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International legal framework regulating military exercises – Lawfare potentially associated with military exercises as a hybrid threat

DOI 10.5604/01.3001.0016.3330

Summary:

This article analyses international law norms and diplomatic mechanisms concerning military exercises. As such a topic is relatively new, with the international legal system being breached by authoritarian regimes using lawfare, the legal aspects of military exercises have not yet been researched and thus require more focus, especially from the standpoint of hybrid threats. International law itself is leaky and lacks enforcement measures, since sanctions are not an element of the international legal arrangement. It lacks a centralised enforcement mechanism, the principles and rules governing responsibility for wrongful acts require the wrongdoer's cooperation, and the mechanisms and procedures to deal with the consequences of such wrongful acts, including restitution and compensation, are not universally recognised. Most countries in the global arena follow the paradigm of the United Nations, where states must maintain their relations in a peaceful manner in order to achieve security and stability. However, some undemocratic states, mainly the Russian Federation and the People's Republic of China, have been presenting hostile postures towards the Western world's values, where human life tops the hierarchy of protected values. Traditionally, military exercises have been used as a messaging tool between strategic competitors and potential adversaries to signal their own military strength. Russia and China are fully aware of the lack of hard law concerning the subject of military exercises; they readily seize the resulting opportunities to create and exploit legal grey zones, as well as to frequently breach international law, while knowing that little can be done against their malevolent conduct.

Key words: international law, lawfare, law of armed conflict, military exercises, hybrid, hybrid threat, Russia, China

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Introduction

This article presents a novel analysis of military exercises from a legal and political perspective. When it comes to the technical level, practitioners, decision-makers, and mainly military commanders are all very well aware of how to organise and conduct such drills and draw lessons from them. There is no reason for doubt or legal questions when we[2] consider the Western constitutional democracies that execute their inherent right of action within their own territory (as long as it is compliant with the internationally accepted norms) in accordance with one of the most vital principles in public international law, namely the principle of sovereignty.[3] Here it is worth adding that the West is no longer looked upon solely from a geographical standpoint. Japan and the Republic of Korea have become big and reliable partners for both the European Union (EU) and the North Atlantic Treaty Organization (NATO). The reason for that is the shared legal culture, meaning the set of values that are important for a given society and thus protected by the codified norms. Let us bear in mind that besides primarily Euro-Atlantic countries, considered the West or Western civilisation, and the former British and French colonies in the Pacific region starting with the Commonwealth of Australia and New Zealand, the Western world's values have also become a point of reference or even a goal for the Republic of Türkiye, Japan and the Republic of Korea. Here it needs to be recalled that Türkiye is a member of NATO, while other non-members, far from the geographical scope of membership,[4] namely Japan and Korea along with Australia and New Zealand, were recently invited – for the first time in the Organization's history – to a NATO summit.[5] This all goes to show how the Western world is spreading together with its values of the rule of law, democracy, and protection of human rights.

Military exercises are traditionally perceived as a messaging tool used to signal one's own military strength. But they may accomplish another key

[2] This article presents the standpoint of the uniqueness and importance of Western civilization, with its values based on the rule of law, democratic principles, transparency, and the protection of human rights. Authoritarian regimes are presented as the biggest threat to these values.

[3] Certainly, next to the international law principle of sovereignty, there are also two other vital principles which must be named when discussing military exercises. They are: the prohibition of interference in internal matters of another state, and the prohibition of the threat or use of force. The latter is tackled later in this article.

[4] Art. 10 of the Washington Treaty states: "The Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty." The North Atlantic Treaty of 4 April 1949.

[5] Madrid Summit 29-30.06.2022. NATO, *Relations with Asia-Pacific partners*, 17.06.2022: https://www.nato.int/cps/en/natohq/topics_183254.htm (2.02.2023).

goal. They build goodwill and interoperability in a nation's or alliance's military capabilities, and they display military might to either recruit more allies, deter antagonists, or both. For adversarial nations, they can be used to show military might as well, but they may also conceal political will to launch real military operations. This could mean limited military support or a prelude to large-scale military operations.

