jus ad bellum* questions are vital for the victim state or alliance. The legal answers to these issues will determine whether a state or an alliance can respond with only “weak” peacetime and crisis countermeasures or whether individual or collective state self-defense against another state or non-state actors can be invoked. At the moment of the conduct of armed hostilities, the applicable law will change from peacetime or crisis (emergency or martial) law to an automatic activation of the LOAC for an IAC or a NIAC. Even though such a decision to respond in state self-defense will likely be taken at the highest strategic and political level, the legal effect of conduct of hostilities or an alien occupation met with or without armed resistance is instant – and the applicability of the legal war-fighting framework immediately changes the permissive countermeasures against any continued hybrid campaign.

All the possible *jus ad bellum* questions present in the gray-zone will neither be mentioned nor analyzed in detail here – only the most relevant in case of a hybrid threat or warfare will be discussed.

1. *The “Trigger” for the Inherent Right of State Self-Defense*

For the purpose of an analysis of the legal challenges and gaps by hybrid warfare, there are multiple issues within the *jus ad bellum* regime, which are both complex and unclear. Here, the focus will be on the possible traditional re-active countermeasures *stricto sensu*, while leaving out a detailed discussion of more active countermeasures in case of a *de facto* armed attack or an imminent threat of an armed attack such as anticipatory, interceptive or even preventive state self-defense. A couple of remarks in this regard suffice to highlight that this *jus ad bellum* gray zone impacts the likelihood of hybrid warfare (and “lawfare”) and poses an obstacle to counter such a hybrid campaign. *On the one hand*, with reference to the ICJ ruling in the *Armed Activity* case, the aggressor of the hybrid campaign, such as Russia, can reasonably justify that an extensive use of state self-defense by a victim and

targeted state is plainly unlawful.⁸² *On the other hand* and *vice versa*, the aggressor state of hybrid warfare could more easily build a scenario based on real or fake facts – or more likely a combination thereof – arguing that it acts in accordance with other states’ practice in anticipatory, interceptive or preventive self-defense, without any or much justification of an existing imminent threat.⁸³

Among the many disputed issues surrounding the right of self-defense partly codified in Article 51 of the UN Charter and regulated in customary international law is the definition of an “armed attack,” which in the view of the ICJ is the only “trigger” for the inherent right to state self-defense against either regular state forces or irregular armed bands sent by a state:

In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack ... [t]he Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.⁸⁴

Which acts qualify as an “armed attack,” “act of aggression” or illegal “use of force” under Article 2(4) of the UN Charter remains disputed as neither the UN Charter nor other treaty law defines these concepts.⁸⁵ In the *Nicaragua* case, the ICJ holds the view that “a mere frontier incident” – however, this should be defined – does not qualify as an “armed attack.” Moreover, the reference to “scale and effects” indicates that according to the

82. *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, 223-24, ¶ 148 (Dec. 19) (describing how “Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.”).

83. The US administration under President Bush and President Obama applied similar policies on the *jus ad bellum*, but still slightly different practice regarding the publicly pronounced legal justification. Under the Bush administration, the defining concept was preemptive self-defense, which attempted to justify with reference to standards of international law. On the contrary, the Obama administration, in the promise to adhere to international law, made no or little attempt to provide legal reasoning for reserving “the right to act unilaterally if necessary to defend our nation and our interests.” See CHRISTIAN HENDERSON, *THE USE OF FORCE AND INTERNATIONAL LAW* 296 (2018) (referring to this as “the Obama doctrine of ‘necessary force’ . . . [w]hat exactly the US policy and doctrine will be under President Donald Trump seems unclear.”).

84. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.)*, Judgment, 1986 I.C.J. Rep. 14, 103, ¶ 195 (June 27).

85. See HENDERSON, *supra* note 83, at 262 et seq., (explaining the possible (and disputed) distinction between “armed attack,” “aggression,” “use of force,” a *de minimis* threshold for the use of Article 2(4) of the UN Charter and permitted forcible law enforcement actions).

ICJ, there is a gravity threshold for an armed attack. Henceforth, other illegal uses of force, i.e. “a mere frontier incident” below that gravity threshold would not “trigger” the inherent right of individual and collective state self-defense. This highly disputed requirement of a *de minimis* threshold for an “armed attack” implies a distinction to other kinds of use of force, a demarcation line almost impossible to draw or define.⁸⁶

Some states and various scholars have expressly rejected the restrictive and cautious interpretation of the inherent right to state self-defense by the ICJ and argued against such a gravity requirement.⁸⁷ It seems, indeed, most convincing to depart from the view of a gravity requirement expressed by the ICJ in the *Nicaragua* case and regard any attack which results in or is likely to cause destruction of property and injury or loss of life as an “armed attack,” which justifies state self-defense subject to the *jus ad bellum* principles of necessity and proportionality. A proportionate response to a small-scale attack, which could be conducted as part of a hybrid warfare, would in itself be limited in scale and effect in order to be lawful.⁸⁸ In fact, the ICJ has stated that in cases of border incidents, these two *jus ad bellum* principles will restrict possible lawful responses and, thus, avoid escalation.⁸⁹

Moreover, there is a wide range of illegal acts, which fall below the threshold for an armed attack and, hence, do not justify acts in state self-defense. It could – at least in the view of the majority of judges in the ICJ – be a breach of the obligations under Article 2(4) of the UN Charter and customary international law not to threaten or use (other) force against another State,⁹⁰ and other commonly recognized violations such as not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful commerce and trade. This means that if one was to follow the view of the ICJ with regard to a hybrid threat or warfare, the means available under the threshold of an armed conflict are not only non-violent (non-kinetic) but also minor incidents of the use of force by armed forces, including assistance in the form of provision of weapons or logistical or other vital military support:

86. *Id.* at 216-24.

87. *Id.* at 222-23; see also DINSTEIN, *supra* note 2, at 209-11.

88. See HENDERSON, *supra* note 83, at 223 (explaining that this view seems to be what customary practice suggests, even though a considerable gray zone remains); see generally DINSTEIN, *supra* note 2, at 210-22 (supporting the same view as in HENDERSON).

89. Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, 223, ¶ 147 (Dec. 19) (explaining how “[t]he Court cannot fail to observe . . . that the taking of airports and towns many hundreds of kilometres from Uganda’s border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.”).

90. U.N. Charter art. 2, ¶ 4.

But the Court does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.⁹¹

Similarly, the ICJ has stated that the “training and military support” of irregular armed groups operating on the territory of another state are a violation of international law but does not justify state self-defense:

The Court further observes that claims that the Sudan was training and transporting FAC [Congolese Armed Forces, Forces armées congolaises] troops, at the request of the Congolese Government, cannot entitle Uganda to use force in self-defence, even were the alleged facts proven.

The Court would comment, however, that, even if the evidence does not suggest that the MLC’s [Congo Liberation Movement, Mouvement de libération du Congo] conduct is attributable to Uganda, the training and military support given by Uganda to the ALC [Congo Liberation Army, Armée de libération du Congo], the military wing of the MLC, violates certain obligations of international law.⁹²

For such low-threshold violations of international law, the victim state and the defense alliance targeted with a hybrid threat or warfare including minor kinetic operations by regular or irregular armed forces do not, according to the disputed position of the ICJ, have the right to respond in self-defense but must, in principle, rely on so-called non-forcible (peaceful) countermeasures. At the same time, in the *Nicaragua* case, the ICJ did consider the question and left the door open for forcible countermeasures staying below the threshold of an armed attack for the victim state on an individual basis, and excluded this only as part of collective self-defense.⁹³ As stated in doctrine, this creates an “open loophole” or a “crucial *potential*

91. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.)*, Judgment, 1986 I.C.J. Rep. 14, 103-04, ¶ 195 (June 27); *see also id.* ¶ 230 at 119 (explaining that “the Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State. Even at a time when the arms flow was at its peak, and again assuming the participation of the Nicaraguan Government, that would not constitute such armed attack.”).

92. *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. ¶¶ 127, 161 at 218, 266.

93. *Nicar. v. U. S.*, 1986 I.C.J. at 110, ¶ 210 (June 27) (quoting “[s]ince the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force. The question is itself undeniably relevant from the theoretical viewpoint.”).

gap in the rules on the use of force,” which should be changed and corrected by the ICJ.⁹⁴

A further possible distinction, which can be exploited by a hybrid threat and warfare campaign, is the difference between not only an “armed attack” and other illegal “use of force” but also a distinction between those acts and other kinds of support such as funding, which only qualify as a minor breach of international law in terms of illegal intervention in internal affairs:

In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force.⁹⁵

Many other *jus ad bellum* issues of state self-defense also have the character of complex legal gray zones covered by uncertainties such as: the quality and quantity of the target of an armed attack (a person, unit, military facilities, infrastructure or territory), the standard of burden of proof, the need of a possible intention (*mens rea* element), a duration or gravity requirement, or whether accumulation of “small” events suffices.⁹⁶ These additional legal gray zones add to the possibility for states to conduct a legally reasonable justified hybrid warfare campaign under the commonly accepted or at least plausible defensible threshold for state or alliance self-defense.

The accumulation of events theory is of particular importance when discussing hybrid threats and warfare designed to stay under the triggering threshold. The asymmetric hybrid character of the low-level use of force, the flexibility regarding intensity and rapid adaptability coupled with disinformation and fake news targeted at the entire society as such may collectively constitute an “armed attack” and, thus, justify a necessary and proportionate act in self-defense.⁹⁷ However, even if one would accept that an accumulation of small events could collectively be seen as an “armed attack”, it must still be demonstrated that this hybrid campaign originates from one or more specific states or a non-state group and that the acts are attributable to those states or non-state actor groups.⁹⁸ Both the standard

94. HENDERSON, *supra* note 83, at 224; *see also* TOM RUYTS, “ARMED ATTACK” AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 141 (Cambridge Univ. Press, 2010).

95. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 228 at 119.

96. *Cf.* HENDERSON, *supra* note 83, at 205 et seq.

97. *See id.* at 224-26.

98. *See* Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, 223, ¶ 146 (Dec. 19) (explaining that the ICJ once again implied that

evidence of attribution to such hybrid attacks to a specific state or non-state actor group, and the determination of the necessary scale and frequency of small attacks required remains unclear. *On the one hand*, this makes the accumulation of theory a most difficult *jus ad bellum* justification to apply for the state claiming self-defense or collective self-defense, but it does open the legal door of self-defense of the victim state by a series of hybrid acts.⁹⁹ *On the other hand*, for a state conducting a hybrid warfare, this unclear accumulation of events theory fits well into the legal toolbox of a hybrid and lawfare campaign.

2. Conditions for Invoking Collective Self-Defense

Having established what may or may not constitute the requirement of individual state self-defense under Article 51 of the UN Charter and customary international law and the many unclear gray zones, the next quest when facing a hybrid campaign conducted in this gray zone of the *jus ad bellum* is to determine the legal conditions for activating collective self-defense of a certain alliance. The term “collective self-defense” in Article 51 of the UN Charter is arguably misleading, as a person or state can act individually in self-defense upon rather strict conditions. When another person or state defends and intervenes, this is done in defense of others. The term “collective self-defense” denotes, however, a commitment of solidarity (collectivity) in defense.

A priori, it is certain that collective self-defense is conditioned *sine qua non* upon the existence of a *de facto* armed attack or an imminent threat of an armed attack against at least one alliance state and, thus, creates a right to individually state self-defense. The issues raised here is how a collective self-defense in such a situation can be legally activated. The ICJ ruling in the *Nicaragua* case is still the leading decision in this regard, where the court, however, reached a rather formalistic and restrictive position on collective

accumulation of events could justify self-defense but did in the case reject the attribution of these activities: “The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC”); *see also* HENDERSON, *supra* note 83, at 224.

99. *See* HENDERSON, *supra* note 83, at 226 (explaining that, “while it is not possible to determine in the abstract at what point, if at all, a series of attack may have occurred to such a degree and frequency that, taken together, they constitute an armed attack, it is also difficult to do so in specific cases”); *see also* (for support of the view that a series of acts (accumulation of event) can activate state self-defense under Article 51 UN Charter) DINSTEIN, *supra* note 2, at 211-13, 236 (stating that despite “some doctrinal reservations, ‘there is considerable support for the view that the “accumulation of events” does affect the possibility of exercising the right of self-defence’ [and that] [t]his is a case where the whole (the series of acts amounting to an armed attack) is greater than the sum of its parts (single acts none of which does by itself)” (citation original) (footnotes omitted).

self-defense. The *ratio* behind this cautious approach of the ICJ is apparently to avoid escalation of conflicts through certain rather strict requirements for a permissive collective armed response.

First, the determination whether a *de facto* armed attack or an imminent threat of an armed attack exists can, according to the *Nicaragua* case, only be made by the state under attack or exposed to an imminent threat of attack. The victim state must both form the view in this respect and declare the view to third alliance state(s):

It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.¹⁰⁰

Second, it is also for the victim state to request the activation of collective self-defense:

[a]t all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.¹⁰¹

Third, the view and request by the victim state must be timely and approximately made at the time the assistant third state acts with armed defense.¹⁰²

Fourth, and more importantly with regard to a hybrid warfare conducted under the *jus ad bellum* threshold, ICJ excluded proportionate forcible countermeasures under the threshold of an armed attack from the content of collective self-defense:

The Court has recalled above (paragraphs 93 to 195) that for one State to use force against another, on the ground that that State has committed a wrongful act of force against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court,

100. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 195 at 103-04.

101. *Id.* ¶ 199 at 105.

102. *See id.* ¶ 236 at 122.

under international law in force today – whether customary international law or that of the United Nations system – States do not have a right of “collective” armed response to acts which do not constitute an “armed attack.”¹⁰³

It is highly disputed whether these formalities and requirements convince and whether they constitute customary international law as proclaimed by the ICJ. In state practice, a formal statement by the victim state that it has been subject to an armed attack or a threat of an imminent armed attack and a formal request for specific collective self-defense is not visible. According to state practice, a request for armed assistance seems to fulfill the requirements and imply both the statement of being a victim state of aggression and the request of armed collective defense, hence the formalities indicated by the ICJ are only partially applied by states.¹⁰⁴ What follows from state practice is *the request-for-assistance requirement*, which may be made expressly but could presumably also be established by other means such as immediate joint defensive re-action of states. A certain departure from the formalistic position of the ICJ on collective self-defense is both convincing and required. More decisively, the formalistic approach by the ICJ will only open the windows of hybrid campaign opportunities even further until the collective self-defense formalities are complied with at the political level. This will likely reduce the deterrence effect of a collective self-defense, which will run counter to the apparent *ratio* of the ICJ to avoid or limit escalation of conflicts.

With the “collective self-defense” notion of commitment and solidarity, the follow-up question is whether the third alliance states will accept the request for assistance and whether an activation of a defense alliance based on *consensus* will be made in a timely manner – this strategic and political matter at the highest level is not to be considered further here. It is rather evident that a full reliable picture of the factual situation with a hybrid warfare and hybrid countermeasures ongoing, including opposing informational campaigns, is unlikely to be present.

3. *Proportionality, necessity and immediacy – Flexibility in the use of force and Rules of Engagement*

In case the threshold for self-defense has been met and it is justified under the *jus ad bellum* to use armed force in defense – either individually or collectively – the next legal issue is the proportionality, necessity and

103. *Id.* ¶ 211 at 110.

104. *See id.* ¶ 232 at 120; *see also* HENDERSON, *supra* note 83 at 256-62, in particular at 260-61.

immediacy of the armed response in self-defense. Since 1837, the classic formula for self-defense has been utilized, which is developed from a statement in the Caroline Affair (1837). The purported Caroline or Webster formula, states that self-defense can do "... nothing unreasonable or excessive; since the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it".¹⁰⁵

The fundamental restrictive requirements of the *jus ad bellum* avoid conflict escalation as a proportionate and necessary force will have to be directed at the imminent threat or use of offensive force *de facto* present or anticipated, and what is needed to the neutralization or defeat thereof only. It should be viewed neither as a strict quantitative nor as a qualitative measurement but rather as an overall estimation of the total force required in order to defend a state.¹⁰⁶ This means that the amount of force permitted may exceed that of the armed attack responded to, but it may also be more limited in scale and damage. Even though this view seems to represent the majority opinion, a quantitative or qualitative measurement of proportionality may still be argued by states to support their alleged proportionate action and military engagements.

The *jus ad bellum* proportionality and necessity is viewed from the perspective of the relevant military level of command. In case of an armed attack against an entire nation as such the proportionality and necessity of the response will be determined at the highest military levels of command and the strategic (political) level with the aim of determining what is minimally required to defend a country. In the case of a small-scale armed attack against a military border unit of an armed state, the immediate decision to respond proportionately and with necessary force can – depending on national Rule of Engagements – rest with a low-ranking unit commander, who will act as an organ of the victim state attacked. In contrast, the *jus in bello* principle of proportionality looks at the balance between collateral damage and military advantage (necessity) when determining whether, and if so, how to use force against a specific military objective (target).

The ICJ case law has only formed part of the customary international law as it relates to this subject matter,¹⁰⁷ therefore the content of these requirements remain difficult to define since it is very context-specific and, thus, dependent upon the particular situation. The ICJ has denied that the proportionality and necessity requirement have been satisfied in the

105. HENDERSON, *supra* note 83, at 227. Cf. CORN ET. AL., *supra* note 35, at 24 (regarding the Carolina formula and anticipatory self-defense).

106. See HENDERSON, *supra* note 83, at 235-37.

107. See *Nicar. v. U.S.*, 1986 I.C.J. at 94, ¶ 176; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, 245, ¶ 41 (July 8).

Nicaragua case¹⁰⁸ and the *Oil Platforms* case¹⁰⁹ and did touch (again) on these questions in the *Armed Activity* case, where it found that an armed attack, which resulted in a large-scale operation of taking towns and airfields and including military operations over 500 kilometers from an international border, could not be proportionate and necessary in order to counter cross-border attacks:

Equally, since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate. The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.¹¹⁰

The convincing view is – in accordance with the position of some states and part of doctrine – that there is no gravity requirement under the *jus ad bellum* and that, thus, a single frontier armed incident, a small exchange of fire and arms cross-border for a limited period of time or for example other small-scale use of armed force against a state within a smaller confined border area will amount to an “armed attack” and activate the inherent right of state self-defense. This does not permit that victim state to use wide-scale and extensive force to counter the armed attack or aggression. Only what is proportionate and strictly necessary to defeat the attacking forces and eliminate a continuous imminent threat is allowed. Hence, a hybrid campaign exceeding the *jus ad bellum* threshold for an “armed attack” by a small margin will only justify the use of individual or collective countermeasures to defeat that marginal “armed attack” or further use of armed force that amounts to a *de facto* attack or threat.

The situation changes dramatically if one follows the view of the ICJ that a certain gravity requirement of the attack or imminent threat is a *conditio sine non* for the right to state self-defense. A hybrid campaign not exceeding this alleged *jus ad bellum* threshold for an “armed attack” can then only lawfully be met with non-forcible countermeasures and peacetime use

108. *Nicar. v. U. S.*, 1986 I.C.J. at 122, ¶ 237.

109. *Oil Platforms (Iran v. U.S.)*, Judgement, 2003 I.C.J. Rep. 161, 198, ¶¶ 76-77 (Nov. 6), <https://www.icj-cij.org/public/files/case-related/90/090-20031106-JUD-01-00-EN.pdf>.

110. *Compare Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 223, ¶ 147 (Dec. 19), *with id.* at 214, ¶ 110 (quoting “Uganda was not in August 1998 engaging in military operations against rebels who carried out cross-border raids. Rather, it was engaged in military assaults that resulted in the taking of the town of Beni and its airfield between 7 and 8 August, followed by the taking of the town of Bunia and its airport on 13 August, and the town of Watsa and its airport at a date between 24 and 29 August.”).

of force. The legal issue of *jus ad bellum* proportionality and necessity of the armed response does not present itself at that stage. Outside the scope of the right of self-defense, the victim state will have to act within the peacetime and crisis legal framework and the applicable HRL and apply the law enforcement proportionality and necessity paradigm.

The ICJ's view of a gravity requirement in the *jus ad bellum* – despite its likely purpose of restricting the right of state individual and collective self-defense and thus avoid escalation – may quickly prove counterproductive as an effective deterrence becomes more difficult and may very well fail. It does limit the possibility to create an effective deterrence in the sense of a strong message to the state or alliance of states or groups of non-state actors conducting hybrid campaigns that any use of or threat of the use of armed force as part of hybrid activities will immediately be countered leaving no room for low-intensive or under the gravity-threshold hybrid armed operations.

Disregarding whether one follows the relaxed conditions for state self-defense or the ICJ gravity requirement, a response in order to be proportionate and necessary will have to be balanced *ab initio*, but it will also have to include possible escalation and de-escalation steps in the use of force. In particular, this is the case when planning and executing law-enforcement measures or military operations to counter hybrid warfare and small-scale armed attacks forming part of a hybrid campaign emanating from a state or non-state actors. From a legal perspective, it matters whether planning and execution of operations are conducted under a peacetime legal paradigm (*jus ante bellum*) or in the context of the inherent right of state self-defense (*jus ad bellum*) in accordance with the *jus in bello* applicable in any case of the existence of an “armed conflict”.

In particular, the law-enforcement or military orders and directives regarding the use of either lethal or non-lethal force, often termed peacetime “Standard Rules for the Use of Force” (SRUF), and the so-called Rules of Engagement (ROE), will have to be designed and shaped according to the situation and possible instant changes thereof. The set of ROE issued from the outset should be both comprehensive in terms of covering the possible situations in peacetime, crisis and armed conflict and flexible in the sense of including sets of active or dormant ROE which can be made effective instantly as the situation escalates or de-escalates. This will enable the police and military staff to jointly or separately conduct appropriate planning and legal training based on the different ROE sets issued but not yet authorized.

b. The threshold for an armed conflict – Applicability of the *jus in bello*

Distinct from the challenges and gaps of the *jus ad bellum*, the *jus in bello* (LOAC) will be applicable in the case of armed conflict – disregarding whether under the *jus ad bellum* there is an illegal war from the outset. A state responding in a proportionate and necessary manner in self-defense can only use force against persons and objects if the conditions of the LOAC are fulfilled; an object is a legitimate target if it constitutes a military objective and if the use of force against this target is proportionate and conducted with lawful methods, means and all feasible precautions have been taken.¹¹¹

In case of a hybrid threat and warfare, which operates in and around the gray zone threshold of an armed conflict, and, thus, casts doubts as to whether the peacetime *jus ante bellum* or the wartime *jus in bello* applies, there are particularly two issues which raise legal challenges and create legal “gaps.”

First, the conditions for the existence of an armed conflict of non-international character (NIAC) in terms of, *inter alia*, sufficient level of organization for the non-state group, intensity of hostilities and control of territory, and moreover, the geographic scope of the internal armed conflict remain a source of legal uncertainty.¹¹² Although the criteria for a common Article 3 GC internal armed conflict after the jurisprudence of the ICTY may seem “tolerably clear,”¹¹³ it will likely result in an unclear state of affair as to how the crisis or conflict should be handled. There is no designated competent authority to decide on the classification of the “situation’, and the *ex post* conflict decisions by courts and tribunals will come much later in time. The decision on the “conflict” status is left to the states involved and the international community. The ICRC makes this determination internally (“privately” and in-house) only because of the organization’s neutrality policy.

Whether the conditions for the existence of a NIAC are met constitutes an important gateway question for the use of force. *On the one hand, a crisis*

111. Iran v. U.S., 2003 I.C.J. at 187, ¶51 (quoting “[t]he United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence”).

112. Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (quoting “[o]n the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.”).

113. Crawford, *supra* note 77, at 71 (explaining that although the criteria for an Article 3 GC conflict is “tolerably clear,” there are still “many uncertainties remain[ing] in its application”).

situation just below the uncertain threshold for a NIAC will be dealt with by the national crisis and emergency (martial) law and law enforcement ROE under a human rights law paradigm, which may be done with or without military support from the state itself or its alliance partners. *On the other hand, a conflict situation* involving a sufficient degree of organization and insensitivity of hostilities will activate the *jus in bello* for non-international armed conflicts and more offensive ROE. However, these ROE will likely be more restrictive and defensive in character and not reflect full permissive (offensive) ROE designed for a full-scale war. In case the hybrid campaign and the non-state armed resistance group(s) are down-scaled and hostilities decrease, the threshold for a NIAC may no longer be met with the result that the peacetime *jus ante bellum* re-applies. For such an exercise in, out, or around the threshold for a NIAC, a hybrid campaign seems well-suited and will create severe legal challenges and, thus, potential legal “gaps” in and between the different phases of peace/crisis/conflict/crisis/peace. In case of a hybrid threat or warfare targeting more national territories simultaneously and with asymmetric means and a different intensity, the high-level, strategic and political decision on the peace/crisis/conflict status at national and multi-national level may be time-consuming, disputed and different from nation to nation.

Second, the distinction between an IAC and a NIAC in a hybrid warfare setting will depend on evidence of state attribution, which will be a difficult and highly political issue. State denial policy and covert operations by provocateurs, Private Military Contractors (PMC) or Private Military Security Contractors (PMSC) like the Wagner Group, mercenaries in terms of non-state conventional forces and state special forces (SOF) provoking the uprising of the civilian population is a central part of the hybrid warfare. If one adds to this evidential legal uncertainty, the ICJ and ICTY dispute about whether one should apply a high degree of “effective control” or a lesser degree of “overall control,” the legal picture of a possible perfect hybrid scenario becomes visible. The strict ICJ requirement of “effective control” in the *Nicaragua* case seems less convincing as it legally allows states to use non-state actors in the gray zone where these strict conditions and proof thereof cannot be met. The arguments presented by the ICTY in the *Tadić* Appeal case against the view of the ICJ seem persuasive, if alleged “lawful” interventions by third states and hybrid campaigns through private non-state actors should be reduced and prevented:

A first ground on which the *Nicaragua* test as such may be held to be unconvincing is based on the very logic of the entire system of international law on State responsibility.

The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria ... The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed *on the one hand* to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.¹¹⁴

The disagreement between the ICJ and ICTY on the attribution of acts by non-state actors to a state was reinforced by the subsequent ICJ judgement in *Genocide* case 2007, where for the purpose of deciding state responsibility, the ICJ confirmed the *Nicaragua* “effective control” test and, moreover, *expressis verbis*, rejected the ICTY jurisprudence.¹¹⁵ With the ICJ

114. See Prosecutor v. Tadić, Case No. IT-94-1-A, ICTY Judgment, ¶ 116-17 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); see also Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.), Judgment, 1986 I.C.J. Rep. 14, 65, ¶ 115 (June 27) (stating that “[f]or this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.”) (emphasis added). Compare the contributions in T.M.C. ASSER PRESS, THE USE OF FORCE AGAINST UKRAINE AND INTERNATIONAL LAW: JUS AD BELLUM, JUS IN BELLO, JUS POST BELLUM (Sergey Sayapin & Evhen Tsybulenko eds., 2018), with NIGEL D. WHITE, *Institutional Responsibility for Private Military and Security Companies*, WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN LAW, AND PRIVATE CONTRACTORS 381, 392 (Francesco Francioni & Natalino Ronzitti eds., Oxford University Press 2011) (explaining that “[t]here are strong arguments to be made that overall control is a better test for attribution of conduct to states so that a government should not be able to escape responsibility by acting through non-state actors. However, ... the arguments are even stronger when considering institutional responsibility.”).

115. See Application of the Convention on the Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) 2007 I.C.J. 47, 206-13 ¶ 396-412, 210 ¶ 404-06; see also Nicar. v. U. S., 1986 I.C.J. at 64-64, ¶ 115; cf. DINSTEIN, *supra* note 2, at 238-41 (explaining that “... the Genocide Judgement has not lain to rest the dissonance between the International Court of Justice and the ICTY, and the doctrinal debate continues with gusto”); cf. Crawford, *supra* note 77, at 80-84. In particular, the ICJ should reconsider its position on state attribution in the light of its own Advisory Opinion in Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 178-79, which describes how the ICJ developed the law and expressly recognised that international organisations have international legal personality and stated that the “... subjects of law in any legal system are not necessarily identical

jurisprudence, the attribution test for the purpose of conflict classification may well be the ICTY “overall control” test, which according to the ICJ could be applicable and suitable. However, this test does not persuade for the purpose of state responsibility. This introduces two different quality tests, which adds another legal layer of complexity: a state can instigate an IAC by having “overall control” of acts of non-state actors, but simultaneously avoid state responsibility for the acts of those non-state actors as the “effective control” test is not met. The ICJ logic of the possible application of difference attribution tests for conflict classification and state responsibility seems questionable and critical, at least from a hybrid warfare perspective. Moreover, from a general perspective, it seems unconvincing and, thus, questionable that the “overall control” test is unsuitable and in the view of the ICJ stretches too far, almost to a breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility. The restrictive perception of the ICJ on state responsibility seems out of tune with the factual needs and the “requirements of international life” to be able to legally counter strategically willful and unlawful hybrid threats and warfare.

The experience in East Ukraine speaks for itself. The threshold (“trigger”) for an international, armed conflict (IAC) involving more than one state, and the threshold for state responsibility are not only difficult to demonstrate with reliable evidence, but also covered with legal uncertainty. In addition, there may exist a lack of appetite to declare an IAC at the strategic political level and thereby risk an escalation and a possible *ad hoc* activation of collective self-defense.

C. *Specific Legal Challenges or “Gaps” in jus ante bellum by Hybrid Threats and Warfare*

A hybrid threat or warfare kept under the threshold of an “armed attack” and below the intensity or organizational requirement for an internal “armed conflict” (NIAC) will pose critical challenges to a peacetime law enforcement regime, as it will be conducted by *inter alia* indirectly employed non-state actors and covert state agents, by provoked opposition from own and foreign citizens, by cyber-attacks, and by the use of information campaigns utilizing fabricated or switched fake news.

Such a hybrid threat or warfare is often coupled with a firm denial policy of any immutability and attribution of such activities to a state initiating and

in their nature or in the extent of their rights, and their nature depends upon *the needs of the community*. Throughout its history, the development of international law has been *influenced by the requirements of international life*” (emphasis added).

de facto controlling the hybrid campaign. The integrated hybrid information campaign merely portrays a public picture of civilian movements consisting of “normal” people being dissatisfied with the current political regime in power and the society conditions in general. With the legal requirement of attribution in the sense of the “effective control” test or the relaxed “overall control” test being disputed, and clear evidence thereof likely either ignored without legal effect or covered by hybrid information campaign, a continued hybrid threat and warfare with both kinetic and non-kinetic means is possible without high, or much, political or legal risks.¹¹⁶

The emerging problems with the principle of distinction just add to this. Military clothing has become popular and trendy among civilians, as paramilitary uniforms are seen more often in the streets. Regular armies have been seen to disrespect traditional uniform codes and permit self-equipment of soldiers in combat zones, missions or on exercises. Moreover, uniforms, accessories and insignia of different states are becoming more similar and hard to distinguish, even at a close distance.¹¹⁷ The possible and recommendable remedy is, *on the one hand*, that military forces consider distinction by choice of design and uniforms and, *on the other hand*, that military discipline of wearing those regular uniforms when on duty is re-enforced.

If all these circumstances come together in a law enforcement scenario in peacetime or crisis, there will be several legal constraints and restraints in the *jus ante bellum*, which will create legal vulnerabilities for both the victim states (host nations) and states sending armed forces for assistance,

116. See Oleksandr Merezhko, *International Legal Aspects of Russia's War Against Ukraine in Eastern Ukraine*, in *THE USE OF FORCE AGAINST UKRAINE AND INTERNATIONAL LAW: JUS AD BELLUM, JUS IN BELLO, JUS POST BELLUM* 111 (Sergey Sayapin & Evhen Tsybulenko eds., 2018) (analyzing the Eastern Ukrainian conflict or better Russian aggression against Ukraine); see also, Merezhko at 115-17 (discussing the publicly available evidence of Russian involvement in Ukraine, noting that “[t]here are numerous factual and legal pieces of evidence corroborating the Russian Army’s presence in Eastern Ukraine. Among this evidence is a confession by Aleksandr Zakharchenko, one of the terrorist leaders, according to whom 3,000 Russian military servicemen fought in Donbas ... It is noteworthy that Western mass media is sometimes misled by Russian propaganda in this respect, especially when it uses terms such as “pro-Russian separatists” or “rebels” ...”).

117. Toni Pfanner, *Military uniforms and the law of war*, 86 INT’L REV. RED CROSS 93, 98-99 (2004) (explaining that “[i]n the twentieth century all armies wore service uniforms, as evidenced in particular by armies in the two world wars. At the same time, battledress became increasingly prevalent during actual hostilities. In addition, internal armed conflicts outnumbered international ones in the second half of the century, and since then warfare has been increasingly influenced by irregular forces largely unaffected by regulations concerning the uniforms or insignia of State armies. But it is astonishing how similar military uniforms, their accessories and insignia appear in traditional armies despite different cultural and geographical environments”).

deterrence purpose, and countermeasures. Some of these will be addressed below.

a. Limits set by the national domestic law enforcement regime and HRL

1. *Respect of Receiving State (Host Nation) Law and Political System*

The deployment and presence of foreign military forces are conditioned on the consent by the host nation as the territorial law of the host nation decides whether foreign military units may enter the state territory (*jus ad praesentiam*) and on what conditions (*jus in praesentia*). This consent can be given *ad hoc* prior to each individual deployment, or in general, as part of a defense agreement and standard status of force agreements. The NATO SOFA applies to the “force” and “civilian component” accompanying a force in the territory of another NATO alliance state, whether stationed or in transit.¹¹⁸ Under the NATO SOFA and usually under any other standard or *ad hoc* agreed SOFA, the foreign forces and civilian component thereof have an obligation under treaty law “to respect the law of the receiving state and to abstain from any activity inconsistent with the spirit of” the standard or *ad hoc* agreed SOFA.¹¹⁹ Moreover, the forces of the sending state (also termed “Troop-Contributing Nation,” TCN) shall not interfere with the internal political affairs of the receiving state and, in particular, take necessary measures to avoid “any political activity.”¹²⁰ As will be discussed subsequently, the latter will be of relevance by measures to counter informational hybrid activities as any such activity by foreign forces to promote a certain political view and NATO policy may be held to constitute “political activity,” *infra* V.A(d).

118. As defined in North Atlantic Treaty art. I, June 19, 1951, https://www.nato.int/cps/en/natohq/official_texts_17265.htm? (last updated Oct. 14, 2009).

119. *See id.* to discuss how this obligation of treaty law (NATO SOFA) is not just of psychological importance but imposes an obligation under public international law, which in case of a breach can be invoked by the receiving state in terms of negotiations and settlements of disputes; *see also* RODNEY BATSTONE, *THE HANDBOOK OF LAW OF VISITING FORCES* 69 (Dieter Fleck ed., Oxford University Press 1st ed. 2001) for the respect of the law of receiving states. *Compare* Status of the Foreign Armed Forces in the Republic of Latvia, Latvijas Vestnesis, 54/55 (1997) *with* Status of the Foreign Armed Forces in the Republic of Latvia, Latvijas Vestnesis, 54/55 (2017) [hereinafter Latvian SOF Act] <https://likumi.lv/ta/en/en/id/42315>. (“Section 6. Jurisdiction, para. (1) Persons contained in the foreign armed forces, during residence thereof in the Republic of Latvia, shall comply with the regulatory enactments of the Republic of Latvia and the international agreements binding on the Republic of Latvia”).

120. North Atlantic Treaty, *supra* note 118, art. II); *see also* U.N. Secretary-General, *Model status-of-forces agreement for peace-keeping operation*, ¶ 6, U.N. Doc. A/45/594 (Oct. 9, 1990) [hereinafter UN Model SOFA].

Hence, the host nation's political governance and law enforcement remain intact. Foreign forces are stationed in the country only for the purpose of military exercises, planning, and deterrence measures with, as a starting point, little or no legal competence to conduct counter hybrid operations in peace time and crisis.

2. *Possession and carrying of arms by foreign forces and contractors*

For any conduct of military exercises, deterrence measures, hybrid counter operations, clarity on the laws and directives for the handling of weapons and ammunition is vital. In this regard, military forces are well-educated and trained to be particularly careful and observant.

According to the NATO SOFA, members of a "force may possess and carry arms" if so authorized by orders whereby "sympathetic consideration to request" from the host nation shall be made.¹²¹ Arguably, although the wording for the NATO SOFA only mentions "arms" and, hence, strictly speaking "weapons," an interpretation in accordance with the context and object and purpose of the provision would include both weapons and ammunition.¹²² The possession and carrying of weapons/ammunition will be governed by the sending states' (TCN's) law, military regulations on weapons and ammunition, and the specific directives and orders given to their forces, but still, due regard shall be had to the host nation regulations as well.¹²³

121. *Id.*, art. 6.

122. See JARIN NIJHOF, *THE HANDBOOK OF LAW OF VISITING FORCES* 203 (Dieter Fleck ed., Oxford University Press 2nd ed. 2018). Similarly, the same interpretation should be made of para. 37 UN Model SOFA, which states that members of the UN peace-keeping forces "may possess and carry arms while on duty in accordance with their orders." This interpretation is in accordance with NATO state practice. UN Model SOFA, *supra* note 120, para. 37. See, *inter alia*, the Exercise Support Agreement between the Ministry of Defence of the Republic of Latvia, the Ministry of Defence of the Estonia, the Ministry of Internal Affairs of the Republic of Estonia, The Lithuanian Armed Forces, the Ministry of Defence of the Kingdom of Norway, the Ministry of Defence of the Republic of Poland, and the United States Special Operations Command Europe, Regarding the Exercise "Shamrock Key 06," art. 9, ¶ 2, Mar. 28, 2006, Latvijas Vēstnesis, 99 [hereinafter *ESA Shamrock Key 06*] (regarding sending states visiting units (VU) present in the receiving state (RS) provides that "VU military personnel may carry weapons and ammunition in accordance with Article VI of the NATO SOFA when performing official duties, transiting the RS, and at the RS training locations"); see also Latvian SOF Act, *supra* note 119, sec. 4(4) (explaining how NATO forces regulate the transport of both weapons and ammunition into Latvia).

123. Section 4(4) of the Latvian SOF Act, *supra* note 119, (2017) (quoting "[w]eapons shall be transported across the State border of the Republic of Latvia and in the territory of the Republic of Latvia unloaded, in packaging and separately from the ammunition thereof, if it is not otherwise provided for in the instructions for use of weapons").

By multi-national forces stationed in a host nation, different military regulations regarding weapons and ammunition may apply. Moreover, the national requests may differ in the various host nations concerned, such as in the Baltic states, Poland, Germany and Denmark. For a multi-national Headquarters, such as the MNDN, with a distributed “Headquarters East” in Denmark and a “Headquarters West” in Latvia and ongoing duty travel between the two permanent locations, the host nation’s legal framework would differ and change constantly. The varying regulations on weapons and ammunition will create legal complexity and administrative obstacles and, thus, may hamper timely and effective reactions to a hybrid campaign. There are good legal and operational reasons to conclude separate multi-national SOFAs on the question of arms and ammunition in peacetime and crisis and align the legal framework of both sending and receiving nations.¹²⁴ The “gap” in the NATO SOFA regarding specific directives for handling arms and ammunition would thereby be closed.

Under Article II of the NATO SOFA, there are two important limitations on the right which state that members of a “force may possess and carry arms” if so authorized by orders.

Firstly, the granted right under the NATO SOFA that a “force may possess and carry arms” is thus exempted from the host nation’s public law regulations on weapons and ammunition as it only applies to the forces in their performance of military duties in accordance with the authorization by orders,¹²⁵ where the sending states (TCNs), in principle, maintain primary jurisdiction under the NATO SOFA.¹²⁶ When not acting on duty, restrictive

124. More recently, with a provision regarding ammunition, such separate SOFAs have *ex tunc* been concluded. *See*, Agreement Between the United States of America and Poland, Pol.-U.S., art. VII, ¶ 3, Dec. 11, 2009, T.I.A.S. No. 10-331 [hereinafter US/Poland SOFA 2009] (quoting “[w]ith regard to the storage of arms and munitions on agreed facilities and areas, United States forces shall apply their own law and regulations. Arms and ammunition may be stored outside agreed facilities and areas upon mutual agreement.”).

125. *See also* NIJHOF, *supra* note 122, at 199, with reference to the *travaux préparatoires* to the NATO SOFA; *see also* the Latvian SOF Act, *supra* note 119, sec. 5 (explaining how “[p]ersons contained in the foreign armed forces, during residence thereof in the Republic of Latvia, are entitled to carry and use firearms solely for fulfilment of service duties.” Importantly, this provision in Latvian law— compared with the NATO SOFA — extends the right to carry and use firearms to civilian components as “persons contained in the foreign armed forces” are both military personnel and “civilians who are employed in the armed forces of the relevant foreign country”) (emphasis added); *see also* the Latvian SOF Act, *supra* note 119, sec. 1(2).

126. *See* North Atlantic Treaty, *supra* note 118, art. 7 (according to Article VII (1) (a) and (b) of the NATO SOFA, the military authorities of the sending state shall, *on the one hand*, have the right to exercise in “all criminal and disciplinary jurisdiction conferred on them by the law of the sending state.” *On the other hand*, the receiving state shall have jurisdiction “with respect to offences ... punishable by the law of that state,” which can lead to competing jurisdiction of the sending and receiving state. In case of such “concurrent” jurisdiction, the military authorities of the sending state (TCN) in accordance with Article VII (3)(ii) of the NATO SOFA “shall have the

public rules on weapons and ammunition in the host nation may apply, such as the Danish prohibition to import, produce, collect, purchase, possess, carry and use any kinds of weapons, including specific knives, without authorization.¹²⁷ More flexible and relaxed weapon regulation for possessing and carrying arms off duty are usually enforced in other NATO alliance countries, *inter alia*, the Baltic states and in particular in the U.S. This is a practical and legal concern in the *jus ante bellum* that military personnel in peacetime and crisis will be temporarily off duty, or on leave, and in that timespan be subject to perhaps unknown, strict weapons regulation in the host nation, and in principle punishable for any violation thereof under the receiving state's (host nation) law and jurisdiction. For foreign troops present in other NATO states, the determination of when a person is "on duty" or "off duty" may not always be easy. In any case, members of foreign forces will have to be educated and trained in legal compliance with the host nation's law and regulations.¹²⁸ In a hybrid campaign, foreign troops are a more vulnerable target for provocation, threats, attacks, and media exposure while "off duty," and acts in violation of the host nation's law may be exploited by a hybrid propaganda campaign.

Secondly, the right under the NATO SOFA to "possess and carry arms" only applies to members of a force and not to civilian components, family members or sending state contractors, including PMSCs. Again, host nation law applies, and the host nation maintains primary or exclusive jurisdiction. If sending states employ civilian components and contractors to perform security and other military tasks requiring them to carry weapons and potential use of force, this should be regulated in a bilateral or multi-lateral

primary right to exercise jurisdiction" in relation to offences to the property or security of the sending state and "*act or omission done in the performance of official duties.*" The receiving state retains primary jurisdiction in case of any other offences).

127. See Promulgation of the Act on Weapons and Explosives, etc., *Lovbekendtgørelse om våben og eksplosivstoffer m.v.*, No. 920, §§ 1-2 (2019); see also *id.* § 8(1)-(2) (the military authorities are exempted from this regulation, and military personnel are also exempted from the prohibition of cross-border purchase, sale, deliver, transport or otherwise transfer of weapons if this is done in the performance of military duty).

128. In addition, for the purpose of jurisdiction of the sending state under Article VII (3)(ii) of the NATO SOFA, the determination of what constitutes "*official duties*" is undefined in the NATO SOFA and should be made part of a separate agreement. See, *inter alia*, US/Poland SOFA 2009, *supra* note 124, art. XIV, ¶ 2 ("Official duty' means any duty, service or act required or authorized to be done by statute, regulation or the order of a military superior or of a member of the civilian component issued in his or her supervisory capacity. Official duty is not meant to include all acts done by an individual during the period while on duty but is meant to apply only to acts that are required or authorized to be done as a function of that duty or service that the individual is performing").

SOFA,¹²⁹ or in the host nation's applicable law.¹³⁰ Moreover, the status of state contractors is not governed by the NATO SOFA, and a specific permission for entry and stay must be granted. In this connection, the jurisdiction issue regarding state contractors should be considered.¹³¹

3. *Use of force and self-defense by foreign forces*

AA) THE SOFA "GAP" ON THE USE OF FORCE

Neither the NATO SOFA nor the UN Model SOFA address the question of the source, scope and application of the use of force in self-defense by foreign forces present on foreign territory. This is a significant "gap" in the standard SOFA regulation.

