

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

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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

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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 deduced 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 peace time 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.