Proper Application of ADR Techniques Regarding Violent Non-State Actors

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I. INTRODUCTION

"We do not negotiate with terrorists"—the mantra has been repeated by politicians and panelists, on the news and in cinema, to the point of becoming a national axiom.[1] However, this mantra rarely holds up in practice.[2] Governments frequently engage in back channel discussion with terrorist organizations, despite public assertions to the contrary.[3] Such discussions can provide pragmatic benefits, while allowing for a measured escalation of force consistent with the broader Law of Armed Conflict. The expanded use of negotiation and mediation has the potential to bridge the capability gap between domestic counter-terror measures and military attacks on foreign territory, better equipping the United States to address emerging transnational threats. As the Global War on Terrorism[4] enters its 13th year, the United States has gained tremendous exposure to a wide variety of violent non-state actors. While American military action has focused primarily on the Taliban, Al-Qaeda, and more recently the Islamic State, these groups are representative of a broad new field of violent non-state actors. Ranging from common street gangs to private armies, violent non-state actors are able to exercise considerable lethal capacity without the restraints associated with state-on-state conflict. Despite a reemergence of

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[1] Peter R. Neumann, *Negotiating with Terrorists*, FOREIGN AFFAIRS (Mar. 20, 2015), http://www.foreignaffairs.com/articles/62276/peter-r-neumann/negotiating-with-terrorists.

[2] John Arquilla, *Getting to Yes with the Taliban*, FOREIGN POLICY (May 20, 2013), http://www.foreignpolicy.com/articles/2013/05/20/getting_to_yes_with_the_taliban.

[3] *See* Neumann, *supra* note 1. Examples from recent history include British negotiations with the Irish Republican Army, Spanish talks with the Basque Homeland and Freedom separatist movement, and Israeli discussions with the Palestine Liberation Organization; all within a close timeframe to serious terror attacks.

[4] *The War on Terrorism,* BOUNDLESS, (July 21, 2015), http://www.boundless.com/political-science/foreign-policy/history-of-american-foreign-policy/the-war-on-terrorism/.

state-centric tensions as a source of national security concern, non-state actors pose a persistent and imminent threat to global security.[5]

The international legal treatment of non-state actors has failed to keep pace with the rapid evolution of such organizations.[6] Before non-state actors developed the capability to strike globally, acts of terrorism were traditionally considered a matter of domestic criminal law.[7] However, the transnational nature of contemporary terrorist groups renders their organizations resilient to domestic prosecution. The Law of Armed Conflict does provide some provisions for the use of military force against non-state actors, despite its primary focus on state centric conflict.[8] However, prosecuting non-state organizations under its tenants has proven difficult. Direct engagement may provide a more immediate and efficient means of dismantling such organizations, as opposed to protracted litigation with territorial governments or controversial kinetic strikes.

In order to understand how best to apply Alternative Dispute Resolution techniques to violent non-state actors, we must understand how the unique attributes of these two concepts interact with one another. First, this requires an analysis of contemporary violent non-state actors. This analysis will include their offensive and defensive capabilities, types of organizational structures, and what drives their resilience to conventional military action. Second, this piece will address how the Law of Armed Conflict treats such organizations, why nations primarily use self-defense arguments to justify actions against such groups, and the limited utility the law has for actually combatting violent non-state actors. Finally, this article will address how negotiation and mediation may be employed against violent non-state actors; the former when such actors are identifiable in an area under relative control, and the latter when such groups remain anonymous or inaccessible.

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[5] Robert J. Bunker, *Defeating Violent Nonstate Actors,* 43 U.S. ARMY WAR COLLEGE Q. PARAMETERS 57 (Winter 2013–14).

[6] Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 491 (2012) (discussing the lack of coherent standards for the use of extraterritorial self-defense against non-state actors operating within a sovereign territory).

[7] Michael N. Schmitt, *Responding to Transnational Terrorism under the Jus ad Bellum: A Normative Framework,* 56 NAVAL L. REV. 1, 8 (2008).

[8] *Id.*

II. DEFINING NON-STATE ACTORS

The emergence of non-state actors as powerful players in global governance is not limited to those with violent intent or to the national security realm. The term non-state actor may refer to any association without nation-state status, which seeks to assert influence over international affairs.[9] Examples include Non-Governmental Organizations (NGOs), industrial organizations, and international environmental groups.[10] Non-state actors are also a prevalent form of organization in both the scientific and sustainable development community.[11] The emergence of such groups has shifted power from more traditional forms of government, which have struggled to adapt to a more globalized society.[12]

The emergence and ability of non-state actors to impact security on a global scale is a relatively new phenomenon.[13] Where large-scale conflict previously required the marshaling of national level resources, a number of factors have altered this dynamic:

> A number of developments explain the emergence of this new breed of conflict. Technological developments have enabled non-state actors to wield military capabilities that were previously unimagined. The process of globalization, which allows more freedom in the movement of people and goods, has also served to empower non-state actors. Finally, the accelerated process of state creation over the past century has created states that are too weak to prevent non-state actors from using their territory as a base for launching hostilities against other states.[14]

Ultimately, the increased prevalence of violent non-state actors can be attributed to a decrease in the cost of organizing and waging conflict. As violent non-state actors increase in number, they also increase in variety. Some organizations pursue traditional criminal activity, albeit on a global

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[9] CRAIG CALHOUN, DICTIONARY OF THE SOCIAL SCIENCES (2002).

[10] Joyeeta Gupta, *Non-State Actors in International Governance and Law: a Challenge or a Blessing*, 11 ILSA J. INT'L & COMP. L. 497 (2005).

