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

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Identifying the demarcation point between militarized law enforcement and armed conflict in response to internal and transnational non-state threats is essential for defining operational and tactical 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 criminal syndicates that have significantly amplified their belligerence and use of violence thereby threatening state authority, continues to morph into forms never contemplated by the principal authorities relied upon to define non-international armed conflict. Financial and economic strategies may ultimately hamper these violent groups due to their complex nature, but current events in places like Mexico indicate that states will also frequently perceive the need to employ force in response to the imminent physical danger created by such threats.

It is therefore unsurprising that proponents of robust state response authority press for including these situations within the definition of non-international armed conflict (NIAC). It is equally unsurprising why critics of this expansion press back, arguing that these threats fail to justify departure from human rights principles and the constabulary response authority derived from this law. These debates expose an operational and tactical incongruity of equally increasing significance: unless characterized as armed conflict, government forces – and especially military forces - called upon to respond to these non-traditional internal threats must presume use of force is an exceptional measure and operate pursuant to the much more restrictive constabulary use of force rules.

I. Existing legal frameworks and the binary nature of use of force authority.

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It is axiomatic that states establish and maintain armed forces as a resource to respond to threats to vital national interests. However, defending the states against external aggression and other state and non-state violent threats—while this has historically been, and in large measure remains the primary mission of such forces—is not the only mission. States routinely utilize their armed forces to respond to a wide spectrum of challenges produced by both human and natural causes including natural disasters, domestic disturbances, humanitarian crises, and internal disturbances lacking the level of organization and intensity to qualify as armed conflict. The oath sworn by members of the U.S. armed forces is symbolic of this purpose: “that I will support and defend the Constitution... against all enemies, foreign and domestic . . .”

Until recently, the locus of these varied missions along the spectrum of legal authority seemed relatively clear. Missions in response to organized 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 the law of armed conflict (LOAC). All other military missions (not involving hostilities with organized armed opposition forces) fell within a domestic legal framework of authority and obligation—law subject to the requirement of compliance with international human rights law applicable during peacetime.

This range of operational missions created what was and remains in effect a binary framework for assessing the legality of use of force in the context of such missions. 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. In contrast, military missions conducted outside the context of armed conflict 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 individualized case by case assessments. In other words, armed

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conflict permits the use of status based targeting – the determination of belligerent status justifies attack. In contrast, all other situations require far more restrictive conduct based use of force – military forces may employ force only in response to conduct that represents a threat of imminent death or grievous bodily harm to them or other potential victims of unlawful violence.4

By necessity, this binary use of force framework is linked to the well-established international legal standards for assessing when a situation of internal disturbance qualifies as an armed conflict.5 Only in such situations may a state legitimately authorize use of force by military personnel – normally in the form of rules of engagement – based on pure status determinations (and therefore obviously far more robust than force authorized for law enforcement personnel in their normal day-to-day operations).6 Accordingly, unless a state considered an internal disturbance to qualify as an armed conflict, military forces used to respond to the disturbance should operate within a pure constabulary/human rights legal framework – essentially functioning in military augmentation to law enforcement operations.7 Deprivation of life (use of deadly force) or liberty (detention) would be permissible only based on individualized assessments of actual threat justifying such measures.8

Two quintessential examples of this binary use of force framework arose from the United Kingdom’s use of regular armed forces to bolster the law enforcement response to the threat posed by the Irish Republican Army. The first example is provided by the case, Attorney General for Northern Ireland’s Reference (No. 1 of 1975), in which the House of Lords reviewed the acquittal of a British soldier on a charge of murder for shooting and killing a U.K. citizen in Northern Ireland.9 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.10 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,11 the soldier shot him with his service weapon – a Self-Loading Rifle.12

While clearly sympathetic to the challenges confronted by soldiers such as the defendant, the Lords addressed the legality of the shooting through a peacetime law

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5 Id.
7 GEOFFREY S. CORN ET AL., TRIGGERING THE LAW OF ARMED CONFLICT, IN THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 65, 67 (Vicki Been et al. eds., 2012).
8 Id.
9 Id.
10 Id. at 106.
11 Id. at 111.
12 Id. at 110.
enforcement lens.\textsuperscript{13} Because the victim was fleeing from the soldier when shot and killed, the court concluded that it was not viable to analyze the case as an exercise of self-defense.\textsuperscript{14} 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 court concluded that the reasonableness of the use of deadly force was necessarily a question of fact for the jury.\textsuperscript{15} The court also concluded that any such assessment of reasonableness must consider the totality of the circumstances confronting the soldier at the time of the shooting, including his extremely limited reaction time.\textsuperscript{16} Finally, the court suggested that even if his judgment of necessity had been objectively unreasonable, his subjectively honest belief of necessity could justify mitigating the offense from murder to manslaughter (a doctrine often defined as imperfect self-defense).\textsuperscript{17}

The critical issue, according to the opinion authored by Lord Diplock, was whether the soldier made a reasonable judgment of necessity to justify what is otherwise an unlawful killing - self-defense or defense of others.\textsuperscript{18} 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 court emphasized 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, to include the nature of training, equipment, and intelligence associated with his mission.\textsuperscript{19}

However sympathetic to the soldier's situation the court may have been, this decision indicates the consequence of using military force in response to an internal threat not considered an armed conflict: use of force legality must be assessed through a pure constabulary legal authority lens. In fact, early in the opinion, the court noted that, "to kill or seriously wound another person by shooting is \textit{prima facie} unlawful."\textsuperscript{20} Such an analytical start point is wholly inconsistent with the law of armed conflict, 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), and not the attacker. The analytical method utilized by the Lords reflects the very different use of force assumption applicable to non-conflict situations: deadly force is always

\textsuperscript{13} Id. at 109.
\textsuperscript{14} Id. at 148.
\textsuperscript{15} Id. at 137.
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 132.
\textsuperscript{18} Id. at 148.
\textsuperscript{19} Id. at 147-48.
\textsuperscript{20} Id. at 136.
a measure of last resort, imposing the burden on the state operative to validate the actual threat posed by the object of violence.

