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The Divide between War and Peace

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Abstract

War and peace is a dichotomy that reflects humans' desire to classify complex situations into simple and understandable concepts. Yet reality is more nuanced than the dichotomy suggests. This raises the question whether definitions of war and peace can inform a better understanding of modern competition, confrontation, and conflict – in particular of hybrid warfare and grey-zone conflict. While no common or widely accepted definitions of war and peace exist in the literature, how international law treats the divide between war and peace allows us to assess how states have jointly conceptualized and continue to perceive war and peace in international relations.

Accordingly, this chapter inquires how international law treats the divide between war and peace by tracing and analyzing the relevant legal rules of *jus ad bellum* and *jus in bello*. Thereby, the chapter clarifies the divide's meaning commonly agreed by states and related behavior. It also offers insights into respective legal challenges that are particularly relevant to hybrid threats, hybrid warfare, and grey-zone conflict. The chapter finds that international law has evolved such to encapsulate war with different labels and legal concepts: war is prohibited under the banner of use of force; war is fought in the name of international peace and security when authorized by the UN Security Council; war tends to be justified as self-defense; and the existence of war is determined by relatively aleatory application of international humanitarian law (IHL).

Hence, the chapter argues that due to its conceptualization and evolution, modern international law does not offer much clarity on the divide between war and peace. Rather, international law confuses the boundaries and conflates the concepts – implying certain parallels to what George Orwell had termed 'war is peace' – to the extent that there is a relatively broad legal grey zone on the two notions. This results in analytical difficulties but also a certain normative permissibility, which is particularly relevant in the context of hybrid threats, hybrid warfare, and grey-zone conflict. The chapter concludes by identifying normative implications for the future of peace and war.

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Introduction

'War is peace.'
George Orwell, 1984

War and peace reflect a dichotomy inherent in the desire of human beings to classify complex situations into simple and understandable concepts. Binary categories are straightforward and powerful: good and bad; right and wrong; new and old; black and white; normal and extraordinary. These categories provide clear divides that allow us quickly to grasp facts and orient action. Thus, in the divide between war and peace, the latter is an aspiration – the good and the ordinary – while the former is the situation to be avoided, the extraordinary that justifies special means, inflicts suffering, and demands sacrifice.

Yet reality is more nuanced than this dichotomy suggests. First and foremost, international politics is a permanent form of competition manifested in various scales of grey. States struggle for survival, power, and influence. Stability arises from the balance of power, international institutions, and transnationally shared values. While stability may result in the absence of war, this is not a given. Continuous preparation for war, engagement in alliances, support of proxy state and non-state actors, and conflicts at the peripheries of great powers' spheres of influence are all common features of a relatively stable international order. In addition, economic and financial competition and confrontation regarding ideals and forms of governance, such as fundamental rights and democracy, continue among states. Peace and stability may be a warlike situation for some and result in war for others.

As Clausewitz suggests with the statement that 'war is a continuation of politics by other means', war and peace are closely intertwined and interdependent in international politics. Accordingly, military strategists have thought and planned in dynamic scales between war and peace ever since. The famous Latin saying, '*Si vis pacem, para bellum*' ('if you want peace, prepare for war') suggests that wars can be prepared for and fought for the sake of peace, and a common phrase during World War I was that it was the 'war to end all wars'. More specifically, deterrence uses the projection of force to dissuade potential attackers and thereby prevent war. Military operations are categorized accordingly. The 2022 US Army Field Manual,[1] for instance, captures the idea of military operations spanning a continuum from peace to war, ranging from stability operations to large-scale combat operations. Certain military operations, such as counterinsurgency

[1] US Department of the Army, *FM 3-0 Operations* (2022).

operations, are defined as 'full-spectrum operations', precisely because they cover the whole spectrum of conflict from peace to war.[2]

The reality of war and peace is indeed not clear-cut. The period after World War II was stable and did not result in war between the two great powers. Yet, because of their permanent confrontation, it was labelled the 'Cold War'. This term suggests that there was a state of war, but that it was a more nuanced affair than the binary opposition between war and peace suggests. Similarly, the era of 'Pax Americana' that followed brought global stability, yet also witnessed the emergence of the global war against terrorism, many intra-state conflicts, and a number of inter-state wars involving the hegemon, notably the war against Iraq in 2003.

In 2022, war broke out between Russia and Ukraine, leading to global repercussions and increased tensions between Russia and NATO allies, with the latter providing significant political and military support to Ukraine. The United States has also become more concerned by a rising and potentially revisionist China. So far, the United States and its allies' competition with Russia and China has not led to open war, but rather a peace with indirect and limited direct military confrontation, leading to a debate as to whether the world would enter a 'Cold War 2.0'.[3] Hybrid threats, hybrid warfare, and grey-zone conflict are core features of these trends and dynamics. Their very rationale is to take political, strategic, and military advantage of potentially blurred conceptual lines between war and peace.[4]

This raises the question of whether definitions of war and peace can inform a better understanding of modern competition, confrontation, and conflict – in particular of hybrid warfare and grey-zone conflict. No common or widely accepted definitions of war and peace exist in the literature, however. Clausewitz described war as an 'act of force to compel our enemy to do our will'.[5] Hobbes considered war as the known disposition to war to the extent that there is no assurance of the contrary: all other time would be peace.[6] More recent thinkers define war by the absence of peace.[7] Peace, on the

[2] In such scenarios, armed forces perform many tasks beyond combat. Force is used on a continuum scale. See US Department of the Army, *FM 3-24, MCWP 3-33.5, Insurgencies and Countering Insurgencies* (2014). The escalation of force is cited in sec 1-25, para 1-142.

[3] See, *eg*, Elliott Abrams, 'The New Cold War' (*National Review*, 3 March 2022) <https://www.nationalreview.com/magazine/2022/03/21/the-new-cold-war/> accessed 30 May 2023; Evan Osnos, 'Sliding toward a New Cold War' (*The New Yorker*, 26 February 2023) <https://www.newyorker.com/magazine/2023/03/06/sliding-toward-a-new-cold-war> accessed 30 May 2023.

[4] As underlined by several chapters in this volume.

[5] Carl von Clausewitz, *On War* (Michael Howard and Peter Paret eds and trs, Princeton University Press 1976) 75.

[6] Thomas Hobbes, *Leviathan* (1651) 82, cited in Stephen C Neff, *War and the Law of Nations: A General History* (Cambridge University Press 2005) 141 fn 28.

[7] For an account of what war entails, see, *eg*, Larry May (ed), *War: Essays in Political Philosophy* (Cambridge University Press 2008). For an overview of modern political theorists, see, *eg*, Irving Louis

other hand, can also be defined negatively, namely as the absence of violence.[8] 'Positive peace', however, which is built on early Christianity's perception of peace in the form of tranquility, has been invoked since the 1970s as an alternative understanding of peace – one characterized by justice, equality, and rights.[9] Similarly, the notion of 'quality peace' defines a different level of peace, essentially abandoning the divide between war and peace and instead defining peace as a continuum.[10]

While these conceptualizations are analytically useful, how international law treats the divide between war and peace allows us to assess how states have jointly conceptualized and continue to perceive war and peace in international relations. The respective rules under international law represent commonly agreed views on the subject with global validity. Moreover, they provide normative guidance on how states should behave in the context of war and peace. While international law thus aims to constrain state action,[11] it also serves to screen and provide information on how states intend to behave.[12] States may measure other states' actions as acceptable or unacceptable by comparing their actions with the standards provided by international law.[13] To this end, international law inherently relies on definitions, categories, and concepts, and intrinsically works towards giving them meaning according to states' views, agreements, and common language.[14] Hence, international law informs how states agree to treat war and peace as part of their mutual relations.