Throughout contemporary history, we have been observing demonstrations by such as the Russian Federation and the People's Republic of China of their more or less hostile attitude towards constitutional democracies with their Western values. For them, military exercises became a perfect opportunity to reinforce their spheres of influence, to demonstrate their power inwards – for their own citizens using means of propaganda – and outwards – to constitutional democracies with whom they never stopped competing, be it in military terms, politically, economically, or culturally. Therefore, it seems indeed vital to understand how Russia and China create and exploit legal grey zones in the context of military exercises.

Finally, malign and hostile actors have always been making use of multiple means and methods of demonstrating or projecting power. The military is one means, thus warfare is a way to achieve strategic ends. More specifically, the rule of law has elevated legal norms and associated grey zones to an integral component of their hybrid threat tactics, whereby exploiting legal thresholds, as well as gaps in and misinterpretation of international legal principles and rules, or utilising unorthodox methods of their interpretation, they create uncertainty for their law-abiding opponents – the West. Undemocratic states are fully aware of the lack of hard law addressing military exercises, and therefore we must not underestimate our antagonists' legal power and influence. Additionally, our strategic competitors and potential adversaries are in no way afraid of using this excuse of legal gaps to create and exploit legal grey zones and to frequently breach international law while knowing that little can be done against them.

Lawfare is gaining more and more importance, but to the detriment of constitutional democracies rather than their benefit. In particular, the Russian Federation has mastered lawfare, which could be described as the use of legal interpretations to achieve political gain (i.e. as opposed to arguing a case or winning a legal argument). Moreover, lawfare is often observed in damage

to the international legal system, its delegitimising, the exploiting of gaps to buy time for illicit activity, or in justifying one's own wrongdoing.[6]

Another hybrid threat

The topic of this article goes beyond international law prosecution, which from its very core is hard, time-consuming, and unfortunately not always fully successful,[7] while international legal tools for preventing and reacting to breaches of peace and stability during military exercises focus on strong political and military signalling. The use of law as a political or military instrument and thus a component of hybrid threat scenarios is not necessarily illegal *per se*. The burden of proof would not only depend on an entity (regarding acts or omissions) but also on its potential victim(s) to legitimise exercises carried out, both nationally and internationally. Secondly, we must be aware that legal interpretations may differ between states, especially those pursuing different or competing interests, or trying to entrench spheres of influence and associated political-military agendas.

Law, especially international law, must be considered and analysed thoroughly, as a double-edged sword. It can be used as a beneficial tool to protect our values, where at the top of the hierarchy of our Western civilisation we place human life with its freedom and dignity. Yet, considering all the weaknesses, gaps, and open clauses in this legal regime, we must be aware of how the enemy uses it for their own gain – against us. And disobedience of law, especially the international humanitarian law of armed conflict (the full and proper name according to the International Committee of the Red Cross), must not be perceived as a green light to act wrongfully either. The key argument that has to be reiterated here is: since the international legal order lacks enforcement tools, where there is no element of sanction in the structure of an international norm,[8]

[6] Let us bear in mind the legal consequences of Russia's aggression towards Ukraine beginning in February 2022. There could be some international criminal options to prosecute Russian war criminals – political leaders starting with the head of state, commandants, officers, and soldiers. The first option was the International Criminal Court. However, Russia is no longer a party to this court, as it withdrew its membership after the unfavourable ruling in 2016 describing the incorporation of Crimea in 2014 by Russia as illegal and that the territory should be given back to the government in Kyiv. The second option was the International Court of Justice – the judicial body inside the United Nations (UN). It issued a judgment in March 2022 that Russia must halt its aggression on Ukraine. Still, the ruling had no enforcement measure, thus the government in Moscow decided to ignore it. Multiple such examples could be given.

[7] For as long as no war criminal head of state has been sentenced by any international tribunal.

[8] A legal norm of a national (internal) legal order comprises a hypothesis, a disposition, and a sanction. An inter-

the judicial system is not compulsory. This all allows for much misuse, especially through creating and exploiting legal grey zones and maintaining "cold peace" scenarios, where, according to our Western standards, we cannot yet speak about a hostile situation or an armed conflict.