The second example is provided by another, and much more widely cited case involving the use of U.K. military forces in response to the IRA terrorist threat, McCann v. United Kingdom.\textsuperscript{21} Indeed, McCann provides an even more compelling example of this binary use of force equation. McCann involved a lawsuit initiated by relatives of several Provisional IRA (PIRA) terrorist operatives killed by U.K. military special operations forces on the Island of Gibraltar. After losing their suit in U.K. courts, the relatives brought an action against the government of the United Kingdom in the European Court of Human Rights. The action alleged a violation of the European Convention of Human Rights resulting from an arbitrary deprivation of life by the U.K. government.\textsuperscript{22}

The facts that led to the killing of the PIRA operatives provide an ideal example of the gray area between law enforcement and 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.\textsuperscript{23} In response, the United Kingdom dispatched a team from the Special Air Services, British military Special Forces trained, \textit{inter alia}, to conduct counter-terrorism operations.\textsuperscript{24} 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.\textsuperscript{25} 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.\textsuperscript{26} SAS personnel then followed several operatives they believed were both armed and possessed the remote detonation device.\textsuperscript{27} When these forces believed the operatives realized they were being followed and observed one of them reach into his pocket, they opened fire killing two of the suspects.\textsuperscript{28} Upon inspection, it turned out they did not have the detonation devices\textsuperscript{29} although a large amount of explosives were subsequently found in the suspect vehicle, and the two men killed by the soldiers were in fact PIRA operatives.\textsuperscript{30}

The ECHR addressed the legality of the killings from a pure peacetime law enforcement perspective.\textsuperscript{31} The Court condemned the United Kingdom for failing to apprehend the operatives when they crossed the border into Gibraltar, noting that

\begin{itemize}
  \item \textit{Id.} at para 1.
  \item \textit{Id.} at para 13 -15.
  \item \textit{Id.} at para 14.
  \item \textit{Id.} at para 24.
  \item \textit{Id.} at para 38.
  \item \textit{Id.} at para. 39-47.
  \item \textit{Id.} at para 61-62.
  \item \textit{Id.} at para 93.
  \item \textit{Id.} at para 99.
  \item \textit{Id.} at para 133-36.
\end{itemize}
such an action would have averted the necessity to resort to deadly force.\textsuperscript{32} In response, the U.K. asserted the reasonableness of allowing the operatives to progress deeper into the operation to enhance the ability to produce a broader incapacitation impact on the group because police authorities sought to identify a broader circle of operatives.\textsuperscript{33} However, because the ECHR concluded that the U.K. 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 force authority than that normally associated with police or constabulary personnel.\textsuperscript{34} While the Court did not condemn the soldiers individually, it did condemn the government decision to utilize military forces trained to use force in a far more aggressive manner than that normally associated with law enforcement action. This, along with the failure to utilize non-deadly force to neutralize the threat (the failure to apprehend at the border crossing), led the Court to conclude the killings were in fact arbitrary and in violation of the European Convention.\textsuperscript{35}

\textbf{II. The Nature of the Contrasting Use of Force Paradigms}

In a previous article, I discussed how underlying threat-derived presumptions explain the diametrically opposed use of deadly force authority associated with armed conflict or peacetime law enforcement.\textsuperscript{36} In the peacetime law enforcement context, use of force rules are derived from a presumption that compliance with law and peacefulness are the normal condition of individuals encountered by law enforcement personnel.\textsuperscript{37} This presumption drives the conduct-based use of force paradigm: because individuals are presumptively peaceful, only individual conduct that rebuts this presumption permits the use of force by government actors.\textsuperscript{38} 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.\textsuperscript{39}

In contrast, use of force during armed conflict is based on an inverse presumption: that members of organized belligerent groups represent a constant threat to friendly forces.\textsuperscript{40} Thus, membership in the belligerent group indicates that hostile threat is the normal expectation. 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.\textsuperscript{41} Contributing to this status base targeting authority is the fact that unlike the normal peacetime criminal, members of organized belligerent groups are not presumptively autonomous agents.\textsuperscript{42} Instead, they act as agents for the group leadership.\textsuperscript{43} Accordingly, until this subordinate agent relationship has been severed through incapacitation resulting from death, wounds, or capture, the status based presumptive threat remains extant.\textsuperscript{44} This explains why the LOAC proportionality principle in no way limits the amount of force directed against such operatives, and why, unlike 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.

Accordingly, had either of these European cases been considered through an armed conflict legal authority lens, the analysis would likely 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 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 \textit{prima facie} lawful.\textsuperscript{45} This is because the LOAC places the burden for eliminating the presumption of threat triggered by belligerent status on the object of attack, not on the attacking force.\textsuperscript{46} Thus, because the objectives of state action were in both cases suspected of being terrorist operatives, that status would ostensibly have justified 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.\textsuperscript{47} As a result, there would have been no legal obligation to consider least restrictive means for subduing these operatives.\textsuperscript{48} Accordingly, it would have been permissible to allow the individuals to progress more deeply into the operation in order to obtain a tactical advantage,\textit{vis a vis} the group, as opposed to the individual operatives.\textsuperscript{49}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 343.
\item Corn, \textit{supra} note 3, at 75-77.
\item \textit{Id.} at 77-78.
\item \textit{Id.} at 85; Corn, \textit{supra} note 42, at 345; see also Robert Chesney, \textit{Ohlin on Capture-or-Kill}, LAWFARE.ORG (Mar. 8, 2013), \url{http://www.lawfareblog.com/2013/03/ohlin-on-capture-or-kill/} (lists several links to capture-or-kill discussions), (hereinafter Capture-Kill Debates).
\item Corn, \textit{supra} note 3 at 87.
\item \textit{Id.} at 80-82.
\end{enumerate}
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It may be tempting to conclude that in many situations, and especially when government forces are responding to armed criminal gangs threatening public order, the IHR/IHRL\textsuperscript{50} use of force dichotomy produces no significant consequence. Whether operating within a law enforcement or armed conflict legal framework, government forces 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. But as is so well illustrated by the cases referenced above and ongoing military interventions against criminal syndicates in places like Mexico today, even in these situations a constabulary legal framework imposes restrictions on the use of force that would be inapplicable in an armed conflict context.

