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The Military Response to Criminal Violent Extremist Groups: Aligning Use of Force Presumptions with Threat Reality

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In 1949, the inclusion of Common Article 3 to the four Geneva Conventions represented a significant advance in the regulation of armed hostilities. That article extended international humanitarian law to the realm of non-international armed conflicts. At that time, these conflicts were considered synonymous with intrastate conflicts such as civil wars. While the scope of applicability of Common Article 3 to internal threats and disturbances has witnessed what is arguably a significant evolution since that time, it is unclear whether and when this baseline humanitarian obligation – and the broader customary laws and customs of war applicable to non-international armed conflicts once this article is triggered – are applicable when a state confronts organised criminal gangs who possess a capability to engage in violence and wreak havoc that rivals, if not exceeds, that of traditional insurgent threats.

Much of this uncertainty derives from the fact that the response to criminal disturbances appears to have been specifically excluded from situations triggering Common Article 3 when it was adopted in 1949. However, it is unlikely that the drafters of the Conventions at that time anticipated the nature of organised criminal gangs and the destabilising effect these groups have today in many areas of the world. The nature of this threat has resulted in the increasingly common utilisation of regular military forces to restore government control in areas in which they operate. This results in the use of force and the exercise of incapacitation powers that far exceed normal law enforcement response authority. It is therefore the thesis of this article that when the nature of these threats exceeds the normal law enforcement response authority and compels the state to resort to regular military force to restore order, international humanitarian law, or the law of armed conflict, provides the only viable legal regulatory framework for such operations. However, it is also the view of the authors that the risk of excess of authority inherent in this legal framework necessitates a carefully tailored package of rules of engagement to mitigate the risk that the effort to restore order will result in the unjustified deprivation of life, liberty and property.

Keywords: armed conflict, criminal gangs' use of force, military law enforcement, Common Article 3, rules of engagement

> *War is a violent clash of competing interests between or among organized groups, each attempting to impose their will on the opposition.*[1]

1. Introduction

Identifying the demarcation point between militarised law enforcement and armed conflict in response to internal and transnational non-state threats is essential for defining the legal

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[1] Raymond T Odierno, William H McRaven and James F Amos, 'Strategic Landpower: Winning the Clash of Wills', Strategic Landpower Task Force (White Paper), 2013.

parameters of operational and tactical response authority. However, the vagaries related to this definitional process, particularly in the context of contemporary threat dynamics, seem almost insurmountable. This uncertainty will become even more complex as the nature of amplified violence utilised by criminal syndicates – referred to throughout this article as organised criminal groups (OCGs) – continues to morph into forms never contemplated by the principal authorities that define armed conflicts, whether international or non-international. Current events in places like Mexico, Honduras, El Salvador and parts of Brazil indicate that increasingly states will be compelled to employ military force in response to the imminent physical danger created by this amplified violence.[2]

Despite this complexity, it is not surprising that proponents of robust state response authority press for treating these situations as non-international armed conflicts – a characterisation that triggers a broader range of response authorities than those associated with a pure law enforcement response. It is equally unsurprising, however, why critics of this expansion press back, arguing that these threats fail to justify departure from a pure law enforcement paradigm subject to peacetime human rights norms. These debates expose an operational and tactical incongruity of increasing significance: the criminal objectives of these groups suggest that they represent simply a new incarnation of a law enforcement challenge. However, the nature of violence associated with OCGs may compel governments to respond with military capabilities, utilising tactics more aligned with armed conflict authority than law enforcement authority, especially to re-establish government authority over especially afflicted areas. This quote from a recent article, addressing Brazil's efforts to reclaim control over *favelas* plagued by criminal gangs, is indicative of this type of reaction:[3]

> Navy tanks entering the narrow twisted alleys with a pink sunrise as a backdrop, naval riflemen in combat fatigues, elite military, federal and civil police squads, drug-sniffing dogs, armoured personnel carriers and helicopters all contributed to the atmosphere of an independence day parade.

Until recently, the locus of military missions along the spectrum of legal authority seemed relatively clear. Those executed in response to organised armed threats – whether external in the form of military threats from other states or internal in the form of armed dissident or insurgent groups – qualified as armed conflicts and accordingly triggered authorities and obligations derived from

[2] For example, it is estimated that more than 60,000 people have died in drug-related violence in Mexico in the last decade: 'Q&A: Mexico's Drug-related Violence', *BBC News,* last updated 25 November 2013, http://www.bbc.co.uk/news/world-latin-america-10681249; Honduras is confronting drug-related violence that has resulted in the highest per capita murder rate in the world, and has deployed military forces to gain control of the most violent neighbourhoods: 'Inside the World's Deadliest Country', *CBS News*, 31 December 2013, http://www.cbsnews.com/news/inside-the-worlds-deadliest-country-honduras/; El Salvador recently deployed more than 4,000 army personnel in response to criminal gang violence: 'El Salvador's Open Wound', *Al Jazeera*, 17 January 2012, http://www.aljazeera.com/programmes/insidestoryamericas/2012/01/201211782215341419.html; Brazil utilises an elite military police and other military units to reclaim control over the notoriously violent *favelas* of Rio: Fabiana Frayssinet, 'Brazil: "Pacification" of Favelas Not Just a Media Circus', *Inter Press Service News Agency*, 4 July 2013, http://www.ipsnews.net/2011/11/brazil-pacification-of-favelas-not-just-a-media-circus/.

[3] Frayssinet, ibid.

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the law of armed conflict (LOAC). All other military operations (not involving hostilities with organised armed opposition forces) fell within a domestic law enforcement legal framework subject to peacetime international human rights obligations.

This range of operational missions created what was and remains in effect a binary framework for assessing the legality of the use of force in the context of such missions. When the military mission is within the context of an armed conflict, the LOAC applies, and military forces may invoke status-based use of force authority against identified members of the opposition organised belligerent force: deadly force is a permissible measure of first resort based on a determination of belligerent group status. In contrast, military missions conducted outside the context of armed conflict (or within an armed conflict but directed against a non-belligerent threat) are subject to what are best understood as conduct-based or constabulary use of force norms governed by international human rights law (and often referred to as a law enforcement framework): deadly force is justified only in response to imminent threats of death or serious bodily harm assessed on an individualised case-by-case basis.

There is no question that soldiers confront operationally and tactically significant challenges when thrust into a situation of intense violence – one that has not crossed the legal definitional threshold of a LOAC but, nonetheless, carries with it many of the characteristics and all of the dangers of a LOAC. The binary legal framework means that, when using military force in response to an internal threat *not* considered to be an armed conflict, the legality must be assessed through a pure constabulary legal authority lens. In such a context, as noted by the United Kingdom House of Lords, 'to kill or seriously wound another person by shooting is prima facie unlawful'.[4] Such an analytical starting point is wholly inconsistent with the LOAC where employing force likely to result in death or grievous bodily harm is a permissible measure of first resort based on a determination of belligerent group status and where the burden to rebut that status is imposed on the object of attack (through surrender), and not the attacker.

This article explores how and why the changing nature of organised criminal groups necessitates a reconsideration of the traditional assumption that efforts to subdue such groups must always fall within a law enforcement legal framework. In so doing, the article focuses heavily on the operational and tactical incongruity of subjecting military operations conducted for this purpose to law enforcement rules. However, it also considers the risk of authority overbreadth that may flow from characterising such operations as armed conflicts and, accordingly, proposes methods to limit this risk. Ultimately, any solution to the uncertainty produced by these emerging threats should ideally achieve two goals:

(i) to strike a fair balance between operational and tactical authority to ensure that military forces responding to OCGs are not unjustly handicapped by rules that are inappropriate for the nature of the threat; and
(ii) to ensure that the response to these threats does not permit a widespread deviation from normal law enforcement authorities not justified by actual operational and tactical necessity.

[4] *Attorney General for Northern Ireland's Reference (No 1 of 1975)* [1975] AC 105,136, Lord Diplock and others (*Attorney General's Reference*).

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2. EMERGING NON-STATE THREATS: BLURRING THE LINE BETWEEN ARMED CONFLICT AND THE BATTLE AGAINST ORGANISED CRIMINAL GROUPS

Organised crime is nothing new. States have struggled for decades to counter the illicit activities of criminal syndicates.[5] Indeed, pop culture is replete with books and films focused on these groups and the challenges they pose for law enforcement agencies.[6] To be sure, they were intimidating organisations, but their modern incarnations, transnational organised criminal gangs, have evolved and expanded to such an extent that they now threaten national, and in some cases regional, stability.[7] Some of these threats are even evolving in a manner that extends their threat to stability and security beyond simply local or regional concerns and into the international realm.[8] Organisations like the Chinese Triad, Russian Mafia and the Japanese Yakuza have spread their tentacles across continents and have infiltrated several layers of society and government.[9] In the post-Cold War era, these organisations have exploited weakened state governments and global commerce to expand their criminal empires and activities.[10] The prevalence of this threat cannot be underestimated, and the corruptive influence of organised crime has become almost permanently embedded over large areas of Europe, Central and South America, and Asia.[11]

Certainly, the objective of organised crime has always been to profit from illegality, and this applies to transnational criminal syndicates no differently from other organised crime groups. However, the modern pervasiveness and intensity of activities such as gambling, prostitution and violence is producing a historically unprecedented degree of destabilisation.[12] While violence has always been associated with organised crime, these modern criminal organisations seem to be evolving to present states with an unprecedented challenge to governing authority. In the past, groups like the Mafia always seemed to avoid antagonising government authorities but, unlike their predecessors, modern OCGs appear far less inhibited in their use of violence.[13] Indeed,

[5] Jerome P Bjelopera and Kristin M Finklea, 'Organized Crime: An Evolving Challenge for U.S. Law Enforcement', *Congressional Research Service*, 6 January 2012, RL 41547.
[6] Mario Puzo, *The Godfather*, 1969 (film).
[7] John Rollins and Liana Sun Wyler, 'Terrorism and Transnational Crime: Foreign Policy Issues for Congress', *Congressional Research Service*, 11 June 2013, RL 41004.
[8] Joseph E Ritch, 'They'll Make You an Offer You Can't Refuse: A Comparative Analysis of International Organized Crime' (2002) 9 *Tulsa Journal of Comparative and International Law* 569, 572.
[9] ibid 578–92; see also Edgardo Rotman, 'The Globalization of Criminal Violence' (2000) 10 *Cornell Journal of Law and Public Policy* 1, 10.
[10] Rotman, ibid 10.
[11] Ritch (n 8).
[12] Phil Williams, 'Problems and Dangers Posed by Organized Transnational Crime in the Various Regions of the World' in Phil Williams and Ernesto U Savona (eds), *The United Nations and Transnational Organized Crime* (Routledge 1996) 1, 31.
[13] Rotman (n 9) 4 ('The transnational expansion of criminal organizations has increased the level of violence through turf wars, reprisals, and attacks on state enforcement agencies and political officials. Organized crime has created a market in violence, subcontracted to and perpetrated by local criminals'); 10 ('Violation of democratic human rights is part of the picture of violence and intimidation. Webster and others have underscored contract killing as one of the most pernicious problems for Russian law enforcement. This is reflected in a 1996

today it seems much more common for OCGs to choose to employ widespread violence and brutality that directly challenge government authority in pursuit of their broader criminal objectives. While much of this violence is the product of rivalries between criminal groups and is in that sense internecine, it is increasingly also directed against government authority and innocent civilians.[14] Some OCGs have even escalated the intensity of their aggression to such an extreme level that the host nation has had to drastically escalate levels of enforcement to near militaristic levels.[15] As a result, the nature of violence associated with these criminal organisations, especially in certain specially affected states, reflects a radical transformation in the equation of battling these threats.