Hence lawfare potentially associated with military exercises must be seen as a hybrid threat. As military manoeuvres have only been analysed academically and by practitioners from traditional tactical angles, the legal aspects around them blur the traditional "messaging tool" of military exercises of signalling own capacities and capabilities. Additionally, military exercises are rarely straightforward in either intention or outcome.[9] Here we have been observing a potential sphere for the occurrence of a hybrid threat. Again, if such a threat occurs, we are not equipped with hard law to prevent or combat it. Yet it is important to speak of such knowledge, as such a gap in law must be then understood as a possible open space for deterrence and defence. Again, in international law, either written and codified or stemming from the states' practice (*opinion iuris*), we are obliged to act in accordance with the paradigm set by the UN in its Charter. Thus, using the aforementioned double-edged sword, we are not defenceless against enemies not abiding by law. The principles such as the right to self-defence, preventive defence and lawfare to strike back are some of the hard options in this hybrid warfare.

There is also a soft mechanism, equally vital, which has its own value in lacking the hard law means such as norm-building or high political decisiveness. It works effectively as a key measure to document and highlight illegal (or unethical) actions that are then used to sway political will which in turn spurs action (whether legal, economic, political, or military, etc). The main and most frequently used soft mechanism is strategic communication. It was used, for instance, in the way NATO[10] decided to counter Russian propaganda. Instead of using the same tool, Western states decided to strengthen their own legal and political means based on the principles of transparency, good governance, and the rule of law. They emphasised fact-spreading against propaganda and disinformation in order to show, not only to Russia and China but also to other

national law is not equipped with the latter.

[9] Beatrice Heuser &Harold Simpson, *The Missing Political Dimension of Military Exercises*, "The RUSI Journal", 2017, 162:3, pp. 20-28.

[10] NATO, *NATO-Russia Setting the record straight*, 27.01.2022: https://www.nato.int/cps/en/natohq/115204.htm (2.02.2023).

potentially hostile actors (both states and non-state actors, NSA such as collapsing or collapsed states, rebels, or terrorist groups, including hackers, private companies, etc.), our unity deriving from the common acceptance, adherence to and promotion of our values: democracy, freedom, human right, and the rule of law.

Hence, by standing strong with our core values and principles of international law, we send a clear and unambiguous signal to other regimes and adversaries. In other words, to successfully combat hybrid threats, since one may appear to be a military drill, we must use the existing international legal framework, even though it is not as concrete and direct as we would wish it to be. That requires tailored measures to each specific international situation, towards each particular hostile action undertaken by an undemocratic regime. Hybrid threats, after all, are – in their very core – a mixture of conventional and unconventional methods, means and tools, military-political and more, but their legal aspects must not be overlooked. Finally, it must be stated clearly: when we ignore this legal component, the enemy takes advantage and eventually wins. Thus, lawfare during military exercises remains an open issue that might lead eventually to an armed conflict. We must be legally prepared.

Military exercises used maliciously

We can use military exercises as a geopolitical tool, to protest against our enemies' lawfare or to boost stability and enhance deterrence. However, they may have exactly the opposite effect: to increase instability and contribute to dangerous levels of escalation,[11] which can threaten our stable position and unity.

The geopolitical situation complicates much, as there is no legal definition of a military exercise. Every state determines within its own internal law and policy how it understands such military drills, manoeuvres, or exercises for its own purposes, and within its own territory, regardless of whether in the air, on land, at sea or in cyberspace, in regard to its own armed forces. Until now, the international community has not decided to forge a jointly accepted and codified norm as the definition of military exercises. Such a definition can be found in

[11] Ralph Clem, *Military Exercises as Geopolitical Messaging in the NATO-Russia Dynamic: Reassurance, Deterrence, and (In)stability*, "Texas National Security Review", 2018/2(1), pp. 130–143.

the national legislature or policy document, but this has no legally binding force, and is rather a form of political and administrative guidelines. Due to many possible obstacles, including not restricting oneself with a closed definition, states usually prefer not to codify terms, because once drafted and implemented, such a norm becomes the source of rights and duties to the state, its organs, citizens and potential external entities. One of the true exceptions is Lithuania, which decided to adopt a separate parliamentary bill on this matter.[12] Art. 2(5) defines international exercises as: "preparation exercises for military operations and other combat preparedness exercises involving joint participation of military units of the Republic of Lithuania and foreign states or involving the use by foreign states' military units of infrastructure facilities and military training grounds assigned to the national defence system of the Republic of Lithuania".