These restrictions produce accordant tactical uncertainty that would not exist in the armed conflict context. For example, is the use of weapons and tactics designed to produce a high probability of death legally permissible in a constabulary mission? As noted in the Republic of Ireland case above, armed forces are routinely armed with weapons that are designed to produce such a probability. These weapons are significantly more deadly than the weapons normally associated with law enforcement activities. Furthermore, soldiers are routinely taught to engage targets with a ‘three-shot burst’ – three rounds fired in close succession at the center-mass of the target.\textsuperscript{51} This tactic is intended to increase the probability of producing total submission – in many ways a euphemism for death. Does this tactic violate the obligation to use only proportional force against the object of violence during a constabulary mission? Finally, is it impermissible to utilize military forces trained for combat operations? The McCann case at least suggests an affirmative answer to this question.

In times of peace, the law presumes 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.\textsuperscript{52} 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).\textsuperscript{53}

\textsuperscript{50} IHR is used to refer to International Human Rights; IHRL is used to refer to International Human Rights Law
\textsuperscript{51} U. S. DEP’T OF ARMY, FIELD MANUAL 3-22.9, RIFLE MARKSMANSHIP M-16-/M4-SERIES WEAPONS at 7-85 (Aug. 2008).
\textsuperscript{52} Corn, supra note 3, at 76.
\textsuperscript{53} CJSC ROE, supra note 5 at A-2.
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 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 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 at all places. Because this in no way indicates the enemy operative is hors de combat (out of the fight/surrendered), it is axiomatic that attack during withdrawal is lawful. This becomes a far more complex question during a constabulary mission. Normally, flight of a suspect who had been using deadly force or 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), but this is certainly an exceptional situation.

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. Utilizing the example above, use of deadly force against a fleeing

54 Id.; see also Laurie R. Blank, Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self Defense Justifications, 38 WM. MITCHELL L. REV. 1655, 1671 (2012); Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (hereinafter AP I) at Art. 40; Marco Sassoli & Laura M. Olson, The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Imprisonment of Fighters in Non-International Armed Conflicts, 871 INT’L REV. OF THE RED CROSS 599, 605-6 (Sept. 2008) (“Combatants may be attacked at any time until they surrender or are otherwise hors de combat, and not only when actually threatening the enemy.”).

55 AP I, supra note 54 at Art. 35.

56 “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.” (Tennessee v. Garner, 471 U.S. 1, 11-12 (1985)).


58 “[T]o 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
threat during a constabulary mission should normally trigger a detailed 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.\textsuperscript{59} It is certainly true that investigations into unlawful killings also occur in the context of armed conflict. However, because killings of enemy belligerent operatives are \textit{prima facie} lawful, this remains the exception and not the rule. Absent some indicia of a LOAC violation, members of the armed forces are normally not subjected to investigation for the decision to employ deadly force.\textsuperscript{60}

These differences all stem from the divergent threat presumptions associated within each context, the core distinction between peacetime and armed conflict uses of force. It is the weight and impact of these presumptions that justifies the accordant divergent use of force norms. Accordingly, any assessment of the appropriate legal framework applicable to government response to organized criminal violence must be responsive to the operational and tactical needs of the forces employed to address the threat. Perhaps more importantly, the credibility of the asserted legal regime framing such response – 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.

\textbf{III. Emerging non-state threats: blurring the line between armed conflict and criminal syndicates}

Organized crime is nothing new. States have struggled for decades to counter the illicit activities of criminal syndicates.\textsuperscript{61} Indeed, pop culture is replete with books and films focused on these groups and the challenges they pose for law enforcement agencies.\textsuperscript{62} FOOTNOTE – MARIO PUZZO’S THE GODFATHER. To be sure, these were intimidating organizations, but their modern incarnations, transnational organized crime (TOC) groups, have evolved and expanded to such an extent that they are nothing short of global threats to peace and stability.\textsuperscript{63} What

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\footnotesize{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?”


\textsuperscript{60} GEOFFREY S. CORN & LAURIE R. BLANK, The Laws of War: Regulating the Use of Force, in NATIONAL SECURITY LAW IN THE NEWS 97, 114 (Timothy McNulty, Paul Rosenzweig, & Ellen Shearer eds.).


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once was a local or regional concern has emerged in recent decades into several
unrestrained worldwide criminal networks. Organizations 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. In the
post-World War II era, these organizations took advantage weakened of state
governments and global commerce to expand their criminal empires and
activities. The prevalence of this threat cannot be underestimated in that several
of these TOCs have spread, and their corruptive influence has almost permanently
become embedded over large areas of Europe, Central and South America, and
Asia. According to John Gotti:

You got a global war. You got the Chinese, the Dominicans, the Asians,
the Russians, the Colombians, the Jamaicans. What they doing? They
desecrate the nation. You got your variable [expletive]snowstorm of
cocaine and smack or whatever the hell else they shove into their
veins. You got a worldwide crime syndicate. There’s no rules, there’s
no perimeters, there’s no feelings. There’s no feelings for this country.
You got anarchy.

Recognizing this threat over a decade ago, 120 nations signed the United Nations
Convention on Transnational Organized Crime. “Pino Arlacchi, Secretary General
and Executive Director of the United Nations Office for Drug Control and Crime
Prevention, stated that 'never before had an international convention attracted so
many signatures barely four weeks following its adoption by the Assembly.’”