Mexico is in many respects symbolic of this evolving paradigm. The level of violence that Mexico's OCGs direct against not only innocent civilians, but also government forces and officials, indicates an apparent objective of demonstrating total impunity from government authority.[16] This, coupled with the obvious intimidation produced by terrorising both the civilian population and tactically inferior law enforcement personnel, has resulted in unprecedented casualty rates and overwhelmed normal law enforcement response capabilities.[17] Indeed, the highly organised nature of the criminal syndicates operating in Mexico, along with the duration and intensity of violence produced by these tactics, has many experts pondering why the situation should not be classified as an armed conflict.[18]

Mexico is not alone in facing this destabilising threat. Many would probably be surprised to learn that Honduras suffers the highest per capita murder rate in the world.[19] Other countries in the region similarly are struggling to stem the tide of OCG violence that is destabilising their already challenged societal structures, including El Salvador, Guatemala, Panama, Brazil and Colombia, to name just a few.[20] The governments in each of these countries face the immense challenge of responding to a level of violence and brutality that genuinely seems to know no limit. OCG activities in these countries have, in a very real sense, exposed the incapacity of

Russian Ministry of the Interior annual report, which mentions that of 562 contract murders in Russia in 1994, only 132 were solved').

[14] Regina Menachery Paulose, 'Beyond the Core: Incorporating Transnational Crime into the Rome Statute' (2012) 21 *Cardozo Journal of International and Comparative Law* 77, 87; see also Rotman (n 9) 4.

[15] Luz E Nagle, 'Global Terrorism in Our Own Backyard: Colombia's Legal War against Illegal Armed Groups' (2005) 15 *Transnational Law and Contemporary Problems* 5, 13–14; Nagesh Chelluri, 'A New War on America's Old Frontier: Mexico's Drug Cartel Insurgency' (2011) 210 *Military Law Review* 51, 54 ('From the beginning of the conflict, the Mexican government has been treating the war as a police action with the aim of prosecuting the leadership of the cartels. However with its police forces unable to cope with the cartels' corrupting influence and military power, the Mexican government deployed its army. The Mexican government has yet to admit the cartels pose a direct threat to the Mexican state').

[16] William A Fixkendra and others, 'Offense, Defense, or Just a Big Fence? Why Border Security is a Valid National Security Issue' (2012) 14 *Scholar* 741, 752–53.

[17] ibid.

[18] Carina Bergal, 'The Mexican Drug War: The Case for Non-International Armed Conflict Classification' (2011) 34 *Fordham International Law Journal* 1042; see also Eric Talbot Jensen, 'Applying a Sovereign Agency Theory of the Law of Armed Conflict' (2012) 12 *Chicago Journal of International Law* 685, 713.

[19] 'UNODC Homicide Statistics', *UNODC*, http://www.unodc.org/unodc/en/data-andanalysis/homicide.html.

[20] Melissa Siskind, 'Guilt by Association: Transnational Gangs and the Merits of a New Mano Dura' (2008) 40 *George Washington International Law Review* 289, 293.

the government to perform its most basic function – the maintenance of internal stability – and the OCG activities may, in fact, be motivated by the objective of demonstrating this governmental incapacity.[21]

In response, afflicted governments are increasingly calling upon their armed forces to respond to these OCG threats and restore government authority over areas dominated by these groups. Many of these operations manifest the characteristics of classic 'clear/hold' missions from conflicts such as Iraq and Afghanistan, conducted by military forces trained and equipped for combat. What is the legal status of such situations within the lexicon of international law, and how does it impact upon the authorities and obligations associated with such missions? Are such operations simply 'militarised' law enforcement missions, or do they cross the critical legal threshold into the realm of non-international armed conflicts?

While simply using military forces at the domestic level does not indicate a shift from a law enforcement paradigm to an armed conflict paradigm, the nature of these situations and the government and military response suggest that this threshold has been crossed. How international law defines this demarcation point is therefore the first essential factor in assessing the viability of an armed conflict characterisation for the military response to OCGs. Beyond that initial legal question (addressed below in 2.1), it is equally essential to understand the operational and tactical consequences of the armed conflict versus law enforcement delineation, as well as the different presumptions on which the two frameworks rest, with regard to how individual and organisational threats dictate presumptions regarding the use of force (addressed below in 2.2 and 2.3 respectively).

2.1 Conflict Identification, Criminal Threats and the Motive Question

Since the end of the Second World War, most armed conflicts have occurred between states and non-state armed groups,[22] and the past decade has been marked by the trend to expand the universe of situations that qualify as non-international armed conflicts. The most notable example of this expansion is the concept of transnational armed conflict against terrorist organisations.[23] Scholars and experts have already begun to argue that violence resulting from internal organised criminal threats belongs under the banner of a non-international armed conflict (NIAC).[24] The assertion that these situations qualify as NIACs has been covered in greater detail elsewhere,[25] but a brief summary of the relevant legal and factual justifications for this designation is useful.

[21] Rotman (n 9) 4, 7.
[22] Orla Marie Buckley, 'Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara' (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 793, 794, 806.
[23] Rosa E Brooks, 'War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror' (2004) 153 *University of Pennsylvania Law Review* 675.
[24] Chelluri (n 15) 56–57; see also Jensen (n 18) 712–13.
[25] Bergal (n 18); see also Chelluri (n 15); Jensen (n 18) 712–13.

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Common Article 3 (CA3) to the four 1949 Geneva Conventions established the category of NIAC, defined as an 'armed conflict not of an international character'.[26] Traditionally, this was understood to encompass purely internal hostilities between state armed forces and insurgent or dissident groups. However, the understanding of this term has evolved to cover other situations of armed hostilities between states and non-state forces, or even between competing non-state forces.[27] Whether emerging threats posed by OCGs fall within this category of armed conflict is in many ways the cutting edge of this evolution. However, in recent decades and following cases such *Hamdan v Rumsfeld*,[28] there has been a definitive if not conclusive movement towards broadening CA3 to support this conclusion.[29]

A commonly applied template for assessing the existence of armed conflict is derived from a seminal opinion by the International Criminal Tribunal for the former Yugoslavia (ICTY),[30] which was created by the United Nations Security Council in response to the widespread violations of international humanitarian law in the conflicts that ravaged the Balkans in the 1990s. The Tribunal's early decision in *Prosecutor v Tadić*[31] significantly contributed to the substantive understanding of NIACs. As one author has noted:[32]

> Although there is no internationally accepted definition of internal armed conflict, the *Tadić* case provides a singular element, a catch all, to show 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized groups or between such groups within a State'.

Additionally, though territorial control is not conclusive in and of itself for the identification of a CA3 conflict, '[where] territory [is] under the control of a party',[33] it can act as an additional objective indication of a NIAC.[34]

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[26] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I), art 3; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea (entered into force 21 October 1950) 75 UNTS 85 (GC II), art 3; Geneva Convention (III) Relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III), art 3; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 3.

[27] ICTY, *Prosecutor v Tadić*, Appeal on Jurisdiction, IT-94-1-AR72, Appeals Chamber, 2 October 1995.

[28] *Hamdan v Rumsfeld* 548 US 557 (2006).

[29] Sylvain Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 *International Review of the Red Cross* 1, 75–78; see also Bergal (n 18) 1056–57.

[30] ibid 71–72, 76.

[31] *Tadić* (n 27).

[32] Chelluri (n 15) 91.

[33] Bergal (n 18) 1060; see also *Tadić* (n 27) para 70.

[34] Control of territory by the non-state belligerent group is an explicit requirement to trigger the applicability of the 1977 Additional Protocol II to the Geneva Conventions (developed to supplement the minimal treaty regulation of non-international armed conflicts provided by Common Article 3 to the four Geneva Conventions): Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (AP II). Art 13 of AP II imposes a targeting discrimination obligation on parties to such conflicts, thereby acknowledging that parties are permitted to use combat power according to traditional conduct of hostilities rules in such conflicts. At least one scholar has posited that this indicates that the conduct of hostilities rules are inapplicable to NIACs that fall

With regard to the violence in Mexico, the objective indicia of widespread hostilities between armed organised groups makes it difficult to contradict at least a de facto NIAC conclusion. In addition, applying what has become an increasingly endorsed 'two prong' test for the existence of a NIAC derived from *Tadić*, OCGs appear to satisfy the organisation and intensity elements.[35] How such elements interact with each other (whether they are strictly independent requirements or factors to guide an assessment of the totality of the circumstances) is the subject of a recent essay I authored with Laurie Blank.[36]

Under any application of these factors, the intensity and duration of hostilities coupled with the indicia of organisation of these groups arguably satisfy this test. Furthermore, government response with regular armed forces – an increasingly common feature of responding to militant organised criminal threats – only bolsters this conclusion. Although deploying armed forces in response to a domestic disturbance does not in and of itself create a situation of armed conflict, government use of regular armed forces is often a critical de facto indication that the situation has surpassed the capability of normal law enforcement response mechanisms and, therefore, qualifies as an armed conflict as noted in the Commentary to Common Article 3.[37] The especially

within the scope of CA3 but have yet to trigger AP II because of the lack of territorial control by the non-state party: Françoise Hampson, 'Between Scylla and Charybdis: The Interplay of Conduct of Hostilities and Law Enforcement from a Policing Perspective', 7th Annual Minerva/ICRC International Conference on International Humanitarian Law 'Conduct of Hostilities and Law Enforcement: A Contradiction in Terms?', 3–4 December 2012 (notes on file with the authors).