Rarely do specific bilateral SOFAs deal with this vital question. The detailed US/Poland SOFA 2009 and the SOFAs between the U.S. and the Baltic states concluded in 2017, do not address this issue. Additionally, separate multi-lateral or bilateral SOFAs for major exercises are normally silent on the issue of use of force and definition of self-defense.¹³² An

129. For an example of such regulation regarding the carrying of weapons by civilian components, *see id.*, art. VII, ¶ 2. Both inside and outside defined military facilities, and areas outside such areas only with consent of the "Executive Agent", which means the Department of Defense for the United States and the Ministry of National Defense for the Republic of Poland.

130. *See* sec. 5, 1(2) of the Latvian SOF Act, *supra* note 119, (2017); *see also* text accompanying *supra* note 122.

131. *See* US/Poland SOFA 2009, *supra* note 124, arts. 8(7), and 33; *see also* Agreement on Defense Cooperation between the Government of the Republic of Latvia and the Government of the United States of America, Lat.-U.S., art. XXVI, Jan. 12, 2017, T.I.A.S. 17-405, https://www.mk.gov.lv/sites/default/files/editor/asv_dca_2017_eng.pdf [hereinafter US/Latvia SOFA 2017]; *see also* Agreement on Defense Cooperation between the Government of the United States of America and the Government of the Republic of Estonia, Est.-U.S., art. XXVI, Jan. 17, 2017, T.I.A.S. 17-706.1, https://www.riigiteataja.ee/aktalisa/2160/6201/7002/Est_USA_agreement.pdf [hereinafter US/Estonia SOFA 2017]; *see also* Agreement on Defense Cooperation between the Government of the United States of America and the Government of the Republic of Lithuania, Lith.-U.S., art. XXVI Jan 17, 2017, T.I.A.S. 17-227 [hereinafter US/Lithuania SOFA 2017]. The US and Baltic SOFA 2017 were preceded by a temporary SOFA with a similar content concluded in 2015 by exchange of notes. *See, inter alia*, the Agreement Between the United States of America and Lithuania, Lith.-U.S., at 2, 3, effected by the Exchange of Notes at Vilnius, June 15, 2015, T.I.A.S. 15-618 [hereinafter US/Lithuania SOFA 2015] (regarding the status of US contractors).

132. *See*, US/Poland SOFA 2009, *supra* note 124, art. 29, sec. 2 ¶ 2 (stating upon the consent of the appropriate authorities of Poland, allows US forces to "operate outside of the agreed facilities and areas in order to ensure security of United States forces and dependents" and where the use of force is not addressed); ESA Shamrock Key 06, *supra* note 122, art. 5 (Force protection and security, which refers to Article VII(10)-(11) of the NATO SOFA and states the following regarding the right of the visiting units (VU) of the sending states (SS) to take measures to maintain order and security, Article 5(3): "All Parties recognize the right of the VU to take all appropriate measures to ensure the maintenance of order and security at any sites it occupies in accordance with this ESA. If the safety of members of the VU is endangered, then SS military authorities may take appropriate measures to maintain or restore order and discipline in the

exception to this silent feature of SOFA regulations is found in the NATO/German SOFA 1954 concluded after the end of the occupation regime following the Second World War, where the permanent stationing of troops in the former West Germany was regulated. The NATO/German SOFA 1954 (now Revised Supplementary NATO/German SOFA 1993) requires that the sending state may authorize "civilian component and other persons employed in the service of the force" to possess and carry arms. However, regarding the use of arms it must "issue regulations, which shall conform to the German law on self-defense (*Notwehr*) on the use of arms."¹³³

BB) THE DISTINCTION BETWEEN PERSONAL AND STATE (UNIT) SELF-DEFENSE

The most restricted legal basis for the use of force is self-defense, which constitutes a generally recognized inherent right of all persons and, in addition, of all states, their organs and armed forces pursuant to Article 51 of the UN Charter and customary international law. However alike, the two forms of self-defense must be strictly distinguished.

The right to personal self-defense derives from the national law applicable and HRL. It is codified in most national laws and constitutes a necessary corollary to the right to life under HRL. However, regarding the source, scope and application the right differs decisively under various national laws.

The right to state individual or collective self-defense derives from public international law and is, pending differences in interpretation, in principle uniform. It is a right vested in a state, its organs and armed forces, and, thus, includes self-defense of the state armed force (force self-defense), the so-called "unit self-defense" or the defense of a single soldier in service and performing military duties.¹³⁴ The exercise of force, unit or soldier self-defense will follow military orders and directives, including ROE, where a

facilities or areas where the VU are located. *The foregoing shall not be interpreted to restrict the right of self-defense outside of the facilities and areas as well*') (emphasis added).

133. See Convention on the presence of foreign forces in the Federal Republic of Germany, art. 12, ¶ 1, Oct. 23, 1954, 334 U.N.T.S. 4765 [hereinafter NATO/German SOFA 1954] (This Convention does not apply to the new Länder and Berlin, and is not in force); NATO Supplementary Agreement, Ger., Aug. 3, 1959, as Amended by the Agreements of Oct. 21, 1971, May 18, 1981, and Mar. 18, 1993 (to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany) (entered into force on March 29, 1998) [hereinafter Revised Supplementary NATO/German SOFA 1993].

134. This divide is rarely addressed in doctrine but nevertheless it is of vital importance, see, however, on this issue, DINSTEIN, *supra* note 2, at 261-62 (proposing the phrase "on-the-spot-reaction" instead of the often used term of "unit self-defence" to describe the use of counter-force by armed forces under attack under the authority of Article 51 of the UN Charter).

unit and soldiers can be ordered not to open fire, cease-fire or withdraw even if the conditions for state (unit) self-defense under international law are fulfilled. Moreover, force self-defense is usually a standing order in terms of an obligation (military duty) and not just an “inherent” right. On the contrary, the right to personal self-defense is generally seen as an inherent right of a person, which cannot be limited by military orders or directives.¹³⁵

Hence, in any discussion of “self-defense,” this divide between personal self-defense under national law and HRL, and force (unit) self-defense as part of the right to state self-defense under international law must be kept in mind.

Regarding the use of force and self-defense by foreign forces, the inherent right to personal self-defense is, *on the one hand*, assumed to be governed by territorial law of the receiving state (host nation) albeit special agreements between the states concerned. As part of the right of state self-defense, the right of force/unit self-defense is governed by international law. The exercise of it depends on how *de facto* this is implemented in the law and policy of the sending state and its military orders and directives. In principle, it does not make any difference whether this right is exercised on foreign territory.¹³⁶ Illustrative in this regard is the Danish Royal Standing Order 1952 (still in force) to all Danish armed forces and personnel that in case of an armed attack on the territory of Denmark or on Danish military units, including Danish forces present outside Danish territory, Danish forces must engage in combat without delay and without awaiting or requesting an order, even when there is no knowledge of a declaration or state of war.¹³⁷ It

135. *See, inter alia*, Law on the Approval of the Statute on the Use of Military Force, Law No. VIII-1621, art. 5(3) (Apr. 13, 2000), as last amended by Law No. XII-2531 (June 29, 2016) (Lith.) [hereinafter Lithuanian Statute on the Use of Military Force] (quoting “[t]he rules of engagement shall not restrict the right of servicemen to use military force for the purposes of self-defence. The servicemen shall take a decision to use the necessary and proportionate military force for the purposes of self-defence independently having regard to the nature of an initiated or imminent attack. The decision to use military force in exercising the right of a military unit to self-defence, as well as in defending other servicemen or military units against the initiated or imminent attack shall be taken by the commander in charge of the military unit or a military operation”).

136. *See* for an agreement with this view NIJHOF, *Arms in Fleck*, *supra* note 122, pp. 201-02, (stating that “it could be assumed that the use of force is regulated by the (self-defense) law of the Receiving State. But visiting forces have a right of self-defense that derives from the Sending State’s sovereign right of self-defence under international law, not the domestic law of the Receiving State.”).

137. *Anordning om forholdsordre for det militære forsvar ved angreb på landet og under krig* [Ordinance on Arbitration for Military Defense in case of attacks in the countryside and during war], Lov. nr. 63 af 06 Mar 1952. <https://www.retsinformation.dk/eli/ta/1952/63>; FORSVARSMINISTERIET, MILITÆRMANUAL OM FOLKERET I INTERNATIONALE MILITÆRE OPERATIONER [MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS] 37 (Jes Rynkeby Knudsen ed., 1st ed. 2016).

is expressly stated that false orders and information not to mobilize, resist and interrupt fighting are expected, and as such may not be followed before there is necessary proof of these being issued by competent authorities.¹³⁸

CC) RIGHT TO POLICE AND TO ENSURE ORDER AND SECURITY

In the limited regulation on the use of force in the NATO SOFA, “the right to police” and to “take appropriate measures to ensure the maintenance of order and security on such premises” is accorded to foreign military units and formations inside camps, establishments or other premises occupied by foreign forces.¹³⁹ It is not defined what exactly is covered by a right to police and to maintain order and security and what kind of use of force is permitted to that end. The SOFAs between the U.S. and the Baltic states further extend the right and authority of the U.S. as a sending state and authorize the U.S. on host nation territory to exercise all necessary rights and authorities for the use, operation, defense, or control of premises, including taking appropriate measures to maintain or restore order. Hence, by these SOFAs, the U.S. is entitled to exercise all rights and authorities necessary in defense of premises and take appropriate measures to protect U.S. forces, U.S. contractors, and dependents.¹⁴⁰ However, it is not addressed whether the use of force in exercising all rights in defense and taking appropriate measures to protect U.S. forces, U.S. contractors, and dependents are governed by host nation law or U.S. law, including a presumably more extensive right to personal self-defense under U.S. law.

Outside such premises, according to the NATO SOFA, any employment of foreign military police or force is subject to arrangements with the receiving state (host nation) and only in so far as such employment “is necessary to maintain discipline and order among the members of the

138. Lov. *supra* note 137 (“Der må forventes ved krigsudbrud og under krigstilstand at ville fremkomme falske ordrer og meddelelser til befolkningen og til mobiliserende eller kæmpende styrker. Ordrer om ikke at mobilisere eller ikke at gøre modstand eller afbryde påbegyndt mobilisering eller kamp må derfor ikke adlydes, før der foreligger fornøden vished for, at ordren er udstedt af dertil kompetent myndighed”) [False orders and messages to the population and to mobilizing or fighting forces must be expected in the event of an outbreak of war and during a state of war. Orders not to mobilize or not to resist or to interrupt the mobilization or struggle commenced must therefore not be obeyed until there is the necessary certainty that the order has been issued by the competent authority].

139. North Atlantic Treaty, *supra* note 118 art. VIII, 10(a).

140. See *US/Latvia SOFA 2017*, *supra* note 131 at 10; see also *US/Estonia SOFA 2017*, *supra* note 131, at 10; see also *US/Lithuania SOFA 2017*, *supra* note 131, at 11 (“[Latvia/Estonia/Lithuania] hereby authorizes U.S. forces to exercise all rights and authorities necessary for U.S. forces’ use, operation, defense, or control of Agreed Facilities and Areas, including taking appropriate measures to maintain or restore order and to protect U.S. forces, U.S. contractors, and dependents”).

force.”¹⁴¹ For other purposes, the maintenance of internal law and order is entirely the host nation’s competence and task. Nevertheless, the receiving state has the obligation to seek such legislation as it is deemed necessary to ensure the adequate security and protection of the foreign forces.¹⁴²

DD) THE DILEMMA OF PERSONAL AND STATE SELF-DEFENSE IN MULTI-NATIONAL OPERATIONS

When the use of force is not regulated in the NATO SOFA or a separate supplementary SOFA, the territorial host nation law will apply and determine the extent to which personal self-defense may be used by members of foreign military forces, civilian components, dependents, and contractors. The inherent right to personal self-defense is universally recognized, but the threshold for an attack or imminent threat of attack to life or causing of serious personal injury varies, just as the possibility to use force in self-defense of others and for the protection of property differs, and the proportionality and necessity requirement can be very strict or to a wide degree relaxed.¹⁴³

If based on an agreement the law of the sending states applies, the multinational forces and Headquarters will face a multiplicity of personal self-defense concepts, and the host nation may have to accept the use of force in self-defense on its territory beyond what its own national law permits. Conversely, if the law of the receiving states (host nation states) applies, there will also be more concepts by cross-border operations and distributed Headquarters and, rather critical, some sending states such as the U.S. will see their national definition of personal self-defense narrowed down – perhaps to an unacceptable degree.

This constitutes *the dilemma of personal self-defense in multi-national operations*, which, in principle, is unsolvable. There is no expectation that a law harmonizing the personal right to self-defense will see the daylight in a near or foreseeable future at a global or even regional level. One will have to choose between one of the two options of applying either the law of the sending states (TCNs) or the law of the receiving states (host nations). In NATO, the first path of referring to the sending nation law regarding personal self-defense has been chosen. Here, the ROE do not limit the inherent right to self-defense under national law by forces under NATO command and

141. North Atlantic Treaty *supra* note 118, art. VII, 10(b).

142. *Id.*

143. North Atlantic Treaty Organization Rules of Engagement MC 362/1, July 2019 [hereinafter NATO ROE 2019] (stating “[i]t is universally recognized that individuals and units have a right to defend themselves against an attack or an imminent attack ... NATO Member States have varying interpretations on the source, scope, and application of self-defence ...”).

control of foreign territory.¹⁴⁴ This approach may be adopted at a national level in the ROE issued for peacetime and crisis by a host nation or agreed upon by separate SOFAs, which then allows foreign forces to use force in accordance with their own national concept of personal self-defense.¹⁴⁵

Until unity of allied command is established by a Transfer of Authority (TOA) from each nation to a common military command such as NATO, the national formations and units will operate under national command and directives regarding the use of force. This means that various national ROEs and policies of state (force/unit) self-defense will apply in a low threshold hybrid warfare theater. The example of the NATO enhanced Forward Presence (eFP) in the Baltic states and Poland is illustrative; as of October 2019, the four multinational battalions consist of rotating troops and staff members from twenty-one countries and four host nations with consequently multiple policies and interpretations of force/unit (state) self-defense being applied.¹⁴⁶

This constitutes *the dilemma of state (force/unit) self-defense in multinational operations* and will be the status of the *jus ante bellum* and *jus in bello* until there is a TOA to NATO by all nations involved. When the allied headquarters is in command, it can and likely will authorize and issue common ROE, which depending on the situation can have a defensive or (perhaps dormant) offensive character.¹⁴⁷ By such ROE, the differences in the national concepts of personal and force (unit) self-defense can be leveled out by, *inter alia*, the use of ROE requiring hostile act and hostile intent for the use of minimum but up to lethal force. The use of force against persons, units or groups showing hostile act and hostile intent (perhaps including “hot pursuit”) will be in line with the concept of personal and force (unit) state

144. *Id.* (specifying NATO “ROEs do not limit this right. In exercising this right, individuals and units will act in accordance with national law...[b]ecause national laws differ...[i]n cases of inconsistency, ROE...shall not be interpreted as limiting the right of self-defense”).

145. See Lithuanian Statute on the Use of Military Force, *supra* note 135, art. 14 (providing for authority to issue ROE for the Lithuanian armed forces in peacetime for the purpose of supporting state and local authorities’ law enforcement); see Rule of Engagement for Protecting Military Territories and Military Property Located Therein or Transported Outside These Territories, Order No. V-1226 (2017) (Lith.) [hereinafter Lithuanian Force Protection ROE 2017] (unmarked (non-classified) but not made realizable to the public, which force protection rules of engagement are applied – after approval by the Lithuanian armed forces at Brigade level – by NATO eFP in Lithuania according to separate MOUs with exceptions considering the differences in the concept of personal self-defense).

146. North Atlantic Treaty Organization, *NATO Enhanced Forward Presence*, NATO.INT (Jan. 21, 2020), https://www.nato.int/nato_static_fl2014/assets/pictures/images_mfu/2020/1/pdf/200121-MAP_eFP-en.pdf.

147. See NATO ROE 2019, *supra* note 143 ¶ 1-2 at 1, (describing how Rules of Engagement (ROE) for NATO forces are guidance and directives to NATO Commanders and the forces under their command and control; and where the term “NATO forces” is defined).

self-defense of some states and clearly excessive when compared to national law and directives of others.

The TOA decision is a critical national political matter and the TOA over national armed forces may come under conditions and, thus, include reservations and caveats. It is only likely to be granted by states just prior to or immediately after activation of individual and collective state self-defense. In a national crisis and in cases of small-scale armed hostilities with non-state actors and armed groups in parts of the territory of an alliance state only, the territorial states concerned may wish to retain command and control of national armed forces and, thus, for the time being refuse TOA. This disregarding whether the armed hostilities fall below or exceed the threshold for a NIAC, where in the latter NIAC scenario, according to the prevailing and convincing view, the LOAC applicable for a NIAC extends to the entire territory of the states concerned.

Another and recommendable option – even though presumably politically difficult – would be for all states concerned, to agree on common ROE applicable in peacetime and crisis when taking part in NATO reassurance measures, either by *ad hoc* agreements or a supplementary SOFA, and thereby filling the decisive “gap” in the NATO SOFA in the time prior to TOA to NATO command.

4. *Military Assistance and Support to Law Enforcement and Crisis Control*

The receiving state (host nation) has the sole responsibility and competence regarding internal security and law enforcement. However, the host nation can permit, and upon consent receive support from law enforcement in peacetime and crisis from the military forces and civilian component of another state present on its territory. The military forces of the sending states have limited authority, which is confined to maintaining law and discipline in designated military facilities, areas, and among members of their forces. Further authority is not granted under the NATO SOFA and only exceptionally given in separate bilateral SOFAs. In Article 29(2), the US/Poland SOFA 2009 authorizes exclusively U.S. operations outside such designated areas for the purpose of protecting U.S. forces and dependents:

Upon request of either Party and with the consent of the appropriate authorities of the Republic of Poland, United States military authorities may operate outside of the agreed facilities and areas in order to ensure security of United States forces and dependents. During such operations, United States military authorities shall use clear identification of their special

status, and they shall immediately contact the appropriate authorities of the Republic of Poland and shall act consistent with their instructions.¹⁴⁸

The legal framework in the host nation, including the applicable HRL constraints and restraints, and the limits for military support to civil law enforcement must be clarified. In addition, the sending states' (TCN's) possible reservations and *caveats* regarding supporting operations must be adhered to as well. In any event, such foreign military support requires, not only specific military and police training, including legal training, but in particular mutual trust regarding the performance of law enforcement (police) tasks. The host nation and TCNs' *caveats* may concern the possible military support in the first place and, if allowed, the specific conditions regarding, *inter alia*, police command and control, detention, and use of force in personal or unit self-defense, in defense of others (civilians), military equipment, and facilities. Each nation will presumably have adopted its own legal regime for the military support to police and law enforcement in peacetime and crisis, which will be designed and shaped by the national tradition and culture and, thus, constitute a *sui generis* regime for each nation. Consequently, an intensive legal training of incoming foreign forces regarding the host nation's peacetime or emergency law, including the impact of TCN's reservations and *caveats*, should be made. With the constant routine of in- and outgoing foreign multi-national forces every third to sixth month in the territories of the NATO states, placed geographically at the hybrid threat or warfare frontline, this will be a demanding, time-consuming and complex task.

In summary, while the NATO SOFA permits alliance state forces to be present and carry arms on the territory of the receiving host nation, any assistance and support to a host nation's law enforcement by other states military forces, including the use of force, must be in accordance with the host nation's peacetime and human rights law. While in times of unrest and crisis, national military force may be empowered to perform law enforcement tasks under police and/or military command, foreign forces must be especially authorized by both the sending nation and the host nation to do so.

A practicable solution – but also a rather radical and politically sensitive one – would be to accord to foreign NATO forces the same authorization to use force in support of police law enforcement as given to national forces at any point in time. This is the stage of Latvian law and, thus, the host nation policy at the East Headquarters of MNDN. As a general statement, the Latvian national rules on the use of force, including rules on escalation of the

148. US/Poland SOFA 2009, *supra* note 124 art. 29, at 24

use of force, apply to foreign NATO forces present in Latvia.¹⁴⁹ Thus, Latvian law permits foreign NATO forces to wear uniforms, carry and use weapons in the same way as Latvian National Armed Forces, and accord them with the relevant rights of the Latvian National Armed Forces. This includes the right to individual self-defense under Latvian law, defense of other persons and to avert an attempt to violently obtain a service firearm. When foreign forces take part in military guard duties or perform other official tasks such as support to the police law enforcement in times of emergency or crisis, they will be authorized to use force in the same manner as Latvian armed forces. If the sending states approve such a support by their armed forces, there will be alignment in the peacetime and crisis Standing Rules for the Use of Force (SRUF).¹⁵⁰ Compared with the law of other states, the use of force permitted by the armed forces according to Latvian law could be viewed as excessive in peacetime. However, it signals a necessity to employ military force against certain hostile and armed activities on the frontline of hybrid threats and warfare already in peacetime and crisis. The same result in terms of alignment of the ROE is reached under Lithuanian law by the application of the peacetime Lithuanian Force Protection ROE 2017 by virtue of separately agreed MOUs with the sending states of eFP forces, however, with respect of the application of the personal self-defense according to national law of the foreign armed forces.¹⁵¹

Turning from the East Headquarters of MNDN in Riga, Latvia, to the MNDN West Headquarters in Denmark, the use of force in peacetime and crisis is entirely a national police task with a possible exclusive supporting role by Danish armed forces. The possibility for the police to request military support from Danish armed forces (but not foreign armed forces) was extended in 2018, but it is still quite limited. It can be provided regarding a wide range of specific tasks only under the strict conditions that the resources and capabilities of the police are insufficient, that supporting operations are under police command and control, and that the rules governing the

149. See Latvian SOF Act, *supra* note 119, § 2(1) (quoting “Armed forces of the North Atlantic Treaty Organisation and European Union Member States may be involved in the provision of support to the National Armed Forces ... In providing support ... the units of armed forces of the North Atlantic Treaty Organisation and European Union Member States and officials ... have the relevant rights of the National Armed Forces and officials thereof”).

150. See *Militārā dienesta likums* [Military Service Act], Latvijas Vēstnesis, 91 § 13 (2002) (amended 2019) (permitting the use of force in peacetime and crisis by national armed forces in clear excess of what is allowed in some other countries, such as Denmark, where the police monopoly of the use of force in peacetime is strictly adhered to).

151. Lithuanian Force Protection ROE 2017, *supra* note 145 (specifying ROE apply only to Lithuanian territory in peacetime when protecting military territories and important military property).

competence and the use of minimum force by the police are followed.¹⁵² With the amendment of the Police Act in 2018, it was made possible to designate specific military areas for, *inter alia*, NATO re-enforcement forces, the outer security of which are secured and guarded by Danish military forces only, and not by foreign forces.¹⁵³

In case of an escalation of a crisis in terms of increasing unrest, riots and armed hostilities below or even above the “armed conflict” threshold for a NIAC, deviation from the normal peacetime law enforcement regime may follow a step-by-step or at once enacted national emergency (martial) law and/or escalation steps taken collectively by the defense alliance concerned.

b. Different National Emergency (Martial) Law Regime and Possible Derogation from HRL

The Baltic states and Poland have been on the frontline of the Russian hybrid threat and warfare for years and have adapted their national legislation and planning on emergency, mobilization, re-organization of governance, civilian support, preparedness and resistance to meet the hybrid challenges.¹⁵⁴ In addition, Poland and the three Baltic states have entered into bilateral SOFAs with the U.S. in 2009 and 2017, which supplements the NATO SOFA, and facilitates the presence of U.S. forces.¹⁵⁵ Other NATO or PfP states without specific bilateral SOFAs or MOUs are left with the standard NATO SOFA and its “gaps”.

Some of the most important issues to be dealt with in the various national emergency (martial) laws or *ad hoc* emergency regulations regarding national and foreign forces are the following: *First*, the conditions for

152. See *Bekendtgørelse af lov om politiets virksomhed* [Promulgation of the law on the activities of the police], Lbk No. 1279 af 29 Nov. 2019. <https://www.retsinformation.dk/eli/lt/2019/1270> [hereinafter Danish Police Act] (detailing use of force by police in §§ 14–16); See *Bekendtgørelse af lov om forsvarrets formål, opgaver og organisation m.v.* [Promulgation of the Act on the purpose, tasks and organization of the Armed Forces, etc.], Lbk No. 582 af 24 May 2017. <https://www.retsinformation.dk/eli/lt/2017/582> [hereinafter Danish Act on Defence] (establishing the legal basis for the military and the Minister of Defense in § 7).

153. Danish Police Act § 24 e.

154. See Ministry of Nat'l Defense Republic of Lith., *Mobilizacijos ir pilietinio pasipriešinimo departamentas prie KAM* [Department of Mobilization and Civil Resistance under the Ministry of National Defense], KARIUOMENE, https://kam.lt/lt/struktura_ir_kontaktai_563/kas_institucijos_567/mobilizacijos_departamentas_prie_kam.html (working with governmental and regional authorities, civil defense and home guards units, civilian organizations, rifle unions, and private companies to prepare for national emergencies, including total national defense and support to national and NATO forces); see CONSTITUTION OF THE REPUBLIC OF LITHUANIA Oct. 25, 1992, ch. 13, art. 142 (requiring the activation of martial law “[i]n the event of an armed attack which threatens the sovereignty of the State or territorial integrity” or “in defence of the homeland or for the fulfillment of the international obligations of Lithuania”).

155. US/Poland SOFA 2009, *supra* note 124.

possession and carrying of weapons and ammunition. When on duty, temporally on leave or “off duty”, military personnel may need to possess and carry weapons and ammunition as the security situation may require military personnel and civilian components to be able to defend themselves at all times. *Second*, the use of force beyond mere personal self-defense or unit self-defense when encountering hostile hybrid activities until TOA and common NATO ROE will apply. Here, the Latvian regulation aligning the use of force by national and foreign forces seems to represent a model to follow.¹⁵⁶ *Third*, the conditions for own national, bilateral or NATO military support to law enforcement (the assist/support role). *Fourth*, the need for legal education and training of all personnel on exercise in peacetime and crisis scenarios. This should be prioritized as military forces will have to operate under a certain national law enforcement regime and apply the peacetime and emergency law of the respective host nations.

The national regulatory approach to a state of emergency or a state of exception vary from state to state. Here again, a comparison with the legal state of affairs in Denmark and the Baltic states show a striking difference, although the countries apply the concept of total state defense.

Under Danish law, the maintenance of law and order, including law enforcement, in peacetime and crisis is exclusively the competence of the civil police with possible support by the Danish armed forces. This is where civilian and military efforts will be coordinated by local authorities and the National Operative Staff (*Den Nationale Operative Stab*), the so-called NOST) on an *ad hoc* basis.¹⁵⁷ The entire joint operation will be conducted under the police law enforcement regime and the use of force applicable in this context.¹⁵⁸ There is no national regulation or law on emergency (martial law) which governs and regulates the emergency and crisis situations as such. For an international military staff and its legal advisors in Headquarters such as the MNDN in Denmark/Latvia, this creates legal challenges as the exact content of the *ad hoc* legal regulations and directives in emergency situations to some extent is uncertain.

Under Latvian law, as well as under Lithuanian and Estonian law, the state of emergency and state of exception is expressly regulated in a specific emergency or martial law, which provides clarity and allows for prior

156. See discussion *supra* Section V.A (a)(4).

157. See Danish Act of Defence § 17 (empowering the Minister of Defense to adopt the necessary measures “[d]uring war or other extraordinary circumstances”).

158. See Law Enforcement Act, RT I § 74 (2011) (allowing nothing more than the use of force according to peacetime law enforcement rules); see State of Emergency Act, RT I 1996, 8, 165 § 15– 15¹ (1996).

planning accordingly.¹⁵⁹ The “State of Exception” in Latvia as a special legal regime can be declared if: 1) the State is endangered by an external enemy; 2) internal disturbances which endanger the democratic structure of the State have arisen or are in danger of arising in the State or any part thereof.¹⁶⁰ The latter situation includes civilian unrest, riots and internal conflicts even though this may fall below the threshold of an internal “armed conflict” (NIAC).¹⁶¹ Upon a declaration of a “State of Exception”, the reasons, time, territory, set of measures, restrictions and additional duties of civilians, the tasks of state and local authorities and information to and recommendations for actions of inhabitants must be stated.¹⁶²

As HRL still plays an important role in case of national emergency and crisis, the possible derogations of applicable human rights law regimes in times of national emergency and war is a viable and necessary option for states, in order to ensure compliance with constitutional rights and HRL treaty law.¹⁶³ However, this may result in different national derogations and, thus, an even wider discrepancy of the content of the host nation’s emergency (martial) laws and more legal complexity.¹⁶⁴ Hence, member States of defense alliances such as NATO should seek to align their possible derogation from the HRL regime applicable, in particular regarding those states which are bound to the same regional HRL treaties. According to the “derogation clause” contained in HRL treaties, a derogation from most provisions is possible:

In time of war or other public emergency threatening the life of the nation
... may take measures derogating from its obligations under the Convention

159. Latvian Act on Emergency Situations and State of Exception, Latvijas Vestnesis 04-10-2013, translated in LIKUMI ([https://likumi.lv/body_print.php?id=255713&lang=en.](https://likumi.lv/body_print.php?id=255713&lang=en;)); LITH. CONSTITUTION May 3, 1791, art. 142, 144; EST. CONSTITUTION Feb. 24, 1918, art. 129(2).

160. Latvian Act on Emergency Situation and State of Exception, § 11.

161. See Estonian State of Emergency Act, §§ 2-3 (Jul. 24, 2009) for the conditions of the existence of a threat to the constitutional order of Estonia: 1) an attempt to overthrow the constitutional order of Estonia by violence; 2) terrorist activity; 3) collective coercion involving violence; 4) extensive conflict between groups of persons involving violence; 5) forceful isolation of an area of the Republic of Estonia; 6) prolonged mass disorder involving violence.

162. Latvian Act on Emergency Situation and State of Exception §§ 13, 15.

163. See LITHUANIAN CONSTITUTION May 3, 1791, art. 145 (stating that after an imposition of martial law or a state of emergency, the rights and freedoms specified in Articles 22, 24, 25, 32, 35, and 36 of the Constitution may be temporarily limited, which provisions provide for the fundamental rights of private life, inviolable of private home, freedom of expression, free choice of residence and right to assemble unarmed and peacefully); see generally ESTONIAN CONSTITUTION (Feb. 24, 1918), art. 130.

164. Latvian Act on Emergency Situation and State of Exception § 17(1)(12) (noting that “partial or complete suspending of carrying out of the liabilities laid down in international agreements, if their carrying out may have a negative impact on the capacity to prevent or overcome the threat to national security”).

to the extent *strictly required* by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.¹⁶⁵

Not permissive under any circumstances is a derogation from the provision concerning the right to life (Article 2 of the ECHR), except in respect of deaths resulting from lawful acts of war, the prohibition of torture and other forms of ill-treatment (Article 3 of the ECHR), the prohibition of slavery or servitude (Article 4(1) of the ECHR) and no punishment without law (Article 7 of the ECHR).¹⁶⁶ When the threshold of an “armed conflict” has been exceeded and the LOAC applies, the special LOAC regime will determine whether lethal use of force is lawful.¹⁶⁷

This is not the place for a detailed analysis of the conditions and validity of possible derogations from, *inter alia*, the ECHR in time of “war and other public emergency”. Nevertheless, from the military legal advisor’s point of view, both the *de facto* declared and possible future derogations, their content and validity should, if possible, be considered in planning and executing military operations in a hybrid crisis and potential armed conflict. Here, it suffices to allude to some of the legal “gray zones” by the interpretation of the HRL “derogation clauses.”

First, the term “war” in Article 15(1) of the ECHR has not been subject to interpretation by the European Court of Human Rights, but should be held to equal the definition of an “armed conflict” in the meaning of the LOAC, whether a NIAC or an IAC. For the purpose of a HRL derogation, a “conflict” below the threshold of an “armed conflict” will mostly constitute a situation of “other public emergency threatening the life of the nation,” where the European Court of Human Rights has deferred to the national authorities’ *prima facie* assessment as to whether such an exceptional situation exists with subsequent judicial appreciation.¹⁶⁸ *Second*, a HRL derogation can be

165. See G.A. Res. 2200A (XXI), at 4 (Dec. 16, 1966); see also EUR. CONSUL. ASS., *European Convention of Human Rights (ECHR)*, 1st Sess., DOC. NO. ETS 5 (1950); see also Organization of American States, *American Convention on Human Rights*, Nov. 22, 1969, O.A.S.T.S. No. 17955, 1144 U.N.T.S. 123.

166. ECHR art. 15(2) (“No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision”).

167. See *supra* note 66 and accompanying text.

168. See *Ireland v. United Kingdom*, 5310/71 Eur. Ct. H.R. (ser. B) ¶ 207 (1978) (“It falls in the first place to each Contracting State, with its responsibility for ‘the life of [its] nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 (art. 15-1) leaves those authorities a wide margin of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is

made for a part of the state, where the “armed conflict” or an actual or imminent crisis in terms of “other public emergency threatening the life of the nation” exists.¹⁶⁹ *Third*, and most importantly, it is up to each individual Contracting State, responsible for the life of its nation, to determine whether the life of the nation is threatened by a “public emergency.” Thus, it is presumably the individual, receiving state (host nation) which for its territory or a part thereof will have to declare a HRL derogation.¹⁷⁰

c. The Dilemma Regarding Use of Private Contractors and Civilian Resistance

The use of state contractors (PMC or PMSC) and the use of civilians for the support of military operations is a delicate legal matter for various reasons.

The employment of state contractors raises the issues of lack of command and control, lack of disciplinary competence, insurance of compliance with national peacetime laws and, when applicable, the LOAC, operational security and jurisdiction issues. Some states are reluctant regarding the use of PMSC, others require compliance with specific vetting procedures, and others may have a general state policy of not using private companies for any military and security tasks in peacetime and crisis,¹⁷¹ and

responsible for ensuring the observance of the States’ engagements (Article 19) (art. 19), is empowered to rule on whether the States have gone beyond the ‘extent strictly required by the exigencies’ of the crisis ... The domestic margin of appreciation is thus accompanied by a European supervision.”).

169. *Aksoy v. Turk.*, Appl. No. 21987/93, 93 Eur. Comm’n H.R. Dec. & Rep. ¶ 70 (1996) (“The Court considers, in the light of all the material before it, that the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a ‘public emergency threatening the life of the nation’”).

170. As far as it is known, this question has not been settled by the European Court of Human Rights but seems to follow from the wording of Article 15 ECHR. In case of an extra-territorial application of the ECHR, the foreign state bound to apply the ECHR in foreign territory, where a “public emergency” under Article 15 of the ECHR exists, should be competent to make an HRL derogation concerning this area. The issue was raised by the European Court of Human Rights. *See Hassan v. U.K.*, App. No. 29750/09, Eur. Comm’n H.R. Dec. & Rep. ¶ 40, 98-101 (“Leaving aside a number of declarations made by the United Kingdom between 1954 and 1966 in respect of powers put in place to quell uprisings in a number of its colonies, the derogations made by Contracting States under Article 15 of the Convention have all made reference to emergencies arising within the territory of the derogating State”).

171. *See Military Justice Administration Act (Act No. 531/2015) amended in Act No. 1550/2017 (Den.)* (stating that the Danish military authorities have the right to control access to military areas, including facilities, and use necessary force, including temporary seizure of property and detention, for that purpose). This authority, which was introduced in 2005 for two security reasons, is granted only to military personnel and not to civilian security contractors. Consequently, as it stands in peacetime, Danish host nation law would not permit foreign PMSCs

involving direct participation in hostilities in case of an armed conflict.¹⁷² Hence, there may be requirements from sending states (TCNs) for the use of their own PMCs or PMSCs such as U.S. contractors as well as host nation *caveats* in this regard. An important “gap” in the NATO SOFA is present regarding this issue. It may be dealt with differently in various specific bilateral SOFAs. When an opponent in a hybrid information campaign is systematically exploiting mistakes, the possible misconduct and illegal acts of PMC and PMSC employed to be a sending state and positioned out of reach of the military chain of command poses an even larger risk and a legal challenge of ensuring law compliance in host allied nations.

The voluntary use of civilians to support an armed defense of a state or the spontaneous appearance and/or encouragement of civilian resistance (a sort of modern *levée en masse*) likewise raises legal issues. The civilian support can constitute acts harmful to the adversary and, thus, constitute taking direct part in hostilities that lead to loss of civilian protection. If this is not the case, civilians supporting armed forces may risk being part of lawful collateral damage. Overall, the civilian population as such may be endangered as the vital distinction between civilians and armed resistance (NIAC) or civilians and combatants (IAC) will be blurred. Moreover, the population in Estonia and Lithuania may refer to their constitutional duty and right to defend their state independence and country against armed attack and invasion, as either a last resort (“[i]f no other means are available”)¹⁷³ or an unconditioned duty and right.¹⁷⁴

to control and secure designated military facilities and areas. In case of a national emergency and crisis, this may be changed.

172. DANISH MILITARY MANUAL § 2.3 (Danish Military of Defence 2020) <https://www2.forsvaret.dk/omos/publikationer/Documents/Military%20Manual%20updated%202020.pdf> (“In the event that the Danish State wishes to use private military and security companies to *perform tasks involving direct participation in hostilities, the private military and security companies need to be integrated into armed forces* within the notion of combatant... This integration could be in the form of employment contracts entered into with civilian staff members. The agreement must ensure that they are subject to the relevant defence legislation and included in the chain of command system, as well as being subject to the requirement to distinguish themselves from the civilian population under the modern rules for combatants outlined above. Such private military and security companies will thereby also be subject to military penal and disciplinary codes on an equal footing with other military personnel”).

173. *See* EST. CONSTITUTION Feb. 24, 1918, art. 54(1) (“An Estonian citizen has a duty to be loyal to the constitutional order and to defend the independence of Estonia”); *see also id.*, art. 54(2) (“If no other means are available, every Estonian citizen has the right to initiate resistance against a forcible change of the constitutional order”).

174. LITH. CONSTITUTION May 3, 1791, art. 3(2) (“The Nation and each citizen shall have the right to resist anyone who encroaches on the independence, territorial integrity, and constitutional order of the State of Lithuania by force”; *see also id.*, art. 139(1) (“The defence of the State of Lithuania against a foreign armed attack shall be the right and duty of each citizen of the Republic of Lithuania”).

This “duty” and/or “right” to conduct civilian resistance depends on the means available such as weapons (also improvised), ammunition, cyber/media capabilities among the civilian population, and the lawfulness of such acts by “*levée en masse*” movements under the LOAC, which will not be further analyzed here.

d. Specific Legal Challenges by countering Informational Campaign and Psychological Operations

A hybrid information campaign, psychological operation, or any other hostile informational activity regarding fake news will not reach the threshold of an armed conflict in the sense of an armed attack or equivalent acts of aggression, but may still constitute an unlawful threat of attack or other unlawful acts under international law such as interfering in the internal affairs of other states. If the hybrid information campaign includes encouragements of the commission of acts contrary to general principles of humanitarian law and illegal advice in a distributed manual on psychological operations this would constitute a violation of LOAC, including the Common Article 3 of the GCs in a NIAC.¹⁷⁵ In addition, national law usually limits, prohibits or even criminalizes certain forms of propaganda for unrest, riots, terror or other acts of hostilities and war.¹⁷⁶

The means and methods to counter hybrid information campaigns and psychological operations in peacetime and crisis are limited *firstly* by SOFA restrictions such as the general prohibition under the NATO SOFA to engage in any “political activity” in the receiving state, *secondly* by HRL restraints, and *most importantly, thirdly* by the limited extent of suitable and capable law enforcement measures applicable in peacetime and crisis. For the most part, counter information measures will have to be strictly based on facts and truth and will, thus, come too late to prevent the effect of the hybrid campaign – the countermeasures will only mitigate the damages. The effective measure against a hybrid information campaign is a rule of law-based counter and preemptive information about an existing hybrid threat and warfare, knowledge of which can build civilian, political and legal resilience.

175. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.), Judgment, 1986 I.C.J. Rep. 14, 129-30, ¶¶ 255-56 (June 27).

176. LITH. CONSTITUTION, *supra* note 170, art. 135(2) (“In the Republic of Lithuania, war propaganda shall be prohibited”).

VI. CONCLUSION AND THE WAY FORWARD: BUILDING LEGAL RESILIENCE
IN *JUS ANTE BELLUM*

A defense alliance can undertake various tasks, and the core tasks for NATO are three: cooperative security, crisis management under Article 3-4 of the NATO treaty, and collective defense under Article 5 of the NATO treaty. The *raison d'être* of NATO is maintaining member state's commitment and support, where legal legitimacy, adherence to legal values, and member states "rule of law" policies are essential parts.

The legal interoperability and legal resilience are, however, decisively challenged by a hybrid threat and warfare mostly conducted just below, or in the "gray-zone" of the threshold for armed conflict and, thus, apparently in a peacetime or crisis legal setting. Here, the framework for a response by individual states and NATO, as such, is to some degree uncertain, different from nation to nation and imposing legal constraints, making it difficult and complex to respond effectively. These legal challenges and "gaps" within the *jus ante bellum* and additional gray-zones in the *jus ad bellum* and *jus in bello* – some of which are analyzed above – will have to be considered more thoroughly by defense alliances, such as NATO, and its member states with the purpose of building and increasing legal resilience.¹⁷⁷

On the one hand, the legal framework of the *jus in bello* applicable in case of an armed conflict and the activation of individual and collective self-defense according to Article 5 of the NATO Treaty is well-codified at the international level and/or supplemented by customary international law, although a number of key issues remain unregulated and/or disputed. The critical issue is not the content of the law governing the conduct of hostilities but rather the conditions for the applicability of the *jus in bello*. This grayzone area of the threshold for a NIAC (organization, intensity and territorial control) and an IAC (attribution of hostile activities to states in terms of "effective control" or "overall control") gives ample options for the conduct of hybrid campaigns.

On the other hand, the *jus ad bellum* is covered by several gray zones and uncertainties, which in a hybrid threat and warfare setting create significant legal "gaps" to be exploited by, in particular, non-law-abiding states and non-state actors. The unclear and disputed "gravity" requirement

177. See generally Hill & Lemetayer, *supra* note 74, at 18, with reference to international law and NATO ("Hence, the Alliance needs to anticipate what requirements might be needed in the fields of international law advice to prepare for, deter, and defend against hybrid warfare. NATO adopted the Readiness Action Plan (RAP) as a means of responding rapidly to news threats as they present themselves along the eastern and southern flanks. The question remains, however about the degree to which NATO, primarily a military organization, can respond to the challenges of hybrid warfare that often fall outside of the classically-defined military area").

and the unsettled issue of a possible use of force under the guise of a "humanitarian intervention" are symbolic in this regard.

Apparently, the case law of the ICJ is based on a *ratio* of restricting the right to use force (the *jus ad bellum* regime) by setting a gravity requirement for the *jus ad bellum*, a formalistic approach to (collective self-defense) and a highly effective control test for state attribution, which all seem out of tune with the realities of hybrid threats and warfare. Such a restrictive and formalistic view of international law may turn out to achieve the exact opposite; it opens several windows of opportunity for an asymmetric hybrid warfare below the critical threshold for the right to war (*jus ad bellum*) and narrows down the possibility to create effective deterrence policies and apply effective countermeasures.

Most importantly, the legal regime applicable before a situation of state self-defense and an armed conflict is, to a large extent, national and not international and uniform. Thus, the content of *jus ante bellum* applicable in each state differs significantly and is only in some areas, such as HRL, aligned. The supporting treaty framework for NATO operations mainly focuses on *whether and on what conditions* foreign forces, Headquarters, and NATO as an organization, national representatives to NATO and international staff to NATO can be present in alliance or partner states (questions of entry, status and jurisdiction). However, these agreements and bilateral SOFAs do not address how and to what extent foreign forces can act, use force, support security and crisis management under Articles 3-4 of the NATO treaty and be used in supporting law enforcement in a state of emergency or martial law. This is a decisive regulative and an alignment "gap" in the existing the SOFA regime. The national emergency (martial) law and the applicable HRL with possible national derogations in times of crisis provoked by a hybrid warfare differ decisively, which reduces the important legal resilience in *jus ante bellum*.

The possible way forward is to build more legal resilience in the *jus ante bellum* and align the current views and interpretations of international law, including the *jus ad bellum*, *jus in bello* and *jus post bellum* in order to meet the legal challenges of hybrid threats and warfare. If a defense alliance, such as NATO, wants to effectively counter the ongoing and future hybrid threats and warfare, the aspects of legal resilience and robustness must be an integrated part. Therefore, it is recommended that a NATO Center of Excellence on Legal Resilience (Legal Resilience CoE) is set up with this main task. Research should *inter alia* be conducted on: (i) the various gray zones and "gaps" in international law, the LOAC and HRL; (ii) the different national peacetime and emergency regulations and how these could be improved, aligned and model laws drafted; and (iii) a possible reform of

existing SOFAs by drafting new model SOFAs, which address the significant “gaps” in the current SOFA regulation.