Accordingly, this chapter inquires how international law treats the divide between war and peace by tracing and analyzing the relevant legal rules of *jus ad bellum* and *jus in bello*. Thereby, the chapter clarifies the divide's meaning as it is commonly agreed by states and manifested in related behavior. It also offers insights into the respective legal challenges that are particularly relevant to hybrid threats, hybrid warfare, and grey-zone conflict. The chapter finds that international law has evolved in such a way as to encapsulate war with different labels and legal concepts: war is prohibited under the banner of the use of force; war is fought in the name of international peace and security when authorized by the UN Security Council; war tends to be justified as self-defense; and the existence of war

Horowitz, *The Idea of War and Peace: The Experience of Western Civilization* (3rd edn, Transaction Publishers 2007).

[8] For an overview of most definitions of peace, see Christian Davenport, Eric Melander, and Patrick M Regan, *The Peace Continuum: What It Is and How to Study It* (Oxford University Press 2018) 36-47.

[9] See, *eg*, Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6(3) Journal of Peace Research 167.

[10] Davenport, Melander, and Regan (n 8).

[11] Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008).

[12] Jana Von Stein, 'Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance' (2005) 99(4) American Political Science Review 611.

[13] Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press 2005).

[14] Martti Koskenniemi, *From Apology to Utopia: The Structure of the Legal Argument* (Cambridge University Press 2006).

is determined by the relatively aleatory application of international humanitarian law (IHL).

Hence, the chapter argues that due to its conceptualization and evolution, modern international law does not offer much clarity on the divide between war and peace. Rather, international law confuses the boundaries and conflates the concepts – implying certain parallels to what Orwell had termed 'war is peace' – to the extent that there is a relatively broad legal grey zone on the two notions. This results in analytical difficulties, but also a certain normative permissibility, which is particularly relevant in the context of hybrid threats, hybrid warfare, and grey-zone conflict. The chapter concludes by identifying normative implications for the future of peace and war.

1. Peace Became the Norm

The divide between war and peace has been a central focus of moral and legal thinking regarding states' international relations and coexistence. Neff identifies four different eras of thinking on war and peace in international law.[15] Until the Middle Ages, there was a strong association between justice and war. This led to the development of the 'Just War Doctrine'. With natural law as the dominant legal framework, war was primarily perceived as a worldly means to enforce a godly order. In the words of Cicero: 'Wars, then, ought not to be undertaken except for this purpose, that we may live in peace, without injustice'.[16] Although conscious that peace was an ideal, early thinkers insisted that worldly action should follow this ideal. Hence, the need for a *casus belli* to resort to war, namely an acceptable reason that would uphold larger community ideals. Christian political philosophers who perceived war as the means to combat evil further developed this, ultimately establishing criteria for a war to be just.[17]

The law of nations emerged from the period of around 1600 to 1815 and overshadowed the Just War Doctrine. Grotius marked its creation with his treatise 'The Rights of War and Peace'.[18] States became the sole subjects of international law and the formalities of inter-state relations became central features of the international legal system. Law was perceived as the creation of humans, not nature, and so was war. Adopting a utilitarian view of international politics that culminated in a Hobbesian world view, war was perceived as a dueling form of state interaction. This was complemented by the development of standing armies that separated warfighters with a professional ethos from civilians. With due regard to form, formal requirements

[15] Neff (n 6) 3. The following draws on Neff's analysis of the four eras of thinking.

[16] Marcus Tullius Cicero, *On Duties* 14-15, cited ibid 13 fn 2.

[17] These are generally: having just cause, being a last resort, being declared by a proper authority, possessing right intention, having a reasonable chance of success, and the end being proportional to the means used.

[18] Hugo Grotius, *The Rights of War and Peace* (Richard Tuck ed, Liberty Fund 2005).

had to be observed for a war to be a 'perfect war', but 'imperfect wars' were still considered wars when they fulfilled objective requirements, however. Overall, the normative stance of natural law remained present throughout legal thinking in this period, but the functioning of international law became more formalistic and morally unloaded.

The 19th century international legal system continued to develop in this direction. With legal positivism becoming the dominant paradigm, war was perceived as a clash of rival state interests and an accepted feature of international politics. International law now ignored moral perceptions of war. War was also no longer at the service of justice or community values, but simply a tool of state interest. Hence, war became an institution of international law with rules of an objective character. War and peace were now completely separate states of affairs with distinct rules governing state behavior. Interestingly from the point of view of modern grey-zone conflicts and hybrid threats, the 19th century international legal system foresaw 'measures short of war', namely interventions to promote the international community's general interests, reprisals as a self-help measure against prior wrongdoing, and emergency actions like self-defense. These were acts of war during the general state of peace that would not trigger the state of war. Like war, they were not illegal, but they were still regulated by international law.

The international legal system following World War I re-endorsed the medieval just-war outlook. The period of the League of Nations established a distinction between lawful and unlawful resort to war. War was first outlawed by the 1928 Kellogg-Briand Pact.[19] After World War II, states banned the threat and use of force in international relations by the UN Charter and established the UN collective security system to monitor and enforce this ban.[20] War was dismissed as a concept under international law and peace was set as the norm in international politics. Similarly, the four Geneva Conventions (GCs) of 1949 did not give normative significance to war, but were built on the rather technical notion of 'armed conflict'. It soon became clear, however, that war would remain a feature of international politics: since the adoption of the UN Charter, war in a colloquial, practical sense has never ceased to exist around the globe.

This leads to two sets of issues. First, if war is ruled out and has no proper normative significance, meaning that peace is the norm, then international law does not provide a straightforward distinction between war and peace. However, it is more complicated than this. A closer study of how international law labels and deals with warlike situations is necessary to identify the conceptualization and nuances of the war-peace divide. Second, if the norm is peace, but the reality is often war, then there seems to be a disconnect between the normative state of affairs – 'peace' – and the actual reality in many parts of the world – 'war'. This has a particular significance in the

[19] Oona A Hathaway and Scott J Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2018).

[20] Nicholas Tsagourias and Nigel D White, *Collective Security: Theory, Law and Practice* (Cambridge University Press 2013).

context of hybrid threats, hybrid warfare, and grey-zone conflict, because many argue that states take warlike actions below the thresholds of the prohibition on the use of force under *jus ad bellum* and armed conflicts under *jus in bello*, so essentially take warlike actions during peacetime.[21] More generally, this suggests that the normative treatment of war and peace does not accurately reflect reality.

The following sections will address these issues in detail. They will show how international law has evolved to encapsulate war with different labels and legal concepts: war is prohibited under the banner of the use of force; war is fought in the name of international peace and security; war tends to be justified as self-defense; and the existence of war is determined by the application of IHL. They will also show that there is no substantial disconnect between law and reality, because the law has adapted to state practice. Hence, the divide between war and peace in international law has evolved such that it mainly consists of a single legal grey zone that is relatively indeterminate. International law has thus become unclear and indeterminate regarding the divide between war and peace, with both analytical and normative consequences.

2. A Permeable Ban of the Use of Force

The post-World War II international legal order proscribes war, and the general state of international affairs from a normative perspective should be peace. The UN Charter mentions 'war' once in its preamble: 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war…'.[22] Apart from this fleeting mention and a few references to World War II, war is non-existent in the Charter. The UN's main purpose is formulated positively as 'to maintain international peace and security'.[23] In this spirit, the UN Charter does not outlaw 'war', but explicitly prohibits the 'threat or use of force' under its Article 2(4). Two exceptions remain, however, namely UN Security Council action under the collective security system and the right to individual or collective self-defense. Both exceptions were narrowly drafted to allow to react to a

[21] Rosa Brooks, 'Rule of Law in the Gray Zone' (*Modern War Institute*, 2 July 2018) <https://mwi.usma.edu/rule-law-gray-zone/> accessed 30 May 2023; Williamson Murray and Peter R Mansoor (eds), *Hybrid Warfare: Fighting Complex Opponents from the Ancient World to the Present* (Cambridge University Press 2012); Scott H Englund, 'A Dangerous Middle-Ground: Terrorists, Counter-Terrorists, and Gray-Zone Conflict' (2019) 5 Global Affairs 389; Steven Haines, 'War at Sea: Nineteenth-Century Laws for Twenty-First Century Wars?' (2016) 98 International Review of the Red Cross 419; Jeffrey Kahn, 'Hybrid Conflict and Prisoners of War: The Case of Ukraine' (2018) SMU Dedman School of Law Legal Studies Research Paper 381 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3127020> accessed 30 May 2023; Aurel Sari, 'Legal Resilience in an Era of Grey Zone Conflicts and Hybrid Threats' (2019) Exeter Centre for International Law Working Paper 2019/1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3315682> accessed 30 May 2023.