[11] *Id.*

[12] *Id.*

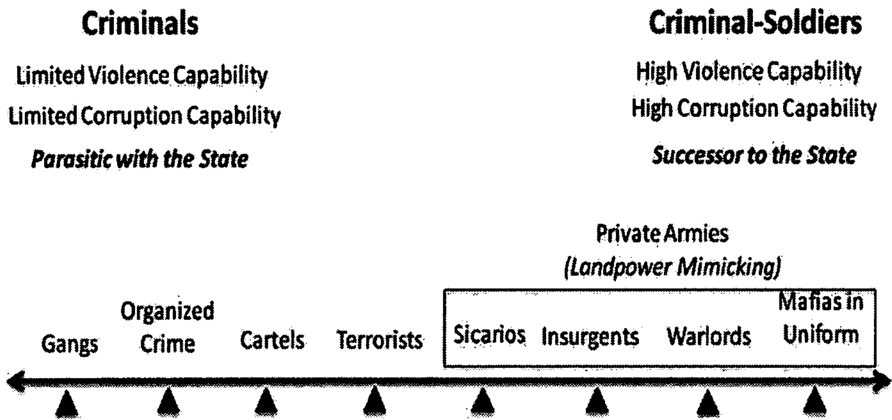
[13] Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 10 (2004).

[14] *Id.*

scale, while others are driven by political and religious ideology.[15] An accurate understanding of the nature and intent of any such organization is critical to determining whether it can be effectively engaged by ADR techniques.

A. *Placing Non-state Actors on the Threat Spectrum*

The term *violent non-state actor* can encompass a broad range of organizations with varying abilities to undermine social order.[16] They may be motivated by religion, political ideology, legitimate opposition to an oppressive regime, or merely profit.[17] In order to better understand such entities, it is helpful to focus on organizational structure rather than specific goals. Ideologically opposed groups may adopt similar organizational structure based on external factors such as member security, operating environment, or simple efficiency.



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Different classifications of violent non-state actors can be placed on a threat-continuum, based on their capacity for violence and corruption.[19] On the low end of the spectrum are criminals; common street gangs and

[15] Neumann, *supra* note 1.
[16] Bunker, *supra* note 5, at 58.
[17] *Id.*
[18] *Id.*
[19] *Id.*

organized criminal enterprises, leading up to cartels. Terrorists, as a loosely defined class, are placed before the violent non-state actors which organize in a more military fashion. These criminal-soldiers include insurgents, warlords, and uniformed private armies. The criminal classes, and to a lesser extent terrorists, are considered parasitic to the state, while the criminal-soldier classes openly challenge state authority.[20]

Certain organizations may transition between classifications based on organizational success, or simultaneously exhibit the characteristics of multiple classifications. The classic example would be a gang growing into a criminal enterprise and finally a cartel.[21] Other organizations may divest themselves into multiple criminal enterprises. For instance, members of the Taliban, which may be considered insurgents or terrorists depending on the specific actors or intended targets,[22] finance their operations through narcotic trafficking.[23] Many of these transitions are both enabled by the factors driving globalization, and a reaction to globalization's negative consequences.[24]

Controlling such groups has proven quite difficult. Along the criminal spectrum, both a capacity for violence and capacity to corrupt increase simultaneously. The warlord is thus better equipped both to combat and to corrupt a local government than a gang would be. However, these variables do not align on the corollary state-power spectrum.[25]

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[20] *Id.*

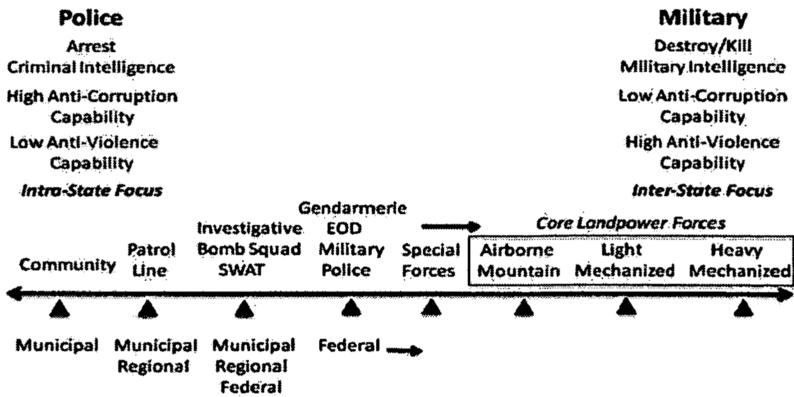
[21] *Id.* at 59.

[22] Michael Rubin, *Yes the Taliban are Terrorists,* COMMENTARY (Jan. 19, 2014), http://www.commentarymagazine.com/2014/01/19/yes-the-taliban-are-terrorists/.

[23] Gretchen Peters, *How Opium Profits the Taliban,* UNITED STATES INST. OF PEACE (Aug. 2, 2009), http://www.usip.org/sites/default/files/resources/taliban_opium_1.pdf.

[24] Bunker, *supra* note 5, at 65.

[25] *Id.* at 60.



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When a nation needs to exert legitimate force, its options range from municipal law enforcement to heavy mechanized divisions. This spectrum recognizes anti-violence capability, [27] which increases with the size, equipment, and complexity of the organization. However, it does not include anti-corruptive capacity,[28] which maximizes at the low end of the spectrum. Generally, local police departments are best equipped to deal with corruption due to investigative capacity and police power not present on the military side of the spectrum. Civil liberty ramifications prevent the consolidation of intra-state police power and inter-state war power into a single organization. This disconnect complicates the ability of nations to confront transnational criminal and terrorist organizations.

B. *Organizational Operation: Personal and Digital Networks*

Technology has fundamentally altered how non-state actors operate, radically enhancing their abilities both to organize internally and promote their message externally. The Internet provides a means by which such actors may communicate transnationally and anonymously.[29] Bypassing traditional territorial boundaries allow such organizations to protect themselves from prosecution in any single nation. Violent non-state entities may inspire the

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[26] *Id.*

[27] The deterrence and suppression of hostile forces.

[28] The capacity for internal investigations and community policing.

[29] *See* CONVERGENCE: ILLICIT NETWORKS AND NAT'L SECURITY IN THE AGE OF GLOBALIZATION (Michael Miklaucic & Jaqueline Brewer eds., 2013) [hereinafter CONVERGENCE].

formation of affiliate organizations without an agent ever visiting the affected country.[30] Ultimately, this allows for decentralized ideological movements to coordinate their collective actions, and for more hierarchal entities to disperse their command and control elements in a protective manner.

