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MIND THE GAP? *JUS AD BELLUM* AND *JUS IN BELLO* IN THE ERA OF HYBRID WARFARE

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ABSTRACT

The international community has long relied on jus ad bellum*, or the legal framework governing state use of force, and* jus in bello*, or the legal framework governing conduct in war, to manage and define state conflict. But in the era of hybrid warfare, conflicts often play out in the legal gaps and areas of ambiguity between these frameworks. In a world of information operations, little green men, hotter border disputes, targeted killings, and lawfare, it is unclear if* jus ad bellum *and* jus in bello *can keep up. States such as Russia and China consistently exploit areas of international legal ambiguity to further their own ends, and this phenomenon shows no sign of stopping. This paper explores the legal gaps between and around the* jus ad bellum *and* jus in bello *frameworks and questions how they might be changed to better handle the realities of hybrid warfare. Building off prior scholarship which has assessed these gaps, this paper ultimately argues against extending these legal frameworks to create coverage for every aspect of modern conflict, while also briefly discussing other legal tools which could be used to create holistic state responses to hybrid warfare.*

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INTRODUCTION

In June of 2023, an unidentified individual gunned down Hardeep Singh Nijjar, a Sikh independence activist, in the suburbs of Vancouver.[1] In September of 2023, Canadian Prime Minister Justin Trudeau stated that the Canadian government was "pursuing credible allegations" that Indian government agents were involved in Nijjar's killing.[2] Nijjar was a Canadian citizen, but the Indian government had designated him as a terrorist three years earlier for his activism in the Khalistan movement.[3]

Also over the summer of 2023, diplomatic efforts continued to resolve a border dispute between China and India, which had led to kinetic violence a few years earlier.[4] In 2020, the two militaries clashed, leading to the deaths of twenty-four Indian and Chinese soldiers.[5] China had maneuvered forces into Ladakh, an territory claimed by India which is adjacent to Tibet.[6] The clash happened around a glacial lake high in the mountains, and the two countries have had tense relations since, though diplomatic efforts have increased recently.[7]

These scenarios showcase what scholars have referred to as the "gap" between the events which trigger the *jus ad bellum* and *jus in bello* legal frameworks. The two bodies of law have historically had independent thresholds and triggers. If it was confirmed that the Indian state was responsible for Nijjar's death, his killing would have been a state use of force but would not have triggered Canada's right to respond with force under *jus ad bellum* nor would it have triggered application of *jus in bello*. Conversely, the clash between Indian and Chinese forces would have triggered *jus in bello*, but still likely would not have given either state the right to respond with force under *jus ad bellum*.

Those who have evaluated the gap between *jus ad bellum* and *jus in bello* have come to varying conclusions: Professor Laurie Blank believes the gap is vital and should be preserved,[8] and Professor Terry Gill believes a more flexible gradient

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[1] Reuters, *India-Canada Ties Fray in Dispute Over Sikh Separatist Killing*, REUTERS (Oct. 3, 2023, 9:25 AM), https://www.reuters.com/world/india-canada-ties-fray-row-over-sikh-separatist-killing-2023-10-03/.
[2] *Id.*
[3] *Id.* The Khalistans believe in the creation of an independent Sikh homeland in the current Indian state of Punjab and led a violent revolt against the Indian government in the 1970s and 80s. Manjari Chatterjee Miller, *Canada-India Tensions Over Killing of Sikh Separatists: What to Know*, COUNCIL ON FOREIGN RELATIONS (Sept. 25, 2023, 5:53 PM), https://www.cfr.org/in-brief/canada-india-tensions-over-killing-sikh-separatist-what-know. They are supported by a minority of Indian Sikhs, and India has accused the Pakistani government of keeping the movement alive in current times. *Id.*
[4] Bilal Hussain, *Unsettled Peaks: Three Years of Tension Along India-China Border*, VOICE OF AMERICA (July 7, 2023, 12:46 PM), https://www.voanews.com/a/unsettled-peaks-three-years-of-tension-along-india-china-border-/7171500.html.
[5] *Id.*
[6] Sudhi Ranjan Sen, *The Border Dispute That's Bedeviling China-India Ties*, BLOOMBERG (Aug. 22, 4L51 AM), https://www.bloomberg.com/news/articles/2023-08-22/the-border-dispute-that-s-bedeviling-china-india-ties#xj4y7vzkg.
[7] *Id.*
[8] *See generally* Laurie R. Blank, *Irreconcilable Differences: The Thresholds for Armed Attack and International Armed Conflict*, 96 NOTRE DAME L. REV. 249 (2020).

would be beneficial.[9] Both approaches reveal different priorities. While Blank focuses on the need to protect the underlying justifications of each framework, Gill is concerned with avoiding opportunities for escalation. In the modern era of hybrid warfare and integrated deterrence, balancing these diverging priorities is essential.

This paper will normatively assess how to balance these priorities in the modern era. Modern "wars" do not always make it to the battlefield, and those that do are waged using larger "arsenals" than ever before. In a world of information operations, little green men, hotter border disputes, targeted killings, and lawfare, it is unclear if the *jus ad bellum* and *jus in bello* frameworks can, or should, stay in their individual boxes. Further, these legal frameworks do not present a binary choice of response for states. International law offers other outlets for resolving state conflict. While this paper addresses international law broadly, it often approaches specific problems and solutions through a U.S.-oriented lens.

This paper proceeds by explaining the existing gaps between and around *jus ad bellum* and *jus in bello*, before contrasting the two approaches of Blank and Gill in Part I. Part II explores the significance of these gaps in the context of hybrid warfare, before offering a few examples of modern forms of conflict which fall within the gaps. Part III normatively evaluates the status quo, while quickly addressing other routes states can take to manage conflict. Ultimately, this paper concludes that the threats of hybrid warfare and the escalation concerns which come with it would be better met by bolstering the current rules-based international order, gaps included.