[22] Charter of the United Nations (24 October 1945) 1 UNTS XVI [UN Charter].

[23] ibid Article 1(1).

breach of the prohibition of the use of force in order to re-establish peaceful co-existence.

Yet since 1945, state practice has undermined the strict prohibition of the use of force. It is empirically difficult to know when the prohibition has actually prevented states from using force, because only violations are apparent to observers outside decision-making processes. Nonetheless, given the manifold conflicts around the globe, it is hard to contend that the general state of affairs in international relations is peace. Glennon had already identified 680 violations of the prohibition on the use of force by 2010,[24] and since then states have continued to violate the prohibition.[25] Indeed, any use of force between states that reaches a certain threshold of gravity[26] without authorization by the UN Security Council is a breach of the UN Charter. Even when a state lawfully uses force in legitimate self-defense, the initial armed attack against this state would be a violation of Article 2(4).

Already in 1970, Franck diagnosed the death of Article 2(4) of the UN Charter because of its inability to prevent states from using military force in international affairs.[27] The seeming irrelevance of the Charter law has also led scholars to ask the editor of the Oxford Commentary on the UN Charter why he would bother to continue working on it.[28] Indeed, it appears that states no longer believe in the system of the Charter because the collective security guarantees they have received in exchange for renouncing their individual and collective rights to resort to force tend not to work.[29] States continue to invest in their individual capacities to ensure their national security, which suggests that they do not fully rely on the protection offered by the prohibition of the use of force. Even if states routinely emphasize the value of Article 2(4), their actions are not so different from a situation

[24] Michael J Glennon, *The Fog of Law: Pragmatism, Security, and International Law* (Stanford University Press 2010) 228.

[25] For prominent examples, see, *eg*, Tom Ruys, Olivier Corten, and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018).

[26] See, for example, *Corfu Channel Case* (*United Kingdom v Albania*) (Merits) [1949] ICJ Rep 4, 35 and *Fisheries Jurisdiction Case* (*Spain v Canada*) (Jurisdiction) [1998] ICJ Rep 432, 466, para 84, where the Court seems to affirm that the 'minimum use of force' does not fall within the scope of Article 2(4); however, see also the Nicaragua case regarding 'less-grave forms' of the use of force that are violations of the UN Charter. *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14 [Nicaragua case] para 191; for comprehensive analyses of this issue, see Olivier Corten, 'What Do "Use of Force" and "Threat of Force" Mean?' in Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd edn, Hart Publishing 2021); Tom Ruys, 'The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?' (2014) 108(2) American Journal of International Law 159.

[27] Thomas M Frank, 'Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States' (1970) 64(5) American Journal of International Law 809, 809-10.

[28] Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) vol 1, Preface.

[29] Jean Combacau, 'The Exception of Self-Defence in the U.N. Practice' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers 1986) 32.

where the provision did not exist.[30] The rules of behavior embedded in the Charter have therefore become aspirational norms.[31]

Indeed, if a rule is breached by a significant number of states a significant number of times over a significant period of time, it can hardly be described as a constraining norm of international law. Seen from this perspective, Article 2(4) has fallen into desuetude due to a 'thick' contrary practice of states.[32] Alternatively, one could argue that the prohibition lacks precision and that therefore states often do not violate the prohibition. If so, given that the international law system is consent-based (meaning that states are free to act how they please as long as they do so without violating their legal obligations), disputes over its application are likely to be decided in favor of the state proposing to act.[33] This indeed leads to the same conclusion, namely that Article 2(4) does not effectively ban states from using force against each other. Thus, it can be concluded that 'this decaying *de jure* catechism is overly schematised and scholastic, disconnected from state behaviour, and unrealistic in its aspirations for state conduct'.[34]

The debate on a customary rule prohibiting the use of force between states further illustrates the limits of the norm. Those who argue that the customary rule is identical to Article 2(4) struggle to make the case because states have used military force against each other both before and after the UN Charter. In addition, the reactions of other states were often ambiguous and inadequate.[35] Those who argue that the customary norm is different from Article 2(4) also face the difficulty of proving a coherent *opinio juris* among states.

Scholarly work on the prohibition of the use of force under the banner of '*jus contra bellum*' leads to the same conclusion. A conservative view of the prohibition, namely that the UN Charter's prohibition is well defined, implies that states' repeated violations are all too obvious.[36] The same is true for a normative reading of the prohibition, namely an interpretation that focuses

[30] ibid 30.

[31] Richard Anderson Falk, *Revitalizing International Law* (Iowa State University Press 1989) 96.

[32] This was recently pointed out in the context of the war between Russia and Ukraine. See Claus Kreß, 'The Ukraine War and the Prohibition of the Use of Force in International Law' (Torkel Opsahl Academic EPublisher 2022) para 4; Nico Krisch, 'After Hegemony: The Law on the Use of Force and the Ukraine Crisis' (*EJIL Talk*, 2 March 2022) <https://www.ejiltalk.org/after-hegemony-the-law-on-the-use-of-force-and-the-ukraine-crisis> accessed 30 May 2023.

[33] Glennon (n 24) 62 citing Michael J Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (Palgrave Macmillan 2001) 63-4.

[34] Mary Ellen O'Connell, Christian J Tams and Dire Tladi, *Self-Defence against Non-State Actors* (Cambridge University Press 2019) vol 1, 19.

[35] Christine Gray, *International Law and the Use of Force* (4th edn, Oxford University Press 2018) 28 citing Gaetano Arangio-Ruiz, *The UN Declaration on Friendly Relations and the System of Sources of International Law: With an Appendix on the Concept of International Law and the Theory of International Organisation* (Sijthoff and Noordhoff 1979).

[36] Raphaël van Steenberghe, 'The Law against War or Jus contra Bellum: A New Terminology for a Conservative View on the Use of Force?' (2011) 24(3) Leiden Journal of International Law 747.

more on what the law should be rather than what it is in practice.[37] Interestingly, Gray, in her rigorous analysis of international law on the use of force, rarely spells out that state actions would represent violations of Article 2(4). Thus, she tends to avoid taking a position on the viability of the prohibition – yet she does explicitly recognize that the rule is under stress.[38]

More recently, Russia's manifest violation of the prohibition of the use of force against Ukraine in 2022 provoked strong condemnations by the international community, including by the UN General Assembly.[39] Western states also strongly reacted both rhetorically and with concrete measures, such as sanctions and the provision of military assistance to Ukraine. These reactions uphold and may strengthen the prohibition in the long run because they confirm states' attachment to the prohibition.[40] Nonetheless, resolute reactions as in this case tend to be the exception in international affairs. Many violations of the prohibition tend to be tolerated, or at least provoke little reaction.

The consequence of these developments regarding the prohibition of the use of force is that peace as the norm according to the black letter of the UN Charter does not reflect reality. As such, although it may be beneficial to have an aspirational norm to indicate how states should behave, the norm does not help to provide clarity on situations, because it has been violated too often to represent the actual standard of behavior. Indeed, there is a disconnect between what states have agreed on and portray as the norm and their actual standard of behavior. The delimitation of proper behavior has thus become indeterminate. Therefore, the prohibition is not particularly useful for identifying the divide between war and peace. Moreover, the repeated violation of the prohibition suggests that it is permeable. Thus, the norm that there is 'peace' is not particularly constraining, but rather relatively permissive for states. This means that the norm that there is peace tends to be confusing and poorly delimited. This also suggests that the prohibition is too loose to provide proper legal boundaries for assessing and guiding hybrid threats and military action in grey-zone conflicts.

