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Military involvement in law enforcement

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Abstract

Law enforcement is not a task usually undertaken by military forces, at least within domestic legal contexts. Conversely, maintaining or restoring security within dysfunctional or 'post-conflict' areas of operation is a role commonly undertaken by them. Within these latter operations, the skill sets and highly calibrated application of force that are commonly associated with police forces in their law enforcement role are in fact manifested in a decisively military context. This article reviews the experiences and legal frameworks associated with military participation in two separate types of mission, namely UN-sponsored peace operations and unilateral/multilateral stabilization and counter-insurgency operations. It argues that these contexts have demanded a revised interpretative approach to the applicable law, one that is much more sensitive to social and political effect.

The conduct of contemporary military operations takes place in a highly complex and contested terrain of legal and social norms. Whether a military force is engaged in conventional armed conflict, counter-insurgency, anti-terrorism, peacekeeping/enforcement, stability operations, or law enforcement, there is a convergence of a dense mixture of law, doctrine and policy that guides military decision-making. Within this highly pluralist environment, the synchronization of law and policy on the one hand, and of formalism and social effect on the other, needs to be constantly reconciled.[1] Military involvement in law enforcement (broadly defined) has become a key feature of operational planning and execution. Law enforcement as referred to in this article relates to the 'broad range of activities to protect the

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civilian populace, provide interim policing and crowd control, and secure critical infrastructure'.[2] It is to be contrasted with conventional war-fighting and often takes place in a context of overlapping legal frameworks. The application of force in law-enforcement-type activities is sometimes determined by peacetime criminal law regimes, sometimes by elements of the law of armed conflict, and sometimes by both. The consequences of non-compliance with the relevant rule, norm, or standard within this highly calibrated and synergetic legal framework can be devastating. The impacts can be measured in terms of personal liability and mission accomplishment goals, as well as broader socio-political registers of legitimacy.[3]

The purpose of this article is to examine the legal frameworks applicable to military involvement in law-enforcement-type activities. While law enforcement has not been a traditional core skill of military training, military forces on deployment are nonetheless undertaking such duties. The basic objective of such involvement is to preserve or restore security, invariably in post-conflict societies. My analysis will focus on two important types of operation in which security/law enforcement activities are prominent, namely United Nations (UN) peace operations and unilateral/multilateral stabilization or counter-insurgency operations. In each of these contexts, highly nuanced and regulated legal regimes dictate permissible levels of force. They also represent different sides of the same coin. In UN peace operations there is invariably an institutional policy directive regarding the limited use of force, notwithstanding that the factual context for such deployments and the threats encountered would probably support the application of the law of armed conflict. Accordingly, UN peacekeeping forces usually navigate a highly circumscribed legal regime when performing their mission. Conversely, in stabilization/counter-insurgency operations the law of armed conflict does normally apply, but recent military doctrine stipulates that the use of force is to take place in a highly surgical and sparing manner. Concomitantly, the law of armed conflict is interpreted in a highly contextualized manner.

It has been recognized that restoring security has become a critical factor for ensuring broader social and political development within societies emerging from conflict. At the same time, the social effect of legal interpretation with respect to the application of force has been better understood and integrated into operational doctrine. The success of the US 'surge' in Iraq in 2007 was partially attributable to a radical new approach to understanding the socio-political impacts of force under the law. This, in turn, has influenced legal interpretative methods. Such changes mark a profound shift in perspective, yet echo the interpretative approach of the US legal-realist school of the early to mid-twentieth century.

In the first part of this article, I will examine the characteristics of UN peace operations as well as stabilization/counter-insurgency operations and outline

1 See in general David Kennedy, 'One, two, three, many legal orders: legal pluralism and the cosmopolitan dream', in *New York University Review of Law and Social Change*, Vol. 31, 2006–2007, p. 642.
2 *The US Army Stability Operations Field Manual 3–07* (*The Stability Ops Manual*), University of Michigan Press, Ann Arbor, 2009, para. 3-22.
3 David Kennedy, *Of War and Law*, Princeton University Press, Princeton, 2006, p. 159.

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their basic contours. These types of operation require a highly calibrated and nuanced application of force to achieve mission outcomes. The constrained application of force that is applied within the operations is consistent with the parameters of force usually applicable in law-enforcement-type actions. The second part of the article will provide a deeper analysis of the assimilation of legal frameworks and seek to reveal the fine line that must be traversed by military forces when acting according to law to achieve mandated social, political, and military outcomes. It is becoming increasingly clear that, whether for action under the law of armed conflict or in domestic and/or international regimes of self-defence and criminal law, the social effect of legal interpretation is fast being recognized as a key indicator of both military success and legitimacy in guiding military decision-making.