CHALLENGES IN REGULATING LETHAL AUTONOMOUS WEAPONS UNDER INTERNATIONAL LAW

Shane R. Reeves, Ronald T. P. Alcala & Amy McCarthy*

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Since 2017, the United Nations (UN) has regularly convened a group of government experts (GGE) to explore the technical, legal, and ethical issues surrounding the deployment of lethal autonomous weapon systems (LAWS). Established by the High Contracting Parties to the Convention on Certain Conventional Weapons (CCW), the UN GGE on LAWS includes

* Colonel Shane R. Reeves is a Professor and Head, Department of Law at the United States Military Academy, West Point. Lieutenant Colonel Ronald T. P. Alcala is an Assistant Professor and Academy Professor in the Department of Law at the United States Military Academy. Amy McCarthy is an Associate Professor in the Department of Law at the United States Military Academy. The views expressed here are the authors' personal views and do not necessarily reflect those of the Department of Defense, the United States Army, the United States Military Academy, or any other department or agency of the United States Government. The analysis presented stems from academic research of publicly available resources, not from protected operational information.

representatives from different states with disparate national interests.¹ Despite multiple meetings, the GGE has failed to reach consensus on several important issues, such as whether new international law is necessary to regulate autonomous weapon systems, or whether political measures and guidelines would be more appropriate to manage this emerging technology.² In March 2019, U.N. Secretary-General António Guterres underscored the urgency of the group's work and pressed for conclusions.³ He stated, "It is your task now to narrow these differences and find the most effective way forward."⁴ He further explained, "[T]his will require compromise, creativity and political will. The world is watching, the clock is ticking and others are less sanguine. I hope you prove them wrong."⁵ Despite this call to action, the international community has, thus far, been unable to coalesce behind any meaningful regulation of LAWS.

This paper outlines the challenges states face in creating international regulatory schemes for LAWS. These challenges arise from several sources: difficulty in defining concepts related to LAWS, disagreements over potential substantive restrictions, and the specific nature of the weapons systems themselves, which may influence states' willingness to be bound by international law.

I. THE IMPORTANCE OF TIMELINESS IN REGULATING EMERGING TECHNOLOGIES

The pace of technological development in the field of artificial intelligence (AI) has been described by the Secretary-General as happening

1. Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Report of the 2017 Session of the Group of Governmental Experts on Lethal Autonomous Weapons Systems (LAWS)*, U.N. DOC. CCW/GGE.1/2017/CRP.1 (Nov. 20, 2017), [https://www.unog.ch/80256EDD006B8954/\(httpAssets\)/B5B99A4D2F8BADF4C12581DF0048E7D0/\\$file/2017_CCW_GGE.1_2017_CRP.1_Advanced_+corrected.pdf](https://www.unog.ch/80256EDD006B8954/(httpAssets)/B5B99A4D2F8BADF4C12581DF0048E7D0/$file/2017_CCW_GGE.1_2017_CRP.1_Advanced_+corrected.pdf).

2. *Autonomous Weapons That Kill Must Be Banned, Insists UN Chief*, U.N. NEWS (Mar. 25, 2019), <https://news.un.org/en/story/2019/03/1035381>.

3. U.N. Secretary-General, Secretary-General's Message to Meeting of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (Mar. 25, 2019), <https://www.un.org/sg/en/content/sg/statement/2019-03-25/secretary-generals-message-meeting-of-the-group-of-governmental-experts-emerging-technologies-the-area-of-lethal-autonomous-weapons-systems>.

4. *Id.*

5. *Id.*

at “warp speed.”⁶ While fully automated LAWS have not yet been fielded, many experts believe existing AI capabilities and associated technology may hasten their arrival—for example, in the development of drones and self-driving cars.⁷ Interestingly, many of these innovations may spring from the private sector.⁸

The ability to influence the use of an emerging technology tends to decline significantly once it becomes widely available and cheap. On occasion, the international community has acted to regulate new technology before it has been widely adopted, but these efforts generally have been the exception rather than the rule.⁹ An important example of a successful preemptive weapons ban is the case of blinding lasers. The Protocol on Blinding Laser Weapons¹⁰ was enacted in 1995, before these weapons were fielded by states.¹¹

New technology more commonly spreads quickly and is weaponized before states have had the chance to act in any meaningful way. For example, a 2018 report released by the Combating Terrorism Center (CTC) at West Point describes how ISIS procured and modified drones to drop aerial munitions in Iraq and Syria.¹² Of note, the report found that ISIS adeptly combined “sophisticated commercial off-the-shelf technology with low-tech

6. ‘Warp Speed’ Technology Must Be ‘Force for Good’ UN Chief Tells Web Leaders, U.N. NEWS (Nov. 5, 2018), <https://news.un.org/en/story/2018/11/1024982>.

7. See Ari Shapiro, *Autonomous Weapons Would Take Warfare to a New domain, Without Humans*, NPR (Apr. 23, 2018), <https://www.npr.org/sections/alltechconsidered/2018/04/23/604438311/autonomous-weapons-would-take-warfare-to-a-new-domain-without-humans> (suggesting that AI innovations related to self-driving cars as well as the proliferation of drone technology may aid in the creation of LAWS. One scientist interviewed stated that autonomous weapons may be “easier than self-driving cars”); Kelsey Piper, *Death by Algorithm: The Age of Killer Robots is Closer Than You Think*, VOX (Jun. 21, 2019), <https://www.vox.com/2019/6/21/18691459/killer-robots-lethal-autonomous-weapons-ai-war>.

8. See Piper, *supra* note 7 (stating that although LAWS do not yet exist, the technology to use algorithm in place of human judgement does).

9. See, e.g., Sean Watts, *Regulation-Tolerant Weapons, Regulation-Resistant Weapons and the Law of War*, 91 INT’L L. STUD. 540, 574-77 (2015) (describing a variety of technologies, including submarines, that the international community attempted to regulate after they had been weaponized).

10. Protocol on Blinding Laser Weapons (Protocol IV) art. 1, Oct. 13, 1995, 1380 U.N.T.S. 370.

11. See Jonah Kessel, *Killer Robots Aren’t Regulated. Yet.*, N.Y. TIMES (Dec. 13, 2019), <https://www.nytimes.com/2019/12/13/technology/autonomous-weapons-video.html> (stating that some nations including the U.S. were apparently in the development stage, however); Watts, *supra* note 9, at 614.

12. DON RASSLER, THE ISLAMIC STATE AND DRONES: SUPPLY, SCALE, AND FUTURE THREATS (2018).

components and other technological add-ons” to create “unique and fairly capable weapons,” including bomb-drop capable drones.¹³ Ingenuity and easy access to drone technology enabled ISIS to conduct “between 60 and more than 100 aerial drone bombing attacks per month, spread across both Iraq and Syria” in 2017.¹⁴

ISIS’s use of drones offers just one example of how quickly weaponization can occur and states can lose exclusive control over an emerging technology. As the former General Counsel for the National Security Agency warned, rapid changes in technology present challenges that can upend our national security.¹⁵ As the pace of technological development quickens, states may have only a very narrow window in which to craft the regulatory frameworks needed to manage the use of new technologies before they become readily accessible. Many states have therefore called upon the international community to take regulatory action in the development, procurement, and use of lethal autonomous weapons.¹⁶

Artificial intelligence research and development, the backbone of LAWS technology, remains controlled by those who can afford the very large data centers necessary for conducting complex calculations.¹⁷ In practice, this means that only states and very large corporations have ready access to the computer infrastructure needed to develop AI technology. In other words, AI research and development remains a field of “haves”—states and large corporations theoretically regulated by states—and “have nots”—non-state actors seeking to weaponize new technologies for asymmetric advantage on the modern battlefield. While the high costs associated with AI may temporarily limit participation and hinder innovation, the limited pace of development also provides time to consider and promulgate international guidelines before the technology becomes widely available. Although many states have implemented their own policies regarding LAWS,¹⁸ many in the

13. *Id.* at IV, 1.

14. *Id.* at 4.

15. Glenn S. Gerstell, *I Work for the N.S.A. We Cannot Afford to Lose the Digital Revolution*, N.Y. TIMES (Sept. 10, 2019), <https://www.nytimes.com/2019/09/10/opinion/nsa-privacy.html>.

16. *Stopping Killer Robots: Country Positions on Banning Fully Autonomous Weapons and Retaining Human Control*, HUMAN RIGHTS WATCH (Aug. 10, 2020), <https://www.hrw.org/report/2020/08/10/stopping-killer-robots/country-positions-banning-fully-autonomous-weapons-and>.

17. Steve Lohr, *At Tech’s Leading Edge, Worry About a Concentration of Power*, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/technology/ai-computer-expense.html>.

18. *See, e.g.*, U.S. DEP’T OF DEF., DIR. 3000.09, AUTONOMY IN WEAPON SYSTEMS 13 (Nov. 21, 2012) (incorporating Change 1, May 8, 2019), <https://www.esd.whs.mil/Portals/54/>

international community have called for a common binding regulatory framework. The likelihood of success for such an instrument is doubtful, however, for the reasons discussed below.

II. LAWS AND DEFINITIONAL PROBLEMS

The concept of autonomous weapon systems is itself not clearly defined internationally, and absent a shared understanding of the technological processes at issue, meaningful regulation will not be possible.¹⁹ Existing definitions generally fall into three broad categories.²⁰ The first tends to define machine autonomy in relation to the role of human operators.²¹ For instance, the United States defines “autonomous weapon systems” as weapon systems that, “once activated, can select and engage targets without further intervention by a human operator.”²² The United States’ definition notes that “[t]his includes human supervised autonomous weapon systems that are designed to allow human operators to override operation of the weapon system, but can select and engage targets without further human input after activation.”²³ Human Rights Watch similarly categorizes autonomous weapons by the level of human involvement in the weapons’ operation.²⁴ The potential for human engagement varies depending on whether a human is “in-the-loop,” “on-the-loop,” or “out-of-the-loop.”²⁵ For Human Rights Watch, the term “fully autonomous weapon” refers “to both out-of-the-loop weapons

Documents/DD/issuances/dodd/300009p.pdf [hereinafter DODD 3000.09] (outlining the U.S. military policy for autonomous weapons).

19. Kelley M. Sayler, *Defense Primer: U.S. Policy on Lethal Autonomous Weapon Systems*, CONG. RESEARCH. SVC., Mar. 27, 2019 (“There is no agreed definition of lethal autonomous weapon systems that is used in international fora.”).

20. VINCENT BOULANIN & MAAIKE VERBRUGGEN, STOCKHOLM INT’L PEACE RESEARCH INST., *MAPPING THE DEVELOPMENT OF AUTONOMY IN WEAPON SYSTEMS* 8 (2017) (describing three categories of definitions of autonomous weapon systems).

21. *See id.* at 8; Sayler, *supra* note 19.

22. DODD 3000.09, *supra* note 18, at 13.

23. *Id.*

24. BONNIE DOCHERTY, HUMAN RIGHTS WATCH, *LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS 2* (2012); *see also* BOULANIN & VERBRUGGEN, *supra* note 20, at 8.

25. DOCHERTY, *supra* note 24, at 2, Human Rights Watch’s *Losing Humanity* report defines “human-in-the-loop” weapons as those “that can select targets and deliver force only with a human command. *Id.* “Human-on-the-loop” weapons are those “that can select targets and deliver force under the oversight of a human operator who can override the robots’ actions” and that “human-out-of-the-loop” weapons are those “that are capable of selecting targets and delivering force without any human input or interaction.”

and those that allow a human on the loop, but that are effectively out-of-the-loop weapons because the supervision is so limited.”²⁶

Alternatively, some states base their definition of autonomous weapon systems on the capabilities of the systems themselves. For example, the United Kingdom defines an “autonomous system” as one that “is capable of understanding higher-level intent and direction.”²⁷ The U.K. definition further explains that “[f]rom this understanding and its perception of its environment, such a system is able to take appropriate action to bring about a desired state.”²⁸

The third definitional category emphasizes the nature of the tasks to be performed autonomously and the legal implications of autonomous action.²⁹ For example, the International Committee for the Red Cross (ICRC) has proposed that an autonomous weapon system “is one that has autonomy in its ‘critical functions,’ meaning a weapon that can select (i.e. search for or detect, identify, track) and attack (i.e. intercept, use force against, neutralize, damage or destroy) targets without human intervention.”³⁰ For the ICRC, “critical functions” are “the functions most relevant to ‘targeting decision-making,’ and therefore to compliance with international humanitarian law.”³¹ Meanwhile, Switzerland currently defines “autonomous weapon systems” as “weapons systems that are capable of carrying out tasks governed by [international humanitarian law] in partial or full replacement of a human in the use of force, notably in the targeting cycle.”³² Switzerland concedes, however, that its working definition “could and probably should evolve to become more specific and purposeful.”³³

26. *Id.*

27. U.K. MINISTRY OF DEFENCE, JOINT DOCTRINE PUB. 0-30.2, UNMANNED AIRCRAFT SYSTEMS 13 (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/673940/doctrine_uk_uas_jdp_0_30_2.pdf.

28. *Id.*

29. BOULANIN & VERBRUGGEN, *supra* note 20, at 8.

30. *Autonomous Weapon Systems: Is It Morally Acceptable for a Machine to Make Life and Death Decisions?*, INT’L COMM. RED CROSS (Apr. 13, 2015), <https://www.icrc.org/en/document/lethal-autonomous-weapons-systems-LAWS> (Statement of the ICRC to the UN GGE on Lethal Autonomous Weapons Systems).

31. *Id.* (explaining that the ICRC also observes that autonomy in selecting and attacking targets “also raise significant ethical questions, notably when force is used autonomously against human targets”).

32. Government of Switzerland, *Towards a “Compliance-Based” Approach to LAWS*, ¶ 6, Mar. 30, 2016 (Informal Working Paper submitted by Switzerland at the Informal Meeting of Experts on Lethal Autonomous Weapons Systems, Geneva, 11-15 April 2016).

33. *Id.* at 2.

III. SUBSTANTIVE LEGAL CHALLENGES

Until these definitional questions are resolved, it is difficult to imagine how any regulatory scheme governing autonomous weapons technology could prove workable. Of even greater challenge, however, is the gulf in state perspectives over the potential substantive legal regulation of LAWS. Dozens of countries have publicly expressed concern over fully autonomous weapons because of a “wide array of serious ethical, legal, operational, proliferation, moral, and technological concerns over removing human control from the use of force.”³⁴ Some of these states, as well as non-governmental organizations and corporations, have advocated for a preemptive ban on fully autonomous LAWS.³⁵ At least twenty-six states have called for such a ban.³⁶ China has expressed support for banning the use of fully autonomous weapons, but not their development.³⁷ Countries including the U.S., U.K., Israel, Russia, and Turkey oppose such a ban.³⁸ In fact, the U.S., U.K., and Russia have not supported negotiating any treaty regulating LAWS, noting that such an instrument would be unnecessary and premature.³⁹

34. HUMAN RIGHTS WATCH, *supra* note 16, at 3.

35. Hayley Evans, *Lethal Autonomous Weapons Systems at the First and Second U.N. G.G.E. Meetings*, LAWFARE (Apr. 9, 2018, 9:00 AM), <https://www.lawfareblog.com/lethal-autonomous-weapons-systems-first-and-second-un-gge-meetings>. Notable organizations include the Campaign to Stop Killer Robots as well as Human Rights Watch; *see, e.g., A Growing Global Coalition*, CAMPAIGN TO STOP KILLER ROBOTS, <https://www.stopkillerrobots.org/about/> (last visited Oct. 11, 2020); *Killer Robots*, HUMAN RIGHTS WATCH, <https://www.hrw.org/topic/arms/killer-robots> (last visited Oct. 11, 2020).

36. Hayley Evans & Natalie Salmanowitz, *Lethal Autonomous Weapons Systems: Recent Developments*, LAWFARE (Mar. 7, 2019, 3:28 PM), <https://www.lawfareblog.com/lethal-autonomous-weapons-systems-recent-developments>; *Country Views on Killer Robots*, CAMPAIGN TO STOP KILLER ROBOTS (Nov. 22, 2018), https://www.stopkillerrobots.org/wp-content/uploads/2018/11/KRC_CountryViews22Nov2018.pdf [hereinafter *Country Views*].

37. *Country Views*, *supra* note 36.

38. Hayley Evans, *Too Early for a Ban: The U.S. and U.K. Positions on Lethal Autonomous Weapons Systems*, LAWFARE (Apr. 13, 2018, 3:00 PM), <https://www.lawfareblog.com/too-early-ban-us-and-uk-positions-lethal-autonomous-weapons-systems>; *see* Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics*, HARV. NAT. SEC. J. (Feb. 5, 2013), <http://harvardnsj.org/wp-content/uploads/2013/02/Schmitt-Autonomous-Weapon-Systems-and-IHL-Final.pdf>. (explaining that autonomous weapons do not *per se* violate existing laws of armed conflict); *see also* Charles J. Dunlap, Jr., *Accountability and Autonomous Weapons: Much Ado about Nothing?*, 30 TEMPLE INT’L & COMP. L.J. 63 (2016).

39. *See* Evans & Salmanowitz, *supra* note 36 (suggesting that new treaty law on LAWS would be premature); *see* Ray Acheson, *New Law Needed Now*, 6 No. 9, CCW REP. 1, 1 (Aug. 30, 2018), <https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/reports/CCWR6.9.pdf>.

From the U.S. and U.K. perspective, existing laws of armed conflict are sufficient to govern the development and use of LAWS.⁴⁰ Indeed, there are strong arguments that existing treaty and customary law regarding armed conflict are adequate to regulate LAWS, assuming states properly interpret and apply this legal framework.⁴¹ In documents submitted to the GGE, the U.S. took the position that the use of autonomous weapons could in fact enhance conformity to the existing laws of war by increasing targeting precision, thus avoiding inadvertent civilian casualties.⁴² In opposition to the argument that existing law is sufficient, some posit that machine decision-making could not properly assess whether a use of force would comply with the requirements of proportionality and distinction under international law.⁴³ Other critiques include the claim that upholding law of armed conflict principles requires human judgement, with associated legal culpability for decision-makers.⁴⁴ Finally, some argue that because LAWS technology is so speculative in nature, it is unclear how traditional principles of the law of war would operate.⁴⁵

Rather than a binding legal agreement, some countries have instead recommended political declarations or other non-binding documents for the purpose of affirming the importance of human control over lethal force and

40. Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Report of the 2018 Session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems*, ¶ 28, U.N. DOC. CCW/GGE.1/2018/3 (Oct. 23, 2018); see Charles P. Trumbull, *Autonomous Weapons: How Existing Law Can Regulate Future Weapons*, 34 *Emory Int'l L. Rev.* 533, 535 (2020).

41. See generally Trumbull, *supra* note 40, at 535 (exploring how international humanitarian law can be interpreted and applied to autonomous weapons technology); Kenneth Anderson et al., *Adapting the Law of Armed Conflict to Autonomous Weapons Systems*, 90 *INT'L L. STUD.* 386 (2014) (concluding that although there are challenges posed by the unique aspects of autonomous weapons, application of traditional international humanitarian law principles is possible).

42. Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Autonomy in Weapon Systems*, ¶¶ 16–18, U.N. DOC. CCW/GGE.1/2017/WP.6 (Nov. 10, 2017).

43. Anderson et al., *supra* note 41, at 395; see Marco Sassoli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, 90 *INT'L L. STUD.* 308, 338–39 (2014) (concluding that although it may be possible for machines to adequately assess the legality of a use of force under the law of armed conflict, it may be wise to limit their use in certain contexts at this time).

44. Anderson et al., *supra* note 41, at 395; see also BONNIE DOCHERTY, *MIND THE GAP: THE LACK OF ACCOUNTABILITY FOR KILLER ROBOTS 1-2* (2015), https://www.hrw.org/sites/default/files/reports/arms0415_ForUpload_0.pdf.

45. Anderson et al., *supra* note 41, at 395-96.

guiding states in using this technology in accordance with law of armed conflict principles.⁴⁶ Achieving consensus among states to even enter into negotiations for a legal agreement appears difficult.

States would also have to agree on the substantive provisions of any such agreement. Short of an outright ban, potential regulatory limits on LAWS could address a variety of issues concerning the technology. At a fundamental level, an international agreement might affirm that existing rules of armed conflict also govern LAWS and that LAWS must undergo state weapons legal reviews prior to deployment.⁴⁷ The international regulation of LAWS might also stipulate that such weapons must feature “meaningful human control.”⁴⁸ Technological uncertainties and the debate on taxonomy discussed above, would likely provoke considerable debate and possible disagreement. Additionally, a regulatory instrument might also clarify what information military commanders must possess before they may use an automated weapons system, whether the system requires a human-override capability, and what sensory-input capacity a system must have to comply with the law of armed conflict principles, such as the principle of distinction.⁴⁹ Finally, the instrument may address legal accountability in the use of autonomous weapons, including clarifying states’ liabilities and responsibilities regarding the unlawful use of force by such technology.⁵⁰ To achieve the greatest agreement among state parties, the above provisions would presumably be rooted in existing laws governing armed conflict and would be made more clearly and specifically applicable to LAWS.

As noted earlier, major military powers, including the U.S. and Russia, are currently opposed to any legally binding agreement regarding LAWS. In fact, the U.S. has not ratified several important treaties that govern conduct in hostilities, including the Additional Protocols to the Geneva

46. *Id.* at 396-97; Countries advocating for such a declaration include France and Germany. Others have suggested that an international group of experts convene to draft a *Tallinn Manual*-style guide for states- but with more state input than the *Tallinn Manual*. Anderson, *supra* note 41, at 407 (citing TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013)).

47. *Id.* at 406-07.

48. *Id.* at 396; *see generally* Neil Davidson, *A Legal Perspective: Autonomous Weapons Systems under International Humanitarian Law*, UNODA Occasional Papers No. 30, 11–15 (2017) (outlining a framework for understanding “meaningful human control” under international humanitarian law).

49. Anderson et al., *supra* note 41, at 407.

50. *See* Jens David Ohlin, *The Combatant’s Stance: Autonomous Weapons on the Battlefield*, 92 INT’L L. STUD. 1, 21–22 (2016) (stating that although international law is poised to handle intentional war crimes related to autonomous weapons, it may not be equipped to handle crimes which result from recklessness).

Conventions,⁵¹ the Convention on Cluster Munitions,⁵² and the Mine Ban Treaty.⁵³ The U.S.' resistance to these treaties stems in part from opposition to specific restrictions outlined in these agreements.⁵⁴ The U.S.' decision to not ratify these treaties, however, also highlights broader differences among world powers in their approaches to law of armed conflict-related requirements.⁵⁵ The U.S., arguably the world's most active military power, will likely continue to reject any overly-restrictive legal limitations that could diminish its warfighting powers.⁵⁶ This is particularly true if it believes its adversaries will continue to develop LAWS technology even in violation of a mutually-binding agreement.⁵⁷

IV. REGULATORY SUCCESS OF WEAPONS AND THE NATURE OF LAWS

Aside from issues of taxonomy and agreement on applicable substantive law, the history of weapons treaties demonstrates how other factors may influence states' willingness to be bound by international regulations. In an article published in the *International Law Studies*, Sean Watts identifies several factors that could be used to predict the likely success of weapons regulations.⁵⁸ Watts first emphasizes that the principles of unnecessary suffering, discrimination, and honor remain the primary determiners of

51. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

52. Convention on Cluster Munitions, May 30, 2008, 2688 U.N.T.S. 39.

53. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211.

54. See generally Watts, *supra* note 9.

55. Notable studies in the field of international relations and law have analyzed possible relevant factors in predicting states' willingness to ratify treaties. Identified factors include the regional and global spread of norms, number of states previously ratifying a treaty, levels of democracy within states, and the nature of domestic legal systems. See, e.g., Brian Greenhill & Michael Strausz, *Explaining Non-ratification of the Genocide Convention: A Nested Analysis*, 10 FOREIGN POL'Y ANALYSIS 371, 377–84 (2014). See Oona Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RES. 588 (2007) (arguing that considerations of domestic legal enforcement and collateral consequences of legal commitment are central to states' decisions to enter into treaties).

56. Theodore Richard, *Unofficial United States Guide To The First Additional Protocol To The Geneva Conventions Of 12 August 1949* (2019), https://www.airuniversity.af.edu/Portals/10/AUPress/Books/B_0157_UNOFFICIAL_UNITED_STATES_GUIDE_TO_THE_FIRST_ADDITIONAL_PROTOCOL_TO_THE_GENEVA_CONVENTIONS_OF_12_AUGUST_1949.PDF.

57. Restrictions on LAWS development and use will be generally difficult to enforce. See Anderson, *supra* note 41, at 397 (positing that it will be difficult to enforce regulations mandating certain levels of human control over autonomous weapons).

58. Watts, *supra* note 9, at 608 (“The three principles of unnecessary suffering, discrimination and honor certainly remain the primary indicators for predicting regulatory success”).

regulatory success. Watts then argues that traits intrinsic to the weapons themselves have also historically influenced states' acceptance or rejection of specific weapons regulations. In particular, states' willingness to enter into, and then obey, international legal limitations have been influenced by factors such as effectiveness, novelty, deployment, medical compatibility, disruptiveness, and notoriety of the weapons.⁵⁹ An analysis of these factors suggests that attempts to regulate LAWS may ultimately prove unsuccessful.⁶⁰

A. *Effectiveness*

According to Watts, the effectiveness of a weapon may play an important role in a state's willingness to regulate it.⁶¹ Historically, states have been reluctant to impose self-limits regarding genuinely effective weapons.⁶² Under his definition, effectiveness may be measured both in terms of the weapon providing access to otherwise limited enemy areas, and its ability to confer a military advantage.⁶³

Though LAWS technology is speculative in nature, experts have predicted that such weapons systems could offer distinct military advantages as well as access to previously restricted environments. As mentioned above, the U.S. takes the position that autonomous weapons could have more accurate targeting abilities, resulting in fewer civilian casualties and other collateral damage on the battlefield. This presents not only a humanitarian benefit, but also a potential operational benefit considering the importance of local civilian sentiment to the success of counter-insurgency operations.⁶⁴

59. *Id.*

60. See John Lewis, *The Case for Regulating Fully Autonomous Weapons*, 124 YALE L. J. 1309, 1310 (2015) (positing that autonomous weapons are amenable to international regulation). Admittedly, there may be some challenges in using Watts' framework in analyzing the chances of success for regulating LAWS. First, most of his historical examples involve efforts to completely ban certain weapons, such as blinding lasers and napalm. The most likely result of attempts at regulating LAWS will be an agreed-upon legal framework, not outright ban. Second, where Watts draws his examples from singular weapons, LAWS would potentially include many discrete kinds of weapons, including air frames, missile defense systems, and drones, all under the umbrella of "autonomous weapons." Nevertheless, application of these factors may be instructive.

61. Watts, *supra* note 9, at 609.

62. *Id.*

63. *Id.*

64. See generally U.S. MILITARY JOINT PUBLICATION 3-24, COUNTERINSURGENCY (Apr. 25, 2018, validated Apr. 4, 2020), available at https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_24pa.pdf.

More accurate targeting would also tend to enable faster battlefield victory.⁶⁵ Additionally, LAWS technology has the capacity to increase data analysis speeds, thereby enhancing weapon reaction times.⁶⁶ Enhanced capabilities would make autonomous weapons strategically advantageous as they may be programmed to execute unpredictable or random maneuvers that could confuse enemy forces.⁶⁷ Furthermore, LAWS devices would not be hindered by traditional human endurance limits and could operate for long periods of time.⁶⁸ These weapons systems may also be used in operational environments where the risk of harm to servicemembers is high, ultimately reducing military casualties.⁶⁹ Finally, autonomous weapons could be useful in battlefield situations where communications are degraded, enabling military forces to operate in areas that would otherwise be off-limits.⁷⁰ The potential effectiveness of LAWS technology suggests that states willing and able to develop such technology may be disinclined to enter into legal agreements establishing limits on its use.

B. *Novelty*

Watts next argues that the degree of novelty of a weapons system may influence the potential success of a regulatory scheme. Watts notes that military attitudes towards weapons can be “critical determinants of approval” and that weapons perceived as new or novel are more likely to be regulated.⁷¹ Accordingly, states’ willingness to regulate LAWS may depend in part on the military’s perceptions of the novelty of the technology.

Watts observes that, in general, weapons with an identifiable ancestry are less likely to be suppressed than novel military technologies.⁷² Weapons

65. Amitai Etzioni & Oren Etzioni, *Pros and Cons of Autonomous Weapons Systems*, MIL. REV. (2017), available at <https://www.armyupress.army.mil/Journals/Military-Review/English-Edition-Archives/May-June-2017/Pros-and-Cons-of-Autonomous-Weapons-Systems/>.

66. Trumbull, *supra* note 40, at 545.

67. Etzioni & Etzioni, *supra* note 65.

68. Trumbull, *supra* note 40, at 545 (noting that because autonomous weapons lack other aspects of “human frailty” such as desire for revenge, their propensity for war crimes may be lower than a servicemember’s); Jason S. DeSon, *Automating the Right Stuff? The Hidden Ramifications of Ensuring Autonomous Aerial Weapon Systems Comply with International Humanitarian Law*, 72 AIR FORCE L. REV. 85 (2015).

69. Trumbull, *supra* note 40, at 546.

70. *See id.*; *see also* Etzioni and Etzioni, *supra* note 65 (stating that each service member deployed to Afghanistan costed the U.S. roughly \$850,000 per year and explaining that costs over time may be lowered by using automated weapons systems).

71. Watts, *supra* note 9, at 612-13.

72. *Id.*

viewed as an evolutionary step in a class of armaments generally enjoy greater acceptance, perhaps because they are already familiar to military professionals.⁷³ For example, because surface-to-surface missiles could be traced to catapult shots, and naval cruisers to triremes, these evolutionary advances were more readily accepted, rather than suppressed, by the international community.⁷⁴ In contrast, chemical weapons, biological weapons, and the new technologies associated with aerial bombardment, which had no historical antecedents, were broadly regulated.⁷⁵

Several notable exceptions to this pattern, however, suggest that novelty is not always a reliable indicator of the likelihood of regulation. Submarines, for example, were resistant to early regulation efforts.⁷⁶ So, too, were nuclear weapons.⁷⁷ Given these varying responses, Watts notes that a “wait and see” approach has come to prevail with respect to the early regulation of new military technologies.⁷⁸ The international community’s posture regarding LAWS appears to bear this out. The GGE, for example, has yet to reach the consensus the Secretary-General has pushed for, although the group plans to present at least some recommendations related to emerging technologies and LAWS at the 2020 Meeting of the High Contracting Parties to the CCW.⁷⁹ Ultimately, it is unclear whether the novelty of LAWS would militate in favor of regulation or against it.

C. *Deployment*

Next, Watts asserts that the degree to which a state has acquired and deployed a weapon within its military’s arsenal could influence that state’s

73. See, e.g., *id.*; see also ROBERT L. O’CONNELL, *OF ARMS AND MEN: A HISTORY OF WAR, WEAPONS, AND AGGRESSION* 24 (1989) (suggesting that “the inclination to fight by the rules, to use similar weapons in a prescribed fashion, is a vestige of intraspecific combat” and arguing that “there is within the military mind a deep and abiding need for order arising out of the very chaos of warfare ... Weapons, then, tend to be viewed in a manner which makes their effects most calculable”).

74. Watts, *supra* note 9, at 612-13.

75. *Id.* at 612.

76. See, e.g., W. Hays Parks, *Making Law of War Treaties: Lessons from Submarine Warfare Regulation*, 75 *Int’l L. Stud.* 339, 343 (2000).

77. Watts, *supra* note 9, at 605-07.

78. *Id.* at 612.

79. Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Report of the 2019 Session of the Group of Governmental Experts on Lethal Autonomous Weapons Systems (LAWS)*, U.N. DOC. ¶ 26(d), CCW/GGE.1/2019/3 (Sep. 25, 2019).

acquiescence to the regulation of the weapon.⁸⁰ Historically, nations have been less resistant to enact binding limitations regarding weapons that have not yet been integrated into their military operations.⁸¹ Analyzing LAWS under this criterion is difficult given the uncertainty of definition and spectrum of weapons that may qualify. For example, weapons that use artificial intelligence to select targets of attack already exist in the arsenals of multiple states.⁸² These are mostly human-supervised defensive weapons.⁸³ The Israeli Aerospace Industries Harpy, for instance, is an automated armed drone that can detect, seek out, and destroy enemy radar infrastructure.⁸⁴ Some states are also in the development stage for offensive automated weapons. The U.S. military's Advanced Targeting and Lethality Automated System (ATLAS) program, for example, seeks to develop combat vehicles with the ability to "acquire, identify, and engage targets at least 3X faster than the current manual process."⁸⁵ The development of autonomous weapons, however, is likely to be largely shielded from public view, casting doubt on true state capabilities in this area.

Since LAWS potentially encompasses a wide range of devices that will likely be introduced incrementally over time, the timing of any international regulation would be crucial in assessing the influence of this factor.

D. *Medical Compatibility*

Watts observes that medical compatibility offers "impressive predictive value" in determining a weapon's susceptibility to regulation.⁸⁶ Weapons that produce wounds that can be treated under existing medical protocols, using regularly available medical resources, are less likely to be regulated than weapons that produce injuries military medical personnel are unaccustomed, or ill equipped, to treat. An example of the latter includes weapons that injure primarily by non-detectable fragments. Fragmentation weapons of this type frustrate the detection and treatment of injuries on the battlefield through the

80. Watts, *supra* note 9, at 613-14.

81. *Id.*

82. Kessel, *supra* note 11.

83. Shapiro, *supra* note 7 (noting that at least 30 countries currently have this kind of weapons technology).

84. Kessel, *supra* note 11.

85. See Patrick Tucker, *US Military Changing 'Killing Machine' Robo-tank Program After Controversy*, DEFENSE ONE (Mar. 1, 2019), <https://www.defenseone.com/technology/2019/03/us-military-changing-killing-machine-robot-tank-program-after-controversy/155256/> (stating that information about the program was revealed in a Government posting regarding a possible contract opportunity).

86. Watts, *supra* note 9, at 616.

use of non-detectable fragments—such as those made of plastic, for example—which may be difficult or impossible to detect by X-ray in the human body.⁸⁷

Presumably, the injuries caused by LAWS will not necessarily cause wounds incompatible with current medical protocols. So long as LAWS enable the autonomous targeting of personnel using existing weapons capabilities, the medical compatibility factor of Watts’ survey suggests that this consideration, at least, will not weigh in favor of regulation.

E. *Disruptiveness*

Watts defines “disruptiveness” as the capability of certain weapons to alter the status quo of the worldwide hierarchy of military power or state hegemony.⁸⁸ Strong military powers have historically proven willing to enter into regulations regarding weapons that pose a threat to their position in the existing international order.⁸⁹

In 2017, Russian President Vladimir Putin declared that whoever mastered the field of artificial intelligence “will become ruler of the world.” Some predict that AI technology will be a game-changer in terms of state war-fighting power and military domination, analogous to the transformative nature of nuclear weapons.⁹⁰ The U.S. and other countries have already committed significant funding and research efforts into AI development, believing it will be highly influential in future military conflicts.⁹¹ LAWS are one element of military AI technology. As discussed above, their potential operational benefits are broad and far-reaching.

While development and use of LAWS technology by the world’s military powers may not significantly alter existing military hierarchy (assuming such military powers would develop these weapons in absence of international regulation, and all maintain a commitment to abide by existing laws of armed conflict), possession of such weapons by smaller countries or

87. *Id.* (the principle of unnecessary suffering “has long considered wound severity and treatment prospects in its balancing calculus.”).

88. *Id.*

89. *Id.*

90. See Greg Allen & Teniel Chan, *Artificial Intelligence and National Security*, BELFER CENTER STUDY, Jul. 2017 10-26 (predicting that “[o]ver the long term, these capabilities will transform military power and warfare”).

91. See Trumbull, *supra* note 40, at 536 (citing Defense Secretary Shanahan’s commitment to pursuing AI capabilities to enhance military readiness).

non-state armed groups may have such an effect.⁹² It is possible that the risk of rogue states or non-state armed groups gaining access to LAWS technology would have a positive effect on international willingness to establish regulations on the weapons' sale and transfer.

F. *Notoriety*

Lastly, Watts notes that one of the strongest historical indicators of future LAWS regulation is notoriety. Watts points out that in the past, efforts to revise weapons laws have been heavily influenced by public opinion and that in the Information Age, "public perceptions of weapons and their effects are likely to be increasingly influential forces in international regulation of weapons."⁹³ In a study of public opinion and the politics of autonomous weapons, Michael Horowitz explained that public opinion is a "microfoundation" that can influence the preferences of bureaucrats and elites who make decisions about the acquisition and deployment of weapon systems.⁹⁴ If the historical trend Watts identified holds true, the notoriety of LAWS and apparent public resistance to such technology suggests LAWS may be susceptible to regulation.

One poll commissioned by the Campaign to Stop Killer Robots and conducted by Ipsos revealed that 61% of respondents in 26 countries indicated they oppose the use of LAWS.⁹⁵ Conducted between November and December 2018, the poll also showed that 22% of respondents supported the use of LAWS and 17% were unsure about their use.⁹⁶ A majority of respondents in the United States (52%) indicated they somewhat or strongly opposed the use of LAWS, compared with 22% of respondents who somewhat or strongly supported their use.⁹⁷ Horowitz's study on public opinion and the autonomous weapons debate, however, highlighted the need to exercise caution when evaluating the results of polls like Ipsos's. Horowitz's work revealed that public opposition to autonomous weapons can

92. See Allen & Chan, *supra* note 89, at 15 ("Like the impact of cyber, increased utilization of robotics and autonomous systems will augment the power of both non-state actors and nation states.").

93. Watts, *supra* note 9, at 618.

94. Michael C. Horowitz, *Public Opinion and the Politics of the Killer Robot Debate*, 3 RES. & POL. 1, 2 (2016).

95. Chris Deeney, *Six in Ten (61%) Respondents Across 26 Countries Oppose the Use of Lethal Autonomous Weapons Systems*, IPSOS (Jan. 21, 2019), <https://www.ipsos.com/en-us/news-polls/human-rights-watch-six-in-ten-oppose-autonomous-weapons>.

96. *Id.*

97. *Id.*

be contextual, and while support for autonomous weapons may be low when considered in a vacuum, support for such weapons increases when it is understood that the technology would be used to protect U.S. forces.⁹⁸ His findings suggest that “the public is willing to make tradeoffs and overcome its opposition to a weapon system when US troops are on the line.”⁹⁹

The notoriety of LAWS is not surprising given the predatory, apocalyptic light in which they are commonly cast. In the media and elsewhere, LAWS are frequently identified with the killer robots of *The Terminator* movie franchise and other ruthless mechanical killing agents.¹⁰⁰ Horowitz’s study suggests, however, that the autonomous weapons debate may be more nuanced than polling numbers may at first imply. Nevertheless, negative characterizations of LAWS and apparent public opposition to them may ultimately influence decision-makers to support regulation in this area.

V. CONCLUSION

Shortly after the first manned balloon flight in 1783, the novelist Horace Walpole penned a letter to Horace Mann expressing some unease about the achievement. “Well!” Walpole wrote, “I hope these new *mechanic meteors* will prove only playthings for the learned and idle, and not be converted into new engines of destruction to the human race—as is so often the case of refinements or discoveries in Science.”¹⁰¹ Like the specter of air warfare, the danger posed by LAWS is stark, leading many in the international community to desire restrictions on their development, sale, and use.

Currently, multiple hurdles stand in the way of the international regulation of LAWS. Questions of taxonomy and differences in legal approach continue to pose major challenges for those seeking international consensus on a regulatory framework. Historical trends also indicate that specific traits of LAWS may further deter states to be bound to such an instrument. Global and individual state-specific political landscapes are ever in flux, however, and it is possible that the inclination of major powers to join an agreement may change. It will be interesting to see, for example, how highly-publicized objections to LAWS by well-known corporations and

98. Horowitz, *supra* note 94, at 4-6.

99. *Id.* at 4.

100. *See, e.g.*, Cameron Jenkins, *AI Innovators Take Pledge Against Autonomous Killer Weapons*, NPR (Jul. 18, 2018, 5:26 PM), <https://www.npr.org/2018/07/18/630146884/ai-innovators-take-pledge-against-autonomous-killer-weapons>; Horowitz, *supra* note 93, at 4 (noting public associations with *The Terminator* and *The Matrix*).

101. RICHARD HOLMES, *THE AGE OF WONDER: HOW THE ROMANTIC GENERATION DISCOVERED THE BEAUTY AND TERROR OF SCIENCE* 135 (2008).

personalities, including Google and Elon Musk, may impact public opinion regarding the weapons systems, perhaps affecting the “notoriety” analysis above.¹⁰² Certainly, if LAWS technology were to be used by a military in a way antithetical to established rules of law, or were acquired by a non-state armed group, a new impetus to create legal limitations on the development, sale, or use of LAWS would likely emerge.

102. See Jenkins, *supra* note 100; see also Uba Oberdorster, *Why Ratify? Lessons from Treaty Ratification Campaigns*, 61 VAND. L. R. 681 (2008) (exploring the role of persuasive campaigns in states’ decisions to ratify various treaties).

THE PRINCIPLE OF PROPORTIONALITY IN MARITIME ARMED CONFLICT: A COMPARATIVE ANALYSIS OF THE LAW OF NAVAL WARFARE AND MODERN INTERNATIONAL HUMANITARIAN LAW

David T. Lee*

Abstract

Modern international humanitarian law (IHL) implements the principle of proportionality with an individualized assessment imposing specific requirements to minimize harm to civilians. In contrast, armed conflicts at sea rely on a vessel-based construct of an older body of law composed of longstanding yet potentially antiquated treaties, and its subjective assessment of customary international law molded by State practice. This paper analyzes the development of the principle of proportionality in each body of law, contextually focusing on civilian crew members aboard naval auxiliaries and other ships which have been rendered lawful military objectives.

Keywords: proportionality, naval warfare, AP I, civilian mariners, customary international law

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* Commander, JAGC, USN, is a Military Professor at the Stockton Center for International Law at the United States Naval War College.

I. INTRODUCTION¹

This paper compares how the law of naval warfare and modern international humanitarian law (IHL) developed primarily through the Geneva Conventions of 1949 and its Additional Protocols of 1977 each implement civilian protections through the principle of proportionality, particularly in the context of civilians serving as crew members aboard naval auxiliaries. The analysis explores the development of the vessel-based construct of the law of naval warfare, distinct from IHL norms that are based on an individualized assessment. Part I relates the history and contemporary practice of civilian seafarers serving on board warships or naval auxiliaries. Part II gives a general overview of the rights provided to civilians in IHL. Part III examines how the law of naval warfare has historically addressed civilian protections at sea. Part IV explores the impact which the modern IHL concept of proportionality may be having on the traditional law of naval warfare.

Civilians are everywhere on the modern maritime battlefield. They provide logistical support in the form of food, equipment, ammunition and fuel, intelligence analysis, technical support of sophisticated military equipment and hardware, and numerous other support roles. They serve on a wide array of support ships (and even some warships) operating as lily pads for the delivery of troops ashore, intelligence collectors, reconnaissance platforms, undersea military bathymetric surveyors, and an expanding list of other vessels. They allow uniformed personnel to focus more on combatant activities, reduce costs, and provide a level of expertise maintaining complex weaponry and equipment which would require costly training programs for members of the armed forces. This trend is not expected to abate.

Civilianization of the maritime domain brings into play the legal construct regarding any civilian protections and rights. Modern IHL agreements provide clear language protecting civilians from direct harm except to the extent they directly participate in hostilities.² Civilians who

1. While the article was submitted while the author was serving on active duty at the U.S. Naval War College, he has since retired from active duty and presently works as a civilian international maritime law practitioner at the U.S. Defense Institute of International Legal Studies, Newport, Rhode Island. The views expressed herein are those of the author alone and should not be construed as the official position of any government entity of the United States. The author is humbled and grateful to have received the invaluable help of Professor James Kraska, Professor Rob McLaughlin, Mr. Pete Pedrozo, US Army LtCol "Elton" Johnson, RAF Squadron Leader Kieran Tinkler, US Coast Guard CDR Dave Dubay, RAF Air Commodore Bill Boothby (ret.), Mr. John Hursh, and Professor Wolff Heintschel von Heinegg.