3. War with – and in – the Name of Peace

In line with treating the normal state of international affairs as peace, the UN collective security system does not foresee war as a general status. The Charter only foresees wars as exceptions, but does not call these exceptions 'war'. According to Article 39 of the Charter, the Security Council 'shall

[37] See Robert Kolb, *International Law on the Maintenance of Peace: Jus Contra Bellum* (Edward Elgar Publishing 2018).

[38] Gray (n 35), Introduction.

[39] See, *eg*, UNGA Res ES-11/1 (2 March 2022) UN Doc A/RES/ES-11/1.

[40] Juliette François-Blouin, 'Implications for International Security Law' in Thomas Greminger and Tobias Vestner (eds), *The Russia-Ukraine War's Implications for Global Security: A First Multi-issue Analysis* (GCSP 2022).

determine the existence of any threat to the peace, breach of the peace, or act of aggression'. Any following measures based on Articles 41 and 42 of the Charter shall intend to 'maintain or restore international peace and security'. The closest concept to war is thus an 'act of aggression', which is a narrowly defined action.[41] A 'breach of the peace' means that the peace is undermined, although there is no associated definition of what this situation would be other than not peace.

The notion of peace under Article 39 of the UN Charter has therefore been defined in a negative way as the absence of conflict. This serves the purpose of allowing the Security Council to react to a conflict. It has then been applied more extensively to encompass a set of political, social, and economic circumstances obstructing the rise of future conflicts,[42] which serve to promote general conditions for conflict prevention. Yet Security Council action only focuses on 'international peace and security', not 'war'. Any Council reaction is conceptualized as a measure to ensure international peace and security, even if this involves the use of military force over a long period of time. Indeed, any such action can be considered as a form of law enforcement in response to the violation of the prohibition of the use of force and other values agreed by UN member states, rather than war between equal parties.[43]

In practice, the Security Council only uses a 'threat to peace' as the qualifier for its action.[44] Chapter VII resolutions are usually adopted after and on the basis of the qualification of a situation as a 'threat to peace and security' by the Security Council. Alternatively, the Council has adopted resolutions under Chapter VII by referring back to resolutions where it had already made such a determination. In a few cases, the Security Council has omitted to qualify the situation as such because of the disagreement over the scope of its own powers.[45]

The Security Council's qualification of situations as a 'threat to peace', however, is so broad and diverse that it does not provide much indication as to what could constitute war or a warlike situation. From a temporal perspective, the notion of threat implies that a conflict has arisen or is likely to arise (albeit limited to situations with a concrete and acute risk of conflict in a particular case).[46] Yet the category is subject to extensive interpretation. In 1992, for instance, the Security Council issued a statement affirming that the 'non-military sources of instability in the economic, social, humanitarian

[41] Definition of Aggression, UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314 (XXIX).

[42] Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations* (4th edn, Brill 2010) 206.

[43] See, *eg*, Jean d'Aspremont, 'The Collective Security System and the Enforcement of International Law' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (online edn, Oxford University Press 2015).

[44] Simma and others (eds) (n 28) 1293.

[45] *Eg*, UNSC Res 1160 (31 March 1998) UN Doc S/RES/1160; UNSC Res 1970 (26 January 2011) UN Doc S/RES/1970.

[46] Simma and others (eds) (n 28) 1291.

and ecological fields have become threats to peace and security'.[47] The 2004 High-level Panel Report also stated that the Security Council is fully empowered under Chapter VII to address the full range of security threats with which states are concerned.[48]

The material scope of the notion of a threat to peace is also very wide. While inter-state conflicts are considered the model case of a threat to peace, the notion has been broadened to encompass states' internal situations. Internal crises with implications for regional or global stability have thus been qualified as threats to peace.[49] The Security Council subsequently did the same regarding purely internal conflicts without any direct international or transboundary ramifications.[50] The violation of human rights (first and foremost the targeting of civilians[51] and the widespread suffering of the civilian population in armed conflicts[52]), the proliferation of arms, and terrorism have also been qualified as threats to peace.[53] Thus, although states tend not to perceive the designation of a particular situation as a 'threat to peace' as being at the unrestricted discretion of the Security Council, it is hard to argue that this is a well-defined legal concept. In addition, there are only very rudimentary legal limits on the Security Council's discretionary powers,[54] and the Council is mainly a political organ that uses its institutional and legal prerogatives in line with its permanent members' preferences.[55]

The consequence of the UN Security Council's practice is that situations that could easily be qualified as war are not, but only qualified as a – somewhat benign – 'threat to peace'. The same applies to the use of military force authorized or mandated by the Security Council in reaction to such threats, which is not called 'war'. The reactions are fought with and in the name of peace: they are called 'all necessary means' to 'establish and maintain international peace and security'. While this may be helpful for ensuring an aspirational discourse on world peace and may indicate that the reaction should be limited, this confounds the reason and rationale for intervention with the actual actions and factual situation, namely warfighting and war. It certainly does not help to clarify the difference between situations of war and peace.

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[47] UNSC Presidential Note (31 January 1992) UN Doc S/23500, 3.

[48] High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (UN 2004).

[49] *Eg*, Palestine in 1948; South Africa in the 1970s and 1980s; Sierra Leone, Liberia, and Somalia in the 1990s and 2000s; Indonesia in 1948; Congo in 1961; Yugoslavia in 1991; Somalia in 1992.

[50] Simma and others (eds) (n 28) 1279, 1282-3.

[51] UNSC Res 1296 (19 April 2000) UN Doc S/RES/1296; see also, *eg*, UNSC Verbatim Record (11 November 2009) UN Doc S/PV.6216.

[52] See, *eg*, UNGA Res 2675 (XXV) (9 December 1970) UN Doc A/RES/2675 (XXV).

[53] Simma and others (eds) (n 28) 1281-2.

[54] Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004).

[55] Erik Voeten, 'The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force' (2005) 59(3) International Organization 527; Adam Roberts and Dominik Zaum, *Selective Security: War and the United Nations Security Council since 1945* (Routledge 2008).

The war between Russia and Ukraine has not led to a paradigm shift in this regard. The Security Council has not classified the war between Russia and Ukraine due to Russia's ability to veto such a resolution. The UN General Assembly has called it an 'act of aggression',[56] although it does not talk of 'war' in its resolutions; the UN Secretary-General, the European Union, and others have used this term, however.[57] As such, the practice of the UN Security Council, even if based on the Charter's categories for taking action, is not particularly informative on the divide between war and peace, but rather adds to the confusion characterizing these concepts. This means that it also does not elucidate the nuances of the divide in the context of hybrid warfare and grey-zone conflict. Even if the Security Council were to determine that certain hybrid threats or actions would constitute a threat to peace, for instance, this would not clarify much, because this category is not well defined and consistently applied in practice. Such a determination would simply indicate that the Security Council perceives the act seriously enough to consider reacting to it due to the risk of its leading to war or insecurity.

4. Self-defense as a Catch-all Justification

Since the UN Charter does not foresee war as general state of affairs and the Security Council reacts to war and warlike situations in the name of peace, the question then becomes if and under what conditions states recognize war as a situation that is distinct from peace as per international law. In the past, states formally declared war to alter their official relations with opponents and other states and to change the general status of affairs and related rules of behavior. This practice has fallen into desuetude.[58] Yet states tend to officially admit and declare their use of force as representing a warlike action when they justify their violence as self-defense. This is comparable to states' previous 'declarations of war', but with the exception that the status of peace does not formally change to the status of war. This also appears to be analogous to states renaming 'ministries of war' as 'ministries of defense'.

Originally intended as a temporary remedy for states to defend themselves against an armed attack until the UN Security Council takes action, self-defense has become the most prominent justification for using military force against states and non-state actors. Indeed, the concept has been so widely used that it has become the legal justification *per se* for any use of

[56] See, *eg*, UNGA (n 39); UNGA Res ES-11/2 (24 March 2022) UN Doc A/RES/ES-11/2.