For a nation-state centric international dispute resolution system, this poses unique challenges.[31] Most forms of international dispute resolution are adapted to interact with hierarchical organizations, be they national governments or multi-national business enterprises.[32] However, contemporary violent non-state actors often associate based on ideological grounds rather than strict objectives. As General McChrystal[33] has observed, "[l]ike their allies in al-Qaeda, this new Taliban is more network than army, more a community of interest than a corporate structure."[34] While this specific observation was based on his experience with al-Qaeda and the Taliban in particular, the concept of non-state actors as a "community of interest" may be applied to ideologically driven violent non-state actors broadly.

While ideologically driven groups may prefer such decentralized methods of leadership, this posture could also be driven by the pressure exerted by counter-terror military operations.[35] More hierarchical organizations, such as the Mexican drug cartels, have adopted similar methods when threatened[36] "from competing actors and states, [and] they tend to devolve into networks as a defensive response—when dominant in a host environment more centralization becomes evident."[37]

Regardless of the degree of centralization employed, personal networks are critical to the operation of violent non-state groups. Constantly under threat from government action and rival groups, a high degree of trust is required to sustain operations. Based on observations from Iraq:

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[30] *See* Thérèse Postel, *The Young and the Normless: Al-Qaeda's Ideological Recruitment of Western Extremists*, 12 CONNECTIONS: THE Q. J. 99, 117 (2013).

[31] CONVERGENCE, *supra* note 29, at xviii.

[32] *Id.*

[33] General Stanley A. McChrystal retired from the U.S. Army in 2010 after commanding the International Security Assistance Force in Afghanistan and the Joint Special Operations Command from 2003 to 2008.

[34] Stanley A. McChrystal, *It Takes a Network*, FOREIGN POLICY (Feb. 21, 2011), http://www.foreignpolicy.com/articles/2011/02/22/it_takes_a_network.

[35] Bunker, *supra* note 5.

[36] *Id.*

[37] *Id.*

> [I]t [has become] increasingly clear—often from intercepted communications or the accounts of insurgents we had captured—that our enemy was a constellation of fighters organized not by rank but on the basis of relationships and acquaintances, reputation and fame. Who became radicalized in the prisons of Egypt? Who trained together in the pre-9/11 camps in Afghanistan? Who is married to whose sister? Who is making a name for himself, and in doing so burnishing the al-Qaeda brand?[38]

Understanding the extent of such personal relationships, and the degree of centralized decision making, is critical to ultimately determining whether dialogue with a non-state actor is possible.

C. *Limits on the Application of Conventional Combat Power*

The lessons of the past decade have been hard learned through the campaigns in Iraq and Afghanistan in particular. Despite objective combat superiority, the U.S. has struggled to achieve articulable military victory in these conflict zones.[39] Two main factors drive this limitation: a disconnect between military capability and mission, and a disconnect between military capability and national policy.[40]

At the outset of the War on Terror, the U.S. was poorly equipped for the task at hand, both doctrinally and from an organizational perspective. Pre-9/11 military force structure was largely unchanged since the Cold War. The U.S. military was well prepared to face a technologically advanced peer-military competitor. However, the limitations of vehicles and equipment poorly suited to irregular warfare lead to a scramble to field adequate replacements.[41] Doctrinally, the U.S. was equally unprepared to fight on what would become known as the human terrain.[42] Just as U.S. equipment

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[38] McChrystal, *supra* note 34.

[39] *Id.*

[40] The U.S. entered the Global War on Terror with a force structure and equipment philosophy left over from the Cold War. The focus on large scale force–on–force conflict placed emphasis on heavily armored vehicles as opposed to the more maneuverable assets required in Afghanistan. A focus on large, expensive systems put the U.S. at a financial disadvantage in asymmetric conflict, short of total war.

[41] Alex Rogers, *The MRAP: Brilliant Buy, or Billions Wasted?*, TIME (Oct. 2, 2012), http://nation.time.com/2012/10/02/the-mrap-brilliant-buy-or-billions-wasted/.

[42] *The Human Terrain System*, UNITED STATES ARMY (Mar. 20, 2014), http://humanterrainsystem.army.mil/.

was not optimized for counterterror operations, U.S. training did not adequately prepare deploying troops to interact with the local population.

From a national policy perspective, there was a disconnect between what policy leaders hoped to achieve through the application of military force, and what such force could actually achieve.[43] While the military has high anti-violence capacity, it has low anti-corruption capacity.[44] The military can suppress violent action; it cannot address the root causes of violence, and thus not pacify a region. Non-military engagement was a critical component overlooked during early war planning. While conventional military force is poorly suited to addressing the threat posed by violent non-state actors, the law governing the use of such force is equally poor suited to the task. Negotiation and mediation present opportunities to modify this posture in a beneficial manner avoiding any potential challenge under the Law of Armed Conflict.

III. Treatment of Violent Non-State Actors Under the Law of Armed Conflict

Following the bloodshed of the early 20th century, the Law of Armed Conflict was adopted as a means to minimize unnecessary suffering in future conflict. The treaties recognize rights in sovereign nations to include self-defense and territorial integrity. While provisions address non-state actors within the Law of Armed Conflict, such groups do not possess reciprocal rights to nation states, especially to territorial integrity. When such groups pose the risk of harm to nations, the traditional self-defense test is triggered. However, the application of defensive force, balanced against territorial integrity, requires special consideration.[45]

A. *Background on the Law of Armed Conflict*

The emergence of loosely organized non-state actors has generated a broad range of legal questions regarding the treatment of such militant groups. The Law of Armed Conflict was drafted with state-on-state conflict

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[43] *Strategic Landpower: Winning the Clash of Wills*, STRATEGIC LANDPOWER TASK FORCE (May 2013), http://www.ausa.org/news/2013/Documents/Strategic%20 Landpower%20White%20Paper%20May%202013.pdf.

[44] Bunker, *supra* note 5.