Military involvement in law enforcement

Domestic law enforcement

Law enforcement is not a traditional military skill. Rather, police forces are usually entrusted with enforcing domestic criminal law under highly prescribed legislative regimes that ensure appropriate 'due process'. In fact, in the United States in particular, army or air force involvement in internal law enforcement is generally prohibited under the *Posse Comitatus* Act.[4] In addition, regulations similarly prohibit the US navy and marine corps from directly participating in civilian law enforcement activities.[5] While other nations may not have similar legislative restraints, there has been a general political reluctance to utilize military means for law enforcement, especially in domestic contexts. Particularly in liberal democratic societies, this is a reflection of the principle of the primacy of the civil government. Counter-terrorism in domestic societies is usually an exception to the resistance to use of military means to resolve law enforcement issues.[6] Even in those situations, however, the legislative regime for transferring responsibility from the civil power to the military is highly complex.[7] Such legislative structures likewise reflect an

4 Act of 18 June 1878 (codified in 18 US Code § 1385 (1994)): 'Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both'.

5 *The Commander's Handbook on the Law of Naval Operations*, US Navy, NWP 1–14M, July 2007, para. 3.11.3.1.

6 Another standard, though exceptional, occasion when the military are used in a law enforcement role is in relief and reconstruction efforts after natural disasters. See Evan Carlin, 'Australian Defence Force experience with non-government organizations in humanitarian assistance and disaster relief operations', in Michael Carsten (ed.), *Global Legal Challenges: Command of the Commons, Strategic Communications and Natural Disasters*, US Naval War College International Law Studies Series, Vol. 83, 2007, p. 267.

7 Simon Bronitt and Dale Stephens, '"Flying under the radar": the use of lethal force against hijacked aircraft: recent Australian developments', in *Oxford University Commonwealth Law Journal*, Vol. 7, No. 2, 2007, p. 265.

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implicit acknowledgement that a criminal matter has metamorphosed into a national security issue.

Operations with security responsibility

Despite the historical resistance to authorizing internal law enforcement functions by the military, military deployments in operations short of conventional armed conflict have been increasingly characterized by the assumption of significant security functions. Such functions reflect law-enforcement-type duties and require close observance of both domestic and international legal obligations and responsibilities. There have been two major areas that are useful to this analysis where military forces have assumed security responsibility that requires law-enforcement-type activity and the associated legal calibration, namely within UN authorized peace operations and within unilateral or multinational stabilization operations.

UN-authorized peace operations

The 1990s saw a rapid expansion of peace operations authorized by the UN Security Council. While the exuberance for authorizing such missions has lessened in more recent times, the high ambitions for them remain relatively unchanged. For UN peacekeeping forces (PKFs), often deployed in post-conflict or dysfunctional societal environments, a central duty is invariably to restore and maintain security. Most assessments of operational effectiveness and 'lessons learned' highlight the central need for security before other development programmes can be effectively implemented. In the adoption of Security Council resolutions, there has tended to be an expansion of mandates likely to anticipate the application of force at the tactical level. The PKF is usually charged with providing security in numerous contexts, including delivering humanitarian supplies,[8] effecting disarmament,[9] and enabling the opportunity for, and participation in, elections in war-prone areas.[10] Where there is a UN civilian police presence, the peacekeeping force will co-ordinate law enforcement activities with the relevant police authorities. In such contexts, however, the line between law enforcement and armed conflict can be blurred. Indeed, one of the factors that serves to determine whether an armed conflict exists is the capacity of police to deal with the threat posed.[11] Within a PKF-mandate area, there is often ongoing internecine violence committed for mixed criminal and political ends by non-state entities. A determination

8 UN Security Council (UNSC) Resolution 776 (1992), 14 September 1992, para. 2.
9 UNSC Resolution 1270 (1999), 22 October 1999, para. 8(b).
10 UNSC Resolution 766 (1992), 21 July 1992, para. 4.
11 Gerald Draper, 'The Geneva Conventions of 1949', in *Académie de Droit International, Recueil des Cours*, Vol. 1, 1965, p. 89; see also the ICRC commentary on Article 3 common to the 1949 Geneva Conventions, available at http://www.icrc.org/IHL.nsf/COM/365–570006?OpenDocument (last visited 2 May 2010), at p. 49, which states that a factor relevant to determining the existence of an armed conflict is whether 'the legal Government is obliged to have recourse to the regular military forces against insurgents'.

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will normally then be made as to whether the nature and continuity of the violence can be contained with civilian police resources and controls or whether PKF intervention is necessary. Even where military means are necessary to make an 'arrest', rebels engaged in non-international armed conflict are still subject to prosecution under domestic criminal law for their actions.

UNTAET and East Timor

The experience of the United Nations Transitional Administration in East Timor (UNTAET)[12] PKF in 2000–2001 is a good example for demonstrating the assimilated legal framework that was applied to deal with the threat posed.