The dilemma of what is a military exercise *erga omnes*, how states and NSAs should understand military exercises and observe their commencement and termination, as well as their potential abuse, remains open and perhaps even unresolved. This certainly creates a clear loophole in international law, mainly its domain of international humanitarian law of armed conflict. It has not even been resolved in the most important and up-to-date document on military cooperation – the Vienna Document of the Negotiations on Confidence and Security-Building Measures (CSBM). The Vienna Document was introduced in 1999 by the Organization for Security and Co-operation in Europe (OSCE). It was adopted at the 269th Plenary Meeting of the OSCE Forum for Security Cooperation in Istanbul on 16 November 1999.[13] Following a decade of negotiations, parties to the Document agreed to annually exchange information on their military forces in regard to military organisation, manpower and major weapon and equipment systems.[14] Art. 30.2 refers to military exercises, but those performed as joint ones between OSCE member states: "The participating States will conduct, on a voluntary basis and as appropriate, joint military training and exercises to work on tasks of mutual interest". As synonymous wording, the Vienna Document used "military activities", which can be understood as meaning that states were and remain unwilling to precisely determine what they understand

[12] Republic of Lithuania Law on International Operations, Military Exercises and other Military Co-Operation Events, 19 July 1994, No I-555 (As Last Amended On 27 June 2018 - No Xiii-1313).

[13] OSCE, Vienna Document of the Negotiations on Confidence- and Security-Building Measures, FSC.DOC/1/99 [16] November 1999.

[14] Art. 9, the Vienna Document.

under military exercise. Hence, under this open clause of "military activities", we put military exercises and demonstrations of new types of major weapon and equipment systems (Art. 31-35). What was indeed new in this document was that the states agreed to give notification in writing "42 days or more in advance of the start of notifiable military activities".[15] The question then is what "notifiable" means. Art. 40.1 brings an answer: "The engagement of formations of land forces of the participating States in the same exercise activity conducted under a single operational command independently or in combination with any possible air or naval components". The following articles specify such military activity as being "at least 9,000 troops, including support troops, or at least 250 battle tanks, or at least 500 ACVs,[16] (…) 250 self-propelled and towed artillery pieces, mortars and multiple rocket-launchers (100 mm calibre and above) if organized into a divisional structure or at least two brigades/regiments, not necessarily subordinate to the same division",[17] "200 or more sorties by aircraft, excluding helicopters";[18] notification must be given even of the arrival or concentration of these forces.[19]

However, the Vienna Document is not a legally binding international treaty according to international law (law of the treaties).[20] Thus, it has not created any norms for the parties from which states could take their rights or duties in the international arena. They are strictly political indications, practical tools, and technical guidelines on how to cooperate in a peaceful manner in Europe. As this document is not law, it should come as no surprise that some OSCE states are not following its recommendations. There are many examples in history of how Russia has been using military exercise-related tactics to prepare for an actual attack. Blaming the NATO Alliance for conflict escalation is an important tool for homeland propaganda, while mirror imaging is a powerful hybrid tactic. Counter accusations, disinformation and spreading fake news are effective, cheap, and fast means of achieving the goals of distracting everyone from the original issue – one's own international legal misbehaviour. Concealing its true intentions is another form of appeasing the Western world

[15] Art. 38, ibidem.

[16] Amphibious Combat Vehicle (ACV).

[17] Art. 40.1.1, the Vienna Document.

[18] Art. 40.1.2, the Vienna Document.

[19] Art. 40.3.1, the Vienna Document.

[20] Vienna Convention on the Law of Treaties of 23 May 1969, Art. 2(1)(a).

applied by Russia, especially during military exercises at the borders of the Baltic States, Poland, and Georgia. Again, Russia knows that it can intimidate these states through its aggressive military activities, very often being "just" a demonstration of existing or new weaponry. For "accidental" violations of air space, maritime territory or other spheres, far smaller and less equipped states are not going to counteract militarily, as that would obviously provide an opportunity for Russia to commence its self-defence activities inevitably leading to an armed conflict.