[45] Schmitt, *supra* note 7.

in mind.[46] Its tenets are geared toward identifying lawful combatants and legally permissible tactics during wartime.[47] By limiting operations to legally acceptable bounds, the intent is to minimize unnecessary civilian casualties, prevent atrocities, and better facilitate lasting peace after the cessation of hostilities.[48] The law is designed to influence pre- and post-war behavior, as much as the behavior during combat.[49]

Past enforcement of the Law of Armed Conflict depended heavily on the nation-state status of the belligerents.[50] Following World War II, the most notorious trials were those prosecuting former Axis leaders for war crimes.[51] Since that time, the UN has sought to delegitimize state on state conflict.[52] Despite an overall reduction in such conflict,[53] the law of war remains focused on conventional conflicts, and is thus under equipped for addressing belligerent non-state actors.[54] As more conflicts become asymmetric in nature, even classifying them as "war" becomes difficult, however the distinction remains critical:

> These questions carry more than mere theoretical significance. Determining whether a certain situation constitutes war - and if so, whether it is war of the intra-state or inter-state variety - determines in turn the legal regime that should apply to it. For example, in times of peace states are not allowed to target individuals, and they are not allowed to detain people indefinitely without first trying them in court. During an inter-state armed conflict, however, a different legal regime applies: The armed forces of the warring states may lawfully target enemy combatants and military objectives, and battlefield

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[46] LTC Richard P. DiMeglio, et al., LAW OF ARMED CONFLICT DESKBOOK (MAJ William J. Johnson & Maj Andrew D, Gillman eds., 2012).

[47] *Id.* at 19. ("While there are numerous LOAC treaties in force today, most fall within two broad categories, commonly referred to as the "Hague Law" or "Hague Tradition" of regulating *means and methods* of warfare, and the "Geneva Law" or "Geneva Tradition" of *respecting and protecting victims* of warfare.").

[48] *Id.* at 8.

[49] *Id.* at 9.

[50] *Id.* at 19.

[51] *Id.* at 16. (Post war tribunals in Nuremburg, Tokyo, and Manila represented immense progress in post-conflict accountability over previous conflicts).

[52] *Id.* at 17.

[53] Joshua S. Goldstein, *World Peace Could Be Closer Than You Think*, FOREIGN POLICY (August 15, 2011), http://www.foreignpolicy.com/articles/2011/08/15/think_again_war.

[54] Schöndorf, *supra* note 13.

detainees may be held until the cessation of hostilities, so long as they are accorded prisoner–of–war status.[55]

The United States government has had internal disputes amongst its branches pertaining to those same issues, particularly surrounding the Authorization for Use of Military Force Against Terrorists (AUMF). [56] The Bush administration relied heavily on this statute for its counter-terror campaigns, and was given broad discretion for military engagements in cases such as *Hamdi v. Rumsfeld*.[57] The Obama administration has continued to rely on this statute for its wide spread drone strike campaign, which has been considered permissible under the Laws of Armed Conflict.[58]

In addition to these unique complexities, enforcing the Law of Armed Conflict suffers from the same deficiencies as any adjudicative process. The complexity, long trial periods, limited ranged of possible outcomes, and entrenchment of adversarial relationships plague international courts as much as domestic civil or criminal dockets. The introduction of non-state actors adds further complexity, and some have argued that a new legal regime may be necessary to address extra-state or non-state armed conflict.[59] "Current legal literature on the topic is limited by the assumption that the laws of war apply only when the situation is governed by the Geneva Conventions."[60] However, that the Conventions "cover certain types of armed conflicts does not preclude the possibility that there may be additional categories of armed conflict that are not regulated by the Conventions."[61] New threats have forced the world to rapidly generate new understandings of the traditional LOAC. Large-scale transnational terrorism compelled the international community to discover a normative architecture governing the legal basis for counterterrorism that had been theretofore been rather obscure.[62]

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[55] *Id.* at 4–5.

[56] Khalil Dewan, *Old Laws, New Enemy-The AUMF Debate and the Wat on on Terrorism,* HUFFINGTON POST (January 16, 2016), http://www.huffingtonpost.com/khalil-dewan/old-laws-new-enemy-the-au_1_b_9009690.html..

[57] *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[58] Michael Isikoff, *Justice Department memo reveals legal case for drone strikes on Americans*, NBC NEWS (March 20, 2014), http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite.

[59] Schöndorf, *supra* note 13.

[60] *Id.* at 6.

[61] *Id.*

[62] Bunker, *supra* note 5.

B. *National Self-Defense under the Law of Armed Conflict*

Under the Law of Armed Conflict there are only two scenarios under which a nation may legally use military force; when sanctioned by a United Nations Security Council resolution consistent with Chapter VII of the UN Charter,[63] or in instances of self-defense as authorized by Article 51.[64] Of these two methods, self-defense has become the preferred mechanism for attacking hostile groups.[65] While the Security Council has passed several resolutions indicating transnational terrorism constitutes a threat to international peace and security,[66] it has never expressly mandated the use of force in response to terrorism.[67] This decision could be a function of the Council's general aversion to authorizing the use of force, or of the veto power held by the Council's five permanent members.[68]

Self-defense is the preferred means of legitimizing the use of force under LOAC, given its broader application and that the threatened nation is the sole decision maker concerning the use of force.[69] "Article 51 makes no mention of the nature of the entity that commits the offending armed attack,"[70] as is the case with other UN provisions, implying a broader grant of discretion in determinations of self-defense. Strikes against non-state actors presumptively fall within this discretion, provided that they adhere to broader LOAC norms

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[63] U.N. Charter Chapt. VII.

[64] U.N. Charter Art. 51.

[65] Bunker, *supra* note 5.

[66] *See* S.C. Res. 1438, U.N. Doc. S/RES/1438 (Oct. 14, 2002), S.C. Res. 1440, U.N. Doc. S/RES/1440 (Oct. 24, 2002), S.C. Res. 1450, U.N. Doc. S/RES/1450 (Dec. 13, 2002), S.C. Res. 1465, U.N. Doc. S/RES/1465 (Feb. 13, 2003), S.C. Res. 1516, U.N. Doc. S/RES/1516 (Nov. 20, 2003), S.C. Res. 1530, U.N. Doc. S/RES/1530 (Mar.11, 2004), S.C. Res. 1611, U.N. Doc. S/RES/1611 (July 7, 2005), S.C. Res. 1618, U.N. Doc. S/RES/1618 (Aug. 4, 2005)

[67] Bunker, *supra* note 5, at 58.

