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The Baltic states should adopt the self-defence pinpricks doctrine: the "accumulation of events" threshold as a deterrent to Russian hybrid warfare

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Abstract: This article addresses a key legal debate that the Baltic NATO members ought to engage in: what constitutes an "armed attack" and what interpretation should be made of this concept in order to deter recent Russian hybrid warfare strategies. These questions are considered in connection with a more general issue regarding the law of self-defence: the question of what constitutes an armed attack in international law. This article will try to present a broad definition and context of Russian hybrid warfare and how it is challenging traditional jus ad bellum paradigms. Too few policy-makers have paid detailed attention to the new Russian "lawfare" in Ukraine, using specific military and non-military tactics in order to blur the lines between "armed attack" and mere political intervention. Meanwhile, legal scholars detach their analysis from actual policy-serving considerations and tend to acquiesce to some very restrictive theories of the use force in self-defence. For some countries, like the Baltic ones, facing strategic exposure – because of both threatening neighbours and low military capacities – the jus ad bellum paradigm should not be construed as another layer of obstacle.

Keywords: self-defence doctrine, Baltic States, Russian hybrid warfare, NATO, pinpricks doctrine, accumulation of events doctrine, entrapment strategy, aggression, armed attack

1 Introduction

Lithuania, Estonia and Latvia[1] are members of the North Atlantic Treaty Organization [Hereafter: NATO]. The Russian Federation's new method of expanding its sphere of influence and, in the worst case, its territory, has been labelled as *hybrid warfare* (Jones, 2014). The latter is not yet clearly defined (Huovinen, 2011).[2] The recent reticence of Western powers to use NATO as a countering force to Russian expansionism legitimately frightens small States like the Baltic ones (Browne, 2016; Shuster, 2016; Scarborough, 2016). These countries perceive a degree of strategic exposure vis-à-vis Russia.[3]

1 Hereafter: The Baltic States.

2 The relevant doctrine usually combines multiple tactics in the generic term "hybrid warfare": economic manipulation; disinformation and propaganda campaigns; fostering of civil disobedience and insurrection by targeting ethnic, religious or any clearly defined minority; the use of paramilitary forces; massive cyber-attacks on strategic private and State networks; and diplomatic efforts to destabilize and ostracize the victim State.

3 Russia already obstructed trade in Lithuania for example. In March 2014, Moscow imposed a ban on all food transported through the Lithuanian port of Klaipeda, the largest in the Baltics. Lithuania provides the most direct land access to Russia's Kaliningrad enclave, representing a strategic target for potential future warfare scenarios.

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States have an "inherent right of self-defence" under conventional public international law.[4] This principle is a fundamental regulation of inter-State relations (Dinstein, 2005).[5] It guarantees each State the right to defend itself in case the international community fails to ensure world peace and security. However, this right has fully grown and shaped itself as a legal instrument since the prohibition of the threat and use of force in inter-State relations (Dinstein, 2005; Sierpinski, 2006). In fact, States almost invariably invoke the right of self-defence when they use armed force in their international relations.

The right of self-defence must be read through the prism of article 2(4) of the Charter of the United Nations.[6] Self-defence is an exception to the illegality of the use of armed force in inter-State relations. It is legal and legitimate because it responds to a previous illegal use of armed force by an attacking State (or attacking States).[7] Determining *what* constitutes an armed attack and *who* launched it are therefore pivotal as far as the issue of self-defence is concerned.[8]

This article seeks to provide clarification of appropriate legal criteria that should be taken into consideration while determining what constitutes an armed attack and who can actually commit such an armed attack. This analysis will help us frame the legal boundaries in which the recent Russian hybrid warfare strategy moves and develops. Part II of the Article identifies both methods and reasons for this new hybrid warfare strategy. Part III addresses self-defence in both conventional and customary international law. This part will particularly focus on the armed attack threshold. Part IV analyses the pinpricks doctrine – or accumulation of events doctrine – and its legality under the international law of the use of force. Under this doctrine, an armed attack is not necessarily a full-scale military invasion or campaign of military strikes, but can also be the result of an accumulation of low-scale events of different natures: cybersecurity breaches, small-scale guerrilla warfare, spontaneous but limited airstrikes, etc. Such small-scale events, if relatively rare in terms of time and not "grave" enough with regard to how much destruction they cause, are unfortunately not considered as an armed attack by many legal scholars or States. Finally, Part V thoroughly investigates NATO's Article 5 and how the Baltic States, by adopting the pinpricks doctrine, could deter Russian intentions of hybrid warfare by securing a realistic and efficient application of Article 5.

2 The new russian hybrid warfare

Traditional international law regulates situations of clear use of armed force by both State and non-State actors. Hybrid warfare, where the use of armed force is not the core tactic used by the attacking belligerent, defies the strictly defined notion of "armed conflict".[9]

A factual case study of Russian hybrid warfare strategy is necessary to set up the framework of a new Baltic self-defence doctrine. This case study must encompass both military doctrines developed by States – the theoretical aspect of hybrid warfare – and actual tactics and operations on the ground – the empirical study of previous Russian use of hybrid warfare, including in Ukraine.

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4 Article 51 of the Charter of the United Nations states that "Nothing in the present Charter shall impair the *inherent right* of individual or collective self-defence if an armed attack occurs against a Member of the United Nations [...]" [emphasis added].

5 "The reliance on self-help, as a remedy available to States when their rights are violated, is and always has been one of the hallmarks of international law." The author distinguishes self-help from self-defence, the latter being the final phase of self-help. In other words, "self-defence is a permissible form of "armed self-help"".

6 Article 2(4) of the Charter of the United Nations promulgates the general prohibition of the use of *force* between States. [emphasis added].

7 *USA v. von Weizsaecker et al.* ("the Ministries Trial") (Nuremberg, 1949), 14 NMT 314, 329: "there can be no self-defense against self-defense."