[57] See, *eg*, 'Secretary-General's Remarks on Russian Decision on Annexation of Ukrainian Territory' (*UN*, 29 September 2022) <https://www.un.org/sg/en/content/sg/speeches/2022-09-29/secretary-generals-remarks-russian-decision-annexation-of-ukrainian-territory%C2%A0> accessed 30 May 2023; European Parliament, 'Russia's Escalation of Its War of Aggression against Ukraine' P9_TA(2022)0353 (6 October 2022); 'Statement by NATO Heads of State and Government' (*NATO*, 24 March 2022) <https://www.nato.int/cps/en/natohq/official_texts_193719.htm> accessed 30 May 2023 [double-check].

[58] Tanisha M Fazal, 'Why States No Longer Declare War' (2012) 21(4) Security Studies 557.

force.[59] Such a broad application in conjunction with the general difficulty of establishing the facts underlying the justification makes the legal concept relatively indeterminate and permissive. Hence, rather than being the right that justifies an exceptional action, it is the most prominent legal label for modern warfighting. Yet, different from formal declarations of war, which established a clear divide between war and other situations of violence, such as measures short of war, self-defense is not only invoked in the context of high-intensity conflicts, but also for military actions limited in time, scope, and intensity. A prominent example is the targeted U.S. strike to kill Qasem Soleimani, an Iranian military commander in 2021.[60]

The right to use force in collective or individual self-defense against unlawful attacks finds its legal basis in Article 51 of the UN Charter. The provision does not indicate either the precise meaning or a definition of the right to self-defense, but is drafted in strict terms.[61] Major disputes exist as to what amounts to an armed attack and the temporal scope of the right's invocation.[62] State practice suggests that the resort to defensive force is associated with a state reacting to another state's use of force in preservation of the former's territorial domain and physical existence. Many affirm that a parallel and broader notion of self-defense exists under customary law that the adoption of the Charter has left untouched,[63] according to which a state may resort to self-defense when the necessity to react is 'instant, overwhelming and leaving no choice of means'.[64] In addition, measures taken in the exercise of

[59] Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method' (2009) 22(4) Leiden Journal of International Law 651. Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method' (2009) 22(4) Leiden Journal of International Law 651, 670; Gray (n 35), 121; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter'* (Cambridge University Press 2011) 53-54; Terry D Gill and Kinga Tibori-Szabó, 'Twelve Key Questions on Self-Defense against Non-State Actors' (2019) 95 International Law Studies 467, 482; Russell Buchan, 'Non-forcible Measures and the Law of Self-defence' (2023) 72(1) International & Comparative Law Quarterly 1, 2. For the argument that the baseline probability of claiming the right remains low, see Atsushi Tago, 'Why do states formally invoke the right of individual self defense? Legal-, diplomatic- and aid-politics to motivate states to respect international law' (2013) 30(2) Conflict Management and Peace Science, 161.

[60] 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?' (2022) 9(1) Journal on the Use of Force and International Law 55.

[61] Derek W Bowett, *Self-defense in International Law* (Lawbook Exchange 2014) 187; see also Jan Klabbers, *International Law* (2nd edn, Cambridge University Press 2017) 209; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens and Sons 1950) 269, 797-8.

[62] Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 861.

[63] Bowett (n 61) 184, 188; see also Institut de Droit International, 'Present Problems of the Use of Armed Force in International Law, Resolution 10A' (2007) <https://www.idi-iil.org/app/uploads/2017/06/2007_san_02_en.pdf> accessed 30 May 2023; and HL Deb 21 April 2004, vol 660, cols 370-1; the ICJ confirmed that Article 51 does not subsume or supervene customary international law. Therefore, they constitute two different sources of law that continue to exist alongside the others. See Nicaragua case (n 26) 14, 94.

[64] 'Letter from Webster to Lord Ashburton (6 August 1842)' in H Miller (ed), *Treaties and Other International Acts of the United States of America* (Government Printing Office 1934) vol 4 [Caroline case] 454-5.

self-defense must not be unreasonable or excessive, but rather limited by necessity and proportionality.[65] The International Court of Justice (ICJ) affirmed that only 'the most grave forms of the use of force' constitute an armed attack, and that 'less grave forms' are excluded.[66] This does not, however, offer much clarity for assessing what amounts to an armed attack in practice.

At the outset, Article 51 was generally perceived as not allowing anticipatory self-defense,[67] albeit self-defense under customary law is also deemed to allow defensive force in instances of imminent or actual dangers to the physical integrity of the state in question.[68] After the terrorist attacks of 11 September 2001 (the so-called 9/11 attacks), however, the United States expanded the temporal scope of application to include the notion of 'pre-emptive self-defense'. This concept refers to the use of force to halt a particular tangible course of action that the potential victim state perceives will shortly evolve into an armed attack against itself. This requires having good reasons to believe that the attack is likely, is near at hand, and, in case of its materialization, will result in significant harm.[69] A broader understanding of self-defense, so-called 'preventive self-defense', refers to the use of force to halt a serious future threat of an armed attack without clarity about when or where that attack may occur. The use of force may also be viewed as preventive when it purports to respond to a state's or group's threatening behavior in the absence of credible evidence that the state or group has the capacity and intent to attack.[70]

Another tendency regarding the expansive use of Article 51 concerns the invocation of the right to self-defense against non-state actors. State practice has followed two different approaches. Some claim that acting in self-defense in response to an attack by non-state actors may find support in the wording of Article 51 because it does not define the perpetrator of the armed attack and therefore non-state actors can qualify as such.[71] Others argue that using force against non-state actors does not fall under

[65] The ICJ affirmed that (1) the necessity of the responsive action with respect to the threat or actual attack and (2) the proportionality therewith are two cumulative conditions necessary for the right to self-defense to be lawfully exercised. See *Oil Platforms* (*Islamic Republic of Iran v United States of America*) (Merits) [2003] ICJ Rep 161 [Oil Platforms case] para 43.

[66] Nicaragua case (n 26) 14, 101; Oil Platforms case (n 65) 161, 187.

[67] For an analysis of such arguments and proposed counterarguments, see Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1981) 276-8.

[68] ibid 252; Leland M Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (World Peace Foundation 1946) 301.

[69] Ashley Deeks, 'Taming the Doctrine of Pre-Emption' in Weller (ed) (n 43) 662-3.

[70] ibid 663.

[71] Klabbers (n 61) 213; Yoram Dinstein, *War, Aggression and Self-defence* (6th edn, Cambridge University Press 2017) 241; Sean D Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter' (2002) 43(1) Harvard International Law Journal 41, 50; *Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 136, Separate Opinion of Judge Higgins, 215; for a counterargument, see André De Hoogh, 'Restrictivist Reasoning on the Ratione Personae Dimension of Armed Attacks in the Post 9/11 World' (2016) 29(1) Leiden Journal of International Law 19, 22.

the scope of Article 2(4) of the Charter because it only prohibits the use of force against other states. Therefore, self-defense against non-state actors would not require a justification under Article 51.[72] The ICJ cases on the *Corfu Channel, Tehran Hostages, Military and Paramilitary Activities in and against Nicaragua,* and *DR Congo v Uganda* established an inter-state reading of Article 51 by consistently resorting to the notion of attribution to link a non-state armed group's attack to the state allegedly supporting it.[73] Yet arguably the ICJ left open the question as to whether a state is entitled under Article 51 to react in self-defense against an attack launched by an armed group operating from abroad without this attack being linked to any state (an unattributable armed attack).[74]

The 9/11 terrorist attacks were a turning point, because practice thereafter departed from the ICJ jurisprudence on attribution, which some consider to have altered customary law.[75] With Operation Enduring Freedom, the United States responded in self-defense under Article 51 to the attacks perpetrated by Al-Qaeda in New York and Washington DC, although they were not attributable to the then *de facto* Taliban government according to the traditional criterion of effective control upheld by the ICJ.[76] Although this line of reasoning had been contested in the past, the international community accepted it.[77] After 9/11, Western states' interpretation and application of Article 51 of the Charter further expanded.[78] To justify their action in self-defense, including when fighting against the Islamic State of Iraq and the Levant (ISIL; also known as Islamic State of Iraq and Syria, ISIS; and Daesh) after 2014, states have often referred to the unwillingness or inability of the

[72] Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2011) 38-9.