In 1999, in a UN-sponsored plebiscite, the East Timorese population voted overwhelmingly for independence from Indonesia. This unleashed a fury of violence by pro-Indonesian militia forces resident in East Timor that resulted in mass destruction, killings, forced migration, and the breakdown of normal societal processes. Pursuant to a resolution adopted under Chapter VII of the United Nations Charter, a UN-authorized/commanded military force charged with restoring security was deployed. A UN Transitional Administration was also created to oversee the assumption of statehood by East Timor. The activities of the pro-Indonesian militia in opposing this transition were essentially military: they used tactics, techniques, and procedures that were military both in style and in substance. Numerous incidents of armed contact between the PKF and the militias occurred, causing deaths on both sides. There was also constant intimidation of the East Timorese population. At the same time a nascent detainee management procedure was created by the PKF (under the authority of the Security Council resolution) to apply the basic elements of 'due process' to militia members captured or otherwise detained.[13]

As security was slowly restored to the country, a local court system was launched and UN civilian police mentored the new East Timorese police force. The transition from security protection to law enforcement was patchy, incremental, and always subject to compromise. When dealing with incidents, UN-authorized rules of engagement to deal boldly with security threats had to be reconciled with the need to recognize the evidentiary and due process requirements that were in operation. Militia members captured during PKF operations were held in the immediate aftermath of an engagement and interrogated for information of military significance. Such members had also committed criminal offences under the domestic law then in force in East Timor and were required to be handed over to UN civilian police, who were subject to their own procedures for charging and prosecuting such members. This necessarily raised the difficult question of whether

12 UNSC Resolution 1272 (1999), 25 October 1999.

13 Michael J. Kelly, Timothy L. H. McCormack, Paul Muggleton, and Bruce M. Oswald, 'Legal aspects of Australia's involvement in the International Force in East Timor', in *International Review of the Red Cross*, Vol. 83, No. 841, March 2001, p. 101.

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the PKF role should be characterized as military or constabulary. In the event, a workable solution was created between the PKF and the UN civilian police whereby the military were permitted to interrogate detainees for twenty-four hours following a contact incident; the detainees were subsequently transferred to the police for questioning.[14] While such a situation was less than ideal from a military point of view, it also carried risks at the evidentiary level. Assessments were constantly being made as to priority: that is, whether obtaining tactically relevant information that could be acted upon to preserve PKF and civilian lives outweighed the risk that any subsequent prosecution of the individual would be undermined for lack of 'due process' rights under a civilian prosecution regime.

Stabilization operations

The experience of UN-sponsored peace operations under Chapter VII has its substantive counterpoint in unilateral and/or multilateral post-conflict military operations. These stabilization (or stability) operations are phased to take place after conventional armed conflict, and have come to be a significant part of the US operational doctrinal firmament.[15] It is a doctrine that has recently emerged from a major rethinking of the military purpose and strategic goals of deployments in Afghanistan and Iraq, where military forces have acted in a mixed environment of peace and armed conflict. It has also been accorded a high priority and is recognized as being a key factor for military strategic success.

There is an interrelationship between stability-operations doctrine and counter-insurgency doctrine, especially in terms of assessing the social cost of the use of force. Stability-operations doctrine expresses an aversion to kinetic operations and is focused more on broader capacity-building; indeed, it expects the application of force to be very judicious and sparing, and draws a direct parallel between the discriminate use of force and legitimacy.[16] The function of the military in such an operation is akin to adopting a heightened law enforcement role. However, as with peace operations, the crossover point with armed conflict is difficult to identify and synchronize. Stability operations are defined within US joint doctrine as follows:

> [Stability operations encompass] various military missions tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief.[17]

14 Michael G. Smith and Moreen Dee, *Peacekeeping in East Timor: The Path to Independence*, Lynne Rienner Publishers, Boulder, CO, 2003, p. 83.
15 *The Stability Ops Manual*, above note 2.
16 *Ibid.*, para. 4–47.
17 *Ibid.*, p. viii.

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It turns out that, despite the considerable training effort devoted to hard-war-fighting skills and preparation for conventional armed conflict, the vast majority of operations conducted by US forces are, in fact, stability operations.[18] Moreover, this experience is shared by all modern militaries, especially those that have participated in UN peace operations. While the stability-operations doctrine originated from US reassessment during the course of its operations within Afghanistan and Iraq, the essential doctrinal content could easily be applied in the type of UN-sponsored peace operations described above.

The institutional design that underlies stability operations is the creation, in a post-conflict state, of an environment that facilitates reconciliation, establishes the development of political, legal, social, and economic institutions, and supports transition to a legitimate civil authority operating under the rule of law.[19] While dismissed as utopian by some,[20] stability-operations doctrine and its integral capacity-building elements have been strongly identified by counter-insurgency experts as being a key factor in effectively combating an insurgency.[21]

The rule-of-law component of a stability operation acts as an institutional reference point for mission progress and ultimate success. The doctrine provides that a successful rule-of-law line of operation will result in a number of outcomes. These include the following: the state monopolizes the use of force; individuals are secure; the state itself is bound by law and does not act arbitrarily; the law can be determined and is stable enough for individuals to plan their affairs; individuals have access to an effective and impartial legal system; human rights and fundamental freedoms are protected by the state; and individuals are able to rely on the existence of legal institutions and the content of the law in the conduct of their lives.[22]

The content and character of these indicia reflect the criteria identified by the influential naturalist legal philosopher Lon Fuller as being essential for an effective legal system.[23] They have something of a universal quality about them; however, they can conflict with more pressing security-related priorities during the course of a mission. In his account of the rule-of-law aspect of stability operations,

18 *Ibid.*, para. 1–9: 'In the decade after the fall of the Berlin Wall, the Army led or participated in more than 15 stability operations'.

