WAR DIFFUSED: WARFARE BETWEEN METAPHOR AND REALITY

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I. INTRODUCTION

War is an interplay between continuity and change.[1] As Carl von Clausewitz famously observed, warfare involves the application of violence for political ends.[2] Its essence is the use of combat power by one organized political community against another to compel the latter to submit to its will.[3] The nature of warfare is therefore constant and enduring: it is defined by the use of violence for political ends. By contrast, the character of war is forever evolving.[4] Many features of warfare—who is fighting whom, for what ends and through what means and methods—are historically contingent. They are shaped by the political, social, technological, military, and other conditions prevailing at any given time. As these conditions change, so does the character of warfare. At some junctures, change can be rapid and dramatic. For example, within just a few decades, the internal combustion engine not only revolutionized military mobility on land and at sea, but by enabling heavier-than-air aviation, paved the way to strategic bombing and air power.[5]

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[1] Jack S. Levy et al., *Continuity and Change in the Evolution of Warfare*, *in* WAR IN A CHANGING WORLD 15 (Zeev Maoz & Azar Gat eds., 2001).

[2] CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard et al. trans., Princeton University Press 1976).

[3] *Id.* at 605. On Clausewitz's distinction between the logic of politics and what he terms the distinct grammar of war, see ANDREAS HERBERG-ROTHE, CLAUSEWITZ'S PUZZLE: THE POLITICAL THEORY OF WAR 150–52 (2007).

[4] The point is well established in the field of strategic studies. *See, e.g.*, COLIN GRAY, MODERN STRATEGY ix (1999) ("there is a unity to all strategic experience: nothing essential changes in the nature and function (or purpose)—in sharp contrast to the character—of strategy and war").

[5] JEREMY BLACK, WAR AND TECHNOLOGY 143–227 (2013); ALEX ROLAND, WAR AND TECHNOLOGY: A VERY SHORT INTRODUCTION 53–55 (2016).

Change can also be more gradual, though no less significant, as illustrated by the progressive urbanization of society and the prevalence of urban warfare.[6]

Whether rapid or gradual, changes in the character of warfare have significant practical and normative implications.[7] Innovations in warfighting require constant adaptation in military organization and doctrine.[8] Preparing to fight the last war is rarely a recipe for battlefield success: a nation's armed forces must plan for the future and continually adjust to new circumstances. The same also applies to the law. Rules that regulate outdated forms of warfare which no longer reflect current realities are of limited use. Disruptive changes in the character of warfare require legal adaptation.

Today, the legal framework of war is under pressure from several directions. In many areas, it is unclear how the existing rules of international law apply to new technologies and methods of warfare. Conflict in cyber spaces illustrates the point. Although it is universally accepted that international law does apply to cyber space,[9] the fact that most rules of international law were designed before the digital age means that they do not seamlessly fit the distinct features of cyber operations.[10] This generates uncertainty, including on elementary points of law.[11] More broadly, the

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[6] Dagmar Haase et al., *Global Urbanization: Perspectives and Trends*, *in* URBAN PLANET: KNOWLEDGE TOWARDS SUSTAINABLE CITIES 19 (Corrie Griffith et al. eds., 2018). On urban warfare, see ALICE HILLS, FUTURE WAR IN CITIES: RETHINKING A LIBERAL DILEMMA (2004); see also more recently ANTHONY KING, URBAN WARFARE IN THE TWENTY-FIRST CENTURY (2021). *But cf*. Emma Elfversson & Kristine Höglund, *Are Armed Conflicts Becoming more Urban?*, 119 CITIES 103356 (2021) (questioning whether urban warfare is in fact on the rise).

[7] *See* Steven Haines, *The Nature of War and the Character of Contemporary Armed Conflict*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 9 (Elizabeth Wilmshurst ed., 2012).

[8] MICK RYAN, WAR TRANSFORMED: THE FUTURE OF TWENTY-FIRST-CENTURY GREAT POWER COMPETITION AND CONFLICT (2022).

[9] Zhixiong Huang & Kubo Mačák, *Towards the International Rule of Law in Cyberspace: Contrasting Chinese and Western Approaches*, 16 CHINESE J. INT'L L. 271, 275–78 (2017).

[10] For an analysis of some of the difficulties, see MARCO ROSCINI, CYBER OPERATIONS AND THE USE OF FORCE IN INTERNATIONAL LAW (2014); RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE (Nikolaos K. Tsagourias & Russell Buchan eds., 2015); TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt ed., 2017); and FRANÇOIS DELERUE, CYBER OPERATIONS AND INTERNATIONAL LAW (2020).

[11] *Cf*. Michael N. Schmitt & Liis Vihul, *Respect for Sovereignty in Cyberspace*, 95 TEX. L. REV. 1639 (2017).

weaponization of most walks of life and the expansion of warfare into new domains has blurred the dividing line between war and peace. An international order based on a principled distinction between war and peace seems to be increasingly misaligned with an age of persistent competition characterized by patterns of conflict that neither reflect nor respect that distinction.

The purpose of this paper is to explore some of the challenges that the changing character of conflict poses for the legal framework of war. It does so in five steps. First, it reviews the main features of the contemporary strategic environment to suggest that modern war is characterized by diffusion among physical and functional domains. One consequence of this diffusion is that war is increasingly caught between real and metaphorical forms of warfare. Second, in an attempt to better understand this development, it turns to the notions of hybridity, political warfare, and gray zone conflict, finding that these concepts offer useful insights into the changing character of warfare that may complement the traditional definition of war, but that they are not suitable replacements for that definition. Third, the paper explores some of the most pressing challenges that the diffusion of war poses for its legal regulation, focusing on the applicability and manner of application of the relevant legal regimes and frameworks. Fourth, building on the preceding section, the paper assesses the ability of the law to adapt. Based on current trends, it argues that the law is faced with demands to align itself with new realities and with competing demands to moderate them. Finally, by way of conclusion, the paper suggests that the regulatory framework of war should not expand at the lower end of the conflict spectrum but continue to maintain the distinction between real and metaphorical warfare in an effort to constrain resort to conventional war.

II. WAR OUT OF BOUNDS

War is inconceivable without boundaries. Environmental factors and material necessity, such as the climate, topography, and the need to conserve finite resources, have always constrained the conduct of military operations and thereby tempered the intensity of war. In addition to these limitations, society has levied its own restraints on warfare throughout the ages, motivated by pragmatic considerations, religious convictions, and cultural mores.[12] One of the most fundamental societal restraints is the distinction

[12] JOHN KEEGAN, A HISTORY OF WARFARE 3 (1993).

between war and peace itself. Peace is often described negatively as a condition defined by the absence of war and other forms of generalized physical violence.[13] A state of war involves the use of violence, whereas a state of peace does not. Since such a negative definition hinges on the meaning of war and violence, it begs the question as to what type and degree of violence qualifies as war.

Most definitions of war do not help much. For example, to suggest that war describes a situation where a breakdown of communication between the opposing parties leaves them with nothing except coercion and force sounds plausible, but in fact overstates the case.[14] Coercion is endemic even in times of peace, while force has a communicative function,[15] for example, when it is used to send a message to deter an adversary or to terrorize a population.[16] Neither coercion nor communication through violence are confined exclusively to either war or peace, which means that their presence or absence does not enable us to draw clear dividing lines between these two conditions. A negative definition of peace thus raises more questions than it answers. Nevertheless, it does have one clear benefit: it implies that war is subject to limits. Whatever peace is, it is not war and hence war cannot be unlimited.

Today, the boundaries of war seem more elusive than before. Although no belligerent is omnipotent, the technological and industrial advances that have accumulated over the course of the last century have significantly enhanced the capabilities of most armed forces, including their ability to master the material constraints of warfare. As a result, the reach, lethality, and tempo of modern war has grown exponentially. In parallel, the information revolution has opened up new battlegrounds and put new instruments and tactics into the hands of both State and non-State actors. Belligerents now have a wider range of options to inflict harm through non-kinetic means, that is means which do not release kinetic energy to cause destructive effects in the physical world, but instead generate harm through

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[13] Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RSCH. 167, 167–68 (1969).
[14] *See* JOHN MACQUARRIE, THE CONCEPT OF PEACE 4 (1973).
[15] *Cf.* Stephen Blumenthal, *Violence as Communication*, 66 CRIM. JUST. MATTERS 4 (2006).
[16] *See* James P. Farwell, *The Media Strategy of ISIS*, 56 SURVIVAL 49 (2014); Paul Gordon Lauren, *Ultimata and Coercive Diplomacy*, 16 INT'L STUD. Q. 131, 148–49 (1972).

non-destructive effects, such as misinformation, political division, or financial instability.[17]

The growing importance of non-kinetic means casts doubt on the traditional view that physical violence is the essence of war, while the diffusion of warfare across time, space, and various functional domains undermines the classic duality of war and peace. The purpose of the present section is to review some of these trends alongside the key continuities in the character of contemporary warfare.

A. The Enduring Prospect of War

The destructive potential of the most capable modern weapons far outweighs the material and ideological benefits that may be derived from their unrestricted use.[18] It is difficult to see what, if anything, could justify waging all-out nuclear war with potentially catastrophic consequences for human civilization. This realization has formed the basis of nuclear deterrence during much of the Cold War era and was fundamental to avoiding direct confrontation between the superpowers with potentially disastrous consequences.[19] Even today, it is reasonable to expect that rational actors will continue to abstain from unleashing the full potential of modern weapons.[20] However, this does not eliminate the possibility of war altogether. Indeed, at the risk of pointing out the obvious, armed conflict has not disappeared for good in some sinkhole of history at the end of the Cold War.[21]

Although the potential consequences of unconstrained warfare could be catastrophic, more limited engagements with conventional, and

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[17] *See* PAUL A. L. DUCHEINE, *Non-kinetic Capabilities: Complementing the Kinetic Prevalence to Targeting*, *in* TARGETING: THE CHALLENGES OF MODERN WARFARE 201 (2015).

[18] *Cf.* Owen B. Toon et al., *Environmental Consequences of Nuclear War*, 61 PHYSICS TODAY 37 (2008).

[19] So argues JOHN LEWIS GADDIS, THE LONG PEACE: INQUIRIES INTO THE HISTORY OF THE COLD WAR 230 (1987). On nuclear deterrence, see LAWRENCE FREEDMAN & JEFFREY MICHAELS, THE EVOLUTION OF NUCLEAR STRATEGY (4th ed. 2019).

[20] *Joint Statement of the Leaders of the Five Nuclear-Weapon States on Preventing Nuclear War and Avoiding Arms Races*, WHITE HOUSE (Jan. 3, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/p5-statement-on-preventing-nuclear-war-and-avoiding-arms-races/.

[21] To his credit, even Francis Fukuyama acknowledged that the end of history and the triumph of liberal democracy, if it ever were to pass, would not necessarily bring about the end of all war. *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 328–39 (1st ed. 1992).

possibly even nuclear, weapons are not necessarily so.[22] Limited war remains a viable and at times attractive option for States and may be the only option available to less capable actors. Moreover, while history suggests that decision-makers do weigh the costs and benefits of going to war in a rational manner, it also shows that such rational calculations are not always decisive on the road to war.[23] The causes of armed conflict are complex.[24] The risk of miscalculation, misperception and inadvertent escalation looms large.[25] Measures short of war may spiral into armed confrontation, while limited wars may descend into more comprehensive conflict. Accordingly, not only do the prospects of war remain real, but it is a mistake to assume that large-scale engagements between great powers have become obsolete and that future wars will necessarily be expeditionary, asymmetric, and limited.[26] If proof was needed, Russia's full-scale invasion of Ukraine in February 2022 confirms that miscalculations borne of a belief in speedy victory harbor a risk of escalation and that protracted, high-intensity warfare among industrialized nations is not a thing of the past.[27]

Whilst modern warfare thus bears many of the hallmarks of earlier epochs, it is also fast evolving. War still involves the business of visiting death and destruction upon the enemy. It remains a contest of wills through

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[22] Thomas G. Mahnken, *Future Scenarios of Limited Nuclear Conflict*, *in* ON LIMITED NUCLEAR WAR IN THE 21ST CENTURY 147 (Jeffrey A. Larsen & Kerry M. Kartchner eds., 2014).

[23] MICHAEL HOWARD, THE CAUSES OF WARS AND OTHER ESSAYS 15 (2d ed. Harvard University Press 1984) ("in general men have fought during the past two hundred years neither because they are aggressive nor because they are acquisitive animals, but because they are reasoning ones").

[24] *See* GREG CASHMAN, WHAT CAUSES WAR? AN INTRODUCTION TO THEORIES OF INTERNATIONAL CONFLICT (2d ed. 2014); GEOFFREY BLAINEY, THE CAUSES OF WAR (3d ed. 1988); JACK S. LEVY & WILLIAM R. THOMPSON, CAUSES OF WAR (2010).

[25] David Abshire & Brian Dickson, *War by Miscalculation: The Forgotten Dimension*, 6 WASH. Q. 114 (1983); Jack S. Levy, *Misperception and the Causes of War: Theoretical Linkages and Analytical Problems*, 36 WORLD POL. 76 (1983); *see* OLE R. HOLSTI, CRISIS, ESCALATION, WAR (1972).

[26] For arguments to this effect, see MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR (1991) and JOHN MUELLER, RETREAT FROM DOOMSDAY: THE OBSOLESCENCE OF MAJOR WAR (1989). *But cf*. COLIN S. GRAY, ANOTHER BLOODY CENTURY: FUTURE WARFARE (2005).

[27] *See* Adam Tooze, *War at the End of History: Will Putin's invasion of Ukraine lead to a New World Order, or an Era of Grinding Compromise?*, THE NEW STATESMAN (Apr. 6, 2022), https://www.newstatesman.com/ideas/2022/04/war-at-the-end-of-history.

force, marked by primordial violence, chance, and reason,[28] as those caught up in the conflicts ravaging Afghanistan, Ethiopia, Ukraine, Yemen, and Gaza may attest to. At the same time, modern warfare is expanding in all directions. In addition to spreading across the physical environment on land, in the air, at sea, and in outer space, war now extends to a multitude of other domains, both material and non-material. Political warfare, cyber warfare, business warfare, ideological warfare, shadow warfare, economic warfare, psychological warfare, electronic warfare, pollution warfare, and digital influence warfare are just some of the various labels used to describe this trend. In an age of the weaponization of everything, warfare seems all-pervasive.[29] War in the contemporary world is thus more *omni*-dimensional than *multi*-domain in character.[30]

B. War as Metaphor?

Of course, many of these different dimensions of contemporary warfare can be described as war only in a metaphorical sense.[31] Information warfare, for example, is not war in the Clausewitzian tradition of the term. While it displays some of the qualities associated with armed hostilities, such as enmity, chance, and friction, it lacks the kinetic element of violence, destruction, and harm. Metaphorical manifestations of war are therefore qualitatively different from real war. They may form a key feature of the contemporary security environment and may resemble real war in certain respects. However, if the essence of war is violence, metaphorical war which does not beget material harm and destruction cannot, by definition, amount

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[28] VON CLAUSEWITZ, *supra* note 2, at 89 (this is Clausewitz's famous trinity).
[29] MARK GALEOTTI, THE WEAPONISATION OF EVERYTHING: A FIELD GUIDE TO THE NEW WAY OF WAR (2022).
[30] On multi-domain warfare, see UNITED STATES ARMY TRAINING AND DOCTRINE COMMAND, THE US ARMY IN MULTI-DOMAIN OPERATIONS 2028, TRADOC Pamphlet 525-3-1 (Headquarters, United States Army Training and Doctrine Command, 2018); Development, Concepts and Doctrine Centre, Multi-Domain Integration, Joint Concept Note 1/20 (United Kingdom Ministry of Defence, 2020).
[31] *See also* MARTIN C. LIBICKI, DEFENDING CYBERSPACE AND OTHER METAPHORS 6 (1997); *cf*. MARK JOHNSON & GEORGE LAKOFF, METAPHORS WE LIVE BY 5 (1st ed. 1980) ("The essence of metaphor is understanding and experiencing one kind of thing in terms of another").

to real war.[32] It follows that metaphorical war has nothing to do with the changing character of warfare either.

Superficially, these arguments may seem attractive. They promise conceptual clarity by drawing a sharp distinction between physical and non-physical violence. However, this distinction can be maintained only with difficulty. First, the threshold between real and metaphorical war is uncertain. This is so because violence is not entirely alien to metaphorical war. Assassination and sabotage are established instruments of political and economic warfare, as illustrated by the Salisbury poisoning incident and the more recent disruption of the Nord Stream gas pipeline.[33] Seen from this perspective, the difference between real and metaphorical war is a matter of degree, more a question of quantity, rather than distinct quality. Second, the harmful effects generated by metaphorical warfare may be virtually indistinguishable from those caused by real hostilities. For instance, cyber-attacks may render a computer system inoperative by manipulating or corrupting data much in the same way as kinetic attacks may render that system useless through its physical destruction.[34] Moreover, cyber-attacks are capable of producing kinetic effects that cause physical damage, even if attacks of this kind have so far been the exception, rather than the rule.[35]

Third, real and metaphorical war occupy different places on the same continuum of coercive action.[36] Whereas the goal of real war may be the physical destruction of the enemy through brute force, more often than not, its purpose is more limited and lies in coercing or compelling an

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[32] For an argument along these lines, see Thomas Rid, *Cyber War Will Not Take Place*, 35 J. STRATEGIC STUD. 5 (2012) and, in greater detail, THOMAS RID, CYBER WAR WILL NOT TAKE PLACE (2013).

[33] On the Salisbury incident, see MARK URBAN, THE SKRIPAL FILES: PUTIN, POISON AND THE NEW SPY WAR (2018). On Nord Stream, see Joanna Plucinska, *Nord Stream gas "sabotage": Who's being blamed and why?*, REUTERS (Oct. 6, 2022), https://www.reuters.com/world/europe/qa-nord-stream-gas-sabotage-whos-being-blamed-why-2022-09-30/.

[34] *Cf.* Ioannis Agrafiotis et al., *A Taxonomy of Cyber-harms: Defining the Impacts of Cyber-attacks and Understanding how they Propagate*, 4 J. CYBERSECURITY 1 (2018).

[35] S. D. Applegate, *The Dawn of Kinetic Cyber*, *in* 2013 5TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT 163 (K. Podins et al. eds., 2013).

[36] *See* Robert J. Art & Kelly M. Greenhill, *Coercion: An Analytical Overview*, *in* COERCION: THE POWER TO HURT IN INTERNATIONAL POLITICS 3 (Kelly M. Greenhill & Peter Krause eds., 2018).

adversary by imposing costs upon them.[37] Most of the time, real war employs violence to obtain the same outcomes—deterrence and compellence—as metaphorical war may seek to achieve through the use of non-violent or less violent means.

Fourth, precisely for this reason, real and metaphorical war are complementary. Belligerents do not forego non-violent means as soon as actual hostilities break out, but continue to engage in metaphorical warfare alongside combat operations, often with renewed vitality.[38] In fact, military operations involve countless activities, such as ruses and other forms of military deception, which are connected to combat either directly or indirectly, but which do not themselves constitute acts of violence. Once real war breaks out, the dividing line between coercive acts carried out in pursuit of metaphorical war and those carried out in furtherance of real war fades quickly.[39]

Finally, real wars that only seek to coerce, rather than comprehensively destroy, an adversary may achieve their objectives through the mere threat of violence. In some cases, such threats may be sufficient to obtain the desired outcome without the need for the actual use of force at all.[40] Clausewitz admits that this poses an embarrassment for a theory of war that treats combat as the essential and necessary feature of warfare: how can the mere threat of war be described as "war" in a strict sense without self-contradiction?[41] Unable to resolve the conundrum,[42] Clausewitz accepts that wars which "consist in *merely threatening the enemy*" are nonetheless wars,

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[37] For a classic discussion, see THOMAS C. SCHELLING, ARMS AND INFLUENCE 1–34 (2d ed. 2008).

[38] *Cf.* Kristen E. Eichensehr, *Ukraine, Cyberattacks, and the Lessons for International Law*, 116 AM. J. INT'L L. UNBOUND 145, 149 (2022) ("Part of what is significant about the Ukraine conflict is not just the absence of high-end mass destructive or disruptive cyberattacks, but also the presence of the DDOS and other operations typical of the gray zone—albeit at an apparently heightened rate").

[39] This line is not very bright to begin with, bearing in mind that armed forces routinely engage in shaping and other influence operations, some of which are designed to have a deterrent effect on adversaries, outside situations of real war. *See* KYLE J. WOLFLEY, MILITARY STATECRAFT AND THE RISE OF SHAPING IN WORLD POLITICS (2021).

[40] Threats of military force are a well-established instrument of statecraft; *see* Todd S. Sechser, *Militarized Compellent Threats, 1918–2001*, 28 CONFLICT MGMT. & PEACE SCI. 377 (2011).

[41] VON CLAUSEWITZ, *supra* note 2, at 604.

[42] *See* HERBERG-ROTHE, *supra* note 3, at 86–87.

albeit limited ones.[43] However, does this not suggest that limited war, or "half-war" as Clausewitz calls it,[44] is in fact constant in an age of nuclear deterrence?[45] Does it not also imply that war can be a condition, a mere disposition towards combat short of actual fighting, as Hobbes would have it?[46] Finally, does it not suggest that acts of metaphorical warfare carried out under the threat of real war should be seen as an integral element of real war, rather than be treated as merely metaphorical?[47]

C. War Diffused

What these dilemmas illustrate is that the dividing line between real and metaphorical war is porous and unstable. Although not a novelty, this fluidity is one of the defining features of war in the contemporary world.[48] The spread of warfare across all domains, both material and non-material, has loosened the seams between a state of peace and a state of war. Metaphorical and half-war seem to leave little room for more than metaphorical and half-peace.[49]

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[43] VON CLAUSEWITZ, *supra* note 2, at 604.

[44] VON CLAUSEWITZ, *supra* note 2, at 604.

[45] *Cf*. ANTULIO J. ECHEVARRIA II, CLAUSEWITZ AND CONTEMPORARY WAR 136 (2007). *See also* W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 26, 27–28 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (the Cold War "created a system of neither war nor peace, but constant preparation for war").

[46] THOMAS HOBBES, LEVIATHAN 88–89 (Cambridge University Press 1996) (1651) ("the nature of Warre consisteth not in actuall fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary").

[47] Put differently, should measures of metaphorical warfare be viewed as "shaping operations" conducted either to prepare the battlespace for real war or to complement the threat of real war in order to coerce an adversary and thereby obviate the need for actual hostilities? *Cf*. Robert Bebber, *Information War and Rethinking Phase 0*, 15 J. INFO. WARFARE 39 (2016). On the role of shaping operations, see UNITED STATES DEPARTMENT OF DEFENSE, JOINT OPERATIONS, at V-9, Joint Publication (JP) 3-0 (Joint Chiefs of Staff, 2018).

[48] *See* QUINCY WRIGHT, A STUDY OF WAR 3–21 (1st ed. 1942) and QUINCY WRIGHT, A STUDY OF WAR 685–700 (2d ed. 1983).

[49] Or to use different images, a state of "unpeace" or "hot peace". *See* MARK LEONARD, THE AGE OF UNPEACE: HOW CONNECTIVITY CAUSES CONFLICT (2021); MICHAEL MCFAUL, FROM COLD WAR TO HOT PEACE: AN AMERICAN AMBASSADOR IN PUTIN'S RUSSIA (2018).

Technological innovations and adaptations in the use of new technologies are among the main drivers of this development. Our societies have become more interconnected as a result of the information revolution.[50] Whilst this has brought countless benefits, it has also generated new societal vulnerabilities by diffusing power[51] and creating opportunities for disruption and interference.[52] With the return of more intense geopolitical competition,[53] major powers are more willing to exploit these vulnerabilities to gain a strategic advantage at a time when greater access to instruments of mass violence has rendered non-State actors more capable of inflicting severe damage.[54] States are thus reaching down the spectrum of conflict to employ an ever wider range of non-violent means of coercion, while non-State actors are stretching up to deploy capabilities and tactics that replicate the intensity and destructive effects of conventional warfare.