[68] *Voting System and Records*, THE UNITED NATIONS SECURITY COUNCIL, http://www.un.org/en/sc/meetings/voting.shtml (last visited Mar. 20, 2014). The United States, Britain, France, China, and Russia have permanent seats on the Security Council, affording them veto power over Council Resolutions. *Id.* This is frequently the case given the countries' divergent national interests. *Id.*

[69] Deeks, *supra* note 6, at 495.

[70] Schmitt, *supra* note 7, at 11.

on the use of force. The most prominent criteria are that any use of force be necessary, proportionate, and immediate relative to the threat at hand.[71]

Any attack not adhering to the principles of necessity, proportionality, and immediacy would be unlawful under the Law of Armed Conflict. Necessity requires:

> [T]here to be no viable option other than force to deter or defeat an armed attack. This is a critical criterion in the context of terrorism. If law-enforcement measures (or other measures short of self defense) will assuredly foil a terrorist attack *on their own*, forceful measures in self-defense may not be taken. The issue is not whether law enforcement officials are likely to bring the terrorists to justice, but instead whether, with a reasonable degree of certainty, law enforcement actions alone will protect the target(s) from terrorism.[72]

The broad scope of this standard serves to allocate the risk of a wrongful attack on those threatening acts of terrorism, rather than the victim nations. Based on this standard, there is no requirement that a nation engage in negotiations with hostile groups; unless there is absolute certainty that such negotiations would thwart an imminent attack.

However, the imminence criterion poses additional challenges. A defining characteristic of terrorist attack is the absence of warning.[73] Given the absolute reliance on surprise, terrorists do not signal their intent to adversaries by making war preparations during the escalatory phase of conflict. This requires a different set of presumptions when planning to engage violent non-state actors. Violent non-state actors are distinguishable from states in their lack of socially beneficial purpose; whereas there is a rebuttable presumption that states will act within the bounds of the law, there is an irrefutable presumption that violent non-state actors will act outside it.[74] An attack, then, should be considered imminent from any group the conduct of which is their avowed purpose. The final criterion, proportionality, is satisfied so long as the amount of force utilized does not cause excessive civilian harm relative to the military objective at hand.

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[71] DiMeglio, *supra* note 46, at 37 (explaining that these factors derive from the 19th century "Caroline Case"). *See generally* 30 BRIT. FOREIGN ST. PAPERS 193 (1843), *reprinted in* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938).

[72]Schmitt, *supra* note 7, at 15.

[73] *Id.* at 17.

[74] *Id.* at 18

C. *Territorial Sovereignty and the "Unwilling or Unable" Test*

Based on the above analysis, nations have seemingly broad discretion to strike at their discretion, rendering moot the need for prior negotiations. However, there are countervailing principles in international law beyond an individual nation's right to self-defense.[75] Most prominent is the right of sovereignty, which demands territorial integrity.[76] As violent non-state actors disperse their networks across multiple sovereign nations, it becomes increasingly difficult to attack them with military strikes or to coordinate an international law enforcement effort.

Many nations may be unwilling or unable to take actions against violent non-state actors operating within their territory. In other words, "[i]t is easy to envision that a neutral state either might ignore its duties or face significant practical difficulties in blocking a committed belligerent from using its neutral territory for various war related purposes." [77] Such difficulties may include: a weak central government, a lack of military resources, an ideological sympathy for the hostile group, or a fear of retaliation from the group.[78] Regardless of these deficiencies, the territorial nation retains its right of sovereignty.

In order to attack groups so located, the threatened nation must argue that the territorial nation is unable or unwilling to interdict hostile actors within its borders.[79] "There is little question that the test exists as an internationally-recognized norm governing the use of force; given how regularly states and commentators evoke it."[80] However, the exact judicial standards of this test remain unarticulated.[81] The result is an inconsistent application of military force, even under similar conditions.[82] This is especially problematic when combating transnational terror organizations, whose networks encompass multiple different countries. The "unwilling and unable" test may be used to justify a strike on a country that could conceivably take action, while terrorists in a genuinely incapable territory may be ignored. Such asymmetries create significant international tension, as

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[75] *See generally* Deeks, *supra* note 6.
[76] *Id.*
[77] *Id.* at 499.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 503.
[81] *Id.*
[82] *Id.*

do the agreements required to conduct such strikes, such as basing, supply, and flyover rights for military aircraft.[83] Ultimately, the constraints on the threatened nation are strategic rather than legal; whether they wish to face international controversy and complication rather than strict judicial penalty.

IV. NEGOTIATION AS A TOOL AGAINST KNOWN, GEOGRAPHICALLY CONSTRICTED, AND INSURGENT NON-STATE ACTORS

That successful negotiations with violent non-state actors are possible is not to suggest that they are always advisable. There a number of risks, both from a security position and from a policy position, which would suggest that such negotiations are ill advised. Such risks include the potential to legitimize violence as a tool when bargaining, rewarding terror groups for deviating from international norms, and undermining non-state actors seeking change through nonviolent means.[84] However, among a set of much worse alternatives, negotiating may be the best option available to combating violent non-state actors:

> Overall, the historical record suggests there is much to commend the notion of negotiating with terrorists. Talks must be undertaken with much care and caution, and war-war must continue while the parties jaw-jaw. But the potential for finding the way to peace, even in the most pernicious conflicts, is far too good to overlook.[85]

Even with negotiations ongoing, military considerations must remain at the forefront of decision-making. Negotiations must be seen as a tactic within the broader military strategy, rather than an independent or terminal phenomenon. In other words, "[t]he key is to be able to discern the difference between situations in which the terrorists are simply manipulating the negotiation process to play for time or score propaganda points, and those in which there is real hope for peaceful progress."[86] Unless commanders are able to understand the role of negotiations in the context of the broader military picture, they run the risk of those negotiations being used to their disadvantage. However, in certain operational situations, negotiations may be the most expeditious means available to dismantle a terrorist network. This is

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[83] Bunker, *supra* note 5.

[84] *See generally* Neumann, *supra* note 1.