This NIAC without conduct of hostilities concept seems to be inconsistent with both the historical nature of NIACs and the general interpretation of conflict classification. For example, although not a party to AP II, the United States has always indicated that it considers the rules of AP II to be applicable to any NIAC that falls within the scope of CA3. Indeed, the only aspect of AP II criticised by President Reagan when he transmitted the treaty to the US Senate for advice and consent was the more demanding triggering requirements of the Protocol: Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-international Armed Conflicts, S. Treaty Doc No 2, 100th Cong, 1st Sess, IV (1987), reprinted in (1987) 81 *American Journal of International Law* 910, 911.

A further example is provided by Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 43–45. That study acknowledges that armed conflict includes situations of hostilities between organised armed groups, or 'parties', and in no way qualifies the assessment of applying conduct of hostilities rules only to those situations that trigger AP II.

[35] *Tadić* (n 27) para 562.

[36] Geoffrey S Corn and Laurie R Blank, 'Losing the Forest for the Trees: Syria, Law and the Pragmatics of Conflict Recognition' (2013) 46 *Vanderbilt Journal of Transnational Law* 693.

[37] Jean S Pictet (ed), *Commentary on the Geneva Convention III Relative to the Treatment of Prisoners of War* (ICRC 1960) Common Article 3 (Note: Article 3 is common to all four of the Geneva Conventions of 1949):

> [M]any of the delegations feared that it might be taken to cover any act committed by force of arms – any form of anarchy, rebellion, or even plain banditry. For example, if a handful of individuals were to rise in rebellion against the State and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article? ... these different conditions, although in no way obligatory, constitute convenient criteria …:
>
> (1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
> (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
> (3) (a) That the de jure Government has recognized the insurgents as belligerents; or

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relevant feature of such deployments is the nature of the tactical operations conducted by the armed forces. As has been increasingly the case in places like Mexico, Brazil, El Salvador and Honduras, when military operations take the form of 'force on force' engagements, the Commentary emphasis seems directly in point. The fact that 'US Pentagon and Mexican government officials have conceded that these are not typical circumstances and that civilian law enforcement is not adequately equipped to handle the conflict between Mexico and Mexican drug cartels'[38] displays the true reality of this response.

Motive – namely that of the OCGs engaged in violence with other groups or the state – takes on a significant role in the conflict recognition debate in these situations. Indeed, there are genuine questions as to the significance of the absence of a traditional political motive for criminal violence in this conflict assessment. Indeed, the entire issue of motive in the conflict analysis equation is an area of contemporary uncertainty. The criminal-commercial and insurgent-political motivation bifurcation between criminal organisations and other belligerent movements has therefore contributed to a blurring of the line between organised criminal activity subject to peacetime law enforcement responses, governed by human rights law, and armed conflict, governed by the LOAC. This dichotomy, however, seems to be increasingly irrelevant in light of the emerging consensus that, consistent with the de facto emphasis of the conflict identification paradigm,[39] such assessments must be based exclusively on whether the situation involves organised belligerent groups engaged in sufficiently intense hostilities.[40]

There are several considerations that account for the growing consensus that motive for violence is in no way dispositive of the existence of a NIAC. According to the International Committee of the Red Cross,[41]

(b) that it has claimed for itself the rights of a belligerent; or
(c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
(d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

(4) (a) That the insurgents have an organization purporting to have the characteristics of a State.
(b) That the insurgent civil authority exercises de facto authority over persons within a determinate territory.
(c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

The above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection … the Article should be applied as widely as possible.

[38] Bergal (n 18) 1076–77.

[39] Corn and Blank (n 36).

[40] ICTY, *Prosecutor v Limaj*, Judgment, IT-03-66-T, Trial Chamber II, 30 November 2005 [170] ('most importantly in the Chamber's view, the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties; the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant).

[41] Buckley (n 22) 799–800.

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> [a]ll too often, the political objectives are unclear, if not subsidiary to the crimes perpetrated while allegedly waging one's struggle. Are we dealing with a liberation army resorting to terrorist acts, or with a criminal ring that tries to give itself political credibility?

In certain instances, criminal groups may not be formally seeking political or governmental domination, but they have seized territories or taken action to create a zone of immunity from government laws and rule and operate as autonomous entities.[42] Furthermore, some of these groups have formed alliances with terrorist organisations and are funding and supplying terrorist campaigns, while others are simultaneously running criminal operations to fund their own belligerent operations.[43] Finally, some criminal organisations have simply adopted political goals as they have evolved over time.[44] If a group's interests, whether commercial or political, are sufficiently interfered with, the potential for use of violence is equally a reality regardless of motivation. What is potentially more ominous is the very real danger of an OCG generating such chaos and havoc that the host nation itself collapses inward and becomes a failed state.[45] In the end, even if the motives are non-political in the traditional sense, the outward reality of danger to the state's citizens and security, and the destabilising effect on society and government is in effect the same, if not greater, than that presented by the more traditional insurgent threat.[46]

From the perspective of tactical clarity, an armed conflict characterisation for the military response to such threats is obviously appealing. However, this also raises genuine concerns. First, determining if a situation of hostilities between state and non-state operatives constitutes a NIAC is very difficult to ascertain, let alone achieve international consensus.[47] This is especially true in the context of the types of emerging threat that do not seem to have been contemplated when the law relating to this category of armed conflict was developed. The law regulating NIACs evolved in response to distinct types of armed challenge to government authority: movements to replace governing authority or separatist movements to establish independent governing authority. In both contexts, the motive for the violent challenge to government authority was never that of destabilisation or the creation of societal chaos in order to enhance criminal profit.

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[42] Chelluri (n 15) 54, 79–80; see also Bergal (n 18) 1086.

[43] Luz Estella Nagle, 'Latin America: Views on Contemporary Issues in the Region – The Challenges of Fighting Global Organized Crime in Latin America' (2002) 26 *Fordham International Law Journal* 1649, 1652 (discussing the alliance of South American and Middle Eastern organisations); see also Eugene Solomonov, 'US–Russian Mutual Legal Assistance Treaty: Is There a Way to Control Russian Organized Crime'? (1999) 23 *Fordham International Law Journal* 165, 185–86. ('There are also possibilities that authoritarian states, such as Iran, Libya, and North Korea may try to acquire nuclear weapons or material from organized criminal groups in order to enhance their weapons development programs').

[44] John Rollins and Liana Sun Wyler, 'Terrorism and Transnational Crime: Foreign Policy Issues for Congress', *Congressional Research Service*, 19 October 2012, RL 41004.

[45] Chelluri (n 15) 54 ('At this stage of the conflict, Mexico may be moving from "Colombianization" to "Afghanistanization". The issue is viewed seriously by the US Joint Forces Command, which reported in a 2008 study that "two large and important states bear consideration for a rapid and sudden collapse: Pakistan and Mexico"').

[46] Nagle (n 43) 1651–52.

[47] Bergal (n 18) 1046.

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Instead, in the classic internal armed conflict scenario, armed violence is always a means to a political end. Armed OCGs rarely profess a complementary political objective. Instead, violence appears to be used as a means to enhance their control over opportunities to ply their criminal trade, which often includes the creation of chaos that has the added benefit of demonstrating the impotence of government authority.[48] This certainly serves their interest by demonstrating dominance in certain areas of a country in order to enhance the impunity of their criminal activities.

Equally challenging is the ostensible inconsistency between treating a threat as criminal in nature while at the same time classifying it as an armed conflict. The law of non-international armed conflict is, in many ways, built on an implied dichotomy between criminal threats (subject to domestic criminal response authority under human rights law) and threats rising to the level of armed conflict (subject to the LOAC).[49] This dichotomy is based on the apparent assumption that criminal threats are distinct in nature and therefore response authority is limited to law enforcement powers. Of course, this is not an explicit aspect of armed conflict recognition, but it does inject confusion into the response equation.

Even assuming that characterising internal criminal violence as an armed conflict is legally viable, other practical considerations and concerns may also undermine the efficacy of this approach. An armed conflict characterisation would, of course, trigger a more robust use of force authority and eliminate many of the uncertainties and inequities associated with the framework of the constabulary use of force, which are addressed below. However, it would also suggest a range of added authorities that are potentially overbroad when responding to such threats. Most notable among these is the authority to preventatively detain captured criminal organisation operatives (an authority derived from the LOAC principle of military necessity).[50]

For example, if the situation validly constitutes an armed conflict, the state could legitimately use military tribunals to prosecute violations of the laws and customs of war applicable to a NIAC, a process that would be invalid in the absence of armed conflict.[51] However, the risk that such tribunals will be used to try what are in effect ordinary criminal offences under the guise of a wartime scenario raises significant legitimacy issues. One need only consider the ongoing litigation over the subject-matter jurisdiction established by the US Military Commission Act to see how the availability of military tribunals may actually lead to overbroad assertions of criminal jurisdiction over non-state captives.[52] In short, designating the situation as a NIAC may lead to overzealous assertions of LOAC authority with insufficient distinctions as to where, when and to whom those authorities are genuinely applicable. However, employing

[48] Chelluri (n 15) 99.
[49] Pictet (n 37) (discussing and listing the criteria for a NIAC).
[50] James A Schoettler Jr, 'Detention of Combatants and the Global War on Terror' in *The War on Terror and the Laws of War: A Military Perspective* (Oxford University Press 2009) 67; see also Geoffrey S Corn and others, 'Detention' in Vicki Been and others (eds), *The Law of Armed Conflict: An Operational Approach* (Aspen 2012) 309, 310–28.
[51] Jimmy Gurule and Geoffrey S Corn, 'Trial by Military Tribunal' in *The Principles of Counter-Terrorism Law* (West Group 2011) 151.
[52] *Hamdan v Rumsfeld* 548 US 557 (2006); *Hamdan v US* 696 F.3d 1238 (2012).

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military forces in situations that manifest all the de facto indicia of armed conflict, while refusing to acknowledge the true legal nature of the situation into which they are thrust, presents an equally significant risk.

2.2 The Operational and Tactical Consequences of Armed Conflict Recognition

The power to kill through the use of deadly force as a first resort, the power to incapacitate through preventive non-punitive detention, and the power to punish for violations of international law adjudicated before military tribunals are all incidents of engaging in armed conflict. These authorities do not exist within a pure peacetime law enforcement legal framework. Thus, governments responding to OCGs confront a binary framework for assessing the lawful parameters of military response authority. This is most apparent in relation to the authority to employ deadly force. When the military mission is within the context of an armed conflict, military forces may invoke use of force authority based on status determinations: once a potential object of attack is identified as a member of an enemy belligerent group, deadly force is permitted as a measure of first resort.[53] In contrast, operations outside the context of armed conflict, even when conducted by military forces, are subject to what are best understood as conduct-based or constabulary use of force norms: deadly force is justified only in response to imminent threats of death or serious bodily harm assessed on individualised case-by-case assessments.[54] In other words, armed conflict permits the use of status-based targeting – the determination of belligerent status justifies attack.[55]

In contrast, all other situations require a far more restrictive conduct-based use of force, justified only in response to imminent threats of death or grievous bodily harm.[56] It is important to understand that in either situation the military may be, and is likely to be, using deadly force in response to the threat; it is not the actual use of force or the particular types of weapon used that

[53] Department of the Army, *Law of War Handbook* (International and Operational Law Department, US Army Judge Advocate General's Legal Center and School 2004) 84.