19 US Department of Defense (DoD) Directive 3000.05 of 28 November 2005, at para. 4.2, expressly states DoD policy regarding stability operations as follows: 'Stability operations are conducted to help establish order that advances US interests and values. The immediate goal often is to provide the local populace with security, restore essential services, and meet humanitarian needs. The long-term goal is to help develop indigenous capacity for securing essential services, a viable market economy, rule of law, democratic institutions, and a robust civil society'.

20 William Easterly, 'J'accuse: the US Army development delusion', *Aid Watch*, 18 June 2009, available at http://aidwatchers.com/2009/06/j%E2%80%99accuse-the-us-army%E2%80%99s-development-delusions/ (last visited 7 May 2010), where the author states 'The 2009 US Army Stability Operations Field Manual is remarkably full of utopian dreams of transforming other societies into oases of prosperity, peace, and democracy through the coordinated use of military force, foreign aid, and expert knowledge'.

21 David Kilcullen, *The Accidental Guerrilla*, Oxford University Press, New York, 2009, pp. 129 and 143.

22 Taken from Dick Pregent, *Rule of Law Capacity Building in Iraq*, forthcoming in Vol. 86 of the US Naval War College International Law Studies Series.

23 See generally Lon L. Fuller, *The Morality of the Law*, revised edition, Yale University Press, 1969.

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Colonel Dick Pregent deftly acknowledges the tension of seeking to establish a rule-of-law regime within a contentious security environment. He notes:

> There will be instances in which security and the types of protections associated with the rule of law will come into tension. In those cases senior leaders will have to make the strategic decision to improve security that some may criticize as compromising the rule of law. There will be times during an active counterinsurgency when the long-term goals of the rule of law mission will of necessity be a lower priority than establishing and maintaining security.[24]

This conflict of aims and goals replicates the chameleon nature of military response to threats under the 'law enforcement' and 'armed conflict' models. It is an uneasy accommodation, a means–ends rationality that is constantly being weighed in determining the right policy response to a threat. Moreover, along with doctrinal tension, there is also the legal conflict of authorities and restraints, which will be discussed more fully in the following section.

Assimilation and reconciliation of the legal framework for law enforcement

UN peace operations

There is usually a great disparity between the strategic ambitions of a Security Council mandate and the various forms of tactical authority granted to the peacekeeping force via UN or nationally issued rules of engagement. The influential 'Brahimi Report' in 2000 reconfirmed that the limited use of force by peacekeepers, confined essentially to self-defence only, was one of three pillars that underpinned all peacekeeping operations.[25] Peace operations are often broadly authorized under Chapter VII of the UN Charter and permit recourse 'to all necessary means' to give effect to the goals of the relevant resolution. Authors such as Hitoshi Nasu have condemned the imprecision of such resolutions and have critiqued the policy constraints imposed by limiting the capacity to use force to self-defence alone. Nasu argues that such a policy stipulation derives from historical happenstance that actually predates the Charter regime.[26] Hence, while there is a formal distinction between Article 40 (provisional measures) and Article 42 (enforcement action) of the UN Charter, the Security Council routinely fails to spell out which specific legal authority it is relying upon when authorizing a peace operation, yet strictly imposes a number of policy constraints concerning the use of force, which are applied more through institutional habit than any considered rationale.[27] This,

24 D. Pregent, above note 22.
25 Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305 – S/2000/809, para. 48.
26 Hitoshi Nasu, *International Law on Peacekeeping: A Study of Article 40 of the UN Charter*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 17–27.
27 *Ibid.*, pp. 27–35.

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accordingly, has necessitated constructive interpretation on the ground by commanders and soldiers seeking to give effect to the Security Council's will, a need that always threatens to undermine the political/legal limits anticipated by the relevant constituencies aligned to give effect to the resolution. Such 'legal ambiguity and uncertainty', Nasu contends, 'may well form unnecessary barriers to making [political] commitment for the purpose of preventing aggravation of armed conflict'.[28]