8 Emphasis added.

9 Two distinct categories of armed conflict are recognized by the Geneva Conventions: international and non-international armed conflicts. Common Article 2 of the Geneva Conventions of 1949 international armed conflicts is defined as those which oppose "High Contracting Parties", meaning States. As for non-international armed conflicts, both Common Article 3 of the Geneva Conventions of 1949 and Article 1 of the Additional Protocol II define them as hostilities occurring between governmental armed forces and non-governmental armed groups or between such groups only. The present Article is only interested in the first category of armed conflicts, the international ones.

The new Russian hybrid warfare is sometimes referred to as the Gerasimov Doctrine (Monaghan, 2015/6). The Chief of the General Staff, namely Army General Valery Gerasimov, published in the Russian newspaper *Voenno-Promyshlenni Kurier* in early 2013, an article said to set the contours of what nowadays commentators call hybrid warfare (Gerasimov, 2013).[10] In this article, Gerasimov points to the increasing importance of non-military means in achieving political and strategic goals. He additionally advocates a system of armed defence in the interests of the State beyond the borders of its territory. This article is the cornerstone of this new Russian strategic thinking.

First of all, its author, Chief of the General Staff Valery Gerasimov, holds one of the highest military commanding posts in Russia. The Chief of the General Staff in Russia is responsible for long-term planning duties and oversees strategic transportation; developments in terms of doctrine and capabilities of the force; and equipment procurement for all branches of the Ministry of Defence. He also exercises daily control, during peacetime, of the *Glavnoye Razvedyvatel'noye Upravleniye* (Main Intelligence Directorate, GRU). He therefore is in charge of developing the theoretical and practical framework of future Russian warfare.

Secondly, the Chief of the General Staff's article is part of the process of setting up Russian national security policy (Blank, 2011).[11] Indeed, the latter process is quite decentralized in Russia. It starts with numerous publications in Russian peer-reviewed journals. It then takes the form of conferences and colloquiums, both in State and non-State owned institutes and think tanks. This second step helps key officials benefit from the contradictory nature of debates and helps them gain a broad comprehension of the different proposals and doctrines defended. The last process is however fully integrated in the State's bureaucracy - both the Ministry of Defence and the Ministry of Foreign Affairs are responsible for key parts in the final draft of the national security agenda or white paper. Gerasimov's article is therefore not benign since it fuels the debate in Russia over what form national defence should take in the upcoming years.
Hybrid warfare can be qualified as a controlled chaos. The key stages of it are:

- Destabilization of the targeted country by fuelling domestic conflict;
- Ruining the economy and causing State collapse by targeting key infrastructures;
- Russia's "step in" as an invited saviour replacing local political leadership with its own operatives (Güngör, 2007; Hernad, 2012).[12]

The methods used are the following (they can be used simultaneously or alternatively, depending on the international pressure which Russia faces during the different steps of the conflict):

- Creation of "puppet State" structures;
- Flooding the targeted country with illegal weapons;
- Using foreign paid mercenaries;
- Enforcing a refugee crisis;
- Exploiting social media and information warfare;
- The use of low-scale force or the threat of the use of force;[13]
- Introduction of a Russian "peacekeeping force".

10 Name of the article: The Value of Science Is in the Foresight: New Challenges Demand Rethinking the Forms and Methods of Carrying out Combat Operations. He indeed mentions, amongst other things, the "internal opposition to create a permanently operational front through the entire territory of the enemy state."

11 Military doctrine forms an important part of the Russian security policy. This important impact of military doctrine can be seen in the different Foreign Policy Concepts (FPC) of the Russian Federation.

12 The last step shows how the new Russian hybrid warfare can only be applied in Russia's neighbouring States. Russia could not play the role of the saviour in countries where no Russian or Russian speaking people live. The new hybrid warfare is therefore tightly linked to the notion of "protection of nationals and cultural minorities abroad". This notion will be discussed later in Part IV. The Baltic States are therefore potential targets since they are neighbours to Russia and have Russian and Russian speaking communities.

13 Diplomatic and political threats are one of the tactics of hybrid warfare. Some authors consider these means as excluded from the scope of self-defence. However, as was pointed out in *Legality of the Threat or Use of Nuclear Weapons*, a threat to use force is as much a violation of Article 2(4) of the Charter of the United Nations as an actual use of force. *See Nuclear Weapons* advisory opinion (n° 2) para. 47.

These methods are particularly effective on multi-ethnic and/or multilingual societies – as the Ukrainian case showed.

This new kind of warfare seeks to expand the scope of conflict from purely inter-military actions to the State's full waging of war. Army General Gerasimov's article expands conflict to "the broad use of political, economic, informational, humanitarian and other non-military measures." The objectives of this new doctrine are clear:

- Since Russia cannot afford a full frontal confrontation with Western powers, it seeks to challenge them in other ways;
- This warfare uses less costly tactics such as special forces, strategic communications, disinformation and propaganda campaigns, the fostering of civil disobedience and insurrection, and the use of paramilitaries;[14]
- It remains in the "grey zone" between war and peace – the intention behind this is to remain under the threshold of the clear use of armed force while coercing the victim State.

The case study of President Putin's declarations on the Crimea crisis helps understand the first abovementioned reason. For more than six weeks after the Crimean occupation, President Putin explicitly denied that Russian soldiers had been involved. He shifted his view on April 2014, admitting that "Russian servicemen did back the Crimean self-defence forces" and that "Russia created conditions [...] for the expression of the will of the people living in Crimea and Sevastopol".[15] As for South-East Ukraine, Russia constantly denied that regular forces were involved. By denying and then openly admitting that his previous public statements were not true, President Putin defied a rather widely accepted principle of international diplomacy: statements of top officials concerning major political crises can, at most, be blurry, but never totally and wilfully wrong (Allison, 2014).[16]

A hybrid war is therefore a non-linear conflict. Russian hybrid warfare blurs the classic war paradigms: *Who* is behind the armed attacks; *how much* is the attacker implicated in the armed attacks; and *what are the objectives* of the offender.