[54] Geoffrey S Corn, 'Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict' (2010) 1 *Journal of International Humanitarian Legal Studies* 52, 74, 76–77; Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 *American Journal of International Law* 1, 16; also Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 *New York University Journal of International Law and Policy* 641.

[55] William Boothby, 'And For Such Time As: The Time Dimension to Direct Participation in Hostilities' (2010) 42 *New York University Journal of International Law and Policy* 741; Geoffrey S Corn and Chris Jenks, 'Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts' (2011) 33 *University of Pennsylvania Journal of International Law* 313, 359; Eric Christensen, 'The Dilemma of Direct Participation in Hostilities' (2010) 19 *Journal of Transnational Law and Policy* 281; Trevor Keck, 'Not All Civilians Are Created Equal: The Principle of Distinction, The Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare' (2012) 211 *Military Law Review* 115.

[56] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross and Martinus Nijhoff 1987), art 51 ('Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities').

determines the relevant legal framework. Rather, as explained here, the characterisation of the situation (as either an armed conflict or not an armed conflict) determines the relevant legal framework, which then provides the parameters for how, when and against whom force can be used.

It may be tempting to conclude that in many situations involving the use of military force to address the OCG threat to public order, the IHL/IHRL[57] use of force dichotomy produces no significant consequence. Whether operating within a law enforcement or an armed conflict legal framework, government forces that are subjected to attack, or even an imminent threat of attack, certainly may use proportional force in response, including deadly force, when less than lethal means would not reasonably be sufficient to defend themselves or others. However, as is discussed below, even in situations where government agents are confronted with such an imminent threat, the scope of tactical response authority when operating within a law enforcement legal framework is not analogous to that permitted in the context of armed conflict.

When the state employs military units capable of using force in a manner that is far more aggressive than that normally associated with law enforcement operations, such operations seem to be obviously responsive to the fact that the OCG threat often exceeds the normal law enforcement response capabilities. However, uncertainty as to the legal characterisation of such operations places its armed forces in a legal, operational and tactical twilight zone: their activities are normally characterised as militarised law enforcement conducted within a pure human rights/law enforcement framework. Yet, consistent with the use of force associated with armed conflict, the threat they are called upon to confront is determined to inflict maximum violence on them and the civilian population.

The military operational impact of the incongruity between the nature of the military response to OCGs, driven by the threat and what is needed to defeat or repel that threat, and the parameters and assumptions of the law enforcement legal framework is therefore significant. Armed forces are tasked to engage highly armed and dangerous organised armed groups – the type of situation that would seem to justify and demand status-based engagement authority.[58] However, such authority is inconsistent with and exceeds that provided for in military support to law enforcement legal characterisation. Instead, their engagement authority is technically purely conduct-based. As a result, when operations against OCGs are not characterised as armed conflict, military forces are required to treat each potential object of violence as presumptively inoffensive, requiring both an individualised validation for every use of force and an effort first to exhaust the least restrictive means of subduing the opponent. In short, although the military units are engaging armed organised opponents that present all the tactical characteristics of an organised belligerent group, they are deprived of the scope of status-based engagement authority associated with the presumptive threat that is normally essential to facilitate effective tactical execution of operations directed against such groups.

[57] IHL is used to refer to international humanitarian law; IHRL is used to refer to international human rights law.
[58] Alexandra Olson, 'Kingpin's Death Could Mean More Violence in Mexico', *NBC News*, 30 July 2010, http://www.nbcnews.com/id/38481971/#.UUyFV1fm3cw.

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Conducting military operations within the framework of law enforcement-based use of force rules is not unremarkable, and is in fact a common aspect of contemporary military operations, which often occur outside armed conflict situations.[59] Yet depriving armed forces of the scope of authority derived from the true nature of the threat and risk manifested by OCGs produces a distorted and unrealistic imbalance between the humanitarian concern for protecting individual rights and the legitimate role (and obligation) of the state to protect itself and its citizens. Furthermore, the binary use of force paradigm, when coupled with the growing militarisation of criminal organisations that seek to directly challenge and destabilise the state, has created a dangerous asymmetry that favours those groups.[60] The aversion to synchronise the legal characterisation of military operations with the true nature of the threat and operational situation generates a dangerous exercise in legal fictions: either the armed forces will expose themselves to unjustified risk by attempting to treat an organised belligerent threat as a normal law enforcement situation – a situation that presumes autonomous actors and the norm of law compliance; or they will apply the type of robust force operationally necessary to respond effectively to the threat and engage in post-hoc machinations to justify the deviation from law enforcement norms.

One solution to this uncertainty – perhaps the most appealing – is to acknowledge that military operations against OCGs are more properly characterised as non-international armed conflicts. This is certainly a plausible option and would justify the type of robust tactical use of force often necessitated by the nature of the threat. Acknowledging the true de jure nature of such situations allows for legitimate adjustments in the scope of use of force authority necessary to provide government forces with tactical clarity at the time of mission execution and with an accordant immunity from criminal or civil liability that should flow from such an adjustment. As an initial proponent of the concept of transnational armed conflict, I am certainly not opposed to this characterisation in the abstract.[61] Indeed, at a theoretical level, this approach seems ideal for many precisely because it preserves the formal binary paradigm of law enforcement and LOAC as the governing legal frameworks.

However, two considerations raise feasibility concerns for this solution. First, it runs counter to what might best be described as 'conflict classification momentum', which seems increasingly to demand satisfaction of a strict formalistic test to justify the recognition of a NIAC.[62] Because these OCG threats do not manifest themselves in traditional insurgency or dissident modality, there is an inevitable pressure on states to limit responsive measures to those falling within a constabulary/law enforcement legal framework. Second, and perhaps more significantly from a pragmatic perspective, it ignores the numerous political and policy pressures that have and will continue to inhibit states from characterising a military response to criminal threats as an armed conflict. For example, there is the political risk associated with

[59] Watkin (2004) (n 54) 1–2.
[60] Bergal (n 18) 1066–67.
[61] Geoffrey S Corn, 'Hamdan, Lebanon, and the Regulation of Armed Conflict: The Need to Recognize a Hybrid Category of Armed Conflict' (2006) 40 *Vanderbilt Journal of Transnational Law* 295.
[62] Corn and Blank (n 36) 2–5; see also Advisory Service on International Humanitarian Law, 'What is International Humanitarian Law?', ICRC, July 2004, http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

acknowledging that the government is incapable of maintaining order or the inevitable international scrutiny that will result from asserting the existence of an armed conflict in response to an OGC threat. Indeed, if this solution were ideal and such other considerations did not inhibit the willingness of states to acknowledge the existence of armed conflict, situations such as that in Mexico might very well have been recognised long ago by the national government as an armed conflict.[63] However, clinging to the alternative fiction that such operations simply involve robust law enforcement is equally untenable for it produces significant operational and tactical inconsistencies, as introduced above.[64]

Two quintessential examples of such tactical consequence of this binary use of force framework arose from the UK's use of regular armed forces to bolster the law enforcement response to the threat posed by the Irish Republican Army (IRA). In *Attorney General for Northern Ireland's Reference (No 1 of 1975)*, the first example, the House of Lords reviewed the acquittal of a British soldier on a charge of murder for shooting and killing a UK citizen in Northern Ireland.[65] The soldier was engaged in a mission to patrol the area for IRA armed operatives, and his unit had been informed to expect an ambush.[66] The soldier observed the victim, a young man in an open field, and when the victim fled in response to the soldier's demand to halt,[67] the soldier shot him with his service weapon – a self-loading rifle.[68]

The Lords addressed the legality of the shooting through a law enforcement lens,[69] even though they were clearly sympathetic to the challenges that soldiers such as the defendant confronted. Because the victim was fleeing from the soldier when he was shot and killed, the court concluded that it was not viable to analyse the case as an exercise of self-defence.[70] Instead, the key issue was whether the use of force was a reasonable measure to prevent the commission of future crime – essentially to apprehend a suspect. Because the crime the soldier would have been attempting to prevent involved a potential grave threat to others in the form of terrorist activity, the House of Lords concluded that the reasonableness of the use of deadly force was necessarily a question of fact for the jury.[71] It also concluded that any such assessment of reasonableness must

[63] Bergal (n 18) 1080.
[64] The intensity and scope of the conflict between the Mexican government and domestic drug cartels have forced the Mexican government to respond not only with law enforcement forces, but also military forces, in a continuing and escalating conflict. The nature of both the Mexican drug war and the corresponding military response transform this conflict from mere criminal activity to an armed conflict, to which the law of armed conflict should apply. Consequently, the Mexican government's recognition of the existence of a NIAC would provide the state with greater latitude to combat the drug cartels by using a level of force that is permitted during an armed conflict. In addition, this categorization would impart a framework for the application of force by the Mexican military. See Bergal (n 18) 1048, 1081 ('This has been evidenced by the amount of soldiers and police deemed necessary to quell the fighting as well as the nature of the combat, which includes the use of automatic weapons and grenades by the cartels. Adhering to one of the most basic tenets of the law of war, proportionality, the Mexican government has resorted to the employment of the military forces to combat the cartels').
[65] *Attorney General's Reference* (n 4).
[66] ibid 106.
[67] ibid 111.
[68] ibid 110.
[69] ibid 109.
[70] ibid 148.
[71] ibid 137.

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consider the totality of the circumstances confronting the soldier at the time of the shooting, including his extremely limited reaction time.[72] Finally the House of Lords suggested that even if his judgment of necessity had been objectively unreasonable, his subjectively honest belief of necessity could justify reducing the offence from murder to manslaughter (a doctrine often defined as imperfect self-defence).[73]

However sympathetic to the soldier's situation the House of Lords may have been, its analysis and decision highlights the consequence of using military force in response to an internal threat in a situation not considered to be an armed conflict: the legality of every use of force must be assessed through a pure law enforcement legal authority lens. In fact, early in the opinion, the House of Lords noted that 'to kill or seriously wound another person by shooting is *prima facie* unlawful'.[74] As mentioned above, such an analytical starting point is wholly inconsistent with the LOAC, where employing deadly force is a permissible measure of first resort based on a determination of belligerent group status and where the burden to rebut that status is imposed on the object of attack (through surrender) – not the attacker. The Lords' analytical method reflects the very different use of force legal framework applicable in non-conflict situations: deadly force is always a measure of last resort, thus imposing the burden on the state operative to validate the actual threat posed by the object of violence.