On the part of NATO, "Defender 2020" is the largest Alliance exercise conducted mostly in the territory of the former Soviet Union, ignoring the invisible line that Russia designates its "near abroad".[21] In the Russian interpretation, as formulated by Valery Gerasimov, Russia has seen itself as a victim of Western hybrid activities, while also accusing the West of being an unreliable partner due to breaching its promise not to expand eastwards after the Cold War. However, such a promise was never officially made either by representatives of NATO or by the United States (US) head of state.[22] The hybrid dimension of a possible conflict in the aftermath of military exercises seems clear indeed. It should be underlined here that Estonia and Latvia are the former Soviet republics with the largest shares of ethnic Russians. Also, Russia has a long tradition of conducting hybrid acts in the Baltics and in Poland. All taken into consideration, this sums up to contributing to strategic escalation on the part of Russia and the militarisation of the Baltic Sea region as a calculated effect. Neither can the possibility of a large-scale conflict triggered by an incident in the Baltic Sea region between the US and Russian militaries be cast aside. The Russian International Affairs Council (RIAC), an academic and diplomatic think tank established by the Russian government, used the example of a "major military exercise" as a source for possible misinterpretation that could lead to loss of stability or conflict. Thus, escalation between NATO and Russia in the Baltic and the Black Sea regions remains a matter of tangible concern.[23]

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[21] Illimar Ploom, Zdzislaw Sliwa and Viljar Veebel, *The NATO "Defender 2020" exercise in the Baltic States: Will measured escalation lead to credible deterrence or provoke an escalation?*, "Comparative Strategy", 2020, 39:4, pp. 368-384

[22] NATO, *NATO-Russia Setting …*

[23] Illimar Ploom, Zdzislaw Sliwa and Viljar Veebel, op. cit.

Maritime exercises

I would like to stress the existence of the Rim of the Pacific[24] Exercise[25] (RIMPAC), which is the American-led manoeuvres in the Pacific Ocean, being the largest water basin on Earth. The 21st century has been called the "Pacific Century".[26] Considering the obvious growth of Southeast Asian powers (the so-called Confucian capitalists), the Pacific region, which is no longer an isolated area, should not be forgotten or underestimated. From the standpoint of the world economy, unexplored deposits of natural resources located at the bottom of the Pacific Ocean are of utmost importance. Another key issue is the resources located in the exclusive economic zones of the island states of the Pacific, as too are the intact and therefore very attractive markets. The Pacific remains a world-changing region due not only to the crossroads of air and maritime trade routes, but primarily due to those resources lying at the seabed. So far, technology has not allowed for their cheap (or profitable) extraction from the seabed. However, technology has been developing at an unprecedented pace, and states are awaiting the exploration of the bottom of the ocean, mainly in the high seas, which, according to the law of the sea,[27] belongs to all humankind. This new international situation will result in not only regional but also global conflicts, and one of them might eventually lead to world war – a war for resources.

RIMPAC is indeed a demonstration of power in favour of Western civilisation along with its values. The Rim of the Pacific Exercise was launched by the United States Pacific Command, the naval forces responsible for the Pacific Ocean zone. At first,[28] there were only five countries involved: Australia, Canada, New Zealand, the United Kingdom, and the USA as the founding state.[29] It is already worth mentioning here the considerable enlargement of the participating forces, now numbering 26: Australia, Brunei, Canada, Chile, Colombia, Denmark, Ecuador, France, Germany, India, Indonesia, Israel, Japan, Malay-

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[25] The singular form of the term "exercise" has been used since the beginning.

[26] See e.g. Hilary Clinton, *America's Pacific Century*, "Foreign Policy", 11.11.2011; D. Scott, *The 21st Century as Whose Century?*, "Official Journal of the Political Economy of the World-System Section of the American Sociological Association" 2007, no. XIII(2); S. Terry, *Where the Wave of the Future Will Crest?*, "The Christian Science Monitor", 28.09.1982.

[27] United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982.

[28] Since 1973 it has been held every two years in and around the Hawaiian Islands in June and July.

[29] *Pacific War Games* in "Micronesia Support Committee Bulletin", the University of California 1977, p.vi.

sia, Mexico, the Netherlands, New Zealand, Peru, the Republic of Korea, the Republic of the Philippines, Singapore, Sri Lanka, Thailand, Tonga, the United Kingdom, and the USA.[30] Russia has never been invited as a full member, while China has breached the agreements each time it was invited. The unsaid motive of the exercises is evident: Washington is sending a clear signal as to who is and who is not an ally. The response from Moscow, in turn, is the Vostok-2018 Strategic Drills, with a significant presence of Chinese military units.