The reality is that, even on peace missions where the Security Council grants wide strategic legal authority, peacekeeping forces are generally granted only the capacity to act in tactical self-defence. While the definition of self-defence within UN canons of interpretation may sometimes be broadened,[29] it nonetheless clearly authorizes less force than is permitted under a classic law of armed conflict paradigm. Hence, the right of self-defence generally extends only to the use of lethal force by peacekeeping troops to defend themselves or others whom they are charged to protect, and then only in the face of a (tactically significant) hostile act or demonstration of hostile intent. This can prove to be problematic when confronting organized opponents or 'spoilers' during a mission who use classic military-style tactics and high levels of force. The existence of an armed conflict is a matter of fact and, in terms of a non-international armed conflict, depends objectively upon the scale, intensity, and scope of the armed force employed. Indeed, the UN Secretary-General's Bulletin of 1999[30] stipulates the principles of the law of armed conflict that will apply (at least as a matter of policy) to peacekeeping forces when engaged in an armed conflict during a peace operation. While reflecting fundamental precepts of the law applicable to armed conflict, the Bulletin is particularly significant in acknowledging that an armed conflict may arise out of action otherwise based upon tactical-level self-defence.[31] Notwithstanding this recognition, there seems to be no acknowledged instance since 1999 where a peacekeeping force has transitioned (even for a short time) from a 'self-defence' framework to a law of armed conflict one as regards the permitted application of force.

Moreover, there has yet to be a contemporary instance of a UN peace operation for which the application of the law of armed conflict to regulate force is consciously recognized, *a priori*, in a Security Council resolution. In keeping with the Council's doctrinal tradition, all authorized force in all contemporary peace missions is restricted to self-defence only. This reluctance by the Department of

28 *Ibid.*, p. 15.
29 *Ibid.*, pp. 184–188.
30 UN Secretary-General's Bulletin, 'Observance by United Nations forces of international humanitarian law', UN Doc. ST/SGB/1999/13, 6 August 1999, available at http://www1.umn.edu/humanrts/instree/unobservance1999.pdf (last visited 1 June 2010).
31 *Ibid.*, Section 1.1: 'The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence'.

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Peacekeeping Operations to recognize the existence of an armed conflict (international or non-international) is not surprising. Domestic courts, more often than not, avoid confirming the existence of an armed conflict or otherwise avoid decisions that too radically undermine executive views on combatant or prisoner-of-war status, given the highly political significance of such recognition.[32] As with domestic courts, there is an understandable deference by the Department of Peacekeeping Operations to the sovereign discretions of participating states in peace operations with regard to the (non-)existence of armed conflict within an area of operations. Nonetheless, this has stark consequences for peacekeeping forces when acting in highly volatile and violent contexts.

The distinction between self-defence and the more extensive use of force permitted under the law of armed conflict is significant. When seeking to disarm or otherwise arrest violent members of rebel groups or militias, PKF troops are restricted to reactionary force only, and their actions will be judged by domestic legal standards of reasonableness and proportionality. As Ken Watkin has pointed out in his analysis of this issue, proportionality in law enforcement is a strikingly different concept from its meaning and function under the law of armed conflict.[33] Proportionality in the former requires strict scrutiny of whether force, especially lethal force, was warranted at all;[34] a determination that force was excessive could lead to criminal charges being laid against the soldier. Proportionality under the law of armed conflict[35] is related to assessment of the extent of unintended but expected civilian loss when targeting combatants or persons taking an active or direct part in hostilities. It involves a range of considerations entirely different from those required for the use of force to achieve mission goals. The fact that Security Council mandates may authorize expansive action as a matter of international law does not absolve soldiers of responsibility under their own domestic law and UN-issued rules of engagement to restrict their use of force to self-defence.

During the UNTAET mission in the early 2000s, it was the duty of the PKF to disarm and detain members of the militia groups who were seeking to stymie the would-be transition to East Timorese independence. Such groups were openly displaying weapons, including semi-automatic/automatic weapons and grenades,

32 See for example *Mohamed Ali et al.* v. *Public Prosecutor* (1968), [1969] AC 430.

33 Kenneth Watkin, 'Controlling the use of force: a role for human rights norms in contemporary armed conflict', in *American Journal of International Law*, Vol. 98, January 2004, pp. 17–22.

34 See European Court of Human Rights, *McCann and others* v. *The United Kingdom*, Series A, No. 324, Application 18984/91 (1995), in which a majority of the European Court of Human Rights determined that there had been a breach of Article 2-2 of the European Convention on Human Rights by the failure of British authorities to arrest suspected IRA terrorists before the point in time where the application of lethal force became inevitable.

35 The principle of proportionality is outlined in Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, in which Article 51(5)(b), under the heading 'Protection of the civilian population', prohibits indiscriminate attacks as, *inter alia*, 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.

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and conducting tactical patrols within East Timor. They were exploiting the UN rules of engagement and had fired upon PKF troops without warning, attacked PKF positions, ambushed PKF patrols, and responded to verbal challenges issued by PKF troops by opening fire. After the PKF had experienced a number of casualties, the Department of Peacekeeping Operations ultimately authorized an addition to the rules of engagement that deemed certain tactical behaviour by militia groups as threatening for the purposes of activating a heightened right of self-defence. This in turn gave an individual soldier the capacity to act according to a subjective belief that he or she was threatened when faced with such behaviour and to employ lethal force in self-defence.[36] It was not an ideal compromise and still exposed the individual soldier to potential prosecution, but it met with enormous approval by the East Timorese population and had an immediate positive effect on the security situation. It demonstrates, however, the highly discordant nature of tactical legal constraint and the strategic ambition of the Security Council when mandating peace operations.