I. GRAB A HEADLAMP: EXPLORING THE GAPS

The tension between the triggering thresholds of *jus ad bellum* and *jus in bello* is not new. The two bodies of law have historically been considered independent, something reiterated in post-World War II adjudications, where "violations of *jus ad bellum* ('crimes against peace') and *jus in bello* ('war crimes')" were distinct.[10] Discussion around humanitarian interventions in the 1990s and wars against terrorism in the 2000s pushed the boundaries of this traditional conception,[11] but the scholarship seems to have landed back at this distinction.[12] This Part will evaluate two perspectives on the "gaps" between *jus ad bellum* and

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[9] *See generally*, T. D. Gill, *Some Reflections on the Threshold for International Armed Conflict and on the Application of the Law of Armed Conflict in any Armed Conflict*, 99 INT'L L. STUD. 698 (2022) [hereinafter Gill, *Some Reflections*].

[10] Antoine Bouvier, *Assessing the Relationship Between* Jus in Bello *and* Jus ad Bellum*: An "Orthodox" View in* THE RELATIONSHIP BETWEEN JUS AD BELLUM AND JUS IN BELLO: PAST, PRESENT, AND FUTURE, 100 AM. SOC'Y INT'L L. 109, 110 (2006) panel at Stanford Law School.

[11] *See* Julie Mertus, *The Danger of Conflating* Jus ad Bellum *and* Jus in Bello *in* THE RELATIONSHIP BETWEEN JUS AD BELLUM AND JUS IN BELLO: PAST, PRESENT, AND FUTURE, 100 AM. SOC'Y INT'L L. 114, 115 (2006).

[12] *See generally* Blank, *supra* note 8 (offering an example of recent scholarly analysis maintaining distinction between the two legal frameworks). *Contra* Frédéric Mégret, Jus in Bello *and* Jus Ad Bellum *in* THE RELATIONSHIP BETWEEN JUS AD BELLUM AND JUS IN BELLO: PAST, PRESENT, AND FUTURE,100 AM. SOC'Y INT'L L. 121, 121 (2006) (arguing that "Humanitarian intervention" [is] a rare case where bringing *jus in bello* and *jus ad bellum* closer makes sense".).

jus in bello. Unfortunately, this paper is forced to discuss each framework in broad strokes, often leaving out important nuance.

Jus in bello, or the international law of armed conflict ("ILOAC"), governs the behavior of combatants in war. Simply put, ILOAC applies when an armed conflict exists, though there are some differences between the parameters of international versus non-international armed conflicts.[13] At an overly simplistic level, an international armed conflict ("IAC") exists when there is a conflict between the armed forces of two states, and a non-international armed conflict ("NIAC") exists when there is a conflict between at least one armed non-state actor and a state, or multiple armed non-state actors.[14] This paper will focus on the *jus in bello* triggering threshold of IACs specifically, as questions related to rights under *jus ad bellum* are of *state* concern.[15]

ILOAC applies whenever the armed forces of at least two states clash, regardless of how long the clash lasts or if the states themselves have officially acknowledged it.[16] There is no clear threshold of intensity required if the clash is between two state armed forces.[17] For example, the incident described above between India and China was an IAC, regardless of how either state characterized it politically. The International Committee of the Red Cross has taken the stance that any non-consensual presence of armed forces in a state's sovereign territory may trigger ILOAC.[18] Application of ILOAC can levy a host of rights and responsibilities on the parties involved, such as rules regarding the treatment of prisoners of war[19] and the protection of civilians.[20] The application of ILOAC ends at the "general close of military operations," which is a fact-specific determination of the moment when the parties involved have fulfilled all obligations, such as providing locations of known minefields.[21]

On the other side, *jus ad bellum* refers to a state's legal right to use force. While states are prohibited from using force under the United Nations Charter ("UN

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[13] *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT 131–35 (3d ed. 2022) (explaining the difference between an IAC and an NIAC).

[14] *See* Terry D. Gill, *Classifying the Conflict in Syria*, 92 INT'L L. STUD. 353, 363–64 (2016) [hereinafter Gill, *Syria*].

[15] This paper will not discuss issues related to attribution or effective control.

[16] This is the generally accepted theory, but there are those who disagree with it and believe a certain level of intensity or sustained conflict is needed to establish an international armed conflict. *See* Gill, *Syria*, *supra* note 14, at 363 (explaining this second theory and noting why he believes the "low threshold is generally held as the better view").

[17] *Id.*

[18] Commentary of 2016, Article 2 – Application of the Convention, Geneva Convention Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, para 262. https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016.

[19] *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S 135.

[20] *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S 287.

[21] Julia Grignon, *The "General Close of Military Operations" and the End of Armed Conflicts*, ARTICLES OF WAR (Sep. 21, 2022).

Charter"),[22] there are exceptions, the most relevant of which is self-defense.[23] A state can legally resort to self-defense when it has experienced an "armed attack,"[24] or such an attack is imminent.[25] The definition of an "armed attack" in this context *differs* from the definition of an "armed conflict" in the ILOAC context, even though the terms are similar. "Armed attack" is not defined in the UN Charter.[26]

International tribunals have helped structure the international understanding of "armed attack," but individual states have different definitions. For example, the United States maintains that any use of force triggers the right of self-defense,[27] whereas international tribunals have often created more limiting principles on what counts as an armed attack.[28] The "gravity" of the attack is a common touchpoint in attempts to pin down a definition and distinguish armed attacks from "less grave forms" of force.[29]

However, states use force in many ways, and it is unclear in international law if a *de minimis* requirement applies when classifying something as a "use of force."[30] In the realm of state uses of force which *do not* meet the *jus ad bellum* threshold of an armed attack, there are two gap-style scenarios: 1) the use of force which triggers ILOAC, and 2) the state use of force which does not. For example, the kinetic clash between China and India was an IAC which triggered ILOAC, but the Indian state's alleged use of force to kill a civilian in Canada was not. Further, neither event crossed the *jus ad bellum* threshold which would have given any of the involved states the legal right to respond with force in self-defense. This paper explores the gaps between and around the *triggering* thresholds; discussing the *ends* of either framework's application invites a broader discussion too large to tackle in this space.