The Russian Navy was invited to RIMPAC 2012 but only as an observer, and not as an active participant with its military capabilities. Then, as the exercise is biennial, its participation in the following exercise in 2014 was cancelled.[31] As RIMPAC is an unstated demonstration of power, there has never been any reference against whom this demonstration is being carried out. Yet last year, after the acceptance of the NATO Strategic Concept 2022[32] following the Madrid Summit,[33] Russia was officially called by the Organization "the most significant and direct threat to Allies' security and to peace and stability in the Euro-Atlantic area",[34] while the People's Republic of China (PRC) was named and blamed as a country that "employs a broad range of political, economic and military tools to increase its global footprint and project power while remaining opaque about its strategy, intentions and military build-up. The PRC's malicious hybrid and cyber operations and its confrontational rhetoric and disinformation target Allies and harm Alliance security".[35]

Thus, we can assume the Pacific exercise is actually organised against both Russia and China, countries which follow it carefully to observe the weaponry, personnel and combat capability of the American-led naval forces. Exactly for this purpose, both Beijing and Moscow have never perceived themselves as excluded from participation in the exercises, but in contrast they have used lawfare to get closer to RIMPAC. UNCLOS, the main source of the law of the sea, though not ratified by the USA,[36] allows maritime exercises with due

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[30] RIMPAC, *Participating Countries*, 30.06.2022: http://www.cpf.navy.mil/rimpac/participants (2.02.2023).

[31] The state of affairs was described completely differently by the Russian side. At this moment (February 2023), due to sanctions imposed on Russia and its media in Europe, the following websites do not work: Sputnik International: https://sputniknews.com/military/20120719174678625/ and Russian today: https://www.rt.com/usa/348620-china-usa-navy-drills.

[32] NATO, *NATO 2022 Strategic Concept*: https://www.nato.int/strategic-concept (2.02.2023).

[33] 29-30.06.2022.

[34] Art.9, NATO Strategic Concept 2022.

[35] Art. 13, NATO Strategic Concept 2022.

[36] The United States recognises the UNCLOS as a codification of customary international law.

notification (so here we have a similar dual legal coverage as required by the Vienna Document): "The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published".[37]

Such interpretation gave a green light to the Kremlin to participate in the exercise. A Russian destroyer and an intelligence ship were sent as spy vessels to shadow one of the US ships near Hawaii in 2016. Still, such an international affair is nothing new. During RIMPAC 2014, the Chinese People's Liberation Army Navy also sent its uninvited spy ship to monitor the exercise as a whole. In this case, though, China had already been participating in the exercise. Likewise in 2016, China expanded its naval delegation despite the formal agreement on how large each national team could be, which made the total build-up of China the most powerful navy during the whole exercise.[38]

Legal and political limbo

As has already been underlined in this article, military exercises have been used as a hybrid threat instrument for some time now. Secondly, there is no international definition of this term, which is highly important due to the potentially huge effect on geopolitics and regional (or even global) security. Thus, it is only a matter of interpretation on how to follow the UN paradigm written in Art. 1 of the Charter, which obliges states to maintain peaceful relations between one another. In order to accomplish this requirement, it remains desirable for states to continue signalling their intention to hold exercises (both members of the OSCE and others). This is undeniably a sign of goodwill – one of the most important principles in international law and international relations. States enter into international relations with goodwill assuming the other party will do likewise, resulting in their matters proceeding smoothly and as expected.

[37] Art. 25(3), UNCLOS.

[38] Katharina Seibel, Mathieu Duchatel and Oliver Brauner, *US defence cooperation in Asia* in: Stockholm International Peace Research Institute, *SIPRI Yearbook 2015: Armaments, Disarmament and International Security*, Oxford University Press, Oxford 2015, p. 265-266; K.R. Bolton, *US Navy Rim of The Pacific (RIMPAC) War Games, Coopting China, Isolating Russia?* (10.07.2016), Global Research, Centre for Research on Globalization: https://www.globalresearch.ca/us-sponsored-rim-of-the-pacific-rimpac-war-games-coopting-china-isolating-russia/5535240 (2.02.2023).

Nonetheless, the enemy does not only deliberately disregard this international customary norm, but also abuses our deep faith in it. The latest example was the Ukrainians' attempt to protect their own citizens by writing large inscriptions with the Russian word Дети (Children) on rooftops or in front of buildings where residents – with minors – were sheltering from the Russian bombardment. What happened next? Clearly, for the Russians, it was a well-defined target, and they did not hesitate to use this opportunity to strike them and kill innocent people.[39] Therefore, the basic question remains the same: how should we, in accordance with international law, protect ourselves but at the same time abide by it when certain undemocratic regimes, mainly Russia and China but also others, violate human rights and possess nuclear weapons?