Stabilization and counter-insurgency operations

Unlike the dilemmas that often arise during UN-sponsored peace operations, the case is generally reversed when undertaking unilateral or multilateral stabilization operations: the law of armed conflict is more readily drawn on when undertaking such operations, especially in the context of counter-insurgency and anti-terrorism activities within post-conflict societies. The decision that dominates military legal thinking is whether to restrict the positive freedoms to use force contained in the law of armed conflict (i.e. targeting persons taking a direct or active part in hostilities) in order to promote a different socio-legal agenda. In seeking to build adherence to a rule-of-law programme, for example, should multinational forces forego rights under the law of armed conflict and tolerate greater risks of their own casualties in order to promote the tenets of that broader programme? The arrest of insurgents pursuant to warrants issued by a court of law would demonstrate this position. The alternative, with a considerably lower risk of own-force casualties, is simply to target insurgents identified as taking a direct or active part in hostilities.[37]

In resolving this dichotomy of adhering to a rule-of-law programme versus achieving short-term security advantages, Colonel Dick Pregent identifies the conundrum faced by US forces in Iraq in 2008. At that time, the 'Awakening' Councils took a significant stand against the insurgency. They first came into being in the country's Al Anbar province in 2007–2008, when Sunni tribal leaders began

36 See generally Dale Stephens, *The Use of Force in Peacekeeping Operations: The East Timor Experience*, Asia Pacific Centre for Military Law, Melbourne, 2005.

37 Protocol I, above note 35, Art. 51(3); Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Art. 13(3); Article 3 common to the four Geneva Conventions of 12 August 1949.

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to oppose al-Qaeda manipulation by forming 'Sons of Iraq' paramilitary-type forces. A number of participants in the 'Sons of Iraq' movement were actually former insurgents against whom arrest warrants had been issued by Iraqi courts. Adherence to the rule-of-law paradigm by using US forces to carry out such arrests would have undermined the strategic political gains achieved with the Awakening movement. In wrestling with this issue, Pregent notes that '[i]n fact, there was no choice in the matter; the realities on the ground dictated that security be maintained and the warrants not executed'.[38] This experience shows the highly nuanced judgement required to determine the correct policy approach to the application of force under the law, especially when the military must grapple with its role as either a security or constabulary force. It was a particularly bold decision, given the emergence and basic functioning of an independent Iraqi judicial system at a tenuous time of its development. It did, however, recognize the goal of implementing a durable security so that other development programmes could flourish.

The invocation of legal rights under formalist frames of interpretation of the law of armed conflict has come under increasing pressure in recent times, and there is a growing literature on understanding the social context of the law's implementation.[39] Military experiences in dealing with counter-insurgency, particularly those of the US in Iraq, have required a serious recalibration of the approach to engaging in warfare under the law. Pragmatic interpretative measures are applied to provide better guidance for military decision-making than traditional linguistic techniques. The soft positivist method of interpretation advanced by legal philosophers such as Hart[40] has in fact been supplemented by techniques usually identified with the US legal realist movement of the 1930s and 1940s.[41] Significantly, these approaches have proved effective in securing the safety of populations and resisting insurgent movements. As the 'new stream' legal scholar David Kennedy has identified when reviewing the role of the law of armed conflict, legitimacy and social effect rather than formal validity have become key measures of interpretative guidance.[42] This new phenomenon portends significant changes to the way the law is interpreted and applied. It also breaks down the cognitive perceptions of 'law enforcement' and 'war-fighting'. When the application of force under the law is assessed in terms of social effect, functional distinctions as to formal role are of less consequence.

38 D. Pregent, above note 22.

39 See generally David Kaye, 'Complexity in the law of war', in Russell A. Miller and Rebecca M. Bratspies (eds), *Progress in International Law*, Martinus Nijhoff Publishers/Brill Academic, Leiden, 2008, p. 681; Nathaniel Berman, 'Privileging combat? Contemporary conflict and the legal construction of war', in *Columbia Journal of Transnational L*aw, Vol. 43, No. 1, 2004–2005, in which the author contends that the law of armed conflict is a discourse of construction, contestation, and strategic instrumentalization; Chris Jochnick and Roger Normand, 'The legitimation of violence: a critical analysis of the Gulf War', in *Harvard International Law Journal*, Vol. 35, No. 2, 1994, p. 387.