3 Self-defence in conventional and customary international law

3.1 Self-defence in conventional international law

The right of self-defence in international law is the State's *inherent* right to use force in order to protect itself from an armed attack. This legal notion has widely been studied and analysed by the relevant legal doctrine (Bowett, 1958; Zourek, 1975; Dinstein, 2005; Green, 2009).[17]

14 This new hybrid warfare tactic relies on proxies and surrogates to prevent attribution and intent and to maximize confusion and uncertainty. This is the reason I previously mentioned a Russian "lawfare" in Ukraine.

15 Interview with Radio Europe 1 and the TF1 TV channel, June 4th, 2014.

16 The Israeli diplomatic practice of "no comment" after Israeli military actions outside of Israel's territory is a proof of this diplomatic principle. Indeed, Israel has no interest in admitting its military actions in neighbouring hostile States. Such statements would undermine its national security and its efforts for a peaceful settlement in the Middle East. However, the international community demands to know when and why a State used force under a particular circumstance. Israel then adopts the "silent treatment" rather than denying its actions. State practice shows that such a policy of silence is not widely condemned by the international community. It can therefore be concluded that silence is an accepted form of diplomatic communication, but openly lying is not. The author states that: *Although military means ultimately were critical, the Russian interventions in the spring and summer of 2014 relied heavily on diplomatic, legal and media campaigns; the mobilization of local political support among civilian groups; and economic pressures and threats in working towards the political goal of restructuring the Ukrainian state.*

17 This article does not intend to present an exhaustive view of the legal literature on self-defence. The reader will, without a doubt, be aware of the impossibility of such an attempt since self-defence is one of the most studied subjects in public international law.

The inter-State use of force is prohibited by Article 2(4) of the Charter of the United Nations, which states that:

> *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.*[18]

The logical other side of the coin of this prohibition is the right given to every State to protect itself by using armed force in self-defence. The Charter of the United Nations is the primary authority concerning self-defence. Article 51 of the UN Charter states that:

> *Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.*[19]

Self-defence is, by Charter norms, governed by a series of factual and legal conditions:
- The presumed victim State must be facing an "armed attack" (or armed aggression if the French translation is the ruling translation);[20]
- The presumed victim State must verify that its armed reaction is necessary (Dinstein, 2005);[21]
- The presumed victim State must use this right only to repel the aggression;[22]
- The actions of the victim State must be proportionate to the armed attack (Dinstein, 2005);[23] and
- The presumed victim State must inform the United Nations of its decision to engage in armed hostilities.

However, the Charter does not define what constitutes an armed attack or armed aggression. On December 14th 1974, the General Assembly of the United Nations adopted Resolution 3314 (XXIX) concerning the definition of aggression. This Resolution states that:

> *Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.*

This definition was an attempt by the international community to clarify the notion of "armed attack" and the legal framework in which the presumed victim State must manoeuvre when it uses armed force with the aim of self-preservation. However, the Resolution's definition of aggression does not clarify all the issues of Article 51 since it only mentions the armed version of an aggression,[24] and is not a binding document.

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18 emphasis added.

19 The French translation of Article 51 does not mention "armed attack" but "armed aggression". The French text of Article 51 states that: "Aucune disposition de la présente Charte ne porte atteinte au droit naturel de légitime défense, individuelle ou collective, dans le cas où un Membre des Nations Unies est l'objet d'une *agression armée* [...]." [emphasis added]

20 This legal condition is also referred to as "immediacy". It is based on the presumed victim State's own factual interpretation of the actual military circumstances taking place. The burden of proof is on the presumed victim State: it must prove that an actual armed attack exists; and that it is presently underway.

21 The interpretation of the necessity requirement is a factual interpretation of whether a reasonable settlement of the armed attack in an amicable way is possible. In this article the specific issue of the "threat of imminent attack" and what the relevant self-defence law that is applicable are not discussed.

22 Meaning the goal of the presumed victim-State's military operations should not be, for example, to topple the attacking regime.

23 This requirement crystallizes the penetration of international humanitarian law with regard to one of the aspects of the *jus ad bellum*: self-defence.

24 Making it harder to distinguish between armed attack and aggression. What differentiates an armed attack from armed aggression? What differentiates armed aggression from aggression?

The last international documents that are relevant with regard to self-defence are the founding texts of regional self-defence organizations, such as:

- Article 5 of the North Atlantic Treaty (Washington D.C., 4 April 1949) stated that "if [...] an armed attack occurs, each of them [the Treaty members], in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked [...]".
- Article 4 of the Warsaw Treaty Organization of Friendship, Cooperation, and Mutual Assistance (Warsaw, 14 May 1955) stated that "In the event of armed attack in Europe on one or more of the Parties to the Treaty by any state or group of states, each of the Parties to the Treaty, in the exercise of its right to individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations Organization, shall immediately, either individually or in agreement with other Parties to the Treaty, come to the assistance of the state or states attacked with all such means as it deems necessary, including armed force. [...]".[25]

The key issue this Article is going to discuss is *what* constitutes an armed attack.[26] The different terms used in the above documents – armed aggression, aggression, and use of force – could be interpreted as a disorganized attempt by the international community to regulate the use of force regarding self-defence. However, the reason for the use of different terms is the international community's intention to distinguish between the "first shot" and the "armed attack" itself (Dinstein, 2005). Indeed, one should not confuse the first State which opened fire, through its armed forces, with the aggressor. Imagine State A's armed forces are ordered to enter State B's territory and capture an undefended border city. The city falls without any armed fight; no weapons are fired. State B responds by deploying its armed forces. State B's forces are the first to open fire in order to capture the fallen city. In that case, however, State A would not be the "first to shoot", but it would be the aggressor since it committed the armed attack.