[85] Arquilla, *supra* note 2.

[86] *Id.*

especially true when individuals within the network are identifiable, are operating within known or restricted geographical boundaries, and the network itself is in a defensive or insurgent posture, as was the case during the later stages of the Operation Iraqi Freedom.

A. *The difficulty inherent in negotiating with non-state actors*

In the Frequently Asked Questions section of their book, Fisher and Ury directly address the concerns related to negotiating with terrorists. [87] However, to borrow from their own theoretical framework, they speak of terrorists in terms of positional rather than interest based bargaining. The presumption is that those who resort to terror are ordinary human beings, who will revert to members of the general population once their short term financial or political goal is achieved. Their language elicits the image of financially motivated Hans Gruber in *Die Hard* rather than the ideological extremists who populate today's battlefields. A more holistic understanding of which groups may be engaged with, and how to engage those groups, is essential to successfully negotiating with them. Each organization must be treated as a unique entity, governed by its own laws and customs, which may or may not be wholly rational. Treating such groups as generic parties to a negotiation will only increase the likelihood such talks will fail.

1. *Which groups can be negotiated with?*

While the decentralized command structures preferred by violent non-state actors may render them resistant to military strikes or criminal prosecution, it can also render them vulnerable to certain negotiating techniques. As previously discussed, many non-state actors may be considered a community of interest, rather than a defined institution. Even those groups with a more hierarchal structure may still have identifiable sub-groups with divergent interests. Recognizing and engaging the differing interests within transnational organizations may be the key to their undoing.

A primary feature of networks is that no single unit is likely to have access or influence to all other units.[88] This can be observed in militant groups united against a common enemy. While their actions may appear unified to the adversary, there may be limited coordination among the subunits. Loyalty among groups or factions may extend only to the next

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[87] ROGER FISHER ET. AL., GETTING TO YES 170 (2d ed. 1987).

[88] *See generally* CONVERGENCE, *supra* note 29.

closest affiliate, rather than the movement as a whole. Those groups with the most limited loyalties should be identified and engaged with first, as they are the ones most likely motivated by personal interest rather than ideological goals.

Fisher an Ury discuss "separating the people from the problem"[89] as a means to deconflict hostile negotiations. With violent non-state actors, this may not always be possible. Some combatants may be so invested in the cause that capitulation is unthinkable. The authors fail to adequately explore the extent to which ideologically driven terrorism differs from interest driven terrorism. Ideologically driven groups have taken a campaign based approach to acts of terrorism, meaning any specific act may not have an associated interest based objective. For such groups, the use of terrorist tactics has become an institutional norm, rather than a tool of last resort. In conventional military engagements, killing is considered a means to an end, but for ideological terrorists it may be the end itself.

2. *Which tactics to utilize?*

The basic dichotomy of interest based and positional bargaining advanced in *Getting to Yes* provides a starting point for addressing negotiations with non-state actors, provided that modifications are made to account for ideologically driven groups. It cannot be assumed that all groups engaged in extra-state armed conflict would be motivated by what Western strategists would consider rational goals.[90] Even then, we must be prepared for the instance that those rational goals are incompatible with our cultural ideals or national security interests, and be prepared to offer alternatives.

For those groups motivated by simple monetary or territorial claims, a distributive posture is to be expected. The question would be a simplistic equation of if and how many of the aggressor's demands should be met in exchange for which concessions. While this runs the obvious risk of "rewarding bad behavior,"[91] it may be the only means to initiate subsequent peace talks. The more complicated consideration becomes when ceding to demands would further empower the violent groups. This is especially true when the demands involve weapons or control of a territory. While weapons may be a good barter chip for incentivizing a previously hostile group to turn on a more dangerous enemy, those same weapons may be utilized in

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[89] FISHER, *supra* note 87, at 53.
[90] Neumann, *supra* note 1.
[91] FISHER, *supra* note 87, at 77.

unforeseen manners.[92] Likewise, while many groups are fighting for territory, granting them a small amount may enable broader territorial ambitions. Colombia faced this problem after granting the Revolutionary Armed Forces of Colombia (FARC) rebels a territorial sanctuary, which was used to stage broader attacks on the country.[93]

Interest based negotiations with violent non-state actors would prove exponentially more difficult. Those groups utilizing violence to achieve their ends may aspire to ends incompatible with modern society. This is especially the case when ideological goals are sought. In such instances, there may be no zone of agreement, and any creative solution may unduly empower the aggressor group. When confronted by such groups, it may be the more prudent tactic to determine which of its affiliates may be pacified through distributive means before eliminating the remaining elements through military action.

B. *The Right Model: Sons of Iraq*

By effectively identifying and engaging in dialogue with those violent groups amenable to negotiations, positive security outcomes can be achieved. A prime example can be drawn from the "Anbar Awakening" in 2004 Iraq. Following the ouster of Sadam Hussein, the U.S. engaged in "de-Ba'athization" – prohibiting members of the former Ba'ath party from holding power in the new Iraqi government.[94] The resulting power vacuum caused the country to rapidly degenerate into sectarian violence. Sunni and Shiite factions, both hostile to occupying coalition forces, regularly launched acts of terror. At the height of the conflict, over 100 civilian casualties occurred daily.[95]

With the situation becoming increasingly dire, the U.S. reached out to Sunni tribesmen with a mutual interest in opposing Al-Qaeda. In exchange

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[92] Sam Heller, *Are CIA-Backed Syrian Rebels Really Fighting Pentagon-Backed Syrian Rebels?,* WAR ON THE ROCKS (March 28, 2016), http://warontherocks.com/2016/03/are-cia-backed-syrian-rebels-really-fighting-pentagon-backed-syrian-rebels/.

[93] Neumann, *supra* note 1.

[94] Zachary Laub & Jonathan Masters, *Everything You Need to Know About Al-Qaeda in Iraq,* DEFENSE ONE (Mar. 20, 2014), http://www.defenseone.com/threats/2014/01/everything-you-need-to-know-about-al-qaeda-iraq/76679/.