40 Herbert Lionel Adolphus Hart, *The Concept of Law*, 2nd edn, Oxford University Press, Oxford, 1997.

41 Neil Duxbury, *Patterns of American Jurisprudence*, Clarendon Press, Oxford, 1997, pp. 65–161.

42 D. Kennedy, above note 1, p. 166.

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Counter-insurgency and law enforcement

The law of armed conflict generally takes a 'Cartesian' approach to regulating warfare.[43] It separates combatants from civilians and permits force to be applied only against the former. An exception to the prohibition on force is made, in both international and non-international armed conflict, with regard to those civilians who take a direct or active part in hostilities. The approach taken is loosely modelled upon one of attrition. There is a simple binary opposition of action/non-action under the law, based upon status and/or function. In determining the risk that military forces will assume, many states have expressly declared that the lives of their soldiers will be factored into the equation of determining military advantage.[44]

An insurgency is fundamentally a political conflict. The centre of gravity is the population itself, who remain 'the deciding factor in the struggle'.[45] To provoke overreaction in the use of force by counter-insurgent forces is a key political goal. A counter-intuitive approach to legal interpretation is therefore needed to grapple with this strategic aim. Rather than relying upon the blunt and somewhat indeterminate rights under the law of armed conflict, the use of force has to be more instrumentally applied. In short, an approach modelled on law enforcement, in terms of calibrated application and anticipated effect, is likely to be strategically more productive than relying upon traditional rights (and methodologies) under the law of armed conflict. In fact, the *U.S. Army/Marine Corps Counter-Insurgency Field Manual* lists a number of counter-insurgency paradoxes, which revise traditional thinking and expressly require that greater risk to the security of counter-insurgent lives must be accepted. The more prominent and legally relevant paradoxes include the following:

- 'Sometimes, the more you protect your force, the less secure you may be.'[46]
- 'Some of the best weapons for counterinsurgents do not shoot.'[47]
- 'Sometimes, the more force is used, the less effective it is.'[48]
- 'The more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.'[49]

43 Lieutenant General Sir John Kiszely, 'Post-modern challenges for modern warriors', in *Australian Army Journal*, Vol. 5, No. 2, 2008, p. 182.

44 For example, when ratifying Additional Protocol I, New Zealand declared: 'In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57 … the term "military advantage" involves a variety of considerations, including the security of attacking forces'. A similar declaration was made by Australia. While not a party to Additional Protocol I, the United States has included in *The Commander's Handbook on the Law of Naval Operations* the following commentary: 'Military advantage may involve a variety of considerations, including the security of the attacking Force'.

45 *The U.S Army/Marine Corps Counterinsurgency Field Manual* 3-24/3-33.5 (*COIN Manual*), University of Chicago Press, Chicago, 2007, p. xxv.

46 *Ibid.*, para. 1–149.

47 *Ibid.*, para. 1–153.

48 *Ibid.*, para. 1–150.

49 *Ibid.*, para 1–151.

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These paradoxes mark a decisive change from the usual legal prescriptions. They also represent a decisive divergence from prevailing views as to Western liberal tolerance for own-force casualty loss.[50] Most significantly, they have worked in Iraq. The 'surge' of 2007 in Iraq was not merely an expansion in the numbers of soldiers but rather a flood of new ideas about the application of force under the law. New approaches to insurgent-targeting under the principle of distinction were both required and demanded to address a deteriorating security situation in Iraq. Similarly, assessments of collateral/incidental damage/injury under the principle of proportionality were revised. According to an orthodox legal interpretation of the law of armed conflict, as indicated above, targeting in a non-international armed conflict requires a determination of whether the person is taking a direct or active part in hostilities. If that person is doing so, then he or she is lawfully targetable. The recent interpretative guidance of the International Committee of the Red Cross on this question highlights (from an ICRC perspective) who may be targeted under this formula, relying principally on a test of individual conduct or membership associated with a combat function.[51]

The starting point for targeting in counter-insurgency operations is likewise the conventional determination of whether a person is taking a direct or active part in hostilities. The counter-insurgency doctrine then introduces the concept of 'reconcilability'. Hence, a decision-maker must further assess the prospect of reconcilability before taking action.[52] If a person is considered reconcilable, then targeting should not occur or should cease, and a law enforcement arrest procedure should be considered. The counter-insurgency doctrine does not provide detailed guidance to determine who may be reconcilable, but this does intrinsically require assessment of numerous socio-political factors. In this regard, David Kilcullen identifies a class of such potentially reconcilable persons as 'accidental guerrillas',[53] that is, individuals who find themselves manipulated into insurgent activity.

Similarly, with respect to the principle of proportionality, the counter-insurgency doctrine sets out a self-conscious variation on the manner in which the formula is to be applied, in accordance with its stated paradoxes. Thus the manual specifies:

> In conventional operations, proportionality is usually calculated in simple utilitarian terms: civilian lives and property lost versus enemy destroyed and

50 Edward Luttwak, 'A post-heroic military policy', in *Foreign Affairs*, Vol. 75, No. 4, 1996, p. 33.

51 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Law*, Geneva, 2009, available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf (last visited 10 May 2010).