The second example appears in another, far more widely cited case involving the use of UK military forces in response to the IRA terrorist threat: *McCann v United Kingdom*.[75] Relatives of several Provisional IRA (PIRA) terrorist operatives killed by UK military special operations forces on the island of Gibraltar sued for damages for wrongful death. After losing their case in the UK courts, the relatives brought an action against the UK government in the European Court of Human Rights (ECtHR), alleging a violation of the European Convention on Human Rights resulting from an arbitrary deprivation of life by the UK government.[76]

The facts that led to the killing of the PIRA operatives provide an ideal example of the operational (but not legal, given the binary legal framework described above) grey area between a mission to apprehend a criminal terrorist suspect pursuant to a law enforcement operation and a mission to engage a belligerent operative of an organised armed group within the context of an armed conflict. Based on credible intelligence, Gibraltar police authorities requested military counter-terrorism assistance to foil a suspected car bomb attack in a densely populated part of the island.[77] In response,

[72] ibid.

[73] ibid 132. The critical issue, according to Lord Diplock, was whether the soldier made a reasonable judgment of necessity to justify what is otherwise an unlawful killing – self-defence or the defence of others. Such a judgment requires a reasonable belief that the victim – the object of state violence – was engaged in individual conduct that represented an imminent threat of death or grievous bodily harm as the result of his flight (for example, because he may be able to warn others to enable them to launch an ambush). The House of Lords emphasised that a post hoc assessment of reasonableness required the finder of fact to consider the situation as perceived through the subjective perspective of the defendant, including the nature of the training, equipment and intelligence associated with his mission (ibid at 147–48).

[74] ibid 136.

[75] *McCann and Others v United Kingdom* (1995) 21 EHRR 97.

[76] ibid para 1.

[77] ibid paras 13–15.

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the UK dispatched a team from the Special Air Services (SAS) – British military Special Forces trained, inter alia, to conduct counter-terrorism operations.[78] These forces were briefed on the PIRA plan to park a bomb-laden vehicle in a central part of the city and detonate the explosives by remote control.[79] Authorities placed the suspected PIRA operatives under surveillance, confirmed their entry into Gibraltar by road, and identified what they believed was the car bomb parked in the designated location.[80] SAS personnel then followed several operatives they believed were both armed and in possession of the remote detonation device.[81] When these forces believed that the operatives realised they were being followed and observed one of them reach into his pocket, they opened fire, killing two of the suspects.[82] Upon inspection, it turned out that the operatives did not have the detonation devices,[83] although a large amount of explosives was subsequently found in the suspect vehicle, and the two men killed by the soldiers were in fact PIRA operatives.[84]

Addressing the legality of the killings in a pure law enforcement framework, the ECtHR condemned the UK for failing to apprehend the operatives when they crossed the border into Gibraltar, noting that such an action would have averted the necessity to resort to deadly force.[85] In response, the UK asserted that it was reasonable to allow the operatives to progress deeper into the operation in order to enhance the ability of the police authority to produce a broader incapacitation impact on the group by identifying a wider circle of operatives.[86] However, because the ECtHR concluded that the UK bore an obligation to use the least harmful means to avert the risk, it rejected this 'tactical' decision. The Court was also critical of the use of armed forces trained for a much more expansive use of force authority than that normally associated with police or constabulary personnel.[87] Although the Court did not condemn the soldiers individually, it did condemn the government decision to utilise military forces trained to use force in a far more aggressive manner than that normally associated with law enforcement action. This failure to plan the operation so as to minimise the risk of using lethal force, along with the failure to utilise non-deadly force to neutralise the threat (the failure to apprehend at the border crossing), led the Court to conclude that the killings were in fact arbitrary and in violation of the European Convention.[88]

2.3 Individual and Organised Threats and Use of Force Presumptions

In an earlier article, I discuss how underlying threat-derived presumptions explain the diametrically opposed use of deadly force authority associated with the armed conflict or law enforcement

[78] ibid para 14.
[79] ibid para 24.
[80] ibid para 38.
[81] ibid paras 39–47.
[82] ibid paras 61–62.
[83] ibid para 93.
[84] ibid para 99.
[85] ibid para 203.
[86] ibid para 204.
[87] ibid para 213.
[88] ibid para 214.

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legal frameworks.[89] In the law enforcement paradigm, use of force rules reflect a presumption that compliance with law and peace is the normal condition of individuals encountered by law enforcement personnel.[90] This presumption drives the conduct-based use of force paradigm: because individuals are presumptively peaceful, government actors may use force only in response to individual conduct that rebuts this presumption.[91] Furthermore, that authority is strictly limited to restoring the status quo ante of non-threat, which is precisely why a proportionality obligation operates to protect the object of state violence from excessive force.[92]

In contrast, use of force during armed conflict is based on an inverse presumption: that members of organised belligerent groups represent a constant threat to friendly forces.[93] Thus, membership of the belligerent group indicates that hostile threat is the normal expectation.[94] That presumption is the foundation for status-based targeting – once an individual is positively identified as falling within the status of enemy belligerent, the presumptive threat associated with that status justifies immediate resort to deadly force.[95] Contributing to this status-based targeting authority is the fact that, unlike the normal peacetime criminal, members of organised belligerent groups are not presumptively autonomous agents.[96] Instead, they act as agents for the group leadership.[97] Accordingly, until this subordinate agent relationship has been severed through incapacitation as a result of death, wounds or capture, the status-based presumptive threat remains extant.[98] For this reason, the LOAC proportionality principle in no way limits the amount of force directed against such operatives and, unlike in the law enforcement context, the burden is placed on the operative to manifest severance from opposition belligerent authority in order to rebut the presumption of threat resulting from a status determination.

If either of the two UK/European cases described above had been analysed through an armed conflict legal authority lens, the analysis is likely to have been different. The decisive question would not have been whether the individual manifested an actual imminent threat or whether the agents' use of least harmful means to apprehend and disable the operatives had been a

[89] Corn (n 54) 74.
[90] ibid 76.
[91] ibid.
[92] ibid. In times of peace, the law presumes that most individuals encountered by law enforcement personnel are autonomous, law-abiding and peaceful. As a result, the burden is clearly placed on the government agent to justify a use of force in response to facts that rebut this presumption. This also means that the government agent bears the risk that an individual may in fact be deviating from this presumptive inoffensiveness. During armed conflict, no such burden is imposed on the government actor – the soldier. Instead, the presumption of hostility triggered by a status determination permits what may often be a factually overbroad use of force, which includes an attack on an enemy belligerent who, in fact, poses no real hostile threat at the time of attack (such as enemy belligerents attacked while sleeping or ambushed while unaware of an enemy presence).
[93] ibid 77.
[94] For an analysis of the extent of belligerent targeting authority, see Geoffrey S Corn and others, 'Belligerent Targeting and the Invalidity of the Least Harmful Means Rule' (2013) 89 *International Legal Studies* 536; see also W Hays Parks, 'No Mandate, No Expertise, and Legally Incorrect' (2010) 42 *New York University Journal of International Law and Policy* 769.
[95] Corn and Jenks (n 55) 359.
[96] ibid.
[97] ibid.
[98] ibid 343.

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reasonable alternative option to the use of deadly force. Instead, it would have been whether the object of attack had been properly identified as a member of a belligerent group. If this prima facie judgment had been reasonable in both instances, the analytical progression would have been fundamentally altered. First, unless and until the suspected belligerent operatives manifested an intention to surrender, the killings would have been prima facie lawful.[99] This is because the LOAC places the burden of eliminating the presumption of threat triggered by belligerent status on the object of attack, not on the attacking force.[100] Thus, because the objectives of state action were in both cases suspected of being terrorist operatives – that is, members of an enemy belligerent force – were the situation to have been classified as an armed conflict, that status would ostensibly have justified the use of deadly force as a measure of first resort.

Second, the objects of state violence would not have been protected by a proportional use of force obligation.[101] As a result, there would have been no legal obligation to consider least restrictive means for subduing these operatives.[102] Allowing the individuals to progress more deeply into the operation in order to obtain a tactical advantage, vis-à-vis the *group* as opposed to the individual operatives, would therefore have been permissible.[103]

Applying law enforcement-based use of force rules in situations involving armed confrontations with organised armed groups produces other inevitable tactical uncertainties that would be mitigated in the context of an armed conflict. For example, is the use of weapons and tactics designed to produce a high probability of death legally permissible in a constabulary mission? It is common knowledge that armed forces are routinely equipped with weapons designed to produce such a probability. These weapons are significantly more deadly than the weapons normally associated with law enforcement activities. Furthermore, soldiers are trained to engage targets with a three-shot burst – three rounds fired in close succession at the centre mass of the target.[104] This tactic is intended to increase the probability of producing total submission – a euphemism for death. Does this tactic violate the obligation to use only proportional force against the object of violence during a constabulary mission, or perhaps even when the use of military forces equipped and trained for combat operations to perform a law enforcement mission runs afoul of human rights obligations – a conclusion suggested by the *McCann* decision?

Another significant difference between operating within these divergent legal frameworks is the radically different use of force presumption triggered by retreat and/or flight. When engaging an enemy belligerent operative during armed conflict, flight from battle is considered as retreat or tactical withdrawal. This same allocation of risk justifies pressing an attack on a fleeing enemy belligerent. The attacking force need not speculate on whether flight is an indicator of termination

[99] Corn (n 54) 75–77.
[100] ibid 77–78.
[101] ibid 85; Corn and Jenks (n 55) 345; see also Robert Chesney, 'Ohlin on Capture-or-Kill', *Lawfare.org*, 8 March 2013, http://www.lawfareblog.com/2013/03/ohlin-on-capture-or-kill/ (Capture-Kill Debates) (which lists several links to capture or kill discussions).
[102] Corn (n 54) 87.
[103] ibid 80–82.
[104] US Department of Army, 'Rifle Marksmanship M-16-/M4-Series Weapons', *Field Manual 3-22.9*, August 2008, Table 2–1, 4–48, 5–70, 7–31, http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm3_22x9.pdf.

of the threat or a temporary condition pending return to hostilities. This is a consequence of placing the burden on the belligerent operative to manifest disassociation from the enemy belligerent leadership. Unless and until this happens, that operative bears the risk of attack at all times and in all places.[105] Because retreat in no way indicates that the enemy operative is *hors de combat* (that is, out of the fight or has surrendered),[106] it is axiomatic that attack during withdrawal is lawful. This, however, becomes a far more complex question during a law enforcement mission. Normally, the flight of a suspect who had been using deadly force or had posed an imminent threat of deadly force terminates the conduct-based justification for employing deadly force in response. It is true that in some situations a reasonable judgment that the fleeing suspect poses a threat of death or grievous bodily harm to others will justify the use of deadly force to apprehend (as was suggested in the case of the fleeing Irish citizen discussed above),[107] but this is certainly an exceptional situation.[108]

Inquiry or investigation into the propriety of a decision to use deadly force is another significant difference between the two operational contexts of military action. Because all peacetime killings are prima facie unlawful, the burden will always be explicitly or implicitly placed on the government agent to justify the use of deadly force.[109] In the example above, use of deadly force against a fleeing threat during a law enforcement mission should normally trigger a detailed

[105] ibid; see also Laurie R Blank, 'Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self Defense Justifications' (2012) 38 *William Mitchell Law Review* 1655, 1671; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3, (AP I) art 40; Marco Sassoli and Laura M Olson, 'The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 871 *International Review of the Red Cross* 599, 605–06 ('Combatants may be attacked at any time until they surrender or are otherwise *hors de combat*, and not only when actually threatening the enemy').