2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 UNTS 3, art. 51(3) (entered into force 7 December 1978) [hereinafter AP I].

directly participate lose their protected status and may be directly targeted and subject to criminal prosecution.³ In contrast, the law of naval warfare largely pre-dates the post-World War II agreements formalizing civilian protections. Instead, it establishes a vessel-based construct made at a time when States reinforced a trend to legally limit armed conflict solely to combatants as much as possible. They had seen for centuries the historical practice of States authorizing private citizens to attack enemy ships, but increasingly saw war as the exclusive preserve for official State warships built solely to fight other warships.⁴ The resulting legal scheme incorporated a presumption of civilian exclusion in active participation in war, allowing it to look to the status or actions of the ship alone to determine its lawful targeting as a valid military objective.⁵ Support ships which would later be called ‘naval auxiliaries’ could be lawfully converted into warships.⁶ The status of individuals embarked aboard did not directly factor into the targeting assessment except through the prism of their ship’s category or actions; to the extent a non-warship could be lawfully attacked, it generally mandated removal of civilians before destroying the ship.⁷

State practice during two world wars significantly challenged the effectiveness of the civilian protection provisions of the law of naval warfare. Civilians at sea increasingly became involved in both supporting and combatant roles aboard merchant vessels and formal naval auxiliaries. Belligerents ignored the formal steps outlined in the pre-war agreements to avoid loss of civilian life and attacked enemy merchant ships regardless of the status of those aboard. Horrified by the extensive loss of civilian life in those conflicts, States negotiated the foundational IHL agreements crystallizing civilian protections and rights. But their clear focus rested primarily on armed conflict ashore, often intentionally refusing to resolve the confusion over their applicability to the maritime domain. While for the most part they did not formally eviscerate the older body of international law on naval warfare, the scope and manner of their application to the law of naval

3. *Id.*; Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, International Committee of the Red Cross, Geneva, 2009, 83-84 [hereinafter ICRC DPH Interpretive Guidance].

4. Carnegie Endowment for International Peace, *Proceedings of the Hague Peace Conferences of 1907, Vol. III*, Oxford University Press, London, 1921, 764-765.

5. *Id.* at 1037.

6. Peace Resource Center, Hague Convention (VII) Relative to the Conversion of Merchant Ships into War Ships, 2 A.J.I.L. Supp. 133, *entered into force* January 26, 1910, <http://hrlibrary.umn.edu/peace/docs/con7.html> [hereinafter Hague Convention VII].

7. Manual of the Laws of Naval War, Oxford, Adopted by the International Institute of International Law, August 9, 1913, art. 104, <http://hrlibrary.umn.edu/instree/1913a.htm> [hereinafter 1913 Oxford Manual].

warfare, in light of historical State practice and the older agreements, was arguably left unclear. This is particularly true in the context of civilian protections.

Three distinct differences between the older law of naval warfare and more recent IHL agreements impact how modern IHL could potentially incorporate or influence its individualized concept of proportionality to conflicts at sea. First, the law of naval warfare is *lex specialis* and encompasses a significant body of law unique to warfare at sea. Developed under different historical conditions than the broader law of armed conflict, it reflects several maritime traditions that have little parallel in the land context. Warfare between ships at sea takes place in a completely distinct operational environment composed of self-contained vessels manned by individuals collectively focused on a mission executed in a manner unknown ashore. The use of uniquely maritime practices such as blockades, boardings, and prize courts prompted development of legal frameworks which would be illegal ashore.⁸ For example, belligerent warships may stop and search any merchant ship for enemy contraband, capture and seize it if it does have contraband, and potentially destroy it if it resists boarding.⁹

The maritime domain also implements IHL's core principle of distinction differently than on land. Combatants ashore must individually distinguish themselves in some manner identifying them as such. This is critical because military objectives, both individuals and property, often exist in close proximity with civilians, particularly in urban environments. In contrast, the need to individually distinguish those embarked aboard each vessel is both impractical and unnecessary, particularly because the fusing of military and civilian objects across a simpler operational picture is typically much less likely. Given these features, the law of naval warfare focuses almost exclusively on the conduct or use of vessels alone to distinguish ships which are lawful military objectives from those that are not. Ships embody and reflect the actions of the people aboard. Even as the level of crew involvement in those actions will vary with each individual, the collective sum of actions by a crew operating together as a team will produce actions by the vessel which potential adversaries will use to assess whether it can be lawfully targeted. The presumption is that the crew willingly follows the orders of the ship's commanding officer or master and share or at least understand their leader's intentions and objectives. All hands act as one, falling into the same targeting category absent unusual circumstances warranting otherwise. The complexities of determining whether a specific

8. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, art. 93-104, at 118-24 (Louise Doswald-Beck ed., 1995) [hereinafter SRM].

9. *Id.* at Part. V.

individual forfeits protection become much easier when one needs to only assess the platform.

A third distinct difference arising from the vessel-based focus of the law of naval warfare is the significantly weakened, or even nonexistent, scope of any individual protections from direct attack based on a crew member's civilian status. Their protection accrues from the status or actions of the ship. Specifically, the attacker need only determine whether the ship is a lawful military objective, largely ignoring the presence of any civilian crew members who may be aboard, absent unusual circumstances.¹⁰ Moreover, the requirement to remove civilians prior to attacking the vessel may still be a formal part of the law but in practice has been largely ignored.¹¹

This final distinction between these two legal constructs appears to create a significant divergence in their application of the principle of proportionality. The individualized concept developed in modern IHL to minimize collateral damage prohibits an attacker from directly targeting civilians, and from conducting attacks where the incidental loss of civilian life exceeds the military benefits.¹² Further, all practicable precautions must be taken to minimize such harm.¹³ With the exception of specially protected vessels such as coastal fishing boats and hospital ships,¹⁴ the traditional law of naval warfare does not bestow the same individual protections; it relies on the ship's actions or status to determine targetability without typically undergoing the same individualized assessment. For civilian crew members aboard naval auxiliaries, this significantly eviscerates an important legal benefit which could potentially accrue from their civilian status. This paper

10. U.S. DEP'T OF DEF., LAW OF WAR MANUAL June 2015, ¶ 5.12.3.2, at 268 (rev. ed. Dec. 2016) [hereinafter DOD LAW OF WAR MANUAL].

11. JEWISH VIRTUAL LIBRARY, Nuremberg Trial Judgments: Karl Doenitz, <https://www.jewishvirtuallibrary.org/nuremberg-trial-judgements-karl-doenitz> (German Grand Admiral Karl Doenitz was charged with violating the London Protocol to safeguard civilians lives before destroying the ship. The court found Doenitz guilty of violating the protocol: "The argument of the defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue and that the development of aircraft made rescue impossible. This may be so, but the Protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope." The court imposed no punishment because of British and American practices that committed the same violations); See SRM *supra* note 8, ¶¶ 151, 158.

12. See AP I, *supra* note 2, art. 51(3) at 37.

13. DoD Law of War Manual, *supra* note 10, ¶ 5.11.

14. *Paquette Habana v. United States*, 175 U.S. 677 (1900), which found the United States government had wrongly seized and then sold two Spanish coastal fishing vessels during the Spanish-American War; hospital ships enjoy explicit protection from attack under Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (1949), art. 22.

explores the development of these differences, first taking a look at modern IHL.

II. CIVILIAN PROTECTIONS UNDER MODERN INTERNATIONAL HUMANITARIAN LAW

Additional Protocol (AP) I to the Geneva Conventions of 1949 is the linchpin providing the modern legal underpinning requiring States to formally safeguard civilians in armed conflict. Over 170 States have formally ratified and acceded to its provisions.¹⁵ Notably, the United States has signed but not ratified AP I and considers many of its provisions as customary international law.¹⁶ It considers the language in some important provisions, including those relating to the protection of civilians, to reflect only a customary principle, and not a precise reflection of customary international law as written in the protocol.¹⁷

AP I Article 50 defines ‘civilians’ in the negative by describing whom they are not. First, civilians are not members of the ‘armed forces’ as defined in Article 43. Although civilian crew members can be similar to members of the armed forces in that they may be “under a command responsible to that Party for the conduct of its subordinates,” the definition also requires they be “subject to an internal disciplinary system which... shall enforce compliance with the rules of international law applicable in armed conflict.”¹⁸ This typically means that civilian crew members would need to be subject to a distinct military justice system to satisfy this prong, which is generally not the case. Second, the term does not include individuals in four of the six categories of persons eligible for prisoner of war (POW) status under Article 4A of the Third Geneva Convention of 1949 (GC III).¹⁹ The remaining two categories include civilians who are eligible for POW status - persons accompanying the armed forces, and “members of crews... of the merchant marine...,”²⁰ either of which could reasonably be extended to civilian mariners employed by combatant forces. If there is doubt about an

15. International Committee of the Red Cross, List of States Acceding to AP I, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last accessed Nov. 3, 2020).

16. Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. UNIV. INT’L L.R. 415, 420 (1987).

17. DoD Law of War Manual, *supra* note 10, ¶ 1.8.1.

18. AP I, *supra* note 2, art. 43 at 23.

19. *Id.* art. 50 at 26; Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 at 93 [hereinafter GC III].

20. GC III, *supra* note 19, at 93.

individual's status, Article 50 directs States to give an individual the benefit of the doubt in favor of civilian status absent evidence to the contrary.²¹ The United States does not consider this provision to reflect customary international law, emphasizing that such status must be determined in good faith based on the information available in light of the circumstances.²² It considers civilian crew members working aboard naval auxiliaries to be civilians accompanying the force.²³

GC III provides few parameters regarding the nature or scope of the support which civilians may provide to combatant forces with which they are accompanying. This applies to both an individual and collective capacity. GC III broadly describes the various support roles which this category encompasses, including "members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces."²⁴ It further provides for issuance of an identity card to serve as proof of the person's status, but neither the convention nor the Commentary expounds further on what the term 'accompanying the force' means. The list appears to only be illustrative, since it uses the term "such as" when identifying the list of support roles.²⁵ The discussion on merchant mariners is even more sparse.²⁶ In terms of the physical proximity which civilians accompanying the force must have in relation to the members of the armed forces, GC III provides no guidance. This gives States broad latitude to employ civilians independently even when they are the only individuals aboard.

Civilians may even be employed at or near a base for a military objective. This potentially raises the specter of using civilians to improperly leverage protections to shield the objective from attack. AP I Article 51 explicitly prohibits the use of civilians "to shield military objectives from attacks or to shield military operations."²⁷ The United States largely embraces this provision as customary international law by confirming that "the civilian population shall not be used to shield military objectives or operations from attack, and immunity shall not be extended to civilians who

21. AP I, *supra* note 2, art. 50 at 26.

22. DoD Law of War Manual, *supra* note 10, ¶ 5.5.3.2.

23. U.S. NAVY, U.S. MARINE CORPS, AND U.S. COAST GUARD, DEP'T. OF HOMELAND SEC., *THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS*, ¶ 5.4.3.1 (2017) [hereinafter NWP 1-14M].

24. GC III, *supra* note 19, at 92-3.

25. *Id.*

26. JEAN DE PREUX ET AL., *COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 65-66* (Jean Pictet ed., A.P. de Heney trans., 1960).

27. AP I, *supra* note 2, art. 51 at 26.

are taking part in the hostilities.”²⁸ However, there is a clear legal distinction between civilians who intentionally place themselves in the vicinity of a military objective for the express purpose of shielding that military objective from attack, and civilians who work there to perform legitimate duties in support of combatant forces.²⁹ In the former, the party using civilians as human shields assumes responsibility for the harm inflicted even as the attacker must continue to take feasible precautions to avoid or minimize harm.³⁰ Civilians who willingly act as human shields for military objectives may be deemed to be directly participating in hostilities, and targeted directly.³¹ Those lawfully providing support to combatant forces as civilians accompanying the force, or as civilian merchant crews, certainly face the risk of personal injury or death given their presence on a military objective. But since their presence is authorized, any attacker applying the IHL framework should consider the accompanying civilians and take feasible precautions to minimize harm to them.³²

To ensure civilians benefit from the legal protections they enjoy, AP I Article 48 requires combatants to distinguish themselves from the civilian population.³³ This imposes a legal mandate for combatants to wear distinctive attire to clearly identify them as military individuals who may be attacked as military objectives with the legal right to conduct belligerent acts in armed conflict.³⁴ At sea, this requirement would mandate combatants wear some form of uniform aboard ship so attackers can avoid harming civilians. As will be discussed more fully in the next section, Article 48 does not formally apply in maritime conflicts.³⁵ Individually applying this principle in the maritime domain is not feasible given the vast distances between belligerents and the ability to remain unseen within the ship’s skin. These practical realities prompt an understandable reliance on the vessel to distinguish between military and civilian objects and personnel.

The legal effect of being a civilian in armed conflict is twofold. First, a civilian has no legal right to directly participate in hostilities.³⁶ Such participation potentially subjects civilians to attack by belligerents and domestic criminal prosecution. However, there is notably no explicit

28. Matheson, *supra* note 16, at 426.

29. DoD Law of War Manual, *supra* note 10, ¶¶ 5.12.3.2, 5.16.

30. *Id.* ¶ 5.12.3.3.

31. NWP 1-14M, *supra* note 23, ¶ 8.3.2; ICRC DPH Interpretive Guidance, *supra* note 3, at 56.

32. NWP 1-14M, ¶ 8.3.2; DoD Law of War Manual, *supra* note 10, ¶ 5.12.3.3.

33. AP I, *supra* note 2, art. 48 at 25.

34. *Id.* art. 43, 51(2), 52(2) at 23, 26-27.

35. *Id.* art. 49 at 25.

36. *Id.* art. 43(2) at 23.

prohibition in any international convention for civilians to directly participate in hostilities.³⁷ Second, AP I Article 51 gives civilians “general protection against dangers arising from military operations” by prohibiting efforts to make civilians the object of attack. Civilians continue to enjoy this protection “unless and for such time as they take a direct part in hostilities.”³⁸ To maximize such protection, an attacker must avoid attacks where the harm inflicted on civilians outweighs the expected military advantage to be gained.³⁹ Further, the attacker must take all feasible measures to minimize any incidental loss of civilian life.⁴⁰ Under this modern construct, civilians at sea would enjoy a number of targeting protections so long as they refrain from directly participating in hostilities.

Determining whether a civilian directly participates in hostilities has been the subject of vigorous scholarly debate. The AP I Commentary to Article 51 specifies that a civilian’s participation is direct if they perform “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”⁴¹ The International Committee of the Red Cross (ICRC) applies a three-part test to assess whether the action is direct.⁴² First, the act must have a threshold of harm wherein it is “likely to adversely affect the military operations or military capacity” of the enemy.⁴³ Second, there must be “a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.”⁴⁴ Finally, the act must intend to directly support one belligerent to the detriment of another.⁴⁵ Let us presume this third prong is met, and focus on the remaining two prongs.

There is a great deal of flexibility in determining whether an action has a threshold of harm which is likely to adversely affect the enemy’s military operations or capacity. The ICRC Interpretive Guidance includes actions which adversely affect the enemy’s military operations even if it does not result in death, injury, or destruction of property.⁴⁶ Indeed, in the context of

37. ICRC DPH Interpretive Guidance, *supra* note 3, at 83-84.

38. AP I, *supra* note 2, art. 51(3) at 26.

39. *Id.*, art. 57(2)(iii).

40. *Id.*, art. 57(2)(ii).

41. Int’l Comm. of the Red Cross, Commentary, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 619 (1987) [hereinafter AP I Commentary].

42. ICRC DPH Interpretive Guidance, *supra* note 3, at 46.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 47.

when medical personnel may forfeit protection from harm, the AP I Commentary confirms that "...the definition of 'harmful' is very broad. It refers not only to direct harm inflicted on the enemy, for example, but also to any attempts at deliberately hindering his military operations in any way whatsoever."⁴⁷ Moreover, the acts can also include benefits to one's own side which have a detrimental effect on enemy military operations.⁴⁸ In its report on this issue, the ICRC's group of experts found the threshold was satisfied for any act "that adversely affect[ed] or aim[ed] to adversely affect the enemy's pursuance of its military objective or goal."⁴⁹ This is a fairly low threshold to satisfy in the context of civilian mariners operating on a naval auxiliary who provide fuel, food, and ammunition to warships. 'But for' this support, the warship would only be able to inflict harm on the enemy until its existing supplies of ammunition or fuel are exhausted.

The more challenging question in assessing whether civilians are directly participating in hostilities is whether there is a sufficient nexus between the act performed and the harm inflicted on the enemy. As Professor Michael Schmitt notes:

[T]he determinative issue in the direct participation context is not whether an act harms or benefits a party. So long as it does either, it should satisfy the threshold element. But the elements are cumulative. Therefore, the key is whether the acts in question are sufficiently causally related to the resulting harm/benefit to qualify as directly caused.⁵⁰

The ICRC distinguishes between indirect participation, which includes "conduct that merely builds up or maintains the capacity of a party to harm its adversary" and direct participation, which is harm "brought about in one causal step."⁵¹ Direct causation does not require the act to be necessary or sufficient to the causation of harm, the ICRC explains, citing the example of a lookout who individually inflicts no harm, but whose involvement is crucial to others' imminent infliction of harm on the enemy.⁵² The act can be just one piece in the process so long as it is an essential ingredient in the overall effort of harming the enemy in the immediate future. A specific example of indirect participation is the transport of weapons and equipment that can become direct participation if "carried out as an integral part of a specific

47. AP I Commentary, *supra* note 41, at 175.

48. William H. Boothby, *Direct Participation in Hostilities - A Discussion of the ICRC Interpretive Guidance*, 1 INT'L HUMANITARIAN LEGAL STUD. 143, 158, 161 (2010).

49. ICRC DPH Interpretive Guidance, *supra* note 3, at 47 n.97.

50. Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 697, 720 (2010).

51. ICRC DPH Interpretive Guidance, *supra* note 3, at 53.

52. *Id.* at 54.

military operation designed to directly cause the required threshold of harm.”⁵³ The ICRC also recognizes that direct participation can be a team sport. The harm inflicted on the enemy often requires a symphony of supporting personnel, few of which may be performing actions actually causing the harm, but who nonetheless could be considered directly participating in hostilities.⁵⁴

The standard of direct causation must therefore be interpreted to include conduct that causes harm only in conjunction with other acts. More precisely, where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.⁵⁵

If applied in the context of civilian mariners aboard a naval auxiliary, the plethora of supporting roles civilians are authorized to perform on the maritime battlefield make it challenging to routinely conclude their individual or collective support is sufficiently tied to the infliction of imminent harm such that their participation is direct. This is true whether the nature of the support is providing routine logistic support or even conducting belligerent acts such as collecting intelligence, as the focus of this prong of the test is about direct causation of the harm, not the means of inflicting it. Absent a finding that civilians are directly participating in hostilities, modern IHL would prohibit an attacker from directly targeting those civilians, impose due precautions to minimize the harm to them, and require an assessment to determine if the military benefits outweigh the harm which is likely to be imposed on those civilians. However, there are certain tactical situations wherein the provisioning of supplies, ammunition, and other logistical support facilitates the relatively imminent application of combat power onto the enemy. In such situations, the nexus could be considered sufficiently close to conclude civilian participation in hostilities is direct.

The United States does not embrace the ICRC three-part test to determine whether a civilian directly participates in hostilities. It refuses to be tied to a specific test because of the contextual nature in which these determinations must be made.⁵⁶ Instead, the United States identifies factors which aid this assessment, including: “whether the act is the proximate or ‘but for’ cause of [harm to the enemy]; the degree to which the act is temporally or geographically near the fighting; the degree to which the act is

53. *Id.* at 53.

54. *Id.* at 54.

55. *Id.* at 54–55.

56. DOD LAW OF WAR MANUAL, *supra* note 10, ¶ 5.9.3.

connected to military operations;” and several others.⁵⁷ It further provides examples of actions which could constitute direct participation in hostilities, including supplying weapons and ammunition in close geographic or temporal proximity to their use.⁵⁸ Similar to the ICRC test, application of these factors to a naval auxiliary providing support to combatant forces would require a contextual look at the situation. The delivery of ammunition to a warship seeking to engage the enemy in close temporal or geographic proximity to the fighting, an activity traditionally performed by uniformed military personnel, and necessary to the infliction of harm in the immediate future, can reasonably lead one to conclude it constitutes direct participation in hostilities. More typical settings which have less imminent impact on the infliction of harm onto the enemy would likely not warrant the same conclusion and require an attacker to consider their presence aboard and weigh the harm inflicted against the military advantage to be gained.

Practical use of the individualized IHL concept of civilian direct participation in hostilities would be extremely challenging unless using a vessel-based application of the principle of distinction. Individual assessments on the maritime battlefield would be almost impossible to implement, and probably unwarranted when applied solely to crew members. Relying solely on the actions or status of the ship to assess the degree of participation in hostilities by crew members aboard would allow an attacker to make the same targeting conclusion for all hands without assessing the individual actions of any single crew member. Even the most inconsequential act of the most junior civilian mariner could potentially be deemed to constitute “an integral part of a concrete and coordinated tactical operation that directly causes harm.”⁵⁹ Using this flexible application of the principle of distinction, the ship’s actions could be deemed sufficiently direct to warrant collective forfeiture of the individual targeting protections that each crew member would enjoy under Article 51.

This review of civilian protections provided in modern IHL helps set the stage for a comparative look with those provided by the law of naval warfare. Even as this paper conceptually applied modern IHL rules to civilian mariners lawfully working aboard a naval auxiliary, it should not be construed as implying support to incorporate them into the law of naval warfare. Its intent, rather, was to demonstrate how such provisions would apply if deemed a part of this body of law.

57. *Id.* at 229–30.

58. *Id.* ¶ 5.8.3.1.

59. “ICRC DPH Interpretive Guidance, *supra* note 3, at 54–55.

III. THE DEVELOPMENT OF CIVILIAN LEGAL PROTECTIONS IN THE LAW OF NAVAL WARFARE

While the law of naval warfare has a long history reaching back centuries, its modern underpinnings can date back to 1856 as a seminal moment which began its modern development. In that year, the maritime powers of the age signed the Paris Declaration to outlaw privateering.⁶⁰ State issuance of official licenses to private individuals to attack enemy ships in armed conflict had been standard practice for centuries, which legitimized the use of private vessels to accomplish State objectives in war (and sometimes even in peace), and forcing other merchant ships to arm themselves for protection against private marauding raiding ships authorized to attack them.⁶¹ The Paris Declaration banned this practice, leaving the fighting to State warships alone. Costly technological improvements gave warships a decided combat edge over their privately-funded counterparts, influencing States to largely abandon the practice of arming merchant ships and embrace support for only their capture in wartime.⁶²

This development significantly influenced how participants at the 1907 Hague Convention sought to protect civilian mariners. They negotiated the Hague Convention (VII) Relating to the Conversion of Merchant Ships into Warships (Hague Convention VII), one of a number of conventions governing numerous aspects of the law of armed conflict codified at the event. This agreement fully supported the progress made by the Paris Declaration to limit war at sea to members of the armed forces, but recognized merchant vessels typically manned by civilians would likely be needed to support combatant forces, subjecting them to potential attack. Their solution was to establish a formal process to convert a civilian-manned merchant ship into a warship operated by combatants,⁶³ carefully defining ‘warship’ with specific criteria to allow any belligerent to distinguish between lawful combatants and civilians.⁶⁴ It was generally understood that only warships could engage in belligerent attacks, and only against enemy warships; other enemy public or private vessels would be unarmed and

60. *Declaration Respecting Maritime Law* (Apr. 16, 1856), <https://ihl-databases.icrc.org/ihl/INTRO/105?OpenDocument>.

61. See Robert W. Tucker, *The Law of War and Neutrality at Sea*, 50 INT’L L. STUD. 60 (1955); JAN MARTIN LEMNITZER, *POWER, LAW AND THE END OF PRIVATEERING* 13 (Palgrave Macmillan, 2014).

62. Tucker, at 61.

63. Carnegie Endowment for Int’l Peace, *Proceedings of the Hague Peace Conferences*, in Vol. I, OXFORD UNIV. PRESS 235 (1920); Hague Convention VII, *supra* note 6.

64. Hague Convention VII, *supra* note 6, art. 2-6.6.

generally only subject to visit, search, and capture.⁶⁵ If the search produced contraband, the warship could then take the merchant ship to a prize court; it could destroy it only in exigent circumstances after safeguarding its crew.⁶⁶ These provisions, if followed, would protect civilians at sea quite well.

The advent of the submarine in World War I made it almost impossible to effectively abide by these legal requirements. Enemy merchant ships were routinely attacked without warning and without first placing civilians aboard into a place of safety prior to the destruction of their ship. Submarines had neither the space aboard nor the time to take these steps without exposing themselves to mortal danger because the British took control of its merchant marine, armed its merchant ships,⁶⁷ directed them to automatically attack German submarines coming within a certain range,⁶⁸ and even developed Q-ships, which posed as harmless merchant vessels to lure German submarines close in before attacking them with guns hidden on the deck.⁶⁹ The pre-war presumption of innocent, unarmed civilian-manned merchant ships proved largely false, as civilians were now present on armed ships deemed military objectives as naval auxiliaries. It called into question whether the carefully structured construct developed before the war would continue to remain legally valid.

After the war States opted to keep the pre-war requirements intact, even explicitly extending their provisions to submarines. President Wilson had justified to Congress his request for a state of war with Germany on the German refusal to properly adhere to those pre-war agreements which he believed prohibited attacks against merchant ships without first placing passengers into a place of safety.⁷⁰ The London Naval Treaty of 1930 reaffirmed these requirements for both surface ships and submarines, citing them “as established rules of international law,” remaining permanently in force even as the other provisions of the agreement expired in 1936.⁷¹ It did provide exceptions to the requirement of removing merchant ship crews “in the case of persistent refusal to stop on being duly summoned, or of active

65. 1913 Oxford Manual, *supra* note 7, art. 31-32.

66. *Declaration concerning the Laws of Naval War*, UNIV. OF MINN.: HUM. RTS. LIBR., Feb. 26, 1909, at Ch. IV [hereinafter 1909 London Declaration]; 1913 Oxford Manual, *supra* note 7, art. 104.

67. CHARLES D. GIBSON, *MERCHANTMAN? OR SHIP OF WAR*, 40-41 (1986).

68. *Id.* at 42-43.

69. *Id.* at 50-51.

70. S. DOC. NO. 65-5, 1st Sess., at 3-8 (Wash. 1917), <https://www.loc.gov/law/help/digitized-books/world-war-i-declarations/ww1-gazettes/US-address-of-president-to-congress-April-1917-1-OCR-SPLIT.pdf>.

71. Limitation and Reduction of Naval Armament (London Naval Treaty) art. 23-24, Apr. 22, 1930, 46 Stat. 2858 [hereinafter London Naval Treaty of 1930].

resistance to visit or search.”⁷² The London Protocol in 1936 further confirmed this rule, and the accompanying Second London Naval Treaty also prohibited States to arm merchant ships in peacetime for the purpose of converting them into warships.⁷³ It was understood that the protocol did not apply to merchant ships that took actions such as sailing in a convoy with enemy warships; essentially such actions rendered them a lawful military objective.⁷⁴ By the time World War II began, there was broad legal consensus of the requirements to attack a merchant ship only under certain specific conditions, and to remove civilians aboard those vessels prior to such attack.⁷⁵ Indeed, even Nazi Germany codified the requirements of the London Protocol in its prize laws, and when war broke out submarine commanders were largely directed to adhere to them.⁷⁶ Their applicability to naval auxiliaries, however, was doubtful, since they were directly supporting combatant forces.

World War II repeated the same violations of codified international law as in the prior conflict. Belligerents routinely destroyed enemy merchant ships and their civilian crews instead of taking them to prize courts because they were deemed to be closely integrated with enemy armed forces.⁷⁷ This assessment was not unfounded. From the very beginning of the conflict, the British armed its civilian merchant fleet, placed them under Admiralty oversight, directed them to provide intelligence on the position of enemy submarines and ram them if possible.⁷⁸ Some British merchantmen even launched torpedo bombers to attack German submarines.⁷⁹ The United States also took steps to integrate its merchant marine by painting them the same ‘wartime grey’ as its warships, directing them to collect intelligence, and placing its merchant marine, including its members, under military control and subject to the Navy disciplinary code.⁸⁰ These factors helped convince

72. *Id.*; Procès-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930, 173 L.N.T.S. 353 (entered into force Nov. 6, 1936), <http://hrlibrary.umn.edu/instreet/1936a.htm> [hereinafter London Protocol].

73. Limitation of Naval Armament (Second London Naval Treaty) art. 9, Mar. 26, 1936, 50 Stat. 1363.

74. H. Levie, *Submarine Warfare: With Emphasis on the 1936 London Protocol*, 70 INT’L LAW SERIES, 315 (1998).

75. 2 LASSA OPPENHEIM, *International Law* § 194a, at 382-85 (Hersch Lauterpacht ed., 6th ed. Longmans, Green and Co. 1940).

76. 58 W. T. Mallison Jr., *Studies in the Law of Naval Warfare: Submarines in General and Limited Wars*, 1 INT’L LAW SERIES, 115 (1966).

77. GIBSON, *supra* note 67, at 119-21.

78. 46 INT’L LAW STUDIES, INTERNATIONAL LAW DOCUMENTS, 1946-47, at 299 (U.S. Naval War College ed., 1948).

79. GIBSON, *supra* note 67, at 103.

80. *Id.* at 89-90, 99, 102.

the Nuremberg court to impose no punishment on German Grand Admiral Karl Doenitz for violating Article 22 of the London Naval Treaty which applied the London Protocol to submarines.⁸¹ The court recognized Doenitz only reluctantly abandoned the protocol in light of these British practices,⁸² which converted many Allied merchant ships into naval auxiliaries.

The Nuremberg court found it particularly improper to impose punishment when the Allies also practiced unrestricted submarine warfare, targeting enemy merchant ships without safeguarding their crews, ostensibly considering them military objectives due to their full integration with enemy fighting forces.⁸³ It took less than twenty-four hours after the Pearl Harbor attack for the United States to direct its fleet to “execute unrestricted air and submarine warfare against Japan.”⁸⁴ The justification may have been deemed reprisal for the surprise attack,⁸⁵ but a post-war alibi indicated it was impossible to distinguish between civilian Japanese merchant ships and military enemy naval auxiliaries.⁸⁶ This suggested the civilian-manned Japanese merchant fleet had been incorporated into its combatant fleet, and in fact it had been placed under military control early in 1941, prior to the outbreak of war.⁸⁷ As naval auxiliaries, these vessels clearly became lawful military objectives which obviated the need to apply the London Protocol’s requirement to remove any civilian crew members to a place of safety prior to attack. By the close of World War II, the vessel-based construct appeared to support the targeting of civilian-manned naval auxiliaries without regard to the civilian status of those aboard. It is now time to examine any impact which the subsequent development of the principle of proportionality in post-war IHL agreements may have had on the law of naval warfare.

81. *Nuremberg Trial Judgement: Karl Doenitz*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/nuremberg-trial-judgements-karl-doenitz> (last visited Nov. 3, 2020).

82. “The Trial of Admiral Doenitz,” 1 *Office of Naval Intelligence Review*, No. 12, at 29-32 (1946) <https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/t/the-trial-of-admiral-doenitz.html>.

83. Gibson, *supra* note 67, at 119-21.

84. James M. Steele, *Running Estimate and Summary in 1* [7 Dec. 1941 to 31 Aug. 1942] at 5 (American Naval Records Soc’y, 2013), http://www.ibiblio.org/anrs/docs/Volumes/Nimitz_Graybook%20Volume%201.pdf.

85. NWP 1-14M, *supra* note 23, at 8-12.

86. Mallison, *supra* note 76, at 122.

87. Mark P. Parillo, *The Japanese Merchant Marine in World War II*, at 73 (1987) (unpublished Ph.D dissertation, Ohio State University) (on file with OhioLink).

IV. IMPACT OF THE MODERN CONCEPT OF THE PRINCIPLE OF PROPORTIONALITY ON THE LAW OF NAVAL WARFARE

AP I participants found it challenging to apply to naval conflicts their newly-christened individualized civilian protections so eagerly embraced in the land domain. Belligerents had relied on the vessel-based construct created by the traditional law of naval warfare to consider enemy merchant ships as naval auxiliaries almost as if they had been converted to warships under Hague Convention VII. Civilian mariners found themselves aboard vessels deemed military objectives, subjecting themselves to harm and extinguishing their rights under the London Protocol to be removed prior to attack. Even as AP I established trendsetting civilian protection mandates for land combatants, it did not impose them on belligerents at sea. Among the excluded legal obligations was the requirement to distinguish between civilians and combatants at sea, to conduct any proportionality assessment, to exercise feasible precautions minimizing the harm to civilians, and to avoid making civilians the object of attack. These were not inadvertent omissions, but rather intentional decisions by the AP I drafters. The specific language of Article 49 reads:

The provisions of this Section [i.e. Articles 48 through 67] apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.⁸⁸

This decision did not reflect any desire to create a warfare domain without limits. It merely signaled a determination “not to undertake a revision of the rules applicable to armed conflict at sea” because the conditions of war at sea “were radically transformed during the Second World War and in subsequent conflicts. It is therefore difficult to determine exactly which are the rules that still apply,” as “they are controversial or have fallen into disuse.”⁸⁹ The Commentary does not elaborate further, but at least one likely primary culprit was the unrestricted targeting of enemy and neutral merchant fleets which killed thousands of civilian merchant mariners, seemingly with State acquiescence. This left (and continues to leave) the law of naval warfare without codified provisions implementing the principles of distinction or proportionality.

As with a good portion of the law of naval warfare, the principles derive from customary international law. There are a number of collateral sources

88. AP I, *supra* note 2, art. 49(3) at 152.

89. AP I Commentary, *supra* note 41, at 606.

that make the case that these principles have been integrated into the law of naval warfare even without their codification in a formal written agreement. In the context of assessing the lawful use of nuclear weapons, the International Court of Justice emphasized in an advisory opinion that States must distinguish between civilians and combatants, and to “never make civilians the object of attack.”⁹⁰ The Court found these rules to “constitute intransgressible principles of international customary law” without identifying any exceptions that could exempt application to the law of naval warfare.⁹¹ It further cited AP I Article 1, which determined that civilians “remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience” even in situations not addressed by any formal agreement.⁹² Whether such protection of civilians at sea is an ‘established custom’ could be a point of contention.

The 1998 Rome Statute of the International Criminal Court provides another potential source to extend proportionality to maritime conflicts. It designates as a war crime certain violations of the law of armed conflict “within the established framework of international law,” including direct attacks on civilians who do not directly participate in hostilities.⁹³ Should the ‘established framework’ of the law of naval warfare consider attacks on civilians aboard a vessel deemed a military objective (such as a naval auxiliary) to be a violation of the law of armed conflict, then it would constitute a war crime under this statute. Given the vessel-based construct of the law of naval warfare, and the inability of civilian crew members to arguably forfeit individual targeting rights they never had, it remains unclear whether this statute could be uniformly leveraged to prosecute someone for killing civilians aboard such a vessel, particularly since the attacker would formally be targeting the ship, not the individuals aboard. To this point, there have not been any cases in the International Criminal Court relating to war crimes committed against civilians at sea.⁹⁴

Maritime legal scholars took a close look at these issues while examining the contemporary state of the law of naval warfare in 1995 as they compiled the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (San Remo Manual). Published under the auspices of the International

90. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 78-79.

91. *Id.*

92. AP I, *supra* note 2, art.1(2) at 7.

93. Rome Statute of the International Criminal Court, art. 8, ¶ 2(b)(i), July 17, 1998, 2187 U.N.T.S. 91 (entered into force July 1, 2002).

94. See generally *Cases, INT’L CRIM. CT.*, <https://www.icc-cpi.int/cases> (select “Crimes” filter; then select “War Crimes” to narrow search to 28 cases) (last visited Oct. 10, 2020).

Institute of Humanitarian Law, and probably the most eminent modern compilation of the law of naval warfare, it incorporates the requirement to avoid targeting civilians directly.⁹⁵ It further includes the principle of distinction, acknowledging the lack of formal treaty provisions but ultimately making a conclusory statement affirming the requirement as “an essential element of that body of law, no matter how inchoate...”⁹⁶ It also assimilates the principle of proportionality to mandate an assessment of the military advantage gained against the harm inflicted on civilians or other protected persons,⁹⁷ and fully embraces AP I Article 52(2)’s definition of military objectives.⁹⁸

After validating these principles as an integral part of the law of naval warfare under customary international law, San Remo Manual participants then applied the vessel-based construct to implement the principle of distinction. In contrast to the individualized standards AP I imposes on belligerents ashore, conflicts at sea distinguish combatants from civilians by looking to the status or actions of the vessel alone to identify whether it constitutes a military objective. The San Remo Manual provides legal clarity by identifying lists of vessels whose status or actions would ‘enable naval commanders to establish whether a given vessel was liable to attack or not.’⁹⁹ It endorses the designation of any warship or naval auxiliary as a military objective based on their status alone.¹⁰⁰ Status protects from harm select categories of vessels, including coastal fishing vessels, hospital ships, and merchant ships (enemy and neutral); they may be attacked only if they engage in certain specific conduct which reasonably can be construed as support to the enemy sufficient to warrant their designation as a military objective.¹⁰¹ Activities which can render neutral merchant ships as military objectives subject to attack include sailing under an enemy convoy, refusing to allow a belligerent warship to board and search it for enemy contraband,

95. SRM, *supra* note 8, ¶ 46, at 16.

96. Salah El-Din Amer et al., *Explanation, in SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA* 57, 114 (Louise Doswald-Beck ed., 1995) [hereinafter SRM Commentary].

97. SRM, *supra* note 8, ¶ 46(d), at 16.

98. *Id.* ¶ 40, at 15.

99. SRM Commentary, *supra* note 96, ¶ 40.7, at 116.

100. SRM, *supra* note 8, ¶ 65, at 21; *see also* 1913 Oxford Manual, *supra* note 7, at 180-81.

101. Hospital ships: 1913 Oxford Manual, *supra* note 7, at 183-184; SRM, *supra* note 8, ¶¶ 49-51, at 17-18; Fishing Vessels: 1913 Oxford Manual, *supra* note 7, at 185-86; SRM, *supra* note 8, ¶¶ 47-48, at 16-17; Enemy Merchant Vessels: 1913 Oxford Manual, *supra* note 7, at 181, 198; SRM, *supra* note 8, ¶¶ 59-61, at 16-17; Neutral Merchant Vessels: 1909 London Declaration *supra* note 7, at 167; SRM, *supra* note 8, ¶¶ 67-69 at 21-22.

or resisting capture while attempting to breach a blockade.¹⁰² In one recent example from 2010, a team of international legal scholars examined the legality of certain actions taken by Israeli military forces against a vessel openly seeking to breach a declared blockade of Gaza. They concluded the ship's non-warship status initially protected it from harm, but once it actively resisted capture while attempting to breach a blockade, it became a lawful military objective subject to attack.¹⁰³ Particularly in light of the impracticality of forcing maritime commanders to individually distinguish each individual aboard the vessel, the application of the principle of distinction through the prism of the vessel makes perfect sense. In the case of naval auxiliaries, their status renders it an inherent military objective.

The U.S. recognizes the differences between armed conflict ashore and at sea, and fully embraces the practice of using the status or conduct of the ship to distinguish combatants and civilians:

The law of land warfare has divided enemy nationals into different categories in order to facilitate the protection of the civilian population from hostilities. Similarly, the law of naval warfare has sought to classify enemy vessels to protect those that are civilian or non-combatant in character.¹⁰⁴

This understanding implements the principle of distinction in the maritime context by analogizing a ship to an individual, embracing vessel-based traditional law of naval warfare norms that culminates with the establishment of categories of vessels which are liable to attack, those that are not, and the circumstances in which those that are protected may forfeit such protection.¹⁰⁵ The law of war manuals from many other States share this position.¹⁰⁶

In doing so, those States' war manuals sanction reliance on the vessel alone to distinguish between lawful military objectives and civilians entitled to protection. They also had the effect of creating a presumption that, absent unusual circumstances, all hands aboard support the conduct (or share the status) which may warrant its lawful targeting.

102. 1913 Oxford Manual, *supra* note 7, at 177-78; SRM, *supra* note 8, ¶¶ 67, 98, at 21-22, 27.

103. Turkel Commission, *The Public Commission to Examine the Maritime Incidents of 31 May 2010 Report, Part One*, ¶ 177 (2010), https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_a.pdf.

104. DOD LAW OF WAR MANUAL, *supra* note 10, ¶ 13.3.2.

105. *Id.* ¶¶ 13.4 - 13.6.

106. Ministry of Def., *JSP 383: The Joint Service Manual of the Law of Armed Conflict*, ¶¶ 13.27, 13.40-41 (2004) [hereinafter UK Law of War Manual]; *Australian Defence Doctrine Publication 06.4*, 11 May 2006, ¶¶ 6.39, 6.41 [hereinafter Australian Law of War Manual]; *Kommandanten-Handbuch - Rechtsgrundlagen für den Einsatz von Seestreitkräften*, ¶¶ 1029, 1031 (2002) [hereinafter German Navy Law of War Handbook].

In contrast to the principle of distinction, the way in which the principle of proportionality applies to the maritime domain is not articulated well. The principle is incorporated as an integral component of maritime conflict in the law of war manuals of the United States,¹⁰⁷ Germany,¹⁰⁸ the United Kingdom,¹⁰⁹ Australia,¹¹⁰ New Zealand,¹¹¹ Norway,¹¹² Israel,¹¹³ Denmark,¹¹⁴ China,¹¹⁵ and many others.¹¹⁶ They adopt almost uniformly the list of activities identified in the San Remo Manual which could render a ship a military objective, authorize attacks on such vessels without warning, and blandly incorporate the proportionality language of AP I Article 57. But with one exception, they do not articulate any differences in how proportionality is applied at sea in contrast to other warfare domains, seemingly implying the individualized assessment used ashore remains valid in a maritime context.¹¹⁷ The International Committee of the Red Cross (ICRC)'s database of customary IHL also lacks any amplifying clarification.¹¹⁸ Even the San Remo Manual Commentary does not flesh out whether proportionality is implemented differently at sea than ashore. Indeed, in applying the principle in the context of the German attack on the *Lusitania* in 1915, it suggests the number of civilians aboard may have rendered the attack disproportionate relative to the military advantage gained in destroying its military cargo.¹¹⁹ Although this suggests an individualized proportionality assessment should be applied for non-warships rendered a military objective, this example may reflect international consensus only in the case of a passenger vessel which has been lawfully deemed a military objective, as it is one of the specially exempted vessels entitled to additional protections.¹²⁰ The lack of clarity is particularly relevant for civilian mariners providing lawful support aboard

107. DOD LAW OF WAR MANUAL, *supra* note 9, ¶¶ 13.5.2, 5.12.3.3; NWP 1-14M, *supra* note 22, ¶ 8.3.2.

108. German Navy Law of War Handbook, *supra* note 102, ¶ 1001.

109. UK Law of War Manual, *supra* note 102, ¶ 15.22.1.

110. Australian Law of War Manual, *supra* note 102, ¶ 6.26.

111. *DM 69 (2d Ed) New Zealand Defence Forces Manual of Armed Forces Law, Vol. 4*, 2017, ¶ 10.4.12.

112. *Norwegian Manual of the Law of Armed Conflict (English)*, 2018, ¶ 10.32.

113. ICRC Database of Customary International Law, *Practice Relating to Rule 14, Proportionality in Attack*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule14 (last visited Nov. 3, 2020) [hereinafter ICRC Database].

114. *Id.*

115. *People's Republic of China Law of Armed Conflict Manual*, 203 (2003).

116. See ICRC Database, *supra* note 113.

117. *Id.*

118. *Id.*

119. SRM Commentary, *supra* note 96, ¶ 46.5.

120. DOD LAW OF WAR MANUAL, *supra* note 10, ¶ 13.5.2.1; SRM, *supra* note 7, ¶ 47(e).

naval auxiliaries, since they work on a military objective without the ability to minimize the danger should the enemy wish to attack the ship.