[73] *Corfu Channel case* (n 26) 22; see also Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625 (XXV); *United States Diplomatic and Consular Staff in Tehran* (*United States of America v Iran*) (Judgment) [1980] ICJ Rep 3, 35; Nicaragua case (n 26); *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (Merits) [2005] ICJ Rep 168.

[74] For the conclusions drawn by commentators from this gap, see, *eg*, Kimberley N Trapp, 'Can Non-State Actors Mount an Armed Attack?' in Weller (ed) (n 43) 686, 689; Michael Byers, 'Terrorism, the Use of Force, and International Law after 11 September' (2002) 51(2) International & Comparative Law Quarterly 401, 409-10.

[75] Carsten Stahn, 'International Law at a Crossroads? The Impact of September 11' (2002) 62 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 183, 216, 227; see also Anne-Marie Slaughter and William Burke-White, 'An International Constitutional Moment' (2002) 43(1) Harvard International Law Journal 1, 20.

[76] The criterion of effective control is confirmed in the ILC Draft Articles on State Responsibility. See ILC, 'Report of the International Law Commission on the Work of Its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10.

[77] Shaw (n 62) 865; Trapp (n 74) 694; see the UNSC condemnation of Israel's attack on the PLO headquarters in Tunisia in 1985 and the concern expressed by a number of governments with respect to the territorial integrity of Sudan and Afghanistan after the US attack; see Byers (n 74) 407; Antonio Cassese, 'The International Community's Legal Response to Terrorism' (1989) 38(3) International and Comparative Law Quarterly 589, 598, 599.

[78] Olivia Flash, 'The Legality of the Air Strikes against ISIL in Syria: New Insights on the Extraterritorial Use of Force Against Non-state Actors' (2016) 3(1) Journal on the Use of Force and International Law 37, 56.

territorial state to suppress the extra-territorial threat posed by the non-state actor operating therefrom.[79] States not directly involved supported – or at least did not condemn – this justification, but the 'unwilling or unable' doctrine remains debated.[80]

This leads to the conclusion that states tend to invoke the right to self-defense for a large variety of unilateral uses of military force. Although not all invocations of the right are accepted by other states, the longstanding practice of broad and repeated invocation suggests that the parameters of the right are vast. This is reflected in the doctrinal debates notably regarding the definition of an armed attack, anticipatory self-defense, and the right to act in self-defense against non-state actors.[81] As a consequence, self-defense has become an agile catch-all justification for using force in international relations. States' use of the concept of self-defense when attacking other states suggests that it is even turned on its head: instead of reacting to a wrongful act, it is used like the right to act in contradiction to the prohibition of the use of force under Article 2(4) of the UN Charter. As a result, this prohibition is further undermined.

Moreover, these normative developments blur the divide between war and peace. States invoke self-defense when using force similarly to how they declared war in the past. The justification of self-defense thus indicates that there is war, warlike situations, or acts of war. Contrary to declarations of war, this does not transform the formal state of affairs into war, however. More importantly, states invoke the concept for such a broad spectrum of military force that it has become too loosely delimited to serve as an indicator for the categorization of specific situations. The divide between peace and war as relating to states' use of force for self-defense is thus blurred, offering little analytical clarity and normative guidance. This notably applies to coercive measures forming part of hybrid threats and grey-zone conflict.

[79] With respect to the US attack on Afghanistan in 2001, President Bush affirmed that the Taliban regime was 'sponsoring and sheltering and supplying terrorists'. See George W Bush, 'Address to a Joint Session of Congress and the American People' (*White House*, 20 September 2001) <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> accessed 30 May 2023; more recently with respect to the intervention against ISIL/ISIS in Syria, see ibid 57 ff; for the underlying theory, see Ashley S Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extra-Territorial Self-Defense' (2012) 52(3) Virginia Journal of International Law 483.

[80] Kevin Jon Heller, 'Ashley Deeks' Problematic Defense of the "Unwilling or Unable" Test' (*Opinio Juris*, 15 December 2011) <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> accessed 30 May 2023; Dawood I Ahmed, 'Defending Weak States against the "Unwilling or Unable" Doctrine of Self-Defense' (2013) 9 Journal of International Law and International Relations 1, 23; Flash (n 78) 54.

[81] Efforts to clarify these debates had mitigated results so far. See, *eg*, Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55(4) International and Comparative Law Quarterly 963.

5. The Subjectivity of Armed Conflict

Since *jus ad bellum* does not provide much clarity on the divide between war and peace, *jus in bello* (the law of armed conflict, LOAC; international humanitarian law, IHL) may serve for identifying the divide's underlying elements, criteria, and conditions. Just as its name suggests, this branch of law deals with the occurrence of 'armed conflicts'. While it is often called 'international humanitarian law', in particular in diplomatic contexts and by humanitarian organizations,[82] militaries prefer the term 'law of armed conflict'. The US military, as a notable exception, continues to call this the 'law of war'.[83] This suggests that the US armed forces perceive situations in which this branch of law applies as war, or at least as circumstances that deserve a legal framework tailored to war.

Like the UN Charter, the GCs and their Additional Protocols (APs) generally do not use 'war' as a legal concept. The major exception is that formal 'declarations of war' or the recognition of belligerency can trigger the application of LOAC as per common Article 2 of the GCs. States tend not to declare wars anymore, however, and it is widely considered that this is not necessary for LOAC to apply in international armed conflicts (IACs).[84] The GCs and APs also rarely use the term 'war'. The concept of 'prisoners of war', 'customs of war', 'operations of war', and 'time of war' are notable exceptions.[85] Because LOAC builds on the legal concept of 'armed conflict' but without defining the term, one must assess how it applies in order to understand which situations states perceive as armed conflicts.[86]

Common Article 2 of the GCs provides for the material scope of LOAC applicability to IAC, namely declared wars and 'any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.[87] This reflects a shift from a purely formalistic approach (declared wars) to one where the existence of an IAC depends on objective legal criteria.[88] The International Criminal Tribunal for the former Yugoslavia (ICTY) specified in the *Tadić*

[82] For an analysis of the emergence of the term IHL, see Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26(1) European Journal of International Law 109.

[83] US Department of Defense, *Law of War Manual* (2016).

[84] ICRC, *Commentary on the First Geneva Convention* (Cambridge University Press 2016) [ICRC Commentary on GC I] paras 194, 206; Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 172 ff.

[85] See, *eg*, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 135 [GC I] Article 44; Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287 [GC IV] Article 144.

[86] For a broad analysis, see Terry D Gill, 'Rethinking the Scope of Application of International Humanitarian Law and Its Place in the International Legal System' (2022) 60(1) Military Law and the Law of War Review 58.

[87] Article 2 common to the four GCs.

[88] ICRC (n 84) paras 192-4, 201; Sassòli (n 84) 168; *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998), para 624.

case that the mere 'resort to armed force between states' would qualify as an IAC (the so-called 'first shot theory'[89]).[90] Any other criterion related to the length of the conflict, the intensity of the violence, or a denial of the state of war would generally be irrelevant.[91] While some, including the International Committee of the Red Cross (ICRC), go further and consider that the mere capture of a soldier of the enemy's forces is enough to trigger the classification of a situation as an IAC,[92] others argue that a certain degree of intensity must be met.[93]

For an IAC to exist, an act of violence attributable to and approved by a state must be directed against someone or something representing another non-consenting state. An act *ultra vires* or a mistake is not sufficient.[94] Yet it remains controversial whether the targeting of an armed group within another state without consent could qualify as an attack against that state itself, or, by contrast, whether the conflict should only qualify as a non-international armed conflict (NIAC), which is the US position. An IAC also occurs in instances of military occupation (with or without armed resistance),[95] which arises when one state exercises effective control over the territory of another state without that state's consent.[96] The required level of control by the occupying power remains debated, however. One view is that the degree of control should resemble the degree usually exercised by a government on its own territory for the Hague Regulation to apply and that the mere invasion of the territory of another state would be enough for the fourth GC's provisions on occupation to apply.[97] Another view is that GC IV is applicable as soon as a person or object it regulates falls under the control of the occupying power.[98]

With regard to NIACs, since common Article 3 to the GCs does not provide any practical criterion for when a NIAC comes into existence, the ICTY specified that the relevant test should focus on two aspects, namely (1)

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[89] *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72 (2 October 1995) para 70.