Certainly, the objective of organized crime has always been to profit from
illegality, and this applies to TOCs no differently than other organized crime groups.
However, the modern pervasiveness and intensity of activities such as gambling,
prostitution, and violence have lead to such a large scale destabilization. While
violence has always been associated with organized crime, these modern criminal
organizations 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 antagonizing government authorities, but unlike their predecessors, TOCs are

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64 Joseph E. Ritch, _They’ll Make You an Offer You Can’t Refuse: A Comparative Analysis of International
65 _Id_. at 578-79; see also Edgardo Rotman, _The Globalization of Criminal Violence_, 10 Cornell J. L. &
Pub. Pol’y 1, 10 (2000).
66 Rotman, _supra_ note 74, at 10.
67 Ritch, _supra_ note 45.
68 _Id_. at 572.
70 _Id._
71 Phil Williams, _Problems and Dangers Posed by Organized Transnational Crime in the Various
Regions of the World_, in _The United Nations and Transnational Organized Crime_ 1, 31 (Phil
Williams & Ernesto U. Savona eds., 1996).
nowhere near as uninhibited in their use of violence.\textsuperscript{72} Indeed, it seems to be only recently that an aspect of achieving that strategic goal is to employ widespread violence and brutality that directly challenge the authority and warrant of the government. While much of this violence is results from rivalries between criminal groups, it is often also directed against government authority and innocent civilians.\textsuperscript{73} Some TOCs 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.\textsuperscript{74} As a result, the nature of violence associated with these criminal organizations, 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 directed against not only innocent civilians, but also government forces and officials by Mexico’s criminal Cartels indicates an apparent objective of demonstrating total impunity from government authority.\textsuperscript{75} This, coupled with the obvious intimidation produced by terrorizing both the civilian population and tactically inferior law enforcement personnel, has both overwhelmed normal law enforcement capabilities and resulted in unprecedented casualty rates.\textsuperscript{76} Indeed, the highly organized 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?\textsuperscript{77}

Nor is Mexico alone in facing this destabilizing threat. Many would likely be surprised to learn that it is Honduras, and not Mexico, that today has the highest per capita murder rate in the world.\textsuperscript{78} And other countries in the region are struggling to stem the tide of organized criminal syndicates violence that is destabilizing their already challenged societal structures. El Salvador, Guatemala, Panama, and of

\textsuperscript{72} Rotman, \textit{supra} note 74, at 4,10.
\textsuperscript{73} Regina Menachery Paulose, \textit{Beyond the Core: Incorporating Transnational Crime into the Rome Statute}, \textit{21 CARDOZO J. INT'L & COMP. L.} \textbf{77}, 87 (2012); \textit{see also} Rotman, \textit{supra} note 74, at 4.

“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.”

Nagesh Chelluri, \textit{A New War on America’s Old Frontier: Mexico’s Drug Cartel Insurgency}, \textit{210 MIL. L. REV.} \textbf{51}, 54 (2011)
\textsuperscript{76} Id.
course Colombia, just to name a few. 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 and is directed in demonstrating the incapacity of the government to perform its most basic function: maintenance of internal stability.

Therefore, it is unsurprising that these and other governments impacted by analogous criminal threats increasingly call upon their armed forces to augment police response. Use of armed forces in such a capacity is nothing new. Even states that impose strict limitations on the role of national military forces in domestic law enforcement activities—such as the United States—periodically rely on the robust capabilities of their armed forces to respond to extraordinary crises. However, what does appear unusual is that the paramilitary capabilities of these criminal threats increasingly thrusts the armed forces into operations that in many ways seem functionally indistinguishable—from those conducted in the context of internal armed conflicts.

Such employment seems obviously responsive to the fact that the organized criminal threat often exceeds the normal law enforcement response capabilities. It is arguable that this factor alone justifies an armed conflict classification. While this is certainly a credible theory, it is inconsistent with political reality, which often compels national authorities to avoid an armed conflict characterization. Therefore, ultimately state response to such threats places its armed forces into an operational and tactical twilight zone: their activities are overtly characterized as militarized law enforcement conducted within a pure human rights/constabulary legal 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.

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80 Rotman, supra note 74, at 4, 7.
81 Melanie Reid, Mexico’s Crisis: When There’s a Will, There’s a Way, 37 OKLA. CITY U.L. REV. 397, 401 (2012); see also Bergal, supra note 87, at 1045-46, 1048.
83 U. S. DEP’T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (Feb. 2008).
The military operational impact of this incongruity is profound. Armed forces are tasked to engage highly armed and dangerous organized armed groups – the type of situation that would seem to justify status based engagement authority. However, such authority is inconsistent with a constabulary/military support to law enforcement legal characterization. Instead, their engagement authority is technically purely conduct based. As a result, they are required to treat each potential object of violence as presumptively inoffensive, requiring both an individualized validation for every use of force and an effort to exhaust least restrictive means of subduing the opponent. In short, although they are engaging armed organized opponents with all the tactical characteristics of an organized belligerent group, they are deprived the scope of status based engagement authority associated with the presumptive threat normally essential to facilitate effective tactical execution of operations directed against such groups.

Subjecting military operations to law enforcement based use of force rules is not unremarkable, and is in fact a common aspect of contemporary military operations. But depriving armed forces of the scope of authority derived from the true nature of the threat and risk presented by organized criminal groups 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 citizenry. Furthermore, the binary use of force paradigm, when coupled with the growing militarization of criminal organizations that seek to directly challenge and destabilize the state, has created a dangerous asymmetry favoring those groups. The law needs to respond to this reality in a way that restores a logical balance between these competing interests. This requires some mechanism to provide greater tactical and operational flexibility to use force against these groups as an entity and not an amalgamation of independent individuals of varying threat levels. Such a mechanism must account for the protection of the individual against arbitrary deprivation of life, but it must also acknowledge that what amounts to arbitrary in this context is far more nuanced than a true normal peacetime law enforcement context.