Any discussion on how proportionality applies to civilians aboard naval auxiliaries should understand the larger dialogue on how the principle applies to any civilian providing lawful support to combatants at a military objective. The United States has struggled to determine how it believes proportionality should apply in this latter context. The June 2015 version of the DoD Law of War Manual explicitly rejected an express prohibition on attacking such civilians because the civilians assumed the risk of harm.¹²¹ This position directly responded to concerns that full application of the principle of proportionality in such situations encourages belligerents to intentionally use civilians to shield military objectives from attack.¹²² An update in December 2016 adjusted its position:

However, sometimes civilian personnel work in or on military objectives in order to support military operations. For example, civilian workers sometimes serve as members of military aircrews, as technical advisers on warships, and as workers in munitions factories. Such persons assume a certain risk of injury. Provided such workers are not taking a direct part in hostilities, those determining whether a planned attack would be excessive must consider such workers, and feasible precautions must be taken to reduce the risk of harm to them. Those making such determinations may consider all relevant facts and circumstances.¹²³

This carefully crafted language treads delicately between the competing concerns of safeguarding any civilian rights while preventing misuse. It mandates feasible precautions and some level of consideration in light of their civilian status. But it remains unclear whether that entails a shore-based proportionality assessment or something less, providing no examples of the kind of facts and circumstances which a commander should deem relevant. There is also continuing emphasis on an ‘assumption of risk’ argument that civilians who willingly accompany combatant forces to provide support warrant less consideration before an attack. Whether or not that is a valid factor to consider, the formal creation of a quasi-combatant category of civilians who count less in any collateral damage assessment would be a new development in IHL presently without foundation in relevant international agreements.¹²⁴

121. DOD LAW OF WAR MANUAL, *supra* note 10, ¶ 5.12.3.2.

122. *Id.*

123. *Id.* ¶ 5.12.3.3.

124. Munitions Factories: Civilian Assumption of Risk in Armed Conflict and the United States’ DoD Law of War Manual, 56 MIL. L. & L. WAR REV. 251, 284 (2017).

The discussion further fails to clarify the extent to which its guidance applies in the maritime arena. Its sole maritime example includes an embarked technical advisor, tellingly overlooking the more obvious example of a crew of civilian mariners operating aboard a naval auxiliary. The manual's maritime section has only a single additional example where drafters devoted clear language explaining the need for a full proportionality assessment—passenger ships which have been rendered a military objective.¹²⁵ Notably, in conformity with the majority of state law of war manuals, the United States omits any clarifying explanation of how civilian mariners aboard a naval auxiliary would enjoy any rights they may have under the principle of proportionality.

Nonetheless, the lack of clarity may reflect a ringing endorsement to apply proportionality using a vessel-based construct. With AP I expressly refusing to apply the individualized concepts to the maritime domain, the law of naval warfare does not need to explain whether its implementation of proportionality mirrors AP I as a matter of customary international law since the original law remains valid. While States could make their positions clearer, a reasonable presumption is that nothing has changed without an affirmative acceptance of AP I civilian protection provisions as a matter of customary international law. Such explicit language expressly incorporating the AP I provisions into naval warfare law has not occurred in any law of war manual in the ICRC database.¹²⁶ One State, Denmark, has done the opposite. It fully articulates in its law of war manual how its naval forces implement proportionality. It ignores the status of anyone on a ship rendered a military objective; instead, the attacker only must assess the harm which could be inflicted on other vessels in the vicinity that are not military objectives.¹²⁷ If States agree with this position, it would serve them well to follow Denmark's lead.

State practice in the world wars may not necessarily reflect a rejection of the pre-war agreements. The signatories of the London Protocol understood well that its provisions did not apply to merchant ships, which had been deemed a military objective.¹²⁸ Belligerents targeted all enemy merchant ships because they could not effectively differentiate between merchant ships which were conducting ordinary commerce unrelated to the war and those which were providing direct or war-sustaining support to enemy combatant forces.¹²⁹ This issue essentially boiled down to a problem

125. See DOD LAW OF WAR MANUAL, *supra* note 10, ¶ 13.5.2.1.

126. See ICRC Database, *supra* note 113.

127. *Id.*

128. Levie, *supra* note 74, at 115.

129. Tucker, *supra* note 61, at 3.

implementing the principle of distinction. The Allies can accept much of the blame for aggressively mobilizing their merchant fleets to blur the difference between supporting ships and any other ship. Those merchant ships which genuinely had no role in the conflict were essentially collateral damage. Arguably, had belligerents effectively determined whether a given merchant ship was a military objective, they would have been more willing to fully implement the London Protocol and earlier law of naval warfare provisions safeguarding civilians at sea.

Some post-World War II State practices may reflect current international viewpoints on how proportionality is to be implemented in maritime conflicts. The Iran-Iraq War in the 1980s included over 450 attacks on the enemy and neutral shipping, causing over 300 civilian mariner casualties primarily aboard tankers carrying war-sustaining oil necessary to support and fund each side's war efforts.¹³⁰ Iraqi attacks focused on Iranian and neutral-flagged tankers controlled mainly by the Iranian military, which convoyed many of them to Iranian ports.¹³¹ Although the belligerents were not well-known for concerning themselves with adherence to law of armed conflict norms, the international community also remained silent about the apparent disregard for civilian crew members during attacks on ships integrated with belligerent armed forces and carrying war-sustaining oil. Only one of eight United Nations Security Council resolutions promulgated during the war specifically addressed attacks on merchant ships; it condemned Iranian attacks on neutral merchant ships ostensibly conducting ordinary commerce in neutral ports.¹³² In legal parlance, it criticized Iran for attacking merchant ships which were not military objectives. Notably absent from any resolution were objections about unrestricted attacks on merchant ships integrated and controlled to a large degree by the Iranian military. To the extent customary international law is generally established by States through a sense of legal obligation, this example may not warrant much attention given the belligerents in this war did not appear to base their actions to fulfill any legal obligations.¹³³ Nonetheless, while the international community's silence may reflect ambivalence or political favoritism, it also could represent a tacit endorsement that such attacks were consistent with World War II standards

130. Ronald O'Rourke, *the Tanker War*, U.S. NAVAL INST. PROC., 6 (May 1988), <https://www.usni.org/magazines/proceedings/1988/may/tanker-war>.

131. J. Ashley Roach, *Missiles on Target: The Law of Targeting and the Tanker War*, 82 AM. SOC'Y INT'L L. PROC. 154 (1988); George K. Walker, *The Tanker War, 1980-88: Law and Policy*, 74 INT'L L. SERIES 387 (2000).

132. G.A. Res 552 (June 1, 1984).

133. See generally John B. Bellinger II. & William J. II Haynes, *A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443 (2007).

allowing attacks on civilian ships deemed a military objective without consideration of any civilians aboard.

The 1982 Falklands/Malvinas conflict between Britain and Argentina may offer another contemporary example. Each side directed and controlled civilian vessels crewed mainly by civilians to carry out activities, including belligerent acts, in support of combatant forces. The British requisitioned civilian merchant vessels to support its combatant forces, including the *Atlantic Conveyor*, which delivered critical fighter jet aircraft and other equipment to British forces in the combat area of operations.¹³⁴ When the ship was subsequently struck by Argentine missiles, killing several civilian crew members, the British lodged no complaints about any potential violations of international law by Argentina. Similarly, Argentina placed under military control the civilian fishing trawler *Narwal*, manned almost exclusively by civilians, to collect intelligence about the British maritime task force.¹³⁵ Clearly a belligerent act, the British subsequently attacked and boarded the ship.¹³⁶ Argentina did not criticize the British actions as illegal even as it suffered the death of one civilian mariner. This contrasts with Argentina's strong legal criticism of the sinking of the *General Belgrano* outside the declared British maritime exclusion zone, which demonstrates Argentina's willingness to legally object to enemy actions which it considered contrary to the law of naval warfare.¹³⁷

A contrasting view is found in the findings of the 2010 Turkel Commission. Israel asked a group of distinguished Israeli and non-Israeli legal experts to examine the legality of its use of military force to board the *Mavi Marmara*, a civilian passenger vessel seeking to breach an Israeli blockade against Gaza. After the ship refused an Israeli request to board the vessel, Israel boarded it using military force. While most civilians aboard the ship did not physically oppose the boarding, a smaller subgroup did so, resulting in several casualties on both sides.¹³⁸ The commission acknowledged the ship became a valid military objective under the law of war, but fully applied the civilian protection provisions embraced in AP I as the basis for any military attacks against the ship. The commission found that

134. SIR LAWRENCE FREEDMAN, *THE OFFICIAL HISTORY OF THE FALKLANDS ISLAND CAMPAIGN VOLUME II: WAR AND DIPLOMACY* 462 (2005).

135. *Id.* at 363.

136. *Id.*

137. *Hundimiento del General Belgrano - Comunicados oficiales*, LA NACIÓN, May 4, 1982, https://web.archive.org/web/20130517050451/http://www.elhistoriador.com.ar/documentos/dictadura/hundimiento_del_general_belgrano_comunicados_oficiales.php.

138. Turkel Commission, *supra* note 103, ¶¶ 1-3.

a proportionality assessment was required except against those civilians who were directly participating in hostilities.¹³⁹

[U]nder international humanitarian law, the flotilla vessels became valid military objectives once they resisted capture. However, the presence of civilians on board the vessels is relevant to the assessment of the principle of “proportionality” discussed above. For instance, had the *Mavi Marmara* been “attacked,” Israeli forces would have had to assess whether the expected incidental loss of civilian life or injury to civilians would be excessive in relation to the concrete and direct military advantage anticipated by the attack.¹⁴⁰

The affirmation of an individualized proportionality assessment may reflect a contextual understanding unique to this case. There was a clear distinction between crew members who sought to resist the boarding and a larger group of civilians known to acquiesce in it. This could have been deemed an unusual situation where the attacker could not presume the entire crew or embarked passengers supported the actions which gave rise to the ship’s designation as a military objective. In such circumstances, even as the ship remains a lawful military objective, a requirement for an attacker to conduct a full proportionality assessment would be understandable. Controversially, the commission applied the concept of direct participation in hostilities to assess whether some civilians aboard the vessel forfeited their civilian protections. Under this line of thinking, had there been no separate group of civilians clearly disassociated from the hostile activities, the Israelis could have lawfully attacked the ship without a proportionality assessment. This action would be consistent with both the law of naval warfare and AP I civilian protection provisions. This contrasting perspective reveals differences in how some believe the law of naval warfare protects civilians at sea.

Comparing two distinct legal constructs highlights unique differences in the implementation of the principle of proportionality in different warfare domains, which reflects the diverse histories and operational realities present in each. It underscores potential seams in how the law of naval warfare wishes to articulate the implementation of proportionality at sea. Reliance on customary international law, and focusing on State practice and policy positions, can leave unsatisfied those who want to provide the same degree of clarity which codified treaty such as AP I brings to combatants ashore. Regardless, the principle of proportionality continues to play a role as an “intransgressible” right consistent with established norms of international law. What those norms are, and how they are applied, can be a subject of

139. *Id.* ¶¶ 177, 183, 192-95, 201.

140. *Id.* ¶ 188.

debate in the absence of a codified tradition, and where an international consensus in light of modern IHL standards can be challenging to identify. For civilian crew members embarked on naval auxiliaries, the law of naval warfare likely imposes no obstacles to having their ship targeted as a military objective without regard to their presence as civilians. Efforts to incorporate individualized norms must originate with States who see value in altering the current construct.

THE RIGHT TO BE FORGOTTEN DOES NOT APPLY OUTSIDE THE EUROPEAN UNION: A PROPOSAL FOR WORLDWIDE APPLICATION

*Katherine G. Vazquez**

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I. INTRODUCTION

Global uniformity in privacy law is needed in order to adequately protect freedom of information and privacy in the digital age. While the internet

* J.D., Southwestern Law School, 2021; B.A. English, Rhetoric and Composition, California State University, Long Beach, 2016. Thank you, mom, fiancé, sisters and family, for all your love and support! I would also like to thank Professor Miller, Professor Grimes, and the Southwestern community for their guidance and assistance in the writing process.

grows every day, an individual's private information is uploaded, collected, and uncovered. In 2020, more than half of the world's population, 4.57 billion people, actively use the internet.¹ Every day, 2.5 quintillion bytes of data are created and 5 billion searches are conducted.² Additionally, 77% of the searches are conducted on Google and Google processes 40,000 searches every second.³ Individuals are also constantly sharing information on social media. Every minute of the day Snapchat users share 527,760 pictures, users watch 4.1 million videos on YouTube, 456,000 tweets are sent on Twitter, and 46,740 photos are shared on Instagram.⁴ Besides people personally uploading data, search engines like Google facilitate the access to content. Personal information such as court documents, hospital records, lawsuits, and newspaper articles can easily be accessed on Google.

In an effort to protect an individual's privacy, the European Union (EU) has implemented the "right to erasure," or more commonly known as the "right to be forgotten." Citizens can request data controllers, search engines like Google, to remove the private information when a search is done using that individual's name. If the search engine removes the link, EU internet users would not have access to the link. Currently, the right to be forgotten only applies inside the EU. Although outside the EU, many countries have implemented similar laws.

Although the right to be forgotten does not apply worldwide, the Court of Justice of the European Union (CJEU) does not prohibit the practice.⁵ The CJEU held that a "supervisory or judicial authority of a Member State remains competent to weigh up" and order that the search engine to "carry out de-referencing concerning all versions of that search."⁶ A decision by the CJEU or any other supervisory or judicial authority that orders Google to remove a link on all versions, including the versions used outside the EU, would be very controversial and could have global effects. I propose that the global process of de-referencing links on all versions of a search engine should be held to a different standard than is currently used in the EU. This adjusted standard would include uniformity in the law and a procedure

1. Global Digital Population as of July 2020, STATISTA, (Aug. 20, 2020, 11:20 AM), <https://www.statista.com/statistics/617136/digital-population-worldwide/>.

2. Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, FORBES (May 21, 2018, 12:42 am), <https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/#29cdea6360ba>.

3. *Id.*

4. *Id.*

5. Case C-507/17, *Google LLC v. Comm'n nationale de l'informatique et des libertes*, 2019 E.C.R. 72.

6. *Id.*

requiring notice. The new standard would be in line with the fundamental values of freedom of information and expression and it would further facilitate the search engine's role as decision-maker.

II. BACKGROUND

Individuals in the European Union (EU) have the right to privacy in the processing and movement of personal data.⁷ The EU called the protection a "fundamental right."⁸ As part of this fundamental right, an individual has the "right to be forgotten" and the "right to de-referencing." That is, individuals can request data controllers to delist search results that involve a person's name so that the link or domain name no longer appear in the search engine. In the *Commission nationale de l'informatique et des libertes (CNIL) v. Google*, CNIL requested that Google carry out de-referencing in all of Google's versions of its search engine and prevent all users globally from accessing the link in their search engines.⁹ On September 24, 2019, the CJEU held that Google only had to carry out de-referencing on the versions of the search engine corresponding to the Member States of the EU.¹⁰ When Google grants a request to delist the link, the link is removed from its search engine so that the link is not accessible to any individual in the EU. CJEU held that search engines must use measures that effectively prevent or seriously discourage an internet user from gaining access when conducting a search from one of the Member States on the basis of a data subject's name.¹¹ The link can still be seen by individuals outside the EU or people inside the EU who are masking their location. This recent decision limited the scope of the right to be forgotten within the Member States.

III. THE EVOLUTION OF THE RIGHT TO BE FORGOTTEN

The EU has evolved its standard over time. For more than twenty years, the EU applied the Data Protection Directive of the European Parliament and of the Council of October 24, 1995 (Directive).¹² The Directive served as a basic instrument for data protection in the EU. In 2014, the CJEU further defined the role of controllers (search engines) and under what circumstances

7. *Id.* at 1.

8. *Id.* at 13.

9. *Id.* at 30.

10. *Id.* at 73.

11. *Id.*

12. Council Regulation 2016/679, 2016 O.J. (L 119) (EU) [hereinafter Regulation 2016/679].

personal data must be removed.¹³ In an effort to provide a more uniform application of the law to all Member States, the EU adopted the General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR) in 2016.¹⁴ Finally, in a more recent case, the CJEU limited the scope of the right to be forgotten. By understanding the EU's current standard and evolution, the need for a more comprehensive and uniform law and criteria becomes apparent if the EU were to ever order removal of data on a global scale.

A. *The Directive of 1995*

The purpose of the Directive was for the Member States to protect “the fundamental rights and freedoms of natural persons and, in particular, their right to privacy with respect to the processing of personal data.”¹⁵ It also concerned the free movement of such data.¹⁶ The Directive defined personal data as any information relating to an identified or identifiable natural person.¹⁷ It further defined personal data to include name, photo, email address, phone number, address, and personal identification numbers.¹⁸ The Directive did not require an organization to maintain an inventory of personal information or report a breach, and the fines for noncompliance varied by jurisdiction.¹⁹

Further, the Directive recognized the role of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which recognized the right to privacy.²⁰ The Directive also recognized the importance of Article 10 of the European Convention for the Protection of Human Rights which documents the fundamental rights of individuals with freedom of information and the right to receive and impart information.²¹ Processing can include an operation performed on personal data that is collected, recorded, organized, stored, retrieved, altered, used, disseminated, blocked, erased, combined, or destroyed.²² The Directive defined the

13. Press Release No 70/14, Court of Justice of the European Union, Judgment in Case C-131/12 (May 13, 2014) (on file with the Court of Justice of the European Union).

14. Regulation 2016/679, *supra* note 12, at 2.

15. *Id.*

16. Case C-507/17, Google LLC v. Comm'n nationale de l'informatique et des libertes, 2019 E.C.R. 1.

17. *Id.* at 5(a).

18. Regulation 2016/679, *supra* note 12, at 4(1).

19. *Id.* at 11(1).

20. Case C-507/17, Google LLC v. Comm'n nationale de l'informatique et des libertes, 2019 E.C.R. 4(10).

21. *Id.* at 4(37).

22. *Id.* at 5(b).

controller as a natural or legal person, public authority, agency, or any other body which processes personal data.²³

The Directive attempted to include as much information as it could to guide the Member States in protecting its citizens' right to privacy. The Directive had its critics. Critics complained that the Directive did not include companies like Google as controllers; had it done so, more people would have brought litigation before 2014.²⁴ Regardless, a few questions remained unanswered: whether individuals could request search engines to remove links from the servers and under what criteria could such request be granted. The next case provided clarity.

B. *Google v. Agencia Española de Protección de Datos*

A new standard to delist a link emerged from *Google Spain, Google Inc. v. Agencia Española de Protección de Datos (AEPD) (Google Spain)*. The *Google Spain* case became known as “the right to be forgotten” case. In 2010, a Spanish national lodged a complaint against La Vanguardia’s newspaper, a publisher of a daily newspaper with a large circulation in Spain, and Google Spain and Google Inc.²⁵ He contended that a list of results would display on the Google search results when he entered his name.²⁶ The data that resulted related to an announcement “for a real-estate auction organized following attachment proceedings for the recovery of social security debts owed” by the Spanish national.²⁷ The Spanish national requested that either the newspaper or Google were required to remove the personal data relating to him because the matter had been “fully resolved for a number of years” and that reference to it was irrelevant.²⁸

The AEPD rejected the complaint against the newspaper but upheld the complaint in regard to Google Spain.²⁹ Google Spain and Google Inc. brought the action before the National High Court of Spain and claimed that the AEPD’s decision should be annulled.³⁰ The case was then referred to the CJEU.³¹ The CJEU held that internet search engine operators like Google are

23. *Id.* at 5(d).

24. Stanford Law School: Law and Policy Lab, THE “RIGHT TO BE FORGOTTEN” AND BLOCKING ORDERS UNDER THE AMERICAN CONVENTION: EMERGING ISSUES IN INTERMEDIARY LIABILITY AND HUMAN RIGHTS (Savni Dutt ed. 2017), at 45.

25. Court of Justice of the European Union, *supra* note 13, at 1.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

controllers because they collect data within the meaning of the Directive.³² Further, search engines are responsible for personal data which appear on the web pages published by third parties.³³ The decision meant that individuals could request that the search engines remove a link from the list of results in the search.³⁴

The CJEU further provided a guide for Google to use when individuals requested the removal of personal data.³⁵ The CJEU held that even lawful and accurate data may become incompatible with the Directive where “the data appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.”³⁶ The decision provided a new standard for “forgetting” personal data; if the data appeared to be “inadequate” or “irrelevant,” the individual could request that Google remove the link from the list of results. The decision by the CJEU also provided that delisting may occur even “when the information causes no prejudice to the individual... when the information is true... and when the web pages are published lawfully.”³⁷ Further, data protection rights override internet users’ interest in assessing the information.³⁸

The *Google Spain* case also required Google to comply with delisting requests.³⁹ Failure to remove a valid request would “be a breach of the company’s duties under the Data Protection Directive and expose the company to fines.”⁴⁰ The case entitled individuals whose requests were denied to seek review before the supervisory authority or the judicial authority to ensure Google’s accountability; specifically, “that it carries out the necessary checks and orders the controller to take specific measures accordingly.”⁴¹ After this decision and in an effort to comply with the court’s ruling, Google created a system that allowed its users to request the removal of their data from Google’s search engine. Given the continuous internet advancement and data growth, the EU adopted the General Data Protection Regulation in an effort to create a more uniform approach to data removal within the EU.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Stanford Law School: Law and Policy Lab, *supra* note 24, at 34.

38. *Id.*

39. *Id.*

40. *Id.*

41. Court of Justice of the European Union, *supra* note 13, at 3.

C. *The General Data Protection Regulation (GDPR)*

The EU adopted the GDPR in April 2016 and substituted the Directive on May 25, 2018.⁴² The GDPR is binding in its entirety and applicable to all Member States.⁴³ The regulation embraces “the new digital environment by giving individuals control over their personal data, and simplifying the regulatory environment for business.”⁴⁴ It maintained all the protections from the Directive, including the right to erasure (right to be forgotten).⁴⁵ It also added new rights, such as the right to restriction of processing (Article 18) and the right to data portability (Article 20).⁴⁶ These new rights require companies to suspend further use while also allowing the existing data to continue to be stored.⁴⁷ Further, an individual may obtain all records of the consented data in the company’s possession, and the company must provide the data to the individual free of charge and without undue delay.⁴⁸

The GDPR extended and clarified the jurisdictional scope of the existing EU data protection law.⁴⁹ A controller or processor that maintains an establishment in the EU will be subject to the GDPR if it processes personal data regardless of whether the processing takes place inside the EU.⁵⁰ Although establishment is not explicitly defined, Recital 22 explains that “effective and real exercise of activity through stable arrangements” would satisfy the provision.⁵¹ A controller may also be subject to the GDPR, even if the controller is not established in the EU, if “it processes the personal data of Data Subjects in the EU and that processing is related to the ‘monitoring’ of the behavior of data subjects taking place within the EU.”⁵²

Under the GDPR, personal data must be removed when the data is no longer necessary for its original purpose, the individual withdraws consent, the individual objects, the personal data was unlawfully processed, or the removal is in compliance with a Member State law.⁵³ Individual consent is freely given, if it is specific and informed, and there must be an unambiguous

42. PROMOTIONAL PRODUCTS ASS’N INT’L, THE GENERAL DATA PROTECTION REGULATION 3, 6 (2018), <https://www.ppai.org/media/2941/gdpr.pdf>.

43. *Id.* at 5.

44. *Id.*

45. *Id.* at 16.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 9.

50. *Id.*

51. *Id.*

52. *Id.*

53. Regulation 2016/679, *supra* note 12, at 43-4.

indication that the individual wishes “by a statement or by a clear affirmative action,” that the personal data relating to him or her is processed.⁵⁴

The GDPR extended the definition of personal data to include IP addresses, mobile device identifiers, geo-location, biometric data, psychological identity, gender identity, economic status, cultural identity, and social identity.⁵⁵ The right to erasure (right to be forgotten) includes these new forms of personal data.⁵⁶ Additionally, the GDPR requires companies to comply without undue delay.⁵⁷ The expansion of the definition of personal data sought to enhance the protection of individual data.

Regardless of the EU’s attempt to provide a comprehensive regulation, opponents of the GDPR argue that the regulation has ambiguous requirements and unclear rules which promote one-sided incentives.⁵⁸ Critics also express that the GDPR inadequately protects free expression.⁵⁹ The CJEU recently limited the de-referencing scope in a September 2019 case, holding that search engines need not de-reference links on all versions of their search engines. The case also repealed the Directive of 1995.

D. *CNIL v. Google*

On May 21, 2015, the President of the CNIL served formal notice on Google demanding that it apply all link removals from result lists to the search engine’s domain name extensions.⁶⁰ That is, Google would have to remove the link corresponding to search engine versions outside of the EU. Compliance with the request would make removed links unavailable not only inside the EU, but worldwide. Google refused to comply with the formal notice, however.⁶¹ Google only removed the links from “the results displayed following searches conducted from the domain names corresponding to the versions of its search engine in the Member States.”⁶² CNIL also regarded Google’s geo-blocking as insufficient.⁶³ Geo-blocking is a tool used to prevent internet users from a certain IP address from accessing a site if the

54. *Id.* at 34.

55. PROMOTIONAL PRODUCTS ASS’N INT’L, *supra* note 42, at 8.

56. *Id.* at 16.

57. *Id.*

58. Daphne Keller, *The Right Tools: Europe’s Intermediary Liability Laws and the EU 2016 General Data Protection Regulation*, 33:297 BERKELEY TECH. L. J. 320, 332-35 (2018).

59. Stanford Law School: Law and Policy Lab, *supra* note 24, at 38.

60. Case C-507/17, *Google LLC v. Comm’n nationale de l’informatique et des libertes*, 2019 E.C.R. 13.

61. *Id.*

62. *Id.*

63. *Id.*

IP found that the internet user was located inside a Member State.⁶⁴ CNIL imposed a penalty on Google of 100,000 euros for failure to comply with the formal notice.⁶⁵

The case reached the CJEU. CNIL argued that Google was not doing enough since the information could still be accessed outside the EU.⁶⁶ Google argued that the right to de-referencing “does not necessarily require that the links at issue are to be removed, without geographical limitation, from all its search engines domain names.”⁶⁷ Further, Google argued that by adopting such interpretation, “the CNIL disregarded the principles of courtesy and non-interference recogni[z]ed by public international law and disproportionately infringed the freedoms of expression, information, communication and the press guaranteed, in particular, by Article 11 of the Charter.”⁶⁸

The CJEU agreed with Google. The CJEU held that Google did not have to comply with CNIL’s request. The Court acknowledged that such obligation can be laid down by the EU legislature, but that the EU legislature has not “struck a balance” in regard to the scope of a de-referencing outside the EU.⁶⁹ The CJEU additionally admits that “third States do not recogni[z]e the right to de-referencing or have a different approach to the right.”⁷⁰ Furthermore, the CJEU notes that the EU legislature has not made it apparent that it wants Article 17 of the GDPR to apply beyond the territory of the Member States.⁷¹ The CJEU’s holding was a victory for Google and the freedom of information and expression because the EU chose not to infringe upon the rights of countries outside the Member States. The decision is “likely to head off international disputes over the reach of European laws” outside the Member States, writes the *New York Times*.⁷²

Critics say that more restrictive governments can adopt rules so that companies have to take down information globally, and that this might lead to a broad censorship of the internet.⁷³ Critics also argue that the right to be forgotten has a reach that has broadened over time and that countries within

64. *Id.*

65. *See id.*

66. *Id.* at 14.

67. *Id.* at 17.

68. *Id.*

69. *Id.*

70. *Id.*

71. Adam Satariano, ‘*Right to be Forgotten*’ Privacy Rule is Limited by Europe’s Top Court, *N.Y. TIMES* (Sept. 24, 2019), <https://www.nytimes.com/2019/09/24/technology/europe-google-right-to-be-forgotten.html>.

72. *Id.*

73. *Id.*

the EU are interpreting the law differently.⁷⁴ Critics also say that policy is expanding into areas it was not intended and that the system is being abused to keep information out of the public eye.⁷⁵ Supporters of Google, such as Thomas Hughes, executive director of a privacy group, Article 19, said “courts or data regulators in the U.K., France or Germany should not be able to determine the search results that internet users in America, India, or Argentina get to see.”⁷⁶ The decision by the CJEU cannot be appealed.

Although the CJEU sided with Google, it also left the “possibility for France and other national government in the European Union to force Google to take down links globally in special cases judged necessary to protect an individual’s privacy.”⁷⁷ The CJEU deliberately left a door open for the EU legislature to apply the GDPR beyond the Member States of the EU. The CJEU emphasized that although the EU law “does not currently require that the de-referencing granted concern all versions of the search engine in question, it also does not prohibit the practice.”⁷⁸ The Court held that a supervisory or judicial authority of a Member State can order a search engine to de-reference a link on all versions of the search engine, including the searches corresponding outside the EU.⁷⁹ If that were to ever occur, procedures must be put in place to protect the rights of people outside the EU. Critics are right when they say that individuals in the EU should not get to decide what people in the United States are able to see. People in the United States still enjoy the freedom of information and expression. That is why I propose a more uniform system between countries inside and outside the EU. The uniform system, along with a procedure of notice, protects the fundamental values of freedom of information and expression.

IV. FUNDAMENTAL VALUES OF FREEDOM OF INFORMATION AND EXPRESSION

The right to be forgotten balances privacy and free expression rights. Supporters of the right to be forgotten see it as a universal human right under Article 17 of the International Covenant on Civil and Political Rights.⁸⁰ On the other side of the argument is UNESCO’s study on Privacy, Free

74. *Id.*

75. *Id.*

76. *Id.*

77. Case C-507/17, *Google LLC v. Comm’n nationale de l’informatique et des libertes*, 2019 E.C.R. 72.

78. Case C-507/17, *Google LLC v. Comm’n nationale de l’informatique et des libertes*, 2019 E.C.R. 72.

79. *Id.*

80. Stanford Law School: Law and Policy Lab, *supra* note 24, at 40.

Expression and Transparency which “finds the effect of the [right to be forgotten] on access to information may be problematic, saying it is ‘debatable in the long run if this decision to remove what the court deemed as irrelevant and outdated information strikes the right balance between the two fundamental interests.’”⁸¹

In both the Directive and the GDPR, the EU attempts to balance the right to privacy with the right of freedom of information and expression. In the Directive, Recital 37 established the exemption to the application to the right to privacy.⁸² If the personal data was for purposes of journalism of literary or artistic expression, then the data qualified for exemption.⁸³ The Directive reconciled individuals’ fundamental rights of freedom of information and the right to receive and impart information “as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights.”⁸⁴ The GDPR kept similar language in Article 85 that states that Member States shall “reconcile the right to the protection of personal data. . . with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.”⁸⁵

Article 10 of the European Convention for the Protection of Human Rights provides that the freedom of expression includes the right to hold opinions, to receive and impart information and ideas without interference by public authorities.⁸⁶ The freedom of expression under the European Convention for the Protection of Human Rights is subject to conditions or restrictions in the interests of national security, protection of the reputation of others, or prevention of the disclosure of information received in confidence, among others.⁸⁷ On an international level, the freedom to information and ideas is expressed in the International Covenant on Civil and Political Rights.⁸⁸

Outside the EU, in countries like the United States, the right to privacy on the internet is essentially nonexistent. The CJEU ruling in the *Google Spain* case is difficult to reconcile with the First Amendment, explains a Time

81. *Id.* at 41.

82. Case C-507/17, *Google LLC v. Comm’n nationale de l’informatique et des libertes*, 2019 E.C.R. 37.

83. *Id.*

84. *Id.* at 5.

85. *Id.* at 27.

86. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Council of Europe, art. 10, Nov. 4, 1950, E.T.S. No. 5.

87. *Id.*

88. International Covenant on Civil and Political Rights, Vol. 999, Mar. 23, 1976, U.N.T.S. No. 14668.

article.⁸⁹ The law that compels a company like Google to limit the type of content it shows in search results would not “pass muster in American courts ... because it could be construed as a form of censorship.”⁹⁰ Further, “in the U.S., free speech sort of trumps privacy.”⁹¹ Although, states like California can demand technology companies to delete data for minors.⁹² With countries like the United States favoring freedom of information, uniformity of the law and a procedure of notice may provide a better standard for applying the right to be forgotten worldwide.

V. UNIFORMITY IN THE LAW AND A PROCEDURE THAT INCLUDES NOTICE

A. *Uniformity in the Law*

A uniformity in the law should be developed if an individual in the EU requests that data be delisted from all versions of a search engine. If the right to be forgotten were to apply to all versions of a search engine and in turn essentially delete the data worldwide, then the requirement for deletion must be uniform. What do I mean by uniformity of the law? The standard and law that would require deletion inside and outside the EU should be the same.

Before the GDPR, when individuals petitioned the courts to have the data removed, different decisions arose from different countries within the Member States. As an example, a decision from the Court of Rome in Italy, reportedly favored the right of freedom of expression and rejected the removal of the data.⁹³ In the United Kingdom, a Nottingham County Court rejected an individual’s request for removal because the article had significant public interest.⁹⁴ The GDPR was important because the “EU realized that the digital era and the increased processing of personal data required a uniform approach between EU Member States in relation to personal data protection.”⁹⁵ Similarly, a uniform approach outside the Member States would facilitate a worldwide application of the right to be forgotten.

Article 5 of the GDPR notes that personal data must be processed lawfully, fairly, and in a transparent manner.⁹⁶ For example, Article 10 notes

89. Victor Luckerson, *Americans Will Never Have the Right to Be Forgotten*, TIME (May 14, 2014, 8:46 AM), <https://time.com/98554/right-to-be-forgotten/>.

90. *Id.*

91. *Id.*

92. *Id.*

93. Stanford Law School: Law and Policy Lab, *supra* note 24, at 37.

94. *Id.*

95. *Id.*

96. Regulation 2016/679, *supra* note 12, at 35.

that the processing of personal data relating to criminal convictions and offences must be carried out only under the control of an official authority or when authorized by Member State law. The GDPR leaves it up to the Member State law in regard to criminal convictions. Google has argued that people in other countries have the right to access the delisted information under their own national law.⁹⁷ A uniformity between other countries and the Member State law allows for a consistent processing of personal data that is lawful. If every country has a different definition of what is lawful, the removal of links is inconsistent. An inconsistent framework cannot be compatible with worldwide removal of data because one country might deem the data to be in the public's interest while another country might not.

Article 6 of the GDPR notes a processing is lawful when it is necessary for compliance with a legal obligation to which the controller is subject.⁹⁸ Again, the GDPR does not have a uniform law defining what legal obligation the controller may be subject. The legal obligations vary from country to country, both inside and outside the EU. Many countries have already adopted similar privacy laws. Brazil modeled their privacy law after the GDPR that will go into effect on February 2020.⁹⁹ Similarly, Japan, South Korea, Thailand, and Australia have also passed privacy laws similar to that of the GDPR.¹⁰⁰ In the United States, California is the leading state among privacy laws that have some overlap to the GDPR.¹⁰¹ Uniformity of all the privacy laws and standards can provide a step closer to apply the right to be forgotten globally.

B. California Law

California passed a law in 2013 to protect the privacy of minors on the internet.¹⁰² The law gives minors a legally protected right to “permanently remove personally posted content from websites and other online services.”¹⁰³ Critics of the California law argue that the law violates the dormant Commerce Clause.¹⁰⁴ Regardless, those same critics argue that

97. Keller, *supra* note 58, at 349-50.

98. Regulation 2016/679, *supra* note 12, at 36.

99. Dan Simmons, *9 Countries with GDPR-like Data Privacy Laws*, COMFORTE INSIGHTS (Jan. 17, 2019), <https://insights.comforte.com/9-countries-with-gdpr-like-data-privacy-laws>.

100. *Id.*

101. *Id.*

102. James Lee, *SB 568: Does California's Online Eraser Button Protect the Privacy of Minors?*, 48 U.C. DAVIS L. REV. 1173 (2015).

103. *Id.*

104. *Id.*

California should push Congress “to pass a national scheme that implements similar online eraser provisions.”¹⁰⁵ A national scheme would provide the uniformity needed to implement the right to be forgotten nationwide and then worldwide. Critics argue it should only apply to minors in the United States.¹⁰⁶ I would argue that the privacy laws can be pushed further to cover minors and adults, and the national scheme would at least start a conversation on providing internet users comprehensive privacy laws that apply worldwide.

Other proponents argue that the California law “has much more in common with GDPR than with other American privacy laws.”¹⁰⁷ Pardau argues that, assuming technology companies have tremendous influence over the drafting of future privacy legislation, then the privacy regime “will be much more favorable to those tech companies than the European regime.”¹⁰⁸ Further, he argues that companies may benefit from federal legislation preempting state law because the costs for complying with the laws would be reduced.¹⁰⁹ The same argument can be made for providing uniformity of privacy laws worldwide.

Facebook’s CEO, Mark Zuckerberg, has already expressed this idea. He argues that “effective privacy and data protection needs a globally harmonized framework.”¹¹⁰ He also argues that governments and regulators need a more active role.¹¹¹ He believes that “it would be good for the Internet if more countries adopted regulation such as GDPR as a common framework.”¹¹² Zuckerberg also believes that a “common global framework – rather than regulation that varies significantly by country and state – will ensure that the Internet does not get fractured.”¹¹³ Although Americans often reject this idea as a violation of the First Amendment, proponents argue that “U.S. courts are increasingly predisposed to removing posted

105. *Id.* at 1203.

106. *Id.*

107. Stuart L. Pardau, *The California Consumer Privacy Act: Towards a European-Style Privacy Regime in the United States?*, 23 J. TECH. L. & POL’Y 68, 100 (2018).

108. *Id.* at 102.

109. *Id.* at 102-03.

110. Mark Zuckerberg, *Mark Zuckerberg: The Internet Needs New Rules. Let’s Start in these Four Areas*, THE WASH. POST (Mar. 30, 2019, 12:00 PM), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html.

111. *Id.*

112. *Id.*

113. *Id.*

information.”¹¹⁴ California has provided a framework that can be used nationally, and eventually consistently with the GDPR.

C. Notice

The GDPR does not include notice to the third-party website (webmaster). If a supervisory or judicial authority of a Member State orders Google to remove data from all version of its search engine, then at the very least, such decision should have a procedure in place that gives notice to the third-party website. Without notice in place, what may be a public interest to one country is not the same in another.

After the *Google Spain* decision, the Article 29 Data Protection Working Party (now known as the European Data Protection Board) published guidelines that included “strict limits on notice to publishers” and did not permit contact from Google to the third-party publisher when its page had been delisted based on an individual’s request.¹¹⁵ The guidance is influential but non-binding. The Article 29 Working Party was “the independent European working party that dealt with issues relating to the protection of privacy and personal data” until May 25, 2018.¹¹⁶ Now, The European Data Protection Board aims “to ensure the consistent application in the European Union of the General Data Protection Regulation.”¹¹⁷ It is an independent entity and, among other things, it provides general guidance to clarify the law, and offers advice concerning any new proposed legislation.¹¹⁸

In 2016, Spain fined Google for notifying the third-party publisher about the delisting.¹¹⁹ Such notice is considered “a new and different unauthorized processing of personal data.”¹²⁰ Opponents of the GDPR’s lack of notice state that ensuring that third-party publishers can contest the delisting decision “reduces the likelihood that improper right to be forgotten requests will succeed in suppressing lawful speech.”¹²¹ Opponents also cite to human rights sources and the Manila Principals that support procedural rights, like

114. Michael L. Rustad & Thomas H. Koenig, *Towards a Global Data Privacy Standard*, 71 FLA. L. REV. 365, 451 (2019).

115. Stanford Law School: Law and Policy Lab, *supra* note 24, at 36.

116. EUROPEAN DATA PROTECTION BOARD, https://edpb.europa.eu/edpb_en (last visited Aug. 20, 2020).

117. *Id.*

118. *Id.*

119. Stanford Law School: Law and Policy Lab, *supra* note 24, at 36.

120. *Id.* at 47.

121. *Id.* at 48.

notice, to the publisher of the website when the content is restricted, and an opportunity for the publisher to contest such restriction.¹²²

Critics argue that the interpretation of the GDPR “tilts the scales toward removal, and against procedural or substantive rights for the other people whose rights are affected.”¹²³ Further, the publishers (or third-party websites) do not have recourse to a regulatory agency that reviews freedom of expression claims.¹²⁴ They may also lack standing to challenge the removal.¹²⁵

The removal of data worldwide should come with more procedural safeguards. The CJEU or another judicial body will weigh the individual’s right to privacy and the right to freedom of information when it requests controllers, like Google, to remove personal data worldwide. Notice should be included as part of the right to freedom of information analysis. Notice and a uniformity in law will also facilitate controllers like Google. Google is a controller, per the CJEU’s recent decision, and it is also a dominant search engine in Europe with 92% of searches in Europe occurring on Google.¹²⁶

VI. FACILITATING THE ROLE OF GOOGLE AND OTHER CONTROLLERS AS DECISION-MAKERS

Google has been called a “quasi-judicial authority” because it determines “what constitutes private information or not.”¹²⁷ Joris van Hoboken, a law professor at Vrije Universiteit Brussel said that “the rulings [in *CNIL v. Google*] delegated the decision making to Google.”¹²⁸ I also focus on Google here because, not only is Google one of the largest search engines used in Europe,¹²⁹ but it is also used worldwide as a search engine.

Individuals in the EU have the right “to ask search engines like Google to delist certain results for queries on the basis of a person’s name.”¹³⁰ Individuals send their request for removal to controllers, defined as entities that handle data, which can be private companies like Google. The individual

122. *Id.* at 26.

123. Keller, *supra* note 58, at 328.

124. *Id.* at 315.

125. *Id.*

126. Edward Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, 49 U.C. DAVIS L. REV. 1017, 1035 (2016).

127. Satariano, *supra* note 71.

128. *Id.*

129. Lee, *supra* note 126, at 1035.

130. Google Transparency Report, *Requests to delist content under European Privacy Law*, GOOGLE (Aug. 15, 2020), https://transparencyreport.google.com/eu-privacy/overview?privacy_requests=country::year::decision::p:2&lu=privacy_requests.

requesting delisting must complete a web form which includes information such as country of origin, full legal name, identity verification, the personal information the individual wants removed, the reason for removal, and a sworn statement.¹³¹ The individual may also make a request on behalf of another person if that person provides proof that he or she is legally authorized to make such a request.¹³²

The search engine must comply “if the links in question are ‘inadequate, irrelevant, or no longer relevant or excessive,’” while “taking into account public interest factors including the individual’s role in public life.”¹³³ Google staff makes the relevant determinations and may reject a delisting request if the page has information that is “strongly in the public interest” or “journalistic in nature.”¹³⁴ The information is not removed from the web,¹³⁵ but from the search engine. Google’s decision could be appealed to the courts or the national Data Protection Authorities.¹³⁶

Google has received more than 845,000 requests to remove more than 3.3 million web addresses.¹³⁷ Google assesses each request on a case-by-case basis and follows the criteria developed by the European Data Protection Board.¹³⁸ The request is reviewed manually, and once Google reaches a decision, the individual receives an email notification regarding Google’s decision and an explanation if Google decides not to delist the URL.¹³⁹ When the content is in the public interest, Google considers diverse factors, such as “whether the content relates to the requester’s professional life, a past crime, political office, position in public life, or whether the content is self-authored content, consists of government documents, or is journalistic in nature.”¹⁴⁰

Google has evaluated requests of delisting for news, directory, government and social media categories.¹⁴¹ Google has delisted thousands of

131. EU Privacy Removal, *Personal Information Removal Request Form*, GOOGLE (Aug. 15, 2020), https://www.google.com/webmasters/tools/legal-removal-request?complaint_type=rtbf&hl=en&rd=1.

132. *Id.*

133. Google Transparency Report, *supra* note 130.

134. *Id.*

135. IT Pro team, *What is the ‘right to be forgotten’? Everything you need to know about the EU’s data-removal ruling*, IT PRO (Jan. 8, 2020), <http://www.itpro.co.uk/data-protection/22378/what-is-googles-right-to-be-forgotten>.

136. Lee, *supra* note 126, at 1036.

137. Leo Kelion, *Google wins landmark right to be forgotten case*, BBC NEWS (Sep. 24, 2019), <https://www.bbc.com/news/technology-49808208>.

138. Google Transparency Report, *supra* note 130.

139. *Id.*

140. *Id.*

141. *Id.*

URL's from sites like Facebook, Twitter, YouTube, and Instagram.¹⁴² The pages are only delisted from results in response to queries related to an individual's name.¹⁴³ For example, if an article is delisted for "John Doe" and a person inside the EU searches "John Doe" that article will not appear in the search engine. The article would still appear if an individual searches "John Doe" outside the EU.

Google has delisted URLs in categories involving a person's crime history, wrongdoing and political and professional information. In one case, Google delisted three URLs of a former politician's departure from politics in connection with a drug scandal because his home address was included. The URL may have had private information, but what if the politician returns to politics. Private companies are not equipped to make that decision on a global scale if there are no safeguards that include notice and a uniformity of law.