[90] Dieter Fleck, 'Scope of Application of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, Oxford University Press 2021) 52.

[91] See ICRC (n 84) paras 236 ff.

[92] ICRC (n 84) para 238, referring to state practice; see also Marian Nash, *Cumulative Digest of United States Practice in International Law, 1981-1988* (Office of the Legal Adviser, Department of State 1995) vol 3, 3456; ICRC (n 84) para 238; Jean S Pictet (ed), *Commentary on the Third Geneva Convention* (ICRC 1960) 23, cited in Sassòli (n 84) 170.

[93] ILA, Use of Force Committee, 'Final Report on the Meaning of Armed Conflict in International Law' (2010) 2.

[94] ICRC (n 84) para 241; Sassòli (n 84) 171.

[95] Article 2 common to the four GCs.

[96] Annex to Convention (IV) respecting the Laws and Customs of War on Land (18 October 1907).

[97] Jean S Pictet (ed), *Commentary on the Fourth Geneva Convention* (ICRC 1958) 60.

[98] For a debate on the topic, see Marten Zwanenburg, Michael Bothe and Marco Sassòli, 'Is the Law of Occupation Applicable to the Invasion Phase?' (2012) 94(885) International Review of the Red Cross 29; see also Tristan Ferraro (ed), 'Occupation and Other Forms of Administration of Foreign Territory: Expert Meeting' (ICRC 2012) 24.

whether the confrontation between the governmental armed forces and the armed group is of a 'protracted nature'; and (2) whether the parties to the conflict are sufficiently organized (particularly the armed group, because states' armed forces are presumed to be so[99]).[100] The criterion of organization demands a command structure, the capacity to sustain military operations, a certain level of hierarchy and discipline within the group, and the ability to implement the basic LOAC obligations.[101] This determination is made on a case-by-case basis and grounded on factual considerations. Yet it is often difficult to determine whether a group can be considered a party to the conflict and to qualify the situation of violence as an NIAC. [102] The element of protracted violence has been subsequently reinterpreted as requiring a certain level of intensity rather than a minimum duration of the confrontation in line with AP II's requirements for application.[103] The ICTY has also summarized a non-exhaustive list of intensity indicators.[104]

LOAC applicability also ends based on the factual conditions for an armed conflict. LOAC of IAC ceases to apply with the general close of military operations, except for those provisions regulating prisoners of war and persons in the power of the enemy or whose liberty has been restricted for reasons related to the conflict that continue to apply until their final release or repatriation.[105] The ICTY has considered that the relevant criterion to determine when LOAC ceases to apply in IACs is the 'general conclusion of peace'.[106] The law of occupation ceases to apply when the occupying power loses control over the foreign territory or when the occupied state consents to the occupier's military presence in the occupied territory. While most agree that the law of NIACs continues to apply until the end of the

[99] ICRC (n 84) para 429.

[100] *Prosecutor v Tadić* (n 89) para 70; also confirmed in *Prosecutor v Tadić* (Opinion and Judgment) ICTY-94-1-T (7 May 1997) para 562, and subsequent jurisprudence. See *Prosecutor v Limaj and others* (Judgment) ICTY-03-66-T (30 November 2005) para 84; *Prosecutor v Boškoski and Tarčulovski* (Judgment) ICTY-04-82-T (10 July 2008) para 175; see also, *eg*, *Prosecutor v Akayesu* (n 88) paras 619-20, and *Prosecutor v Rutaganda* (Judgment and Sentence) ICTR-96-3-T (6 December 1999) paras 91-2.

[101] ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report' (ICRC 2003) 19.

[102] ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2007) 89(867) International Review of the Red Cross 719, 743.

[103] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 609 [AP II] Article 1 and 2; see on this issue Stuart Casey-Maslen and Steven Haines, *Hague Law Interpreted* (Hart Publishing 2018) ch 2.

[104] Sassòli (n 84) 181. These are: the number, duration, and intensity of individual confrontations; the type of weapons and other military equipment used; the number and caliber of munitions fired; the number of persons and type of forces participating in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict. See *Prosecutor v Haradinaj and others* (Judgment) ICTY-04-84-T (3 April 2008) para 49.

[105] GC IV (n 85) Article 6(2), 6(3), 6(4); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3 [AP I] Article 3(b); GC I (n 85) Article 5; Convention (III) relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135 [GC III] Article 5(1); AP II (n 103) Article 2(2).

[106] *Prosecutor v Tadić* (n 89) para 70; Sassòli (n 84) 191.

conflict even when the criteria for its existence (intensity and organization) are no longer met during confrontations,[107] some contend the opposite.[108] In this vein, an assessment of modern wars has revealed that current international law provides insufficient guidance to ascertain the end of many armed conflicts as a factual, normative, and legal matter.[109]

The LOAC's geographical scope of application is highly controversial, particularly because the GCs and APs do not contain explicit provisions on this issue. With respect to IACs, it is generally accepted that LOAC applies to the whole territory of the states involved in the conflict[110] and is not limited to the actual theater of hostilities,[111] although some consider it to be applicable even outside the territory of the parties to the conflict to the extent that there are belligerent activities with a sufficient nexus with the conflict.[112] Regarding NIACs, the ICTY made it clear that LOAC applies to 'the whole territory under the control of a party, whether or not actual combat takes place there'.[113] The case is less clear regarding NIACs with extra-territorial elements, namely when a state joins an NIAC occurring in the territory of another state with the latter's consent to fight a non-state armed group. While some consider that LOAC applicability is limited to the territory of the state where the actual conflict is taking place,[114] others argue that it applies also throughout the entire territory of the states involved extra-territorially.[115] This was potentially the case for European states involved in the conflict in Syria to fight ISIL/ISIS, for instance.

In addition, it has been suggested that the geographical scope of application of a NIAC may also extend to adjacent non-belligerent countries when the conflict or elements thereof spill over to them.[116] According to some, in such cases, LOAC would continue to apply as a spill-over effect even when in the neighboring state the criteria for a NIAC (intensity and organization) are not met; a structural link between sporadic extra-territorial outbreaks of

[107] Sassòli (n 84) 192; *Prosecutor v Haradinaj and others* (n 104) para 100.

[108] Marko Milanovic, 'End of IHL Application: Overview and Challenges' (Scope of Application of International Humanitarian Law, Bruges, 2012) 87 <https://www.coleurope.eu/sites/default/files/uploads/page/collegium_43_webversie.pdf> accessed 30 May 2023; see also Derek Jinks, 'The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts' (Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, 2003) 3 <https://www.hpcrresearch.org/sites/default/files/publications/Session3.pdf> accessed 30 May 2023.

[109] Dustin A Lewis, Gabriella Blum and Naz K Modirzadeh, 'Indefinite War: Unsettled International Law on the End of Armed Conflict' (Harvard Law School Program on International Law and Armed Conflict 2017).

[110] ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report' (ICRC 2015) 13.

[111] See also *Prosecutor v Tadić* (n 89) para 70.

[112] Sassòli (n 84) 187, 190.

[113] *Prosecutor v Tadić* (n 89) paras 69-70.

[114] ICRC (n 84) para 471, fn 193.

[115] ICRC (n 110) 14.