In November 1983, NATO conducted a ten-day military exercise (Able Archer 83). This exercise was broadly commented on as "the closest the world has ever come to WWIII".[40] In response to the exercises, the Soviet Union placed their nuclear arsenal on standby and air units in East Germany and Poland on alert. The situation defused itself, yet the alertness to the possible engagement of nuclear weaponry during military exercises remains to this day.

My mission is to further awareness of the different mindsets represented by us – the Western world, the "West" – and the wrongdoer(s). Unfortunately, we keep losing when expecting authoritarian countries and war criminals to follow the principles of international humanitarian law. We must not be fooled into thinking that what is sacred for us may also be so for the enemy (it most likely never will be), who does not hesitate to use our own values against us. We must not expect the enemy to speak the same language as we do. Deterrence does not mean diplomacy or other soft tools where Russia or China are concerned. They understand strength, they fear strength, and only (military) strength is capable of halting them. There is no doubt that international law is not always clear, and there are certain areas where norms have not been formulated. Yet we must use legitimised legal methods as a beneficial tool to protect democratic civilisation, but also to prevent the spread of authoritarian tendencies in other unstable regions.

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[39] Civilians are certainly specially protected by the Geneva Conventions, further treaties, and above all customary law where the norm *jus cogens* (peremptory norm of general international law) forbids such extrajudicial killing.

[40] Cody Marden, *Exercises in Futility: Can Military Exercises Constitute Provocation for an Attack in Anticipatory Self-Defense?*: http://www.mjilonline.org/exercises-in-futility-can-military-exercises-constitute-provocation-for-an-attack-in-anticipatory-self-defense (2.02.2023), based on Benjamin B. Fischer, *A Cold War Conundrum: The 1983 Soviet War Scare*, 2017.

The notion of preventive defence (frequently also referred to as *pre-emptive* or *anticipatory*) remains controversial. The most severe violation of international law, a system based on the pillars of peace and security, is the use of force, or even the threat of using it.[41] This means that, in order to protect ourselves against this threat or use of force, we can attack first to prevent the outbreak of hostilities. Such a situation is undeniably easy to imagine during military exercises. What are the legal frames then? There are two exceptions in accordance with the international framework for not following the *jus cogens* norm on the prohibition of the threat or use of force. Those are either the state's right to self-defence, or a mission having a mandate, thus legitimised, by the UN Security Council.[42] Following that international custom, we can address two specific sources of pre-emptive self-defence. Here, such pre-emptive self-defence includes a legitimised reaction to military exercises endangering national security, and can be understood as an "asserted legal right to use offensive military force against a target that does not yet, but may in the future, pose a threat".[43]

These two legal sources of anticipatory self-defence arise from the UN Charter and the "Caroline Test" of customary international law. Art. 51 of the Charter confirms "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations". This norm must also be read as meaning that nothing in the Charter excludes the right to take to anticipatory action. Secondly, the Caroline Test[44] has been adopted in customary international law as a principle to test and therefore determine whether anticipatory self-defence is justified or not. It has been accepted that pre-emptive self-defence is legitimised in accordance with international law when the threat is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." In other words, 1) the use of force must be necessary, because a threat is imminent, and all peaceful alternatives have also been exhausted; 2) the use of force must be proportionate to the threat.[45]

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[41] Art. 4, the UN Charter: "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".

[42] See UN Assistance Mission for Iraq based on the UN Security Council resolution 1500, adopted on 14 August 2003.

[43] Michael Reisman and Andrea Armstrong, *The past and future of the claim of preemptive self-defense*, American Journal of International Law, 2006/100, p. 525-550.

[44] This legal case testing was developed following a pre-emptive attack by British forces on a US steamer, named the Caroline, which was supporting insurgents in British Canada.