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[22] *See* U.N. Charter art. 2(4) ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.")

[23] *See* U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defen[s]e if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

[24] *Id.*

[25] *See* Matthew Waxman, *The Caroline Affair in the Evolving International Law of Self-Defense*, LAWFARE (Aug. 28, 2018, 2:26 PM), https://www.lawfaremedia.org/article/caroline-affair (discussing *Caroline v. United States*, 11 U.S. 496 (1813) and noting that it is "frequently invoked for the proposition that a state may use proportionate force in self-defense against "imminent" threats").

[26] RUSSEL BUCHAN & NICHOLAS TSAGOURIAS, REGULATING THE USE OF FORCE IN INTERNATIONAL LAW: STABILITY & CHANGE 43 (2021).

[27] *See* OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 1.11.5.2 (12 June 2015) (C3, 13 Dec. 2016) [hereinafter LAW OF WAR MANUAL] ("The United States has long taken the position that the inherent right of self-defense potentially applies against any illegal use of force.")

[28] *Id.* at para. 195.

[29] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 191 (June 27) [hereinafter *Nicaragua*]; Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 51 (Nov. 6) [hereinafter *Oil Platforms*].

[30] *See* Tom Ruys, *"License to Kill" in Salisbury: State-Sponsored Assassinations and the Jus Ad Bellum*, JUST SEC. (Mar. 15, 2018), https://www.justsecurity.org/53924/license-kill-salisbury-state-sponsored-assassinations-jus-ad-bellum/.

Professor Laurie Blank cleanly presents the edges of one gap between the frameworks and offers a normative assessment.[31] After explaining the different triggering thresholds of the legal frameworks, Blank explores the motivations underpinning each.[32] She notes that separation of the frameworks ensures that combatants must obey ILOAC whether or not the conflict they are engaged in is lawful, but simultaneously ensures that the individual behavior of combatants does not *determine* whether a conflict is lawful in the *jus ad bellum* sense.[33] She concludes that this gap is desirable, since raising the triggering threshold of ILOAC to move it closer to the "armed attack" threshold would create situations where combatants could operate unchecked, and lowering the definition of an "armed attack" to move it closer to events which trigger ILOAC would allow states to use force too frequently.[34]

In contrast, Professor Terry Gill offers a view on a different gap. Gill does not explicitly address the gap between *jus ad bellum* and *jus in bello*, focusing instead on a seeming gap below the ILOAC triggering threshold. Gill advocates for raising the legal threshold required to label a situation an IAC, but singles out the humanitarian aspects of ILOAC so they can apply below that threshold.[35] Essentially, he separates the protective aspects of ILOAC from the aspects which enable escalation, like status-based targeting of combatants.[36] While the protective aspects of ILOAC would be triggered easily, other aspects would not be triggered unless the conflict became an IAC, which would be determined using an intensity assessment.[37] Gill expresses clear concern about escalation, proposing a "unit-level" self-defense theory which would employ the *jus ad bellum* conception of self-defense to determine how a unit could respond to force when the situation has not yet become an IAC.[38] Overall, Gill seems to be concerned that collapsing the *existence* of an IAC into the *application* of ILOAC could lead to escalation in conflict.

While Blank discusses both *jus in bello* and *jus ad bellum* in boxes, Gill's approach turns *jus in bello* considerations into a gradient. This approach would not fully address Blank's gap but could serve as an enabling mechanism to raise certain thresholds while keeping others the same. For example, Blank notes that it is important to have a low threshold for ILOAC application because of its protective principles.[39] Gill's approach raises the IAC triggering threshold, while answering Blank's concerns by extending the coverage of the protective aspects of ILOAC.

Gill's raising of the IAC triggering threshold seeks to make steps towards escalation more costly. However, it could exacerbate some of Blank's concerns by

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[31] *See generally* Blank, *supra* note 8.
[32] *Id.* at 251–62.
[33] *Id.* at 282–87. The United States recognizes these purposes in the Law of War Manual, noting that they support keeping the two doctrines entirely separate. *See* LAW OF WAR MANUAL, *supra* note 27, § 1.11.5.2.
[34] Blank, *supra* note 8, at 287–289.
[35] Gill, *Some Reflections*, *supra* note 9, at 717.
[36] *Id.* at 703–06.
[37] *Id.* at 717.
[38] *Id.*
[39] *See* Blank, *supra* note 8, at 288.

increasing a state's ability to incrementally cause harm, such as holding members of adversary militaries indefinitely,[40] without ever triggering a victim state's *jus ad bellum* right to respond. Gill would likely view this situation as undesirable, but acceptable, as protective principles regarding the treatment of POWs would apply but adherence to unit level self-defense would limit further escalation.[41] In contrast, Blank views escalation concerns as addressed by the high triggering threshold of "armed attack," as this requirement exists to prevent full-scale wars.[42]

Overall, both approaches highlight gaps in the current understandings and applications of *jus ad bellum* and *jus in bello*. Blank accepts the gaps as they are, while Gill's parsing out of *jus in bello* concerns seeks to address the overarching problem of escalation. These gaps only seem more important when considering how they can be exploited, particularly in the context of hybrid warfare.