It can therefore be considered that Article 2(4) from the Charter prohibits the use of force which, if it takes the form of an armed aggression, will materialize through an armed attack, triggering the right to self-defence of Article 51. In some cases then, a State can use mere force – diplomatic and economic pressure, threats – without actually committing armed aggression. The challenge with recent strategies of Russian hybrid warfare is the fast-paced passage from a mere Russian use of force to actual aggression, in its worst form: armed attack. Indeed, the Ukrainian crisis showed how, one week, Russia would be threatening and putting economic pressure on the Ukrainian government, and the next week, would be engaging in full front armed attacks, to suddenly deescalate the conflict and then return to mere diplomatic and economic pressures again.

3.2 Self-defence in customary international law as interpreted by the International Court of Justice

The decisions of the International Court of Justice [hereafter ICJ] are not general binding authorities.[27] However, studying the Court's jurisprudence in cases related to "use of force" is interesting in two ways: firstly, cases related to the use of force, and more specifically to the right of self-defence, are not common and are therefore unique occasions for the Court to study customary self-defence law; secondly, the Court's decisions tend to be harmonized and present a rather exhaustive analysis of both doctrine and State legal opinions. Customary international law can therefore "appear" behind such decisions.

The main self-defence issue treated in the ICJ's jurisprudence is the requirement of armed attack. For the ICJ, an armed attack is a prerequisite for the lawful exercise of self-defence. The majority of the Court

25 Other examples include the Chapultepec Pact (March 3rd, 1945), etc.

26 emphasis added.

27 The Court, in *Military and Paramilitary Activities in and against Nicaragua*, stressed that it does not possess "authority to ascribe to states legal views which they do not themselves advance".*See Nicaragua* merits (n°2) para. 207.

asserted this requirement in the *Nicaragua* judgement,[28] in the *Case Concerning Oil Platforms*,[29] and in the *Armed Activities on the Territory of the Congo* case.[30] The occurrence of an armed attack is therefore the condition *sine qua non* for the right to use armed force in self-defence.

A secondary issue arose from the self-defence cases of the ICJ: when can a State use armed force in response to the *threat* of attack, rather than an actual attack. This article will not discuss this issue since the pinpricks doctrine is a response to the delicate issue of *what* is an armed attack, not *when* can a State use armed force – before an attack because of a threat, or after an attack (Green, 2009; Allain, 2004).

According to the ICJ, identifying an armed attack is a question of gravity. The Court has viewed it as "necessary to distinguish the gravest forms of the use of force from other "less grave forms".[31] The ICJ therefore introduces the notion of gravity in the process of determining what constitutes an armed attack. Additionally, by stating that an armed attack is either a grave or less grave *use of force* – and not a use of armed force – the Court considers that the armed attack must in itself be contrary to Article 2(4) of the UN Charter. This highlights the relationship between the notion of armed attack and the principle of non-intervention. Therefore, all armed attacks amount to both uses of force and interventions. In contrast, not all interventions amount to an armed attack.

In *Nicaragua*, the Court outlined the "nature of the acts which could be treated as constituting armed attack":

> [I]*t may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces* [...] *In customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another state, if such an operation, <u>because of its scale and effects</u>, would have been classified as an armed attack rather than a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or <u>logistical or other support</u>.*[32]

One act identified by the Court as being able to amount to an armed attack is useful for the purposes of this article: the sending of irregulars if their actions have a certain scale and certain effects. However, the Court did not consider the "significant scale" assistance of such irregulars in the form of logistical or "other support" as an action capable of amounting to an armed attack (Green, 2009).[33]

The pinpricks doctrine is the answer to such a restrictive ICJ approach to what can constitute an armed attack. Recent Russian warfare strategy uses the restrictive ICJ approach in order to avoid accountability and to restrain its victim from invoking its right of self-defence. However, if logistical or "other support" is accumulated to other actions taken by a State against another State, the latter can claim to be a victim of an armed attack.

This leads us to the issue of how to frame the pinpricks doctrine while remaining coherent with regard to customary and conventional international law.

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28 *Nicaragua* merits (n°2) para. 195.

29 *Case Concerning Oil Platforms* (*Islamic Republic of Iran v. United States of America*) merits (2003) ICJ Reports 161, paras. 51 & 71.

30 *DRC v. Uganda* (*Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda*) merits (n°2) paras. 143 & 146.

31 *Nicaragua* merits (n°2) para. 191; *Oil Platforms* merits (n°2), para. 51.

32 *Nicaragua* merits (n°2) para. 195.

Emphasis added.

33 The author states that: "this would mean that material support even on a vast scale would not be grave enough to give rise to the right of self-defence".

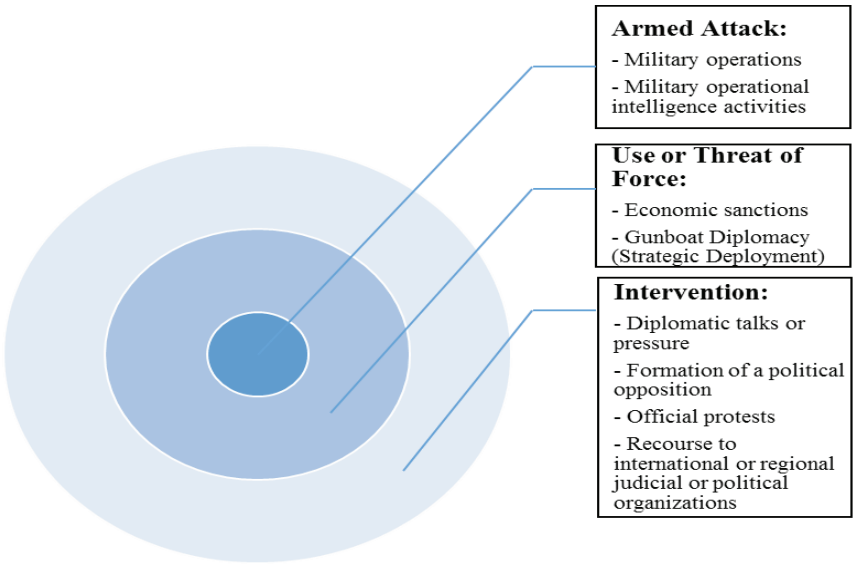

Figure 1. Hybrid warfare and the three levels of intervention as interpreted by the ICJ