At the same time, technology has loosened the constraints of geography and time. The ability of modern militaries to wage war remotely by employing targeted violence at a distance has extended war across space,[55] rendering it potentially ubiquitous.[56] Yet remote warfare has also distanced civil society from the visceral experience of warfighting, reducing its political and social costs.[57] This in turn has made protracted campaigning more acceptable to the public and helps governments to sustain war over

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[50] JAN A. G. M. VAN DIJK, THE NETWORK SOCIETY: SOCIAL ASPECTS OF NEW MEDIA (2d ed. 2006); MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY (Wiley Blackwell, 2d ed. 2010) (1996). *See also* CHRIS FREEMAN & FRANCISCO LOUÇÃ, AS TIME GOES BY: FROM THE INDUSTRIAL REVOLUTIONS TO THE INFORMATION REVOLUTION 301–35 (2001); JAMES GLEICK, THE INFORMATION: A HISTORY, A THEORY, A FLOOD (2011).

[51] JOSEPH S. NYE JR., THE FUTURE OF POWER 113–51 (2011); *see also* ALVIN TOFFLER, POWERSHIFT: KNOWLEDGE, WEALTH, AND VIOLENCE AT THE EDGE OF THE 21ST CENTURY (1990).

[52] Dave Karpf, *How Digital Disinformation Turned Dangerous*, *in* THE DISINFORMATION AGE 153 (Steven Livingston & W. Lance Bennett eds., 2020); *see generally* LEONARD, *supra* note 49.

[53] ROBERT KAGAN, THE RETURN OF HISTORY AND THE END OF DREAMS (2008).

[54] AUDREY KURTH CRONIN, POWER TO THE PEOPLE: HOW OPEN TECHNOLOGICAL INNOVATION IS ARMING TOMORROW'S TERRORISTS (2020).

[55] *See* REMOTE WARFARE: NEW CULTURES OF VIOLENCE (Rebecca A. Adelman & David Kieran eds., 2020); REMOTE WARFARE: INTERDISCIPLINARY PERSPECTIVES (Alasdair McKay et al. eds., 2021).

[56] *Cf.* Derek Gregory, *The Everywhere War*, 177 GEOGRAPHICAL J. 238 (2011).

[57] THOMAS WALDMAN, VICARIOUS WARFARE: AMERICAN STRATEGY AND THE ILLUSION OF WAR ON THE CHEAP 125–30 (2021).

time.[58] Technology is also undercutting the difference between war and its representation. While traditional broadcast media has universalized the experience of warfare through real-time reporting,[59] social media and related technologies have dramatically expanded the capacity of citizens to actively participate in war by relaying and producing information.[60] Television may have brought war into the living room,[61] but the mobile phone has brought the public to the war.[62] More than ever, mediating war is an aspect of fighting it.[63]

In short, technological progress and its impact has set in motion conflicting tendencies and transformations in the character of war: reducing, yet also increasing the distance to the battlefield; compressing, but also extending warfighting time; increasing interconnectedness among belligerents, whilst also fueling divisions within their own societies at home.

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[58] On the effects of "wartime" in societies not directly exposed to actual hostilities, see MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES (2012).

[59] ANDREW HOSKINS & BEN O'LOUGHLIN, WAR AND MEDIA: THE EMERGENCE OF DIFFUSED WAR (2010).

[60] MATTHEW FORD & ANDREW HOSKINS, RADICAL WAR: DATA, ATTENTION AND CONTROL IN THE 21ST CENTURY (2022).

[61] *See* DANIEL C. HALLIN, THE "UNCENSORED WAR": THE MEDIA AND THE VIETNAM WAR 103–210 (1986); Michael Mandelbaum, *Vietnam: The Television War*, 111 DAEDALUS 157 (1982).

[62] *E.g.*, Dan Sabbagh, *Ukrainians use phone app to spot deadly Russian drone attacks*, THE GUARDIAN (Oct. 29, 2022) https://www.theguardian.com/world/2022/oct/29/ukraine-phone-app-russia-drone-attacks-eppo. For an analysis of some the legal implications for civilians, see Michael N. Schmitt & William Casey Biggerstaff, *Are Civilians Reporting With Cell Phones Directly Participating in Hostilities?*, ARTICLES OF WAR (Nov. 2, 2022), https://lieber.westpoint.edu/civilians-reporting-cell-phones-direct-participation-hostilities/.

[63] *See* DAVID PATRIKARAKOS, WAR IN 140 CHARACTERS: HOW SOCIAL MEDIA IS RESHAPING CONFLICT IN THE TWENTY-FIRST CENTURY (2017); P. W. SINGER & EMERSON T. BROOKING, LIKEWAR: THE WEAPONIZATION OF SOCIAL MEDIA (2018).

Consequently, it is fair to conclude that "war has burst out of its old boundaries."[64] War is diffused.[65]

III. MAKING SENSE OF CONTEMPORARY WAR

In recent years, a plethora of concepts have emerged to explain contemporary forms of warfare and to realign our traditional understanding of war with new strategic realities. Notions such as unconventional warfare, asymmetric warfare, irregular warfare, persistent competition, and surrogate warfare are just some of the ideas put forward over the last two decades to make sense of modern war and its trajectory. For our purposes, three of these concepts—hybridity, political warfare, and gray zone conflict—merit closer attention, as each of them highlights a significant feature of contemporary conflict.

The idea at the heart of *hybridity* is simple: a hybrid is some kind of compound made up of diverse elements. Although the notion has lent itself to different applications in policy discourse and practice, leading to an important distinction between hybrid warfare and hybrid threats, the value of the hybrid construct is that it underscores the compound or mixed character of contemporary warfare. The concept of *political warfare* is based on the realization that war and peace are not diametrically opposed, but are different manifestations of political struggle carried out through different means. Political warfare waged through measures short of war therefore shares many traits with real warfare, displaying levels of antagonism and intensity that are similar to those of actual war. Finally, the notion of *gray zone conflict* suggests that hostile actors engage in coercive activities that go beyond routine competition, but are calculated to stop short of open warfare, thereby creating a zone of conflict that falls in-between the traditional duality of war and peace. Despite their various shortcomings, all three notions offer insights

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[64] ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON 13 (2016).

[65] For other work on diffusion and war, see MICHAEL C. HOROWITZ, THE DIFFUSION OF MILITARY POWER: CAUSES AND CONSEQUENCES FOR INTERNATIONAL POLITICS (2010) (explaining the adoption and spread of military innovations); HOSKINS & O'LOUGHLIN, *supra* note 59 (describing diffused war as a new paradigm of war where the mediatization of war creates more diffuse causal relationships and greater uncertainty for decision-makers).

that aid our understanding of the changing character of war, as we shall find out below.

A. Hybrid Warfare

The notion of hybridity was introduced into the national security discourse by General James Mattis and Lieutenant Colonel (retired) Frank Hoffman, both formerly of the United States Marine Corps, in 2005.[66] Surveying the trends of warfare and their implications for the organization and composition of the United States military, Mattis and Hoffman suggested that future adversaries will most likely resort to irregular means against the United States in an attempt to offset its overwhelming superiority in conventional combat. To achieve their goals, adversaries are bound to rely on niche capabilities and unexpected combinations of tactics to catch the United States off guard. Specifically, they are likely to adopt a combination of diverse modes of violence, blending conventional warfighting, terrorism, insurgency, guerrilla tactics, and organized criminality in a synergistic manner. Mattis and Hoffman described this blend of violence as hybrid war.[67] As originally understood by these two authors, "hybrid warfare" thus refers to a form of warfighting that combines distinct modalities of physical violence and employs these in a complementary manner.[68]

The Second Lebanon War of 2006 seemed to confirm these predictions. In that conflict, Israel was confronted by Hezbollah, a non-State adversary, fielding a combination of conventional and irregular capabilities

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[66] James N. Mattis & Frank G. Hoffman, *Future Warfare: The Rise of Hybrid Wars*, 131 PROC. MAG. 18 (2005). On the intellectual evolution of the term, see OFER FRIDMAN, RUSSIAN "HYBRID WARFARE": RESURGENCE AND POLITICIZATION (2018). For historical context, see HYBRID WARFARE: FIGHTING COMPLEX OPPONENTS FROM THE ANCIENT WORLD TO THE PRESENT (Williamson Murray & Peter R. Mansoor eds., 2012).

[67] For a more in-depth discussion, see FRANK G. HOFFMAN, CONFLICT IN THE 21ST CENTURY: THE RISE OF HYBRID WARFARE (2007); Frank G. Hoffman, *Hybrid Threats: Reconceptualizing the Evolving Character of Modern Conflict*, STRATEGIC F. 1 (2009).

[68] For similar, but not identical, uses of the term, see TIMOTHY MCCULLOH & RICHARD JOHNSON, HYBRID WARFARE 17 (2013) (describing hybrid war as form of warfare where a party combines all available resources to produce synergistic effects against a conventionally-based opponent); John J. McCuen, *Hybrid Wars*, 88 MIL. REV. 107, 108 (2008) (defining hybrid wars as a combination of symmetric and asymmetric warfare).

in a highly congested operating environment. Although the Israel Defense Forces ultimately prevailed in a narrow military sense, they struggled to confidently assert their conventional superiority against these hybrid capabilities and tactics.[69] Partly as a consequence, the Israeli Government found that the military means at its disposal were insufficient to achieve its ambitious strategic goals and to successfully shape the wider perception of the war.[70]

Concerned by the prospects of such hybrid conflicts, the North Atlantic Treaty Organization (NATO) began to study the subject of hybridity from 2008 onwards as part of its work on the future of warfare, including by conducting a series of conceptual experiments.[71] The Alliance focused on "hybrid threats," which it defined as threats posed by adversaries "with the ability to simultaneously employ conventional and non-conventional means adaptively in pursuit of their objectives."[72] The notion of hybrid *threats* extends the concept of hybrid *war* introduced by Mattis and Hoffman in two principal ways. First, hybrid threats comprise not only actual warfighting, but also situations of potential violence. Second, whereas hybrid war describes the amalgamation of diverse forms of physical violence, hybrid threats are not confined to armed force, but entail the complementary use of military and civilian means. Despite embracing a wider understanding of hybridity, NATO's attention nonetheless remained firmly focused on hybridity in situations of conflict or near-conflict, in line with its institutional mandate of collective self-defense against armed attack.[73]

This broader approach was vindicated by the Russian Federation's annexation of Crimea in 2014.[74] In what seemed to many observers like a

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[69] BRIN NAJŽER, THE HYBRID AGE: INTERNATIONAL SECURITY IN THE ERA OF HYBRID WARFARE 89–111 (2020); SCOTT C. FARQUHAR, BACK TO BASICS: A STUDY OF THE SECOND LEBANON WAR AND OPERATION CAST LEAD (2009).

[70] PATRICK PORTER, MILITARY ORIENTALISM: EASTERN WAR THROUGH WESTERN EYES 171–90 (2009).

[71] Headquarters, Supreme Allied Commander Transformation, Assessing Emerging Security Challenges in the Globalised Environment: The Countering Hybrid Threats (CHT) Experiment, Final Experiment Report (FER) (2015). On NATO's approach to hybrid threats, see NATO'S RESPONSE TO HYBRID THREATS (Guillaume Lasconjarias & Jeffrey A. Larsen eds., 2015).

[72] Supreme Headquarters Allied Powers Europe and Allied Command Transformation, Bi-SC Input to a New NATO Capstone Concept for the Military Contribution to Countering Hybrid Threats 2–3 (2010).

[73] North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 541.

[74] SERHY YEKELCHYK, UKRAINE: WHAT EVERYONE NEEDS TO KNOW 104–39 (2d ed. 2020).

textbook application of NATO's definition of hybrid threats,[75] Russia employed a range of military and civilian measures to take control of the Crimean peninsula, including covert operations by special forces, disinformation, economic pressure, deception, and paramilitary proxies,[76] all backed by nuclear messaging and a threat of massive military escalation through conventional forces held in reserve.[77] This seemingly close match between theory and practice allowed the idea of hybridity to gain wider traction.[78] In response to Russia's aggression, NATO leaders declared themselves ready at their Wales Summit held in September 2014 to "…effectively address the specific challenges posed by *hybrid warfare threats*, where a wide range of overt and covert military, paramilitary, and civilian measures are employed in a highly integrated design."[79] The Wales Summit Declaration engraved hybridity into the Western policy lexicon and confirmed NATO's understanding of the term as primarily concerned with the integrated use of military and civilian levers of power in the context of actual or impending armed conflict.

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[75] *E.g.,* ANDRÁS RÁCZ, RUSSIA'S HYBRID WAR IN UKRAINE: BREAKING THE ENEMY'S ABILITY TO RESIST (2015); *cf*. Lawrence Freedman, *Ukraine and the Art of Limited War*, 56 SURVIVAL 7, 11 (2014) ("the advantages of hybrid warfare have been less evident than often claimed").

[76] KENT DEBENEDICTIS, RUSSIAN "HYBRID WARFARE" AND THE ANNEXATION OF CRIMEA: THE MODERN APPLICATION OF SOVIET POLITICAL WARFARE (2021); Oscar Jonsson & Robert Seely, *Russian Full-Spectrum Conflict: An Appraisal After Ukraine*, 28 J. SLAVIC MIL. STUD. 1 (2015).

[77] On the military and paramilitary dimension of the Russian operation to take Crimea, see Anton Lavrov, *Russia Again: The Military Operation for Crimea*, *in* BROTHERS ARMED: MILITARY ASPECTS OF THE CRISIS IN UKRAINE 157 (Colby Howard & Ruslan Pukhov eds., 2015). On the role of force in Russia's subsequent actions towards Donbas, see Andrew S. Bowen, *Coercive Diplomacy and the Donbas: Explaining Russian Strategy in Eastern Ukraine*, 42 J. STRATEGIC STUD. 312 (2019). On the nuclear dimension, see JACEK DURKALEC, NUCLEAR-BACKED "LITTLE GREEN MEN:" NUCLEAR MESSAGING IN THE UKRAINE CRISIS (2015).

[78] GILES KEIR, RUSSIA'S 'NEW' TOOLS FOR CONFRONTING THE WEST: CONTINUITY AND INNOVATION IN MOSCOW'S EXERCISE OF POWER 6 (2016) ("The hybrid phraseology became firmly embedded in NATO's conceptual framework for characterizing Russian operations in Ukraine…").

[79] Press Release, North Atlantic Council, Wales Summit Declaration issued by the Heads of State and Government participating in the meeting of the North Atlantic Council, NATO Press Release (2014) 120 ¶ 13 (Sept. 5, 2014).

B. Hybrid Threats

The notion of hybrid warfare, as coined by Mattis and Hoffman, draws on the idea of hybridity in a narrow fashion, using it to describe the synergistic combination of diverse forms of organized violence. Whilst this usage captures an important trend in the changing character of warfare, its focus on actual hostilities reflects the priorities of the armed forces. Most importantly, it overlooks the fact that persistent competition below the threshold of open warfare has become one of the defining features of the contemporary security environment. NATO's reframing of hybridity as the combined use of military and civilian means aligned the concept more closely with this geopolitical reality.

Other institutions have taken a different approach. The European Union has defined hybrid threats to mean the synergistic use of non-violent means below the threshold of open hostilities.[80] On this understanding, actual or potential violence is not an essential feature of hybrid threats. This approach encounters two main difficulties. First, threats are largely in the eye of the beholder. A threat is commonly understood as a perceived or declared possibility of harm.[81] Unlike risks, they are deliberate and directed by one actor against another.[82] For this reason, threats are actor-specific in the sense that their harmful impact depends on the circumstances and interests of the parties affected. In the context of geopolitical competition, what is a threat to one party may be a strategic advantage to another. Second, the synergistic use of multiple levers of power is not a sinister or novel idea, but a feature of good statecraft. Most international actors aspire to use the different resources

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[80] European Commission, Joint Communication to the European Parliament and the Council JOIN (2016) 18 final, Joint Framework on Countering Hybrid Threats: A European Union Response (Apr. 6, 2016) 2 ("…the concept aims to capture the mixture of coercive and subversive activity, conventional and unconventional methods (i.e. diplomatic, military, economic, technological), which can be used in a coordinated manner by state or non-state actors to achieve specific objectives while remaining below the threshold of formally declared warfare."). *Cf.* DANIEL FIOTT & RODERICK PARKES, PROTECTING EUROPE: THE EU'S RESPONSE TO HYBRID THREATS 4–6 (2019).

[81] J. Reid Meloy et al., *Threat Assessment and Threat Management*, *in* INTERNATIONAL HANDBOOK OF THREAT ASSESSMENT 3 (J. Reid Meloy & Jens Hoffmann eds., 2d ed. 2021).

[82] Fabrizio Battistelli & Maria Grazia Galantino, *Dangers, Risks and Threats: An Alternative Conceptualization to the Catch-all Concept of Risk*, 67 CURRENT SOCIO. 64 (2019).

at their disposal in a coherent manner. The complementary use of multiple policy instruments is therefore hardly remarkable.

Accordingly, the analytical value of the notion of hybrid threats is limited if it is used to describe synergistic action in general without reference to the particular circumstances, interests, and goals of individual actors. Since all international actors aspire to act coherently and in doing so will at least potentially threaten the interests of their rivals, a value-neutral use of the term amounts to little more than a truism. To endow it with more specific meaning, the phrase has therefore frequently been used by Western commentators and institutions in a pejorative sense to describe the efforts of authoritarian governments to undermine or otherwise weaken democratic nations. In the political West, the notion of hybrid threats has thus become a shorthand for the malign activities and tactics employed by hostile actors against open societies.[83] This is evident in the approach taken by the European Centre of Excellence for Countering Hybrid Threats, which characterizes hybrid threats as

> action conducted by state or non-state actors, whose goal is to undermine or harm a target by influencing its decision-making at the local, regional, state or institutional level. Such actions are coordinated and synchronized and deliberately target democratic states' and institutions' vulnerabilities. Activities can take place, for example, in the political, economic, military, civil or information domains. They are conducted using a wide range of means and designed to remain below the threshold of detection and attribution.[84]

While this definition does not exclude coercive activities and makes explicit reference to the military domain, it is nevertheless geared towards malign

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[83] *Cf.* Press Release, North Atlantic Council, Brussels Summit Communiqué issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Brussels, NATO Press Release (2021) 086 ¶ 31 (June 14, 2021); European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Security Union Strategy, at 14–5, COM (2020) 605 final (July 24, 2020).

[84] *Hybrid Threats as a Concept*, EUR. CTR. EXCELLENCE FOR COUNTERING HYBRID THREATS, https://www.hybridcoe.fi/hybrid-threats-as-a-phenomenon/ (last visited Nov. 10, 2022).

activities that occur below the threshold of armed conflict and which are typically non-violent in character.

C. Political Warfare

The position that war and peace are separate conditions, or that at least they should be, has long been opposed by those who argue that war and peace are in fact part of the same continuum. Proponents of this view dismiss attempts to sharply delineate one from the other not just as unconvincing, but as severely misguided and fraught with potential danger. A prominent example of this position is George F. Kennan's advocacy for organized political warfare during the opening stages of the Cold War.[85]

Confronted by the Soviet Union's concerted efforts to expand its sphere of influence across Europe with all means at its disposal,[86] Kennan argued that the United States should conduct its own form of political warfare, utilizing measures short of war to counter the Kremlin's aggressive designs.[87] His proposal was based on an implicit distinction between the nature of the confrontation taking place and the means employed to pursue it. Kennan described the contest between the United States and the Soviet Union in decidedly martial terms, speaking of a "political assault," battles, weapons, "indirect aggression," and a "political offensive."[88] He felt that the United States was embroiled in "a type of war" with the Soviet Union and that the situation was only "nominally peaceful."[89] In fact, Kennan saw Washington and Moscow engaged in a struggle consisting of two phases: a *political phase* during which they sought to expand their respective power through mostly non-military means, potentially followed by a *military phase* involving direct confrontation between their armed forces should the initial,

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[85] *See* Scott Lucas & Kaeten Mistry, *Illusions of Coherence: George F. Kennan, U.S. Strategy and Political Warfare in the Early Cold War, 1946-1950*, 33 DIPLOMATIC HIST. 39 (2009); Sarah-Jane Corke, *George Kennan and the Inauguration of Political Warfare*, 26 J. CONFLICT STUD. 101 (2006).

[86] For Kennan's assessment of the Soviet Union's intentions, see *The Charge in the Soviet Union (Kennan) to the Secretary of State 861.00/2–2246: Telegram ("The Long Telegram")*, *in* FOREIGN RELATIONS OF THE UNITED STATES 1946: VOLUME VI, EASTERN EUROPE, THE SOVIET UNION 696 (Rogers P. Churchill & William Slany eds., 1969); X, *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566 (1947).

[87] George F. Kennan, *What is Policy?*, *in* MEASURES SHORT OF WAR: THE GEORGE F. KENNAN LECTURES AT THE NATIONAL WAR COLLEGE 1946-47 295 (Giles D. Harlow & George C. Maerz eds., 1991).

[88] *Id.* at 301–05.

[89] *Id.* at 305, 308.

political phase of the struggle be lost.[90] On this account, war and peace are both an arena of confrontation and struggle. What distinguishes them is the means employed.[91]

This is a deeply Clausewitzian position. Like Clausewitz's theory of war, the notion of political warfare maintains that politics, in the sense of a grand strategy for asserting and contesting power,[92] permeates both war and peace, and ties them together.[93] The point was made explicit in a memorandum on political warfare prepared in 1948 by Kennan's unit at the State Department, which in its opening sentence declared political warfare to be "the logical application of Clausewitz's doctrine in time of peace".[94] The memorandum went on to lament the "popular attachment to the concept of a basic difference between peace and war" in the United States and the corresponding "reluctance to recognize the realities of international relations—the perpetual rhythm of struggle, in and out of war."[95] War is a clash of wills, but so is peace; the difference lies in the instruments of contestation.[96]

As an analytical concept, political warfare asserts the essential similarity of war and peace based on the premise that political antagonism is a defining feature of both. By borrowing from the vocabulary and imagery of warfare, the concept underscores the intensity of this antagonism and its relative abnormality.[97] Kennan thus contrasted the bitterness of political

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[90] *Id.* at 302–08.
[91] *Id.* at 302.
[92] *Cf. id.* at 296.
[93] As Clausewitz puts it, war is a conflict of interests that differs from other forms of human conflict only in that it is resolved by bloodshed. The outlines of war are already present in peacetime in nascent form. *See* VON CLAUSEWITZ, *supra* note 2, at 149.
[94] U.S. Dep't State, *Policy Planning Staff Memorandum on the Inauguration of Organized Political Warfare*, *in* FOREIGN RELATIONS OF THE UNITED STATES, 1945–50: EMERGENCE OF THE INTELLIGENCE ESTABLISHMENT 668 (C. Thomas Thorne, Jr. et al. eds., 1996).
[95] *Id.* at 669.
[96] *Cf.* PAUL A. SMITH, JR., ON POLITICAL WAR 3 (1989) ("Political war is the use of political means to compel an opponent to do one's will, *political* being understood to describe purposeful intercourse between peoples and governments affecting national survival and relative advantage.").
[97] *Cf.* Angelo M. Codevilla, *Political Warfare, in* POLITICAL WARFARE AND PSYCHOLOGICAL OPERATIONS: RETHINKING THE U.S. APPROACH 77 (Frank R. Barnett & Carnes Lord eds., 1989) ("Political warfare is the *forceful* political expression of policy") (emphasis added).

warfare with the prospect of more benign conditions during which international affairs could be conducted on the basis of a shared commitment to peaceful co-existence.[98] In addition, political warfare asserts the continuity between war and peace. The political phase of great power contest may turn out to be a mere prequel to the actual war that dominates its second military phase. Conversely, peace may be a mere sequel to war. The absence of open violence in times of peace obscures the fact that peace may simply be the continuation of warfare by other means of coercion, as the likes of Winston Churchill and Michel Foucault have observed.[99]

The parallels between the early days of the Cold War and our own geopolitical climate are striking, notwithstanding clear differences in the modalities of great power competition between then and now. It is not surprising, therefore, to find that the idea of political warfare has attracted renewed interest.[100] Using political warfare as an interpretive lens, a study carried out by the RAND Corporation has suggested that contemporary measures short of conventional warfare are characterized by a set of shared attributes, including the unprecedented reach of non-State actors, heavy reliance on non-attribution, and the increased importance of information operations.[101] Among the study's noteworthy findings is the point that modern forms of political warfare extend, rather than replace, traditional conflict.[102] For the most part, political warfare enables an actor to achieve

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[98] Kennan, *supra* note 87, at 298.