II. IN THE DEPTHS: HYBRID WARFARE AND CONFUSING CATEGORIES

A. Understanding the Overall Geography

"Hybrid warfare is understood as the effort to use all instruments, elements, and determinants of power in a coordinated, comprehensive, and holistic way (including violence or the threat of violence) to achieve [a] political end."[43] It seeks to blur lines and confuse conventional understandings of war and escalation, which often involves exploiting areas where there are seeming legal gaps in the international system.[44]

For example, one of the characteristic features of Russian hybrid warfare is that it aims to operate under other states' conventional reaction thresholds, such as the "armed attack" threshold of *jus ad bellum*.[45] Before invading Crimea with "little green men" in 2014, Russia used information warfare, a refugee crisis, private military companies, and other tools to avoid having its operations labeled as an

[40] In this example, Blank explains a situation where an IAC has been triggered and a state is legally allowed to detain members of the adversary state's armed forces. *Id.* at 265. In Blank's example, the IAC could continue indefinitely if the detaining state continued to take actions which did not constitute "armed attacks." *Id.*

[41] *See* Gill, *supra* note 9, at 716 ("All of the obligations and prohibitions on any party to an armed conflict under IHL would apply as soon as any situation arose where they needed to be applied.").

[42] *Id.* at 257.

[43] Larry Goodson & Marzena Zakowska, *How Russia's Hybrid Warfare is Changing*, SMALL WARS J. (July 7, 2023, 5:19 PM), https://smallwarsjournal.com/jrnl/art/how-russias-hybrid-warfare-changing. Further, some choose to differentiate between "hybrid threats" and "hybrid warfare." *See* Sean Monaghan, *Countering Hybrid Warfare*, 8 PRISM 82, 83. While the author of this paper agrees with the general approach of holding the word "war" as something which should be treated with special care considering its implications, the author believes that refraining from using the phrase "hybrid war" leads to a less integrated and prepared state. The U.S. adoption of "integrated deterrence" indicates a willingness to embrace the "whole of state" approach and focus on the desired political end.

[44] Aurel Sari, *Legal Aspects of Hybrid Warfare*, LAWFARE (Oct. 2, 2015), https://www.lawfaremedia.org/article/legal-aspects-hybrid-warfare.

[45] *Id.*

"armed attack.[46] While many countries condemned Vladimir Putin's actions, he successfully prevented a unified response from the international community long enough to annex Crimea.[47] The most formal condemnation at the time came from the United Nations General Assembly, when it passed a non-binding resolution affirming commitment to the territorial integrity of Ukraine.[48] Some have argued that the resulting desensitization to Russian hybrid operations enabled the Russo-Ukrainian War, as Putin used many of the same moves before conventionally (and illegally) invading Ukraine.[49] Clearly there can be consequences to allowing too much ambiguity in legal thresholds.

Many states have altered their warfighting strategies in response to hybrid warfare, with a special focus on the legal dimension. The U.S. adoption of "integrated deterrence" in the 2022 National Defense Strategy shows a strategic effort to reckon with hybrid warfare.[50] Integrated deterrence refers to "integration across domains, regions, the spectrum of conflict, and the U.S. Government," [51] which sounds like a direct response to hybrid warfare's "use [of] of instruments… in a… holistic way."[52] Beyond the military and administrative aspects of integrated deterrence, the strategy also requires legal clarity, as emphasized in April of 2023 when the General Counsel of the Department of Defense, Caroline Krass, gave a speech regarding the "role of the lawyer in advancing integrated deterrence."[53]

Two themes in Krass's speech highlight the importance of the law in countering hybrid warfare: escalation management and clarity.[54] While the focus of the speech was on cyber capabilities, these themes are applicable across all domains of conflict. Krass explicitly acknowledges that clear legal standards prevent inadvertent escalation, and then explains a category of U.S. action called "campaigning," or activity in "the gray zone…that is, on the spectrum of

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[46] Phillippe Bou Nader, *The Baltic States Should Adopt the Self-Defence Pinpricks Doctrine: The "Accumulation of Events" Threshold as a Deterrent to Russian Hybrid Warfare*, 3 J. BALTIC SEC'Y 11, 13.

[47] *See* Brad Simpson, *Self-Determination in the Age of Putin*, FOREIGN POL'Y (Mar. 21, 2014, 3:40 PM), https://foreignpolicy.com/2014/03/21/self-determination-in-the-age-of-putin/.

[48] *See* G.A. Res. 68/262, Territorial Integrity of Ukraine (Apr. 1, 2014).

[49] *See* Sandra O'Hern, *Operational Legal Advisors as Champions of Legal Resiliency in the Fight Against Hybrid Threats*, JAG REP. 1, 4–5 ("This abuse of international regulations is particularly egregious in that it happened repeatedly, effectively desensitizing the international community to the point that Russian troop build-up just prior to the 2022 invasion of Ukraine was dismissed as yet another intimidation tactic by Putin and not warranting any immediate international response"

[50] U.S. DEP'T OF DEF., SEC'Y OF DEF., 2022 NAT'L DEF. STRATEGY (Oct. 27, 2022), https://media.defense.gov/2022/Oct/27/2003103845/-1/-1/1/2022-NATIONAL-DEFENSE-STRATEGY-NPR-MDR.PDF

[51] U.S. DEP'T OF DEF., *DOD General Counsel Remarks at U.S Cyber Command Legal Conference* (Apr. 18, 2023), https://www.defense.gov/News/Speeches/Speech/Article/3369461/dod-general-counsel-remarks-at-us-cyber-command-legal-conference/ [hereinafter, *General Counsel*].

[52] *See* Goodman & Zakowska, *supra* note 43.

[53] *General Counsel*, *supra* note 51 (emphasis added).

[54] *See id.* Krass also offered stances on other unsettled areas of international law, such as nonintervention, a concept this paper does not have room to address but which can also be exploited in hybrid warfare.

competition *below the level of or outside* the context of armed conflict."[55] Tying together these ideas, Professor Michael Schmitt noted that clear legal thresholds are crucial for such engagement because "effective campaigning necessitates *understanding the rules of the game*" to prevent unjustified state responses.[56] For example, Schmitt notes that clarifying thresholds will ensure that "unfriendly but lawful cyber activities" are responded to differently than those which amount to armed attacks.[57]

Thinking about clarity more broadly, Krass also reiterates the Department of Defense's goal of "promot[ing] the rule of law around the world."[58] By explaining how the United States conceptualizes its response to hybrid warfare and emphasizing the importance of international law (even while explaining areas where the United States disagrees), Krass underscores the centrality of the rules-based international order in achieving the clarity needed to reduce ambiguities and prevent escalation.