Insisting that the military response to such criminal threats must be conducted pursuant to a pure human rights/constabulary framework undermines this necessary balance and compromises the effectiveness of government action for the legitimate purpose of suppressing these threats. Where this imbalance results from an aversion to recognize the true nature of an operational situation, it generates a dangerous exercise in legal fictions: either the armed forces will expose themselves to unjustified risk by attempting to treat an organized belligerent threat as a normal law enforcement situation – a situation that presumes autonomous

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85 Alexandra Olson, *Kingpin’s death could mean more violence in Mexico*, NBCNEWS (July 30, 2010), http://www.nbcnews.com/id/38481971/#.UUyFV1fm3cw.
86 HR-LOAC, supra note 3, at 1-2.
87 Bergal, supra note 87, at 1066-67.
actors and the norm of law compliance; or they will apply the type of robust force necessary to respond to the threat and engage in post-hoc machinations to justify the deviation from law enforcement norms. In contrast, acknowledging the true de facto nature of such situations permits the legitimate adjustment 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/civil liability that should flow from such an adjustment.

One solution to this imbalance – perhaps the most appealing – is to acknowledge that military operations against organized criminal threats can rise to the level of non-international armed conflicts (NIACs). This is certainly a plausible option and would justify the type of robust tactical uses of force often necessitated by the nature of the threat. As an initial proponent of the concept of transnational armed conflict, I am certainly not opposed to this characterization in the abstract.\textsuperscript{88} Indeed, at a theoretical level, this approach seems ideal. 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.\textsuperscript{89} Because these threats do not manifest themselves in the traditional insurgency or dissident modality (for example, they rarely have the type of military organization and command and control characteristics normally associated with insurgent or dissident groups), there is an inevitable pressure on states to limit responsive measures 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 characterizing a military response to criminal threats as armed conflicts. Indeed, if this solution were ideal, situations such as that in Mexico would have been designated an armed conflict long ago.\textsuperscript{90} However, clinging to the alternative fiction that such operations simply involve robust law enforcement is equally untenable, for it produces the inconsistencies highlighted above.

These differences are not merely academic or semantic. Instead, they create a risk of injecting an unacceptable degree of uncertainty into the tactical execution of military missions directed against these militant organized criminal groups. In turn, this uncertainty may produce tactical hesitation that is both dangerous for government forces and provides an unjustified advantage to their armed criminal opponents. All of this is the inevitable consequence of operating within a legal framework based on an underlying presumption arguably inconsistent with the tactical reality of counter-crime operations, a presumption that provides the


\textsuperscript{90} Bergal, \textit{supra} note 87, at 1080.
foundation for the distinction between armed conflict and law enforcement use of force rules.

**IV. Use of Force Authority, Presumptions, and Allocation of Risk**

As noted above, the allocation of risk related to government uses of force is driven substantially by the legal framework regulating that use. This allocation is derived from the divergent presumptions of threat that exist in peacetime as compared with armed conflict and the locus of the burdens related to threat identification and submission associated with these presumptions. When armed forces are tasked to engage and subdue members of highly armed and organized criminal groups, the very nature of the threat and the accordant mission might suggest that like the armed conflict context, a risk allocation based on presumptive threat would be logical. However, unless the situation is characterized as an armed conflict, such missions are, by implication, considered constabulary in nature and therefore subject to law enforcement use of force norms. Accordingly, it is the law enforcement presumption and accordant risk allocation that will normally frame the legal authority to use force. Ultimately, this produces the inconsistency between legal authority and tactical reality highlighted above.

There are obviously solutions to this troubling inconsistency. One (most likely commonly utilized) is to simply adopt a fiction that every use of force in such missions is consistent with constabulary/conduct based targeting authority. Critiquing the validity of such assertions is undoubtedly complicated by the complexity of investigating military action in response to these type of criminal threats and the chaos they produce in areas of operations. However, it seems almost impossible to believe that this approach is not a fiction. Instead, it seems almost inevitable that use of combat power in response to an internal armed threat, no matter the source of the threat and even assuming the forces are instructed to comply with strictly conduct based targeting rules, will morph into more of a status based targeting paradigm.

If this is not a fiction – if military forces strictly comply with conduct based targeting rules - then it raises serious questions related to whether this paradigm provides the criminal groups with an unjustified windfall. If these threats represent the type of risk normally associated with organized belligerent opposition forces during armed conflicts, why should the forces called upon to engage and subdue them restrict their operations pursuant to use of force rules that are tactically illogical? Such restrictions cede tactical advantage to the armed organized opposition group, potentially allowing them to exploit the soldier’s obligation to validate each and every use of force. 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.

The alternate solution would be to simply characterize response to organized criminal threats as armed conflicts. From the perspective of tactical clarity, this
solution is obviously appealing. However, there are also genuine concerns over such a characterization. First, determining if a situation of hostilities between state and non-state operatives qualifies as a NIAC is very difficult to ascertain, let alone achieve international consensus. This is especially true in the context of the type of emerging threats that do not seem to have been contemplated when the law related to this category of armed conflict was developed. The law regulating NIACs evolved in response to distinct types of armed challenges 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 destabilization, or the creation of societal chaos in order to enhance criminal profit. Instead, in the classic internal armed conflict scenario armed violence is always a means to a political end. Armed criminal groups seek no analogous political objective. Instead, they seem to utilize violence as a means to enhance their control over opportunities to ply their criminal trade, which often includes the creation of chaos to demonstrate the impotence of government authority. I WONDER IF WE CAN FIND SOMETHING TO SUPPORT THIS? This certainly serves their strategic interest of asserting their 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 conflicts is in many ways built on an implied dichotomy between criminal threats (subject to domestic criminal response authority) and threats rising to the level of armed conflict (subject to the law of armed conflict).  This dichotomy is based on the apparent assumption that

91 Bergal, supra note 87, at 1046.
92 Chelluri, supra note 84, at 99.

“[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
criminal threats are distinct in nature and 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.

None of these concerns is insurmountable though. Since the end of World War II, most armed conflicts have occurred between a state and non-state armed group,\(^{94}\) and the past decade has been marked by the trend to expand the universe of situations qualifying as non-international armed conflicts. The most notable example of this expansion is the concept of transnational armed conflict against international terrorist organizations.\(^{95}\) Scholars and experts have already begun to argue that violence resulting from internal organized criminal threats belongs under the banner of NIAC.\(^{96}\) The assertion that these situations qualify as NIACs has been covered in greater detail elsewhere,\(^{97}\) in particular Mexico’s situation, but a brief summary of the relevant legal and factual justifications for this designation is useful.