[99] WINSTON S. CHURCHILL, THE WORLD CRISIS: THE AFTERMATH 264 (1929) ("a state of so-called peace, i.e., a suspension of actual fighting with firearms, may simply mean that the war proceeds in a still more difficult and dangerous form, viz., instead of being attacked by soldiers on the frontier, the country is poisoned internally and every good and democratic institution which it possesses is undermined"); MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLEGE DE FRANCE 1975–76 46–51 (David Macey trans., Picador 2003) (1976). *See also* Necati Polat, *Peace as War*, 35 ALTERNATIVES: GLOB., LOC., POL. 317 (2010).

[100] *E.g.*, Donovan C. Chau, *Political Warfare—An Essential Instrument of U.S. Grand Strategy Today*, 25 COMPAR. STRATEGY 109 (2006); Thomas Paterson & Lauren Hanley, *Political Warfare in the Digital Age: Cyber Subversion, Information Operations and 'Deep Fakes'*, 74 AUSTL. J. INT'L AFF. 439 (2020); HAL BRANDS, THE DARK ART OF POLITICAL WARFARE: A PRIMER (2020); SETH G. JONES, THE RETURN OF POLITICAL WARFARE (2018); LINDA ROBINSON ET AL., THE GROWING NEED TO FOCUS ON MODERN POLITICAL WARFARE (2019).

[101] LINDA ROBINSON ET AL., MODERN POLITICAL WARFARE: CURRENT PRACTICES AND POSSIBLE RESPONSES xix (2018).

[102] *Id.* at 242–45.

relatively limited objectives at lower cost. The study suggests that political warfare should therefore be seen as part of the spectrum of warfare, rather than as a substitute for conventional force.

D. Gray Zone Conflict

Although no universally accepted definition of the term exists, gray zone conflict is widely understood to involve the pursuit of strategic objectives in a manner that is coercive and aggressive, yet deliberately designed to remain below the threshold of conventional war.[103] In other words, just like hybrid threats and political warfare, gray zone conflict is concerned with strategic competition involving measures short of war.[104]

In a white paper published in 2015, the United States Special Forces Command defined gray zone conflicts as "competitive interactions among and within state and non-state actors that fall between the traditional war and peace duality."[105] A report prepared by the International Security Advisory Board of the United States State Department adopted a similar approach, arguing that the central characteristic of gray zone operations is "that they involve the use of instruments beyond normal international interactions yet short of overt military force."[106] As these definitions make clear, the distinguishing feature of gray zone conflict is that it takes place in a space that falls in between war and peace. The gray zone must therefore be demarcated on two sides, from war at the higher end and from peace at the lower end. This is easier said than done.

Gray zone conflict is variously said to occur below the level of overt war or at least below the level of conventional military conflict. Many of the coercive measures associated with gray zone conflict, such as information operations and economic sanctions, evidently do fall below these

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[103] *E.g.*, Javier Jordan, *International Competition Below the Threshold of War: Toward a Theory of Gray Zone Conflict*, 14 J. STRATEGIC SEC. 1, 2 (2020); Philip Kapusta, *The Gray Zone*, 28 SPECIAL WARFARE 18, 20 (2015); Isaiah Wilson III & Scot Smitson, *Solving America's Gray-Zone Puzzle*, 46 PARAMETERS 55, 56 (2016); KATHLEEN H. HICKS ET AL., BY OTHER MEANS PART I: CAMPAIGNING IN THE GRAY ZONE 34 (2019); Hal Brands, *Paradoxes of the Gray Zone*, FOREIGN POL. RSCH. INST. (Feb. 5, 2016) https://www.fpri.org/article/2016/02/paradoxes-gray-zone/.

[104] *Cf.* Jahara W. Matisek, *Shades of Gray Deterrence: Issues of Fighting in the Gray Zone*, 10 J. STRATEGIC SEC. 1, 2 (2017).

[105] PHILIP KAPUSTA, WHITE PAPER: THE GRAY ZONE 1 (2015).

[106] INT'L SECURITY ADVISORY BD., REPORT ON GRAY ZONE CONFLICT 2 (2017).

thresholds.[107] However, other measures linked to the concept, such as unconventional warfare, sabotage, or the use of paramilitary proxies, may involve the use of military force and could amount to real war, even if only limited and irregular in character.[108] Examples of such gray zone incidents include China's military activities in the South China Sea and Russia's support for separatist forces in Eastern Ukraine.[109] Accordingly, it is difficult to confidently differentiate gray zone conflict from actual warfare at the top end, where real and metaphorical war overlap.

At the lower end of the spectrum, gray zone conflict must be distinguished from peace. However, if competition is an endemic feature of the international system, at least among the great powers, what separates peacetime rivalry from gray zone conflict? Most commentators insist that a certain level of aggression is required to push peacetime competition into the gray zone.[110] This suggests that it is the heightened degree of animosity, what Kennan described as "bitterness," that elevates ordinary peacetime interaction into the gray zone.[111] This sounds intuitive, but it is not an exact threshold. For example, the International Security Advisory Board refers to engagements that go "beyond *normal* international interactions."[112] However, if gray zone conflict is a persistent feature of the international system, what precisely makes it abnormal? Some authors point to the revisionist aims that gray zone actors typically pursue.[113] In some cases the

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[107] HICKS ET AL., *supra* note 103, at 7.

[108] *E.g.*, Joseph L. Votel et al., *Unconventional Warfare in the Gray Zone*, 80 JOINT FORCE Q. 101, 103–09 (2016); INT'L SECURITY ADVISORY BD., *supra* note 106, at 2–3.

[109] *E.g.*, Maren Leed, *Square Pegs, Round Holes, and Gray Zone Conflicts: Time to Step Back*, 16 GEO. J. INT'L AFFAIRS 133, 137–40 (2015); James J. Wirtz, *Life in the "Gray Zone": Observations for Contemporary Strategists*, 33 DEF. & SEC. ANALYSIS 106, 108–09 (2017).

[110] *E.g.*, Kapusta, *supra* note 103, at 21.

[111] Kennan, *supra* note 87, at 308; *see also* Votel, *supra* note 108, at 102 ("intense political, economic, informational, and military competition more fervent in nature than normal steady-state diplomacy").

[112] INT'L SECURITY ADVISORY BD., *supra* note 106, at 2.

[113] MICHAEL J. MAZARR, MASTERING THE GRAY ZONE: UNDERSTANDING A CHANGING ERA OF CONFLICT 9–31 (2015); *cf.* ANTULIO J. ECHEVARRIA II, OPERATING IN THE GRAY ZONE: AN ALTERNATIVE PARADIGM FOR U.S. MILITARY STRATEGY 12–13 (2016) (adversaries are operating below threshold of armed conflict to achieve "wartime-like" objectives); NATHAN P. FREIER ET AL., OUTPLAYED: REGAINING STRATEGIC INITIATIVE IN THE GRAY ZONE 33 (2016) ("achieve warlike aims without resorting to warlike violence").

revisionist intent is obvious, for example where hostile actors seek to alter the territorial *status quo* or expand their sphere of influence, as Russia attempts to do in Ukraine. Yet in other cases, revisionism may be more subtle and a matter of perspective,[114] for instance when authoritarian governments hold up the principle of non-intervention as a shield against criticisms of their human rights record.[115] Finally, gray zone conflict is sometimes distinguished from peacetime competition with reference to the means and tactics employed. The International Security Advisory Board suggests that gray zone actors rely on means that "go beyond the forms of political and social action and military operations with which liberal democracies are familiar, to make deliberate use of instruments of violence, terrorism, and dissembling."[116] The tactics usually associated with gray zone conflict include deliberate ambiguity, deception, prolonged campaigning, the use of proxies, and seeking incremental gains.[117] However, even if these measures were the sole preserve of authoritarian actors, which surely they are not, at best they would still only draw a rather uncertain line between peacetime competition and gray zone conflict.

By situating itself in the space that falls in between the duality of war and peace, gray zone conflict needs to be demarcated from both. The gray zone concept thereby trades one uncertain dividing line between war and peace for two uncertain thresholds: the threshold to war at the higher end and the threshold to peace at the lower end.[118] Whether this deal is worth the trouble is doubtful: it hardly offers greater analytical clarity.

Nevertheless, the gray zone construct is not without merit. The notion that State and non-State actors engage in hostile measures that are highly coercive in effect or design, but are deliberately calculated to avoid escalation into open military confrontation, clearly reflects an important strategic reality. To conceptualize this as a relatively distinct zone on the

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[114] Van Jackson, *Tactics of Strategic Competition: Gray Zones, Redlines, and Conflicts before War*, 70 NAVAL WAR COLL. REV. 39, 50–56 (2017).

[115] *See Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development*, PRESIDENT OF RUSSIA (Feb. 4, 2022), http://en.kremlin.ru/supplement/5770.

[116] INT'L SECURITY ADVISORY BD., *supra* note 106, at 2.

[117] Geraint Hughes, *War in the Grey Zone: Historical Reflections and Contemporary Implications*, 62 SURVIVAL 131, 133–36 (2020).

[118] *Cf.* John Arquilla, *Perils of the Gray Zone: Paradigms Lost, Paradoxes Regained*, 7 PRISM 118, 124–26 (2018).

spectrum of conflict also resonates. Where the gray zone construct disappoints is its attempt to delineate this sphere from war and peace. In the absence of clear thresholds, this attempt is bound to be unconvincing. One way to avoid this trap is to treat the gray zone not as a space that falls *in between* war and peace, so that it is neither one nor the other, but as the space where war and peace *gradually blend* into each other, with no hard-and-fast boundaries on either side. Understood in this way, the point of the gray zone concept is to highlight that the blurred line between war and peace is not really a line at all, but a much wider zone of uncertainty where highly coercive interactions combine elements of war and peace.[119]

E. Diffused Warfare: A Need for New Paradigms?

The three concepts just outlined—hybridity, political warfare, and gray zone conflict—map onto the spectrum of conflict in different ways. Hybrid warfare, as understood by Mattis and Hoffman, is focused on war in its traditional, strict sense. By comparison, the notions of hybrid threats narrowly defined, political warfare, and gray zone conflict are all concerned with adversarial engagements below the threshold of open hostilities. Only NATO's somewhat awkward reframing of hybridity as "hybrid warfare threats," consisting of the synergistic use of military and civilian instruments, deliberately straddles the classic divide between war and peace. Where does this leave us with respect to the diffused character of contemporary warfare?

Of the three concepts, NATO's notion of "hybrid warfare threats" best reflects the way in which modern war is diffused and oscillates between the real and the metaphorical. Compared to concepts such as grand strategy and the "comprehensive approach,"[120] both of which envisage the holistic use of all levers of power, the added value of hybridity is to underline that

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[119] *Cf*. DAVID KILCULLEN, THE DRAGONS AND THE SNAKES: HOW THE REST LEARNED TO FIGHT THE WEST 151–55 (2020) (noting that the "threshold between armed conflict and competition is not in fact a line, but rather a transitional space or liminal zone…" and describing this zone as "liminal maneuver space.").

[120] As Colin Gray put it, grand strategy is the "direction and use made of any or all the assets of a security community, including its military instrument, for the purposes of policy as decided by politics," or, in essence, the theory and practice of statecraft itself. COLIN S. GRAY, THE STRATEGY BRIDGE: THEORY FOR PRACTICE 18, 28 (1st ed. 2010). At its most general, the comprehensive approach calls for the coordinated use of military and civilian capabilities, typically in the context of crisis management. *See* CÉCILE WENDLING, THE COMPREHENSIVE APPROACH TO CIVIL-MILITARY CRISIS MANAGEMENT: A CRITICAL ANALYSIS AND PERSPECTIVE (2010).

adversaries may employ coercive measures short of war in combination with armed force, whether actual or threatened, in a complementary manner in order to achieve synergistic effects.[121] Complementarity in this context means more than just acting coherently or using all available means of statecraft. As the literature on gray zone conflict points out,[122] coercive measures short of war—regardless of whether we label them hybrid threats, political warfare, or gray zone interactions—are often designed to avoid open military confrontation, whether due to weakness, limited objectives, or a fear of escalation. In other words, they are calculated to exert significant coercive pressure, but at a level that remains below red lines and thresholds which, if they were to be crossed, might stir a rival to respond decisively, possibly through resort to armed force. The same logic continues to apply even in situations of open hostilities. For example, Russia's reliance on a combination of military and political warfare measures in Eastern Ukraine in the years following the annexation of Crimea enabled it to conduct a more limited war and to manage the risk of escalation.[123] Real and metaphorical war thus complement each other, blending hostilities with measures short of war, and military with non-military means to create synergies.

By focusing our attention primarily on conflict below the threshold of open warfare, the hybrid threat, political warfare, and gray zone conflict constructs may end up obscuring the continuity between real and metaphorical warfare and underplaying the complementarity of armed force and measures short of war. These are serious limitations. Nonetheless, by turning the spotlight on adversarial engagements short of real war, they single out metaphorical warfare and thereby enable us to better appreciate its place in the contemporary "threatscape" and its role in diffusing warfare.

Does this mean that the classic understanding of war is no longer fit for purpose? That conclusion would be a step too far. The simple fact is that combat operations carried out by organized armed forces, which Clausewitz identified as the essence of war, can deliver physical destruction on a scale

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[121] Along broadly similar lines, see Ilmari Käihkö, *The Evolution of Hybrid Warfare: Implications for Strategy and the Military Profession*, 51 PARAMETERS 115, 119 (2021) ("…hybrid war and gray zone conflict suggest that success in contemporary war depends on coordination and combination of military and nonmilitary means.").
[122] Jackson, *supra* note 114, at 40–41; MAZARR, *supra* note 113, at 33–34; Wirtz, *supra* note 109, at 107.
[123] Andrew Mumford & Pascal Carlucci, *Hybrid Warfare: The Continuation of Ambiguity by Other Means*, 9 EUR. J. INT'L SEC. 1, 11 (2022).

and at a speed that other forms of violence are unable to match. At the same time, combat is too blunt an instrument to be of universal utility as a tool of statecraft, as Kennan and other proponents of political warfare have recognized.[124] Not every problem has a military solution. Other instruments remain relevant and necessary. Accordingly, while armed force has a role to play, it is a specialized role. Real war is *not* ubiquitous.

These considerations suggest that drawing a distinction between war and peace based on the presence or absence of combat between organized armed forces remains valid and useful. Notwithstanding all the conceptual difficulties involved, there is a material difference between actual armed hostilities and measures short of combat. The point is not lost in practice. For example, when missiles hit the territory of Poland close to its border with Ukraine on November 15, 2022, killing two Polish civilians and causing material damage,[125] the incident immediately generated much speculation as to whether it constituted an armed attack by Russia for the purposes of the collective security guarantee set out in Article 5 of the North Atlantic Treaty.[126] Eventually, it was determined that the missiles in question were most likely launched by Ukraine to intercept Russian missiles and that they landed in Poland by accident.[127] The incident demonstrates that despite the many ways in which Poland and other members of the North Atlantic Alliance are affected by and invested in the war between Russia and Ukraine, questions of intent, scale, and context determine whether red lines and

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[124] Kennan, *supra* note 87, at 306.

[125] Marc Santora & Maria Varenikova, *Poland Suggests Russian-Made Missile Killed 2 Inside Its Borders*, N.Y. TIMES (Nov. 15, 2022), https://www.nytimes.com/2022/11/15/world/europe/poland-ukraine-russia-nato.html.

[126] *E.g.*, Graeme Demianyk, *What Happens If Russian Missiles Crossed into NATO Member Poland?*, HUFFINGTON POST (Nov. 15, 2022, 9:08 PM), https://www.huffingtonpost.co.uk/entry/russia-poland-ukraine-article-5-nato_uk_6373e192e4b08013a8b02f0b; John Deni, *Could Poland demand NATO act in Event of Russian Attack?*, CONVERSATION (Nov. 16, 2022, 8:58 AM), https://theconversation.com/could-poland-demand-nato-act-in-event-of-russian-attack-an-expert-explains-article-4-and-5-commitments-following-missile-blast-194714.

[127] *Press conference by NATO Secretary General Jens Stoltenberg after the meeting of the North Atlantic Council on Poland*, NORTH ATLANTIC TREATY ORGANIZATION (Nov. 16, 2022), https://www.nato.int/cps/en/natohq/opinions_209063.htm.

thresholds to war have or have not been crossed.[128] What complicates this assessment are the many continuities along the spectrum of conflict: the fact that war does not consist exclusively of combat, that physical destruction is not the sole mission of the armed forces, that violence is not absent during situations recognized as peace... and so on. None of these continuities are novel or unique to our era, but it is undeniable that technological and social change have reinforced and diversified them.

However, there is no reason why these developments cannot be accounted for with the help of the distinction drawn between the enduring nature of war and its changing character, thus retaining the basic Clausewitzian tenet that the essence of war is combat, but adding that this essence becomes diluted at the outer edges where real war is diffused and gives way to metaphorical war. Accordingly, there is no need to replace the Clausewitzian understanding of war with the idea of hybridity, political warfare, and gray zone conflict. Nor, for that matter, are these concepts suitable replacements for a general theory of war, given their respective shortcomings and narrower focus. Instead, they are best employed as conceptual devices that sharpen our understanding of metaphorical warfare and the diffused character of contemporary war more broadly.

IV. LAW AND WAR

War is often seen as the antithesis of law, a view associated with Cicero's dictum that when swords are drawn, the law falls silent.[129] In reality, the relationship between law and war is more complex. In the modern era,

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[128] On several occasions, Russian missiles and drones have also come down in Romanian territory. In response to one such incident that involved the crash of a Russian drone on 13 December 2023, the Romanian Ministry of Foreign Affairs protested strongly against the "new violation of Romania's airspace, contrary to international law", calling on Russian to refrain from the "irresponsible escalation of the security situation". While the Ministry announced that it had informed and was consulting with NATO allies, its press statement made no mention of war, the use of force or self-defense. *See Precizări de presă*, MINISTRY OF FOREIGN AFFAIRS OF ROMANIA (Dec. 14, 2023) https://www.mae.ro/node/63646.

[129] MARCUS TULLIUS CICERO, DEFENCE SPEECHES 186 (D. H. Berry trans., 2000). The aphorism is commonly cited in support of the view that war is a normative void unregulated by rules of law. *E.g.*, Gerald Fitzmaurice, *Inter Arma Silent Leges*, 1 SYDNEY L. REV. 332 (1954). Actually, Cicero was making a different and less drastic point, suggesting that the law tacitly accepts the use of force in self-defense as a form of self-help.

law has emerged as one of the key societal restraints on the conduct of hostilities.[130] Today, warfare is heavily regulated by law, primarily in the form of the rules governing the use of force and the law of armed conflict.[131]

As noted earlier, the changing character of war has operational as well as normative implications. Just as national armed forces must adapt in response to new means and methods of warfare in order to prevail over the enemy, so too the law must adapt to remain relevant and effective. The diffusion of warfare poses a number of challenges in this context.

The expansion of warfare across space, time, and functional domains makes it more difficult to apply the legal thresholds that separate war from peace. This matters greatly, since different standards of conduct apply depending on whether or not the relevant legal thresholds have been crossed. If the legal lines that divide war and peace are unclear, uncertainty will surround the applicable body of law and, ultimately, decisions about who may be killed and whose live must be spared.[132] The expansion of warfare also raises questions about how the existing rules should be applied in circumstances and domains that are materially different from those for which the rules were originally designed. One of the most pressing dilemmas in this respect is how pre-digital rules should operate in the digital era.

Both sets of challenges—the applicability of the law and how the relevant rules are to be applied—raise broader questions. Although the terminology has moved on since the end of the Second World War, the post-1945 international legal order is still based on an underlying distinction between war and peace. A situation of war confers certain privileges on State belligerents, enabling them to resort to forms of violence that are not

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[130] For general accounts of the attempts to confine war within legal boundaries, see OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017); GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS (1980).

[131] For detailed treatments of the former, see OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW (Hart Publishing 2d ed. 2021) (2008); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (6th ed. 2017) (1988); CHRISTIAN HENDERSON, THE USE OF FORCE AND INTERNATIONAL LAW (2018). On the latter, see MARCO SASSÒLI, INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE (2019); THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT (Andrew Clapham & Paola Gaeta eds., 2014).

[132] BROOKS, *supra* note 64, at 342.

permissible during times of peace.[133] However, if real and metaphorical warfare blend into each other in a gray zone that straddles the divide between war and peace, is a strict dichotomy between these two conditions and their distinct legal frameworks still appropriate and workable?

Against this background, the view that the law is outdated and therefore no longer adequate to meet contemporary challenges is common.[134] So is the concern that hostile actors are actively exploiting cracks in the law, using legal uncertainty to their advantage,[135] and turning the law itself into an instrument of metaphorical warfare.[136] The purpose of the present section is to assess these concerns by exploring some of the most pressing legal challenges that the diffused character of warfare presents.

A. Legal Thresholds: War and the Use of Force

In the period before the adoption of the Charter of the United Nations, mainstream legal doctrine accepted the duality of war and peace, but struggled to develop a consistent position as to how the two should be distinguished.[137] One school of thought was represented by Lassa Oppenheim. For the purposes of international law, Oppenheim defined war as a "contention between two or more States through their armed forces,"[138] adding that for war to exist, "two or more States must actually have their

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[133] Mary Ellen O'Connell, *Ad Hoc War*, *in* KRISENSICHERUNG UND HUMANITÄRER SCHUTZ - CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSCHRIFT FÜR DIETER FLECK 405, 407–12 (Horst Fischer et al. eds., 2004).

[134] U.K. MINISTRY DEF., INTEGRATED OPERATING CONCEPT 9 (2021) ("the blurring of 'peace' and 'war' means that our legal, ethical and moral framework needs updating").

[135] *E.g.*, Parl. Ass. Council Eur., Resolution on Legal Challenges related to hybrid war and human rights obligations, 17th Sitting, Res. No. 2217 (Apr. 26, 2018), https://pace.coe.int/en/files/24762/html.

[136] U.K. MINISTRY DEF., *supra* note 134, at 6; *see* Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146 (2008); more broadly, see ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR (2016).

[137] *See generally* FRITZ GROB, THE RELATIVITY OF WAR AND PEACE: A STUDY IN LAW, HISTORY AND POLITICS 173–88 (1949); Georg Schwarzenberger, *Jus Pacis Ac Belli?: Prolegomena to a Sociology of International Law*, 37 AM. J. INT'L L. 460 (1943); Clyde Eagleton, *The Attempt to Define War*, 15 INT'L CONCILIATION 237 (1933).

[138] 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, WAR AND NEUTRALITY § 55 (2d ed. 1912) (1906).

armed forces fighting each other."[139] While a formal declaration of war or a unilateral act of force may predate any hostilities,[140] Oppenheim argued that such a situation would constitute war only if it was followed by actual violence between at least two opposing armed forces.[141] This approach is not without difficulties. By excluding unilateral acts of force from the concept of war, Oppenheim's definition discounts a potentially large number of warlike situations, including acts of aggression that are not met with force by the victim. To avoid this outcome, he suggested that unilateral acts of force would amount to war if they were declared as such by the other party.[142] Yet this abandons an objective approach and renders the existence of war dependent on the will of the opposing sides.[143] It also leaves unclear just how much and what kind of force is required to trigger war.