4 The pinpricks doctrine: an accumulation of events lowering the armed attack threshold

4.1 The "accumulation of events" doctrine and State practices

The pinpricks doctrine lowers the traditional threshold of an "armed attack". It states that the addition of many actions, both armed and unarmed, happening over a relatively long period of time, can constitute an armed attack. The addition of multiple actions of different natures – political, economic, electronic and military – can constitute an armed attack.[34]

This doctrine finds its source in the gravity threshold set out by the Court with regard to self-defence. Some authors define the gravity criterion as "context specific" (Green, 2009). An armed attack is therefore not a mere question of fact – namely the actions taken by the attacking State – but rather an analysis of the factual circumstances of each crisis (Bou Nader, 2016). This would explain the ICJ's distinction between cases of grave use of force and other less grave uses of force. The Court invites both policymakers and the doctrine to study each case in a broader more exhaustive manner than mere actions where "fire" is used. The pinpricks doctrine answers the Court's incentive to adopt a global and encompassing analysis of situations where *force* is used.[35]

This doctrine, if it had been adopted by the Ukrainian decision-makers as soon as the events in the East of the country and in the peninsula of Crimea started, would have resulted in a faster response from Kiev. Indeed, under this doctrine, the Russian combination of cyberattacks, the sending of irregulars, the sporadic artillery support provided by Russian armed forces, the sending of so-called humanitarian relief convoys, and the threat or use of economic pressures would have been identified, considered cumulatively, as an armed attack triggering the State's right of armed self-defence. Instead, the Ukrainian government started by using its police forces and anti-riot corps. The use of the army, and therefore the full use of the State's armed potential, was delayed because of both the difficulty in attributing the actions of armed

34 For example, a small-scale cyberattack, combined with massive anti-regime propaganda and the use of certain militias and economic pressures are considered to form an actual armed attack by the defenders of this doctrine.

35 emphasis added.

groups to a foreign country – in this case Russia – and the blurriness of the events happening, from purely political events such as riots to sporadic artillery strikes from remote areas.

This doctrine is often adopted by States facing asymmetrical tactics from non-State actors. General State practice tends to be in favour of such an approach. For example, the Israeli defence doctrine adopted the accumulation of events doctrine in its armed conflict with *Hezbollah* in 2006. Israel claimed that the accumulation of events prior to the actual armed conflict justified its use of armed force with regard to self-defence (De Bock, 2007). Indeed, the *Hezbollah* border attack was considered by Israel as part of a series of other "repetitive" – or even "continuous" – forceful actions. Additionally, Israel justified its raids in Syria (November 1964), in Lebanon (May 1970 and June 1972) and in the Gaza Strip (Operation Defensive Shield, 2002) by stating that the doctrine of accumulation of events met the armed attack threshold.

In the *Oil Platforms* case, the United States of America invoked the doctrine of accumulation of events. Indeed, the United States of America "*tried to tackle the argument that a single incident would not be enough to amount to an armed attack by putting forward the « accumulation of events » theory according to which a series of attacks may amount to an « armed attack ». The US listed a number of incidents as being part of a series of attacks* [...]" (Chainoglou, 2008).

This doctrine is therefore suitable under certain circumstances where a country is facing an unclear threatening foreign political agenda. Against a non-State actor, a State can adopt the pinpricks doctrine in order to deter such an actor and respond, even extraterritorially, against the actions of the non-State actor. Against a State, this doctrine can prevent hybrid warfare tactics where the attacking State would use both military and non-military actions, over a relatively long period of time, in order to blur the lines between armed conflict and peace. If such actions are taken by the attacking State, the defending State, under the pinpricks doctrine, will not await a full-on armed conflict to break out in order to use its right of armed self-defence.

The issue remaining is whether this doctrine is legal under international laws related to the use of force in inter-State relations.

4.2 The legality under conventional and customary international law of the pinpricks doctrine

The pinpricks doctrine is legal under both conventional and customary international law. The accumulation of events doctrine does not overstep the confines of the right to self-defence. The Court tried to determine the nature of an armed attack in the *Case Concerning Oil Platforms*. It stated that:

> [...] *in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary international law on the use of force.*[36]

Additionally, in *DRC v. Uganda*, the majority stated that:

> *Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a state to protect perceived security interests beyond these parameters.*[37]

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36 *Case Concerning Oil Platforms* (*Islamic Republic of Iran v. United States of America*) merits (2003) ICJ Reports 161, para. 51. **The Court reaffirmed its view that an armed attack is the prerequisite for the right of self-defence in terms of both its advisory opinion in** *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* **and in** *Armed Activities on the Territory of the Congo* **(***Democratic Republic of the Congo v. Uganda***).**
See the advisory opinion of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* **(2004) ICJ Reports 135, para. 139;** *DRC v. Uganda* **merits (n°2), paras. 143, 146.**
37 *DRC v. Uganda* merits (n°2) para. 148.

The Court did not develop the issue of what are the "confines" laid by Article 51 of the Charter. However, the reading of the Court's decisions with regard to matters of use of force helps to extract a set of conditions to qualify a use of force as an armed attack. First of all, as mentioned above, the Court viewed it as necessary to distinguish the gravest forms of the use of force from other less grave forms. The Court can therefore be said to distinguish between two sets of situations: situations where the actual use of force exists but is not serious enough to amount to an armed attack; and situations where the use of force is too serious not to amount to an armed attack. As a consequence, an armed attack is recognized as such depending on its "gravity".