[95] Arquilla, *supra* note 2.

for arms and training, the groups agreed to cease hostilities with coalition forces and fight alongside them.[96]

More than 80,000 fighters shifted allegiance in this arrangement, tipping the balance of power in coalition favor.[97] The following six months saw a 90% reduction in violence.[98]

Coalition allied Sunni fighters would come to be known as the "Sons of Iraq," and the alliance is considered one of the few breakthroughs of the Iraq war. "[T]he original idea of bypassing terrorist leaders and reaching out directly to those committing heinous acts was a real breakthrough, a model of how to disrupt a network by aiming at the edges, rather than just trying to rub out leaders."[99]

To be effectively implemented, negotiations required addressing anti-coalition forces as a collection of different interests unified in opposition to the U.S., rather than a categorical whole. From the combatant commander's perspective, it may be difficult to identify which particular group one was fighting at a given time. The real breakthrough came from increased intelligence sharing and analysis.[100] Through a better understanding of the divergent interests among different violent non-state actors, effective negotiations were made possible. Unfortunately, the current Iraqi government failed to honor many of the agreements made after U.S. withdrawal, erasing many of these gains.[101]

C. *Counter Example: Al-Qaeda in Iraq*

Violent non-state actors have also identified the benefits of specifically targeting the individual elements of groups aligned against their interests. By doing so, they can degrade coalitions organized against them, promoting the environmental instability needed to flourish. Al-Qaeda in Iraq[102] proved

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[96] *Baghdad to Pay Sunni Groups,* AL JAZEERA (Mar. 20, 2014), http://www.aljazeera.com /news/middleeast/2008/10/200810151630737451.html.

[97] Arquilla, *supra* note 2.

[98] *Id.*

[99] *Id.*

[100] McChrystal, *supra* note 34.

[101] Arquilla, *supra* note 2.

[102] A Sunni jihadist group, Al-Qaeda in Iraq has been operating in Iraq since before the 2003 U.S. invasion. The group was formed by Abu Musab al-Zarqawi, who was active in Afghanistan before fleeing to Iraq. While sharing the al-Qaeda name, the group is sufficiently distinct from the Al-Qaeda commanded by Osama bin Laden,

especially adept at this strategy, as demonstrated by their renewed aggression in the region.

The notion of indirect action formed an important part of Al-Qaeda in Iraq's strategy against the coalition. In essence, they attempted to create a polycentric conflict in which individual factions could be isolated and destroyed.[103] To isolate the United States, Al-Qaeda in Iraq directed a significant portion of their attacks against coalition allies; hoping that these allies would withdraw from the conflict.[104] Comparable attacks were launched against infrastructure, Iraqi government personnel, and civilian aid workers in an effort to deter collaboration.[105] Finally, the Sunni Al-Qaeda in Iraq deliberately stoked the ongoing Sunni-Shiite civil war, in an effort to draw the U.S. military into this exhaustive conflict.[106]

This strategy proved effective at creating backlash against the war, and friction within coalition forces. Instead of expending their energy negotiating with potential defectors among the insurgents, the coalition was forced to negotiate amongst itself how best to sustain operations in the region.

V. THE USE OF MEDIATION TO ENGAGE UNKNOWN, GEOGRAPHICALLY DISPERSED, AND OFFENSIVELY POSTURED NON-STATE ACTORS

The challenges and benefits of mediation generally parallel those of negotiations when it comes to counter-terrorism; however, the dynamics of mediated discussion lend themselves best to a differing set of operational considerations. The ability to account for individual interests and mutually beneficial conflict resolution noted in the negotiation section remain. However, the presence of a mediator provides an additional, if not the only, means of access to certain groups while enhancing the perceived legitimacy of talks to the disputing parties. Despite these benefits, the risk of abuse remains high, especially depending on the ideological persuasions or strategic interests of the mediator. Undue deference to the cultural expectations of terrorists runs the risk of legitimizing that culture on a wider scale. Whereas negotiations are best leveraged against known non-state

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demonstrating the non-hierarchal nature of such operations. *See* Laub & Masters, *supra* note 94.

[103] *Id.*

[104] M. J. Kirdar, *Al Qaeda in Iraq*, THE CTR. FOR STRATEGIC AND INT'L STUDIES 4 http://csis.org/files/publication/110614_Kirdar_AlQaedaIraq_Web.pdf (last visited Nov. 16, 2015).

[105] *See* Laub & Masters, *supra* note 94.

[106] *Id.*

actors operating defensively in restrained areas, mediation is strongest when the targeted groups are anonymous, transnational, or decentralized entities. Multilateral talks are a fixture of international diplomacy as it relates to deescalating potential conflicts between nation states, and the parallels apply to disputes with non-state actors.[107]

A. *Bring Parties to the Table*

Despite the risk of mediator bias, the use of a mediator may be the critical first step to bringing non-state actors to the negotiating table. Especially for those groups engaged in ongoing hostilities, there may be significant apprehension to meeting with government authorities. Such groups may only be willing to send agents on their behalf, or speak only through third parties, if they can be found at all. For groups that have decentralized and distributed membership transnationally as part of their defensive posture, a third party mediator may be the only means of access.

This function may, in fact, flow naturally from the process of planning military action against non-state actors. As previously mentioned, strikes may only be launched on sovereign territory with consent, or when the territorial government is unable or unwilling to eliminate threatening groups.[108] Additional consent from neighboring countries is required to secure fly over rights for military aircraft or entry rights for other military assets moving through sovereign territory. When combating regionally based transnational terrorist groups, the surrounding governments could be called upon to mediate disputes as an alternative to immediate military action.[109] This extension of already required negotiations may be a preferable alternative to the complexity and controversy surround kinetic military action.

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[107] Schmitt, *supra* note 7.

[108] Deeks, *supra* note 6.

[109] The obvious example is the complex counter-terror relationship between the United States and Pakistan. Al-Qaeda fighters routinely operate in the lawless border region between Afghanistan and Pakistan, relying on the territorial integrity of Pakistan to shield themselves from U.S. air strikes. Pakistan, for its part, has consented to strikes in some instances and denied access in others. It is a critical, though somewhat unreliable partner in ongoing peace talks, demonstrating both the opportunities and risks associated with the use of local governments to facilitate discussion with regionally based transitional terror groups.