[116] ICRC (n 84) para 474.

violence and the main conflict would be sufficient.[117] State practice tends to support this.[118] Yet, taken to its extreme, such a view can imply the acceptance of the notion of a 'global battlefield' according to which LOAC is applicable without territorial limitations so long as an action has a nexus with an ongoing conflict fought elsewhere.[119] Although this approach represents the minority's view and practice, it does reflect US practice.[120] It has been central to the concept of the 'war on terror'[121] and plays a role regarding certain states' use of drones across the globe.[122]

The consequence of these normative developments and controversies is that *jus in bello* – the branch of international law applicable to armed conflicts – does not clearly indicate when an armed conflict exists and when a state or other actors are involved in such a conflict. Although the respective rules contain objective criteria and their core meaning is well accepted among states, the rules' delimitation has become vague due to extensive interpretation and state practice. This is well reflected in the doctrinal debates.[123] Efforts to classify situations of violence in an objective manner, such as by the Rule of Law in Armed Conflicts project,[124] have produced clarity, but do not necessarily reflect states' perceptions. This suggests that even a substitute for 'war' as a state of affair – 'armed conflict' – tends to be so blurringly used that it does not provide clarity to assess the difference between war and peace. LOAC does indeed govern warfighting activities (called 'conduct of hostilities'), but its inconsistent application has the consequence that the legal qualification of a situation as armed conflict does not objectively explain or delimit any given situation compared to others. Rather, it is a legal framework that states apply in a relatively aleatory – or perhaps even subjective – manner.

In this context, states tend to avoid qualifying tensions and military confrontation with other states as armed conflicts to not escalate the tensions and crises. States also tend to not acknowledge officially the existence of NIACs so as not to recognize opponents as serious forces of

[117] Marko Milanovic and Vidan Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar Publishing 2012) 33.

[118] ICRC (n 84) para 474, fn 198; further examples of conflicts that have spilled over into the territory of another state are given in Marko Milanovic, 'The Applicability of the Conventions to "Transnational" and "Mixed' Conflicts"' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) paras 52, 56, 58.

[119] Sassòli (n 84) 189.

[120] ICRC (n 110) 15.

[121] US President Obama rejected the term 'war on terror' in 2009, but asserted that the United States was at war with Al-Qaeda.

[122] Sassòli (n 84) 189; see ICRC (n 84) para 482, fn 212; see more on the debate on the war on terror and the geographic scope of the LOAC in ICRC (n 110) 18.

[123] For further reading, see Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 531

[124] Geneva Academy, 'Rule of Law in Armed Conflicts' (*Rulac*) <https://www.rulac.org/> accessed 30 May 2023.

opposition while downplaying their domestic political problems. The result is that war and peace can hardly be distinguished by states' application of LOAC. This also means that LOAC does not clearly circumscribe its application regarding hybrid threats, hybrid warfare, and grey-zone conflict.

Implications and Outlook

In his book *1984*, George Orwell wrote: 'War is peace.' These words are part of the official motto of the fictional nation of Oceania. They are also an expression of doublethink, which is the ability to hold two opposing ideas in one's mind simultaneously. An example of this is that Oceania's Ministry of Peace oversees war. This allows Oceania's citizens to live with constant contradictions in their lives and keeps them in a mental grey zone. As a result, they accept their fate and fully rely on and accept the dictates of the ruling elite. Accordingly, there is no divide between war and peace in Oceania. War equals peace and *vice versa*.

The normative treatment of the divide between war and peace is not doublethink as in *1984*. Yet, there are certain parallels. The international legal system does not contain 'war' as a consequential legal status, concept, or category. Rather, the general state of affairs is peace – even when the reality is war among and within multiple states. War or warlike actions are also conducted in the name of peace when the UN Security Council authorizes all necessary means to establish and maintain international peace and security. In addition, states tend to use the only exception to the prohibition of the use of force – self-defense – as a malleable justification for using military force and waging wars. Furthermore, state practice and interpretations regarding the application of *jus in bello*, which governs their conduct in war and warlike situations that are termed 'armed conflict', remain inconsistent and debated.

The result is that international law does not provide a clear divide between war and peace. While the core meaning of the respective rules remains rather undisputed, states' extensive interpretations and practice blur their precise delimitation and legal consequences. Peace and war also seem to be conflated to the extent that the normative treatment of the divide does not allow to distinguish one from the other and that there is a tension between the normative state of affairs ('peace') and the actual realities ('war'). Thus, the divide between war and peace is blurred. More specifically, the absence of clear delimitations by international law makes the divide a legal grey zone.

The consequence of this is that the normative framework on war and peace is more permissive than the black letter rules notably in the UN Charter suggest. This means that states have a relatively broad range of maneuver for resorting to military force and war. Distinguishing between legal and illegal actions and reacting to the latter is also rendered difficult. The Russian attack on Ukraine in 2022 is a notable exception where Russia did not seem to give particular attention to its legal justifications, which was identifiable as a flagrant violation of the prohibition of the of use force, and which led

to rapid and strong reactions by the international community. This remains the exception, however, notably when great powers resort to force.

The legal grey zone regarding war and peace also results in the respective international rules not clearly regulating hybrid threats, hybrid warfare, and grey-zone conflicts. This does not mean that these situations are not regulated by international law. Yet, since the rules and their application are not clearly delimited, states can take advantage of this by conducting military and other actions in the legal grey zone without fearing legal consequences. This finding is different from the more common assumption that states conduct hybrid activities below the thresholds of application of the given rules to avoid these rules' consequences. This can be positive to the extent that the legal grey zone is confined enough to draw states – notably great powers – away from resorting to high-intensity and full-scale wars in flagrant violation of the rules, and towards resorting to hybrid tactics and grey-zone conflict due to the benefits of the legal grey zone. This chapter's analysis suggests, however, that the normative divide of war and peace is so indeterminate that this may not be the case. There is the risk that states may conclude that the divide is so blurred under international law that they can get away with practically anything.

This leads to the future of peace and war from a normative perspective. Based on this chapter's analysis, there are several avenues to be explored when reflecting on how to strengthen international law's ability to foster peace and prevent war. A fundamental point is that international law establishes peace as the general state of international affairs, but multiple realities around the globe represent war. How can this tension be alleviated? Should the norms be strengthened, and if so, how? Or should the expectations be lowered so that the norms more closely reflect reality? Would a more accurate and less normative discourse on war and peace foster or undermine existing international law? Another central point is the blurred normative divide between war and peace. How can this divide be sharpened? Or should the indeterminacy of certain rules be tolerated because it avoids clear violations and normative revisionism by states?

Several options derive from these questions. To strengthen and clarify the normative framework, states should increasingly condemn expansive interpretations and violations, notably regarding the prohibition of the use of force and the right to self-defense. Similarly, the use of judicial mechanisms, such as the ICJ and arbitration tribunals, can bring clarity. Similarly, stronger language from the UN Security Council, such as naming situations as 'war' and classifying situations as a 'breach of the peace' or even an 'act of aggression' rather than only as a 'threat to peace' would allow the legal terms to better reflect reality. Judging political leaders for the crime of aggression can also contribute to clarifying and strengthening the normative framework on war and peace. More prominently communicating that a situation qualifies as an armed conflict can also foster the application of *jus in bello* and align the normative treatment with the actual reality. This notably concerns hybrid threats, hybrid warfare, and grey-zone conflict where hostile actions are specifically conducted in this legal grey zone between war and peace.

Alternatively, there is also the possibility to continue not to talk of 'war', but to focus on 'peace' in the normative realm. This may help to keep the ideal alive and expectations high. In this vein, similar to the notion of 'quality peace', which essentially abandons the divide between war and peace, but defines peace as a continuum, respect for international human rights law can be used as the normative indicator of levels of peace. This would be an approach that focuses on human security rather than the status of relations between states and would work independently of whether there is war or not. Such an approach would notably require the international community to further push the universal application of and respect for international human rights law – even during armed conflicts and particularly for hybrid threats, hybrid warfare, and grey-zone conflict.

Ultimately, the essential point of the dichotomy between war and peace is a reminder of the need for analytical clarity and consequential action: peace is the aspiration, the good, and should be the ordinary; war should be the extraordinary to be avoided. Further research, debate, and action should prevent the normative treatment of the divide between war and peace from becoming doublethink where 'war is peace'. War is not peace, and peace is not war.