Another school of thought accorded primacy to the intentions of the would-be belligerents. Hugo Grotius defined war as "the condition of those contending by force, viewed simply as such."[144] War within the meaning of the law of nations was therefore a legal status between sovereign States, brought about by a formal declaration of war. To Grotius, a declaration of war was necessary to trigger the legal consequences attached to a state of war, above all, the authority to exercise belligerent rights.[145] Hostilities undertaken without a formal declaration might still be acts of war, but they were not *solemn war* sanctioned by the law of nations.[146] This approach too runs into problems. Declarations of war were far less common in the past than is often assumed today.[147] The theory of solemn war was never fully

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[139] *Id.* § 57.
[140] *Id.*
[141] To similar effect, see THOMAS JOSEPH LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW § 155 (1st ed. 1895) ("War is a contest, not a condition").
[142] 2 OPPENHEIM, *supra* note 138, § 55.
[143] *Cf.* WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW § 15 (Pearce Higgins ed., 8th ed. 1924).
[144] HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, at Book I, Ch. I(II), § 2 (Francis W. Kelsey trans., Clarendon Press 1925) (1625).
[145] *Id.* at Book III, Ch. IV.
[146] On Grotius' notion of solemn war under the law of nations, as distinguished from just war under the law of nature, see PABLO KALMANOVITZ, THE LAWS OF WAR IN INTERNATIONAL THOUGHT 45–68 (2020) and Camilla Boisen, *Hugo Grotius, Declaration of War, and the International Moral Order*, 41 GROTIANA 282 (2020).
[147] For a classic study, see JOHN FREDERICK MAURICE, HOSTILITIES WITHOUT DECLARATION OF WAR: AN HISTORICAL ABSTRACT OF THE CASES IN WHICH HOSTILITIES HAVE OCCURED BETWEEN CIVILIZED POWERS PRIOR TO DECLARATION OR WARNING FROM 1700 TO 1870 (1883).

borne out by the historical record. It certainly does not reflect modern practice, given that declarations of war have all but fallen into disuse since the Second World War.[148] Moreover, if the existence of a state of war depends on purely formal criteria as the Grotian position suggests, war could commence without any actual fighting, reducing it to a mere formality.[149] Conversely, a belligerent could engage in large-scale hostilities, fail to declare war, and then deny that those hostilities constituted war within the meaning of international law, as Japan did during its invasion of Manchuria in 1931.[150] Faced with these challenges, those who continued to insist on the mandatory character of declarations of war were forced to admit the possibility of *de facto* war, thereby casting doubt on their premise that war is a formal state of affairs.[151]

Both the objective and the subjective approach were thus compelled to borrow from each other and hence were haunted by the same questions: what amount and kind of violence triggers war and what weight should be given to the intentions of the parties? With no conclusive answers forthcoming, it was widely recognized in the literature that the line between

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[148] U.S. DEP'T DEF., LAW OF WAR MANUAL § 3.4.1.1. (Jun. 2015, updated July 2023), UNITED STATES DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 5.7.3.2. (Jun. 2015, updated July 2023), https://media.defense.gov/2023/Jul/31/2003271432/-1/-1/0/DOD-LAW-OF-WAR-MANUAL-JUNE-2015-UPDATED-JULY%202023.PDF; *see also* TANISHA M. FAZAL, WARS OF LAW: UNINTENDED CONSEQUENCES IN THE REGULATION OF ARMED CONFLICT 72–108 (2018) (arguing that States have abandoned formal declarations of war because the substantial increase in legal obligations during times of war has made them weary of triggering or accepting the applicability of these rules as a result of making a declaration of war; however, this argument does not account for the fact that the law has both a constraining and a permissive dimension: see ANNE QUINTIN, THE NATURE OF INTERNATIONAL HUMANITARIAN LAW: A PERMISSIVE OR RESTRICTIVE REGIME? (2020)).

[149] Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT'L L. 19, 22 (1938).

[150] *See* Eagleton, *supra* note 137, at 253–58.

[151] *E.g.*, CHARLES H. STOCKTON, OUTLINES OF INTERNATIONAL LAW 297 (9th ed. 1914).

war and peace was far from clear.[152] This left national governments with considerable latitude,[153] including scope for launching violent interventions falling short of war.[154] Meanwhile, the majority of modern authors conceded that a state of war could commence both as a result of actual hostilities or by way of a formal declaration, thus accepting that war could be both a factual and a formal state of affairs.[155] Against the background of these debates, those who today look to international law in the hope of finding a bright line that separates war from peace are bound to be disappointed.

Following the adoption of the United Nations Charter, the legal parameters of war have changed fundamentally. The duality of war and peace stills runs through the United Nations Charter and the international legal order more generally. The Charter proclaims the determination of the United Nations to "save succeeding generations from the scourge of war", declares that maintaining peace is one of the core purposes of the Organization, and empowers the Security Council to take measures in order to maintain or restore international peace and security.[156] Implicit in these provisions is the idea that peace is the normal, or at least the desirable, condition of humanity and that war is an aberration. However, whilst the language of war and peace has not vanished from international law, it has receded into the background

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[152] Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War-Law*, 43 GEO. L. J. 282, 304-4–06, 311-1–14 (1955); TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES: ON THE RIGHTS AND DUTIES OF NATIONS IN TIME OF PEACE (Claredon Press, 2d ed. 1884) (1861); HENRY WAGER HALLECK, INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 369 (Paul, Trench, Trübner & Co., 4th ed. 1908) (1861).

[153] *Cf.* 15 WILLIAM FREDERICK BARRY, THE TIMES LAW REPORTS 166–67 (1899) (finding that a state of war existed between the United States and Spain even before Congress passed a resolution authorizing a formal state of war, as a few days earlier the United States had declared a general blockade and carried out limited acts of hostility).

[154] Lauren Benton, *Pretection Emergencies: Justifying Measures Short of War in the British Empire*, *in* THE JUSTIFICATION OF WAR AND INTERNATIONAL ORDER: FROM PAST TO PRESENT 167 (Lothar Brock & Hendrik Simon eds., 2021).

[155] *E.g.*, 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 195 (1922); HALLECK, *supra* note 152, at 350–55; HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 212–14 (1st ed. 1836).

[156] U.N. Charter art. 1(1) & 39, Preamble.

to the point where it is of limited legal significance.[157] This is so because the paramount legal threshold today is not the line between war and peace, but the one between the use and non-use of force.

Rather than banning recourse to war, as other instruments have done in the past,[158] Article 2(4) of the United Nations Charter prohibits the use of force in inter-State relations.[159] The prohibition has attained the status of a general principle of international law.[160] The transition from outlawing war to a general prohibition of force is important in the present context for two main reasons. First, whether or not a State has recourse to force is a question of fact. The assessment does not depend on the existence of a declaration of war or any other formal act. Accordingly, the current regulatory framework takes an objective approach which sidelines the intention of the parties, thereby largely resolving the question as to what weight should be given to subjective considerations.[161] Second, the definition of force is more inclusive than the traditional understanding of war as a clash between opposing armed forces.[162] Force within the meaning of Article 2(4) of the Charter includes the direct use of physical violence as well as certain measures of support enabling third parties to employ physical violence indirectly, for example by

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[157] Dino Kritsiotis, *Topographies of Force*, *in* LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 315 (Schmitt & Pejic eds., 2007); *see also* Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT'L & COMPAR. L. Q. 283, 294–303 (1987).

[158] General Treaty for Renunciation of War as an Instrument of National Policy, August 27, 1928, 94 U.N.T.S. 57.

[159] Nico Schrijver, *The Ban on the Use of Force in the UN Charter*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 465 (Mark Weller ed., 2015); *see* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 394 (Nov. 26).

[160] Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, ¶ 190 (June 27).

[161] Intentions do have a more role to play, but their significance is residual. An act that would otherwise qualify as a use of force may not be a violation of Article 2(4) of the Charter if it was unintended, for example as a result of an accident. *See also supra* note 125–27 and accompanying text; *cf.* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 394, ¶ 231 (Nov. 26) (implying that the "motivations" of forcible incursions are relevant for their characterization as an armed attack); Case Concerning Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 62 (Nov. 6) (pointing to a lack of specific intention to cause harm).

[162] CORTEN, *supra* note 131, at 51–52.

training and arming of proxy forces.[163] The prohibition of force therefore covers classic acts of warfare, such as an invasion, bombardment, or enforced blockade,[164] but also extends to some acts that traditionally may have been seen as measures short of war. The prohibition to use force also applies regardless of the weapon used.[165] Provided it has the capacity to inflict physical harm, and in this sense amounts to "armed" force, the ban covers both military and non-military instruments and tactics.

While the rules governing the use of force thus avoid some of the difficulties that the distinction between a formal state of war and peace has raised in the past, they also pose questions of their own. The exact scope of the prohibition is not settled. In particular, there is continued disagreement whether physical destruction or harm is essential for acts of force to qualify as such and, if so, whether this destruction or harm must meet a minimum level of severity.[166] These debates are particularly relevant for acts of metaphorical warfare that are violent in nature, such as assassinations or material damage caused by cyber operations. Take the Salisbury poisoning incident, for example, which involved an attempt by two Russian military intelligence officers to poison a former Russian spy with a chemical warfare agent in the British town of Salisbury in March 2018. The incident caused one fatality and several individuals, including one police officer, required intensive care. While the British Government denounced the assassination

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[163] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 394, ¶¶ 195, 205 & 228 (Nov. 26); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶¶ 161–65 (Dec. 19); *see also* G. A. Res. 2625 (XXV), The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (Oct. 24, 1970) ("Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State. Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force").

[164] G. A. Res. 3314 (XXIX), Definition of Aggression (Dec. 14, 1974).

[165] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 244, ¶ 39 (July 8).

[166] For competing views, see CORTEN, *supra* note 131, at 66–92; Tom Ruys, *The Meaning of 'Force' and the Boundaries of the Jus Ad Bellum: Are 'Minimal' Uses of Force Excluded from UN Charter 2(4)?*, 108 AMER. J. INT'L L. 159 (2014); Mary Ellen O'Connell, *The Prohibition of the Use of Force*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: JUS AD BELLUM, JUS IN BELLO AND JUS POST BELLUM, 102–07 (Nigel White & Christian Henderson eds., 2013).

attempt as a use of force and accused Russia of violating the United Nations Charter,[167] the relatively low level of violence involved raised doubts as to whether it did in fact cross the threshold of force.[168] Although borderline cases such as this one will continue to pose difficult questions, the point to underline is that the prohibition of force extends below the traditional divide between war and peace to cover at least some acts of metaphorical warfare.

Another long-standing but unresolved challenge relates to the response options available to counter an unlawful use of force. The most pressing question, undoubtedly, is whether a State targeted by armed force in violation of Article 2(4) of the Charter may respond in kind. Leaving aside collective enforcement action undertaken or authorized by the Security Council under Chapter VII of the Charter, the established justification for such counterforce is the right of individual and collective self-defense, recognized by Article 51 of the Charter.[169] However, the use of force in self-defense is not permissible in response to any unlawful act of force,[170] but only those that rise to the level of an "armed attack" because of their

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[167] Theresa May, Prime Minister, U. K., Statement on the Salisbury Incident, House of Commons (Mar. 12, 2018); *see also* Theresa May, Prime Minister, U. K., Statement on the Salisbury Incident, House of Commons (Mar. 14, 2018).

[168] Stephen Lewis, *Salisbury, Novichok and International Law on the Use of Force*, 163 RUSI J. 10, 13–15 (2018); Eliav Lieblich, *The Salisbury Incident and the Threshold for "Unlawful Use of Force" under International Law: between Stigmatization and Escalation*, STOCKHOLM CTR. FOR ETHICS WAR & PEACE (Apr. 20, 2018), http://stockholmcentre.org/the-salisbury-incident-and-the-threshold-for-unlawful-use-of-force-under-international-law-between-stigmatization-and-escalation/.

[169] For classic studies, see STANIMIR A. ALEXANDROV, SELF-DEFENCE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW (Ralph Beddard ed., 1996); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963) and D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW (1958). For more recent treatments, see CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, 120–99 (4th ed. 2018) (2000); DINSTEIN, *supra* note 131, at 197–327 and Dino Kritsiotis, *A Study of the Scope and Operation of the Rights of Individual and Collective Self-defence under International Law*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: JUS AD BELLUM, JUS IN BELLO AND JUS POST BELLUM 170 (Nigel White & Christian Henderson eds., 2013).

[170] Kritsiotis, *supra* note 157, at 51–52.

gravity,[171] as determined with reference to their scale and effects.[172] This restricts the right of States to employ counterforce in self-defense to situations that are sufficiently serious.[173]

The limited scope of the right of self-defense reduces the risk of escalation, but it comes at the price of preventing States that are targeted by unlawful force below the level of an armed attack from responding through forcible means, including through forcible reprisals.[174] This does not pose an insurmountable problem where alternative response options are more practicable or at least equally effective.[175] For example, even if the United Kingdom would have been entitled to respond to the Salisbury poisoning incident in a forcible manner, it is difficult to see exactly what good the use of armed violence against Russia would have achieved. Clearly, in this instance, non-violent measures such as diplomatic and economic sanctions were a more suitable option for imposing costs on Moscow. In other cases, however, strategic considerations may call for a forcible response in order to achieve goals that cannot be obtained through non-violent means, for

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[171] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 394, ¶ 195 (Nov. 26). The Court has confirmed this position in subsequent cases. *See, e.g.*, Case Concerning Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 51 (Nov. 6); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶¶ 165 & 304 (Dec. 19).

[172] *See* Partial Award: Jus Ad Bellum (Eth. v. Eri.), Hague Ct. Rep. (Scott) 26, ¶ 11 (Int'l Arb. 2005).

[173] In addition, the exercise of the right of self-defense must be necessary and proportionate to the threat it is meant to address. *See* CHRIS O'MEARA, NECESSITY AND PROPORTIONALITY AND THE RIGHT OF SELF-DEFENCE IN INTERNATIONAL LAW (2021).

[174] Corfu Channel Case (Alb. v. U.K.), Merits, 1949 I.C.J. 4, at 34–35 (Apr. 9); Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname, Hague Ct. Rep. (Scott) 30, ¶ 446 (Int'l Arb. 2007); Friendly Relations Declaration, *supra* note 163 ("States have a duty to refrain from acts of reprisal involving the use of force"); *see* Shane Darcy, *Retaliation and Reprisal*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 879 (Mark Weller ed., 2015) ("the overwhelming weight of opinion is that a use of force by way of retaliation or reprisal is generally unlawful").

[175] Alternative response options not involving the use of force include acts of retorsion and countermeasures, as underlined by Nicar. v. U.S., 1986 I.C.J. at ¶ 249. *See* ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES (Transnational 1984); Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, *in* RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW 19 (Larissa van den Herik ed., 2017).

instance to deter a hostile actor by physically degrading its capabilities.[176] However, unless the conditions of self-defense are satisfied, such a forcible response is not legally permissible. The fact that countering low intensity hostile activities in a forcible manner remains a strategically expedient and at times necessary course of action, but one that falls outside the scope of the right of self-defense as traditionally understood, means that strategic imperatives and normative expectations around the use of force diverge.[177]

Faced with this misalignment and the ineffectiveness of the Charter's collective security arrangements, States have not abstained from the unilateral use of force in circumstances falling below the threshold of an armed attack, but instead have sought to justify it within the constraints of the Charter system, typically through an expansive reading of the right of self-defense.[178] This approach, which was endemic during the Cold War and

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[176] E.g., the United States justified the limited air strikes it carried out in February 2021 against "Iran-supported non-State militia groups" operating in the territory of Syria as designed "to defend United States personnel and *to deter* further attacks" (emphasis added). *See* Permanent Rep. of the U.S. to the U.N., Letter dated Feb. 27, 2021 from the Rep. of the United States to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2021/202 (Mar. 3, 2021). For an assessment of the compatibility of these strikes with Article 2(4) of the Charter, see Chris O'Meara, *February 2021 American Airstrikes in Syria: Necessary and Proportionate Acts of Self-defence or Unlawful Armed Reprisals?*, 9 J. ON USE FORCE & INT'L L. 78 (2022).

[177] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 148 (Dec. 19), when it underlined that Article 51 of the Charter "does not allow the use of force by a State to protect perceived security interests' beyond the strict parameters of self-defense." This has not gone without criticism. *E.g.*, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 394, ¶ 177 (Nov. 26) ("The Court appears to offer—quite gratuitously—a prescription for overthrow of weaker governments by predatory governments while denying potential victims what in some cases may be their only hope of survival"). To similar effect, see also Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 93–96 (1989) and John Lawrence Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 135, 139 (1987).

[178] NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 74 (2010). Contemporary practice in relation to the use of force against

remains so ever since,[179] has stretched the ban on force and the scope of the right of self-defense close to their breaking point.[180] A substantial gap therefore divides the expectations imposed on States by the letter of the law and by the actual operation of the Charter rules in practice, a gap that the diffusion of warfare can only deepen.

B. Legal Thresholds: War and Armed Conflict

The rules governing the use of force determine under what conditions resort to armed force is permissible. The role of the law of armed conflict, by contrast, is to regulate the conduct of hostilities when these break out. Some obligations imposed by the law of armed conflict apply even before any combat takes place, such as the duty to instruct members of national armed forces on the content of the applicable law.[181] However, most of its provisions, including the rules protecting civilians and other persons and objects not liable to attack, are engaged only in times of armed conflict.[182] The existence of an armed conflict is therefore a threshold criterion on which

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terrorism, including coalition operations against the Islamic State, illustrates the point. *See* GRAY, *supra* note 169, at 200–61; Tom Ruys & Luca Ferro, *Divergent Views on the Content and Relevance of the Jus ad Bellum in Europe and the United States?: The Case of the US-Led Military Coalition against "Islamic State"*, *in* WHITHER THE WEST? INTERNATIONAL LAW IN EUROPE AND THE UNITED STATES 231 (Chiara Giorgetti & Guglielmo Verdirame eds., 2021); Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT'L L. 359, 378–92 (2009).

[179] W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279 (1985) (noting the "partial revival" of a unilateral *jus ad bellum*).

[180] A point illustrated by Robert W. Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT'L L. 586 (1972) (invoking pre-existing customary international law to cast aside the express requirements of Article 2(4) of the Charter); *see also* BOWETT, *supra* note 169, at 187–93.

[181] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions art. 83, Aug. 12, 1949 1125 U.N.T.S. 41; Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), June 8, 1977, 1125 U.N.T.S. 3; *see* Elizabeth Stubbins Bates, *Towards Effective Military Training in International Humanitarian Law*, 96 INT'L REV. RED CROSS 795 (2014).

[182] DIETER FLECK, *Scope of Application of International Humanitarian Law*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 50 (4th ed. 2021).

the applicability of the larger part of the law, and hence the belligerent rights, privileges, and responsibilities of the opposing parties, depends. In this area too, the dividing line between a formal state of war and a formal state of peace has receded into the background in favor of different legal concepts and thresholds, though without disappearing entirely.

Armed conflicts within the meaning of international law come in two forms: international and non-international armed conflicts.[183] The first type encompasses hostilities between States, whereas the second involves conflicts between the armed forces of State and non-State actors, or between the forces of several non-State actors. Accordingly, what distinguishes the two types of conflicts from one another is the status of the belligerents.[184]

International armed conflicts may commence in several ways.[185] Declarations of war are the first possibility. As we have seen, the effect of a declaration of war is to establish a formal state of war, even in the absence of any actual fighting between the belligerents.[186] A declaration of war creates an international armed conflict, triggering the applicability of the Geneva Conventions and the law of armed conflict more generally.[187] However, today this is of historical significance at best. Declarations of war have fallen

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[183] Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Judgment pursuant to Art. 74 of the Statute, ¶ 539 (Apr. 5, 2012), https://www.icccpi.int/sites/default/files/CourtRecords/CR2012_03942.PDF (describing the dichotomy between international and non-international armed conflicts as the established law); *See* Dapo Akande, *Classification of Armed Conflicts*, *in* THE OXFORD GUIDE TO INTERNATIONAL HUMANITARIAN LAW 29 (Ben Saul & Dapo Akande eds., 2020); Milanovic Marko & Hadzi-Vidanovic Vidan, *A Taxonomy of Armed Conflict*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: JUS AD BELLUM, JUS IN BELLO AND JUS POST BELLUM 256 (Nigel White & Christian Henderson eds., 2013).

[184] Prosecutor v. Musema, ICTR-96-13-T, Judgment and Sentence, ¶ 247 (Jan. 27, 2000), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-13/MSC21027R0000532584.PDF.

[185] Fleck, *supra* note 182, at 50.

[186] Partial Award: Jus Ad Bellum (Eth. v. Eri.), Hague Ct. Rep. (Scott) 26, ¶ 17 (Int'l Arb. 2005); *see supra* note 144–146 and accompanying text. *But see* Committee on the Use of Force*, The Hague Conference (2010): Use of Force*, INT'L L. ASS'N., https://www.ila-hq.org/en/documents/conference-report-the-hague-2010–12 (last visited Mar. 14, 2023, 4:48 PM) (suggesting that "earlier practice of states creating a *de jure* state of war by a declaration is no longer recognized in international law").

[187] Int'l Comm. Red Cross [ICRC], *Common Article 2 of the Geneva Conventions*, INT'L HUMANITARIAN L. DATABASE, https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-2 (Mar. 14, 2023, 6:20 PM).

out of use and there are no signs that this will change in the foreseeable future.[188] It is highly unlikely that contemporary forms of warfare would qualify as an armed conflict through a formal declaration of war.

The vast majority of international armed conflicts are initiated not through formalities, but because two or more States resort to armed force against each other. Some uncertainty surrounds the question as to whether this armed force must reach a certain level of intensity before it qualifies as an armed conflict.[189] One position in this debate suggests that no real minimum threshold of this kind exists, but that even minor or inconsequential confrontations between opposing national forces or their individual members will amount to an international armed conflict.[190] The other, more compelling position holds that the level of force and its effects must be more than trivial, though they still need not be substantial.[191]

Hybrid wars as envisaged by James Mattis and Frank Hoffman imply a level of violence that is more than marginal and thus transcends any *de minimis* threshold that may be required for an international armed conflict to exist. In other words, it is safe to assume that hybrid wars between States amount to an international armed conflict by definition and for this reason engage the law of armed conflict. By contrast, the vast majority of acts of metaphorical warfare, including hybrid threats, political warfare, and gray zone conflict, will not cross this threshold. This is so because the majority of such acts do not cause material destruction or injury and do not entail the direct use of armed force. Yet the possibility that metaphorical warfare may engage the law of armed conflict cannot be discounted entirely. Violent acts of sabotage, attacks by proxy forces, or cyber operations causing a degree of material destruction that is more than trivial could, in principle, initiate an international armed conflict.

What complicates the assessment is the fact that low intensity and isolated acts of violence may fall on either side of the dividing line between "unpeace" and armed hostilities sufficient to create an international armed

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[188] FAZAL, *supra* note 148.
[189] Akande, *supra* note 183, at 34–35.
[190] Int'l Comm. of the Red Cross [ICRC], *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 9, 32IC/15/11 (Oct. 31, 2015), https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts.
[191] *Cf*. Committee on the Use of Force, *supra* note 186, at 29–31.

conflict.[192] For example, the killing of Iranian Major General Qassam Soleimani by the United States in a targeted drone strike in January 2020 gave rise to substantial disagreement as to whether the operation was of sufficient gravity, when taken on its own, to trigger the applicability of the law of armed conflict.[193] By contrast, the Salisbury poisoning incident did not generate much discussion on this point. Given the low level of violence and the identity of the intended and actual victims, the incident was not treated as an armed conflict between Russia and the United Kingdom, even though it did involve the use of what was reported to be a chemical warfare agent.[194] However, had the Russian operation caused more severe harm, including injury to British security personnel, the position would have been less clear cut. Accordingly, the specific circumstances of each case will have a significant impact on the legal assessment, including whether or not they formed part of a broader series of incidents which may cross the threshold of an international armed conflict cumulatively.[195]

Finally, international armed conflicts may also arise in situations of partial or total occupation of the territory of a State, even if that occupation

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[192] This is so especially when such acts are linked to organized criminality or terrorism. *Cf*. Haines, *supra* note 7, at 24–27.

[193] *E.g.*, Geoffrey S. Corn & Chris Jenks, *Soleimani and the Tactical Execution of Strategic Self-Defense*, LAWFARE (Jan. 24, 2020), https://www.lawfareblog.com/soleimani-and-tactical-execution-strategic-self-defense ("if a state reasonably determines that military action is necessary to intercept or preempt an imminent armed attack, that military action indicates the existence of an armed conflict"); Human Rights Council*, Use of Armed Drones for Targeted Killings: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶¶ 12–39, U.N. Doc. A/HRC/44/38 (Aug. 15, 2020) (concluding that no armed conflict existed). For an overview of the competing positions, see Luca Ferro, *Killing Qasem Soleimani: International Lawyers Divided and Conquered International Law in the Age of Global Crisis: The American Society of International Lawyers Research Forum Symposium Issue*, 53 CASE W. RSRV. J. INT'L L. 163, 179–83 (2021).