[106] AP I, ibid art 41.

[107] *Tennessee v Garner* 471 US 1, 11–12 (1985) ('Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given').

[108] William A Schabas, 'Parallel Applicability of International Humanitarian Law and International Human Rights Law: Lex Specialis? Belt and Suspenders? The Parallel Operations of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum' (2007) 40 *Israel Law Review* 592, 604.

[109] *Attorney General's Reference* (n 4) 105, 136–37:

> To kill or seriously wound another person by shooting is prima facie unlawful … A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large … What amount of force is 'reasonable in the circumstances' for the purpose of preventing crime is, in my view, always a question for the jury in a jury trial, never a 'point of law' for the judge ... The form in which the jury would have to ask themselves the question in a trial for an offence against the person in which this defence was raised by the accused, would be: Are we satisfied that no reasonable man (a) with knowledge of such facts as were known to the accused or reasonably believed by him to exist (b) in the circumstances and time available to him for reflection (c) could be of opinion that the prevention of the risk of harm to which others might be exposed if the suspect were allowed to escape justified exposing the suspect to the risk of harm to him that might result from the kind of force that the accused contemplated using?

inquiry into the reasonableness of the judgment that the use of deadly force was based on a genuine ongoing and imminent threat, something that would not occur during an armed conflict.[110] It is certainly true that investigations into unlawful killings also occur in the context of armed conflict. However, because killing opposition belligerent opponents is prima facie lawful, this remains the exception and not the rule. In the absence of some indicia of a LOAC violation, members of the armed forces are normally not subjected to investigation for the decision to employ deadly force.[111]

Both legitimacy and tactical necessity therefore dictate that any assessment of the appropriate legal framework applicable to government responses to organised criminal violence must take into account how that assessment accords with the operational and tactical needs of the forces employed to address the threat. Conflict recognition and classification is an objective analysis based on the facts of the particular situation as reinforced in both Common Article 2 and Common Article 3 of the Geneva Conventions and their associated commentaries.[112] However, those who rely on this mandate of objectivity often forget that one key component of that objective analysis is how the government views and feels compelled to respond to the relevant threat. An objective analysis that relies only on the nature and activities of the armed group is overly formalised and often incomplete because of a lack of consideration for the nature of the government's response, a factor highlighted in the commentary to Common Article 3.[113] Perhaps more importantly, the credibility of the asserted legal regime framing such a response

[110] *McKerr and Others v United Kingdom* (2001) 34 EHRR 553, para 111.

[111] Geoffrey S Corn and Laurie R Blank, 'The Laws of War: Regulating the Use of Force' in Timothy J McNulty, Paul Rosenzweig and Ellen Shearer (eds), *National Security Law in the News: A Guide for Journalists, Scholars, and Policymakers* (American Bar Association 2012) 97, 114; see also Hays Parks (n 94) 809–10; Richard Murphy and Afsheen J Radsan, 'Due Process and Targeted Killing of Terrorists' (2009) 32 *Cardozo Law Review* 405, 417.

[112] See Pictet (n 37) (discussing and listing the criteria for a NIAC), Common Article 3:

> The discussions at the Conference brought out clearly that it is not necessary for an armed force as a whole to have laid down its arms for its members to be entitled to protection under this Article. The Convention refers to individuals and not to units of troops, and a man who has surrendered individually is entitled to the same humane treatment as he would receive if the whole army to which he belongs had capitulated. The important thing is that the man in question will be taking no further part in the fighting.

Pictet (n 37) Common Article 2 (Note: Article 2 is common to all four of the Geneva Conventions of 1949):

> By its general character, [Common Article 2] deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for recognition of the existence of a state of war ... Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.

[113] Pictet (n 37) Common Article 3.

> It was suggested that the term 'conflict' should be defined or – and this would come to the same thing – that a list should be given of a certain number of conditions on which the application of the Convention would depend. The idea was finally abandoned, and wisely so. Nevertheless, these different conditions, although in no way obligatory, constitute convenient criteria.

among government forces, policy makers and even the aggrieved population will inevitably be linked to the symmetry between the nature of the threat and the scope of permissible response authority. Therefore, threat dynamics simply cannot be ignored in this analysis.

3. Armed Conflict or Law Enforcement: Threat Realities and the Risks of an Either/Or Approach

Uncertainty as to the international legal framework applicable to military operations responding to OCGs may generate important academic debate, but when afflicted with these threats, it is unlikely to inhibit governments in calling upon their armed forces to augment police response capabilities.[114] It is also likely that the paramilitary capabilities of OCGs will increasingly thrust the armed forces into operations that, in many ways, seem functionally indistinguishable – at least at the tactical level[115] – from those conducted in the context of more traditional NIACs. Thus, the different scopes of response authority associated with each legal framework are anything but academic or semantic. In the absence of greater clarity regarding the actual governing legal framework in any given situation and better correlation between legal framework and operational and tactical necessity, an unacceptable degree of uncertainty may well be injected into the tactical execution of military missions directed against OCGs. In turn, this uncertainty may produce tactical hesitation that is both dangerous for government forces and provides an unjustified advantage for their armed criminal opponents.

As noted above, the contrast between law enforcement and armed conflict use of force authority is reflective of the divergent presumptions of threat that exist during peacetime (when law enforcement rules are in effect) as compared with armed conflict. When armed forces engage members of highly armed and organised criminal groups, the nature of the tactical engagements and the threat these forces confront suggest that, like any armed conflict, a risk allocation based on presumptive threat would be logical. However, because to date it does not appear that military responses to OCGs have been characterised as armed conflicts, such missions have been, and are likely to be treated as law enforcement operations even though they may often take place within situations that could qualify as armed conflicts. Accordingly, it is the law enforcement presumption and corresponding risk allocation that will normally frame the legal authority to use force in the context of such operations. Ultimately, this unnecessarily risks producing inconsistency between legal authority and the tactical reality highlighted above.

There are several seemingly obvious solutions to this potential inconsistency between legal authority and tactical reality.

[114] Melanie Reid, 'Mexico's Crisis: When There's a Will, There's a Way' (2012) 37 *Oklahoma City University Law Review* 397, 401; see also Bergal (n 18) 1045–46, 1048.
[115] US Department of Army, 'Operations' *Field Manual 3-0,* February 2008.

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3.1 USING A LAW ENFORCEMENT PARADIGM: PROS AND CONS

One solution is simply to adopt a fiction that every use of force during such missions is consistent with law enforcement/conduct-based targeting authority. Critiquing the validity of such assertions is undoubtedly complicated by the complexity of investigating military action in response to OCGs and the chaos they produce in areas of operations. However, it seems almost impossible to believe that this approach is not a fiction as the military forces engaged in these operations are unlikely to constrain their use of force in accordance with strict law enforcement standards.

Of course, this need not be a fiction, and military forces could certainly comply strictly with law enforcement-based use of force rules. This would eliminate any inconsistency between tactical operations and the controlling legal framework. However, restricting operations against OCGs to strict conduct-based targeting rules, even when the situation could meet the threshold for an armed conflict, may provide the criminal groups with an unjustified windfall. As noted above, there is increasing evidence that the nature of the tactical threat presented by such groups is analogous to that normally associated with organised belligerent opposition forces during armed conflicts. In such situations, it seems illogical to restrict the forces called upon to engage and subdue such threats to use of force rules that are tactically illogical. Such restrictions cede tactical advantage to the armed organised opposition group, and thus the soldier's conduct-based evaluation obligation can be exploited whenever use of force may be employed. If nothing else, the knowledge that use of force decisions will often, if not always, be subjected to post-hoc critique risks injecting individual hesitation into a tactical situation where such hesitation is neither factually justified nor logical.

If it were legally feasible to expand the authority to employ deadly combat power under a pure law enforcement/human rights framework, this might provide a more palatable solution to the legal/tactical authority divergence. Such an approach would isolate the use of force authority from issues relating to detention and trial inherent in an armed conflict legal framework, which may be incongruous with the situation or counter to a government's policies. This could permit a rational adjustment to use of force authority to balance the necessities of the forces engaged in this response with an overarching law enforcement response framework. By retaining an overall peacetime legal framework, while acknowledging the permissibility of tactical use of force authority more analogous to status-based targeting than the pure conduct-based approach, the interests of the armed forces would be reconciled with threat realities, but it would not open the door to deviation from other aspects of the peacetime response framework.

The feasibility of such an approach is highly questionable. As noted earlier, one of the most significant differences between a human rights/law enforcement legal response framework and a LOAC framework is authority to employ deadly combat power. It may be true that the European Court of Human Rights has provided some expanded space to manoeuvre for states responding to internal terrorist threats with military force,[116] although the extent of such permissible use of

[116] *Finogenov and Others v Russia* App No 18299, (ECtHR 20 December 2011) para 211, 213, 226:

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force rules pursuant to a human rights legal framework is uncertain. However, if states continue to conduct these operations outside the legal framework of an armed conflict, this approach may gain momentum in order to strike a fair balance between state necessity and individual rights.