With these goals in mind, it is important to evaluate where ambiguities currently play out in legal gaps, particularly between *jus ad bellum* and *jus in bello*.

B. Specific Examples

As discussed in Part I, there are at least two types of gaps between and around *jus ad bellum* and *jus in bello*. The first involves state use of force which creates an international armed conflict ("IAC") but does not constitute an armed attack which gives the victim state the right to respond lawfully with force. The second involves state use of force which does not constitute an IAC, or something which falls below the ILOAC triggering threshold and does not constitute an armed attack.

1. *Conflict Category #1: Hazy Borders*. In *Nicaragua v. U.S.*, the International Court of Justice ("ICJ") held that incidents must have a certain level of "gravity" or "scale and effects" to constitute an armed attack for *jus ad bellum* purposes.[59] The Court further suggested that a "mere frontier incident" does not constitute an armed attack but did not clarify what this term meant.[60] The concept was picked up in other decisions, such as in the Eritrea-Ethiopia Claims Commission, which determined that "geographically limited clashes" on unmarked and disputed borders did not constitute armed attacks, even where there were

[55] *Id.* (emphasis added). Further explained, "[c]ampaigning is a daily effort to close warfighting vulnerabilities, shape the perceptions of our competitors, and sow doubt that they can achieve their objectives through directly countering the United States, our Allies, or our partners." *Id.*
[56] Michael Schmitt, *Reflections on the DOD General Counsel's Cyber Law Address*, ARTS. OF WAR (Apr. 19, 2023), https://lieber.westpoint.edu/reflections-dod-general-counsels-cyber-law-address/ (emphasis added) [hereinafter Schmitt, *Reflections*].
[57] *Id.*
[58] *Id.*
[59] Nicaragua, *supra* note 29, ¶ 195.
[60] *Id.*

encounters between small infantry units and losses of life.[61] As the United States maintains that any use of force triggers a state's inherent right to respond, it does not agree with such a limitation.[62] However, the conflict between India and China over the border around Ladakh seems to serve as a prime example of what some international tribunals might refer to as a "mere frontier incident."

While there is disagreement over how grave a border clash must be to constitute an armed attack, even minor disputes between the militaries of two countries triggers ILOAC,[63] so this conflict makes the gap between *jus ad bellum* and *jus in bello* clear.

This gap is especially concerning considering increasing focus on borders in warming conflicts around the world. While China and India serve as one example, the border between Russia and Ukraine prior to the beginning of the Russo-Ukrainian War in 2022 was another. Russia amassed close to 100,000 or 150,000 troops along the Ukrainian border by exploiting requirements under security cooperation agreements before invading Ukraine in 2022.[64] If Russia had decided not to directly invade Ukraine in 2022, it could conceivably have allowed these troops to engage in small border skirmishes for years without ever giving Ukraine the *jus ad bellum* right to respond in self-defense. By using hybrid warfare to exploit the ambiguities of this gap, it could have perpetually weakened the Ukrainian state.

This paper does not have nearly enough space to evaluate all dynamics in the South China Sea[65] but calling the region and its borders "disputed" is an effective, if oversimplistic, description. Though Beijing believes its "nine-dash line" accurately describes its territorial jurisdiction, these claims were rejected in the Permanent Court of Arbitration in the Hague,[66] and countries like Malaysia, the Philippines, and Vietnam all claim parts of the sea.[67] China has used force against a number of actors in the South China Sea, including civilian fishermen, and it reportedly has paramilitary forces patrol the Sea disguised as fishing boats.[68]

These clashes are not limited to civilian actors. In October of 2023, a Chinese coast guard ship rammed a Filipino coast guard ship in a contested area.[69]

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[61] Blank, *supra* note 8, (citing Ethiopia's Claims 1–8 (Eth. v. Eri.), Partial Award, 26 R.I.A.A. 457, 465–66 (Eri.-Eth. Claims Comm'n 2005)).

[62] *See* LAW OF WAR MANUAL, *supra* note 27, § 1.11.5.2.

[63] *See* Blank, *supra* note 8, at 260.

[64] *See* O'Hern, *supra* note 49, at 5. ("The reality is that Russia amassed closer to 100,000 or 150,000 Russian troops arguing only 12,500 were taking part in the exercise at any one time with no assurance that all of the troops returned to Russia after each exercise as required under the [Security and Cooperation in Europe's (OSCE) 2011] Vienna Document.")

[65] https://www.jpolrisk.com/chinese-lawfare-in-the-south-china-sea-a-threat-to-global-interdependence-and-regional-stability/

[66] *See The Republic of the Philippines v. The People's Republic of China*, (Perm. Ct. Arb. 2016).

[67] Anson Zhang, *Why Does China Claim Almost the Entire South China Sea?*, ALJAZEERA (Oct. 24, 2023), https://www.aljazeera.com/news/2023/10/24/why-does-china-claim-almost-the-entire-south-china-sea.

[68] *China and Philippines Boats Clash in Disputed South China Sea Area*, EURONEWS (Oct. 23, 2023, 7:59 PM), https://www.euronews.com/2023/10/23/china-and-philippines-boats-clash-in-disputed-south-china-sea-area.