[194] *But see* Michel Paradis, *The U.K.'s Opportunity to Use Lawfare in Response to the Salisbury Attack*, LAWFARE (Mar. 15, 2018), https://www.lawfareblog.com/uks-opportunity-use-lawfare-response-salisbury-attack.

[195] *Cf.* STEFAN A. G. TALMON & MIRIAM HEIPERTZ, THE U.S. KILLING OF IRANIAN GENERAL QASEM SOLEIMANI: OF WRONG TREES AND RED HERRINGS, AND WHY THE KILLING MAY BE LAWFUL AFTER ALL 11–12 (2020); Agnes Callamard, *The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters*, JUST SEC. (Jan. 8, 2020), https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/.

meets with no armed resistance.[196] The elements of belligerent occupation are well established: hostile forces must be physically present in the territory of another State without the latter's consent; the territorial sovereign must be unable to exercise its authority in the territory concerned due to the presence of the foreign forces; and those forces must be in a position to assert their own authority over the territory.[197] Whether or not these three elements are met in situations of diffused warfare is principally a question of fact.

The invasion and subsequent occupation of Crimea by the armed forces of the Russian Federation in 2014 illustrates the point. Much has been made of the fact that Russia took control of the Crimean Peninsula through deceit, including by stripping its forces of their nationality markings and by strenuously denying their activities.[198] Such attempts at "plausible deniability" are typically designed to circumvent the law and to evade accountability for its violation.[199] In this instance, the law itself was clear. On the one hand, the removal of national identification marks did not contravene the law of armed conflict.[200] On the other hand, this did not alter the fact that the deployment of unmarked Russian forces, the infamous "little green men,"

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[196] Int'l Comm. Red Cross [ICRC], *supra* note 187.

[197] YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 42–54 (2d ed. 2019); EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 43 (Oxford University Press 2d ed. 2012) (1993); Philip Spoerri, *The Law of Occupation*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 182, 187–92 (Andrew Clapham & Paola Gaeta eds., 2014).

[198] DEBENEDICTIS, *supra* note 76, at 95–111; Katri Pynnöniemi & András Rácz, *Fog of Falsehood: Russian Strategy of Deception and the Conflict in Ukraine*, FIN. INST. INT'L AFF. (Oct. 5, 2016), https://www.fiia.fi/wp-content/uploads/2017/01/fiiareport45_fogoffalsehood.pdf.

[199] *See also* Roy Allison, *Russian 'Deniable' Intervention in Ukraine: How and Why Russia Broke the Rules*, 90 INT'L AFF. 1255 (2014); *cf.* Rory Cormac & Richard J. Aldrich, *Grey is the New Black: Covert Action and Implausible Deniability*, 94 INT'L AFF. 477 (2018).

[200] Ines Gillich, *Illegally Evading Attribution: Russia's Use of Unmarked Troops in Crimea and International Humanitarian Law*, 48 VAND. J. TRANSNAT'L L. 1191 (2015); Shane R. Reeves & David Wallace, *The Combatant Status of the Little Green Men and Other Participants in the Ukraine Conflict*, 91 INT'L L. STUD. 361, 394–95 (2015).

in Crimea met the criteria of belligerent occupation,[201] nor did it absolve Russia from its obligations as an occupying power or from its responsibility for violating other applicable rules of international law.[202] Deceit, diversion, and denial may feed on legal ambiguity and uncertainty, but often they are simply a matter of non-compliance with the applicable rules. Accordingly, in the Crimean case, Russia's denial of the facts as an element of hybrid warfare raised few genuinely distinct normative questions.

The same also holds true for non-international armed conflicts between States and non-State actors, such as the Second Lebanon War between Israel and Hezbollah. The legal challenges that arise here are not unique to hybrid wars, but flow mostly from the uncertainty surrounding the criteria for the existence of a non-international armed conflict. Armed conflicts of this type must exceed mere riots and other civil disturbances, and for this reason require hostilities of a certain intensity to take place between the armed forces of a State and an organized armed group of a non-State actor, or between several such organized groups.[203] The existence of a non-international armed conflict thus demands violence that is more systematic and displays a higher level of intensity than what is required for an international armed conflict. While international courts have developed a comprehensive set of indicators to assess the intensity and the organization requirement, none of the relevant factors lend themselves to easy

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[201] Rustam Atadjanov, *War Crimes Committed During the Armed Conflict in Ukraine: What Should the ICC Focus On?*, *in* THE USE OF FORCE AGAINST UKRAINE AND INTERNATIONAL LAW: JUS AD BELLUM, JUS IN BELLO, JUS POST BELLUM 385, 391 (Sergey Sayapin & Evhen Tsybulenko eds., 2018); *see also* Ukr. v. Russ., App. No. 20958/14 & 38334/18, ¶¶ 315–35, (Dec. 16, 2020), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-207622%22]} (finding that the Russian Federation exercised "effective control" over Crimea within the meaning of the Court's case-law from Feb. 27, 2014 onwards).

[202] *Cf.* Gillich, *supra* note 200, at 1203–04.

[203] Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Musema, ICTR-96-13-T, Judgment and Sentence, ¶ 248 (Jan. 27, 2000), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-13/MSC21027R0000532584.PDF; Prosecutor v. Gombo, ICC-01/05-01/08-3343, Judgment pursuant to Article 74 of the Statute, ¶¶ 137–39 (Mar. 21, 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF; *see* SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 155–11 (2012); YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 23–46, 53–65 (2d ed. 2021); Akande, *supra* note 183, at 40–41.

quantification.[204] The exact point at which mere disturbances tip over into a non-international armed conflict thus remains a matter of some debate, especially when an assessment is demanded in real time, without the benefit of hindsight.[205] Situations of hybrid warfare involving non-State actors raise much the same issues and there is nothing intrinsic about them that poses unique normative challenges for determining the existence of a non-international armed conflict.

Accordingly, intense, and protracted armed confrontations between opposing forces present no significant difficulties, especially when they occur on a large scale and cause significant material destruction and injury: such confrontations qualify as international or non-international armed conflicts and are governed by the law of armed conflict. It is bouts of violence on a lower level of intensity and destructiveness, or those which are more transient, that pose problems, especially when carried out through irregular means or by entities other than conventional armed formations, as is typical of the limited forms of violence associated with metaphorical warfare. Thus, it may not be immediately apparent in specific cases whether coercive measures taken by the civilian or paramilitary branches of a foreign State, such as its coast guard agencies, are law enforcement activities or acts of hostilities.[206] Similarly, it may not be obvious whether acts of violence carried out by non-State actors are ordinary acts of criminality, acts only incidentally connected to an ongoing armed conflict, or part of a wider series

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[204] Prosecutor v. Boškoski & Tarčulovski, Case No. IT-04-82, Judgment, ¶¶ 177–206 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008); *see also* Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Judgment pursuant to Art. 74 of the Statute, ¶¶ 538–39 (Apr. 5, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03942.PDF. For an argument against an overly technical and strict application of these criteria and in favor of looking at the totality of circumstances, inspired by the assessment of the conflict in Syria, see Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VAND. L. REV. 693 (2013).

[205] E.g., while there is broad agreement that the internal disturbances taking place in Syria tipped over into a non-international armed conflict by the summer of 2012, few commentators seem to be willing to put a more exact date on this development. *See* Tom Gal, *Legal Classification of the Conflict(s) in Syria*, *in* THE SYRIAN WAR: BETWEEN JUSTICE AND POLITICAL REALITY 29, 44–45 (Hilly Moodrick-Even Khen et al. eds., 2020).

[206] ALEXANDER LOTT, HYBRID THREATS AND THE LAW OF THE SEA: USE OF FORCE AND DISCRIMINATORY NAVIGATIONAL RESTRICTIONS IN STRAITS 259 (2022).

of acts that may at one point cross the threshold of armed conflict.[207] Given that hybrid and gray zone engagements are characterized by deliberate ambiguity, obfuscation, and denial, we may expect the relevant facts to be unclear and contested.[208] The diffusion of warfare into the gray zone thus poses significant challenges for determining the existence of international and non-international armed conflicts at low levels of intensity.

Uncertainty over the existence of an armed conflict and hence the applicability of the law of armed conflict has major implications for governments confronted by diffused warfare at the lower end of the spectrum of conflict.[209] The law of armed conflict protects certain persons and objects from the adverse effects of military operations, but it also entitles belligerent States to apply combat power as a matter of first resort against persons and objects that constitute lawful military objectives.[210] By contrast, the exercise of public power below the threshold of armed conflict is subject to different standards based on domestic law, including the law of the State on whose territory the relevant authorities are acting, and other rules of international law, in particular international human rights law.[211] These legal regimes preclude national authorities from carrying out many of the acts associated with combat operations, such as the offensive use of lethal force, security detention, or invasive intelligence gathering, and instead require them to

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[207] EMILY CRAWFORD, IDENTIFYING THE ENEMY: CIVILIAN PARTICIPATION IN ARMED CONFLICT 172–202 (2015); Haines, *supra* note 7, at 24–27; *see also* Dino Kritsiotis, *The Tremors of Tadić*, 43 ISR. L. R. 262, 296 (2010) (offering the September 11 attacks on the United States as an example).

[208] Euro. External Action Serv., *Food-for-Thought Paper "Countering Hybrid Threats"*, 8887/15 (May 15, 2015) ("A critically important aspect of hybrid warfare is to generate ambiguity both in the affected population under attack and in the larger international community. The aim is to mask what is actually happening on the ground in order to obscure the differentiation between war and peace"); *see also* Mumford & Carlucci, *supra* note 123; DEBENEDICTIS, *supra* note 76, at 95–111.

[209] *Cf.* Geoffrey S. Corn, *Legal Classification of Military Operations*, *in* U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 67, 90 (Geoffrey S. Corn et al. eds., 2015) (conflict classification is "critically important, as it impacts virtually every aspect of mission execution").

[210] The law of armed conflict therefore has not merely a prohibitive dimension, but also a permissive one. *See* QUINTIN, *supra* note 148.

[211] Gloria Gaggioli, *The Use of Force in Armed Conflicts Conduct of Hostilities, Law Enforcement, and Self-Defense*, *in* COMPLEX BATTLESPACES: THE LAW OF ARMED CONFLICT AND THE DYNAMICS OF MODERN WARFARE 61 (Winston S. Williams & Christopher M. Ford eds., 2018).

adopt a law enforcement posture.[212] Governments confronted by acts of diffused warfare which have not patently crossed the threshold of armed conflict face a dilemma: must they abide by the more restrictive peacetime legal regimes or may they rely on the more permissive rules of the law of armed conflict? The answer is of considerable importance, since it conditions the nature of their response. Thus, it is difficult to see how the United States could have carried out an air strike against General Soleimani in conformity with international law *if*, in the absence of a nexus to an armed conflict, the law of armed conflict did not apply to the strike and international human rights law was the governing legal framework.[213]

However, the tactical and operational implications of this dilemma are not always as stark as they might appear at first sight. The less intense and destructive the violence, the more likely it is that ordinary law enforcement mechanisms will suffice to respond to the threat posed by hybrid and gray zone tactics, without the need to resort to combat power. Indeed, as the Salisbury poisoning incident demonstrates, an armed response may be inappropriate or downright counterproductive.[214] This is why even in situations where the law of armed conflict is applicable and where combat operations are admissible, there may be cogent policy reasons to temper reliance on its permissive rules in favor of adopting a law enforcement posture.[215] Nor is the application of the legal frameworks corresponding to the conduct of hostilities and the law enforcement paradigm an entirely binary matter, since human rights law continues to apply during times of

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[212] *Cf.* NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 85–239 (2008); *see also* Charles Garraway, *Armed Conflict and Law Enforcement: Is There a Legal Divide?*, *in* ARMED CONFLICT AND INTERNATIONAL LAW: IN SEARCH OF THE HUMAN FACE: LIBER AMICORUM IN MEMORY OF AVRIL MCDONALD 259 (Mariëlle Matthee et al. eds., 2013).

[213] To this effect, see Human Rights Council, *supra* note 193, ¶¶ 40–53.

[214] *Cf.* Deborah Pearlstein, *Armed Conflict at the Threshold*, 58 VA J. INT'L L. 369–402, 399 (2019) ("armed conflict law is an ill-fitting cloak for the contemporary threats about which the policy critics worry because those threats, however threatening, are not meant to be covered by armed conflict law by definition").

[215] KENNETH WATKIN, FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT 588–610 (2016).

armed conflict.[216] National authorities may be required to exercise their law of armed conflict privileges subject to their human rights obligations,[217] especially in situations of lower intensity.[218]

C. Regulating Hybrid War

As we have seen, hybrid wars as defined by Mattis and Hoffman will almost certainly cross the intensity threshold of an armed conflict and trigger the applicability of the law of armed conflict. The possibility that metaphorical wars may do the same cannot be dismissed, partly because measures short of war may escalate into real war and partly because metaphorical warfare is likely to continue during armed hostilities, becoming an integral aspect of the latter. Regardless of the exact scenario, each of these cases is bound to involve a combination of regular and irregular forms of violence. It is also safe to assume that they will involve multiple belligerents,

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[216] *Cf.* Todd C. Huntley & Andrew D. Levitz, *Controlling the Use of Power in the Shadows: Challenges in the Application of Jus in Bello to Clandestine and Unconventional Warfare Activities*, 5 HARV. NAT'L SEC. J. 461, 4802 (2014); *see generally* PRACTITIONERS' GUIDE TO HUMAN RIGHTS LAW IN ARMED CONFLICT (Daragh Murray et al. eds., 2016); GERD OBERLEITNER, HUMAN RIGHTS IN ARMED CONFLICT: LAW, PRACTICE, POLICY (2015); RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW (Robert Kolb & Gloria Gaggioli eds., 2013).

[217] *E.g.*, Hanan v. Germany, App. No. 4871/16, Eur. Ct. H.R. (2021) (holding that Germany was bound under the European Convention on Human Rights to carry out an effective investigation into an air strike in Afghanistan that killed the applicant's two sons).

[218] In its most recent jurisprudence, the European Court of Human Rights has carved out an exception to the application of the European Convention on Human Rights in situations involving large-scale hostilities taking place in the context of an international armed conflict. *See* Georgia v. Russia (II), App. No. 38263/08, Eur. Ct. H.R., ¶¶ 125–44 (2021) (deciding that a State party engaged in active combat operations as part of an international armed conflict does not exercise extra-territorial jurisdiction over the contested territory or persons present there, meaning that its obligations under the Convention are not engaged); Shavlokhova v. Georgia, App. No. 4871/16, Eur. Ct. H.R., ¶¶ 27–35 (2021) (holding that large-scale hostilities may prevent a State party from exercising its authority within its own territory, thus suspending the application of its Convention obligations in relation to the relevant territories). The Court's reasoning has attracted vocal criticism. *See* Katharine Fortin, *The Relationship between International Human Rights Law and International Humanitarian Law: Taking Stock at the End of 2022?*, 40 NETH. Q. HUM. RTS. 343, 350–53 (2022); Marco Longobardo & Stuart Wallace, *The 2021 ECtHR Decision in Georgia v Russia (II) and the Application of Human Rights Law to Extraterritorial Hostilities*, 55 ISR. L. REV. 145 (2022).

including a mix of State and non-State actors. States waging hybrid wars are likely to rely on proxies, as the latter may serve as force multipliers and offer other advantages, such as deniability.[219] Similarly, non-State actors such as Hezbollah or Hamas often depend on the support of friendly States, in particular for gaining access to conventional or more advanced military capabilities.[220]

This highly diffused character of modern warfare does not sit well with the regulatory framework of the law of armed conflict.[221] The presence of multiple State and non-State parties in the same battlespace raises difficult questions about how such conflicts should be classified: do they constitute separate international and non-international armed conflicts running in parallel or do they form a single, internationalized armed conflict?[222] The facts, in particular the nature of the relationship between the different State and non-State belligerents, are decisive. However, the law itself remains unsettled. It does not provide definite guidance on how the relevant facts should be assessed and, consequently, how conflicts involving a multitude of different actors should be classified. The principal difficulty in this respect is that it is unclear under what conditions and at what exact point non-international armed conflicts are transformed into international armed conflicts.[223] The matter is of some importance,[224] since the status, rights, and responsibilities of the belligerents differ in key respects depending on

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[219] *See* ANDREAS KRIEG & JEAN-MARC RICKLI, SURROGATE WARFARE: THE TRANSFORMATION OF WAR IN THE TWENTY-FIRST CENTURY (2019); ANDREW MUMFORD, PROXY WARFARE (2013); Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT'L REV. RED CROSS 69 (2009).

[220] *E.g.* Jennifer Maddocks, *Iran's Responsibility for the Attack on Israel*, ARTICLES OF WAR (Oct. 20, 2023), https://lieber.westpoint.edu/irans-responsibility-attack-israel/.

[221] Vité, *supra* note 219.

[222] *E.g.* Gal, *supra* note 205; Robert Heinsch, *Conflict Classification in Ukraine: The Return of the Proxy War*, 91 INT'L L. STUD. 323 (2015); Carrie McDougall, *The Other Enemy: Transnational Terrorists, Armed Attacks, and Armed Conflicts*, *in* SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 219 (Leila Nadya Sadat ed., 2018).

[223] *See generally* KUBO MAČÁK, INTERNATIONALIZED ARMED CONFLICTS IN INTERNATIONAL LAW (2018); NOAM ZAMIR, CLASSIFICATION OF CONFLICTS IN INTERNATIONAL HUMANITARIAN LAW: THE LEGAL IMPACT OF FOREIGN INTERVENTION IN CIVIL WARS (2017); INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS (Elizabeth Wilmshurst ed., 2012).

[224] Akande, *supra* note 183, at 30–32.

whether the conflict is international or non-international in nature.[225] In addition, the classification of the conflict also has consequences for the manner and scope of application of other legal regimes, in particular international human rights law.[226]

Approaching the question from a principled perspective, the transformation of one type of armed conflict into another type must happen by the operation of the law, rather than depend on the subjective will of the parties concerned. If a situation no longer satisfies the conditions for the existence of a non-international armed conflict, but does meet the criteria for an international one, the former must necessarily transform into the latter. Given that the feature that distinguishes the two classes of conflict from one another is the status of the belligerents, it follows that what triggers a change in conflict classification is a change in the legal position of a non-State actor. It is at this point that the difficulties arise. Clearly, should a non-State belligerent achieve Statehood as a result of the process of State recognition, the pre-existing non-international armed conflict would convert into an international one. The case of Croatia during the breakup of the former Socialist Federal Republic of Yugoslavia provides a historical example.[227] Similarly, it should be uncontroversial that if a non-State belligerent were to become either a *de jure* or *de facto* organ of an existing State, this would also transform the conflict, given that the actions of the non-State party would now have to be attributed to that State.[228] What is subject to debate is whether

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[225] *See infra* note 245–246.

[226] Yahli Shereshevsky, *Politics by Other Means: The Battle over the Classification of Asymmetrical Conflicts*, 49 VAND. J. TRANSNAT'L LAW 455 (2016). Recent cases have conceded that a belligerent's human rights obligations should be accommodated with its authority to detain enemy personnel and civilians in an international armed conflict (at ¶ 104) but have not accepted that such an authority even exists in the case of non-international armed conflicts. *See* Abd Ali Hameed Al-Waheed v. Ministry of Defence; Serdar Mohammed v. Ministry of Defence [2017] UKSC 2, [13]-[16], [275]-[276] (Eng.).

[227] Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶¶ 83–115 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004).

[228] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. Rep. 15,

intervention by a State into a pre-existing non-international armed conflict on the side of a non-State belligerent internationalizes the conflict in circumstances where the relationship between the two parties is not so close, in other words where the non-State actor has neither been formally incorporated into a State's institutional structure nor grown completely dependent on that State.[229]

Pursuant to the law of State responsibility, acts carried out by persons or entities that are not *de jure* or *de facto* organs of a State may still be attributable to the latter if those persons or entities act under the direction, instructions, or effective control of the State concerned.[230] These standards of attribution imply a high degree of subordination. However, they say nothing about the substantive aspects of this relationship, most importantly about what kind of acts a non-State belligerent is performing on behalf of a State. It is impossible to conclude that a pre-existing non-international armed conflict has become internationalized merely because some activities of a non-State actor fall under the effective control of a State *without* also clarifying what those activities are. Evidently, if the non-State belligerent acts on behalf of a State in matters entirely unrelated to the conflict, there is no sound reason why the non-international armed conflict should be treated as internationalized. Rather, what is required is that the non-State belligerent should resort to armed force against one State under the effective control of another,[231] thus meeting the criteria for the existence of an international

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¶ 408 (Feb. 26) (noting that a State may incur responsibility for the acts of its official organs and also for the acts of "persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State"). For an example of the *de jure* incorporation of a non-State belligerent, see *infra* note 244 and the accompanying text.

[229] The International Court of Justice admitted this possibility in the Genocide Case, (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. Rep. 15, ¶ 405 (Feb. 26) ("the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict").

[230] Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. Doc. A/56/10, art. 8 (2001) [hereinafter Draft Articles].

[231] *Cf.* Separate Opinion of Judge Shahabuddeen, Prosecutor v. Duško Tadić, Case No. IT-94-1-T, ¶ 7 (Int'l Crim. Trib. for the Former Yugoslavia Appeals Chamber July 15, 1999).

armed conflict.[232] Where these conditions pertain, the conflict is internationalized.[233]

However, might a looser relationship between the non-State belligerent and a State suffice to produce the same outcome? In the *Tadić* case, the International Criminal Tribunal for the former Yugoslavia answered in the affirmative, holding that the exercise of "overall control" by a State over an organized armed group, a lower standard than that of "effective control," was sufficient to internationalize a conflict.[234] Key law of armed conflict treaties also point in this direction to suggest that a high level of subordination is not required. Article 4(A)(2) of the Third Geneva Convention accords prisoner of war status to members of militias and volunteer corps, including those of organized resistance movements, that are not formally incorporated into the armed forces of a State belligerent, but merely "belong to" it. Organized armed groups that "belong to" a State thus acquire the same status under the law of armed conflict as national armed forces. The essence of belonging is that the State concerned accepts, either

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[232] Where the non-State actor engages in hostilities against one State exclusively on behalf of another, it stands to reason that the character of the pre-existing non-international armed conflict has transformed in its entirety and been replaced, effectively, with what is now a single international armed conflict. However, in situations where the non-State belligerent conduct hostilities both on behalf of a State and in an independent capacity, it may not be warranted to treat the pre-existing non-international armed conflict to have been internationalized. Depending on the balance between State-controlled and independent action, it may be more accurate to treat the conflict as mixed, meaning that the pre-existing non-international armed conflict now runs in parallel with an international one. This is the position taken by the International Court of Justice in Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 394, ¶ 219 (Nov. 26) (holding that conflict between the contras and the Nicaraguan government was non-international in character, while the one between the United States and Nicaragua was international).

[233] Marina Spinedi, *On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia,* 5 EUR. J. INT'L CRIM. JUST. 829, 833 (2007) ("if the behaviour of a group of persons meets the conditions necessary for such behaviour to be attributed to the state as an internationally wrongful act, indisputably this same behaviour also meets the conditions for being regarded as an act of the state from the viewpoint of its being a party to an international armed conflict").

[234] Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶¶ 120–22 and 137 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

expressly or tacitly, that an irregular group is fighting on its behalf.[235] While this may entail the exercise of some degree of control by the State over the group, control is not a necessary factor for belonging.[236] Affiliation may manifest itself in looser forms, for example through express recognition by the State authorities concerned.[237]

There is no need to decide in the present context which of these positions reflects the law as it stands. Rather, the point is that diffused warfare is bound to raise these questions as a matter of course, as illustrated by the conflict in eastern Ukraine. Before launching its full-scale invasion of Ukraine in February 2022, Russia recognized the Donetsk and Luhansk People's Republics, two separatist-controlled provinces that declared their independence from Ukraine.[238] Treating the two entities as sovereign States enabled Moscow to claim, in contravention of its earlier commitments to respect the existing borders of Ukraine,[239] that they were independent actors

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[235] MAČÁK, *supra* note 223, at 173–74; Katherine Del Mar, *The Requirement of 'Belonging' under International Humanitarian Law*, 21 EUR. J. INT'L L. 105, 109–13 (2010).