Google has delisted two news articles that contained accusations against an individual for sexually abusing his child.¹⁴⁴ Google delisted the two URLs because the individual had provided proof that he had been acquitted following a court proceeding.¹⁴⁵ Google has also delisted an article about an individual's escape from a mental hospital, because although he had been found guilty of murder, he was not held criminally responsible.¹⁴⁶ Google delisted the URL because it had "sensitive information regarding an individual's mental health." The French Data Protection Agency requested on behalf of an individual to delist three URLs that discussed their sentencing for the murder of a family member.¹⁴⁷ Google delisted it because the crime was committed when the individual was eighteen years old and his sentence was served.¹⁴⁸

Variations within the EU in terms of requests for delisting. Individuals from France and Germany requested to delist social media and directory pages more frequently.¹⁴⁹ Countries like Italy and the United Kingdom were "3x more likely to target news sites."¹⁵⁰ Further, France, Germany and the United Kingdom generated fifty-one percent of URL delisting requests.¹⁵¹

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Theo Bertram Et Al., *Three Years of the Right to be Forgotten* (2018), GOOGLE, <https://d1110erj175o600.cloudfront.net/wp-content/uploads/2018/02/google.pdf>.

150. *Id.*

151. *Id.* at 2.

Private individuals make up the majority of requests with eighty-five percent of the requested URLs.¹⁵² Social media sites such as Facebook, YouTube, Twitter, and Myspace account for more than half the delisting requests. News media is also represented in such requests. The Daily Mail had a delisting rate of 27.4% between January 2016 and December 2017.¹⁵³ Delisting requests also occurred in popular government and government-affiliated websites within the same time period.¹⁵⁴ The delisting rate ranged between 1.3 to 65.2%.¹⁵⁵

Critics have questioned the power Google has in making these determinations.¹⁵⁶ The United Kingdom House of Lords' Home Affairs, Health and Education EU Subcommittee also criticized this practice and declared that "it is wrong in principle to leave search engines themselves the task of deciding whether to delete information or not, based on vague, ambiguous and unhelpful criteria, and we heard from witnesses how uncomfortable they are with the idea of a commercial company sitting in judgment on issues like that."¹⁵⁷ Further, critics point out that even Google's Chairman, Eric Schmidt, questioned Google's responsibility.¹⁵⁸ The Google European Communications Director Peter Barron stated that Google "never expected or wanted to make... [these] complicated decisions that would in the past have been extensively examined in the courts, [but are] now being made by scores of lawyers and paralegal assistants [at Google]."¹⁵⁹

Under the Directive, Google could send notice to the webmaster (the third-party website) when the URLs were removed from the search results when such removal occurred due to legal reasons.¹⁶⁰ The notice would not contain person information, and their decision to provide such notice is

152. *Id.* at 8-9.

153. *Id.* at 11.

154. *Id.*

155. *Id.*

156. Lee, *supra* note 126, at 1035.

157. Alex Hern, *Lords Describe Right to be Forgotten as 'Unworkable, Unreasonable, and Wrong,'* GUARDIAN (Jul. 30, 2014, 04:56 EDT) (internal quotation marks omitted), <https://www.theguardian.com/technology/2014/jul/30/lords-right-to-be-forgotten-ruling-unworkable>.

158. Lee, *supra* note 126, at 1037 (citing Aoife White, *Google EU Ruling Response Vetted as Complaints Pile Up*, BLOOMBERG (Sept. 18, 2014, 6:04 AM) (internal quotation marks omitted), <https://www.bloomberg.com/news/articles/2014-09-18/google-eu-ruling-response-vetted-as-complaints-pile-up>).

159. Julia Powles, *Google Says It Acknowledges Some People Want 'Right to Be Forgotten,'* GUARDIAN (Feb. 19, 2015, 11:09 EST) (internal quotation marks omitted), <https://www.theguardian.com/technology/2015/feb/19/google-acknowledges-some-people-want-right-to-be-forgotten>.

160. Letter from Peter Fleischer, Global Privacy Counsel, Google France Sarl, to Isabelle Falque-Pierrotin, Chair, Article 29 Working Party (July 31, 2014), <https://docs.google.com/file/d/0B8syaai6SSfiT0EwRUFyOENqR3M/view>.

protected under Article 7(c) and (f) of the Directive.¹⁶¹ The GDPR removed the prior-notice obligations and now requires controllers “to maintain records of all processing activities.”¹⁶² The records are maintained so that Google can demonstrate that it has complied with the GDPR requirements.¹⁶³ The records can also be made available upon request to a supervisory authority.¹⁶⁴ Google has been given tremendous responsibility. It is currently processing all these requests itself. With a more uniform system, the role of Google may be facilitated because it may not need to look at each request case-by-case. Notice is also helpful because the third-party website may be able to remove the data themselves instead of Google. Last, the freedom of information and expression is preserved because the removal of data would only occur under certain circumstances, not just when Google thinks it is right.

The CJEU has already forced a United States company to remove content worldwide. On September 26, 2019, the CJEU ordered Facebook to take down a plaintiff’s “posts, photographs, and videos not only in their own countries but elsewhere.”¹⁶⁵ The Plaintiff in this case was a member of the National Council in Austria who sought to have a comment removed on Facebook that harmed her reputation. The CJEU held that Facebook “could be forced to remove a post globally by a national court in the European Union’s 28-member block if the content [is] determined to be defamatory or otherwise illegal.”¹⁶⁶ The CJEU did not make its decision under the GDPR, but under Directive 2000/31/EC.¹⁶⁷ Facebook in this context is not a controller but a host provider.¹⁶⁸

The CJEU held that the Directive on electronic commerce seeks to strike a balance “between the different interests at stake.”¹⁶⁹ The court held that Facebook was not liable for the comments posted about the plaintiff but that it did not act “expeditiously to remove or to disable access to that information.”¹⁷⁰ This case shows the differences in the countries within the Member States. French regulators have “tested the expansion of privacy laws

161. *Id.*

162. Regulation 2016/679, *supra* note 12, at 16.

163. *Id.*

164. *Id.*

165. Adam Satariano, *Facebook Can be Forced to Delete Content Worldwide*, *E.U. Court Rules*, N.Y. TIMES, Oct. 4, 2019, at B1 N.

166. *Id.*

167. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ir. Ltd.*, 2019 EUR-Lex CELEX LEXIS 7 (Oct. 3, 2019).

168. *Id.*

169. Press Release No 128/19, Court of Justice of the European Union, Judgment in Case C-18/18 (Oct. 3, 2019) (on file with the Court of Justice of the European Union).

170. *Id.*

beyond the European Union. Germany has adopted strict laws to remove hate speech from social media platforms. Britain is considering new restrictions against ‘harmful’ internet content.”¹⁷¹ Critics also pointed out that the plaintiff in the Facebook case is a public figure and “there needs to be a greater scope for freedom of opinion and expression.”¹⁷²

The Facebook case, although narrowly crafted, is a prime example of how European laws can begin to affect the internet on a global scale. Currently, decisions are being made on a case-by-case basis and every new decision pushes the envelope. Using the Facebook case as an example, defamation means something different in every country. Yet, in this case, Facebook had to remove the information based on the definition of defamation in Austria. By establishing a system of law where everybody is on the same page and the requirements of the law are uniform, the public and companies can be better aware of the standards they must follow. The uniformity would protect the freedom of expression and information.

VII. CONCLUSION

The right to be forgotten only applies to the Member States of the EU. When Google receives and grants a request from an individual to delist a link on Google, Google delists the link from its search engine that pertains to the Member States only. Individuals in the United States can still see the link when they search that individual’s name. The CJEU held that other supervisory or judicial authorities may exercise their discretion and request Google to delist a link pertaining to an individual’s name on all versions of Google’s search engine. That is, globally, nobody would have access to the link that Google removes. Before allowing the removal of a link on a global scale, the de-referencing process should go through a uniform law and notice standard that includes countries outside the EU. Without such standard, Google and the world risk forfeiting important values such as the freedom of information and expression.

171. Satariano, *supra* note 166, at B8 N.

172. *Id.*

ARMENIA AND THE BATTLE TO DEFEAT ETHNO-NATIONALIST ATTACKS ON THE ISTANBUL CONVENTION

*Mariam Ghazaryan**

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I. THE COMMISSION, THE CONVENTION, AND THE CONSTITUTION

The Third Republic of Armenia was established in 1991, when the country gained its independence from the Soviet Union.¹ Armenia, as a new State in the international community and Armenians, as a long-repressed people, face particular challenges when pressured regarding international human rights. Principal forces in Armenia resist international attempts to put codes on the behavior of the citizens due to the fact that Armenians have suffered so badly at the hands of foreign governments in the past. To be appreciated as a sovereign State, Armenia must be willing to learn from and

* J.D. Candidate, Southwestern Law School, 2021; B.A. Political Science, University of California, Irvine, 2017. A special thank you to my family for instilling in me a strong drive and motivation, my professors for their constant support, and my friends for the continuous encouragement.

1. *A Guide to the United States' History of Recognition*, OFFICE OF THE HISTORIAN, <https://history.state.gov/countries/armenia> (last visited Sept. 6, 2020).

adapt progressive guidelines from international instruments and be a part of the give and take of sovereign states.

In this breakdown of Armenia's path towards ratification of Convention on Preventing and Combating Violence Against Women and Domestic Violence ("Istanbul Convention"), I will discuss gender-based violence and domestic violence towards women and how the Istanbul Convention would benefit Armenia's evolving governmental system. To further this point, I will use the recently published opinion by the Venice Commission ("Commission"), which was requested by leaders of the Armenian government, to discuss how ratification of the Istanbul Convention would impact Armenia.

Domestic and gender-based violence is a legal, educational, health, developmental and, above all, a human rights issue. Domestic violence against women has always been prevalent in Armenia. For hundreds of years, society viewed women as less than human, and likewise husbands viewed their wives as property. Women, who grew up in homes where their mothers were beaten, accepted it as their role as a wife, and most often married men who also abused them. Women in the early nineteenth hundreds believed that being abused was just a part of their duties as a wife. Many believed they deserved to be hit – they had done something wrong and needed physical punishment. Men who grew up in homes where their fathers beat their mothers continued the abuse in their marriages, and in most cases also abused their children. Although domestic violence can include the abuse of parents, children, and siblings, it mainly involves violence against sexual partners, with women being the most common victims, and men being the aggressors.

These outdated views must end. Domestic violence is a societal problem; it leads to extensive physical and psychological consequences, some with fatal outcomes, and societies ought to hold it as a separate crime with a separate law and regulation. Moreover, when domestic violence goes unpunished, the damage to the family, which is the core of society, is significant. Consequently, domestic violence inflicts grievous harm to the State. Police and prosecutors must function competently to help women in all steps of receiving protection, without being ashamed or afraid of public opinion. There are many steps States, such as Armenia, may take to help combat this issue of domestic and gender-based violence. Armenia has already taken major steps in signing and ratifying numerous United Nations ("UN") and Council of Europe conventions, such as the Convention on Elimination of All Forms of Discrimination against Women ("CEDAW") and the Istanbul Convention. In 1993, Armenia ratified the CEDAW Convention and in 2018, Armenia signed the Istanbul Convention, but has yet to ratify it.

The UN, a major international rights organization, maintains peace and security, while working to protect human rights.² In 1985, the UN General Assembly and its human rights bodies adopted several resolutions and recommendations on violence against women, highlighting the importance of adopting specific measures to combat violence against women.³ At the regional level, the Council of Europe, since the late 1990s, continues to raise its concern towards domestic violence.

One of the most important achievements for women's rights was the adoption of CEDAW. Although CEDAW does not contain any specific clause on domestic violence, the CEDAW Committee adopted several general recommendations and individual decisions on violence against women in the private sphere.⁴ Beginning in 1992, the CEDAW committee in its General Recommendation No. 19 affirmed that "violence against women is a form of discrimination, directed towards a woman because she is a woman or that affects women disproportionately."⁵ This type of violence directed towards women inhibits their ability to enjoy their rights and freedoms with the same equality as men. In 2017, the CEDAW committee marked its 25th anniversary of General Recommendation No. 19 by elaborating in its General Recommendation No. 35 additional international standards on gender-based violence against women. General Recommendation No. 35 recognizes that "prohibition of gender-based violence against women has evolved into a principle of customary international law."⁶ Thus, the CEDAW Committee reaffirmed that violence towards women is one of the main obstacles to the achievement of equality between women and men in its Recommendation to the Member States.

The Istanbul Convention was implemented by the Council of Europe. The purposes of the Convention are to "protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence."⁷ A major concern and purpose is also support for victims of domestic violence.⁸ The Convention acknowledges that women are

2. *About the UN*, UNITED NATIONS, <https://www.un.org/en/about-un/> (last visited Sept. 6, 2020).

3. *See* G.A. Res. 40/36, ¶ 2 on Domestic Violence (Nov. 29, 1985).

4. Convention on the Elimination of All Forms of Discrimination against Women art. 16, Sept. 3, 1981, S. Treaty Doc. No. 96-53, 1249 U.N.T.S. 20378.

5. *See* Comm. on the Elimination of Discrimination against Women Gen. Recommendation No. 19. On Its Eleventh Session, U.N. Doc. A/47/38 (1992).

6. Comm. on the Elimination of Discrimination against Women Gen. Recommendation No. 35, 2017.

7. *Convention on Preventing and Combating Violence against Women and Domestic Violence*, COUNCIL OF EUROPE, art. 1 (April 12, 2011), <https://rm.coe.int/168046031c>.

8. *Id.*, art. 2.

affected by domestic violence disproportionately and necessitates Parties of the Convention to pay particular attention to women while implementing the provisions of the Convention.⁹ Additionally, the Convention in Article 4 (1) explicitly compels parties to protect women “in both the public and the private sphere.”¹⁰ Article 29 of the Convention states:

1. Parties shall take the necessary legislative or other measures to provide victims with adequate civil remedies against the perpetrator.
2. Parties shall take the necessary legislative or other measures to provide victims, in accordance with the general principles of international law, with adequate civil remedies against State authorities that have failed in their duty to take the necessary preventive or protective measures within the scope of their powers.¹¹

CEDAW and the Convention have focused attention on domestic abuse so that State agencies will no longer assess domestic violence as a private matter and remain dormant on the issue. Furthermore, the Convention holds State authorities responsible, if the State authorities fail to protect individuals from domestic violence, by demanding that the State provide adequate remedies to victims.

After signing the Convention on January 18, 2018, Armenia became the 45th member State of the Council of Europe to do so, however the process of ratification is still pending due to the concerns of many Armenian ethno-nationalists regarding the substance of the Convention.¹² I will discuss these concerns, how the Venice Commission’s report responds to them and the impact these explanations by the Venice Commission will have on the advancement of society in Armenia.

II. CONCERNS REGARDING THE ISTANBUL CONVENTION AS VOCALIZED BY ETHNO-NATIONALISTS IN ARMENIA

The signing of the Convention produced a backlash in Armenia, with many challengers disapproving of the Convention because it endangers national Armenian traditions and values. This makes issues of domestic violence a particular challenge. To help shed light on matters of domestic violence and various other problems, the Minister of Justice of Armenia, Rustam Badasyan, applied to the Venice Commission, requesting an opinion

9. *Id.*

10. *Id.*, art. 4(1).

11. *Id.*, art. 29(1)-(2).

12. See *Armenia signs the Istanbul Convention*, COUNCIL OF EUROPE (Jan. 18, 2018), <https://www.coe.int/en/web/istanbul-convention/-/armenia-signs-the-istanbul-convention>.

on the constitutional implications for Armenia of ratifying the Convention.¹³ The Commission is the Council of Europe's advisory body on constitutional matters.¹⁴ The Commission's role is to help States, such as Armenia, who wish to adjust their legal and institutional bodies in line with European standards.¹⁵ The Commission's report on the ratification of the Convention in Armenia took a significant step forward by addressing the ethnonationalist concerns of many in Armenia so that the Convention cannot reasonably be seen to assault Armenia's cultural identity, as many challengers of the Convention believe it does.¹⁶ The Commission's report outlines struggles that Armenia has between defending its national traditions and integration of the Convention. It also offers Armenia a productive path toward ratification.¹⁷

Opponents of the Convention in Armenia argue that the Convention is not necessary because there is already a national framework in Armenia to combat violence against women. Further, opponents of the Convention argue that the Convention would result in legislative changes that would infringe on the national constitution of the country regarding same-sex marriage. Lastly, the opponents argue that international bodies should not dictate to the Armenian people how to educate the population on gender and domestic violence.¹⁸

A significant opponent against the ratification of the Convention is the former Minister of Justice, Davit Harutyunyan. He believes that several provisions in the Convention will not be valid for Armenia, because of the "peculiarities of [Armenia's] legal system."¹⁹ Another radical critic of the Convention is the President of the Chamber of Advocates, Ara Zohrabyan, who considers Article 12(1) of the Convention as one of the most controversial concepts because it requires Armenia to question its cultural

13. See Aneta Harutyunyan, *Armenian Justice Minister requests Venice Commission for Opinion over Istanbul Convention*, ARMENPRESS (July 26, 2019), <https://armenpress.am/eng/news/982943/>.

14. *The Venice Commission of the Council of Europe*, COUNCIL OF EUROPE, https://www.venice.coe.int/WebForms/pages/?p=01_Presentation (last visited Dec. 19, 2019).

15. See *id.*

16. See CDL-AD(2019)018-e, *Opinion on the Constitutional Implications of the Ratification of the Istanbul Convention Adopted by the Venice Commission*, COUNCIL OF EUROPE (Oct. 11, 2019), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)018-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)018-e).

17. See *id.*

18. See Ani Mejlumyan, *Armenian Government Fighting for Ratification of Convention on Violence Against Women*, EURASIANET (July 31, 2019), <https://eurasianet.org/armenian-government-fighting-for-ratification-of-convention-on-violence-against-women>.

19. Hovhannes Nazaretyan & Karine Kirakosyan, *Manipulations Regarding the Istanbul Convention*, FACT INVESTIGATION PLATFORM (July 12, 2019), <https://fip.am/en/7547>.

traditions.²⁰ Mr. Zohrabyan believes that Article 12(1) states “the Convention will force States to eradicate prejudices, customs, traditions and all other practices which are based on the idea of stereotyped roles for women and men.”²¹ However, Mr. Zohrabyan has omitted an important distinction. Article 12(1) states, “Parties shall take the necessary measures to promote changes in the social and cultural patterns of behavior of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.”²² The Convention wants to eradicate prejudices, customs, and traditions which are based on the inferiority of women or on stereotyped roles.²³ That omission is a key part of the article because without it, the content of what the Convention wishes to accomplish is inaccurate. Various other opponents that have voiced their concerns in the Armenian Parliament have proposed that “Armenia adopt its own ‘local’ document on the prevention of domestic violence, one that leaves no room for ambiguity.”²⁴ They believe that the Convention is contrary to the traditions and values of Armenia as well.²⁵

Armenian nationalists also oppose same-sex marriage and claim that the Convention will open the door to same-sex marriage. Their understanding is that the Convention seeks to entirely alter the culture of national states, such as Armenia, and by that alteration, force them to reject biological differences between men and women.²⁶

Mr. Zohrabyan “has been rallying support for his campaign to ‘stop the Istanbul Convention’ through a website.”²⁷ Mr. Zohrabyan emphasized that he sees a threat to family values and that is why he has raised his concerns.²⁸ He supports the prevention of violence and believes the Convention has tools that should be applied in Armenia’s legislation, but the Convention has some

20. *Id.*

21. *Id.*

22. *Convention on Preventing and Combating Violence against Women and Domestic Violence*, *supra* note 7, art.12(1).

23. *Id.*

24. Sona Martirosyan, *Why Armenia isn’t taking to the European convention against domestic violence – myths and refutations*, JAM NEWS (Nov. 15, 2019), <https://jam-news.net/myths-surround-the-european-convention-on-the-prevention-of-violence-against-women-in-armenia/>.

25. *Id.*

26. *Venice Commission: No Provisions of the Istanbul Convention can be Considered Contradictory to the Constitution of Armenia*, HETQ (Oct. 11, 2019), <https://hetq.am/en/article/108549>.

27. Susan Badalian, *Armenian Official Voices Support For Istanbul Convention Ratification*, AZATUTYUN (July 30, 2019), <https://www.azatutyun.am/a/30083775.html>.

28. *Id.*

unacceptable wording.²⁹ Mr. Zohrabyan states that, along with the word “family” the Convention uses the term “domestic unit,” which contains a risk that LGBT community members will also be able to create families.³⁰ He believes that a separate law should be passed protecting the rights of LGBT people, “but not write about domestic violence and include them in the family, because in that case, tomorrow the conception of family will already imply these people as well.”³¹

In addition to the Armenian nationalists, the Armenian Apostolic Church, which rarely voices political concerns, criticized the Convention as well.³² It believes that the freedom for people to choose their gender, goes against the Armenian perception of what a family consists of—a union between a man and a woman.³³ The Deputy Minister of Justice, Rafik Grigorian, said that according to Armenia’s Constitution, “only a man and a woman who attain the marriageable age shall have the right to marry and form a family.”³⁴ Due to the opposition and societal outcry, it has forced the authorities to delay the ratification process until 2020.³⁵

Lastly, there is opposition to international instruments, such as the Convention, dictating how to educate Armenian citizens regarding gender and domestic violence. This is a difficult topic because there is a monumental difference between protecting the rights of minorities to educate their children and insistence on basic international human rights protections. When the two are incompatible, international human rights presents values that ought to predominate. Mr. Zohrabyan criticized the articles on education by pinpointing this passage: “Parties shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles.”³⁶ His interpretation is that the non-stereotyped gender roles referred to in the statement refer to queer and transgender people. He believes that making it mandatory to teach and provide educational materials to children, regarding sex other than the biological sexes, at an early age can cause confusion.³⁷ However, Zara

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Naira Nalbandian, *Yerevan ‘Not Forced’ to Ratify Contentious European Treaty*, AZATUTYUN (Nov. 1, 2019), <https://www.azatutyun.am/a/30248404.html>.

36. Manya Israyelyan, *The Istanbul Convention: A Peril or Prospect for Armenia?*, ARMENIA WEEKLY (Jan. 31, 2020), <https://armenianweekly.com/2020/01/31/the-istanbul-convention-a-peril-or-prospect-for-armenia/>.

37. *Id.*

Hovhannisyan, coordinator of the Coalition to Stop Violence Against Women noted that the Convention does not impose any educational model for gender equality and fighting stereotypes.³⁸ The Ministry of Justice also issued a statement that assured Armenia's citizens that the "Convention does not contradict the concept of sexes or family as envisaged by the Constitution and urges society 'not to give in to manipulations.'"³⁹

III. THE VENICE COMMISSION AND ITS JUSTIFICATION FOR THE ISTANBUL CONVENTION

The Commission responds to the argument that there is already a satisfactory national framework in Armenia reasoning that ratification of the Convention does not affect uniformity with the Constitution of Armenia, but concerns the opportunity to have both an internal foundation and external support to safeguard human rights.⁴⁰ The Commission emphasized that domestic violence is widespread in all European countries, including Armenia, and as such, ratifying the Convention would greatly benefit victims.

The Convention requires States to implement specific procedures to protect women from violence and contains provisions forbidding discrimination of individuals based on sexual orientation and gender. Similarly, it provides a unique monitoring mechanism, something that already existing instruments do not have.⁴¹ The unique monitoring mechanism ensures efficient implementation of the Convention. It is a two-pillar monitoring system consisting of an independent expert body, the Group of Experts on Action against Violence against Women and Domestic Violence ("GREVIO"), and a political body, the Committee of the Parties, which is composed of representatives of the Parties to the Convention.⁴² GREVIO will evaluate and publish reports regarding legislative and other measures taken by the Parties concerning the effects of the provisions of the Istanbul Convention.⁴³ GREVIO may initiate a special inquiry procedure if

38. *Id.*

39. *Id.*

40. CDL-AD(2019)018-e, *supra* note 16, at 14.

41. *Venice Commission: No Provisions of the Istanbul Convention can be Considered Contradictory to the Constitution of Armenia*, *supra* note 26.

42. *Workshop on the Istanbul Convention and its monitoring mechanism held in Georgia*, COUNCIL OF EUROPE (June 19, 2018), <https://www.coe.int/en/web/genderequality/-/workshop-on-the-istanbul-convention-and-its-monitoring-mechanism-held-in-georgia>.

43. *GREVIO – Group of Experts on Action against Violence against Women and Domestic Violence*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/istanbul-convention/grevio> (last accessed Dec. 19, 2019).

action is necessary to avert any serious or continuous patterns of violence that are covered by the Convention.⁴⁴ Further, by ratifying an international instrument, State authorities send a strong message that they are serious about protecting fundamental rights of citizens,⁴⁵ and presence on a global level may provide useful for absorbing different approaches to tackling violence against women and domestic violence.⁴⁶

Furthermore, because there is no duty for State Parties to the Convention to legalize same-sex marriage, the Commission does not believe that there is an issue regarding same-sex marriage.⁴⁷ The question of same-sex marriage has been repeatedly dealt with by the European Court of Human Rights. The Court has stated that there is no European consensus regarding same-sex marriage, and it is subject to the national laws of the State.⁴⁸

Under Article 3, the Istanbul Convention has laid out the “definitions” of the terms it will commonly use. The definitions were written at the outset to hopefully avoid any misconstruing of the provisions set out in the Istanbul Convention. However, that did not work out as planned. Armenia may still ratify the Istanbul Convention if these terms are used correctly:

- a. “Violence against women” is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;⁴⁹
- b. “Domestic violence” shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim;⁵⁰

44. *Id.*

45. *Venice Commission: No Provisions of the Istanbul Convention can be Considered Contradictory to the Constitution of Armenia*, *supra* note 26.

46. CDL-AD(2019)018-e, *supra* note 16, at 14.

47. *Id.* at 25.

48. Grégor Puppinc, *The ECHR Unanimously Confirms the Non-Existence of a Right to Gay Marriage*, EUROPEAN CENTRE FOR LAW AND JUSTICE (June 9, 2016), <https://eclj.org/marriage/the-echr-unanimously-confirms-the-non-existence-of-a-right-to-gay-marriage>.

49. *Convention on Preventing and Combating Violence against Women and Domestic Violence*, *supra* note 7, art. 3(a) – (e), at 7-8.

50. *Id.*

- c. “Gender” shall mean the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men;⁵¹
- d. “Gender-based violence against women” shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately;⁵²
- e. “Victim” shall mean any natural person who is subject to the conduct specified in points (a) and (b).⁵³

Surrounding this debate on the definition of “family,” the President of GREVIO responded:

The Istanbul Convention does not define family. It does not promote a particular type of family. The Istanbul Convention does not say a family consists of X, Y, Z. It does not define family at all. What the Istanbul Convention tries to do is to protect women wherever they are – whether they are at home, whether they are on the street, whether they are at work, because violence against women sadly occurs everywhere and anywhere. Now we also say that the Convention should generally apply to all women regardless of who they are—whether they are Roma women, Muslim women, irrespective of their ethnicity, their sexual orientation, if they are lesbian women, if they are heterosexual women, regardless of who they are, none of them should be excluded from receiving help and support and protection from violence against them.⁵⁴

To reiterate, the Convention does not contain any definition of family, nor of partner or same-sex relationships, nor does it promote any particular form of such relationships. Therefore, the Convention does not contradict the Armenian Constitution defining marriage as a union between a woman and a man, and it does not oblige States to legalize same-sex marriage.

Lastly, in regards to the concerns of education surrounding gender and domestic violence, the Commission explains that the Convention does not interfere with the right of parents to educate their children according to their own preferences, but merely encourages States to include teaching materials on issues mentioned in the provision on school curriculum.⁵⁵ The provisions regarding education are as follows:

Article 14 – Parties shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict

51. *Id.*

52. *Id.*

53. *Id.*

54. *See id.*

55. CDL-AD(2019)018-e, *supra* note 16, at 20.

resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education. Parties shall take the necessary steps to promote the principles referred to in paragraph 1 in informal educational facilities, as well as in sports, cultural and leisure facilities and the media.⁵⁶

Article 16 – Parties shall take the necessary legislative or other measures to set up or support programs aimed at teaching perpetrators of domestic violence to adopt non-violent behavior in interpersonal relationships with a view to preventing further violence and changing violent behavioral patterns.⁵⁷

Article 17 – Parties shall develop and promote, in co-operation with private sector actors, skills among children, parents and educators on how to deal with the information and communications environment that provides access to degrading content of a sexual or violent nature which might be harmful.⁵⁸

The reasoning behind these provisions is that violence against women and domestic violence often stem from harmful gender stereotypes and prejudices that are a part of people’s attitudes, convictions and behavioral patterns, and these attitudes, convictions and behavioral patterns are shaped very early on in life. The continuation of gender stereotypes in education limits the growth and progression of natural talents and abilities of girls and boys. “It will have a huge impact on their educational and professional choices, as well as their life opportunities.”⁵⁹

Education is essential because it effects significantly how boys and girls think about themselves, their peers, and what behaviors are appropriate when interacting with the opposite sex. The education of our youth begins in educational institutions, both in formal and informal settings, and they should be taught to believe that gender-based discrimination and violence against women are unacceptable.⁶⁰ Change can happen through educational capacity, and that is where the Istanbul Convention seeks to stimulate values of gender equality, mutual respect, non-stereotyped gender roles, awareness about gender-based violence and the need to counter it.⁶¹ Teaching children about

56. *Convention on Preventing and Combating Violence against Women and Domestic Violence*, *supra* note 7, at 12.

57. *Id.*

58. *Id.* at 13.

59. *Istanbul Convention: Questions and Answers*, COUNCIL OF EUROPE, <https://rm.coe.int/istanbul-convention-questions-and-answers/16808f0b80> (last accessed: Dec. 18, 2019).

60. *Id.*

61. *Id.*

such values helps them become respectful and equal citizens. It does not affect them in their sexual orientation or gender identity.⁶²

IV. ARGUMENTS THAT FAVOR THE ISTANBUL CONVENTION AS EXPRESSED BY THE VENICE COMMISSION AND REFUTING THE ETHNO-NATIONALIST APPREHENSIONS

In response to the argument made by opponents of the Convention that there is already a national framework in Armenia, the Commission believes in external support as well as an internal foundation to support human rights. With such widespread concern surrounding domestic and gender-based violence, ratification of the Convention would benefit all parties involved.

The Commission could point to an actual occurrence that took place right next to Armenia, of how beneficial the ratification of the Convention is. Women in Georgia, Armenia's neighboring country, experienced similar abuses. The Ministry of Internal Affairs in Georgia had reported that "in the first four months of 2017, the ministry issued 752 restraining orders," however many women's rights organizations claim that these restraining orders have proven ineffective.⁶³ Due to the ongoing and highly publicized violence on women, Georgia was urged to ratify the Convention.⁶⁴ On May 19, 2017, Georgia became the 23rd state to ratify the Convention.

Recently, Equality Now, a non-governmental organization that advocates for the protection of women and girl's rights, wrote an article that shed light on an issue affecting the portrayal of a survivor of sexual violence by a Georgian TV channel.⁶⁵ The article mentioned that "a woman was allegedly subjected to physical violence and attempted rape by her male boss," who was part of the City Council in Tbilisi, Georgia.⁶⁶ The woman was exposed in her interview—she was probed about her experience, which violated ethical, gender-sensitive, and human rights based standards that are guaranteed by the Convention.⁶⁷ These violations included:

"Examining the survivor's moral character, commenting on her attire at the time of the assault, enquiring whether she had had a previous intimate relationship with the abuser, confronting her with degrading comments from

62. *Id.*

63. *Georgia Ratifies Istanbul Convention*, OC MEDIA (May 5, 2017), <https://oc-media.org/georgia-ratifies-istanbul-convention/>.

64. *Id.*

65. *Portrayal of Sexual Violence in Georgian Media*, EQUALITY NOW (Oct. 9, 2019), https://www.equalitynow.org/georgia_media_sexual_violence.

66. *Id.*

67. *Id.*

social media and other sources, and intimations about whether she provoked the perpetrator.”⁶⁸

These violations are accusations dressed as questions, posed to a sexual violence survivor, and Equality Now identified these as deeply rooted and harmful stereotypes⁶⁹ that examine the behavior of the victim rather than looking at the actions and behavior of the alleged perpetrator. This often leads to denial of justice to victims and discourages women from reporting sexual violence.⁷⁰

In Article 17, the Convention encourages private sectors to implement policies and guidelines to “prevent violence against women and enhance respect for their dignity”.⁷¹ Equality Now urges the TV channel to abide by the standards of the Convention and believes that the potential for awareness and social change is enhanced by the media and the social power they have in Georgia.⁷² This unfortunate situation is why the ratification of the Convention in Armenia will benefit victims of gender violence and discrimination.

To address the following concerns of the opponents, it is critical to concentrate on the Istanbul Convention itself and how you cannot analyze violence against women without addressing gender equality issues as well. With that in mind, there are some points to tackle so as to not create confusion. First, the recognition of same-sex marriage is not in the Istanbul Convention and it does not affect national laws on marriage in any way.⁷³ Second, the word “gender” does not replace the terms “women” and “men,” nor does the Istanbul Convention promote any “gender ideology.”⁷⁴ Third, men and boys who experience violence are not excluded in the Istanbul Convention.⁷⁵ The provisions on domestic violence can be applied to them as well. However, the word “gender” is used in the Istanbul Convention to emphasize that women are more likely to experience violence because they are women.⁷⁶ Lastly, a “third gender” is not introduced nor is there an obligation to recognize it. The states are only required to protect victims’

68. *Id.*

69. *Id.*

70. *Id.*

71. *See Convention on Preventing and Combating Violence against Women and Domestic Violence, supra note 7, art. 17.*

72. *Portrayal of Sexual Violence in Georgian Media, supra note 65.*

73. *Istanbul Convention: Questions and Answers, supra note 59.*

74. *Id.*

75. *Id.*

76. *Id.*

rights without discrimination or any grounds, including sex, race, religion, language, sexual orientation or gender identity.⁷⁷

The Prime Minister of Armenia, Nikol Pashinyan, had indicated the government's intention to guarantee the quick ratification of the Istanbul Convention by the Armenian Parliament.⁷⁸ However, he was quickly met with resistance and backlash by conservative groups and individuals, who objected to the Convention's definition of gender and believe that it "paves way for introducing transsexual or transgender as separate categories and legalizing same-sex marriage."⁷⁹

Some members of the government have continued to push for ratification. Vladimir Vartanian, a senior member of the Prime Minister's government,⁸⁰ has insisted that the Armenian parliament is not facing pressure from the Venice Commission to ratify the Istanbul Convention. Vartanian insisted that the Convention does not "obligate states to legalize same-sex marriages or adoptions of children and will not reflect in any way on issues relating to promotion of a non-traditional sexual orientation."⁸¹

Related to Vartanian's opinion, the definitions stated above were written at the outset to hopefully avoid any misconstruing of the provisions set out in the Istanbul Convention. However, that did not work out as the drafters had hoped. If these terms are understood accurately, Armenia may still have a chance to ratify the Istanbul Convention.

Conversely, in Bulgaria, they have interpreted the terms differently, and as a result Bulgaria has chosen to not ratify the Convention.⁸² On July 27, 2018, the Bulgarian Constitutional Court voted 8 to 4 to declare the Convention unconstitutional.⁸³ In February 2018, parliament members requested a ruling on the Istanbul Convention's compatibility with Bulgaria's Constitution, amid claims and warnings that it could lead to "questioning traditional values of Bulgarian society."⁸⁴ The opponents of the Convention in Bulgaria also believed that the instrument was a "trojan horse" that was intended to introduce a "third sex" and same-sex marriage.⁸⁵ The

77. *Id.*

78. Nalbandian, *supra* note 35.

79. *Id.*

80. *Id.*

81. *Id.*

82. Georgi Gotev, *Istanbul Convention 'unconstitutional' in Bulgaria*, EURACTIV (July 27, 2018), <https://www.euractiv.com/section/future-eu/news/istanbul-convention-unconstitutional-in-bulgaria/>.

83. *Id.* at 1.

84. Hillary Margolis, *Speak Out to Protect Bulgaria's Women*, EURONEWS (Oct. 10, 2018), <https://www.hrw.org/news/2018/10/10/speak-out-protect-bulgarias-women>.

85. Gotev, *supra* note 82, at 2.

Constitutional Court declared that “the Convention’s use of ‘gender’ as a social construct contravenes Bulgaria’s Constitution, which specifies a binary understanding of ‘sex’—male and female—that is ‘determined at birth.’” Despite the Bulgarian Constitution’s protection against sex-based discrimination, the court says this “does not mean equal treatment of both sexes because biological differences must be taken into account.”⁸⁶

This decision by the Bulgarian Constitutional Court is a prime example of why Armenia should not interpret the words of the Convention but take them at face value. The Istanbul Convention does not mandate states to take actions to recognize various groups of persons nor to grant them any distinctive status on the basis of their gender identity. It merely confirms that gender identity ranks among the barred grounds of discrimination. This means that an individual may not be denied protection against violence or cannot have the status of victim because of his or her gender identity. This perspective seems to be quite well-suited with the Constitution of Armenia’s provisions on universal equality before the law and the prohibition of discrimination. The same can be said for sexual orientation—the Convention does not force a progressive responsibility on states which do not acknowledge the reality of a legal right for persons belonging to a sexual minority to aggressively initiate such a concept in their own national legal framework.

If we take a look at the concepts presented and compare the Istanbul Convention and Armenia’s Constitution, we can see that they have numerous similarities.

Gender: Article 30 of the Constitution of Armenia guarantees that “women and men shall have equal rights.”⁸⁷ The Istanbul Convention, which includes gender-based violence, is aimed at also achieving this end goal and seeks to modify destructive gender stereotypes. Thus, it is fully in line with Armenia’s constitutional directive of equality.

Gender identity: As previously stated, the Istanbul Convention does not require States to take any measures to grant people of sexual minorities any special legal status, but simply confirms that gender identity ranks among the prohibited grounds of discrimination. This guideline, compared to Article 28 and Article 29 of the Constitution of Armenia, seem to be completely fitting. Article 28 states that “everyone shall be equal before the law”⁸⁸ and Article 29 states that “[a]ny discrimination based on sex, race, skin color, ethnic or

86. Margolis, *supra* note 84.

87. *Armenia’s Constitution of 1995 with Amendments through 2015*, CONSTITUTE (Aug. 12, 2019) https://www.constituteproject.org/constitution/Armenia_2015.pdf?lang=en.

88. *Id.*

social origin, genetic features, language, religion, worldview, political or any other views, belonging to a national minority, property status, birth, disability, age, or other personal or social circumstances shall be prohibited.”⁸⁹

Sexual orientation: This term refers to individuals who are heterosexual and members of a sexual minority, such as lesbians, gays, bisexuals and transsexuals (LGBT). The Convention refers to sexual orientation under Article 4 (Fundamental rights, equality and non-discrimination).⁹⁰ Though the Armenian Constitution does not specifically include LGBT equality, Article 29 prohibits discrimination generally. However, the Convention highlights prohibition of discrimination on a broader and more universal basis.⁹¹

Same-sex marriage: This term has been the cause of political turmoil in Armenia, but it has been misconstrued because the Convention does not refer to homosexuals nor does it refer to marriage, except in Article 37, which criminalizes the intentional conduct of forcing an adult or child into entering a marriage.⁹²

There are similar guarantees of equality between both the Istanbul Convention and the Armenian Constitution, thus there seems to be no contradiction.

Finally, in confronting the issues surrounding the Convention and education, Article 14 of the Convention gives States large discretion in deciding to what extent and in which manner they will educate their population. The reasoning behind Article 14, 16, and 17 in the Convention is that violence against women and domestic violence often stem from harmful gender stereotypes. Removing gender stereotypes does not mean overturning all traditions and customs. Many customs or beliefs from generation to generation are important in shaping our identity and maintaining a connection to our roots and ancestors.⁹³ However, some customs and traditional practices are harmful to women, and may put them at a higher risk of violence. The objective must be to end the stereotypes affecting women and men that are used to validate such toxic customs.⁹⁴ Such toxic traditions tend to stem from within one’s own household and from society’s

89. *Id.*

90. *Convention on Preventing and Combating Violence against Women and Domestic Violence*, *supra* note 7, art. 4.

91. *Armenia’s Constitution of 1995 with Amendments through 2015*, *supra* note 87, art. 29.

92. *Convention on Preventing and Combating Violence against Women and Domestic Violence*, *supra* note 7, art. 37.

93. *Istanbul Convention: Questions and Answers*, *supra* note 59, at 9.

94. *Id.*

indifference to it. In an interview, Hasmik Gevorgyan, of the Women’s Support Center in Armenia, stated that “fundamental steps are necessary to change society’s mentality and stereotypes—as long as we don’t see [violence] as a crime, and we say that, well, this is the traditional Armenian family, whoever doesn’t use violence doesn’t change anything.”⁹⁵ There is tremendous work to be done to raise awareness about changing attitudes, we have to start from the schools.”⁹⁶ In the same vein as Hasmik Gevorgyan’s statements, regarding change and achieving change through education, Japan, a civil law country, has a nearly perfect law for prevention of spousal violence and the protection of victims.⁹⁷ Japan takes steps in training and educational activities needed to deepen understanding of the human rights of victims, the distinctive characteristics of spousal violence, etc.⁹⁸ To prevent spousal violence and protect victims, the state and local governments encourage education and measures that deepen the understanding among the public, and it provides necessary support to private entities that are engaged in activities designed to prevent spousal violence and protect victims.⁹⁹ They not only encourage education among the public, but provide education to the victims themselves regarding counseling, advice, and social assistance.¹⁰⁰

On the opposite end of the spectrum, there was significant impact on the education sector by the Bulgarian Constitutional Court ruling.¹⁰¹ Following the decision, “the Bulgarian Academy of Sciences announced it would halt work on a program to support teachers in addressing gender inequality. The Education and Science Ministry had already reportedly stopped a school-based survey that addressed gender, violence, and stereotypes.”¹⁰² The ruling even spilled over into Poland, where Poland’s ruling party threatened to withdraw from the Istanbul Convention because it endangered traditional Polish culture and values, including women’s “natural role” in society.¹⁰³ Additionally, another neighboring country felt the ripple effects of Bulgaria’s decision—Hungary’s ruling Fidesz party moved to ban gender studies in

95. Gohar Abrahamyan, *Domestic Violence: An Imperfect Law and Enduring Stereotypes*, EVN REPORT (Nov. 15, 2018), <https://www.evnreport.com/raw-unfiltered/domestic-violence-an-imperfect-law-and-enduring-stereotypes>.

96. *Id.*

97. See Research Committee on Society of Cooperative Way of Life, *Law for the Prevention of Spousal Violence and the Protection of Victims*, HOUSE OF COUNCILLORS, https://www.wewonline.org/pdf/lawcompilation/Japan-prevention_violence.pdf (last visited Dec. 19, 2019).

98. *Id.*

99. *Id.*

100. *Id.*

101. Margolis, *supra* note 84.

102. *Id.*

103. *Id.*

higher education.¹⁰⁴ The consequences surrounding the decision not to ratify the Istanbul Convention will affect every area of Armenia's government and society as it has in countries like Bulgaria, Poland, and Hungary.

Nonetheless, Article 14 of the Istanbul Convention gives States broad discretion in deciding to what extent and in which manner they will educate their population about the matters covered by the Convention.¹⁰⁵ Values such as human dignity, respect for human rights and fundamental freedoms, and equality of all, including equality between men and women, are declared in the Constitution of Armenia, and these ideals connect with the principles stated in the Convention. Thus, there is no contradiction between the Convention and the Constitution of Armenia.

V. CONCLUSION

Gender-based violence and domestic violence as a form of discrimination against women is one of the most concerning human rights issues globally. Irrespective of its causes, domestic violence is one of the major obstacles to protect women's rights and achieve gender equality. Based on various advanced international human rights laws and instruments that have been implemented, domestic violence and gender-based violence can by no means be deemed a private issue anymore. The atrocities that have plagued women for hundreds of years should come to an end. Through the ratification and implementation of the Istanbul Convention, we would be one step closer to that goal.

All forms of domestic and gender-based violence should be condemned and perpetrators should be persecuted, as indicated by the Istanbul Convention. State actors are obliged to take appropriate measures to prevent the violence, protect victims and persecute perpetrators. A state's positive obligation to protect women from domestic and gender-based violence is part of customary international law, which provides several mechanisms for victims of domestic and gender-based violence and that hold State actors responsible for the failure to protect their rights.

After gaining its independence from the Soviet Union, the Republic of Armenia has voluntarily signed and ratified several significant human rights conventions which oblige the State to treat individuals under its jurisdiction according to international standards. Although the documents submitted to international human rights bodies indicate the readiness of the Government of the Republic of Armenia to comply with its international obligations, the

104. *Id.*

105. *Convention on Preventing and Combating Violence against Women and Domestic Violence*, *supra* note 7, at 12.

current situation proves that not much progress has been registered concerning domestic and gender-based violence so far. Moreover, the lack of governmental support to victims of domestic and gender-based violence, the lenient sentences for perpetrators, the lack of gender sensitivity of representatives of law enforcement bodies and the judicial system, and the incomplete and defective implementation of programs and projects aimed to improve conditions of victims, reveal that Armenia is quite far from total compliance with international standards for combating domestic violence. Thus, as requested by Rustam Badasyan, the Commission investigated and prepared a thorough opinion on whether Armenia would benefit by the ratification of the Istanbul Convention.