[69] *Id.* The Filipino coast guard has also expressed commitment to actions that might ensure future clashes, such as removing constructed Chinese barriers in disputed areas. *See* ALJAZEERA, *'Bold*

The United States also continues to conduct freedom of navigation operations in the South China Sea, showing another opportunity for conflict.[70] However, if these clashes remain small, even if they involve loss of life or destruction of property, they might be labeled "mere frontier incidents" by international tribunals. This classification empowers China to keep exploiting the legal gap and further antagonize the involved countries, without giving any of the countries the legal right to respond. While ILOAC would apply to each of the individual incidents, the high *jus ad bellum* threshold might not deter China from continuing its behavior.

Some have argued for the development of a "pinpricks doctrine" to manage this particular gap between *jus in bello* and *jus ad bellum*. Also called the "accumulation of events" doctrine, this approach accepts that defining an "armed attack" is context specific.[71] The pinpricks doctrine would broaden the relevant context to include the entire conflict, rather than the specific event at issue.[72] While the United States maintains that any use of force triggers the right of response, it also advocated for the accumulation of events doctrine regarding past use of Iranian force against U.S. assets.[73] Israel has adopted this doctrine in the past, and some have argued that states fearing Russian aggression, such as the Baltics, should adopt it.[74]

This approach would increase the consequences of continuously using hybrid tactics below the level of "armed attack." However, at what point have events "accumulated" to the point that a victim state could legally respond with force? The continued lack of clarity might even create greater ambiguity for hybrid actors to exploit.

2. *Conflict Category #2: States and Individuals*. The other state use of force which falls below the armed attack threshold also falls under the ILOAC triggering threshold. In other words, this is state use of force which would neither create an IAC nor trigger the right of lawful response under *jus ad bellum*. One example of this type of force is state force directed at individuals, such as the killing of Hardeep Singh Nijjar in Canada (if the attack was indeed carried out by the Indian state).

The poisoning of Sergei Skripal in Salisbury, England is another example of likely state use of force against an individual in a non-consenting state.[75] The poison was likely developed in Russia, and Prime Minister Theresa May asserted

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Step': Philippines Vows to Remove Future South China Sea Barriers (Sep. 29, 2023), https://www.aljazeera.com/news/2023/9/29/philippines-promises-to-remove-future-barriers-at-disputed-reef?traffic_source=KeepReading.

[70] *See* Heather Monglio, *China Protests U.S. South China Sea Freedom of Navigation Operation*, USNI NEWS (Mar. 24, 2023), https://news.usni.org/2023/03/24/china-protests-u-s-south-china-sea-freedom-of-navigation-operation#.

[71] *See* Nader, *supra* note 46, at 12.

[72] *Id.* at 18.

[73] *See Oil Platforms*, *supra* note 29, ¶ 18 (discussing the argument of the United States that the legality of a specific use of force should be considered "in the context of a long series of attacks by Iranian military and paramilitary forces on US and other neutral vessels").

[74] Nader, *supra* note 46, at 19–23.

[75] Ryan Goodman & Alex Whiting, *Salisbury Response Option: Take Putin to Int'l Criminal Court*, JUST SEC'Y (Mar. 13, 2018), https://www.justsecurity.org/53713/salisbury-response-options-putin-intl-criminal-court/.

that the Russian state was behind the poisoning either directly or indirectly.[76] While assassination attempts are not new, targeted killings are inherently connected to hybrid warfare, because they can be viewed as another tool that states can use to accomplish political objectives.[77] While the Ukrainian government's alleged killing of Russian civilian Daria Dugina did not fall in a gap because ILOAC clearly applied to the war between Russia and Ukraine, it shows the potential political impact an assassination can have.[78] Targeted killings also spread terror and undermine stability, tools which help hybrid actors undermine the rules-based international order.

Determining whether targeted killings of individuals count as uses of force under *jus ad bellum* is the first step to determining what sort of gap they might fall into. There is a debate over whether the act's gravity must be considered when labeling it as a use of force, or whether the act must be directed at the territorial state itself.[79] For example, in the Salisbury poisoning, Russia was likely not explicitly targeting the British state. Similarly, in the killing of Nijjar in Toronto, it is unlikely that India was trying to target the Canadian state. In addition, whether a *de minimis* threshold exists for Art. 4(2) of the UN Charter is unsettled.[80] As Professor Tom Ruys has argued, "the deliberate projection of lethal force into the territory of another (non-consenting) State is perfectly capable of qualifying as a use of force 'in the international relations' between States."[81] The United States was willing to support a similar reading in 1988, when President George H.W. Bush experienced a failed assassination plot.[82]

Assuming that such targeted killings do constitute state "uses of force," some commentators have framed the Salisbury incident in ILOAC terms, arguing that Vladmir Putin should be tried as a war criminal for targeting civilians.[83] However, Professor Charles Dunlap noted that applying ILOAC to such a situation, particularly when the conflict is between two nuclear powers, would not be practical or desirable.[84] As application of ILOAC offers states options for actions they cannot take in times of peace, like status-based targeting of combatants, a rush to classify the conflict as an IAC would risk further escalation.

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[76] *Id.*

[77] *See* Bruce Hoffman & Jacob Ware, *The Accelerating Threat of the Political Assassination*, WAR ON THE ROCKS (Aug. 24, 2022), https://warontherocks.com/2022/08/the-accelerating-threat-of-the-political-assassination/ (noting that "[p]olitical assassinations are uniquely suited to tear at [a] country's social fabric," and discussing targeted killings and their political motivations around the world and in the U.S.).

[78] *See* Charlie Dunlap, *Law and the Killing of a Russian Propagandist: Some Q & A*, LAWFIRE (Oct. 9, 2022), https://sites.duke.edu/lawfire/2022/10/09/law-and-the-killing-of-a-russian-propagandist-some-q-a/ (discussing the ILOAC dynamics and particular concerns related to Dugina's use of propaganda).

[79] Ruys, *supra* note 30.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *See* Goodman & Whiting, *supra* note 75.