[236] *Cf.* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 43(1) (Additional Protocol I), June 8, 1977 ("The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates"). This provision does not require the individual members of irregular armed forces, groups or units to fall under the direct control of a State party, but it does require the leadership ("command" in the English and "commandment" in the French language version) of such formations to be "responsible" to a State party. Responsibility in this context implies accountability, which in turn implies a relationship of control. *Cf.* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 512 (Yves Sandoz et al. eds., Int'l Committee of the Red Cross 1987).

[237] Del Mar, *supra* note 235, at 109–13.

[238] Decree of the President of the Russian Federation, *No. 71 On the recognition of the Donetsk People's Republic*, OFF. REP. LEGAL INFO. RUSS. (Feb. 2022) http://publication.pravo.gov.ru/Document/View/0001202202220001; Decree of the President of the Russian Federation, *No. 72 On the recognition of the Luhansk People's Republic*, OFF. REP. LEGAL INFO. RUSS. (Feb. 2022) http://publication.pravo.gov.ru/Document/View/0001202202220002.

[239] Treaty between Ukraine and the Russian Federation on the Ukrainian-Russian State Border, Jan. 28, 2003, 3161 U.N.T.S. 1; Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, art. 2, Apr. 1, 1999, 3007 U.N.T.S. 117; Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, Dec. 5, 1994, 3007 U.N.T.S. 167.

responsible for their own actions. In reality, both entities were dependent on Russian support and, in the absence of recognition by other States, neither had achieved Statehood.[240] In fact, there is evidence to suggest that as early as 2014, the relationship between Russia and the two People's Republics met either the "overall control" or the "belonging to" standard,[241] meaning that any non-international armed conflict between the forces of the two separatist entities and Ukraine had merged with the broader international armed conflict between Russia and Ukraine.[242] As a result, Russia became responsible under the law of armed conflict for the actions of the armed forces of the two People's Republics that were fighting on its behalf during

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[240] Save for a few exceptions, Russia's recognition of the two breakaway entities has been widely condemned. *E.g.* Peter Stano, *Ukraine: Declaration by the High Representative on behalf of the European Union on the decisions of the Russian Federation further undermining Ukraine's sovereignty and territorial integrity*, COUNCIL EUR. UNION (Feb. 22, 2022, 2:05 PM), https://www.consilium.europa.eu/en/press/press-releases/2022/02/22/ukraine-declaration-by-the-high-representative-on-behalf-of-the-european-union-on-the-decisions-of-the-russian-federation-further-undermining-ukraine-s-sovereignty-and-territorial-integrity/; *see* Sofia Cavandoli & Gary Wilson, *Distorting Fundamental Norms of International Law to Resurrect the Soviet Union: The International Law Context of Russia's Invasion of Ukraine,* NETH. INT'L L. REV., 384, 401–02 (2022).

[241] Re MH17, No. 09-748006/19, ¶ 4.4.3.1.3 Hague District Court, (2022); GLOBAL RIGHTS COMPLIANCE, INTERNATIONAL LAW AND DEFINING RUSSIA'S INVOLVEMENT IN CRIMEA AND DONBAS 91–335 (2022), https://globalrightscompliance.com/wp-content/uploads/2022/05/International-Law-and-Russia-Involvement-in-Crimea-and-Donbas.pdf?fbclid=IwAR1uC0KAsEW_T_ZRT7tfCUrvjdBonx-SgC3MdeKYomxCsjr-u2zDb4wxr1s; *see also* 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, 112–18 (Sergey Sayapin & Evhen Tsybulenko eds., 2018); Agnieszka Szpak, *Legal Classification of the Armed Conflict in Ukraine in Light of International Humanitarian Law*, 58 HUNGARIAN J. LEGAL STUD. 261, 273–76 (2017).

[242] Alternatively, if these standards were not met before February 2022, the conflict would have to be classified as a mixed one, where a non-international armed conflict between Ukraine and separatist forces ran in parallel with an international conflict between Russian and Ukraine. *Cf.* OFF. PROSECUTOR, INT'L CRIM. COURT, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 169 (2016).

this period.[243] In any event, it is beyond doubt that the conflict transformed into an international armed conflict following the subordination of separatist forces under Russian command from February 2022 onwards or, at the very latest, by October 2022, when Russia formally assumed the exercise of public powers over the two breakaway regions by passing legislation to incorporate them into its own territory.[244]

Conflict classification also has implications for the legal position of the belligerents. While in recent years the rules applicable to international and non-international armed conflicts have converged in key respects, significant differences do remain.[245] Amongst other things, in a non-international armed conflict, members of non-State organized armed groups do not benefit from combatant status, the law of belligerent occupation does not apply and it is disputed whether State parties enjoy a permissive authority to detain persons in connection with the conflict.[246] Accordingly, members of organized armed groups fighting on behalf of the Luhansk and Donetsk People's Republics did not enjoy combatant immunity prior to the Russian invasion of February 2022, assuming that they did not "belong to" the Russian Federation before that date. However, once the conflict had become internationalized, members of those groups became entitled, amongst other things, to prisoner of war status on capture by Ukrainian forces.[247] Similarly,

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[243] Wolfgang Benedek et al., *Report on Violations of Int'l Humanitarian Law and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine since 24 Feb. 2022*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE [OSCE] ODIHR.GAL/26/22/Rev.1 (Apr. 13, 2022) (arguing that Russia is exercising "overall control" over the two Peoples' Republics and therefore responsible for their conduct).

[244] Federal Constitutional Law, *No. 5-FKZ On the admission of the Donetsk People's Republic to the Russian Federation and the formation of a new subject within the Russian Federation - the Donetsk People's Republic*, OFF. REP. LEGAL INFO. RUSS. (Oct. 2022) http://publication.pravo.gov.ru/Document/View/0001202210050005; Federal Constitutional Law, *No. 6-FKZ the admission of the Lugansk People's Republic to the Russian Federation and the formation of a new subject within the Russian Federation - the Lugansk People's Republic*, OFF. REP. LEGAL INFO. RUSS. (Oct. 2022) http://publication.pravo.gov.ru/Document/View/0001202210050006.

[245] DINSTEIN, *supra* note 203, at 276–85; Emily Crawford, *Blurring the Lines between International and Non-International Armed Conflicts: The Evolution of Customary International Law Applicable in Internal Armed Conflicts*, 15 AUSTL. INT'L L. J. 29 (2008).

[246] DINSTEIN, *supra* note 203, at 299–392; SIVAKUMARAN, *supra* note 203, at 513–32.

[247] Marco Sassòli, *Application of IHL by and to Proxies: The "Republics" of Donetsk and Luhansk*, ARTICLES OF WAR (Mar. 3, 2022), https://lieber.westpoint.edu/application-ihl-proxies-donetsk-luhansk/.

territories occupied by the two People's Republics became occupied territories within the meaning of the law of armed conflict, with all the attendant obligations that this imposes on occupying forces and the State party to which they belong.[248]

The status of the parties also has ramifications for other rules governing the conduct of hostilities, including the rules on targeting. Whereas members of armed forces, militias, or volunteer corps belonging to a State party are subject to lethal targeting on the basis of their membership of those forces regardless of the function they perform,[249] the use of lethal force against persons acting on behalf of non-State actors in a non-international armed conflict is subject to different rules.[250] Individuals who are members of organized armed groups and perform combat functions on a continuous basis are understood not to be civilians, but warfighters who are liable to direct attack on the basis of their status.[251] However, it is a matter of debate whether other members of organized armed groups who carry out combat support or combat service support functions, in other words persons who perform logistics, engineering, intelligence, signals, or similar functions in support of warfighters, are also liable to direct attack solely on the basis of their membership in the organized armed group.[252]

The fact that hybrid wars involve irregular forms of violence, such as organized criminality or acts of terrorism, adds further urgency to these debates. Provided they meet the criteria of an organized armed group,

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[248] This includes the obligation to re-establish and ensure public order and safety pursuant to Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, as well as a general duty to respect, protect and treat humanely all protected persons in line with Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 27, Aug. 12, 1949. Pursuant to Article 47 of Geneva Convention IV, protected persons do not lose their rights, should the occupying power annex the occupied territory.

[249] Except for military medical and religious personnel: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 15 (Additional Protocol I), June 8, 1977.

[250] INT'L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2008).

[251] *Id*. at 32–35.

[252] U.S. DEP'T DEF., *supra* note 148, § 5.7.3.2; *see also* Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 690–92 (2010).

criminal gangs and terrorist groups are likely to include persons, possibly in large numbers, who are not directly engaged in warfighting. Such persons could be bomb-makers, bodyguards, traffickers, or drug dealers. Some may perform functions that can reasonably be described as involving combat support tasks, thus raising the question whether their activities are connected with the hostilities so intimately as to justify treating them as non-civilians. Other persons may only be loosely affiliated with organized armed groups without being members.[253] Again, the facts will be decisive in determining the status of individuals engaged in criminal activity, but the unsettled position of the law does not make the assessment any easier. Of course, these difficulties are not confined to situations of hybrid warfare, but have arisen in other circumstances, in particular in the context of counterinsurgency operations.[254] Once again, the point to take away is not that these legal challenges are unique to hybrid wars, but that they are prone to arise in such situations.

D. Regulating Metaphorical Warfare

Acts of metaphorical warfare are designed to inflict harm, but often do so without producing kinetic effects. Disinformation, election interference, economic sanctions, and passportization are examples of measures that do not cause physical destruction and injury directly.[255] On their own, such measures do not amount to an armed conflict and will not, therefore, trigger the application of the law of armed conflict. Instead, they engage other thresholds and regimes of international law.

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[253] *Cf.* Edward C. Linneweber, *To Target, or Not to Target: Why 'tis Nobler to Thwart the Afghan Narcotics Trade with Nonlethal Means*, 207 MIL. L. REV. 155 (2011).

[254] *E.g.*, COUNTERINSURGENCY LAW: NEW DIRECTIONS IN ASYMMETRIC WARFARE (William C. Banks ed., 2013); NEW BATTLEFIELDS, OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE (William C. Banks ed., 2011).

[255] On passportization, see Sabine Hassler & Noëlle Quénivet, *Conferral of Nationality of the Kin State – Mission Creep?*, *in* THE USE OF FORCE AGAINST UKRAINE AND INTERNATIONAL LAW: JUS AD BELLUM, JUS IN BELLO, JUS POST BELLUM 73 (Sergey Sayapin & Evhen Tsybulenko eds., 2018); Toru Nagashima, *Russia's Passportization Policy toward Unrecognized Republics*, 66 PROBS. POST-COMMUNISM 186 (2019); Vincent M. Artman, *Documenting Territory: Passportisation, Territory, and Exception in Abkhazia and South Ossetia*, 18 GEOPOLITICS 682 (2013); Anne Peters, *Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction*, 53 GERMAN Y.B. INT'L L. 623 (2010).

At the lower end of the spectrum of conflict, international law does not prohibit measures that are merely unfriendly.[256] States are therefore at liberty to engage in a broad range of offensive actions in their relations with other international actors, such as withholding diplomatic courtesies, imposing economic sanctions, and participating in boycotts, as long as these activities do not breach any applicable rules of international law. Certain measures of metaphorical warfare, such as attempts to manipulate public opinion through the selective amplification of existing sentiments, will not contravene any specific prohibitions of international law and are therefore legally permissible, despite causing potentially severe harm.[257]

Other hostile measures that are harmful, but fall short of being coercive in nature, may violate the sovereignty of the targeted State. France, for example, has taken the position that malicious cyber operations carried out against French digital systems intended to affect their availability, integrity, or confidentiality are in breach of French sovereignty.[258] However, this is a minority position. At present, there is no consensus as to exactly what measures are incompatible with the duty to respect another State's sovereignty and political independence.[259] The dividing line between unfriendly acts and those that violate sovereignty therefore is not clear.

In addition, harmful but non-coercive acts may also contravene other rules of international law. For example, disseminating disinformation may be incompatible with a State's obligations under international human rights

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[256] Neil McDonald & Anna McLeod, *"Antisocial Behaviour, UnfriendlyRelations": Assessing the Contemporary Value of the Categories of Unfriendly Acts and Retorsion in International Law*, 26 J. CONFLICT & SEC. L. 421 (2021).

[257] *See* ALEX KRASODOMSKI-JONES ET AL., WARRING SONGS: INFORMATION OPERATIONS IN THE DIGITAL AGE (2019).

[258] Jack Kenny, *France, Cyber Operations and Sovereignty: The 'Purist' Approach to Sovereignty and Contradictory State Practice*, LAWFARE (Mar. 12, 2021), https://www.lawfareblog.com/france-cyber-operations-and-sovereignty-purist-approach-sovereignty-and-contradictory-state-practice.

[259] Kevin Jon Heller, *In Defense of Pure Sovereignty in Cyberspace*, 97 INT'L L. STUD. 1433, 1462 (2021); Harriet Moynihan, *The Vital Role of International Law in the Framework for Responsible State Behaviour in Cyberspace*, 6 J. CYBER POL'Y 394, 399–402 (2021); Luke Chircop, *Territorial Sovereignty in Cyberspace after Tallinn Manual 2.0*, 20 MELB. J. INT'L L. 349, 360–64 (2019).

law.[260] Given the diversity of malign activities and the sheer volume of the applicable rules, it is not feasible to offer a comprehensive account of possible violations. In fact, the range of potential legal issues raised by acts of metaphorical war is exceedingly wide, as underlined by the notion of hybrid threats.[261] Threats of this kind may take on a virtually endless number of guises, from spreading misinformation, fostering economic dependence and cyber espionage to intellectual property theft, leveraging national diasporas, and stoking societal divisions. Since almost anything can be weaponized and turned into a threat, there is hardly any area of law that could not, at least potentially, be touched by metaphorical warfare. Nevertheless, in the present operating environment, metaphorical warfare follows certain recurrent patterns that raise certain legal challenges and questions more regularly than others, such as those that arise in relation to the information sphere and cyber space.

Moving up the scale of conflict, certain malign acts may contravene the principle of non-intervention, which prohibits acts that seek to coerce a State in matters in which it is permitted to decide freely.[262] The principle only proscribes coercive measures, such as interference with election processes which disable or tamper with national voting infrastructure to forcibly prevent a State from conducting an election that meets applicable international standards.[263] The principle does not, however, cover activities that may obtain similar outcomes through non-coercive means, for example tarnishing the legitimacy of an election by undermining trust in individual candidates or the fairness of the electoral process.[264] For the same reason,

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[260] Human Rights Council Res. 49/21 U.N. Doc. A/HRC/49/L.31/Rev.1 (Mar. 30, 2022) ("*Emphasizing* that disinformation can be designed and spread so as to mislead, and to violate and abuse human rights, including privacy and the freedom of individuals to seek, receive and impart information, including in times of emergency, crisis and armed conflict, when such information is vital"); *cf*. Marko Milanovic & Michael N. Schmitt, *Cyber Attacks and Cyber (Mis)information Operations during a Pandemic*, 11 J. NAT'L SEC. L. & POL'Y 247, 267–69 (2020).

[261] *See Hybrid Threats as a Concept*, *supra* note 84.

[262] Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 ¶¶ 202–09 (June 27).

[263] Michael N. Schmitt, *"Virtual" Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law*, 19 CHI. J. INT'L L. 30, 50 (2018).

[264] JENS DAVID OHLIN, ELECTION INTERFERENCE: INTERNATIONAL LAW AND THE FUTURE OF DEMOCRACY 83 (2020); Michael N. Schmitt, *Foreign Cyber Interference in Elections*, 97 INT'L L. STUD. 739, 744–50 (2021); *see* Barrie Sander, *Democracy Under The Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections*, 18 CHIN. J. INT'L L. 1, 20–24 (2019).

many other forms of political subversion, including much of what falls under the banner of influence operations, will not be caught by the principle.[265] Moving further up the scale, malign acts that cause physical damage or injury may engage Article 2(4) of the United Nations Charter, which as we have seen prohibits the use of force in international relations. However, most acts of metaphysical warfare will lack the severity to cross this threshold as traditionally understood, or will not do so manifestly, precisely because they are designed to avoid these thresholds and any corresponding red lines in the first place.[266]

The various legal boundaries that traverse the spectrum of conflict are not fully settled and the scope of the conduct they proscribe remains uncertain in key respects. This affords hostile actors with ample opportunities to engage in harmful activities that are not blatantly unlawful. Obfuscation tactics, such as operating covertly, relying on proxies, and old-fashioned lies and denials, enable them to exploit these opportunities further and to sow legal confusion.[267] This complicates matters for States targeted by malign

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[265] Duncan B. Hollis, *The Influence of War; The War for Influence*, 32 TEMP. INT'L & COMPAR. L. J. 31, 41 (2018); *see also* Ido Kilovaty, *Doxfare—Politically Motivated Leaks and the Future of the Norm on Non-Intervention in the Era of Weaponized Information*, 9 HARV. NAT'L SEC. J. 146 (2018).

[266] It is difficult to envisage, for example, a malign actor interfering with the electoral process in another State through forcible measures that would cross the threshold of an armed attack within the meaning of Article 51 of the United Nations Charter. *See also* Schmitt, *supra* note 264, at 66; *cf.* James Van de Velde, *When Does Election Interference via Cyberspace Violate Sovereignty?: Violations of Sovereignty, "Armed Attack," Acts of War, and Activities "Below the Threshold of Armed Conflict," in* DEFENDING DEMOCRACIES: COMBATING FOREIGN ELECTION INTERFERENCE IN A DIGITAL AGE 163, 166 (Jens David Ohlin & Duncan B. Hollis eds., 2021).

[267] It has been suggested, for example, that Russia's seizure of Crimea in 2014 merely violated the principle of non-intervention, but *not* the prohibition to use force under Article 2(4) of the Charter, because the Russian "military personnel that established operational control over Crimea did so without the use of violence." *See* Russell Buchan & Nicholas Tsagourias, *The Crisis in Crimea and the Principle of Non-Intervention*, 19 INT'L CMTY L. REV. 165, 179 (2017). This assessment ignores the scale, objective and broader military context of the Russian deployment inside Crimea, leading to the absurd result that the Russian presence would have triggered the law of belligerent occupation without the use of force, that Ukraine would have

interference, since demonstrating in a convincing manner that such interference is in breach of international law and attributing it to the hostile actor responsible is essential for holding the latter to account.[268]

While acts of metaphorical war are unlikely to cross the threshold of armed conflict on their own, it would be a mistake to assume, as underlined earlier, that belligerents prepared to engage in such acts below the level of real war will suddenly abandon this tactic in times of armed hostilities. On the contrary, as the stakes and enmity increase, the more likely it is that belligerents will resort to such measures against their adversaries if doing so delivers them an advantage. It is therefore likely that the instruments and methods associated with metaphorical warfare will feature heavily in situations of real war, where they complement acts of material violence.[269]

This hybridity of diffused war, encapsulated in NATO's notion of "hybrid warfare threats," poses real challenges for the law of armed conflict as the primary regulatory framework of armed conflict. This is so because the relevant rules are concerned for the most part with kinetic action and their consequences. For example, the targeting rules and the various protections they confer on civilians and civilian objects apply in the case of "attacks," which are defined as acts of violence in offence or defense.[270] Disinformation and economic sanctions are not acts of violence, even if they were to produce destructive or fatal outcomes indirectly. Thus, deliberate acts of disinformation directed at the enemy civilian population that knowingly

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violated Article 2(4) of the Charter if it had chosen to forcibly resist the Russian deployment or that it would have been necessary for Ukraine to induce Russian units to open fire before being entitled to rely on the right of self-defense to resist the Russian seizure of its territory. *Cf.* Veronika Bílková, *The Use of Force by the Russian Federation in Crimea*, 75 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 27, 31–37 (2015); Antonello Tancredi, *The Russian Annexation of the Crimea: Questions relating to the Use of Force*, 1 QUESTIONS INT'L L. 5, 29–34 (2014).

[268] Draft Articles, *supra* note 230, art. 2; *see* Sander, *supra* note 264, at 17.

[269] *E.g.* Todd C. Helmus & William Marcellino, *Lies, Misinformation Play Key Role in Israel-Hamas Fight*, THE RAND BLOG (Oct. 31, 2023), https://www.rand.org/pubs/commentary/2023/10/lies-misinformation-play-key-role-in-israel-hamas-fight.html; Angelo Fichera, *The Horrifying Images Are Real. But They're Not From the Israel-Gaza War*, N.Y. TIMES (Nov. 2, 2023), https://www.nytimes.com/2023/11/02/us/politics/israel-gaza-war-misinformation-videos.html.

[270] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 49(1) (Additional Protocol I), June 8, 1977.

exposes them to the risk of injury or death, for example by convincing them to expose themselves to danger or to behave in a reckless manner, do not qualify as attacks.[271]

This is not to suggest that other rules of the law of armed conflict could not be engaged by non-kinetic influence activities. For example, Article 51(2) of Additional Protocol I prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population." However, the scope of this prohibition is relatively narrow—it covers terror bombardments, shelling, and sniping, for instance—but not the dissemination of information unless it constitutes a threat of violence.[272] Most cases of disinformation and other influence activities will not be caught by this rule. Similarly, while it would not be lawful to endanger civilians by issuing misleading or deceptive warnings to the civilian population about impending attacks, the circumstances in which this rule is engaged are quite narrow.[273] The same is true for spreading misinformation in order to persuade civilians to move or to remain in place in an attempt to shield, favor, or impede military operations.[274] The general duty of protection set out in Article 51(1) of Additional Protocol I, which declares that the "civilian population and individual civilians shall enjoy general protection against dangers arising from military operations," may fill this gap to a degree. However, since this rule is limited to military operations, it is open to question whether it covers acts of disinformation a belligerent may direct against the enemy civilian population through means other than military operations, for example disinformation activities conducted by its civilian

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[271] Accordingly, subjecting civilians to influence activities is generally considered to be permissible, as long as the activities in question comply with any specific prohibitions and obligations. *See* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 421 (Michael N. Schmitt ed., 2017); INT'L COMM. RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 21 (2019). This is so despite the fact that Article 48 of Additional Protocol I requires the parties to the conflict to "direct their operations only against military objectives."

[272] *Cf*. Prosecutor v. Galić, Case No. T-98-29-T, Judgment and Opinion, ¶¶ 584–94 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

[273] Pnina Sharvit Baruch & Noam Neuman, *Warning Civilians Prior to Attack under International Law: Theory and Practice*, 87 INT'L L. STUD. SER. 359, 377 (2011).

[274] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 51(7) (Additional Protocol I), June 8, 1977.

agencies in parallel to the hostilities. On the whole, the law of armed conflict deals with malign influence only tangentially and in narrow circumstances.

V. COPING WITH DISRUPTION

Throughout history, technological developments have generated successive waves of military transformation. New inventions and innovations such as the railroads, mass production, wireless communications, aviation, and spaceflight have disrupted established military organization and tactics by handing those able to exploit the potential of new technologies a military advantage over their opponents.[275]

Disruptive technological change and its ripple effects pose profound questions for the regulation of warfare: how does law designed for a bygone era remain relevant in new and potentially unforeseen circumstances? The answer is governed in part by normative considerations. Whether and how the provisions of international agreements apply to novel conditions must be determined with reference to the rules of treaty interpretation, as formulated in the Vienna Convention on the Law of Treaties.[276] There is nothing mechanical about the application of these rules though. They often do not yield definite answers, but merely lay bare a spectrum of tenable interpretations that leave room for reasonable disagreement.[277] Alongside such normative considerations, we should not lose sight of the political nature of war and the rules that seek to regulate it. The changing character of warfare benefits some belligerents and disadvantages others. States with access to new arms and technologies that give them an edge on the battlefield will not want to see this advantage neutralized by legal restrictions, while adversaries without access to those weapons and technologies will almost certainly wish to achieve exactly that outcome.[278] Military asymmetries foster disagreement

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[275] Among the plethora of works on the subject, see MAX BOOT, WAR MADE NEW: TECHNOLOGY, WARFARE, AND THE COURSE OF HISTORY (2006); MARTIN VAN CREVELD, TECHNOLOGY AND WAR: FROM 2000 B.C. TO THE PRESENT (1989); TREVOR N. DUPUY, THE EVOLUTION OF WEAPONS AND WARFARE (1980).