The Commission composed its opinion to help Armenia assess the compatibility of the Istanbul Convention with its Constitution and contribute to the political debate on the ratification of the Convention. The belief of several Armenian ethnonationalists that (1) there is already a national framework in Armenia to combat violence against women, (2) the Convention would result in legislative changes that would infringe on the national constitution of the country regarding same-sex marriage, and (3) education regarding gender and domestic violence, have been properly addressed and cross-examined with the Convention.

There are no provisions in the Istanbul Convention that could be said to contradict the Constitution of Armenia. The main commitment of the Convention is to prevent and combat any form of violence against women and domestic violence, which already follows from the Armenian Constitution and many other human rights treaties to which Armenia is a party. While the ratification of any treaty is an individual act of the State, the Commission appropriately concluded that there are no provisions in the Convention that could be said to contradict the Constitution of Armenia. Minister of Justice Rustam Badasyan, who applied for an advisory opinion by the Commission, stated that the Armenian Ministry of Justice has received the opinion by the Commission and will discuss it, after it has been translated into Armenian.¹⁰⁶ However, the process is not only proving to be a battlefield in the political arena, but has trickled into the public sector as well. On November 1, 2019, a rally was held near the Armenian parliament against the ratification of the Convention.¹⁰⁷ The rally took place because the

106. Stepan Kocharyan, *Armenian Government to discuss Venice Commission's advisory opinion on Istanbul Convention*, ARMENPRESS (Oct. 29, 2019, 3:07 PM), <https://armenpress.am/eng/news/993335.html>.

107. *Combating Violence Against Women vs. National Values – Armenians protest ratification of Istanbul Convention*, JAMNEWS (Nov. 1, 2019), <https://jam-news.net/combating-violence-against-women-vs-national-values-armenians-protest-ratification-of-istanbul-convention/>.

Armenian Parliament discussed the ratification of the Convention with the senior officials of the Council of Europe in attendance.¹⁰⁸ The head of the “Voila” initiative, announced that their rallies will continue if the National Assembly of Armenia does not listen to the voice of its citizens and goes against their opinion and ratifies the Convention.¹⁰⁹ The activists join the views of many opponents of the Istanbul Convention that are convinced that the Convention threatens traditional Armenian values and culture.¹¹⁰

Armenia is not the only country that has had discord surrounding the ratification of the Istanbul Convention. “Latvia, Poland, Lithuania, Liechtenstein, Hungary, United Kingdom, Moldova, Czech Republic, Ukraine and Armenia are among the Council of Europe member states which have signed—but not yet ratified—the Convention. Bulgaria has declared it totally unconstitutional, with Russia and Azerbaijan not having signed and ratified it at all.”¹¹¹ Greece and Croatia are among the countries that have recently ratified the Istanbul Convention, but the ratification was not taken easily by their citizens.¹¹² In Croatia, thousands of citizens marched in the streets to protest the ratification and voiced opinions of the opposition that they are against same-sex marriage and the “third gender.”¹¹³ For the same reasons, the Convention also sparked controversy in several other Council of Europe member states, Bulgaria and Slovakia; both countries rejected it last year.¹¹⁴

The main reasons surrounding the conflict within these countries who have yet to ratify is the same as those of Armenia—the terms used in the Istanbul Convention have been taken out of context and twisted until what is left is terminology that does not fit within the ideologies and customs of the countries. Only through intelligent discussion can Armenia become the progressive country that other countries look to and consider when debating if they should ratify the Istanbul Convention. Thus, if we look past terms such as “gender” or “sexual orientation” and focus on the main goal of the Istanbul Convention, I genuinely believe that Armenia will make the appropriate decision for the growth and empowerment of its country and ratify the Istanbul Convention and work toward equality for all.

108. *Id.*

109. *Id.*

110. *Id.*

111. Amalya Arakelyan, *Demonstrations, discord, unconstitutionality: How do Council of Europe member states react to the Istanbul Convention?*, TERT.AM (Nov. 18, 2019, 7:07 PM), <https://www.tert.am/en/news/2019/11/18/Istanbul-convention/3143089>.

112. *Id.*

113. *Id.*

114. *Id.*

IMPROVING OUTCOMES FOR NEW MOTHERS IN THE UNITED STATES

*Julia Wood**

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I. INTRODUCTION

The United States has a shockingly high maternal mortality rate. Conservative estimates put the maternal death rate between 700-900 deaths

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per year,¹ which is more than double since 1987.² Research shows that it is more dangerous to give birth in 2020 than it was 40 years ago. What is even more shocking is that research also shows that at least 60% of these deaths are preventable.³

The maternal mortality rate, also called the pregnancy-related mortality ratio, is the number of pregnancy-related deaths for every 100,000 live births.⁴ The Centers for Disease Control and Prevention (CDC) defines pregnancy-related deaths as the “death of a woman while pregnant or within 1 year of the end of a pregnancy – regardless of the outcome, duration or site of the pregnancy – from any cause related to or aggravated by the pregnancy or its management, but not from accidental or incidental causes.”⁵ This definition is taken from the World Health Organization (WHO)⁶ and is used by all countries, allowing for comparisons of maternal mortality rates between countries.

The maternal mortality rate has more than doubled in the U.S. from 7.2 deaths per 100,000 in 1987 to 18 deaths per 100,000 live births in 2014, according to the U.S. Dept. of Health and Human Services (HHS).⁷ The CDC released a report in January 2020 listing the U.S. maternal mortality rate for 2018 at 17.4.⁸ This ranks the U.S. 55th worldwide, according to WHO, just behind Russia. The U.S. is ranked tenth out of ten when compared to similarly wealthy countries.⁹ This number could be a drastic undercount since the CDC number does not count births for women over forty-four nor do they

1. Robin Fields & Joe Sexton, *How Many American Women Die From Causes Related to Pregnancy or Childbirth? No One Knows.*, PROPUBLICA (Oct. 23, 2017, 8 AM), <https://www.propublica.org/article/how-many-american-women-die-from-causes-related-to-pregnancy-or-childbirth>.

2. U.S. DEP’T OF HEALTH AND HUM. SERV., HRSA MATERNAL MORTALITY SUMMIT: PROMISING GLOBAL PRACTICES TO IMPROVE MATERNAL HEALTH OUTCOMES 5 (2019).

3. Emily E. Petersen et al., *Vital Signs: Pregnancy-related deaths, United States, 2011–2015, and strategies for prevention, 13 states, 2013–2017*, 68 MORBIDITY AND MORTALITY WKLY. REP. 423, 423 (2019), <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6818e1-H.pdf>.

4. PREGNANCY MORTALITY SURVEILLANCE SYSTEM, CDC, <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm> (last visited Oct. 10, 2019).

5. *Id.*

6. WORLD HEALTH ORGANIZATION, INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS 156 (2010 ED., 10TH REV. VOL. 2).

7. U.S. DEP’T OF HEALTH AND HUM. SERV., *supra* note 2, at 5.

8. Press Release, CDC, First Data Released on Maternal Mortality in Over a Decade (Jan. 30, 2020), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2020/202001_MMR.htm.

9. Julia Belluz, *We Finally Have a New US Maternal Mortality Estimate. It’s Still Terrible.*, VOX (Jan. 30, 2020, 10:40 AM), <https://www.vox.com/2020/1/30/21113782/pregnancy-deaths-us-maternal-mortality-rate>.

count deaths that happen after forty-two days postpartum.¹⁰ By the CDC's own admission, 24% of maternal deaths occur six weeks or more after birth.¹¹

Maternal mortality can vary depending upon a few factors. African American women are three to four times more likely to die from pregnancy-related causes than Caucasian women, and Native American women are three times more likely to die from pregnancy related causes than Caucasian women.¹² The number of maternal deaths also differs depending upon the state where the mother gives birth. California currently has the lowest maternal death rate with a 4.5 out of 100,000¹³ while Louisiana has the highest with 58.1.¹⁴

The U. S. needs to lower its maternal mortality rate. Completely fixing the problem will require addressing many broad aspects of law and society, such as healthcare access, income inequality, and systemic racism within the medical field. This paper will focus on smaller incremental changes that can be made to existing healthcare laws and practices that would immediately help. Drawing from California, Germany, and Finland these changes can be a model for how federal standards should be set and implemented.

II. BACKGROUND

The U.S. spends more on healthcare annually than any other developed nation.¹⁵ The U.S. also spends the most money on pregnancy.¹⁶ Women should not be dying at the rate they are, especially in light of the disproportionate expenditures. The spiraling cost of healthcare in the U.S. is

10. Vanessa Taylor, *The CDC's Updated Maternal Mortality Stats Show How Far the U.S. Has to Go*, MIC (Jan. 31, 2020), <https://www.mic.com/p/the-cdcs-updated-maternal-mortality-stats-show-how-far-the-us-has-to-go-21765288>.

11. *Id.*

12. Belluz, *supra* note 9, at 2; Press Release, CDC, Racial and Ethnic Disparities Continue in Pregnancy-Related Deaths (Sept. 5, 2019, 1:00 PM), <https://www.cdc.gov/media/releases/2019/p0905-racial-ethnic-disparities-pregnancy-deaths.html>.

13. Michael Ollove, *A Shocking Number of U.S. Women Still Die of Childbirth. California Is Doing Something About That.*, WASH. POST (Nov. 4, 2018, 9:00 AM), https://www.washingtonpost.com/national/health-science/a-shocking-number-of-us-women-still-die-from-childbirth-california-is-doing-something-about-that/2018/11/02/11042036-d7af-11e8-a10f-b51546b10756_story.html.

14. *USA Today Investigation Ranks States with the Highest Maternal Death Rates*, CBS NEWS (July 26, 2018, 1:48 PM), <https://www.cbsnews.com/news/best-and-worst-states-to-give-birth-usa-today-investigation/>.

15. Bradley Sawyer & Cynthia Cox, *How Does Health Spending in the U.S. Compare to Other Countries*, PETERSON-KFF HEALTH SYS. TRACKER (Dec. 7, 2018), <https://www.healthsystemtracker.org/chart-collection/health-spending-u-s-compare-countries/#item-start>.

16. *The U.S. Maternal Health Crisis: 14 Numbers You Need to Know*, AMNESTY INT'L (May 3, 2011), <https://www.amnestyusa.org/the-u-s-maternal-health-crisis-14-numbers-you-need-to-know/> [hereinafter AMNESTY INT'L].

a significant problem that should be addressed; however it is beyond the scope of this paper.

Money is not determinative of whether a woman receives good postpartum care.¹⁷ Immensely helpful changes can be implemented that are relatively low cost, such as following the best practices from the Alliance for Innovation on Maternal Health (AIM) and engaging in ongoing education and training.¹⁸ Following these practices makes giving birth safer for women regardless of income.

When people discuss changes to healthcare, the immediate response is to claim the changes are too expensive. Setting aside the real-world consequences, like death, the price argument does not stand up here. If a woman receives comprehensive care during and after pregnancy, then she will be able to avoid many complications that are expensive to treat. About four million women give birth each year in the U.S., making childbirth related care the most common reason for hospital services.¹⁹ Ninety-eight billion dollars is spent each year on hospital bills related to childbirth.²⁰ Healthcare fees for maternal care are twice as high in the U.S. than any other country.²¹ A substantial reason for those costs are that some complications are not caught in a timely fashion, and as a result, costly treatments ensue. One study that followed mother-infant pairs for five years after birth found that untreated perinatal mood disorders cost California \$2.4 billion in those subsequent five years.²² That is one pregnancy complication in one state, and it cost billions of dollars to treat because it was not addressed properly when presented. If this paper's proposed changes are made on the federal level, they would save lives and save money.

III. THRESHOLD NECESSITY

To begin the fight to improve outcomes for new mothers in the U.S., we need data.²³ To address the maternal mortality rate it is essential to know

17. Ollove, *supra* note 13, at 1.

18. Council on Patient Safety in Women's Health Care, *AIM Program Library*, ALLIANCE FOR INNOVATION ON MATERNAL HEALTH, <https://safehealthcareforeverywoman.org/aim-program/> (last visited Oct. 9, 2020).

19. AMNESTY INT'L, *supra* note 16, at 1.

20. *Id.* at 2.

21. *Id.*

22. Rhitu Chatterjee, 'A Lifeline' For Doctors Helps Them Treat Postpartum Depression, NPR (Jan. 15, 2020, 5:03 AM), <https://www.npr.org/sections/health-shots/2020/01/15/794943944/a-lifeline-for-doctors-helps-them-treat-postpartum-depression>.

23. See Fields et al., *supra* note 1 ("What we choose to measure is a statement of what we value in health," stated Dr. William Callaghan, the head of the CDC's maternal and infant health branch. He also rated the difficulty of measuring maternal deaths at about a 3 on a scale of 10 and

what the contributing factors are, and all parties involved need to be on the same page. The CDC released a report in January 2020 regarding the maternal mortality rate for the first time in over a decade.²⁴ The main reason the CDC delayed releasing any reports was a lack of confidence in the data due to a lack of standardization. Another reason why such data is lacking is because sharing information on maternal mortality is voluntary.²⁵ The U.S. currently has no central way to collect or analyze data, nor general agreement on the data that needs to be collected. The CDC, for example, requests states to send copies of death certificates²⁶ for women who died during pregnancy; these are tracked via the Pregnancy Mortality Surveillance System (PMSS).²⁷ This is not mandatory reporting nor is a death certificate an accurate way to account for all pregnancy related deaths.

In December 2018, Congress passed H.R. 1318, a law aimed at gathering data. This statute allocates 12 million dollars to the research of maternal mortality, starting with data gathering.²⁸ The new law directs HHS to establish a program to support state efforts to establish or expand Maternal Mortality Review Committees (MMRC). In addition, it directs the program to collect consistent standardized data, and work with state departments on prevention.²⁹ But nothing in the bill makes participation mandatory.³⁰ I propose that Congress mandate and standardize the reporting of maternal deaths in order to fully address the problem that is plaguing this country.

The MMRC draws information from a variety of sources including vital records, social media and others. The CDC currently only uses the death certificate. By gathering information from many sources, there is a more complete picture of the underlying cause of the maternal death.³¹ These committees can also determine whether the death could have been prevented

viewed the lack of data as a reflection on the lack of importance America places on expectant and new mothers).

24. BELLUZ, *supra* note 9, at 2.

25. Mayer et. al, *The United States Maternal Mortality Rate Will Continue To Increase Without Access To Data*, HEALTH AFF.: HEALTH AFF. BLOG (Feb. 4, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190130.92512/full/>.

26. Fields et al., *supra* note 1 (noting that it only became standard in 2018 for all states to include a checkbox on death certificates, at the request of the CDC, to indicate if a woman had been pregnant within one year prior to death. This is not reliable data because the person filling out the death certificate may not have access to that information.).

27. Mayer et al., *supra* note 25.

28. *Id.* at 4.

29. Kozhimannil et. al, *Beyond The Preventing Maternal Deaths Act: Implementation And Further Policy Change*, HEALTH AFF.: HEALTH AFF. BLOG (Feb. 4, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190130.914004/full/>.

30. *Id.* at 3.

31. Fields et al., *supra* note 1.

and what steps to take in the future.³² California began using a review committee in 2006, since then maternal deaths have dropped by 55%.³³ Despite the clear benefit of the review committees, many states do not have them. Experts cite resource issues as the main struggle to begin or to keep a review committee going.³⁴ But, by government standards, these committees are not expensive because committee members typically volunteer their time.³⁵

Currently, only thirty-eight states have MMRCs recognized by the CDC, and the data collected is not standardized.³⁶ While this is an increase from the twenty-two committees that existed in 2010,³⁷ it shows why participation needs to be mandatory from the Federal Government. The data collected by these thirty-eight committees varies by how it is collected, what is collected, how often hospitals report, to whom they report, and who has access to the data.³⁸ State laws and regulations also differ in how the information from these committees should be used and what the next steps should be.³⁹ At least thirty states have been able to avoid scrutinizing the medical care that women receive and, instead, solely focus on the women's lifestyle choices to account for the pregnancy related deaths.⁴⁰ All of these variables should be standardized so that the best course of action can be determined.

The government should go beyond H.R. 1318, and establish maternal review committees that make it mandatory to gather data. Congress should also make reporting to the CDC mandatory. This would create a central system that gathers and synthesizes data to make recommendations about best practices and preventative care for pregnancy and postpartum.

The proposed system above would not create any unnecessary burden on the Federal Government because they already require Medicaid to disclose information about care for the elderly as a condition to receive funding, which is then posted online.⁴¹ It would not be hard to require

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Kozhimannil et al., *supra* note 29.

37. *Id.*

38. *Id.*

39. *Id.*

40. Laura Ungar, *Maternal death: What states aren't doing to save new mothers' lives*, USA TODAY (Nov. 14, 2019), <https://www.usatoday.com/in-depth/news/investigations/deadly-deliveries/2018/09/19/maternal-death-rate-state-medical-deadly-deliveries/547050002/>.

41. Alison Young & Alison Young, *Hospitals know how to protect mothers. They just aren't doing it.*, USA TODAY (Nov. 14, 2019), <https://www.usatoday.com/in-depth/news/investigations/deadly-deliveries/2018/07/26/maternal-mortality-rates-preeclampsia-postpartum-hemorrhage-safety/546889002/>.

hospitals to disclose pregnancy-related death and complications data as a contingency to receive funding. There has been more than a decade of studies, advice, training, and support from groups such as the American College of Obstetricians and Gynecologists (ACOG), the CDC, the California Maternal Quality Care Collaborative, American College of Nurse-Midwives, and more. Unfortunately, hospitals continue to ignore the best practices that have been presented and proven, instead choosing to provide uneven care.⁴² If hospitals are required to disclose data and implement best practices, this would go a long way in the fight against the rising maternal mortality rate.

IV. WHY BORROW FROM FINLAND, GERMANY AND CALIFORNIA

Finland, Germany, and California are all at the forefront of the fight to end maternal deaths. While Finland and Germany have been at the top of the field for decades, California is relatively new. Each offers innovative and collaborative ways to make the pregnancy and the post-partum time safer for the woman.

Finland, recognizing a problem, began gathering data on infant and maternal mortality around the turn of the 20th century. It immediately began using the data to make healthcare changes that were safer for the mother and the baby.⁴³ Even though Finland is one of the safest countries to give birth in, they continue to explore ways to make it even safer.⁴⁴ Finnish representatives recently attended a conference in the U.S. focused on maternal mortality hosted by the Health Resources and Services Administration (HRSA).⁴⁵ The Finns wanted to learn about any new practices they could bring home and to teach what had worked for their country.⁴⁶ The U.S. should emulate the Finns in constantly striving to get lower maternal deaths.

The Finnish Government began changing healthcare laws early on in the 20th century to benefit pregnant women and families. They created the first maternity and child health clinics in the 1920s.⁴⁷ There, women could receive pre- and post-pregnancy services.⁴⁸ The Finnish Government then introduced

42. *Id.*

43. See generally Tuovi Hakulinen & Mike Gissler, *Finland's low infant mortality has multiple contributing factors*, THL-BLOGI (Jan. 27, 2017), <https://blogi.thl.fi/finlands-low-infant-mortality-has-multiple-contributing-factors/>.

44. U.S. DEP'T OF HEALTH AND HUM. SERV, *supra* note 2, at 4.

45. *See id.*

46. *See id.*

47. *See id.*

48. *Id.* at 2.

the Maternity package in 1938, which contained everything a baby needed in the first year of life.⁴⁹ This was followed by healthcare laws in 1944 that charged local authorities with providing maternity and child services as part of the primary care for each citizen and permanent resident.⁵⁰ These services included midwife home visits which helped new mothers immensely. This deep commitment to a new mother's health is the reason why Finland is the safest country in the world to give birth.

Germany began making health insurance mandatory for all citizens and permanent residents in its 1883 healthcare bill.⁵¹ The Germans began gathering data related to maternal mortality in the 1950s,⁵² as they wanted to address the high maternal and infant mortality rate within their country. At the turn of the 20th century, Germany, like the rest of the world, was experiencing a high rate of maternal and infant mortality.⁵³ Beginning in 1976, the German government convened a commission made up of representatives from all aspects of healthcare to review policies and make recommendations in a wide range of health related areas.⁵⁴

California is the safest state to give birth in within the United States. California has achieved this through the continued use of review committees, which in turn have implemented best practices for many post-partum complications and extensive training for doctors and nurses.

Due to their pioneering practices in this field, I propose implementing laws borrowed from Finland, Germany and California. Although these places differ from one another in many ways, their innovative practices and procedures can be easily incorporated into existing U.S. federal healthcare laws without a huge expenditure.

V. LAWS AND PRACTICES TO BORROW

A. *Home Healthcare from a Trained Professional:*

Both Finland and Germany, and virtually all of Europe, require a trained professional to make home visits as part of the post-natal care. These care givers are trained in a wide array of skills to care for the mother and the baby.

49. *Id.* at 11.

50. *See id.*

51. *Healthcare in Germany*, WIKIPEDIA, https://en.wikipedia.org/wiki/Healthcare_in_Germany (last visited Nov. 2, 2020).

52. Max Rosner & Hannah Ritchie, *Maternal Mortality*, OUR WORLD IN DATA (2013), <https://ourworldindata.org/maternal-mortality> (last visited Nov. 2, 2020).

53. *Id.*

54. WIKIPEDIA, *supra* note 51.

In Finland, this medical professional is a health nurse who comes to your home to assess the health of the mother and baby.⁵⁵ The health nurse will make trips to the pregnant mother's home at least once a month and will arrange for post-natal doctor's visits within two weeks of the mother giving birth.⁵⁶ The health nurse is trained in a vast skillset for the mother and baby wellness including post-natal assessments, looking for signs of depression, looking for signs of potential postpartum complications, baby feeding, and family planning. Part of the health nurse's job is to educate the family so the new mother can take care of herself and the baby.

Germany has the same holistic approach to postpartum care that includes home care by a midwife. The midwife will visit the new mom at home the day after she is discharged.⁵⁷ In the days that follow, the midwife will visit every day for the first 10-14 days and will then continue to visit up to eight weeks after the mother has been discharged from the hospital.⁵⁸ The midwife in Germany assesses the baby and the mother's health and will help schedule follow ups with a doctor, if needed. After the initial eight weeks, visits will become less frequent, but the midwife will continue to answer questions and help with the transition of being a new mother.⁵⁹

B. "Motherpass:"

Germany uses a Mutterpass, or "motherpass." A Mutterpass is a booklet that all German women are given during pregnancy and it acts as a complete record for the pregnancy and post-partum period.⁶⁰ All medical professionals who see the mother put information from the pregnancy, birth and postpartum period into the Mutterpass.⁶¹ During pregnancy and up to a year after, it is recommended this document be carried at all times in case an emergency arises.⁶² This document has all the medical information about the mother and the baby in one place. A new mom does not have to worry about

55. ULLA HOPPU ET AL., *HAVING CHILDREN IN FINLAND*, 20 (Hanna Talasniemi trans., Ministry of Labor, Migration Division, 2nd rev. ed. 1997).

56. *Id.*

57. *Having a baby in Germany*, EXPATICA (Oct. 9, 2020), <https://www.expatica.com/de/healthcare/womens-health/having-a-baby-in-germany-107643/>.

58. Sabine Devins, *The midwife: Your best friend in natal care*, THE LOCAL (Oct. 5, 2010), <https://www.thelocal.de/20101005/30273>.

59. *Id.* (noting that sometimes midwives even offer fitness classes with the baby).

60. Berlin for all the Family, *The Mutterpass: An English Explanation & Translation*, ¶ 2, (Jul. 22, 2013), <http://www.berlinforallthefamily.com/pregnant/the-mutterpass-an-english-explanation-translation>.

61. *Id.* ¶ 3.

62. *Id.*

transferring data from doctor to doctor,⁶³ nor do they have to worry about emergency responders not having all of the pertinent information available.

C. *Maternity Package*

One of the first ways Finland addressed infant mortality problems was by introducing the Maternity package in 1938.⁶⁴ Originally, this package was distributed by the social welfare of the mother's municipality depending on income.⁶⁵ In 1949, this benefit was extended to all pregnant women regardless of income.⁶⁶ The package is a "welcome pack" from the Finnish Government to the new family. The package contains all clothing, diapers, bedding, and outerwear that a baby will need in the first year of life, including a bed.⁶⁷ The Finnish Government used this package as an incentive for women to receive prenatal care. A mother could only receive this benefit after obtaining a certificate that affirms the pregnancy has lasted 154 days or more and that the mother had a health examination before the fifth month of pregnancy.⁶⁸ This package helped incentivize prenatal care in Finland (with wonderful results) and has since been implemented in other countries, like Mexico and Sweden, to try to achieve the same result.⁶⁹

D. *California Practices*

Federal policymakers should look to California for guidance in policies regarding gathering and reporting data, and also for the implementation of narrowly focused solutions to help make birth safer. In 2006, after noticing an alarming increase in maternal deaths, California created a pregnancy-

63. The author's personal experience illuminates this point:

"At two weeks my baby had to go to the hospital for a fever and shortness of breath, due to her complicated delivery and pneumothorax. The hospital she was delivered in did not have an ER that served infants, so we went to another hospital. This new hospital did not have her medical records and were relying on two scared parents to try and remember everything we were told during the four days she had been in NICU, including every medical term. The ER staff was trying to call the birthing hospital but with everyone busy they were not getting the answers they needed. If we had a Mutterpass this would not have been so complicated since the information would have been on hand." (citation omitted).

64. Hakulinen et al., *supra* note 43, at ¶ 4.

65. *Id.* ¶¶ 4, 5.

66. *Id.*

67. Helena Lee, *Why Finnish Babies Sleep in Cardboard Boxes*, BBC NEWS, (Jun. 4, 2013), www.bbc.com/news/magazine-22751415.com.

68. Hakulinen et al., *supra* note 43.

69. Emily Matchar, *Finnish Baby Box Is Becoming Popular Around the World*, SMITHSONIAN, (Mar. 30, 2017), <https://www.smithsonianmag.com/innovation/finnish-baby-box-is-becoming-popular-around-world-180962723/>.

related mortality review board.⁷⁰ This board looked at the cause of every pregnancy-related death.⁷¹ In turn, this agency created the California Maternal Quality Care Collaborative, which brought people from many fields to sift through the data and identify solutions.⁷² This data is compiled into the Maternal Data Center and researchers analyze down to the hospital level to see if providers are following the best practices.⁷³ Hospitals report their data every forty-five days, a quick pace for the medical field.⁷⁴ Medicaid-managed plans in the state require hospitals to participate to receive money. This is the model the Federal Government should employ.⁷⁵ This approach helped California cut their maternal mortality rate by 55% from 2006 to 2013, and this trend continues.⁷⁶ California has been able to implement these practices for \$950,000 a year,⁷⁷ making it attainable for all states.

Hospitals in California implemented best practice standards and regular postpartum treatment for common complications. These relatively simple changes have quickly brought down the maternal mortality rate for all,⁷⁸ not just the wealthy.⁷⁹ Some of the changes include quantifying the mother's blood loss instead of estimating it and giving blood pressure medication within sixty minutes of a high blood pressure reading.⁸⁰ One striking example is where the oversight committee recognized that when a woman was hemorrhaging during birth, nurses had to run to where the blood was stored, taking up to fifteen minutes.⁸¹ The simple fix was to keep a storage of blood in the labor and delivery department, cutting down the time it took to treat a hemorrhage.⁸²

70. Ollove, *supra* note 13.

71. *Id.*

72. *Id.* ¶ 1.

73. *Id.* ¶ 6.

74. *Id.*

75. *Id.*

76. *Id.* ¶ 1.

77. *Id.* ¶ 3.

78. *Id.*

79. *Id.*

80. Am. Coll. of Obstetricians and Gynecologists, *ACOG Committee Opinion: Quantitative Blood Loss in Obstetric Hemorrhage*, 134 J. OBSTETRICS & GYNECOLOGY 1129, e151 (2019), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2019/12/quantitative-blood-loss-in-obstetric-hemorrhage.pdf>.

81. Ollove, *supra* note 13.

82. *Id.*

For preventative measures, California uses toolkits to address emergency complications.⁸³ It identified the most commonly treated complications and created a toolkit for each, similar to a crash cart for heart-attacks.⁸⁴ For instance, there is an obstetrical hemorrhage cart stocked with all equipment that would be needed in the emergency: a checklist, IV line, oxygen masks, speculum, and Bakri balloon.⁸⁵ Having everything at their fingertips and a checklist of what needs to be done as a reference enables the staff to work quickly. California's practices should be implemented on a nationwide basis.

VI. LAWS THE U.S. SHOULD IMPLEMENT

A. *Earlier Postpartum Care*

The U.S. needs to implement a healthcare regulation that mandates a woman to see a trained medical professional within three days of giving birth or being discharged from a hospital. This would be similar to what Finland and Germany have in place where a woman is seen within days of giving birth.⁸⁶ In addition, this regulation should mandate that the postpartum care continues and is covered by health insurance for twelve months after the birth.

Currently in the U.S., a woman does not see a health professional for a routine post-natal checkup until six weeks after giving birth.⁸⁷ If the mother suspects that something is wrong, but does not know for certain, due to lack of information, then the mother must go to the emergency room for treatment. This six-week check-in happens once and is not a comprehensive, ongoing support tailored to the needs of the mother, as the ACOG recommends.⁸⁸ This lack of attention to postpartum maternal health is alarming, since more than one-half of pregnancy-related deaths occur after the birth of the infant.⁸⁹

83. Renee Montagne, *Lost Mothers: Maternal mortality in the U.S.*, N.P.R. (July 29, 2018 8:02 AM), <https://www.npr.org/2018/07/29/632702896/to-keep-women-from-dying-in-childbirth-look-to-california>.

84. *Id.*

85. *Id.*

86. See, ULLA HOPPU ET AL., *SUPRA* NOTE 55; see also *Delivery and Aftercare*, INTERNATIONALS GO!, <https://www.internations.org/go/moving-to-germany/healthcare/delivery-and-aftercare> (last updated Dec. 6, 2018).

87. Am. Coll. of Obstetricians and Gynecologists, *ACOG Committee Opinion: Optimizing postpartum care*, 131 J. OBSTETRICS & GYNECOLOGY 853, e141 (2018), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2018/05/optimizing-postpartum-care.pdf>.

88. *Id.*

89. *Id.* at e143.

According to the CDC, 18.6% of pregnancy-related deaths occur 1-6 days postpartum and 21.4% of pregnancy-related deaths occur 7-42 days postpartum.⁹⁰ Thus, 40% of pregnancy-related deaths occur before a woman would typically see a healthcare provider. The ACOG advises that “the timing of the comprehensive postpartum visit be individualized, and woman centered,” and should begin within the first three weeks postpartum, not the “arbitrary 6-week check.”⁹¹

With so many pregnancy-related deaths occurring soon after delivery, the U.S. should begin postpartum care within three days after delivery or discharge. This postpartum care should last for twelve months, what the CDC considers the entire postpartum period, to address any late onset complications or mental health issues.⁹² This would give women ongoing care if they had injuries during birth, ongoing pregnancy-related complications such as heart disease, or if they have mental health issues.

Within the U.S., this approach in postpartum care could be implemented within the existing health insurance framework. Congress should enact a statute mandating public and private insurance to begin covering post-natal visits from trained healthcare professionals within three days of birth or discharge from the hospital and that such coverage be continued for at least twelve months postpartum.

To implement this regulation for private insurance, Congress merely needs to pass a law mandating that women see a medical provider within three days after giving birth and that the insurance covers postpartum care for an additional twelve months. This could be done by mandating coverage for twelve visits per year, or more, as needed depending upon any complications that may arise. The law should also mandate that postpartum care cover mental health. Generally, under private insurance, a woman can see a specialty provider any time she wishes, therefore this would not be a big change for the private insurance companies. If the woman is covered by an HMO, a visit to her post-partum caregiver should fall outside of the need for a referral and be seen as a primary point of care to alleviate the hassle of a referral and encourage women to receive post-partum care.

To implement this change for Medicaid, Congress will have to change how long a woman is covered after birth and how payments are disbursed. Medicaid is the government-sponsored health insurance program for low-income families who have inadequate or no medical insurance.⁹³ States are

90. Petersen et al., *supra* note 3, at 425.

91. Am. Coll. of Obstetricians and Gynecologists, *supra* note 87.

92. Petersen et al., *supra* note 3, at 426.

93. *Medicaid for Pregnant Women*, AM. PREGNANCY ASSOC. (Aug. 25, 2019), <https://americanpregnancy.org/healthy-pregnancy/planning/medicaid-for-pregnant-women-71027>.

required to cover certain groups in their Medicaid plan including “categorically needy” and “medically needy” groups, both of which can include pregnant women.⁹⁴ The “categorically needy” group covers pregnant women whose income level is at or below 133% of the Federal Poverty Level.⁹⁵ The “medically needy” group covers pregnant women who make too much money to qualify under the “categorically needy” group.⁹⁶ This means a woman who was previously denied Medicaid may qualify once they are pregnant.⁹⁷ Medicaid finances 45% of births in the U.S., so changes to postpartum treatment within Medicaid would benefit a lot of new mothers.⁹⁸

Currently Medicaid postpartum coverage ends after sixty days⁹⁹ and only covers one visit for a vaginal birth and two visits for a c-section.¹⁰⁰ This falls well below the recommendations of the ACOG and the WHO.¹⁰¹ Both agencies recommend that women begin receiving postpartum care before the current six-week mark in the U.S., and that women receive postpartum care for at least three months, but suggest a year would be better.¹⁰² The WHO recommends that all mothers and newborns receive, at a minimum, one postnatal contact during the third day, the second week, and the sixth week after giving birth.¹⁰³ By redesigning the reimbursement for postpartum care, women could get the care they need after the birth of a baby.

B. *Midwife Care:*

The U.S. should pass a federal law standardizing the definition and necessary qualifications for a midwife and mandate that health insurance cover midwives for postpartum care. A midwife is someone who is skilled and knowledgeable in the care of women, infants, and families throughout

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Alison Stuebe et al., *Extending Medicaid Coverage for Postpartum Moms*, HEALTH AFF.: HEALTH AFF. BLOG (May 6, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190501.254675/full/>.

99. BELLUZ, *SUPRA* NOTE 9 (Illinois has extended Medicaid to cover 12 months of postpartum care and is seeing good results from this).

100. Stuebe et al., *supra* note 98.

101. *See* Am. Coll. of Obstetricians and Gynecologists, *supra* note 87, at e141.

102. *Id.*

103. World Health Org., *WHO Recommendation on Postnatal Care of the Mother and Newborn*, at 3, 16 (Oct. 2013), https://www.ncbi.nlm.nih.gov/books/NBK190086/pdf/Bookshelf_NBK190086.pdf.

pre-pregnancy, pregnancy, birth, and postpartum.¹⁰⁴ The midwife could be the point of contact rather than a doctor. Both Finland and Germany use midwives as point people for women's health during pregnancy and in the postpartum period with great success. A midwife can assess medical and mental health needs and instruct women on who to see and where to get help. Studies show about 40% of women do not attend a postpartum appointment¹⁰⁵ due to long wait times and high costs. However, allowing women to see midwives makes it more likely that women would attend their postpartum appointments.

The use of midwives would be a great advantage to all women, but especially to women in rural areas. Many women in rural areas do not live near a hospital and do not have access to traditional post-natal care. 2019 was a record breaking year for rural hospital closures, with nineteen hospitals closing.¹⁰⁶ According to the ACOG, 22.8% of U.S. women of childbearing age live in rural America.¹⁰⁷ Of those women, less than half live within a thirty-minute drive of a hospital with perinatal care (there are no numbers on postnatal care).¹⁰⁸ Even worse, 10% of those women have to drive over 100 miles for care.¹⁰⁹ These women would benefit from trained professionals, not just doctors, being able to assess and help guide them to the care they need. These women would benefit from home visits, or, if those are not possible, from telemedicine where they would be able to speak over the phone or internet to someone who can assess their symptoms, listen to concerns, and give advice. A midwife could also give guidance about when they need to make that drive to the doctor.

Currently, most states do not allow midwives to be fully integrated into the medical system or to be legal practitioners.¹¹⁰ Some states severely limit what midwives are allowed to do despite evidence showing they are a

104. World Health Org., *The Case for Midwifery*, MATERNAL, NEWBORN, CHILD AND ADOLESCENT HEALTH, https://www.who.int/maternal_child_adolescent/topics/quality-of-care/midwifery/case-for-midwifery/en/ (last visited Oct. 3, 2020).

105. Am. Coll. of Obstetricians and Gynecologists, *supra* note 87.

106. Dylan Scott, *1 in 4 Rural Hospitals is Vulnerable to Closure, a New Report Finds*, VOX MEDIA (Feb. 18, 2020, 4:00 PM), <https://www.vox.com/policy-and-politics/2020/2/18/21142650/rural-hospitals-closing-medicaid-expansion-states>.

107. Sharon T. Phelan & Linda Marie Wetzel, *Maternal Death in Rural America*, CONTEMP. OB/GYN (Aug. 17, 2018), <https://www.contemporaryobgyn.net/obstetrics-gynecology-womens-health/maternal-death-rural-america>.

108. *Id.*

109. *Id.*

110. THE EDITORS, *The U.S. Needs More Midwives for Better Maternity Care*, SCIENTIFIC AM. (Feb. 1, 2019), <https://www.scientificamerican.com/article/the-u-s-needs-more-midwives-for-better-maternity-care/>.

beneficial tool for pregnancy, birth, and postpartum periods.¹¹¹ According to the WHO, 83% of maternal deaths, stillborn, and newborn deaths could be eliminated by allowing midwives to implement full care; 87% of services can be carried out by a midwife with proper training; maternal mortality would be reduced by 82% with universal midwifery coverage.¹¹² These statistics suggest that there would be a major immediate benefit to mothers by standardizing and mandating coverage for midwives during and after a pregnancy.

It is difficult to utilize these services even in states that are not hostile to midwives. The Affordable Care Act mandates that Medicaid cover all midwifery services. However, private insurers are not required to cover midwives. As a result, many insurers do not cover midwives and, if they do, there are no in-network midwives. The cost of an uncomplicated birth that is attended by a midwife is vastly less expensive than one that is attended by a physician.¹¹³ Insurance networks should embrace births and postpartum care by midwives in hospitals because the cost is lower. Further, if there is a need for a doctor, the midwife can facilitate it.

Since many states do not embrace midwives and insurance companies refuse to cover their services, a federal law is needed to standardize the education and licensing of midwives across all states. In addition, the law should direct all insurers that midwives are to be covered for their full range of services beginning with pregnancy and extending into the postpartum period.

C. *Motherpass*:

A third change the U.S. should adopt is requiring a “Motherpass” for all mothers upon confirmation of their pregnancy. This pass would be a comprehensive record of the pregnancy and postpartum period for each woman. This pass, either a physical booklet or online portal, would be a place where the mother has access to her record at all times. Each and every doctor, trained professional, and anyone the mother sees during this time would add information to this record. For example, if the mother sees an obstetrician and a midwife, both would record the visit, all tests, results and anything else that occurred during the appointment. Having one area where all medical notes are kept would allow medical staff to quickly diagnose and treat a pregnancy-related complication before it causes the mother’s death.

111. *Id.*

112. World Health Org., *supra* note 103.

113. THE EDITORS, *supra*, note 110.

Currently, in the U.S., it is very difficult and cumbersome to gain access to one's medical records from one doctor, let alone from an array of specialists. While the Health Insurance Portability and Accountability Act (HIPAA) affords everyone the right to access their own medical records, it does not make the acquisition of one's medical records uncomplicated.¹¹⁴ A patient in the U.S. has to fill out a form and request his or her own records for every medical professional they see.¹¹⁵ This is cumbersome and time consuming. HIPAA allows medical providers thirty days to respond to an individual's record request.¹¹⁶ In the case of a woman who has a serious pregnancy-related complication, thirty days is simply too long to wait. Another obstacle that patients encounter are the fees associated with obtaining a copy of their own records as providers are allowed to charge a flat fee or to base the fee on the work necessary to copy and provide the file.¹¹⁷

This pass would allow medical professionals to see a new mother's health history and arrive at a diagnosis more quickly. If a new mother had to go to the emergency room, the attending physician may see her headache as something mundane. However, if there was a comprehensive file, the doctor could see that in addition to the headache, she had high blood pressure as well. The doctor may then diagnose preeclampsia, one of the most common postpartum complications.

The Motherpass could be implemented with a physical book in the beginning, which is also accessible for those who do not have internet access. The woman would then bring the Motherpass book to each of her appointments. The physical book should be used while states explore transitioning to an electronic "Motherpass." This would not be a HIPAA violation because the woman, who is the owner of the medical records, would allow all of the medical professionals to see her records.

D. *Maternity Package:*

Lastly, the United States should try to incentivize prenatal care by enacting a joint state and federal maternity benefit package similar to Finland's Maternity Package. This would include necessary clothing for the first year of the baby's life, a small mattress, a cardboard box to be used as a

114. Chris Dimick, *How to Request your Medical Records*, AM. HEALTH INFO. MGMT. ASS'N., <http://bok.ahima.org/doc?oid=300996#.X3jiO5NKiu4> (last visited Oct. 3, 2020).

115. *Id.*

116. *Id.*

117. *Id.*

bed, and information about how the mother can stay healthy. Prenatal care can help reduce the pregnancy-related deaths in the U.S. by screening for illnesses and pregnancy-related complications that may become emergencies.¹¹⁸

The U.S. should initiate this benefit package when the mother receives prenatal care. The doctor would indicate that the woman received care prior to her fourth month of pregnancy, enabling the mother to receive the package. This would be a great benefit but would also be costly. This is why it should be implemented at the community level with financial help from the state and federal governments. The logistics of this package would be better carried out at a local level, but not all cities would be able to afford the cost of the benefit package. Jumpstarting prenatal care in this way would have lasting beneficial effects and help prevent pregnancy-related deaths.

VII. SAVING MONEY THROUGH THE IMPLEMENTATION OF NEW LAWS

In the U.S., \$98 billion is spent each year on hospital bills related to childbirth.¹¹⁹ Since Medicaid covers 45% of all births in the U.S. each year, a large portion of that \$98 billion is used to cover those expenses. The money Medicaid uses comes from taxes. In the long run, these laws would lower the cost of giving birth in the U.S. and subsequently, lower the cost that Medicaid has to pay. The cost of giving birth in Finland and Germany is much less than in the U.S.¹²⁰ Diagnosing pregnancy-related complications quickly, before they turn catastrophic, would help lessen the amount of money spent on postpartum issues.

These proposed laws would bring healthcare costs down by diagnosing post-partum complications before a mother needs emergency room care. This is important because emergency hospital care is expensive.¹²¹ The Affordable Care Act considers maternal and newborn care as preventative because it is cheaper to provide this care than to treat the potential complications.¹²² This concept should be expanded on to include early postpartum care. By treating

118. *HOW PRENATAL CARE CAN IMPROVE MATERNAL HEALTH*, SAFE MOTHER (Mar.-Jun. 1993), <https://pubmed.ncbi.nlm.nih.gov/12286437/>.

119. AMNESTY INT'L, *supra* note 16.

120. *It Costs Less than \$60 to have a Baby in Finland. How?*, CBS NEWS (Mar. 5, 2019, 8:28 AM), <https://www.cbsnews.com/news/why-finland-is-consistently-ranked-one-of-the-best-places-in-the-world-to-be-a-mom/>; see also Melissa Willets, *Interactive Map Shows Cost of Childbirth Around the World and It's Shocking*, PARENTS MAGAZINE (Jan. 4, 2017), <https://www.parents.com/pregnancy/everything-pregnancy/interactive-map-shows-cost-of-childbirth-around-the-world-and-its/>.

121. Kimberly Amadeo, *Why Preventive Care Lowers Health Care Costs*, THE BALANCE (Sept. 17, 2020), <https://www.thebalance.com/preventive-care-how-it-lowers-aca-costs-3306074>.

122. *Id.*

complications as early as possible, the cost to the individual and the taxpayers will be lower than if a complication becomes catastrophic.

The COVID-19 pandemic has unleashed many new complications to the healthcare system and has incurred incalculable costs to individuals and governments. Emerging research has shown that pregnant women are at a heightened risk of complications due to the virus. It is imperative that pregnant women are eligible for treatments and vaccines when they become available. To address this problem, Senators Warren and Underwood put forth a new bill that would, among other things, mandate that one of the vaccines is safe for pregnant women, and provide funding for non-clinical healthcare workers to monitor postpartum health.¹²³ While this law has not yet been introduced for debate, laws like this are imperative for the health of women in the time of COVID-19 and after.