[84] Charlie Dunlap, *Don't Create an International Armed Conflict Between the UK and Russia,* LAWFIRE (Mar. 13, 2018), https://sites.duke.edu/lawfire/2018/03/13/dont-create-an-international-armed-conflict-between-the-uk-and-russia/ [hereinafter, Dunlap, *Don't Create*].

III. HOW DO WE FEEL DOWN HERE? A NORMATIVE ASSESSMENT

A. *Assessing the Status Quo*

Clearly, the gaps exist. There are situations which do not fit cleanly into the *jus ad bellum* or *jus in bello* frameworks both in academic hypotheticals and in real conflicts and hybrid wars around the world. And there are consequences to that reality. Whether it is Chinese paramilitary forces attacking Filipino coast guard members or the Russian state condoning targeted killings on park benches, adversaries are weaponizing legal ambiguity to stretch the international rules-based order as far as they can.

This stretching is concerning, particularly considering that the weaker these frameworks get, the happier adversaries like China and Russia will be. A reasonable impulse in response to this dynamic is to bring situations arising within the gaps more formally into either the *jus ad bellum* or *jus in bello* framework. As Professor Gill suggests, the application of ILOAC could be stretched to a gradient, where protective principles like the prohibition on the targeting of civilians could apply *without* triggering status-based targeting of combatants which might escalate the conflict.[85] Applying this gradient to the Salisbury poisoning, this approach could have allowed the UK to pursue justice against Putin as a "war criminal," while arguing that other offensive aspects of ILOAC should not apply to the situation.

However, the fuzzier the lines between *jus ad bellum* and *jus in bello* get, the more difficult it is to remember they exist at all. While a gradient approach would expand how often ILOAC is *applicable* to situations of international conflict like targeted killings, and cover the gap below the ILOAC threshold, it only increases the overall amount of legal ambiguity. Indicating that different aspects of ILOAC apply at different points gives states the flexibility to develop craftier arguments regarding which thresholds their adversaries have triggered, or how their own actions have stayed below certain lines.

In contrast, having a single trigger point for the application of ILOAC in its entirety, both its protective principles and its offensive ones, adds clarity and limits room for craftiness. Delineating when ILOAC applies might feasibly increase ILOAC's deterrent effect, as a state must understand that once its use of force crosses the triggering threshold, the consequences can be severe. As Professor Dunlap noted, claiming that an international armed conflict exists between two states is no laughing matter.[86] So, while targeted killings are tragic and the international system must deter them, it should do so in ways other than stretching ILOAC too thin.

Regarding the other gap, when an IAC exists but the victim state has not experienced an armed attack which gives it the *jus ad bellum* right to respond, the main proposed solutions seem to be lowering the armed attack threshold or embracing the pinpricks doctrine. As Professor Blank explains, lowering the threshold would weaken the international system's "structural preference for the

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[85] *See generally* Gill, *Some Reflections*, *supra* note 9.
[86] *See* Dunlap, *Don't Create*, *supra* note 84.

peaceful settlement of disputes" and encourage the use of defensive force.[87] Further, while the pinpricks doctrine would limit an aggressor state's ability to manufacture continuous "mere border" incidents and grind a victim state down, it also makes it more likely that the aggressor state would use the same justification for its own ultimate decision to use an armed attack. In this scenario, a state like Russia would have an easier time claiming it was legitimately acting in self-defense under *jus ad bellum*, even if it may have manufactured each of the "pinpricks" the state experienced.

Finally, operationally, hybrid warfare already allows states to exploit asymmetric advantages.[88] States which have shown a willingness to embrace lawfare and push against the international legal order will *always* find legal gray areas to exploit. Insisting that either *jus ad bellum* or *jus in bello* should apply in every situation will more frequently limit the states which do follow the law, while hybrid warfare operators will realistically not feel any more constrained. If part of the purpose of expanding either of these frameworks is preventing escalation, it seems less than obvious that escalation risks will be reduced just because there are a greater number of thresholds to cross. Clarity is worthy of pursuit for the ways in which it can decrease escalation, but opportunities for clarity and risk assessment need not be limited to the *jus ad bellum*/*jus in bello* binary.

To be clear, this does not mean that the existing international legal system cannot accurately address all threats from hybrid warfare; it simply cannot expect to cram all responses to hybrid warfare into our "conventional" legal frameworks for wars between states. The U.S. embrace of "integrated deterrence" showcases a willingness to look beyond the traditional toolboxes of state conflict, as well as an understanding that *all* tools must be coordinated and strengthened to address modern threats.[89] The last section of this paper evaluates a few other tools that states should embrace and bolster to comprehensively address hybrid warfare.

B. Other Tools? Stronger Ladders

States do have ways to respond to conflict beyond traditional military force. And many of these other paths minimize escalation and require fewer hazy legal assessments. At a high level, the UN Charter does require states to resolve conflict using peaceful means under Article 33, stating that "the continuance of [any dispute] which is likely to endanger the maintenance of international peace and security, shall, first…seek a solution by negotiation…arbitration, judicial settlement, resort to regional agencies or arrangements, or other *peaceful means* of their own choice."[90] This clause contains a variety of tools states could use to

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[87] Blank, *supra* note 8, at 286.
[88] *See* Monaghan, *supra* note 43, at 85.
[89] *See General Counsel*, *supra* note 51, ("My colleague, Dr. Colin Kahl, Under Secretary of Defense for Policy, has explained that integrated deterrence is a reminder that successful deterrence must seamlessly incorporate tools from every domain, including, of course, cyber and space; from every geographic theater; and from multiple instruments of national power, including not only military activities but also diplomacy, economic tools, and others.").
[90] U.N. Charter art. 33 (emphasis added).

combat certain hybrid warfare tactics, and there are other approaches which, while potentially not "peaceful," could help avoid escalation.