[276] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 332.

[277] *See generally* INTERPRETATION IN INTERNATIONAL LAW (Andrea Bianchi et al. eds., 2015).

[278] JOHN D. MAURER, COMPETITIVE ARMS CONTROL: NIXON, KISSINGER, AND SALT, 1969–72 (2022).

over the law, its interpretation, and its application.[279] These difficulties are compounded by the fact that the law tends to lag behind the evolution of warfare, often by some margin.[280] Many of the foundational instruments of the law of armed conflict were adopted in response to past conflicts to address the historical challenges those events posed. Reading the Geneva Conventions of 1949, it does not take long to realize that their content and scope is fundamentally shaped by the experiences of the Second World War and that not all of these experiences remain relevant today.[281] The horizon of the law is heavily constrained by the past, a feature exacerbated by the accelerating pace of technological change.

In sum, the legal regime of warfare struggles with novel developments because the letter of the law does not conclusively determine how existing rules should be applied to new situations, the different interpretative possibilities this opens up implicate competing strategic interests and the historically contingent ambit of the rules leaves gaps in their application. The legal challenges posed by contemporary forms of warfare must be assessed against this background and against the scale of ongoing technological change. Over the coming years, the growing capabilities of unmanned vehicles in the air, on land, and on water, steady advances in artificial intelligence, the widespread automation of human decision-making processes, the exploitation of vast amounts of data, and progresses in bio- and quantum technology will almost certainly cause significant disruption that demands continued military adaptation and transformation. It is safe to assume that these developments will sustain, rather than curb, the diffusion of warfare.

As the preceding sections have shown, the legal difficulties posed by diffused warfare are formidable. However, they must be treated with some care. Broad generalizations only go so far. It is often claimed in sweeping

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[279] On the impact of strategic considerations on legal posture in cyber space, see Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT'L L. 421, 448–58 (2011).

[280] W. Michael Reisman, *Rasul v. Buch - A Failure to Apply International Law*, 2 J. INT'L CRIM. JUST. 973 (2004).

[281] A case in point is the limited definition of protected persons under Article 4 of Geneva Convention IV. *Cf.* Separate Opinion of Judge Shahabuddeen, Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Separate Opinion of Judge Shahabuddeen, ¶¶ 164–66 (Int'l Crim. Trib. for the Former Yugoslavia Appeals Chamber July 15, 1999) (holding that in "modern inter-ethnic armed conflicts" ethnicity may be a more appropriate ground than nationality for qualifying as a protected person).

terms that the law is inadequate, out of date, or otherwise defective in the face of modern developments.[282] This certainly holds true in relation to specific points or areas,[283] but it is too broad a complaint to level against the legal regime of warfare as a whole and without qualification.[284] Sweeping claims that the law is outdated imply that far-reaching adjustments are needed to align the old rules with current realities. Again, this may be the true in some areas, for instance where new developments have opened up gaps.[285] However, the scale of legal change required to respond to the evolving character of war must be assessed on the basis of a realistic understanding of the operating environment. Much of the law may appear antiquated in the eyes of those who proclaim the death of conventional warfare.[286] However, if the belief in the demise of conventional war among industrialized powers is misplaced, as the conflict in Ukraine has shown, then so is the idea that the

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[282] *Cf.* Editorial Board, *Rules of War need Rewriting for the Age of AI Weapons*, FIN. TIMES (Dec. 1, 2021), https://www.ft.com/content/d8371144-364b-496d-943c-16f7e0982b6e.

[283] For examples of such points and areas, see INTERNATIONAL HUMANITARIAN LAW AND THE CHANGING TECHNOLOGY OF WAR (Dan Saxon & Martinus Nijhoff eds., 2013); Eric Talbot Jensen, *The Future of the Law of Armed Conflict: Ostriches, Butterflies, and Nanobots*, 35 MICH. J. INT'L L. 253 (2014).

[284] Closer inspection reveals that at least some of these complaints are based on misunderstandings or an inflated sense of the law's deficiencies. *E.g.* ECHEVARRIA, *supra* note 113, at 12 (suggesting that Russia's seizure of Crimea has not provided a "legal justification for direct military intervention on the part of the West," thus overlooking the right of collective self-defense); John Dwight Ingram, *The Geneva Convention is Woefully Outdated*, 23 PENN STATE INT'L L. REV. 79, 88 (2004) (arguing that the rules of warfare "are at the very least outdated, and probably never did make much sense").

[285] For instance, anti-satellite (ASAT) operations in outer space may produce debris that poses a hazard to other space objects by, in essence, polluting the lower earth orbit region. *See* Karl D. Hebert, *Regulation of Space Weapons: Ensuring Stability and Continued Use of Outer Space*, 12 ASTROPOLITICS 1, 12–17 (2014). In a terrestrial context, the rules for the protection of the natural environment (Articles 35(3) and 55(1), Additional Protocol I) would potentially come into play in analogous situations during armed conflict. However, it is open to some doubt whether these rules extend to the outer space environment. *See* David A. Koplow, *ASAT-isfaction: Customary International Law and the Regulation of Anti-Satellite Weapons*, 30 MICH. J. INT'L L. 1187, 1249–57 (2008). The adoption of a new international agreement could provide legal certainty on this and other points. *See* U.N. Secretary-General, *Reducing Space Threats through Norms, Rules and Principles of Responsible Behaviours*, U.N. Doc. A/76/77 (July 13, 2021).

[286] MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR 249 (1991).

law is obsolete and must be transformed in its entirety. Rather than wholesale change, diffused warfare demands more targeted adjustments.[287]

The direction of change cannot be taken for granted, however. This is so because the legal regime of war is caught between two competing imperatives: an expectation that it will adjust to better reflect the changing character of warfare and an expectation that it will restrain war and shape its future evolution. It is caught, in other words, between a demand to align itself with new realities and a demand to moderate them.

A. International Order and the Use of Force

Seen from a historical perspective, the Charter rules on the use of force are an example of successful past adaptation. Low intensity violence and acts of metaphorical warfare do not sit well with the binary distinction between war and peace, since they typically lack the intensity that would merit treating them as proper wars, yet they are too severe not to disturb the peace. By contrast, the prohibition of the use of force in Article 2(4) of the Charter covers violent acts of lesser intensity falling below the traditional threshold of war and also certain indirect uses of force.[288] The prohibition thus extends into the space occupied by gray zone conflict and prohibits at least some violent acts of metaphorical war. As a result, the United Nations Charter system better reflects the reality of strategic competition in the contemporary world than the binary divide between war and peace ever did.

This is not some minor point. For some time now, it has been fashionable to proclaim that the dividing line between war and peace has become blurred. This claim obscures the fact that the United Nations Charter draws the relevant legal thresholds in a different place. Ironically, using the outdated terminology of war and peace fuels the perception that the law itself is badly outdated.[289] This overlooks the flexibility of the current rules: the modern legal regime governing the use of force is not tied to any rigid

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[287] *Cf*. Braden R. Allenby, *Are New Technologies Undermining the Laws of War?*, 70 BULL. ATOMIC SCIENTISTS 21, 29–30 (2014) ("What would seem to be appropriate, therefore, is neither the wholesale rejection of the laws of war nor the comfortable assumption that only minor tweaks to them are necessary").

[288] *See* note 163 for more details.

[289] *Cf*. Prime Minister, *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy,* at 73 (Mar. 2021) ("We must update our deterrence posture to respond to the growth in state competition below the *threshold of war under international law*") (emphasis added).

distinction between war and peace. To suggest that diffused warfare has rendered it meaningless is wide off the mark.[290] It also overlooks the persistent nature of the problem: the blurred line between war and peace is not some new development brought about by recent trends, but an intrinsic feature of an international system that is unable to restrain the amorphous reality of war within the formal categories of the law.[291] The Charter rules on the use of force are more in tune with current strategic conditions than is often suggested, but it would be naïve to assume that they will ever be in lockstep.

If anything, the diffusion of warfare will exert renewed pressure on the law. Since the prospects of amending the United Nations Charter are minimal, attempts to adapt in response to these pressures will most likely take the form of reinterpretations and clarifications of the existing rules through State practice, judicial decisions, and non-binding instruments.[292] Accordingly, as competitive interactions in the gray zone take hold, States may be more inclined to invoke the language of Article 2(4) of the Charter, including the prohibition to threaten the use of force, in order to condemn low intensity acts of coercion.[293] In theory, this could progressively extend the scope of the prohibition to acts that in the past have not been considered to cross the threshold of force, such as law enforcement measures at sea or forms of support provided by State authorities to non-State actors that are looser than those envisaged in the *Nicaragua* case.[294] There are some signs pointing in this direction, mostly in the cyber context. France, for example, has taken the position that cyber operations devoid of physical effects may qualify as a use of force, for instance in situations where they penetrate its

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[290] Gergely Tóth, *Legal Challenges in Hybrid Warfare Theory and Practice: Is There a Place for Legal Norms at All?*, *in* THE USE OF FORCE AGAINST UKRAINE AND INTERNATIONAL LAW: JUS AD BELLUM, JUS IN BELLO, JUS POST BELLUM 179 (Sergey Sayapin & Evhen Tsybulenko eds., 2018).

[291] ZIV BOHRER ET AL., LAW APPLICABLE TO ARMED CONFLICT 106–96 (2020).

[292] For an example of the latter, see *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT'L & COMPAR. L. Q. 963 (2006).

[293] *E.g.*, U.N. Security Council, Letter dated June 8, 2020 from the Permanent Representative of the Bolivarian Republic of Venezuela to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2020/520 (June 9, 2020) (accusing the United Kingdom of threatening the use of force and attempting to impose a blockade on Venezuela).

[294] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 392, ¶ 228 (Nov. 26) (holding that the mere supply of funds to rebel forces fighting another State does not amount to an indirect use of force).

military systems with the aim of compromising French defense capabilities.[295] Cases where foreign authorities finance or train individuals to carry out cyberattacks against France may also qualify.[296] Norway has declared that cyber operations which severely disrupt the functioning of the State could amount to a use of force, as could acts of digital sabotage that cause widespread economic effects and destabilization.[297]

The more orthodox position espoused by the majority of States does not go this far, but asserts that cyber operations may cross the threshold of force if their scale and effects are comparable to those of a conventional act of force.[298] This position is likely to prevail for now. Accusing hostile actors of resorting to the use of force in breach of Article 2(4) of the Charter underlines the gravity of the situation and of the alleged violation.[299] However, unless the use of force in question rises to the level of an armed attack and engages the right of self-defense, there are no other immediate benefits to invoking Article 2(4) of the Charter. Without meaningful incentives, it is unlikely that a sufficient number of States will champion a broader reading of force and extend it to acts of metaphorical warfare, especially as there are good reasons for not doing so. Since the prohibition to use force applies irrespective of the means and methods employed, the rule benefits from a considerable degree of flexibility that facilitates its application in novel situations, such as the cyber context. [300] There is no real

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[295] MINISTÈRE DES ARMÉS, DROIT INTERNATIONAL APPLIQUÉ AUX OPÉRATIONS DANS LE CYBERESPACE 7 (2019).

[296] *Id*. This goes further than the Nicaragua case. *Cf. supra* note 294.

[297] U.N. Gen. Assembly, Official Compendium of Voluntary National Contributions on the Subject of How International Law applies to the Use of Information and Communications Technologies by States submitted by Participating Governmental Experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security established pursuant to General Assembly Res. 73/266, at 67, U.N. Doc. A/76/136 (July 13, 2021). The Netherlands has taken a similar position in relation to a "cyber operation with a very serious financial or economic impact." *Id*. at 58.

[298] Allied Joint Doctrine for Cyberspace Operations, NATO, Jan. 29, 2020, AJP-3.20, 20.

[299] *See* Jan Klabbers, *Intervention, Armed Intervention, Armed Attack, Threat to Peace, Act of Aggression, and Threat or Use of Force: What's the Difference?*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 488, 503–05 (Marc Weller ed., 2015) (noting the stigmatizing effect of such accusations).

[300] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 244, 39 (July 8).

need to go further, as the principle of non-intervention already addresses acts of coercion that lack an element of overt violence.[301] Stretching the prohibition might also be something of a strategic *faux pas*, as it would impose greater constraints not just on hostile actors who may simply ignore them, but also on friendly powers and a nation's own authorities, thereby constraining their options for robustly countering malign activities in the gray zone. Broadening the prohibition would invite more frequent accusations of its violation and encourage its use as a rhetorical device. Among repeated accusations of non-compliance, the rule would almost certainly be weakened.[302]

Even if the diffusion of warfare is unlikely to inaugurate a wider reading of the prohibition to use force, it may still have a significant impact on the rule by reinforcing current trends towards expanding the right of self-defense. Over the last two decades, many States have faced unpredictable and potentially highly destructive threats emanating from non-conventional sources, in particular those posed by transnational terrorism. Where States have adopted a military response, they have often invoked the right of self-defense in ways that deviate from past practice. Although no aspect of the right has escaped this trend, the most important departures include the use of force in self-defense against armed attacks launched by non-State actors not operating under the control of a State; self-defense in anticipation of impending attacks, often aided by a liberal understanding of the requirement of imminence; self-defense against non-State actors present in the territory of third States that are seen as unable or unwilling to address the threat posed by those non-State actors; and self-defense in response to the accumulation of a series of events that do not necessarily rise to the level of an armed attack when considered independently of one another.[303]

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[301] Renewed interest in the principle of non-intervention suggests that States are not prepared to undermine that principle through a broad reading of the prohibition to use force. *See* Suella Braverman, U.K. Att. Gen., International Law in Future Frontiers (May 19, 2022).

[302] *See also* Thilo Marauhn, *How Many Deaths Can Article 2(4) UN Charter Die?*, *in* THE JUSTIFICATION OF WAR AND INTERNATIONAL ORDER: FROM PAST TO PRESENT 449, 455–58 (Lothar Brock & Hendrik Simon eds., 2021).

[303] *See* David Cameron, Prime Minister, Statement on Counter-Terrorism, House of Commons (Mar. 12, 2018) (Sept. 7, 2015) (justifying the exercise of the right of self defense in anticipation of armed attacks by non-State actors in the territory of a State unable and unwilling to address the threat).

Gray zone conflict is likely to sustain, possibly amplify, these trends. States targeted by force that does not rise to the level of an armed attack may not respond in kind, but are bound by Article 2(4) of the Charter to rely on other, potentially less effective responses. Recognizing this, it makes strategic sense for hostile actors to calibrate their unlawful use of force in a way that deliberately remains below the threshold of an armed attack, so as not to engage the targeted State's right to employ counterforce in self-defense. The gap between Article 2(4) and Article 51 of the United Nations Charter thus invites hostile gray zone activity and threatens to hollow out collective self-defense guarantees, such as Article 5 of the North Atlantic Treaty.[304] To close this gap, States vulnerable to such tactics may be inclined to build on the trends of the last two decades and interpret the notion of armed attack in an expansive manner. The right to use force in self-defense against non-State actors and the accumulation of events theory are particularly relevant in this respect.

However, at least some States appear willing to revisit the gravity threshold of self-defense as well. In line with its generous interpretation of the notion of force, France takes the view that an incident causing significant economic damage may amount to an armed attack even where it does not involve the loss of life or physical destruction.[305] Singapore has taken a similar stance, declaring that in certain limited circumstances, malicious cyber activities may qualify as an armed attack even without producing injury or physical damage, for example where they cause sustained and long-term outage of Singapore's critical infrastructure.[306] These are minority positions, but it is not unreasonable to assume that they may find support among other States over time. While there are few, if any, strategic incentives for lowering the threshold of Article 2(4) of the Charter, relaxing the conditions governing the exercise of the right of self-defense does offer some benefits, most importantly by deterring hostile gray zone actors. However, there are limits as to how far the conditions for self-defense may be stretched before they become meaningless. For example, to suggest that misinformation

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[304] *E.g.*, Julio Miranda Calha, North Atlantic Treaty Organization [NATO], *Hybrid Warfare: NATO's New Strategic Challenge?*, NATO Parliamentary Assembly, Defence and Security Commitee, at 4, 166 DSC 15 E bis (Oct. 10, 2015).
[305] MINISTÈRE DES ARMÉS, *supra* note 295, at 9.
[306] U.N. General Assembly, *supra* note 297, at 84.

campaigns or psychological operations could amount to an *armed* attack would strain the language of the law to its extreme.[307]

How, then, should we assess the impact of diffused warfare on the rules governing the use of force? The dissonance between the normative expectations that flow from the prohibition to use force and the prospect of more permissive State practice invites three possible responses. The first is to resist legal adaptation out of a concern that widening the right of self-defense would severely weaken the ban on force and, ultimately, undermine international order. Proponents of this response seek to arrest recent trends by reaffirming the restrictive interpretation of the right of self-defense,[308] whilst dismissing divergent practice as insufficiently dense to meet the formal conditions necessary to modify the rules.[309] This restrictive approach takes comfort in the idea that as long as the majority of the international community rejects an expansive interpretation of self-defense as incompatible with the prohibition to use force, the existing higher threshold for the unilateral use of force in self-defense is in fact reinforced.[310] At a formal level, this may be true. However, there is only so much divergent State practice that the law can bear before it loses credibility.[311] By rejecting attempts to adapt the right of self-defense in the face of evolving threats, the restrictive approach puts compliance with the prohibition to use force on a collision course with competing strategic interests.

Aware of the danger this poses to the rule of law, a second response is to accept that some degree of legal adaptation is necessary by aligning normative expectations more closely with the reality of State practice. Since support for an expansive interpretation of self-defense is not sufficiently

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[307] Peter J. Smyczek, *Regulating the Battlefield of the Future: The Legal Limitations on the Conduct of Psychological Operations (PSYOP) under Public International Law*, 57 A.F. L. REV. 209, 237–38 (2005).

[308] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9) (stipulating that the right of self defense is available only when an armed attack is made by another State).

[309] *See* MARY ELLEN O'CONNELL ET AL., SELF-DEFENCE AGAINST NON-STATE ACTORS 14–89, 174–257 (2019).

[310] *Cf.* Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), Judgment, 1984 I.C.J. 392, ¶ 186 (Nov. 26) ("If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule").

[311] GRAY, *supra* note 120, at 27.

widespread among States to formally modify the established rules,[312] proponents of this approach may favor a realist position to suggest that in determining the content of the law, regard must be had not just to its letter, but also to how it operates.[313] On this account, what from a formalistic perspective may look like deviations from the rules as expressed *on paper* may in fact be conduct tolerated by the international community in *practice*. The dissonance between normative expectations and actual practice is therefore not necessarily a sign of the law's fragility, but part of its progressive adaptation. However, this begs the question as to how much dissonance is acceptable or, in other words, where the line between legal adaptation through practice and rule avoidance lies.[314]

A third position is to deduce that the rules governing the use of force are torn between doctrinal purity and normative drift, as Daniel Bethlehem put it, and conclude that the law is in a state of flux.[315] Much like Schrödinger's cat, expansive interpretations of the right of self-defense therefore may be both lawful and unlawful. That the law is indeterminate may be an apt description of the present situation, but it is also a deeply unsatisfactory state of affairs.

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[312] *See* Jutta Brunnée & Stephen J. Toope, *Self-defence against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?*, 67 INT'L & COMPAR. L. Q. 263, 277–82 (2018); *cf*. Int'l Law Comm'n, *Report of the Commission to the General Assembly on the work of its seventieth session*, 2018 Y.B. Int'l L. Cmm'n 100–02, UN Doc. A/CN.4/SER.A/2018/Add.1 (Conclusion 8: 'The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent').

[313] *See also* W. MICHAEL REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT 95–104 (2013); *cf*. Monica Hakimi & Jacob Katz Cogan, *The Two Codes on the Use of Force*, 27 EUR. J. INT'L L. 257 (2016) (arguing that the legal regime on the use of force comprises to codes: an institutional code and a State code).

[314] One may agree with Rosalyn Higgins that "there *is* a distinction between non-compliance, on the one hand, and interpretation *infra legem* to achieve certain outcomes, on the other", yet also find that distinction difficult to draw. *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 252 (1994); c*f*. Monica Hakimi, *What Might (Finally) Kill the Jus ad Bellum?*, 74 CURRENT LEGAL PROBS. 101, 113–23 (2021).

[315] DANIEL BETHLEHEM, LAW AND THE USE OF FORCE: THE LAW AS IT IS AND AS IT SHOULD BE (June 7, 2004) https://publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/4060808.htm.

B. Expanding Battlespaces and the Law of Armed Conflict

Despite all its structural problems, the law of armed conflict is reasonably well equipped to adjust to at least some aspects of diffused warfare.[316] The last century and a half has seen a long line of treaties that have repeatedly realigned the law with the prevailing military, political, and strategic conditions of the day. The evolution of the Geneva Conventions, from the first agreement in 1864 to their Additional Protocols in 1977,[317] illustrates the process.[318] This legislative route for responding to the changing character of warfare remains open to States. Perhaps its most attractive feature is that it enables States to adjust the law in a deliberate manner. However, many of the legal challenges today demand merely a refinement of existing rules and clarification of how they apply in new circumstances, rather than the development of tailor-made legal regimes from scratch.[319] The disparate nature of the rules in need of clarification does not lend itself easily to being addressed in a single instrument. Also, the success of the legislative method depends on the existence of a sufficient degree of political agreement and momentum. As the ongoing debate over lethal autonomous weapon systems demonstrates,[320] these political preconditions are not always present,

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[316] *See* Michael N. Schmitt, *War, Technology and the Law of Armed Conflict*, 82 INT'L L. STUD. 137 (2016); Darren M. Stewart, *New Technology and the Law of Armed Conflict*, 87 INT'L L. STUD. 271 (2011).

[317] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940.

[318] Giovanni Mantilla, *The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols*, *in* DO THE GENEVA CONVENTIONS MATTER? 35 (Matthew Evangelista & Nina Tannenwald eds., 2017).

[319] Emily Haslam, *Information Warfare: Technological Changes and International Law*, 5 J. CONFLICT & SEC. L. 157, 158–59 (2000) ("whether technological developments demand a new legal paradigm is a question of interpretation and this depends upon the particular rule under consideration"). For instance, since it is generally accepted that the law of armed conflict applies in outer space, there is no need to devise a new legal regime to regulate the conduct of hostilities in space. Rather, the task is to determine how the existing rules and principles operate. *See, e.g.*, Kubo Mačák, *Silent War: Applicability of the Jus in Bello to Military Space Operations*, 94 INT'L L. STUD. 1 (2018).

[320] Sebastiaan Van Severen & Carl Vander Maelen, *Killer Robots: Lethal Autonomous Weapons and International Law*, *in* 4 ARTIFICIAL INTELLIGENCE AND THE LAW 151 (Cedric Vanleenhove & Jan De Bruyne eds., Intersentia 2021).

and it requires some optimism to believe that they can be found in the current geopolitical climate.[321]

In the absence of legislative action, other adaptation mechanisms and features of the law of armed conflict come to the fore, such as norm development through interpretation and non-binding instruments.[322] Many of the applicable rules are highly contextual. Consider the duty to take feasible precautions in attack in order to avoid, and in any event to minimize, incidental harm to civilian persons and objects.[323] Feasibility is generally understood to require a belligerent to take those measures of precaution that are practicable or practically possible.[324] Such a standard cannot be divorced from its context: what is and is not practicable or practically possible depends on the specific circumstances prevailing at the time of the attack, including the technological means and capabilities available to the attacker. The contextual nature of the feasibility rule means that the exact obligations it imposes in individual circumstances shadow the prevailing material conditions, enabling it to be applied to a wide range of situations, including to new weapons, tactics, and domains, without the need for legislative refinement or updating.