Common Article 3 (CA3) to the four 1949 Geneva Conventions established the category of non-international conflict, defined as an “armed conflict not of an

\[(b)\] 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 organisation 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.”

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\(^{96}\) Chelluri, *supra* note 84, at 57; see also Jensen, *supra* note 87, at 712-13.

\(^{97}\) Bergal, *supra* note 87; see also Chelluri, *supra* note 84; Jensen, *supra* note 87, at 712-13.
international character.” Traditionally, this was understood to encompass purely internal hostilities between state armed forces and insurgent or dissident groups. However, this is no longer the case, as 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. Whether emerging threats posed by organized criminal groups fall within this category of armed conflict is in many ways the cutting edge of this evolution. However, in recent decades and pursuant to cases like *Hamdan v. Rumsfeld*, there has been a definitive if not conclusive movement towards broadening CA3 to support this conclusion.

A commonly applied template for assessing the existence of armed conflict is derived from a seminal opinion from the International Criminal Tribunal for the Former Yugoslavia (ICTY). 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 1990’s, the Tribunal’s early decision in *Tadic* significantly contributed to the substantive understanding of NIACs. As one author has noted: “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, “... [where] territory [is] under the control of a party,” it can act as an indication of a NIAC.

In regards to the violence in Mexico, the objective indicia of widespread hostilities between armed organized groups makes it difficult to contradict at least a de facto NIAC comparison. In addition, applying what has become an increasingly endorsed “two prong” test for the existence of a NIAC derived from Tadic, criminal organizations seem to satisfy the two-prong organization and intensity elements. How such elements interact with each other (whether they are strict independent requirements or factors to guide more of a totality of the circumstances assessment)

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101 *Id.* at 71-72, 76
103 Chelluri, *supra* 84, at 91.
104 *Id.* at 1061; see also Tadic, at par. 70.
105 Tadic, at para 562.
is the subject of a recent Essay I authored with Laurie Blank. But under any application of these factors, the intensity and duration of hostilities, coupled with the indicia of organization of these groups, arguably satisfies this test. Government response with regular armed forces – an increasingly common feature of responding to militant organized criminal threats – only bolsters this conclusion. 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" displays the true reality of this threat.

Nonetheless, 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 organizations and other belligerent movements has therefore contributed to a blurring of the line between organized criminal activity subject to peacetime law enforcement responses and armed conflict. This dichotomy, however, seems increasingly irrelevant.

There are several realities 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, “…all 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. Furthermore, some of these groups (as have most TOCs) have formed alliances with terrorist organizations and are either funding supplying terrorist campaigns while others are simultaneously running criminal operations to fund their own belligerent operations. Finally, some criminal organizations have simply adopted political goals as they evolved over time. If a group’s interests are sufficiently interfered with, whether commercial or political, the potential for use of violence is equally a

106 GEOFFREY S. CORN & LAURIE R. BLANK, The Laws of War: Regulating the Use of Force, in NATIONAL SECURITY LAW IN THE NEWS 97 (Timothy McNulty, Paul Rosenzweig, & Ellen Shearer eds.).
107 Bergal, supra note 87, at 1076-77.
108 Buckley, supra note ?, at 799.
109 Id.
110 Chelluri, supra 84, at 54, 80; see also Bergal, supra 87, at 1086.
reality regardless of motivation. What is potentially more ominous is the very real danger of an organized criminal syndicate generating such chaos and havoc that the host nation itself collapses inward and becomes a failed state. In the end, even if the motives are non-political in the traditional sense, the outward reality of danger to the state’s citizens, security, and destabilizing effect on society and government is in effect the same, if not greater, than that presented by the more traditional insurgent threat.

Even assuming the armed conflict characterization of internal criminal violence is legally viable, other practical considerations and concerns may undermine the efficacy of this solution to the military response dilemma. An armed conflict characterization would of course trigger more robust use of force authority and eliminate many of the uncertainties and inequities associated with the constabulary use of force framework. However, it would also suggest a range of added authorities that are potentially overbroad to respond to such threats. Most notable among these is the authority to preventively detain captured criminal organization operatives (an authority derived from the principle of military necessity). Furthermore, an armed conflict designation would subject participants to individual criminal responsibility for violations of an increasingly expansive body of international law regulating non-international armed conflicts, and the use of military tribunals to adjudicate such allegations.

Clarity is another issue. Organized crime is cancerous by nature and tends to infiltrate all layers of society and government. In many cases local crimes are a proxy for the larger organized crime syndicate. Differentiating between independent, common criminals and the local operatives of the organized crime threat will create operational distinction quandaries not easily resolved. 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.

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. It is, therefore, essential to recognize that crossing the characterization threshold to armed conflict results in a transformation of legal authorities that extend well beyond the authority to employ force. Whether the military response to criminal threats justifies or necessitates triggering this full

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113 “At this stage of the conflict, Mexico may be moving from ‘Colombianization’ to ‘Afghanistanization.’ The issue is viewed seriously by the U.S. 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.’” Chelluri, supra note 84, at 54.

114 Nagle, supra note 123, at 1651-52.


package of LOAC derived authorities (and accordant obligations) is a complicated question. The core criminal agendas and activities of these groups might indicate that detention, trial, and punishment should remain within the exclusive realm of domestic law enforcement authority. Perhaps more significant is the question of whether, like the use of force issue, the nature of this threat inherently degrades the efficacy of these normal law enforcement response modalities? In short, while there may be pragmatic necessity to adjust the use of force equation, analogous necessity does not ipso facto extend to these other aspects of normal law enforcement response to criminal threats.