[45] Cody Marden, *op. cit*., based on Letter of Mr. Webster, Secretary of State, United States of America, to Mr. Fox, British Ambassador to the United States of America (24.04.1841), In 29 BRITISH AND FOREIGN STATE

Also, UNCLOS remains silent on the legality of military operations in foreign Exclusive Economic Zones (EEZ). First and foremost, as on land and at sea, a state's responsibility and limitation of performing military exercises and the prosecution of any illegal manoeuvres are either ambiguous or not codified at all. Art. 298 (1)(b) excludes any disputes concerning military activities, including military activities from the jurisdiction of the International Tribunal for the Law of the Sea. Bearing in mind the non-compulsory international judiciary, and well as having no clear definitions of the nature and scope of permissible military activities, once again we have no distinct indicator of what (and if) will happen to naval forces breaching the Law of the sea. Thus, we might only anticipate conflicting interests of coastal and maritime states in the legality of military operations in a foreign EEZ.[46] Also, as state practice evolves, the potential for hostilities will become even higher, particularly in the Pacific due to the anticipated future war for resources, and semi-enclosed sea areas such as the South China Sea and the Baltic Sea, the latter becoming "the NATO lake" after Sweden and Finland become members of the Alliance.

Conclusions

The existing international legal framework regulating military exercises is predominantly of a political but not legally binding nature. This creates a legal niche that requires deeper analysis, which might eventually lead to the establishing of some norms, although not necessarily hard law since such was apparently not anticipated by the international community. Customary norms, in turn, stemming from countries' current practice, imply peaceful cohabitation and conduct with goodwill. However, authoritarian regimes deliberately use the lack of hard law in regard to military exercise, a domain that is also not regulated on a universal scale. On the one hand, this allows every sovereign state to exercise its inherent right to act however it wishes on its own territory, of course within the international legal framework; states can decide for themselves whether they want to codify the term "military exercise" in their national legal regime, or utilise their own definitions constituting rather administrative and tactical guidelines.

PAPERS, 1840-41 at 1137-38 (1857).

[46] Jing Geng, *The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS*, "Utrecht Journal of International and European Law, 2012/28(74), pp. 22-30; Hyun-Soon Kim, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict*, in: Richard B. Jaques, *Issues in International Law and Military Operations*, Naval War College, Newport 2006, pp. 257-262.

On the other hand, such ambiguity between states, and especially neighbouring countries, can lead and has already led to the abuse of law. Therefore we speak about lawfare possibly associated with military exercises as a hybrid threat.

International military exercises are used as hybrid threat instruments, while due to the political-legal limbo in this matter authoritarian regimes will most likely use military manoeuvres on a broader scale, with even more dangerous kinds of weapons potentially affecting larger populations. As it is difficult to point to any hard law norm in regard to exploiting military exercise, undemocratic states such as Russia and China deliberately disregard international customary norms. The main recommendation is first of all to be aware of the vastly different mindset and legal culture, being the set of values providing legal protection that are vital for a given society. This set of legal values and the tools to protect them and the methods to pursue national interests vary between Western civilisation and authoritarian countries. We, the West, must no longer present a naïve approach and expect states – including undemocratic and authoritarian ones – to follow the rules of the international humanitarian law of armed conflict, including international customary law. Indeed, the whole system of international law, lacking obligatory executive and judiciary power, relies on the paradigm from the UN Charter where states are obliged to maintain peace and security among themselves. Also, specific treaties such as the UNCLOS state: "States should create dialogues and form agreements to help clarify the contours of military activity in the EEZ. They should focus on mutual interests, interdependence, and coexistence rather than perceiving the ocean as a zero-sum resource".[47]

Nevertheless, we have witnessed more dangerous outbursts of hostilities starting from or constituting a threat to peace and legal order through military exercises. The growth of lethal technologies, legally undefined tactics and the creation of grey zones lead to greater insecurity and instability where military drills are becoming a deadly hybrid threat. Due to either the lack of codification in this domain, or open and general legal clauses, we must rely on the existing permitted framework comprising mostly customary law, where the right to self-defence, preventive defence and lawfare to strike back are the most effective options in this hybrid warfare. To react and respond to those malicious threats we, the West, must stay united as the game is not only about the current geopolitical situation in particular regions where military exercises might take pla-

[47] Jing Geng, *op. cit.*

ce. The Western heritage is a guarantee of peace and stability in international relations. Therefore, we are obliged to carry, promote, and protect our values, especially before those who may in the near future abuse the existing law, considering how leaky and weak it is. By spreading our values of the rule of law, democracy, and protection of human rights we must also remain alert during military exercises.

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