B. *Facilitate ongoing discussion through hostilities*

Ongoing hostilities during the discussions pose a significant threat of derailing progress. This could include either the targeted killing of a high level terrorist leader or the successful execution of a high-profile terrorist attack, either of may induce the collapse of any progress made during discussions. The selection of a mutually agreeable mediator may provide a buffer against such obstacles. If both parties can establish that negotiations will be held on a good faith basis, they may be more willing to participate. However, that good faith basis must accept the reality of ongoing hostilities. The use of a mediator with personal ties to an adversarial group may be the only means of access, especially given such groups reliance on personal relationships as a means of security during conflict.

To bolster the chances of reaching a mediated resolution, the mediator could adopt a facilitative approach, setting the parameters for both the talks and ongoing hostilities. Temporary rules of engagement for both sides could reinforce the good faith basis for discussion. Such rules could include restrictions on certain targets, or more ambitiously a temporary cease-fire. The presence of a mediator could make such agreements more credible than those arrived at through direct negotiation, which may be interpreted as the pursuit of a temporary tactical advantage. In this capacity, the primary use of the meditator should be to establish trust and stability otherwise lacking due to the lack of transparency between the disputing parties.

C. *Encourage disputing parties to adhere to terms of agreement*

The final benefit from the use of a mediator is the additional layer of insurance that the mediated agreement will be adhered to. The selection of a mutually agreeable mediator, or even a mediator of necessity, demonstrates that mediator has some ongoing access to the non-state actor in question. Such persistent contact may be the only means of monitoring the actions of the non-state group following the cessation of hostilities, or the groups' individual members should it disband following discussion. In the case of regional governments, their proximity to the non-state actors' prior territory provides a degree of oversight not possible with simple negotiations. Such governments may have their own national interests in keeping peace in the region, providing additional reassurance against the reemergence of hostile groups.

VI. LIMITATIONS ON THE APPLICABILITY OF ARBITRATION

Unlike mediation, arbitration has little promise to achieve positive results in counter-terror applications. The strengths of the process lie in its ability to generate legally binding and enforceable outcomes. The enforceability of these outcomes makes the process more appealing for disputing parties with conflicting interests or mutual animosity. There is the belief that, should they prevail, the decision will carry the weight of the law. To be effective then, an arbitrator must have power over the disputing entities.

Unfortunately, the very nature of violent non-state actors indicates an ability to act beyond the control of the law. Such groups tend to be criminal by nature, whether they be in violation of domestic law or the law of armed conflict. With the exception of those groups existing in state-sponsored sanctuaries, they have demonstrated an ability to persist despite the efforts of international law enforcement. This could be a function of the general lawlessness of underdeveloped nations, as is the case with Somali pirates,[110] or a function of the complexity of the organization, such as the Mexican drug cartels.[111] Regardless of how they managed to evade law enforcement efforts, an arbitrated agreement will likely have less deterrent effect on such groups than conventional laws.

The worst consequence that violent non-state actors could be threatened with for a violation of an arbitrated agreement would be a return to the status quo. As is especially the case in the War on Terror, where hostile groups have learned the extent to which we are willing to combat them. Most would doubt that any violation of an agreement, short of a large scale attack on the

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[110] CENTRAL INTELLIGENCE AGENCY WORLD FACT BOOK, (last visited Nov. 6, 2015) https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf_so.pdf. (Somalia has lacked a stable, functioning government for decades. Absent a centralized, stabilizing force, the country remains contest by several warlords. Persistent poverty has caused many coastal villagers to turn to piracy; capturing commercial cargo ships to be held for salvage or ransom. Combatting piracy in this area is one of the largest ongoing international campaigns targeting violent non-state actors.).

[111] *As Globalized Gangs Profit From New Regulations And Markets, Governments Are Struggling To Keep Up,* BUSINESS INSIDER (Jan. 17, 2014), http://www.businessinsider.com/as-globalised-gangs-profit-from-new-regulations-and-markets-governments-are-struggling-to-keep-up-2014-1. (Compared to other violent non-state actors, transnational drug cartels are highly sophisticated. The revenue from their operations rivals that of many Fortune 500 companies. Such organizations have been known to hire business professionals, ex-special forces soldiers, and skilled engineers to facilitate to production, protection, and illicit transportation of their product.).

domestic United States, would elicit a military response beyond what they currently endure. That embattled groups have not capitulated thus far indicates that they do not find the status quo unmanageable.

While arbitrated agreements may have no deterrent effect on non-state actors, those same groups may doubt such an agreement would deter their enemies either. Returning to the relative power of the arbitrator, the arbitrator would require combat power equal to or greater than either belligerent to impose its judgment. When the combat power of one party radically exceeds that of both the other party and the arbitrator, neither will expect the decision to carry much weight. This dynamic is particularly pertinent to the United States, which has the military capacity to strike globally nearly at will. In essence, hostile groups would need to take the agreement in good faith, rather than the belief any arbitrating power could prevent future hostilities.

VII. CONCLUSION

Despite its frequent recitation, the mantra "We do not negotiation with terrorists" does not hold up to scrutiny. It would be pragmatically unwise to deprive ourselves of any tool in the fight against violent non-state actors, even those which carry inherent risks in their use. National security developments over the last decade demonstrate the need to expand, rather than contract, the options available when confronting such groups.

Violent non-state actors represent the new normal in national security. The factors driving their formation, including globalization, technology proliferation, and response to law enforcement pressure, will persist for the foreseeable future. So long as the Law of Armed Conflict remains focused on controlling state-on-state violence, there will be disagreement concerning its application to non-state actors. Such groups can be expected to exploit this disagreement to their tactical advantage, using the law's protections as a means to shield themselves from more powerful military adversaries.

For these reasons, any alternative means of engaging such groups should be pursued, in order to expeditiously limit any harm they may cause. This includes the use of negotiation when non-state actors are known and geographically contained, and the use of mediation when they are anonymous and dispersed. While these techniques carry inherent risks, the risks associated with the failure to engage such groups are an order of magnitude more severe in comparison.