3.2 Using an Armed Conflict Paradigm: Pros and Cons

Characterising the military response to OCGs as an armed conflict might better align legal authority with operational and tactical reality. As mentioned above, although it creates a genuine risk of 'authority overbreadth', this does not justify refusal to acknowledge the existence of armed conflict when states engage in hostilities against OCGs. Instead, the overbreadth associated with applying the LOAC to such operations should be ameliorated by the imposition of carefully and judiciously tailored rules of engagement that regulate the application of LOAC authority to situations of genuine situational necessity. Because such authority is not synonymous with obligation, a state need not utilise the full range of measures permissible during a situation of armed conflict when doing so is contrary to policy interests and not justified by the necessities of the situation. For example, rules of engagement (ROE) could be used to limit situations in which robust use of force is permitted only to those tactical engagements involving a highly organised and potent threat. Additionally, once operatives are subdued – or even in a situation in which apprehension is a feasible option – use of normal law enforcement modalities

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That being said, the Court may occasionally depart from that rigorous standard of 'absolute necessity'. As the cases of *Osman*, *Makaratzis*, and *Maiorano and Others* (all cited above) show, its application may be simply impossible where certain aspects of the situation lie far beyond the Court's expertise and where the authorities had to act under tremendous time pressure, and where their control of the situation was minimal … The hostage-taking came as a surprise for the authorities (see, in contrast, the case of *Isayeva v Russia*, App No 57950/00 (ECtHR 24 February 2005) para 180 et seq.), so the military preparations for the storming had to be made very quickly and in full secrecy… [i]n such a situation the Court accepts that difficult and agonising decisions had to be made by the domestic authorities. It is prepared to grant them a margin of appreciation, at least in so far as the military and technical aspects of the situation are concerned, even if now, with hindsight, some of the decisions taken by the authorities may appear open to doubt … In sum, the situation appeared very alarming. Heavily armed separatists dedicated to their cause had taken hostages and put forward unrealistic demands … [t]he Court concludes that there existed a real, serious and immediate risk of mass human losses and that the authorities had every reason to believe that a forced intervention was the 'lesser evil' in the circumstances').

Theresa Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11' (2011) 105 *American Journal of International Law* 244, 245–46:

While the incidents analyzed below reveal a certain degree of legal uncertainty as to the exact contours of the emerging legal regime governing the defensive use of force, state practice clearly indicates that the law is undergoing transformation and that the majority of states agree on the need to adapt existing rules to the changes in geopolitical realities. As we shall see later on, this process of transformation is most visible in states' changed interpretations of the principles of immediacy and necessity, which are nowadays understood in more contextualized and permissive terms … include[d in the study are] Russia's strikes against Chechen positions on Georgian territory, Uganda's use of force against rebels operating on the territory of the Congo, Israel's invocation of the right to self-defense in response to Hezbollah attacks from Lebanon, Colombia's anti-FARC raids on Ecuadorian soil, Turkey's military offensive in pursuit of PKK fighters in northern Iraq … [t]he right to self-defense is subject to an elaborate framework of checks and balances to hedge against abuse.

could be required as a matter of policy with exceptions triggered only by indicia that the target of an operation cannot be subdued effectively by limiting authority in such a manner.

Obviously, this cannot ensure that an armed conflict characterisation will not result in what appear to be overbroad assertions of state power. Once the armed conflict threshold is crossed, reliance on self-imposed restraints by national authorities, especially in situations of crisis created by OCGs, might be insufficient to prevent the invocation of a full range of LOAC-based response authorities.[117] Unfortunately, the only viable alternative appears to be the current approach: deny any overt acknowledgement of armed conflict, but exercise authority that can be reconciled only with an armed conflict characterisation. In either case, individual rights and liberties will potentially be adversely affected by government action. This risk is exacerbated when military forces conduct operations in a manner that suggests they are involved in hostilities without being instructed to apply the core humanitarian protections and limitations to such operations imposed by the LOAC. In short, refusing to recognise a situation of armed conflict when the 'facts on the ground' so indicate creates a real risk of military operations that reflect an atmosphere of 'authority without obligation'. One need only consider the policies adopted by the US in the first years of the armed conflict with Al Qaeda to understand the inherent risks of such an interpretation of the law.

One plausible alternative approach to addressing the challenges associated with OCGs would be to restrict the exercise of LOAC authority to areas afflicted by OCG violence, thereby restricting response authorities to law enforcement methods in other areas of the country. As a practical matter, this might very well be the nature of ongoing military responses to these threats.[118] In countries currently afflicted with this problem, military action does indeed seem to have been limited to the especially afflicted areas, but imposing such a geographical restriction as a matter of law presents numerous practical problems. As a general proposition, the notion that some geographic restriction is inherent in the concept of armed conflict seems to be inconsistent with both history and strategic and operational logic.[119] These concerns admittedly seem less significant in the hypothetical situation of an armed conflict between a state and an OCG, as such groups tend

[117] Janet Cooper Alexander, 'John Yoo's War Powers: The Law Review and the World' (2012) 100 *California Law Review* 331; see also Daniel R Williams, 'Averting a Legitimation Crisis and the Paradox of War on Terror' (2008–09) 17 *Michigan State Journal of International Law* 493; Paul Haridakis, 'The Tension Between National/Homeland Security and the First Amendment in the New Century' (2005) 14 *Temple Political and Civil Rights Law Review* 433; Jenny S Martinez, 'Process and Substance in the "War on Terror"' (2008) 108 *Columbia Law Review* 1013; Shawn D Rodriguez, 'Caging Careless Birds: Examining Dangers Posed by the Willful Blindness Doctrine in the War on Terror' (2008) 30 *University of Pennsylvania Journal of International Law* 691. After 9/11, in addition to engaging the perpetrating belligerents in Iraq and Afghanistan, the US 'War on Terror' involved implementing domestic measures as well. These policies and actions were criticised by many for having encroached on civil liberties typically left undisturbed under normal peacetime law enforcement. The policies and actions encompassed areas such as detention, interrogation, military commissions, surveillance and others, with the main debate bordering on the blurred line between national security/armed conflict necessities versus individual rights/peacetime regimes. Over a decade later (including several Supreme Court cases), many of these debates are still unresolved.

[118] Hampson (n 34).

[119] Geoffrey S Corn, 'Geography of Armed Conflict: Why it is a Mistake to Fish for the Red Herring' (2013) 89 *Naval War College International Law Studies* 77.

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to operate out of already limited geographic areas (such as the *favelas* in Brazil or certain border regions of Mexico).

How would the permissible scope of LOAC-based military operations be defined? The determination of armed conflict is already complicated by the lack of universally recognised triggering standards and the lack of an oversight mechanism to ensure objectively valid situation characterisations. This problem would be magnified if an aspect of conflict recognition included identification of some geographic limitation on accordant operations. A further obvious flaw in this theory is that it offers OCG members the opportunity to essentially deprive government forces of necessary response powers by shifting the locus of their operations to 'non-afflicted' areas. Because it is impossible to predict what their capabilities will be if and when they dislocate from afflicted areas, imposing a strict geographic limitation on LOAC-based operations is strategically and tactically illogical. Instead of having rigid boundaries etched into stone by international law, a more logical approach to imposing such a limitation – both operationally and legally – is by national policy directive implemented through rules of engagement. These rules could establish a powerful presumption that conduct of hostilities rules are limited to especially afflicted areas. This approach would also provide the flexibility to modify this operational scope based on the actual threat situation.

4. STATUS, HOSTILE FORCE RECOGNITION, AND A POSSIBLE HYBRID APPROACH

The authority to employ force consistent with an armed conflict legal framework is, as explained above, directly linked to the nature of the threat presented by organised armed groups.[120] Accordingly, when criminal threats manifest themselves as not only organised groups, but groups that engage in widespread and consistent violence, the armed conflict characterisation for a military response to this threat is both legally and logically justified.

When an armed conflict exists, the application of the LOAC will trigger a presumption of hostility for members of such groups during all active engagements, aligning military response use of force authority with the true nature of the threat presented by such groups. This will both facilitate operations conducted pursuant to military tactics and principles, and it will eliminate tactical hesitation and uncertainty produced by subjecting responding forces to condemnation for uses of force that in a true law enforcement situation would normally be considered overzealous. In short, it would justify the employment of force triggered by the presumption of hostility derived from determination of membership of the belligerent group during the execution of tactical operations. As a result, the individual soldier would not be required to make the type of case by case assessment of actual imminent threat normally required by law enforcement officers prior to employing deadly force.

[120] See, eg, Corn (n 54); see also Corn (n 61); Geoffrey S Corn and Eric Talbot Jensen, 'Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations' (2009) 42 *Israel Law Review* 45.

This shifted presumption triggered by national-level armed conflict recognition should then be carefully implemented through 'mission accomplishment' rules of engagement. This type of ROE authorises the use of force based on the presumption of threat triggered by a determination that the object of attack is a member of the organised opposition belligerent group, which therefore causes it to shift to status-based targeting and thus opens the mission to the more robust authority and applications of conflict. In addition, unlike a law enforcement-based use of force, LOAC-based mission accomplishment ROE are not required to impose a proportional force limitation on engaging an opposition operative. Authorising this expansive use of force authority against OCG members would require satisfying a number of predicate requirements. First, it would necessitate express or implied recognition that the contest with the group qualified as an armed conflict. Second, it would require endorsement of belligerent status-based targeting authority in the context of a NIAC – a proposition that, again, is not universally accepted by the international community.[121] Finally, some method of identifying the 'hostile force' would be necessary to implement status-based targeting authority. This is not an insurmountable obstacle, but it is obviously much more difficult in relation to a non-uniformed opponent than in the context of traditional international armed conflict.

Accordingly, mission accomplishment ROE must establish the threat identification criteria used to make the membership and targeting assessment. Furthermore, where appropriate, this authority should be restricted to actual afflicted areas. In contrast, operations outside such areas would be conducted pursuant to law enforcement norms, even when involving armed forces. These rules would normally not be 'standing' in the sense of remaining in effect at all times and in all places (such as when an enemy armed force is declared hostile in the context of an armed conflict). Instead, they would be issued only in the context of certain missions directed against threats assessed to possess the type of capability requiring a tactical response more akin to military action than law enforcement. Finally, as a matter of policy,[122] a requirement to refrain from attack when capture is tactically feasible could also be incorporated into the rules. This would prohibit the use of deadly force for any opponent functionally incapable of resistance but only under strict circumstances outlined in the ROE, thereby avoiding broader judicial review in situations analogous to the aforementioned Ireland and *McCann* cases. While still less restrictive than a pure 'capture instead of kill' rule,[123] it would nonetheless prohibit employing deadly force in those situations where capture is unquestionably feasible without subjecting the soldier to risk of death or grievous bodily harm. Such a limitation is not uncommon as a policy measure, even in armed conflict. In the context of an operation to subdue criminal operatives, the hybrid nature of the threat that straddles a blurred line between armed conflict and law enforcement compels considering the imposition of such a constraint.

[121] Instead, these experts believe that non-state operatives must be considered as civilians directly participating in hostilities and, as a result, lose their protection from deliberate attack for such time as the direct participation continues. Thus, even when attack is authorised, it must be conduct based, because the authority to attack results from the conduct of direct participation in hostilities: Sandoz, Swinarski and Zimmermann (n 56) 681.
[122] See Corn and Jenks (n 55).
[123] Capture-Kill Debates (n 101).