52 Multi-National Force–Iraq (MNF-I) Guidelines as contained in Thomas Ricks, *The Gamble*, Penguin Press, New York, 2009, Appendix D, p. 369, provides: 'We cannot kill our way out of this endeavor. We and our Iraqi partners must identify and separate the "reconcilable" from the "irreconcilables" through engagement, population control measures, information operations and political activities. We must strive to make reconcilables a part of the solution, even as we identify, pursue, and kill, capture or drive out the irreconcilables'.

53 D. Kilcullen, above note 21, p. 38.

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> military advantage gained. In COIN operations, [military] advantage is best calculated not in terms of how many insurgents are killed or detained, but rather which enemies are killed or detained … In COIN environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape.[54]

The commentary subsequently outlines an additional socio-political determination that should take place, observing that 'Fires that cause unnecessary harm or death to noncombatants may create more resistance and increase the insurgency's appeal – especially if the populace perceives a lack of discrimination in their use'.[55]

Thus, the counter-insurgency doctrine expressly requires assessment of military advantage in terms of the risk of social or political alienation. As the Harvard academic and contributor to the counter-insurgency manual Sarah Sewall emphasizes:

> In this context, killing the civilian is no longer just collateral damage. The harm cannot be easily dismissed as unintended. Civilian casualties tangibly undermine the counterinsurgent's goals … The fact or perception of civilian deaths by their nominal protectors can change popular attitudes from neutrality to anger and active opposition.[56]

The minimization of incidental civilian injury has become so critical to mission success that in July 2009 the Commanding General in Afghanistan issued a directive detailing very limited circumstances under which close air support and indirect fire can be undertaken in residential areas.[57]

Legal realism and counter-insurgency

The counter-insurgency doctrine draws on the interpretive style and techniques of the US legal realist school of the early and mid-twentieth century. Such an approach relies more fully upon the social sciences to guide legal interpretation; consideration of the social sciences has become a key tool for achieving military success in post-modern warfare. Indeed, the introduction of concepts such as reconcilability when interpreting the principle of distinction and assessing the second- and third-order effects of the proportionality equation in terms of psychological response is certainly new. Even the conception of what constitutes military success and how it is to be defined has been transformed. Instead of focusing on the attrition logic inherent in the structure of the law of armed conflict, greater emphasis is placed on assessing the social effect of the application of force.

54 *COIN Manual*, above note 45, para. 7–32.
55 *Ibid.*, para. 7–37.
56 *Ibid.*, p. xxv.
57 NATO/ISAF Tactical Directive, 6 July 2009, available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (last visited 10 May 2010).

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As mentioned above, the success of the 'surge' in Iraq relied heavily on instrumentalized assessments of the application of force under the law.[58] The decisive change of approach that resulted from this fundamental course correction is evident to anyone who served in the Iraqi area of operations. Recognizing the socio-political consequences of the application of force necessarily entails a psychological connection that invariably restrains unnecessary force. It adds to the deontological framing of the moral underpinnings of the law. The famous 'clear, hold, build' strategy initially devised by Colonel McMasters in Tal Afar in Iraq in 2006[59] graphically demonstrates the attitudinal changes made by soldiers to protect resident populations that follow from such conclusions.[60] The establishment of psychological connections with populations whom military forces are charged with protecting, especially within nearby residential urban areas, personalizes the use of violence and necessarily curbs its application. Psychological studies have amply shown the reinforcing effect of the sense of protecting an 'identifiable, determinate individual and not a mere statistical someone'.[61] This observed effect plainly adds texture to any assessment of proportionality or distinction in a manner that resembles (in terms of effect) the law enforcement paradigm on the application of force.

Conclusion

The close correlation between the application of force and the strategic social effect has been a lesson painfully learned in the contemporary military environment. The trying experience of Coalition forces in Iraq in 2007 generated a major reassessment of the instrumental application of military force. This reassessment has proved extremely effective in quelling violence and creating the necessary conditions for development. While law enforcement *per se* is not a core military task, the restoration and maintenance of security certainly is. Whether in the course of a stabilization operation or a UN-authorized peace operation, military action takes place within a highly complex and contested arena of social, political, and legal norms. While this has always been the case, it has now been consciously recognized and more fully documented in military doctrine. The careful navigation between these norms has led to a revised approach to legal interpretation. When legitimacy and validity go hand in hand, it augers well for a restrained and constructive role for military forces, whether acting within a law enforcement or indeed any other type of legal framework.

58 D. Kilcullen, above note 21, pp. 128–154.
59 T. Ricks, above note 52, pp. 50–51.
60 *Ibid.*, pp. 200–227.
61 Joshua D. Greene, 'The secret joke of Kant's soul', in Walter Sinnot-Armstrong (ed.), *Moral Psychology*, Vol. 3, *The Neuroscience of Morality, Emotion, Disease and Development*, MIT Press, Cambridge, MA, 2007, pp. 35–48.

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