But how can lawyers and policy-makers define the gravity of each situation? The second issue at hand therefore shifts to when the actual use of force becomes grave enough. The answer to this question resides in the Charter's prohibition of the use of force in inter-State relations.[38] The Court solved this issue by linking the concept of armed attack and the principle of non-intervention. In *Nicaragua*, the Court stated that an unlawful use of force also constitutes a breach of the principle of non-intervention.[39] An armed attack is therefore, according to the Court, a grave use of force and an intervention.[40] Using a lethal drone to strike down a terrorist leader on another country's territory can, under this interpretation, be considered as a grave use of force but not really an intervention since the latter must be targeted at the political integrity of another State. An armed attack is therefore the grave use of force by a State in order to intervene in the victim-State's internal affairs.

The last issue is whether the international legal framework of self-defence is applicable to cases where non-State actors are the opposing side. Some scholars may argue that such cases constitute pure policing cases and should therefore be regulated by domestic criminal and military law. This issue emerged with the recent Russian recourse to so-called "little green men". Indeed, Russia could argue that the unidentified combatants crossing the border are not Russian agents but mere organized militias. Nonetheless, this line of defence would not stand under the pinpricks doctrine since the Baltic States would argue that the accumulation of Russian logistical support to such groups, with the opening of the Russian border and the economic and diplomatic support Russia gives to these groups, would constitute an armed attack orchestrated by Russia.

The accumulation of events doctrine is therefore not contrary to both conventional and customary international law. Indeed, it does not violate the armed attack requirement of Article 51; it does not contradict the ICJ's interpretation of the concept of armed attack; and it is coherent with the ICJ's incentive to study each situation in a "context specific" manner and to not restrain an armed attack to a situation where only "fire" is being used.

5 Nato's article 5 and the pinpricks doctrine: deterring the threat by securing respect of conventional collective security obligations

Hans Morgenthau considers alliances as the most important manifestation of the balance of power. Alliances can be defined as formal associations of States bound by the mutual commitment to use armed force against any aggressor to defend the integrity of member-States.

Article 5 of the Washington Treaty stipulates that an armed attack on one is an attack on all. It adds that the parties will take such action *as deemed necessary to restore and maintain* the security of the North Atlantic Area.[41] According to the international doctrine, Article 5 "is not per se a mutual defence

38 Article 2(4) of the UN Charter.

39 *Nicaragua* merits (n°2), paras. 205, 247.

Here, the use of force in situations other than for self-defence or in accordance with a UN Security Council resolution is an unlawful use of force.

40 On the other hand, not all interventions are armed attacks and not all uses of force amount to an armed attack. An armed attack should therefore violate both the prohibition of the use of force and the principle of non-intervention.

41 emphasis added.

clause, since there is no absolute guarantee of mutual military assistance in the case of an armed attack on a signatory to the Washington Treaty" (Jonson, 2010). Additionally, the scope of the assistance is not conventionally determined.

Adopting the pinpricks legal doctrine would in fact be a translation of the political will of the Baltic leaders to create an "entrapment" logic in the relationship between NATO and Russia. Indeed, in an alliance system, some States, in particular the great powers, might not consider the threat to a small State or a civil war as a threat worthy of collective action. Such political considerations can lead to an "abandonment" logic where small States see their security guarantees as not respected by their more powerful counterparts. Small States can therefore adopt an entrapment logic consisting of dragging their more powerful partners into their armed conflict. Small States have the ability to upset the designs for stability promoted by the larger States: this ability reflects the leverage small States have over more powerful ones in the systems of alliances.

Such a policy would be a political act by which the Baltic States would preserve their security while at the same time contribute to the stability and efficacy of NATO's north-eastern borders. However, this adoption would only be effective if two requirements were met.

First of all, this new self-defence doctrine should be publicly adopted. The white papers of the Baltic States should therefore include this doctrine. In comparison, the nuclear deterrence of a State would not be effective if its policy related to the use of its nuclear capacity was not made public. Rendering public such a policy serves as an essential aspect of deterrence: letting the potential aggressor be aware of both the willingness of the State to respond to aggression and the cost – in a nuclear scenario that cost would be unbearable – of such an aggression.

Secondly, the Baltic States should adopt this self-defence doctrine but not lobby for a full reform by NATO of its Article 5 self-defence approach. Indeed, if NATO institutionally adopts the same doctrine, some of the members of the Alliance may use it for non-defensive purposes and turn this policy into a doctrine that creates tension. Turkey for example could use this new NATO doctrine in order to justify strikes and military operations against Kurdish groups in Syria, Iraq and Iran; against Armenian armed groups in Armenia; and against the Republic of Cyprus. Such actions would jeopardize the stability of the south-eastern border of the Alliance as seen in the figure below.

The figure shows how the Baltic States have no interest in using the pinpricks doctrine for offensive purposes against Russia since they hold no strategic reason within Russian territory. However, and as the figure shows, some of Turkey's strategic interests are extraterritorial and would consist of intervening outside of Turkish soil. The pinpricks doctrine in the Turkish case would therefore necessarily be an offensive tension-creating policy rather than a defensive policy.

Additionally, if NATO adopts the pinpricks doctrine, it could be argued that the nature of the Alliance would change from a defensive one to an aggressive one. A collective security agreement that countenances aggression is bound to be in violation of the peremptory nature of the prohibition of the use of inter-State force as *jus cogens* (Dinstein, 2005). NATO's adoption of the pinpricks doctrine would render it offensive because of the different political agendas that reside in such an Alliance – the Turkish case shows how this theory could be a tension-creator, if the country using it has an extraterritorial destabilizing agenda.