One logical solution to this risk of overbreadth would be to designate the response to organized criminal threats as armed conflict, but then rely on the state to carefully and judiciously regulate the invocation of permissible authorities based on genuine situational necessity. Because LOAC authority is not synonymous with obligation, a state need not utilize this full package of expanded response authorities when doing so is contrary to policy interests and unjustified by the necessities of the situation. For example, rules of engagement (ROE) could be used to limit situations where robust use of force authority is permitted to only those tactical engagements involving a highly organized and potent threat. Additionally, once operatives are subdued, use of normal law enforcement modalities would be the norm, with exceptions only triggered by genuine emergency situations (the same type of situations that would justify derogation from core human rights obligations related to deprivations of liberty).117

This obviously cannot ensure an armed conflict characterization will not result in unjustified deviations from normal peacetime legal regimes. Once the threshold is crossed, reliance on self-imposed restraints by national authorities, especially in situations of crisis created by the organized criminal threat, might be insufficient to prevent invocation of a full range of LOAC based response authorities.118. Unfortunately, the only viable alternative appears to be the current


In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Id.

approach: deny any overt acknowledgment of armed conflict but exercise authority that can only be reconciled with an armed conflict characterization. In either case, individual rights and liberties will potentially be adversely impacted by government action. At least when the existence of armed conflict is acknowledged, the state will be bound to comply with the humanitarian protections of the law it is invoking to address the threat.\textsuperscript{119}

If it were possible to expand the authority to employ deadly combat power under a pure law enforcement/human rights framework, this might provide a viable alternate solution. Such an approach would isolate the use of force issue from the broader legal framework in order to implement 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.

V. Status, Hostile Force Recognition, and a Possible Hybrid Approach

Building on one of the authors prior work addressing the relationship between organized armed groups and use of force authority,\textsuperscript{120} we believe that ultimately the only viable way to address the operational and tactical challenge associated with combating the threat of organized criminal groups is through the LOAC. Only LOAC based use of force authority is responsive to the presumptive threat resulting from membership in an armed organized group, because this authority is based on the presumption of threat that results from such membership and agency relationships.

Such a designation 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


\textsuperscript{120} See, e.g., Corn, supra note 3; see also Corn, supra note 98; Geoffrey S. Corn and Eric Talbot Jensen, \textit{Transnational Armed Conflict: A 'Principled' Approach to the Regulation of Counter-Terror Combat Operations}, 42 \textit{ISRAEL L. REV.} 45 (2009)
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 employment of force triggered by the presumption of hostility derived from determination of membership in the belligerent group during the execution of tactical operations, and not require the individual soldier to make a case-by-case judgment of actual threat as is normally required by law enforcement officers.

This shifted presumption triggered by national level armed conflict recognition should then be carefully implemented through rules of engagement, which would also establish the threat identification criteria used to make the membership assessment. These rules of engagement would normally not be “standing” in the sense that they remain in effect at all times and in all places (such as when an enemy armed forces 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 necessity a tactical response more akin to military action than law enforcement. Such rules of engagement might also incorporate a “functional hors de combat” rule. This rule would prohibit the use of deadly force for any opponent functionally incapable of resistance. While still less restrictive than a pure “capture instead of kill” rule, 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.

Status based ROE implement the LOAC rules of military necessity and military objective by authorizing the use of force, including deadly force, based on the determination that a potential target qualifies as a member of the enemy forces. Such ROE 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. Mission related ROE will also emphasize 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 absent appropriate authorization). However, it is clear that the primary consequence of recognizing the existence of an armed conflict is that it permits utilization of status based engagement authority.  

121 Capture-Kill Debates, supra note 47.
122 Conduct based ROE, in contrast, 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 ROE, each use of force must be predicated by an individualized assessment that the object of attack poses an imminent threat of death of 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 only to situations when that level of force is assessed as absolutely necessary.
Accordingly, status based ROE authorize use of force based on the presumption of threat only and impose no proportional force limitation on engaging an opposition operative. Authorizing this expansive use of force authority against members of criminal organizations 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 is far from universally accepted. In fact, many experts insist that status based targeting is inapposite to NIAC because non-state operatives cannot qualify as combatants within the meaning of the Geneva Conventions and the Additional Protocols. 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 traditional international armed conflict context.

It is important to note that we believe recognition of an armed conflict and the accordant status based targeting authority should not be understood as a talisman to resolve all complexity associated with the response to armed criminal organizations; far from it. Instead, the nature of opposition members will substantially impact the efficacy of utilizing this authority. It is true that some non-state opposition groups manifest a sufficient level of military organization and objective uniformity to facilitate the hostile force designation and positive identification. For example, a state fighting a dissident armed force (such as the civil wars in Bosnia and Croatia) or a state fighting an insurgent force that adopts a military type uniform (such as the FARC in Colombia) would qualify for this designation. However, this is certainly not always the case and increasingly not the norm. Instead, non-state operatives will rarely wear any type of uniform or distinctive emblem, but instead, it will appear indistinguishable from the civilian population (whether the law implicitly incentivizes such conduct is an interesting question but beyond the scope of this article). This status determination challenge will obviously be equally complex if status based targeting is extended to organized crime members.

None of these challenges are insurmountable, but they do indicate the importance of an extremely judicious use of the scope of authority associated with armed conflict. The objective person must always be to carefully expand and tailor use of force authority in order to address the tactical realities of a military response to organized criminal groups. The key to any such approach must be an adjusted use of force authority that responds to the reality that the presumptive inoffensiveness

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123 Instead, these experts believe that non-state operatives must be considered 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 authorized, it must be conduct based, because the authority to attack results from the conduct of direct participation in hostilities.
that underlies pure conduct based use of force authority is simply inapposite to these threats. Still, the more robust use of force authority derived from the LOAC should ordinarily be invoked only during tactical operations against criminal operatives manifesting the type of organization and capability normally associated with belligerent groups.