Primary among these other choices could be deploying countermeasures. Countermeasures are actions that would normally be unlawful but are acceptable when used to end another State's internationally wrongful act or secure lawful reparations.[91] Countermeasures have become particularly important in the context of cyber operations, as states take actions in cyberspace that do not constitute "armed attacks" or even international armed conflicts.[92] Countermeasures are governed by the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts,[93] and importantly, they are limited to imminent or ongoing operations and have a limiting factor akin to proportionality under Article 51.[94] However, countermeasures run the risk of being perceived as escalatory when legal standards are unclear, mirroring risks relating to the gaps discussed by this paper.[95] Caroline Krass's speech mentions the ways lawyers play a role in limiting such risk: by articulating standards, developing norms of responsible behavior, and increasing overall predictability.[96] To strengthen the use of countermeasures as a tool for ending international disputes, these efforts towards clarity should be embraced wholeheartedly.

Another approach worthy of bolstering is international human rights law ("IHRL"). IHRL does apply to many of the situations which fall in the gaps between and around *jus ad bellum* and *jus in bello*. While the principle of *lex specialis* means that *jus in bello* replaces IHRL when relevant, IHRL provides a wide breadth of protective law in the gray areas.[97] A common complaint about IHRL is that its enforcement capabilities are weak,[98] but it is possible to strengthen IHRL by combining it with unilateral economic penalties. The United States already has

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[91] Schmitt, *Reflections*, *supra* note 56.
[92] *See* Schmitt, *Reflections*, supra note 56.
[93] *See* G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts (Jan. 28, 2002).
[94] *See* Schmitt, *Reflections*, supra note 56.
[95] *See* Michael Schmitt, *Grey Zones in the International Law of Cyberspace*, 42 YALE J. INT'L COMP. L. 1, 21 (2017)

> Consider the case of a State that conducts a cyber operation in the belief that the operation does not amount to an internationally wrongful act. The target State responds with a countermeasure based on its assessment that the first operation constituted an internationally wrongful act. Because the first State believed it had acted lawfully, it might now interpret the countermeasure as escalatory. The same dynamic could operate, for instance, with respect to the meaning of the term armed attack in the law of self-defense. Grey zones constitute fertile ground for an escalatory spiral.

[96] *See* Schmitt, *Reflections*, *supra* note xx, (citing *General Counsel*, *supra* note 51).
[97] *See* Peter Maurer, *International Humanitarian Law: Answers to Your Questions*, INT'L COMM. RED CROSS, 41 (2014) ("…IHL, whose application is triggered by the occurrence of armed conflict, constitutes the *lex specialis*. In other words, when human rights law and IHL are in conflict, the latter is deemed to prevail, since it was conceived specifically to deal with armed conflict").
[98] *See* Ingrid Brunk, *A Post Human Rights Era? A Reappraisal and Response to Critics*, LAWFARE (Mar. 22, 2019, 8:10 am), https://www.lawfaremedia.org/article/post-human-rights-era-reappraisal-and-response-critics (Noting that "[e]fforts to enforce global human rights norms through binding international law are less and less likely to succeed," while also ultimately questioning if enforcement of human rights through international law is actually desirable).

sanctions regimes against human rights abusers[99] and is using supply chain regulation to bolster human rights around the world and weaken its adversaries.[100] Clarifying commitments to international human rights and providing nonviolent means of enforcing them can add stronger layers of protection in the gap below the *jus in bello* triggering threshold. This is especially important considering efforts by states like China to shift the international community's approach to human rights to frameworks less focused on protection.[101]

Finally, other forms of economic and commerce-based measures offer additional responses to situations falling in the gaps. Following the recent border skirmish between India and China, India blocked some Chinese apps such as Tik-Tok and curbed Chinese imports of laptops and tablets.[102] While the true impact of these types of measures is uncertain, they offer states a more "peaceful" way to respond to conflicts without kinetic action.

Strengthening these other tools will give the United States and others ladders out of potentially escalatory situations. Rather than hoping a state will not escalate under *jus ad bellum* or *jus in bello*, other strategies can be deployed to stabilize and reduce threats. None of these approaches individually are silver bullets, but they should all be used as part of a holistic state response.

CONCLUSION

As warfare evolves, the legal frameworks that have been classically used to limit it will continue to be questioned. The increasing use of strategies which fall in the gaps surrounding *jus in bello* and *jus ad bellum* means that more areas of conflict will appear to fall in legal gray zones. The associated risks should be mitigated by strengthening other legal frameworks and tools, like countermeasures and international human rights law. Adversaries will always find gray areas, and weakening existing legal frameworks to manage them directly will only undermine the overall governance system.

This does not mean that *jus in bello* and *jus ad bellum* are any less important than other frameworks. Their preservation is more vital than ever, especially with the re-emergence of conventional kinetic conflict involving great powers. But preservation requires keeping these frameworks narrowly tailored to the legal questions they were designed to tackle. The United States has rightfully adopted an approach of integrated deterrence, and this approach must also seek to fully integrate other legal strategies that can be used to mitigate conflict and deter

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[99] *See Permanent Global Magnitsky Act Will Ensure Perpetrators Face Consequences*, FREEDOM HOUSE (Apr. 12, 2022), https://freedomhouse.org/article/permanent-global-magnitsky-act-will-ensure-perpetrators-face-consequences (explaining recent evolutions of the Global Magnitsky Act, a U.S. sanctions program targeted at human rights abusers).
[100] *See* Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. 1525–31, 1532 (2021) ("An Act [t]o ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market, and for other purposes.").
[101] *See* Brunk, *supra* note xx, (noting that China's approach to human rights "include[es] an emphasis on sovereignty, a softening of enforcement measures for civil and political rights, and an underscoring of the "bedrock principle" of sovereign equality and noninterference").
[102] Sen, *supra* note 6.

escalation. This approach puts significant trust in the strength of the rule of law, but such trust is necessary to effectively counter hybrid warfare. This trust cannot be blind, but preserving the rules-based international order requires committing to its legal frameworks fully, while acknowledging both their limits and strengths.