The following prediction of events in the case of Russian hybrid warfare against the Baltic States will help us understand how the adoption of this legal doctrine will create a political will of the NATO members to engage in a more deterring posture vis-à-vis Russia and will therefore deter Russian expansionism:

1 Russia engages in hybrid warfare against the Baltic States: use of military and non-military tactics to destabilize the Baltic States and, in the worst case, invade parts of their territories by proxy forces.
2 The Baltic States, as soon as any hybrid warfare tactics are used against their sovereignty, will engage in an armed conflict against Russia and will ask NATO members to abide by their Article 5 promise to stand by any member of NATO facing an armed attack.
3 Three scenarios are possible at this level:

a. NATO members do not agree with the active and early use of armed self-defence of the Baltic States and do not militarily support them: the consequence of such an abandonment would be the loss of NATO's credibility. In the long run, some eastern European NATO members would probably reconsider their NATO treaty obligations and would turn to a "European Union-only" security framework.

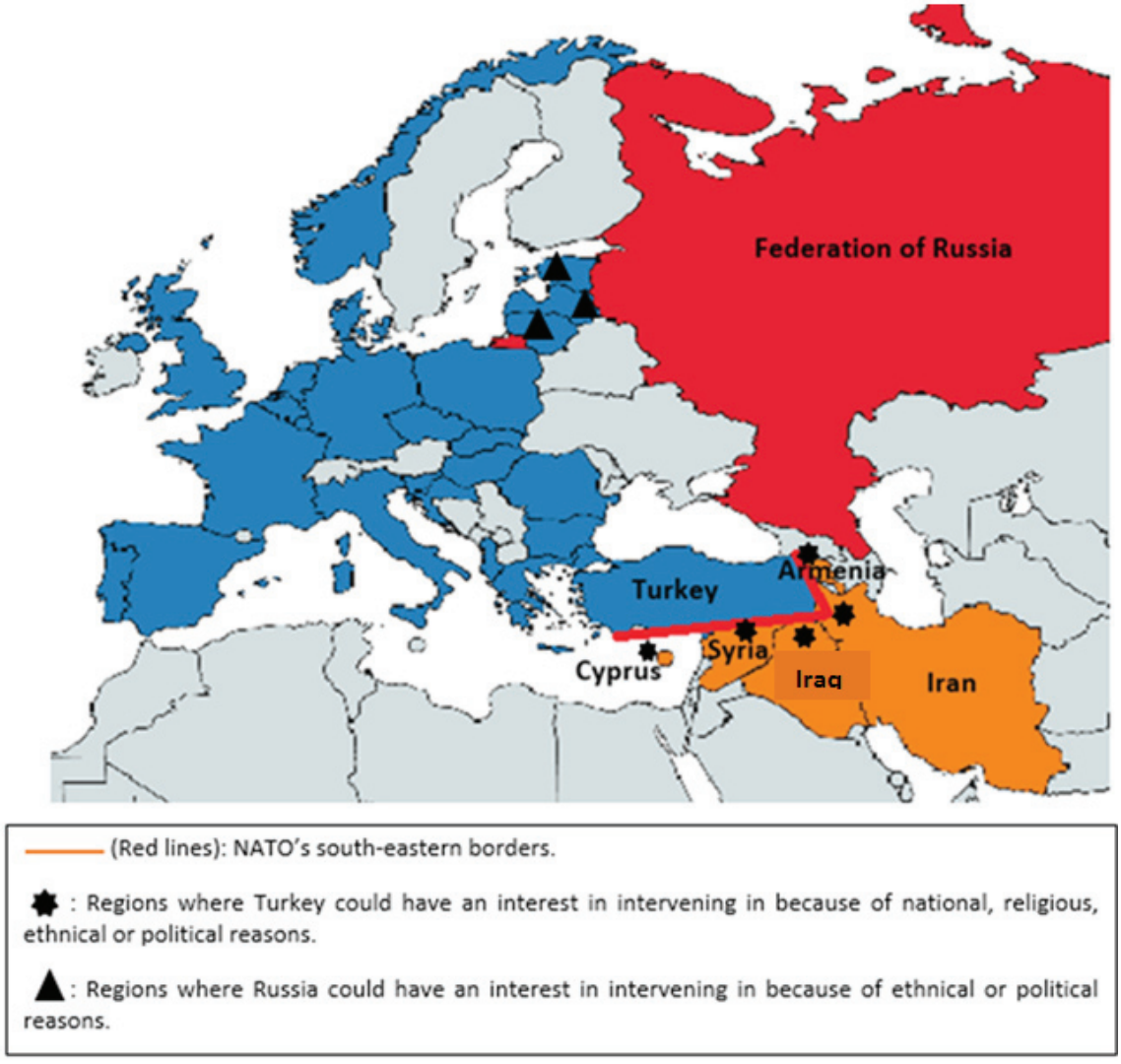

Figure 2. Map of the European Members of NATO

b. NATO members do not agree with the active and early use of armed self-defence of the Baltic States but militarily support them: by doing so, NATO safeguards its fundamental purpose – collective self-defence – but the NATO-Russia armed conflict would cause too much of a disturbance in terms of international relations and its military and financial consequences could be dramatic.
c. NATO members agree with the active and early use of armed self-defence of the Baltic States and militarily support them: same consequences as in (b).

As for the Russian standpoint, scenarios (a), (b) and (c) would cost too much for too little gain. Indeed, in scenario (a), the dislocation of NATO in Eastern Europe would certainly strengthen European Union projects concerning defence unification and could lead to a coherent European block on the western border of Russia. As for scenario (b), the fight against NATO would probably cost too much for Russia on both the economic and military levels, partly because the modernization of the Russian army is still underway. Additionally, the European and Asian neighbours of Russia would distance themselves even more out of fear of more targeting in terms of hybrid warfare.