VI. CONCLUSION

These four proposed laws would have an immediate impact on keeping new mothers alive. These proposed laws need to be implemented on the federal level because states have failed to address the problem of rising maternal mortality in the two decades in which it has been happening. Even as some states investigate and propose changes to help, others have failed to even provide data on the subject.¹²⁴ While some states have changed insurance laws to make access to post-natal care easier, others have not. The Federal Government needs to step in and pass common-sense laws that could be implemented quickly within our existing insurance framework and help save the lives of women.

There is not going to be a quick fix for some of the problems that the United States has within the healthcare industry, but by passing the proposed laws, the maternal mortality rate will decline, while the larger issues within the healthcare industry are researched, analyzed and addressed. When the health of the mother is protected, the new baby and family thrive; this is good for all people.

123. Shefali Luthra, *Democrats Focus New Legislation on the Pandemic's Effect on Maternal Mortality*, THE 19TH (Aug. 10, 2020), <https://19thnews.org/2020/08/democrats-focus-new-legislation-on-the-pandemics-effect-on-maternal-mortality/>.

124. Laura Ungar, *What States aren't doing to Save New Mothers' Lives*, USA TODAY (Nov. 14, 2019, 11:15 AM PST), <https://www.usatoday.com/in-depth/news/investigations/deadly-deliveries/2018/09/19/maternal-death-rate-state-medical-deadly-deliveries/547050002/>.

**STATE RESPONSIBILITY FOR
AUTHORIZING PRIVATE ARMS EXPORTS:
EXPANDING THE SUBSTANTIVE
OBLIGATION UNDER COMMON ARTICLE
ONE TO THE FOUR GENEVA
CONVENTIONS**

*Enrique Martinez**

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I. INTRODUCTION

“Common Article 1 is a living provision which must be interpreted in the overall context of the Conventions and, where applicable, the Protocols, and the international legal order as a whole. Its content will be further concretized and operationalized in the decades ahead.”

– ICRC 2016 Commentary to the four Geneva Conventions.

Some States authorize the export of weapons knowing they will probably be used to commit war crimes. This flow of weapons continues because many States refuse to impose any limitations on their arms transfers.¹ However, there are States that have ratified treaties limiting arms transfers,² enacted domestic laws incorporating international humanitarian standards,³ or ceased to export weapons into these regions as a matter of foreign policy.⁴ The underlying problem is that most States are not willing to ratify a treaty obligating them to investigate the commission of war crimes before authorizing arms deals. The only feasible alternative is to advocate for a more

1. See, e.g., Bill Chappell, *Trump Moves to Withdraw U.S. From U.N. Arms Trade Treaty*, NPR POLITICS (Apr. 26, 2019, 2:53 PM), <https://www.npr.org/2019/04/26/717547741/trump-moves-to-withdraw-u-s-from-u-n-arms-trade-treaty>; (President Trump announced he was “unsigning” the Arms Trade Treaty (ATT) and informing the UN Secretary-General the US had no legal obligations arising out of its previous signature).

2. See, e.g. Arms Trade Treaty, art. 2, ¶1, Apr. 2, 2013, 3013 U.N.T.S. 52373, <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/52373/Part/I-52373-08000002803628c4.pdf>.

3. See Council Common Position, 2008/944/CFSP of 8 Dec. 2008, art. 1-16, O.J. (L 335) 99 [hereinafter Common Position] (Adopted by the European Union, the Common Position requires a Member State to “deny an export license if there is a clear risk the military technology or equipment might be used in the commission of serious violations of international humanitarian law.”); see also, User’s Guide to Council Common Position 2008/944/CFSP, defining common rules governing the control of exports of military technology and equipment, at 45 COM (2015) 10858 (Jul. 20, 2015), <http://data.consilium.europa.eu/doc/document/ST-10858-2015-INIT/en/pdf> [hereinafter User’s Guide].

4. New Desk, *UK follows Germany, Court of Appeal forbids arms sale to Saudi Arabia*, GLOBAL VILLAGE SPACE, (June 21, 2019), <https://www.globalvillagespace.com/uk-follows-germany-court-of-appeal-forbids-arms-sale-to-saudi-arabia/> (noting Germany has publicly banned the export of certain arms into Saudi Arabia after the death of journalist Jamal Khalsoggi).

expansive definition of existing international treaties that will obligate States to investigate war crimes and cease the private export of arms.⁵

Ongoing academic discussion has mostly centered on whether States are responsible for providing official government support to non-state actors who actively engage in war crimes. This discussion does not address whether States are responsible for allowing their own private businesses to sell weapons to parties who commit war crimes. The latter implicates less government control, indirect involvement, and a lack of knowledge of the circumstances on the ground.

The Campaign Against Arms Trade (CAAT) judgment is a major step towards expanding current treaty obligations to address this issue. The UK Court of Appeals decided the British government acted unlawfully by failing to deny an export license without considering the clear risk that the military equipment would likely be used to commit serious violations of international law.⁶ The court noted that the government failed to adhere to its international legal obligations under Common Article One of the Geneva Conventions that requires States to adopt all reasonable measures to avoid violations from occurring.⁷ According to this interpretation of Common Article One, if any State fails to properly assess the likelihood its authorized weapons shipments by its private businesses will be used to commit war crimes, then they should also be held in violation of the Geneva Conventions. But more importantly, if any State does authorize the transfer of weapons into one of these regions then the State should be held responsible under Article One of the Geneva Conventions in circumstances where they (a) fail to account for previous violations in their assessment of the likelihood of future violations, and/or (b) ignore factual findings resulting from independent investigations from public

5. Any reference to “arms” or “weapons” shall reflect the ATT’s definition of conventional arms in article 2(1), except for “small arms and light weapons” – i.e. missiles, aircraft, tanks, etc. See Arms Trade Treaty, *supra* note 2.

6. R. ex rel Campaign Against Arms Trade v. Sec’y of State for Int’l Trade [2019] EWCA (Civ) 1020 [138]-[139] (Eng.), <https://www.judiciary.uk/wp-content/uploads/2019/06/CAAT-v-Secretary-of-State-and-Others-Open-12-June-2019.pdf>.

7. *Id.* ¶ 21; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art.1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

sources such as social media, news reports, the United Nations, or other Non-Governmental Organizations (NGOs).⁸

II. BACKGROUND

The CAAT judgment was handed down in response to the conflict in Yemen. In March 2015, the Saudi-UAE coalition (“Coalition”) intervened in the civil war in Yemen pursuant to the government’s request for support against the Houthi rebels.⁹ The armed intervention included arms and technical support from third parties, like the United Kingdom and the United States.¹⁰ The goal of the operation was to stop the Houthis from controlling additional territory in the region.¹¹ The operation consisted of air bombings, a sea blockade, and a dispersal of ground forces. Roughly four years since the intervention elapsed, millions of innocent Yemeni lives have been displaced, starved, and killed.

Worse still, war crimes have reportedly been committed by the Coalition forces and Houthi rebels. For example, the Coalition has reportedly dropped bombs on weddings, funerals, and hospitals in a seemingly indiscriminate and reckless fashion.¹² According to reports, the Coalition engaged in “double tap” airstrikes where a single bomb hits a target then a second bomb lands only minutes later endangering first responders.¹³ The Houthis have similarly engaged in humanitarian law violations by leaving landmines scattered throughout the region without regard for Yemeni residents who are returning to their war-torn neighborhoods.¹⁴

In response to this crisis, the United Nations Human Rights Council submitted resolution 36/31 requesting the United Nations High Commissioner for Human Rights to send a group of experts to investigate

8. *Id.*

9. Hubert Swietek, *The Yemen War: A Proxy War, or a Self-Fulfilling Prophecy*, 26 POL. Q. INT’L AFF. 162, 43 (2017).

10. *U.S. boosts assistance to Saudis fighting rebels in Yemen*; CNN POLITICS (Apr. 9, 2015), <https://www.cnn.com/2015/04/08/politics/yemen-u-s-assistance-saudi-coalition/index.html>.

11. *See* Swietek, *supra* note 9.

12. Adil Ahmad Haque, *The UN Report and the Indiscriminate Attacks on Yemen*, JUST SECURITY (Sept. 13, 2019), <https://www.justsecurity.org/66170/the-un-report-and-indiscriminate-attacks-in-yemen/>.

13. *See* Annual Rep. of the U.N. High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, *Situation of Human Rights in Yemen, including Violations and Abuses Since September 2014*, ¶ 1 at ¶¶ 24-30, U.N. Doc. A/HRC/42/17 (Aug. 9, 2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/GEE-Yemen/A_HRC_42_17.pdf [hereinafter A/HRC/42/17].

14. *Id.* ¶¶ 43-46.

violations of international human rights in Yemen.¹⁵ Not only did the experts have reason to believe war crimes were committed, but they claimed third-party States indirectly contributed to the war crimes by providing weapons, intelligence and general support to the Saudi-UAE coalition.¹⁶ The involvement of Britain alone ranged from the sale of missiles to training Saudi pilots in the region. At one point there were roughly 6,300 private British contractors stationed in Saudi Arabia.¹⁷ Since 2015, the United Kingdom government licensed more than six billion dollars in weapons to Saudi Arabia.¹⁸

Despite the wealth of information on humanitarian law violations and the continuous flow of weapons encouraging them, countries like the United Kingdom are likely to escape responsibility by claiming the Coalition alone is choosing who to target. The former justification is tough to counter because holding a State responsible for supplying weapons to another State that is allegedly committing war crimes is a legally complicated manner.

The Articles on the Responsibility of States for Internationally Wrongful Acts (“Articles”) have been generally accepted as the governing law on the issue.¹⁹ The Articles are a product of the United Nations’ International Law Commission and were approved by the General Assembly.²⁰ The Articles’s framework requires applicants to meet unreal evidentiary burdens, and it is referred to as the “attribution doctrine.”²¹ According to the International Law Commission’s Commentary on Article Sixteen, an applicant must show: (1) the third-party State was *aware* of the specific circumstances surrounding the wrongful act, (2) the third-party State gave aid with the *intent* to facilitate the

15. *See id.*

16. Annual Rep. of the U.N. High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, *Situation of Human Rights in Yemen, including Violations and Abuses Since September 2014*, ¶ 902, U.N. Doc. A/HRC/42/CRP.1 (Sept. 3, 2019) [hereinafter A/HRC/42/CRP.1].

17. Arron Merat, “*The Saudis couldn’t do it without us*”: *The UK’s true role in Yemen’s deadly war*, THE GUARDIAN (June 18, 2019), <https://www.theguardian.com/world/2019/jun/18/the-saudis-couldnt-do-it-without-us-the-uks-true-role-in-yemens-deadly-war>.

18. Dan Sabbagh & Beth McKernan, *UK arms sales to Saudi Arabia unlawful, court of appeal declares*, THE GUARDIAN (June 20, 2019), <https://www.theguardian.com/law/2019/jun/20/uk-arms-sales-to-saudi-arabia-for-use-in-yemen-declared-unlawful>.

19. Articles on the Responsibility of States for Internationally Wrongful Acts, art. 16 (2001), https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf [hereinafter Articles].

20. *See generally* Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 65-67 (2001) [hereinafter ILC Report].

21. Oona A. Hathaway, et. al., *Ensuring Responsibility: Common Article 1 & State Responsibility for Non-State Actors*, 95 TEX. L. REV. 539, 548-63 (2017).

commission of the specific act, and (3) that the specific act *actually occurred*.²²

These requirements for state responsibility under the Articles are simply unworkable. If any theory of responsibility is going to be advanced, then it must be based on something less stringent than the attribution doctrine under the Articles. Common Article One to the Four Geneva Conventions (“Article One”) offers a feasible alternative.²³ Under Article One, states are obligated to take all reasonable measures to ensure respect for international humanitarian law (“IHL”). Article One imposes on States a positive obligation to undertake respect, and a negative obligation to ensure respect for the Geneva Conventions. At issue is the negative obligation imposed on third-party States requiring them to neither encourage, nor aid or assist in the commission of violations of the Conventions.²⁴

Using Article One in this manner is not a novel concept. In *Nicaragua v. US* (1986), the International Court of Justice stated the U.S. could be held accountable under Article One for encouraging non-state actors to commit war crimes.²⁵ Further, the International Committee of the Red Cross (“ICRC”) released its commentaries on the Geneva Conventions in 2016 and suggested the obligation to ensure respect for the conventions extended to interactions between a State and its own private citizens, as opposed to just non-state actors.²⁶ More recently, legal commentators have also supported the idea of expanding the standard for third party accountability under Article One.²⁷ Oona Hathaway has suggested third-party States should be held accountable under Article One when IHL violations are “likely or foreseeable.”²⁸ This is a great starting point, but it is just commentary without

22. See generally ILC Report, *supra* note 20, at Chapter IV, 64-71.

23. See generally Int’l Committee of the Red Cross, Commentary, art. 1, ¶ 158 (Mar. 22, 2016), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD> [hereinafter ICRC Commentary]; see generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW - VOLUME 1: RULES, at 509-513 (2005).

24. ICRC Commentary, art. 1, ¶ 158.

25. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. 14, ¶ 220 (June 27).

26. ICRC Commentary, *supra* note 23, ¶ 154.

27. See Hathaway, *supra* note 21; See also ICRC Commentary, *supra* note 23.

28. See also *Nicar. v. U.S.*, 1986 I.C.J., ¶ 256 (the ICJ in *Nicaragua* used the “foreseeability” standard and held the U.S. in violation of Common Article One. The court stated the U.S. ought to have known that their continued military assistance to non-state actors (“Contras”) was encouraging them to violate humanitarian law. The court referred to the distribution of military manuals to the Contras as evidence of the U.S. government’s knowledge of the commission of war crimes).

the force of law. Luckily, the UK Court of Appeals handed down a judgment that sheds considerable light on one possible application of the doctrine.²⁹ This judgment provides an important international precedent for state responsibility for aiding another state that commits humanitarian law violations. The UK Court of Appeals took the position that the State's licensing of arm exports to Saudi Arabia ignored a clear risk of international humanitarian law violations and constituted a failure to "ensure" respect for humanitarian law under Article One.³⁰

Part One will review why the Articles are an inadequate tool to deal with third party accountability regarding the sale of weapons as assistance in the commission of war crimes. State responsibility under the Articles require IHL violations to be directly attributable to the third party. Although this might be the case where third parties are choosing the targets for drone strikes, it does not suffice for the transfer of weapons. Furthermore, the legal frameworks elaborated by commentators do not adequately address the unique circumstances where a State can be held to encourage the commission of war crimes by authorizing its private businesses to continue supplying weapons to these conflict regions. Part Two will discuss how the CAAT judgment confirms Common Article One's use as a source of State responsibility when a State authorizes a sale of weapons. This discussion will be supplemented by the recommendations for accountability in the UN reports. Part Three will elaborate on the due diligence factors future courts should consider in holding a State responsible under Common Article One. The analysis is confined to instances when a State authorizes the sale of weapons and how this authorization is alleged to be a form of assistance in the commission of war crimes.

If any State does authorize the transfer of weapons into one of these regions then the State should be held responsible under Article One of the Geneva Conventions in circumstances where they (a) fail to account for previous violations in their assessment of the likelihood of future violations, and/or (b) ignore factual findings resulting from independent investigations from news reports, social media, the United Nations, or other Non-Governmental Organizations.

III. INTERNATIONAL STATE RESPONSIBILITY UNDER THE ARTICLES AND

29. See generally *R. ex rel Campaign Against Arms Trade v. Sec'y of State for Int'l Trade* [2019] EWCA (Civ) 1020 [138]-[139] (Eng.).

30. *Id.* ¶ 21.

BEYOND

The Articles do not provide a feasible legal basis for holding a State responsible when it authorizes the private sale of weapons. First, a direct causal link must be shown between the transport of weapons and the commission of a specific war crime. Second, the Articles require an applicant to prove a State rendered assistance with the intent of facilitating a specific commission of a humanitarian law violation.

A. *State Responsibility under the Articles*

The Articles are the authoritative source on international State responsibility. The Articles on State Responsibility for Internationally Wrongful Acts were adopted by the International Law Commission (“ILC”) in August 2001. Chapter IV of the Articles contains provisions detailing the responsibility of a State in connection with the acts of another State. More specifically, Article 16 deals with aiding or assisting another State in committing an internationally wrongful act. An internationally wrongful act is simply conduct that is attributable to the State and consists of a breach of an international obligation of the State.³¹

Article 16 places stringent limits on third-party State responsibility for aiding and assisting another State that commits an internationally wrongful act. First, the third-party State must be aware of the circumstances that make the conduct of the assisted State an internationally wrongful act.³² Second, an assisting State must give aid with the intent of facilitating the commission of the wrongful act and the wrongful act must occur. Although responsibility is predicated on linking the assistance to the occurrence of the wrongful act (i.e. causation), the ILC states it is enough if the assistance significantly contributed to the wrongful act.³³ The last requirement is that the wrongful conduct committed by the assisted State would similarly constitute a breach of the assisting State’s international obligations.

The Articles’ legal framework cannot adequately address the United Kingdom’s authorization of export licenses into Saudi Arabia (which has presumably committed wrongful acts). In its report, the ILC writes that a State which simply provides material assistance “does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act” and further elaborates that States which are unaware of the

31. Articles, *supra* note 19, art. 16.

32. ILC Report, *supra* note 20, at 65.

33. *Id.* at 66.

exact circumstances pertaining to the wrongful act cannot be held responsible.³⁴ This means a government that merely approves export licenses from its private companies will not be held accountable under the Articles for aiding and assisting another State that commits a wrongful act.

First, a third-party State who provides weapons to another State does not assume the risk they will be used to commit war crimes. This form of assistance is different than providing direct government assistance to non-state actors by training them and supplying them with weapons. The former only indirectly facilitates the commission of a wrongful act and it is a form of assistance that is considerably removed from war crimes themselves.

Some argue this provision means the State must intend to give the assistance, but a closer reading of the ILC's commentary explicitly refers to the intention of facilitating the occurrence of the wrongful act.³⁵ This straightforward reading of the text in Article 16 makes more sense. The ILC's commentary tells us the assistance only needs to significantly contribute to the occurrence of the wrongful act. At first glance this interpretation of causation may seem to support responsibility in the case of authorizing the sale of weapons, but it does not. This interpretation does not diminish the fact that assistance must be directly linked to the occurrence of the specific wrongful act. It is nearly impossible to prove the second requirement absent a showing of direct linkage between the sale of a specific set of weapons and the occurrence of a wrongful act enabled by the sale of those weapons.³⁶ At most, the assisting State is acting recklessly.³⁷

B. *State Responsibility under Common Article One*

However, Common Article One can be used to establish responsibility where the Articles failed. Common Article One, as a source of international obligations, is enjoying a resurgence in the international legal community. The International Committee of the Red Cross³⁸ issued its Commentaries on

34. *Id.*

35. Compare Hathaway, *supra* note 21, at 55 with ILC Report, *supra* note 20, at 66.

36. The third requirement as elaborated in the ILC Report is not discussed and is presumably met since the conduct of Saudi Arabia if attributed to the UK would constitute a breach of its own international obligations. See ILC Report, at 66.

37. If a mental state had to be ascribed, then a State providing military assistance (i.e. weapons) would most likely be ascribed the U.S.'s Model Penal Code definition of recklessness: "consciously disregards a substantial and unjustifiable risk." MODEL PENAL CODE §2.02(2)(c) (AM. LAW INST., Proposed Official Draft 1962).

38. The International Committee of the Red Cross ("ICRC") is a private humanitarian organization headquartered in Geneva, Switzerland. The ICRC was established in 1863 and seeks to protect victims of war. In addition, its assistance is recognized and expressly welcomed in all

the Four Geneva Conventions in March 2016. These commentaries provided the spark that ignited the legal discussion on a broader application of Common Article One.³⁹ The Commentaries explain the substantive obligations under Common Article One that developed in the years since the promulgation the Geneva Conventions. The ICRC recognizes that originally Common Article One was not a substantive provision, instead it was a “mere stylistic clause.”⁴⁰ In particular, the ICRC and legal commentators have elaborated: (1) the types of obligations Common Article One imposes, (2) who is obligated under Common Article One, and (3) which affirmative defenses a party may offer to excuse accountability.

The 2016 Commentaries were designed to consider developments in the implementation of the four Geneva Conventions (collectively, “Conventions”) since 1950. In 1950 the ICRC published its first set of commentaries to the four Geneva Conventions of 1949 to give “practical guidance on their implementation,” which set humanitarian law standards within conflict regions.⁴¹ For example, the first Geneva Convention protects soldiers who are wounded and sick on land during war, the second Geneva Convention is the same as the first Geneva Convention but applies to the sea, the third Geneva Convention covers the treatment of prisoners of war, and the fourth Geneva Convention pertains to the protection of civilians during times of war. Further, Common Article 3 governs the general rules for conflicts that are not of international character (e.g. Yemen civil war).⁴²

C. *Who is Obligated to Ensure Respect Under Common Article One?*

The relevant text of Common Article One requires the High Contracting Parties to “undertake to respect and ensure respect for the present Conventions in all circumstances.”⁴³ The duty to ensure respect extends to the High Contracting Parties engaged in multinational operations.⁴⁴ These operations are normally thought of as coordination with non-state actors,⁴⁵

four Geneva Conventions. Geneva I, *supra* note 7, art. 3; Geneva II, *supra* note 7, art. 3; Geneva III, *supra* note 7, art. 3; Geneva IV, *supra* note 7, art. 3.

39. See generally ICRC Commentary, *supra* note 23.

40. ICRC Commentary, *supra* note 23, ¶ 121.

41. *Updated Commentary brings fresh insights on continued relevance of Geneva Conventions for warfare at sea*, INT’L COMMITTEE OF THE RED CROSS (May 4, 2017), <https://www.icrc.org/en/document/updated-commentaries-second-geneva-convention>.

42. Geneva I, *supra* note 7, art. 3; Geneva II, *supra* note 7, art. 3; Geneva III, *supra* note 7, art. 3; Geneva IV, *supra* note 7, art. 3.

43. ICRC Commentary, *supra* note 23, ¶125.

44. *Id.* ¶¶ 133-37.

45. Hathaway, *supra* note 21.

but the operations may take any variety of forms and extend beyond armed forces acting on behalf of the High Contracting Parties whose conduct is attributable to them. More importantly, the duty to ensure respect extends to States who fail to monitor the behavior of private individuals over whom the State exercises authority.⁴⁶ Further, the duty to ensure respect extends to States who are not a party to the conflict but still exercise some degree of influence in the conflict (i.e. sale of weapons).

D. *What is the Extent of the Obligation to Ensure Respect under Common Article One?*

Under the 2016 Commentary, the duty to undertake to respect and ensure respect for the Conventions represents two types of obligations. The negative obligation, implied from the duty to undertake to respect, demands that the High Contracting Parties neither encourage nor aid or assist in the commission of violations of the Conventions.⁴⁷ The positive obligation, implied from the duty to ensure respect, requires the High Contracting Parties to take affirmative measures that will lead to the prevention and extinguishing of violations of the Conventions.⁴⁸

In 1986, the International Court of Justice (ICJ) held that Common Article One imposed substantive obligations on States aiding non-state actors. In the *Nicaragua* decision, the ICJ stated that the US had a duty to refrain from encouraging parties to conflict and commit violations of the Conventions.⁴⁹ The ICJ determined the US had reason to know about the commission of war crimes because the US distributed military manuals to the rebel forces instructing them on humanitarian law. The ICJ held that the US violated its negative obligation under Common Article One by rendering direct assistance and encouraging the commission of war crimes.

Unlike the Articles, the negative obligation under Common Article One does not require intent by the States to facilitate the occurrence of a wrongful act.⁵⁰ Rather, Common Article One only requires that a third-party State render military aid knowing the likely result is further commission of war

46. ICRC Commentary, *supra* note 23, ¶ 150.

47. *Id.* ¶ 154.

48. *Id.* ¶ 159 (regarding positive obligations, the High Contracting Parties who exercise considerable influence in the conflict had a duty to leverage their influence to prevent foreseeable violations. This type of affirmative obligation is less widely accepted in the international community because it creates an affirmative duty).

49. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 220 (June 27).

50. ICRC Commentary, *supra* note 23, ¶ 159.

crimes. The 2016 Commentary recognizes that this negative obligation extends to arms transfers and requires the assisting States to withhold transfers that will likely violate the Conventions (based on facts or knowledge of prior violations).⁵¹

A violation is not established if a State provides military weapons to another party who is likely to commit war crimes. The next step for the courts is to identify whether a State has done its due diligence in investigating the possible contributions to humanitarian law violations. Matters are further complicated when recipients of weapons refuse to respond to any inquiries about war crimes. This type of situation raises the question whether States, whose citizens continue to supply the weapons, should still be held responsible in the absence of any inquiries into the recipient's conduct.

Oona Hathaway argues that States providing military assistance violate their Common Article One obligations when war crimes are likely to result.⁵² States who provide military assistance violate the Conventions regardless of providing aid to non-state actors or authorizing the weapons' export.⁵³ According to Hathaway, States breach their Common Article One obligation by (a) failing to properly assess whether assisting a non-state actor will likely violate the Geneva Conventions and (b) failing to exercise due diligence and take affirmative steps that assure non-state actors do not violate the Geneva Conventions.⁵⁴ Hathaway also supports the recognition of an affirmative defense for those states who make attempts to assess possible violations or exercise due diligence only to trigger responsibility under the Articles. Hathaway calls for an affirmative defense when States exercise reasonable care to prevent and rectify non-state actor violations of the Conventions. The example given in her article concerns a training program that instructs non-state actors on international humanitarian law standards. In this example, a State which institutes a training program in good faith and exercises reasonable care sufficiently carries out its Common Article One obligation to ensure respect for the Conventions.⁵⁵

A problem arises when trying to reconcile how a due diligence standard might look for States attempting to meet their Common Article One obligations. How could a State possibly account for the aggregate conduct of its private citizens? The *Nicaragua* decision shows it would be too easy to compare domestic criminal law theory on incitement to commit an offense,

51. *Id.* ¶ 162.

52. *See* Hathaway, *supra* note 21, at 568-69.

53. *Id.* at 578-79.

54. *Id.* at 578-82.

55. *Id.* at 68-69.

with international law theory on incitement by an entire State to commit a wrongful act.⁵⁶ The main difference between the two is the ability to pinpoint an individual's guilty state of mind and the inability to do the same for a sovereign State. With so many individuals to account for, how can it possibly be fair to hold an entire State liable for failing to observe its obligation not to encourage the commission of IHL violations? Along the same line of reasoning, what affirmative defenses could a State raise on behalf of its citizens who conduct independent transactions with another State?

IV. THE UK COURT OF APPEAL JUDGMENT AND THE EU COMMON POSITION

The UK Court of Appeal Judgment and the EU Common Position perfectly align with the 2016 ICRC Commentary's and Oona Hathaway's conception of a Common Article One obligation.⁵⁷ However, the UK Court of Appeals took it one step further by clarifying: (1) what it means for an IHL violation to be "foreseeable," and (2) what type of evidence may be considered to determine whether a third-party State knows about the IHL violation.

A. *Background to the Litigation*⁵⁸

The European Union's Common Position ("Common Position") integrated international humanitarian obligations and imposed them on Member States.⁵⁹ Until further notice, the Common Position remains applicable to the United Kingdom despite its withdrawal from the European

56. *See generally* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 220 (June 27).

57. Common Position, *supra* note 3.

58. *See* R. *ex rel* Campaign Against Arms Trade v. Sec'y of State for Int'l Trade [2019] EWCA (Civ) 1020 [12]-[25] (Eng.) (The UK Court of Appeals expressly referred to Common Article One as a relevant legal principle (i.e. binding authority). The Court confirmed Common Article One is generally interpreted as obligating third-party States, who are not parties to a conflict, to refrain from encouraging the parties to the conflict to violate international humanitarian standards. The Court similarly confirmed third-party States should take steps to prevent the violations of humanitarian law. More specifically, the Court referred to those third-party States who supply weapons and could exercise their influence to ensure respect for the Conventions by withholding the means. The Court concluded by recommending that States should exercise caution to ensure exports are not used to commit violations of humanitarian law).

59. Common Position, *supra* note 3. (Germany, Italy, France, Poland, Spain are all part of the European Union and have signed off on the Common Position).

Union (EU) on January 31, 2020.⁶⁰ The Common Position requires Member States to assess requests for export licenses on a case-by-case basis in accordance with the User's Guide.⁶¹ More specifically, the Common Position requires that Member States shall:

(b) exercise special caution and vigilance in [granting] licenses, on a case-by-case basis and taking into account the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, the EU or the Council of Europe; and

(c) deny an export license if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.⁶²

CAAT initiated proceedings against the Secretary of State for Business, Innovation and Skills by filing a judicial review claim form on December 9, 2015.⁶³ The claim was approved on June 30, 2016, and Amnesty International, Human Rights Watch, Rights Watch (UK) and Oxfam International were permitted to intervene as co-parties. CAAT sought review of the Secretary of State for International Trade's decision to approve an export license of arms into Yemen when there was a clear risk the military equipment would be used in the commission of IHL violations by the Saudi-UAE Coalition.⁶⁴ More specifically the claim form alleged that the Secretary of State failed to make sufficient inquiries into the possibility that the military equipment would be used in the commission of an IHL violation.⁶⁵ CAAT requested relief in the form of an order prohibiting the government from granting new licenses to Saudi Arabia for the sale or transfer of arms, pending a lawful review by the Secretary of State to determine whether the license grant complied with the European Union Common Position standards (i.e. whether special caution was exercised and whether there was a clear risk the arms transferred might be used to commit war crimes).

60. See Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 2019 O.J. (L 335) 99 [hereinafter EU Withdrawal Agreement] ("... Union law, including international agreements, should be applicable to and in the United Kingdom... with the same effect as regards the Member States [until] ... agreement(s) on the future relationship [are] negotiated.").

61. User's Guide, *supra* note 3, at 14, 73, 80, 121.

62. Common Position, *supra* note 3, art. 2, sec. 2(b)-(c).

63. Michael Plachta, *UK Appeal Court Held Licensing Arms to Saudi Arabia Illegal*, 35 INT'L ENFORCEMENT L. REP. 266, 267 (2019).

64. *R. ex rel Campaign Against Arms Trade v. Sec'y of State for Int'l Trade* [2019] EWCA (Civ) 1020 [30] (Eng.) (noting the Secretary of State for International Trade was substituted as defendant for the Secretary of State for Business, Innovation, and Skills).

65. *Id.*

On July 10, 2017, the Divisional Court of the Queen's Bench Division dismissed the claim for judicial review applied for by the CAAT. The Divisional Court held the Secretary of State's calculation of a clear risk did not solely depend on the recipient's historical record of serious violations. Instead the Common Position required a prospective assessment of the risk of serious violations, of which the history of prior IHL violations was only a factor.⁶⁶ Another noteworthy basis for the dismissal was the Divisional Court's rejection of the criticism lodged against the Ministry of Defense by the CAAT. The Divisional Court claimed the Ministry of Defense's central database for storing information on reports of IHL violations was a reliable source for making its legal determinations. According to the Court, the Ministry of Defense's database provided valuable, instructive, and sophisticated information about the Coalition's specific operations.⁶⁷

The case was appealed shortly thereafter to the United Kingdom's Court of Appeal – the second highest court in the UK. The only ground for appeal granted by the Court was based on the concrete evidence that showed how the Secretary of State's evaluation of Saudi Arabia's pattern of IHL violations was “fundamentally deficient.”⁶⁸ Further, the “central contention” for Ground 1 of the appeal was that the Secretary's assessment of previous IHL breaches and the subsequent “estimation of the risk of future violations” was erroneous as a matter of law.⁶⁹ The Court granted the appeal and issued a judgment in favor of the CAAT because there were no documents identifying or even attempting to identify previous breaches of IHL. As a result, the Secretary of State acted irrationally and unlawfully by granting the export licenses without assessing the clear risk of the weapons being used in the commission of war crimes.⁷⁰

B. *What It Means for IHL Violations to be “Foreseeable”*

The Common Position only requires a “clear risk the military technology or equipment *might be* used in the commission of serious violations of international humanitarian law.”⁷¹ A pattern of previous violations is a major factor in assessing the risk (i.e. foreseeability) of future violations that cannot

66. *Id.* ¶ 38.

67. *Id.* ¶ 57.

68. *Id.* ¶ 49.

69. *Id.* ¶ 62.

70. *Id.* ¶ 145.

71. Common Position, *supra* note 3, art. 2, sec. 2(c).

be ignored. As the User's Guide explains, the burden of proof for denying an export license is very low.

In applying this standard, the UK Court of Appeals concluded the Secretary of State erred as a matter of law in its overall risk assessment by not investigating whether previous IHL violations had taken place.⁷² The Court determined it was irrational to approve licenses without addressing Saudi Arabia's pattern of previous violations.⁷³

The Secretary of State's prospective analysis based on past conduct is misleading and speculative, and changing factors make it impossible to predict the future from the past. However, the CAAT judgment is very clear in stating that the overall assessment, of whether weapons might be used to commit war crimes, is partially based on the country's previous usage.⁷⁴ According to the Court, the rationality of the decision to continue supplying weapons into the region was questionable as a matter of law considering the reports from independent bodies such as the UN and NGOs regarding the Saudi-UAE coalition's track record. More importantly, the information gathered by the major NGOs and UN panel of experts could have supplemented the information from the government's databases.

Other factors affecting the foreseeability of future IHL violations include the recipient's intentions as expressed through formal commitments, the recipient's capacity to ensure that the equipment is not diverted to usage concerning IHL violations, and the recipient's attitudes.

C. *Deference to the United Nations and other Competent Bodies for Information*⁷⁵

Previous violations are an important factor for determining the foreseeability of future violations, but who establishes the previous violations is the determinative factor. The Common Position requires States to, "exercise special caution and vigilance in granting licenses, on a case-by-case basis and taking into account the nature of the equipment, to countries *where serious violations of human rights have been established by the*

72. R. *ex rel* Campaign Against Arms Trade v. Sec'y of State for Int'l Trade [2019] EWCA (Civ) 1020 [145] (Eng.).

73. *Id.*, ¶¶ 57, 167 (noting the matter was remitted to the Secretary of State to "reconsider in accordance with the correct legal approach").

74. *Id.* ¶¶ 38, 94.

75. User's Guide, *supra* note 3, at 42 (Member States shall ... exercise special caution and vigilance in issuing licenses ... to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or the Council of Europe").

*competent bodies of the United Nations...*⁷⁶ The User's Guide to the Common Position presumes governments will investigate reports from news sources confirming humanitarian law violations. The information sources vary greatly from the EU Council statements and conclusions on certain countries, to the United Nations, ICRC and international NGOs documents and reports.⁷⁷

It is within the backdrop of the UN Human Rights Council's reports and the media reports that the UK Court of Appeals issued its judgment.⁷⁸ In response to the crisis in Yemen, the United Nations mandated an investigation into possible humanitarian violations and ordered a group of experts to conduct their own analysis of the crisis.⁷⁹ During independent investigations, over 600 interviews were conducted with victims, witnesses, and other affected parties.⁸⁰ The group of experts determined that the intervention by the Coalition significantly exacerbated the "world's worst humanitarian crisis."⁸¹

According to the UN Report, the experts had reasonable grounds to believe the coalition was guilty of violating humanitarian law under the Geneva Conventions. The "double tap" air strikes are one of several highly criticized practices that indiscriminately and disproportionately result in unnecessary civilian casualties. "Double tap" air strikes are those that come within several minutes of the first bombing and kill first responders or any civilians who rush to aid the wounded.⁸²

In their report, designated experts stated the Yemeni government, the Saudi-UAE coalition members, the non-State armed groups within Yemen, and third-party States exercising influence in the conflict were either directly or indirectly accountable under international law. The UN stated third-party States such as the United States, UK, and France, may be responsible for aiding and therefore facilitating the commission of these international law

76. Common Position, *supra* note 3, art. 2, sec. 2(b); *see also* Campaign Against Arms Trade, 2019 EWCA 1020, ¶ 134.

77. User's Guide, *supra* note 3, at 41-42 (noting that some of the information sources include "(1) documentation from the United Nations, the ICRC, and other international and regional bodies; (2) reports from international NGOs; and (3) information from civil society").

78. *See* S.C. Res. 2216 ¶ 1 (Apr. 14, 2015); *see also*, Letter from Abdrabuh Mansour Hadi, Pres., Yemen, to U.N. Security Council (Mar. 24, 2015) (on file with the U.N. SCOR).

79. A/HRC/42/17, *supra* note 13, ¶ 1.

80. *Id.* ¶ 6.

81. *Id.* ¶ 14.

82. *See generally* Arron Merat, *The Saudis Couldn't Do it Without Us*, THE GUARDIAN (June 18, 2019, 1:00 PM), <https://www.theguardian.com/world/2019/jun/18/the-saudis-couldnt-do-it-without-us-the-uks-true-role-in-yemens-deadly-war>.

violations.⁸³ The designated experts concluded their report by recommending that third-party States should prohibit the authorizing transfers of arms that could potentially be used in the conflict.⁸⁴

V. WHAT A POTENTIAL COMMON ARTICLE ONE OBLIGATION COULD LOOK LIKE

The CAAT judgment set an expansive precedent for the Common Article One's obligation to refrain from encouraging the commission of war crimes. Under the CAAT judgment, Common Article One is breached when a third-party State authorizes an export of private arms sales with a conscious disregard of the risk that the weapons could foreseeably be used to commit war crimes. Further, a third-party State that is exporting arms is held to have knowledge of the risk of IHL violations pursuant to the investigations conducted by regional and international competent bodies.⁸⁵

A. *When and to What Extent is a Third-Party State Accountable?*

The CAAT judgment established that a third-party State is responsible for failing to ensure respect for the Conventions the moment it authorizes the sale of weapons to a recipient who will foreseeably use them to commit war crimes. This is a big departure from the Articles's requirements. Under the Articles, a State was responsible only if their assistance succeeded in causing or significantly contributing to an actual war crime.⁸⁶ In contrast, Common Article One simply demands that a violation be likely or foreseeable and that the third-party State authorized the export.⁸⁷

The foreseeability of future violations is a product of several factors. A pattern of previous violations serves as a significant factor.⁸⁸ The UK Court of Appeals claimed the government had an obligation not to encourage IHL violations by authorizing exports when previous violations had been found. The Secretary of State violated this obligation when he approved export licenses and failed to offer any evidence assessing how these previous violations filtered into his current assessment of future violations. Under Common Article One, third-party States are obligated to withhold the

83. See A/HRC/42/17, *supra* note 13, ¶ 92.

84. A/HRC/42/CRP.1, *supra* note 16, ¶ 933.

85. User's Guide, *supra* note 3, at 64.

86. ILC Report, *supra* note 20, at 66-67.

87. ICRC Commentary, *supra* note 23, ¶ 150.

88. User's Guide, *supra* note 3, at 43; *see also* R. *ex rel* Campaign Against Arms Trade v. Sec'y of State for Int'l Trade [2019] EWCA (Civ) 1020 [139] (Eng.).

transfer of arms when they will likely be used to violate the Conventions. The CAAT judgment clarifies that the likelihood of future violations must be determined by assessing previous violations.

Another factor that should be considered in determining the likelihood of future violations is the recipient's attitudes.⁸⁹ A strong example of this is when a country refuses to cooperate with a group of experts sent by the United Nations Human Rights Council.⁹⁰ The Saudi authorities refused to cooperate when Amnesty International approached them to share their finding of any documented air strikes.⁹¹

The UK Court of Appeals referred to specific inquiries a decisionmaker should make when issuing a license. For example: "Have any other arms bearers taken up similar measures to ensure respect of international humanitarian law standards?"⁹² This refers to the conduct of other similarly situated States and the actions taken by that State. For instance, Germany chose to ban all arms exports to Saudi Arabia in 2018.⁹³ The User's Guide has a complete list of questions for the States to consider and among them are: "[h]as the international humanitarian law been incorporated in military doctrine and military manuals, rules of engagement, instructions and orders?" Or "[d]oes the end-user have the capacity to use the equipment in accordance with international humanitarian law?"⁹⁴

Foreseeability should not be viewed through the domestic criminal or tort law lens because the justifications for doing so are absent in the international law context. Although many of these concepts may seem intuitive, it is noteworthy to remember Judge Ago's comments in the *Nicaragua* decision cautioning against borrowing directly from criminal law theory on aiding and abetting. Whereas the justification for punishing aiders and abettors rests on the assumption that individuals helping one another are equally culpable, the same cannot be said about a State entity that enables its private businesses to transfer weapons into these war-torn regions.

For example, in the tort context foreseeability and proximate cause are largely a matter of whether it is fair to hold someone accountable for their *individual* actions. Importing these principles into the international context is unreasonable because now the question becomes whether or not it is fair to

89. User's Guide, *supra* note 3, at 44.

90. A/HRC/42/17, *supra* note 13, ¶ 7.

91. *See id.*

92. *R. ex rel Campaign Against Arms Trade v. Sec'y of State for Int'l Trade* [2019] EWCA (Civ) 1020 [21] (Eng.); *see also* User's Guide, *supra* note 3, at 55-58.

93. Plachta, *supra* note 63, at 268.

94. User's Guide, *supra* note 3, 55-57.

hold Country X accountable for the private actions of its individual citizens. Thus, it makes more sense to argue that a pattern of previous violations is sufficient to make it foreseeable that a future violation may occur, and thus a failure to adequately investigate these previous violations directly results in a violation of Common Article One.

B. Information from Independent Competent Bodies: Attributing Knowledge of the Risk of IHL Violations

One of the biggest obstacles to accountability under the Articles was the knowledge requirement. The Articles require an assisting State to give aid with the intent of facilitating the commission of the wrongful act. Under Common Article One, a third-party State is accountable when it consciously disregards the risk of IHL violations. Further, a third-party State is held to be aware of such a risk against the backdrop of investigations and findings from competent bodies, such as the UN Human Rights Council.⁹⁵

Once it is established that the investigations from independent international bodies warrant assessment before exportation, a third-party State should be held to know about the risk of future violations. As the UK Court of Appeals put it, “how can such an approach be rational, when other important and authoritative bodies, such as the UN Panel of Experts, Human Rights Watch and Amnesty International have been able to make and publish such assessments, and conclude that widespread violations have been demonstrated?”⁹⁶ To put things in perspective, a summary of Amnesty International’s work in Yemen consisted of seven field missions, interviews with survivors, victims, witnesses, journalists, lawyers, government officials and corroboration via satellite imagery and medical reports.⁹⁷

VI. CONCLUSION

The academic discussion on whether States are responsible for their joint operations with other countries or non-state actors that actively engage in war crimes does not answer the practical question of whether a State is responsible for allowing its own private businesses to provide weapons to these same countries or non-state actors engaged in war crimes. The CAAT’s answer is yes, the State is responsible for encouraging violations of the

95. *Campaign Against Arms Trade*, 2019 EWCA 1020, ¶ 134.

96. *Id.* ¶ 62.

97. *Id.* ¶ 90.

Conventions through the private conduct of its individuals (at least under circumstances where it authorizes the export of weapons).

The Court of Appeals decided the British Government acted unlawfully and irrationally when the Secretary of State for International Trade failed to deny an export license because there was a clear risk the military equipment would be used to commit serious violations of international law.⁹⁸ The CAAT judgment established that a third-party State is responsible for failing to ensure respect for the Conventions the moment it authorizes the sale of weapons to a recipient who will foreseeably use them to commit war crimes. The UK Court of Appeals took it one step further by clarifying (1) what it means for IHL violations to be “foreseeable,” and (2) what type of evidence may be considered in determining whether a third-party State ought to know about these foreseeable violations.⁹⁹

In sum, if any State does authorize the transfer of weapons into one of these questionable regions then the State should be held responsible under Common Article One to the Geneva Conventions in circumstances where they (a) fail to account for previous violations in their assessment of the likelihood of future violations, and/or (b) ignore factual findings resulting from independent investigations on behalf of the media, United Nations, or other Non-Governmental Organizations.¹⁰⁰

98. *Id.* ¶¶ 61-63.

99. *See id.*

100. *See* Written Statement from Elizabeth Truss, Sec’y of State for Int’l Trade, to Parliament, HCWS339 (Jul. 7, 2020), <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-07-07/HCWS339/>. The United Kingdom’s Secretary of State for International Trade announced the government was withdrawing their appeal to the Supreme Court and that they were now in compliance with the new legal approach articulated by the UK Court of Appeal, *id.*, and as a result, the government is going to resume the granting of export licenses since “there is not a clear risk that the export of arms and military equipment to Saudi Arabia might be used in the commission of a serious violation of IHL.”