In other cases, the application of the existing rules raises questions of principle or threshold issues which do require explicit clarification. For example, it is not immediately clear whether data held by information technology systems amounts to an "object" for the purposes of the law of armed conflict, so that it benefits from the protection that civilian objects enjoy from direct attack. Compelling arguments have been made on different

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[321] Paul B. Stephan, *The Crisis in International Law and the Path forward for International Humanitarian Law*, 104 INT'L REV. RED CROSS 2077, 2079–81 (2022).
[322] Cordula Droege & Eirini Giorgou, *How International Humanitarian Law Develops*, 104 INT'L REV. RED CROSS 1798, 1810 (2022). For more detail, see EMILY CRAWFORD, NON-BINDING NORMS IN INTERNATIONAL HUMANITARIAN LAW: EFFICACY, LEGITIMACY, AND LEGALITY (2022).
[323] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 57 (Additional Protocol I), June 8, 1977; *see* IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I 157–96 (2009).
[324] International Law Association Study Group, *The Conduct of Hostilities under International Humanitarian Law: Challenges of 21st Century Warfare,* 93 INT'L L. STUD. 322, 374 (2017).

sides of the debate.[325] Ultimately, the question will have to be settled by State practice, but non-binding instruments can make a significant contribution to this process.

While the law of armed conflict is served by various mechanisms that enable it to adapt to new developments, the diffusion of warfare raises more fundamental questions about the direction of this adaptation. Simply put: if war has transcended its old boundaries, should the law of armed conflict follow in its footsteps? To the extent that belligerents avail themselves of new instruments and methods of war, such as cyber operations, or conduct hostilities in domains that lie beyond traditional battlefields, such as outer space, the answer must surely be affirmative. To remain effective, the law of armed conflict must adjust its reach and extend to new theatres and forms of war. This should be uncontroversial.

The difficulties lie elsewhere. First, there is a concern that the taxonomy of armed conflict no longer suits modern conditions. The law clearly struggles with the classification of complex conflicts that involve a mix of belligerents and which are not confined to the territory of a single State. Although there may be some benefits in modifying the traditional dichotomy between international and non-international conflicts in response to complex transnational wars, the notion that the law is becoming anachronistic without such an adjustment is not borne out by the evidence.[326] The vagaries of conflict classification are a source of legal uncertainty.[327] Nevertheless, their impact is less pronounced in some areas than in others. The core principles of targeting, for example, are not affected by the intricacies of conflict classification. In fact, on a tactical level, it would not have made much difference in the conduct of coalition attacks against the Islamic State of Iraq and Syria (ISIS) whether the conflict was classified as international or non-international in character. Operational impediments to target verification, such as hostile forces mixing with the civilian population,

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[325] *See* Kubo Mačák, *Military Objectives 2.0: The Case for Interpreting Computer Data as Objects under International Humanitarian Law*, 48 ISR. L. REV. 55 (2015); Michael N. Schmitt, *The Notion of 'Objects' during Cyber Operations: A Riposte in Defence of Interpretive and Applicative Precision*, 48 ISR. L. REV. 81 (2015).

[326] As argued by Carrie McDougall, *The Other Enemy: Transnational Terrorists, Armed Attacks, and Armed Conflicts*, *in* SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 219, 245 (Leila Nadya Sadat ed., 2018).

[327] *See supra* Part IV § C (Regulating Hybrid War).

or in the case of foreign fighters detained in Syria, the reluctance of their States of nationality to repatriate them, pose more acute problems.[328]

Granted, the character of the conflict determines what rules must be applied and this has major implications in some areas, for instance due to the weaknesses of the detention regime in non-international armed conflicts or the unsettled criteria of membership in organized armed groups. However, these difficulties relate primarily to the content of the law, rather than the challenges surrounding conflict classification. Complex conflicts, including hybrid wars, undoubtedly demand further refinement of individual rules and their application. Adjusting the legal taxonomy of conflict is not, however, essential.

Second, there is a danger of overreach. Extensive reliance on the permissive rules of the law of armed conflict in situations beyond conventional combat risks redrawing the boundaries of conflict and displacing law-enforcement and other peacetime standards.[329] As long as the applicability of these rules depends on the existence of an armed conflict as a threshold condition, the likelihood that States may extend them to metaphorical warfare outside situations of real war is low. However, as two decades of counterterrorism and counterinsurgency operations have shown, during ongoing armed hostilities, governments may rely on permissive rules against persons and activities only loosely connected with the actual fighting.[330]

At the same time, there is also a danger of normative dilution. The intermingling of metaphorical warfare, criminality, and irregular violence with armed hostilities generates friction between peacetime legal regimes and the law of armed conflict. In some cases, peacetime regimes may impose standards on metaphorical warfare that are more appropriate than those of the law of armed conflict. The obligations that international human rights law lays upon States to refrain from disseminating misinformation and to

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[328] Dan E. Stigall, *The Syrian Detention Conundrum: International and Comparative Legal Complexities*, 11 HARV. NAT'L SEC. J. 54 (2020).
[329] *Cf*. Pearlstein, *supra* note 214, at 399–400. For a recent example, see Conor Foley, *Legitimate Targets: What is the Applicable Legal Framework Governing the Use of Force in Rio de Janeiro?*, 10 INT'L J. SEC. & DEV. 1 (2022).
[330] *See* Linneweber, *supra* note 253.

suppress false information are a case in point.[331] These obligations provide at least some protection to the information environment itself, something that the law of armed conflict fails to do. However, when it comes to matters at the core of warfighting, in particular targeting and detention, the application of peacetime standards threatens to undermine the logic and normative integrity of the law of armed conflict.[332] Neither operational overreach nor normative dilution are appropriate adaptations. They upset the balance between humanitarian considerations and military necessity at the core of the law of armed conflict and must be resisted for it to remain a credible restraint on war.[333]

VI. CONCLUDING THOUGHTS

The essence of war is the use of combat power by an organized political community to impose its will on another. From the sacking of Troy to the siege of Mariupol, this has been the defining feature of war. By contrast, the means and methods of warfare have evolved dramatically over the centuries. Precision guided munitions have replaced battering rams and the remote delivery of lethal force has become a viable alternative, in some cases, to assembling massed formations to meet the enemy on a battlefield. The impact on how wars are fought has been profound.

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[331] U.N., Joint Declaration on Freedom of Expression And "Fake News", Disinformation and Propaganda, FOM.GAL/3/17 (Mar. 3, 2017) ("State actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda)" and "States have a positive obligation to promote a free, independent and diverse communications environment, including media diversity, which is a key means of addressing disinformation and propaganda"); *see* Rebecca K Helm & Hitoshi Nasu, *Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation*, 21 HUM. RTS. L. REV. 302 (2021); Milanovic & Schmitt, *supra* note 260, at 270–74; Katie Pentney, *Tinker, Tailor, Twitter, Lie: Government Disinformation and Freedom of Expression in a Post-Truth Era*, 22 HUM. RTS. L. REV. 1 (2022).

[332] *See* Sean Aughey & Aurel Sari, *Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence*, 91 INT'L L. STUD. 60 (2015); Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT'L HUMANITARIAN LEGAL STUD. 52 (2010); Yoram Dinstein, *Concluding Remarks: LOAC and Attempts to Abuse or Subvert It*, 87 INT'L L. STUD. 483 (2011).

[333] Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795 (2010).

Technological advances will continue to change the face of war in years to come. In fact, their potential to disrupt established patterns of warfighting is immense. Developments in artificial intelligence, hypersonic weapons, biotechnology, quantum computing, advanced materials, and robotics are widely expected to revolutionize the conduct of hostilities.[334] To prevail in future conflicts, armed forces around the world must adapt to reap the advantages that these technologies offer and they must strive to prevent their adversaries from doing the same. Technological developments breed disruption at the very core of war by demanding change in the ways and means of applying combat power.

Recent decades have also seen the diffusion of warfare in multiple directions. War has expanded across the material world. Modern armed forces have become more adept at projecting power and sustaining operations on land, at sea, in the air, and in outer space. Spurred on by the digital revolution, warfare has expanded across social and functional domains. Interconnectedness has created new vulnerabilities that hostile actors are able to weaponize in pursuit of their strategic goals. The diffusion of war also causes disruption at the periphery by eroding the line that divides war from peace.

Taking a step back, it is difficult to escape the conclusion that war has indeed transcended its traditional boundaries. However, this idea must be entertained with some caution. Media warfare, financial warfare, influence warfare, and countless other forms of competitive engagements that do not entail the application of combat power are not war in the strict meaning of the term. Unlike real war, they do not involve physical destruction to overcome enemy forces through fighting. Nevertheless, they may *resemble* real war in view of their coercive purpose, harmful effects, and heightened antagonism. To this extent, it is appropriate to describe them as warfare in a metaphorical sense.

Today, conflict in the international arena fluctuates between real and metaphorical warfare. War in the traditional sense, including large-scale war among industrialized powers, has not disappeared, as Russia's full-scale invasion of Ukraine in February 2022 demonstrates. Yet real war occurs

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[334] *E.g.*, KENNETH PAYNE, I, WARBOT: THE DAWN OF ARTIFICIALLY INTELLIGENT CONFLICT (2021); PAUL SCHARRE, ARMY OF NONE: AUTONOMOUS WEAPONS AND THE FUTURE OF WAR (2018); PETER W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY (2009).

against the backdrop of persistent competition among strategic rivals, featuring measures short of war below the threshold of open hostilities. This paper drew on the notions of hybridity, political warfare, and gray zone conflict in an attempt to gain a better understanding of this aspect of the contemporary strategic environment. Engaging with these concepts has underlined that real and metaphorical war sit on a spectrum of conflict. While relying on combat as the distinguishing feature of real war enables us to differentiate it from metaphorical warfare, in practice, these two forms of coercion blend into each other. Not every act of real war involves fighting, nor are all measures short of war non-violent. When actual war breaks out, metaphorical warfare typically complements the hostilities. This means that the nature, purpose, and effect of acts carried out in pursuit of real war and those carried out in furtherance of metaphorical war can be hard to tell apart. In fact, measures short of war may serve as a prelude to real war or enable its continuation through non-violent means. Where metaphorical warfare becomes an instrument of real war in this way, and *vice versa*, distinguishing the real from the metaphorical is fraught with difficulty. The diffusion of war thus creates a zone on the spectrum of conflict where elements of real and metaphorical warfare coalesce.

None of this is truly new. To the extent that war serves a political master, warfare has always been subservient to the needs of policy. Those needs sometimes demand only a limited military effort, a mere threat of force rather than total war, and may relegate armed force into second place behind other instruments of statecraft.[335] War has an innate tendency both towards escalation *and* towards the metaphorical. Blending real and metaphorical warfare thus has a long tradition, for instance in the guise of unconventional warfare.[336] What is new is how their symbiosis manifests itself today. The

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[335] Strategies for limited war have assumed particular importance in the nuclear age. For classic contributions on the subject, see BERNARD BRODIE, STRATEGY IN THE MISSILE AGE 305–57 (1959); HENRY A. KISSINGER, NUCLEAR WEAPONS AND FOREIGN POLICY 132–73 (1957); ROBERT ENDICOTT OSGOOD, LIMITED WAR: THE CHALLENGE TO AMERICAN STRATEGY 234–84 (1957). For an overview of more recent United States policy, see MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER (2014).

[336] In United States doctrine, unconventional warfare comprises "guerrilla warfare and other direct offensive, low visibility, covert, or clandestine operations, as well

increased reach, tempo, destructiveness, and availability of conventional force is now married to the ubiquity, speed, impact, and diversity of measures short of war. Their combination produces an environment where a wide variety of hostile actors operate across multiple domains in a synergistic manner with the ability to cause substantial material and non-material harm with speed and at relatively low cost.

The normative implications of these developments are significant, but these too need to be approached with some caution. Sweeping claims that the regulatory framework of war is out of step with current strategic realities press the point too far. Disruption to the ways and means of warfighting poses substantial legal challenges, but their impact varies depending on the area and issue at hand.

The law is well equipped to deal with certain aspects of disruption at the heart of warfare. The legal regime on the use of force applies regardless of the type of weapon used.[337] Provided they produce effects that are comparable to those caused by conventional forms of armed force, new weapons and tactics are caught by the existing rules. The same goes for the law of armed conflict. Many of its provisions are framed in terms that are flexible enough to cover new instruments and forms of warfare.[338] The relative indeterminacy of the rules is a major asset in this regard, since it permits States to extend and adapt them to new developments through practice and other informal processes.[339] In this context, it should be recalled that State parties to Additional Protocol I are under an express obligation to

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as the indirect activities of subversion, sabotage, intelligence activities, and evasion and escape." JOINT CHIEFS OF STAFF, JOINT SPECIAL OPERATIONS TASK FORCE OPERATIONS, Joint Publ'n 3-05.1, R-4 (2007); *see also* U.S. ARMY SPECIAL OPERATIONS COMMAND, UNCONVENTIONAL WARFARE POCKET GUIDE 3 (Sergeant Wolf ed., 2016). For historical parallels, see UNCONVENTIONAL WARFARE FROM ANTIQUITY TO THE PRESENT DAY (Brian Hughes & Fergus Robson eds., 2017).

[337] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 244, 39 (July 8).

[338] Stewart, *supra* note 316, at 293.

[339] Michael N. Schmitt, *Normative Architecture and Applied International Humanitarian Law*, 104 INT'L REV. RED CROSS 2097, 2105 (2022) ("indeterminacy infuses the normative architecture with flexibility").

assess whether new means and methods of warfare are compatible with their existing obligations.[340]

This is not to deny that challenges do exist. For example, the availability of highly accurate weapons has fostered unrealistic expectations about what is practically feasible and legally required to avoid civilian harm in different circumstances.[341] Less capable adversaries often resort to prohibited methods to compensate for technological asymmetry.[342] The deployment of certain new capabilities may not be lawful in some cases, such as the use of automated decision-making in complex and dynamic targeting situations.[343]

Other changes in the operating environment, in particular, the increased presence and capabilities of non-State actors, pose further difficulties. Many of the controversies that trouble the legal regime of war are fueled by the severity and complexity of transnational threats involving non-State actors. These include the question as to whether self-defense extends to armed attacks emanating from such entities, the legality and conditions of anticipatory self-defense, and the status of the unable or unwilling doctrine; as well as matters relating to conflict classification and the rules applicable in non-international armed conflicts. Complex conflicts involving diverse adversaries thus expose the normative biases and weaknesses of the law, raising questions about how non-State actors fit into

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[340] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 36 (Additional Protocol I), June 8, 1977. Although some States that are not parties to Additional Protocol I conduct robust weapons reviews, in particular the United States and Israel, whether an obligation to do so has emerged in customary international law is open to question. *See* NATALIA JEVGLEVSKAJA, INTERNATIONAL LAW AND WEAPONS REVIEW: EMERGING MILITARY TECHNOLOGY UNDER THE LAW OF ARMED CONFLICT 163–94 (2021).

[341] *Cf.* Charles Pede & Peter Hayden, *The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on "Battlefield Next"*, MIL. REV. (Mar. 2021), https://www.armyupress.army.mil/Journals/Military-Review/English-Edition-Archives/March-April-2021/Pede-The-18th-Gap/. *See also* A. P. V. Rogers, *Zero-Casualty Warfare*, 82 INT'L REV. RED CROSS 165 (2010).

[342] Schmitt, *supra* note 316, at 166.

[343] *E.g.*, Elliot Winter, *The Compatibility of Autonomous Weapons With the Principle of Distinction in the Law of Armed Conflict*, 69 INT'L & COMPAR. L. Q. 845 (2020) (concluding that autonomous weapons can mimic decisions that have come before, but they are not yet able to account for context by balancing contradictory objectives such as humanity and military necessity in the manner required to discharge [the legal obligation of] distinction in a complex and dynamic warzone).

legal regimes originally designed to be applied between States, including whether such entities and the organized armed groups fighting on their behalf should play a greater role in the evolution of the law.[344]

Disruption at the periphery of war is another source of friction. It is often unclear whether low intensity acts of violence, including those inflicted by metaphorical warfare, have crossed the legal thresholds to engage the rules governing the use of force and the law of armed conflict. In situations where the thresholds have been crossed, for instance where belligerents resort to acts of metaphorical warfare alongside combat operations, the mostly non-kinetic nature of these activities does not sit easily with the existing rules for war, which are primarily concerned with kinetic effects. Since many acts of metaphorical warfare fall outside of the regulatory framework of war altogether, either because the relevant regimes are not engaged or because the limited scope of their rules, other rules of international law, such as the principle of non-intervention and international human rights law, may take center stage. Disruption at the periphery thus creates and feeds on legal uncertainty: the ambiguous nature of the hostile engagements occurring in this space lends itself to competing assessments and positions on what rules apply and how. Disruption at the periphery also reveals the normative fault lines of war: the legal regimes of war were not designed to regulate most acts of metaphorical warfare, yet the level of harm the latter cause may demand a more robust response than what is permissible under the law enforcement and other peace-time legal frameworks. Caught between legal uncertainty and inadequacy, a gap has opened up over the last two decades between the normative expectations imposed by the law and State practice, in particular through expansive reliance on the right of self-defense.

Against this background, the diffusion of war raises a more fundamental question: are we best served by reinforcing traditional constraints on the use of force or by relaxing them to accommodate the changing character of warfare? The answer does not depend on a simple choice between order and self-help or between war avoidance and national

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[344] For an argument in support of their greater involvement, see Marco Sassòli, *How to Develop International Humanitarian Law taking Armed Groups into Account?*, 60 MIL. L. & L. WAR REV. 71 (2022).

sovereignty, as the question has sometimes been framed,[345] but on what kind of international order is desirable and sustainable and what kind of war is to be avoided and how. In the absence of effective collective mechanisms to prevent breaches of the peace, interpreting the prohibition to use force broadly and insisting on a high threshold for self-defense is asking States targeted by low intensity acts of violence to endure these without recourse to counterforce.[346] This is not conducive to the non-use of force, since it incentivizes malign actors to exploit the strict conditions of self-defense and the targeted States to interpret self-defense expansively in order to restore some kind of deterrent effect.[347] By comparison, relaxing the restraints on the use of force to allow more liberal recourse to counterforce may increase the danger of escalation and undermine the exceptional nature of forcible self-help. Considered in the abstract, neither of these options are appealing; whereas the first seeks to restrain recourse to force by imposing exacting thresholds at a heightened risk of non-compliance, the second seeks to foster compliance with the rules at the cost of blunting their restraining effect.

Of course, the law does not operate in the abstract, but inhabits a world where the strategic goals, vulnerabilities, and relative power of States differ vastly, prompting different governments to favor one option over the other, and where legal restraints are one among several considerations shaping the decision to resort to force. One way to approach the matter is to draw inspiration from the early Cold War-period. Just as limited war is appealing when the alternative on offer is nuclear Armageddon,[348] hybrid threats, political warfare, and gray zone conflict may look attractive when the other option is large-scale conventional war.[349] Seen from this perspective,

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[345] W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 282 (1985); Tom J. Farer, *Drawing the Right Line*, 81 AM. J. INT'L L. 112, 113 (1987).

[346] *Cf.* JULIUS STONE, AGGRESSION AND WORLD ORDER 101 (1st ed. 1958) (as a result of this approach, the United Nations "could only become a protective shield for those States whose predatory and imperial interests could sufficiently realise themselves without the need for "armed attack" upon other Members").

[347] *See* REISMAN, *supra* note 45, at 39–40 (concluding that such a system is, in effect, "tolerant of different forms of protracted and low-intensity conflict").

[348] BRODIE, *supra* note 335, at 308.

[349] *See also* Stone, *supra* note 152, at 288 ("It can even be argued that as long as such liberty to resort to war itself survives, it would be a disservice to international peace, and to international law, to prohibit resort to these lesser degrees of force. For such prohibition may tend to drive States to seek to vindicate their claims by war, in circumstances when they might otherwise well have been content with measures less disturbing to international order").

strategic competition is best confined to the gray zone, which means tolerating some degree of confrontation in this space, whilst guarding against the potential for escalation into conventional war by deterring hostile States from engaging in gray zone activities that approximate conventional war too closely.[350] This demands real war to be distinguished from hostile engagements that merely resemble it.

To preserve the difference between real and metaphorical warfare, the legal regime of war should not become progressively more inclusive at the lower end of the conflict spectrum. This calls for a narrow understanding of force that limits the prohibition to situations that are more than trivial, thus excluding acts of metaphorical warfare from the scope of the ban unless they are destructive in nature, more than marginal and analogous to regular forms of armed force. By contrast, reducing the risk that gray zone conflict may escalate into conventional war requires a generous rather than an overly stringent interpretation of the notion of armed attack, in particular its gravity threshold, sources, and the possibility of accumulation.[351] This is to narrow the gap between the prohibition to use force and the right of self-defense and thereby deter hostile actors from exploiting this space. Admittedly, States deliberately calibrating their malign activities to remain below the threshold of self-defense are more likely to be deterred by this than non-State actors intent on inflicting substantial harm, for example through terrorist methods. This is one of the reasons why it is imperative to safeguard the exceptional character of the right of self-defense and prevent it from lapsing into a self-judging license to use force at will. To resist this outcome, States exercising the right must explain how their actions meet the requirements of necessity and proportionality, so as to enable other States and international bodies to

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[350] For gray zone conflict to be morally preferable to war, it has to minimize the probability of escalating into real war. *See* Daniel Brunstetter & Megan Brau, *From Jus ad bellum to Jus ad vim: Recalibrating Our Understanding of the Moral Use of Force*, ETHICS & INT'L AFF. 87, at 91–94, 98 (2019).

[351] This is not a plea to accept expansive interpretations of self-defense without reservation. Rather, the point is that trends over the last two decades to depart from rigid interpretations of self-defense are appropriate adaptations in the light of the diffusion of warfare, provided they benefit from sufficiently widespread State support. *See, e.g.*, TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE UN CHARTER: CUSTOMARY LAW AND PRACTICE 155 (confirming that a gravity threshold is indeed required, but that "customary evidence nonetheless makes clear that the gravity threshold should not be set too high and that even small-scale attacks involving the use of (possibly) lethal force may trigger Article 51").

scrutinize their justifications in a meaningful way.[352] By contrast, there is no need to adapt the thresholds of the law of armed conflict. States cannot circumvent the prohibition to use force by relying on the law of armed conflict as an independent authority to resort to violence, but must observe both sets of rules. Accordingly, the restrictions on the right of self-defense compensate for the low threshold of international armed conflict, while the higher threshold of non-international armed conflict reinforces the requirement of necessity for using force against non-State actors in self-defense.

A narrow reading of the prohibition to use force to exclude most acts of metaphorical warfare from its scope may seem like an insufficiently ambitious response to the diffusion of warfare. However, the alternative offers no real advantages, bearing in mind that the principle of non-intervention can deliver much of the work that a broad reading of force might accomplish.[353] It bears repeating that real war is *not* ubiquitous and should not be confused with metaphorical warfare. Failing to distinguish real from metaphorical war undermines our ability to respond to them in ways that are appropriate to each situation. To avoid this trap, it is instructive to place the legal challenges that the current strategic environment poses into their historical context.[354] Misinformation, the use of proxies, political warfare, measures short of war, and the like are not recent inventions that those who drew up the rules that comprise the legal framework of war could not have anticipated all those years ago. The blind spots, gaps, and uncertainties that plague the applicable legal regimes are not necessarily the product of historical tunnel vision or a lack of imagination, but in some cases flow from an inability to come up with better solutions when faced with competing imperatives, lack of consensus, or persistent policy dilemmas. Change in the fabric of warfare is interwoven with thick threads of continuity, both in an

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[352] *See* Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259 (1989) (arguing that the rule of law demands that resort to force in self-defense be open to community accountability). To similar effect, see Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L LAW 244, 285 (2011). For criticism of the lack of detail offered by the United States to justify resort to self-defense in a recent case, see Christian Henderson, *The 25 February 2021 Military Strikes and the 'Armed Attack' Requirement of Self-Defence: from 'Sina qua Non' to the Point of Vanishing?*, 9 J. ON USE FORCE & INT'L L. 55, 63–64 (2022).

[353] *See supra* note 298–302 and the accompanying text.

[354] *See also* Naz K. Modirzadeh, *Cut These Words: Passion and International Law of War Scholarship*, 61 HARV. INT'L L. J. 1, 21–22 (2020).

operational and in a legal sense.[355] To simply assume that we can do better reveals a lack of perspective. This is not to suggest that today there are no novel challenges at all, that these do not require legal adaptation or that there is no point in trying. Rather, it is an appeal for a more realistic appraisal of the need for legal change and to entertain more modest expectations about what can be achieved.

[355] Rain Liivoja, *Technological Change and the Evolution of the Law of War*, 97 INT'L REV. RED CROSS 1157, 1175–76 (2015).