Since the consequences in the three possible scenarios would be too grave to be acceptable, the psychological effect of the adoption of the pinpricks doctrine would lead to a stronger presence of NATO

in the Baltic States and to Russia reconsidering the use of hybrid warfare against them. The pinpricks doctrine of the Baltic States would be similar to nuclear deterrence in that its fundamental objective is to, paradoxically, never be used. Its primary goal is to deter, not to destroy or justify any military action.

6 Conclusion

Law can create policy as much as policy can create law. The Baltic States should adopt the pinpricks doctrine with regard to their self-defence posture. This doctrine, legal under the international law concerning the use of force in terms of inter-State relations, would create an entrapment strategy vis-à-vis the NATO allies of the Baltic States, and a deterrent strategy vis-à-vis Russia:

- The entrapment strategy: non-Baltic members of NATO would see themselves forced to both reinforce their support of the security with regard to the Baltic States – physical and in terms of cybersecurity – and stand by their Baltic partners in the event of Russian intervention. Additionally, non-Baltic members of NATO, and NATO as an institution, would be forced to tightly cooperate with Russia in order to avoid such an eventuality of armed conflict.
- The deterrent strategy: Russia would be deterred since the cost of its hybrid warfare strategy against the Baltic States would be much higher than its benefits.

However, and paradoxically, the Baltic States should not lobby for an adoption by NATO of this doctrine since some members of NATO could use it for destabilizing purposes – the Turkish case is the primary example of such a negative effect. In case some members of NATO argue that Article 5 should be redefined to absorb the pinpricks doctrine, the Baltic States should therefore use the consensus system enforced in NATO in order to block any formal modification of the collective security philosophy outlined in Article 5 of NATO.

References

Allain, J. (2004). The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union. 8 *Max Planck Yearbook of United Nations Law*, pp. 237-242.

Allison, R. (2014). Russian "deniable" intervention in Ukraine: how and why Russia broke the rules, International Affairs, *The Royal Institute of International Affairs*, available at: http://commonweb.unifr.ch/artsdean/pub/gestens/f/as/files/4760/39349_202339.pdf (accessed January 22nd, 2017).

Blank, S. (2011). Russian Military Politics and Russia's 2010 Defense Doctrine. *Strategic Studies Institute*, available at: http://www.strategicstudiesinstitute.army.mil/pdffiles/pub1050.pdf (accessed February 11th, 2017).

Bou Nader, P. (2016). *Les interprétations extensives de l'article 51 de la Charte : De la légalité en droit international public des extensions temporelles et matérielles du droit de légitime défense*. Germany. 200 pages.

Bowett, D. W. (1958). *Self-Defense in International Law*. Manchester. 294 pages.

Browne, R. (2016). Is Trump on a collision course with NATO?, CNN Politics, available at: http://edition.cnn.com/2016/11/09/politics/trump-nato-challenge/ (accessed December 18th, 2016).

Chainoglou, K. (2008). *Reconceptualising the law of self-defence*. Brussels. 488 pages.

De Bock, C. (2007). Israel, Eté 2006: « légitime défense disproportionnée » ou « représailles » ? Analyse d'un glissement de langage. *Revue québécoise de droit international*, p. 55.

Dinstein, Y. (2005). *War, Aggression and Self-Defence*. 4th ed. Cambridge. 349 pages.

GERASIMOV, V. *Tsennost Nauki v Predvidenniye*, Voenno-promyshlenni Kurier, February 27th, 2013, http://www.vpk-news.ru/articles/14632

Green, J. (2009). *The International Court of Justice and Self-Defence in International Law*. Oregon. 229 pages.

Güngör, O. (2007). Ethnic Russians and minority rights in the Baltic States during their EU accession process. Ph.D., available at: https://etd.lib.metu.edu.tr/upload/12609195/index.pdf (accessed February 5th, 2017).

Hernad, W. (2012). The Russian minority in Estonia. *Institute for Cultural Diplomacy*, available at: http://www.culturaldiplomacy.org/pdf/case-studies/russian-minority.pdf (accessed February 5th, 2017).

Captain Petri Huovinen (2011). Hybrid Warfare – Just a Twist of Compound Warfare?, Department of Military History, National Defence University, available at: https://www.doria.fi/bitstream/handle/10024/74215/E4081_HuovinenKPO_EUK63.pdf (accessed December 18th, 2016).

Jones, S. Ukraine: Russia's new art of war, *Financial Times*, August 28th, 2014, available at https://www.ft.com/content/ea5e82fa-2e0c-11e4-b760-00144feabdc0 (accessed January 15th, 2017).

Jonson, P. (2010). The debate about Article 5 and its credibility – What is it all about?, Research Paper, *NATO Defense College*, No. 58, Rome, 12 pages.

Harold Hongju Koh, Legal Adviser, U.S. Department of State, Remarks at USCYBERCOM Inter-Agency Legal Conference: International Law in Cyberspace, September 18th, 2012.

Monaghan, A. The "War" in Russia's "Hybrid Warfare", *Strategic Studies Institute, Parameters*. 45(4) Winter 2015-16, 65, available at http://www.strategicstudiesinstitute.army.mil/pubs/parameters/issues/Winter_2015-16/9_Monaghan.pdf (accessed January 14th, 2017).

Scarborough, R. Obama viewed NATO as a"threat" rather than peace alliance, top U.S. general charges, *The Washington Times*, 2016, available at: http://www.washingtontimes.com/news/2016/sep/9/obama-viewed-nato-threat-rather-peace-alliance-top/ (accessed December 18th, 2016).

Shuster, S. Can NATO Survive a Donald Trump Presidency?, *TIME*, 2016, available at: http://time.com/4569578/donald-trump-nato-alliance-europe-afghanistan/ (accessed December 18th, 2016).

Sierpinski, B. (2006). La légitime défense en droit international : quelques observations sur un concept juridique ambigu, *Revue Québécoise de droit international*, 19.1, pp. 79-120.

Zourek, J. (1975). La notion de légitime défense en droit international, *Annuaire International de Droit International*, pp. 1-80.