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Conduct of hostilities/mission accomplishment ROE, even when incorporating use of force restrictions beyond those required by the LOAC, inform the soldiers called upon to tactically execute missions that a positively identified member of the opposition group may be engaged unless and until rendered *hors de combat* (pursuant to the definition established in the ROE). These ROE should also emphasise limits on the use of force required by the LOAC (such as prohibiting attack against any enemy personnel who have surrendered or are otherwise *hors de combat*) or imposed as a matter of command policy (such as limits on attacking certain areas, specified protected targets, or use of certain methods or means of warfare without appropriate authorisation). To clarify, the difference with this proposed ROE structure and the current international law framework displayed in *McCann* is that, by default, the soldier is essentially liable to judicial review for every lethal decision, whereas this ROE structure creates a much more adaptive zone of review as per the national policy directive. However, it is clear that it is only in the context of an armed conflict that mission accomplishment ROE, with the corresponding status-based engagement authority, may be authorised.[124]

Recognition that a military operation directed against an OCG has crossed the line from law enforcement to armed conflict should not be understood as a talisman to resolve all complexity associated with the response to an OCG threat. Far from it; the very nature of certain aggressive OCGs will produce inevitable complexity for armed forces responding to these threats, irrespective of the applicable legal framework. Unlike non-state belligerent groups that manifest a sufficient level of military organisation and objective uniformity to facilitate hostile force identification (for example, dissident armed forces or insurgent forces that adopt a military type of uniform), OCG operatives will rarely wear any type of uniform or distinctive emblem. Instead, it should be expected that they will, like other contemporary non-state belligerent group operatives, appear indistinguishable from the civilian population. Thus, even assuming that military forces conduct operations pursuant to mission accomplishment ROE, status-based targeting assessments will be extremely complex, and it may often be necessary to revert to conduct-based indicia of hostility.

None of these challenges are insurmountable, but they do indicate the importance of an extremely judicious leverage of targeting authority derived from armed conflict. The strategic imperative dictates striking a logical balance between authority and restraint. Thus, even when recognising a situation of armed conflict, there must be constant vigilance on the part of the national political and military leadership to carefully tailor use of force authority to address the tactical realities of a military OCG response while limiting the negative second and third

[124] In contrast, conduct-based ROE define the conduct that triggers the authority to use force. This will normally be described as 'hostile act or hostile intent'. Pursuant to this type of ROE, each use of force must be predicated by an individualised assessment that the object of attack poses an imminent threat of death or grievous bodily harm, to the responding soldier or to some other individual defined as falling within her protective authority (such as other members of the soldier's unit, or in certain situations other designated individuals such as aid workers, civilian contractors, or perhaps even local civilians). Conduct-based ROE also normally require a proportional use of force in response to the threat, thereby limiting resort to deadly force to situations when that level of force is assessed as absolutely necessary.

order consequences flowing from the shift from law enforcement to armed conflict authority. There are two imperative considerations for this tailored approach: (i) modulating the use of force authority to respond effectively to the reality that the presumptive inoffensiveness that underlies the pure law enforcement response framework is simply unsuitable for the nature of these threats; and (ii) carefully limiting the more robust LOAC-based use of force authority to tactical operations against criminal operatives manifesting the type of organisation and capability normally associated with belligerent groups.

5. ONE POSSIBLE COMPROMISE: EXTENDING A LIMITED PROPORTIONALITY PROTECTION TO CRIMINAL ORGANISATION OPERATIVES?

One of the key distinctions between targeting belligerent operatives during armed conflict and law enforcement operations is that the enemy belligerent is not protected by any proportional force limitation. It is also clear that the military response to OCGs obviously straddles the divide between law enforcement and armed conflict. Accordingly, this may justify considering whether tactical operations against OCG operatives implicate to the same degree the justification for dispensing with a proportional force requirement when engaging more traditional belligerent operatives. Unlike the more traditional belligerent group operative, individuals involved with OCGs are unlikely to be trained members of a quasi-military organisation devoted to a common ideological cause. Instead, it is more likely that they engage in violent activities based on profit motive, or perhaps simply as a result of social relationships.

A more significant consideration is the invalidity of the assumption that targeting individual operatives will be expected to influence the opposition group leadership as a means to compel submission to government authority. Unlike a traditional insurgent or dissident group engaged in armed conflict against a government, it is less likely that attacking their ground operatives will compel OCG leaders to abandon their criminal agendas, a consideration that refers directly back to the absence of a traditional political agenda driving the violent activities of these groups. Because organised criminal violence is less likely than more traditional insurgent threats to be motivated by the strategic goal of compromise or agreement with the government, and instead will seek to establish impunity from government authority, it is less likely that disabling individual operatives will influence OCG leaders to abandon their criminal agenda. Indeed, the fact that the leadership of these groups will be subject to criminal sanction if captured makes any such submission even less likely. While it is certainly true that disabling individual operatives may result in a decrease in violence and/or the effectiveness of criminal activities, this will be the result of loss of the ability to assert their will and not an abandonment of the violent agenda writ large. In short, incapacitating individual OCG members might not produce such an analogous effect on group leadership as it would with regard to more traditional insurgent threats.

Thus, the ultimate goal for using force against individual OCG members is perhaps subtly different from the use of force against individual members of more traditional organised belligerent groups. The primary objective will normally be focused on disabling the capacity of individual operative or groups of operatives to engage in violent activities. Such operations will ideally

undermine the efficacy of the OCG. However, the effectiveness of government efforts may produce a corresponding decrease in the ability of the group to challenge government authority through violence (and thus the need to invoke mission accomplishment ROE), but it is unlikely to lead the OCG leaders to submit to government authority.

As a consequence of this potentially subtle distinction from more traditional NIACs, it may be justifiable to subject attacks against OCG operatives to a law enforcement type of proportionality rule. However, the soldier would still be permitted to initiate tactical engagement based on a hostile status determination and to use weapons and tactics associated with combat operations. Furthermore, that initiation would be treated as presumptively (although not conclusively) reasonable. Thus, unlike a law enforcement engagement, use of deadly force by the military would not be treated as prima facie unlawful, and the burden would not be placed on the government to justify that use of force. In short, the armed conflict characterisation would trigger the authority to initiate action to reduce the threat and to include the use of force, but it would incorporate a proportional force requirement based on the nature of the threat and the tactical situation.

This may seem like a distinction without substance. When OCG operatives initiate attacks on armed forces, military forces will respond with the force necessary to subdue the threat under any legal framework. This does not render this concept meaningless. A sliding scale of presumptive threat recognises that this presumption moves very close to that of status-based targeting when the criminal group is highly organised, heavily armed and functionally immune from normal law enforcement incapacitation. This will permit military forces to act with the tactical initiative justified by the nature of the threat and permit the use of force necessary to effectuate the tactical objective without subjecting them to unjustified risk. However, by imposing a proportionality limitation and requiring high-level assessment that the conditions triggering the criminal threat designation are satisfied, such authority can be qualified to mitigate the risk of authority overbreadth. In short, this approach would limit the potential attack authority overbreadth of pure LOAC-based use of force authority by prohibiting the use of deadly force when a lesser degree of force would clearly (based on objective circumstances) be effective to achieve the incapacitation objective.

Perhaps most importantly, adopting this approach will limit the risk of tactical hesitation during military operations against OCG operatives. While it will not relieve military personnel of the obligation to refrain from employing deadly force when the situation cannot reasonably justify that level of force, it will eliminate the presumptive impropriety of using deadly force in all situations. This outcome is justified when the organised and violent nature of the OCG operatives overwhelm normal law enforcement response capabilities and necessitate the use of regular armed forces to restore public order and government authority over a given area.

There are already indications that states plagued by the modern incarnation of organised criminal threats are already utilising this expanded authority, especially when armed forces are tasked to respond to these threats. However, because a law enforcement/human rights framework does not currently account for such adjusted use of force authority, fictions continue to be adopted to fit the tactical square peg into the legal round hole. This is not an acceptable approach. Instead, law must be responsive to strategic threat realities. If the nature of the OCG threat compels states to respond with combat power, these responses must either be characterised as armed conflicts, or

human rights norms must be interpreted in a manner that permits effective tactical execution of the counter-crime mission – a concept that is inherently inconsistent with the presumptions that form the foundation of human rights use of force authority. Ignoring this reality and clinging to the fiction that such responses fall within a concept of military support for law enforcement, because afflicted states are reluctant to treat such situations as armed conflicts, produces tactical uncertainty, unnecessary risk to state forces, and a potential windfall for the organised criminal groups themselves.

6. CONCLUSION

Debates over the permissible authority to use force against emerging non-state threats are consistently dictated by a binary legal paradigm: either armed conflict is recognised, permitting status-based targeting, or law enforcement conduct-based use of force norms must be respected. This paradigm has driven an expansion of the threats characterised by states as falling within the scope of non-international armed conflicts, a trend that has produced substantial controversy. At the same time, in many states organised criminal groups are creating unprecedented challenges to government authority by utilising widespread and indiscriminate violence to sow the seeds of chaos and demonstrate their impunity. The nature of these threats often overwhelms the capacity of normal law enforcement response authority, and it necessitates use of regular armed forces in an effort to restore public order and reassert the government warrant. When these forces are employed, uncertainty as to the legal nature of such operations degrades clarity of tactical engagement authority.

One solution to this problem is to embrace an armed conflict characterisation for such operations. This approach will certainly provide a legal foundation for the aggressive use of combat power against these threats. However, it may also produce a degree of strategic and operational overbreadth. Because expanding the scope of permissible tactical engagement authority within a pure human rights legal framework is simply not feasible, this must be recognised as the only viable starting point to address these emerging threats. To offset the risk of authority overbreadth, this invocation of LOAC authority must also be accompanied by limitations on exercising the full scope of this authority. This would achieve two important objectives. First, it would align use of force authority with the nature of the tactical missions these forces are called upon to execute. Second, it would limit the impact of this expanded authority to those tactical missions where high-level national authorities assess the true necessity for such expansion while, at the same time, retaining other aspects of a human rights dominated response. Such an approach will undoubtedly spark criticism from both human rights and armed conflict proponents. However, before such adjustment to military use of force authority is rejected, opponents should seriously consider the alternative. While debates will undoubtedly continue about the appropriateness of responses within the current legal framework – one that leaves little room for legal manoeuvrability and little room to adjust to operational and tactical situations – governments are faced with the very true reality of confronting a formidable adversary, one that threatens the lives of its innocents by way of violence and the resulting chaos and one that is potentially destabilising to the very foundations of its country. Perpetuating the current frameworks and fictions will do little to properly combat, let alone rectify, the true nature of the danger being faced by these countries.