VI. One Possible Compromise: Extending a Limited Proportionality Protection to Criminal Organization Operatives?

As noted above, one of the hallmarks of status based targeting of belligerent operatives in armed conflict is the absence of any obligation to utilize proportional force to achieve submission. Because the military response to armed criminal groups seems to straddle the divide between law enforcement and armed conflict, tactical operations against criminal operatives arguably do not implicate – at least to the same degree - the justification for dispensing with a proportional force requirement when engaging more traditional belligerent operatives. First, individual criminal group operatives are unlikely to be trained members of a military organization devoted to a common ideological cause. Instead, they are more likely engaged in their violent activities based on profit motive or perhaps simply as a result of social relationships. Far more significant is the invalidity of the assumption that targeting of individual operatives can credibly be expected to influence the criminal organizational leadership as a means to compel them to submit to government authority. Unlike a traditional insurgent or dissident group engaged in armed conflict against a government, it is unlikely these leaders will abandon their violent agenda as the result of disabling of individual operatives, a factor that ties directly back to the absence of a traditional political agenda driving the violent activities of these groups. Because organized criminal violence is not motivated by an end state of compromise or agreement with the government but instead to establish impunity from government authority, it is highly unlikely that disabling individual operatives will motivate submission. 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 may be true that disabling individual operatives may result in a decrease in violence, this will be the result of loss of the ability to assert their will and not an abandonment of the violent agenda writ large.

Thus, the ultimate goal for using force against individual members of organized criminal groups is somewhat different, in theory, from the use of force against a more traditional organized belligerent group in armed conflict. The primary objective will normally be focused on disabling the capacity of individual operative or groups of operatives to engage in violent activities and not necessarily to influence criminal group leadership. The effectiveness of government efforts to achieve this goal will produce an accordant decrease in the ability of the group to challenge government authority through violence and thus the need to invoke tactical status type use of force authority, but it is unlikely to lead the criminal organization leadership submit to government authority.
As a consequence of this difference, subjecting such attacks to the general constabulary obligation of proportionality is defensible. However, by acknowledging a presumed individual hostility for organization members, the soldier would be justified to initiate tactical engagement, to use weapons and tactics associated with combat operations, and to employ deadly force absent indicia that the threat has dissipated. Furthermore, that initiation would be treated as presumptively (although certainly not conclusively) reasonable. Thus, unlike the normal peacetime constabulary context, the use of force by a military forces would not be treated as prima facie unlawful, and the burden would not be placed on the government to justify that use of force by proving the conduct of the object of violence manifested an imminent threat of death or grievous bodily harm to the attacking soldier. In short, the armed conflict characterization would trigger the authority to initiate action to reduce the threat, to include the use of force, but would not eliminate the requirement to use only that amount of force necessary to reduce the threat.

This may seem like a distinction without substance. Certainly, when criminal group operatives initiate attacks on armed forces, the distinction becomes almost irrelevant (although the applicability or inapplicability of proportional response obligation would still be potentially significant). Military forces would respond with the force necessary to subdue the threat. This does not render this concept a legal fiction. A sliding scale of presumptive threat recognizes that this presumption moves very close to that of status based targeting when the criminal group is highly organized, heavily armed, and functionally immune from normal law enforcement incapacitation. This will permit military forces to act with the tactical initiative justified by the highly armed and organized nature of the threat and 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, the use of force authority is sufficiently qualified to mitigate the risk of use of force in response to this threat. In short, this approach would limit the inherent over-breadth of pure status 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 allow armed forces to execute operations against criminal operatives without the risk of tactical hesitation resulting from a legal framework that treats every killing as an exceptional action. While it will not relieve them of the obligation to refrain from employing deadly force when the situation cannot reasonably justify that level of force, it will in effect modify the presumptive impropriety of using deadly force in all situations. When the organized and violent nature of criminal 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, this outcome is justified. Refusing to acknowledge that the nature of these emerging and highly destabilizing internal criminal threats necessitates this modification of the normal
presumption that underlies law enforcement authority is inconsistent with the reality that exposes these forces to unjustified risk.

We also believe, however, that absent extraordinary circumstances, states should refrain from leveraging an armed conflict designation for any authority beyond that associated with tactical uses of force against organized belligerent threats. By leaving detention and criminal sanction issues within a pure law enforcement framework, this will alleviate the significant and legitimate concern that an armed conflict characterization will be used as a subterfuge to justify widespread oppressive measures. Accordingly, a national recognition (or designation) of a situation as an armed conflict, accompanied by a clear and precise indication of the scope of authority invoked by the state pursuant to this designation, should be the norm when states feel compelled to respond to organized criminal threats with the combat capabilities of their armed forces.

We believe there is strong evidence that states plagued by the modern incarnation of organized criminal threats are already utilizing this expanded authority especially when armed forces are tasked to respond to these threats. Because, however, a peacetime human rights framework does not currently account for such adjusted use of force authority, fictions continue to be utilized to fit the tactical square peg into the legal round hole. Perhaps some consider this an acceptable approach. We do not. Instead, we believe that law must be responsive to strategic threat realities. If the nature of the criminal threat compels states to respond with combat power, these responses must either be characterized 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 to 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 organized criminal groups themselves.

VII. 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 recognized 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 characterized 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 organized criminal groups are creating unprecedented challenges to government authority by utilizing 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 characterization 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 over breadth. However, because expanding the scope of permissible tactical engagement authority within a pure human rights legal framework is simply not feasible, this must be recognized as the only viable start point to address these emerging threats. To offset the risk of authority over breadth, however, this invocation of law of armed conflict 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 only those tactical missions where high level national authorities assess true necessity for such expansion while at the same time retain other aspects of a human rights dominated response. Such an approach will undoubtedly spark criticism from both human rights and armed conflict proponents. The former will likely object to treating criminal threats as belligerent operatives; the latter to limiting use of LOAC authority. However, before such adjustment to military use of force authority is rejected, opponents should seriously consider the alternative that this rejection may press states to adopt: a continuation of the trend to essentially pretend they are responding to a pure law enforcement threat, while at the same time employing force in a manner that can only be permissible within the context of armed conflict. In short, opponents of such a proposal might consider ‘being careful what they ask for, because they just might get it.’