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## The Twenty-First Century Wars. Unconventional Conflicts Before International Law

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### Introduction

The lines between conventional and unconventional conflicts become blurred. Alongside non-international and international conflicts, a third category of armed conflict is emerging: hybrid, asymmetric, and transnational conflicts which involve state and non-state actors whose legal status and classification is disputed.<sup>1</sup> While it's a blend of traditional and irregular tactics, hybrid warfare makes use of a wide range of tools: military and civilian; conventional and unconventional. Hybrid warfare was linked almost exclusively with non-state actors. Afterwards the concept of hybrid warfare developed in a way that is now commonly accepted to describe the interplay between conventional and unconventional means used also by governments and regular armies.

For such emerging conflicts/warfare there is no legal definition, therefore leaving room for interpretation and applicable law. International law (IL) and international humanitarian law (IHL) – in particular the law of war (Geneva and Hague law) – apply in case of armed conflict. The law of war, a branch of public international law, sets the acceptable justifications to engage in war (*jus ad bellum*) and the limits to acceptable wartime conduct (*jus in bello*). The law of war regulates *inter alia*: declaration of war; acceptance of surrender and the treatment of prisoners of war; military necessity, along with distinction and proportionality; and the prohibition of certain weapons that may cause unnecessary suffering.

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<sup>1</sup> For a definition of the term hybrid conflict, see: Gray, C.S. (2005). *Another Bloody Century: Future Warfare*, London: Weidenfeld & Nicolson.

## Research problem and question investigated

The research aims to investigate whether and how current international customary<sup>2</sup> and treaty law applies to unconventional conflicts that characterize the 21<sup>st</sup> century. The study investigates whether new rules are required, or if current rules are still valid and can be used/adapted.

The research aims to check whether and to what extent states abide IL/IHL in dealing with unconventional conflicts, or if, through their course of conduct, states are attempting to create new customary law, or to adapt the existing instruments to the challenges that unconventional conflicts pose. The study investigates also whether these conducts abide customary IL and peremptory norms (*jus cogens*), that are not consent-based, but still are obligatory upon state and non-state actors.

The research has the purpose to contribute to develop solutions for the global challenges of today and tomorrow by understanding the present and imaging future scenarios.

## Basic design of the study, including sources and methods

The research topic involves main cross-cutting issues (the rule of law, fundamental human rights and ethical principles) and therefore requires an interdisciplinary approach: history, political science, political philosophy, sociology, law, ethics.

The research requires an empirical, positivist framework that rests on qualitative data analysis.<sup>3</sup> Although in complicated legal systems no ultimate distinction can be made between legal and moral standards, as positivism insists, socio-legal theory offers a contrasting/complementary perspective that will be useful in a global study like this. The research is conducted applying the concept of triangulation, which combines different methods (exploratory, descriptive and analytical) and fits to qualitative studies.

The specific nature of the methodology employed in this study is reflected in its structure, which is divided into two principal parts. The first part considers the theoretical elements, definitions and current research. The second part analyzes the legal aspects of some case studies and nests them within the broader discussion on the applicable law, starting from an analysis based on three pillars: historical, theoretical-conceptual and legal (in the light of IL/IHL).

To answer the starting question, the research moves from a historical-documentary analysis, then takes into consideration the literature and eventually focuses on some case studies of the post Cold War era: NATO bombing of Yugoslavia (1999); Gulf War (1990); Iraq War (2003); invasion of Afghanistan (2001); Syrian conflict (2011); the War on Terror (2001).

At first stage the study explores the theoretical elements: literature and legal framework. The legal framework consists of customary IL/IHL; international instruments (conventions and treaties); documents produced by relevant UN international agencies, bodies and entities; rulings of relevant supranational courts and international tribunals. Then an empirical analysis based on these tools checks the compliance of some case studies with current IL/IHL. Under most circumstances, an analysis of this type requires an empirical, positivist framework that rests on either a qualitative or quantitative data analysis.

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<sup>2</sup> For a discussion, see: Bederman, D.J. (2004). *International Law in Antiquity*. Cambridge University Press.

<sup>3</sup> For a definition of research methods cited: Given, L.M. (ed.) (2008). *The SAGE Encyclopedia of Qualitative Research Methods Vol. 1&2*. Los Angeles/London: SAGE.

## **Major findings**

The approach to warfare in political and legal discourse changed dramatically over the last fifty years and left significant room for free interpretation by policymakers and military leaders. Current rules are applied partially (and with difficulty) in situations that go beyond the rigid classifications established by international conventions and customary law. International law, in particular IHL, is good as long as it dealt with conventional conflict, or with civil war within a single country, but it shows its limits when faced with hybrid conflict. However, current rules may be sufficient to manage unconventional conflicts, but must be strictly respected and applied by all actors. Some governments and international organizations such as the NATO face difficulty using the tools currently available and therefore attempt to overtake IL/IHL by adopting a course of conduct to change *de facto* current legal framework through customary law. The nature and the scope of IL makes it easy for states to escape from their obligations, in the absence of mandatory constraints and of an effective sanctioning mechanism.

Lastly, lexicon and definition of terms are essential, and the international community should find common, undisputed and unambiguous legal formulations for terms such as: conventional/unconventional; traditional/non-traditional; kinetic/non-kinetic; lethal/non-lethal.

## **Interpretations and conclusions**

This research does not rest on pre-defined hypotheses, but rather relies on the ability to divulge meaning from different elements of research without being bound by pre-existing limitations. While this presents a serious challenge, it does open much room for possible explorations of new fields of research without necessitating a fixed point of departure – or arrival. Findings and conclusions are to be considered provisional.

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