13 Rules of Engagement

13.0. Introduction

At Bunker Hill, in 1775, William Prescott (or was it Israel Putnam?) is said to have ordered his Continental rebels, "Don't shoot until you see the whites of their eyes." Because the order specified the circumstances in which deadly force could be employed by infantry forces it could be considered an early rule of engagement. (Except it is too clear and too brief to qualify.)

Rules of engagement (ROE) are *not* law of armed conflict (LOAC) or international humanitarian law (IHL). They are not mentioned in the Geneva Conventions or Additional Protocols, and they are not the subject of a multinational treaty bearing on armed conflict. Nor are they are domestic law. They are military directives, heavy with acronyms. ROE are examined here because they play a significant role in executing the state's LOAC/IHL obligations and because they are frequently cited when LOAC/IHL violations are alleged. Most states' armed forces have some version of ROE to guide their combatants. (The record of UN peace-keeping forces and their ROE implementation has been troubled,[1] making a "strong [UN] response to provocation close to impossible."[2]) Although not LOAC/IHL, ROE violations are typically punished through the state's military code. In U.S. practice, violations are prosecuted as violations of a lawful general order, a common Uniform Code of Military Justice offense.[3]

ROE are often misunderstood, even by junior military personnel who are tasked with executing them. Say "rules of engagement" to a naval officer, and she will think: freedom of navigation. Say "ROE" to an air force officer, and he will think: targeting constraints. Say "ROE" to an infantry officer, and he will think: use of deadly force. These viewpoints

[1] Lt.Gen. Roméo Dallaire, *Shake Hands With the Devil* (New York: Carroll & Graff, 2003), 99, 229, 233, 264. Gen. Dallaire describes his continued difficulties in gaining approval of his UN peace-keeping force's ROE, and the interference of UN officials in the ROE, to the detriment of the Rwandans he was assigned to protect.

[2] Gen. Tony Zinni, in Tom Clancy with Gen. Tony Zinni, *Battle Ready* (New York: G.P. Putnam's Sons, 2004), 251.

[3] *U.S. v. John Winnick*. In 2008, Sgt. Winnick was charged with two specifications (counts) of involuntary manslaughter and one specification of failure to obey a lawful order, in that he failed to adhere to the rules of engagement by firing without reasonable certainty that his targets were hostile. After a pretrial investigation, the investigating officer recommended a general court-martial on lesser charges. The convening authority, however, dismissed all charges "in light of the circumstances." There are several earlier cases, for example, from the U.S. invasion of Panama, *U.S. v. McMonagle*, 34 M.J. 825 (ACMR, 1992), and *U.S. v. Finsel*, 33 M.J. 739 (ACMR, 1991); and from the peace-keeping mission to Somalia, *U.S. v. Conde* (USMC SpCM, Mogadishu, 1993), among six other ROE-related courts-martial.

are variations on a common theme but with different applications, which can make a common understanding of ROE difficult. Say "rules of engagement" to an infantry squad leader, and he will think: "Damn lawyers!"

Each combatant sees this elephant differently, which can lead to battlefield confusion. Marine Colonel Hays Parks goes so far as to write, "overly restrictive ROEs are a key factor in the loss of confidence by company-grade officers and enlisted soldiers and Marines in their senior leaders and in the exodus of good men and women from the military."[4] That comment goes not to ROE as a concept, but to their use, and the restrictions they impose. There is no doctrinal cure for bad judgment, and as long as there are ROE there will be occasional ill-considered ROE formulations.*

Unless one is an experienced field grade officer – a midlevel leader, major or colonel, lieutenant commander or commander – ROE can be a mystery, as they are to the public and the media.[5] A Navy SEAL (sea, air, and land) veteran of Afghan combat, awarded the Navy Cross for a patrol in which his patrol leader, Navy Lieutenant Michael Murphy, was posthumously awarded the Medal of Honor, writes:

> Each of the six of us in that aircraft en route to Afghanistan had constantly in the back of our minds the ever-intrusive rules of engagement. These are drawn up for us to follow by some politician sitting in some distant committee room in Washington, D.C.... And those ROE are very specific: we may not open fire until we are fired upon or have positively identified our enemy and have proof of his intentions. Now, that's all very gallant. But how about a group of U.S. soldiers who have been on patrol for several days; have been fired upon; have dodged rocket-propelled grenades and homemade bombs; have sustained casualties; and who are very nearly exhausted and maybe slightly scared? How about when a bunch of guys... brandishing AK-47s come charging over the horizon straight toward you? Do you wait for them to start killing your team, or do you mow the bastards down before they get a chance to do so? That situation might look simple in Washington, where the human rights of terrorists are often given high priority.... However, from the standpoint of the U.S. combat soldier, Ranger, SEAL, Green Beret, or whatever, those ROE represent a very serious conundrum.... they represent a danger to us; they undermine our confidence on the battlefield in the fight against world terror. Worse yet, they make us concerned, disheartened, and sometimes hesitant.[6]

A half century of experience indicates however, that, for combat operations involving large units, ROE are probably necessary on the modern battlefield, even given misunderstandings like those in the SEAL's complaint.

13.1. A Brief History of ROE

In the United States, the law of war developed along two lines, the law of the sea and the law of land armies. The two did not merge until the 1950 implementation of the

[4] W. Hays Parks, "Deadly Force *Is* Authorized," U.S. Naval Institute *Proceedings* (Jan. 2001), 33.

* For example, some ROE include the oxymoronic, "use minimum deadly force"; also, "shoot to wound," and "fire no more rounds than necessary." Such provisions are not reassuring to warfighters.

[5] For example, Kenneth P. Werrell, "Across the Yalu: Rules of Engagement and the Communist Air Sanctuary During the Korean War," 72–2 *J. of Military History* (April 2008), 451–75, 458. The author frequently refers to Korean War–era JCS policy and directives as ROE, misunderstanding their operational and legal distinctions.

[6] Marcus Luttrell, *Lone Survivor* (New York: Little, Brown, 2007), 37–8.

Uniform Code of Military Justice, which finally blended the Army and Air Force Articles of War and the Navy's Articles for the Government of the Navy. In American practice, the development of ROE has been similar. They first were restrictions on use of force in the Air Force. "Although not yet referred to as such, modern rules of engagement first appeared during the air campaign over North Korea in 1950, when General Douglas MacArthur received orders from Washington that American bomber aircraft were neither to enter Chinese airspace nor destroy the Suiho Dam on the North Korean side of the Yalu River."[7] General MacArthur was eventually relieved of his duties because, among other reasons, he violated those ROE. Nor is he the only officer relieved of duty for doing so.[8]

In November 1954, the Joint Chiefs of Staff issued "Intercept and Engagement Instructions" to the Air Force, which were soon referred to as "rules of engagement." The term was officially adopted by the Joint Chiefs of Staff in 1958. The U.S.–Vietnam War hastened further development of air combat ROE, which became highly detailed and restrictive, with unprecedented domestic political involvement in day-to-day tactical operations of the Air Force. In the late 1960s, even before the end of the war in Vietnam,

> . . . ROE were in a state of disorganization only slightly short of anarchy. In 1979, the Chief of Naval Operations, Admiral Thomas B. Hayward, directed a study to standardize the worldwide peacetime maritime rules of engagement . . . to bring together in a single document these various references while also providing a list of supplemental measures from which a force commander could select when he felt it necessary to clarify force authority beyond basic self-defense statements. The Worldwide Peacetime Rules of Engagement for Seaborne forces . . . were approved by the JCS in 1981 . . . [T]hey were a clear statement of national views on self-defense in peacetime that also could smooth the transition to hostilities . . . [9]

Today's ROE are historically related to the Navy's service-specific first-strike directive in Admiral Hayward's 1981 Rules. That is, must U.S. combatant naval vessels take the first blow before initiating offensive measures? The Navy standardized ships' captain's guidance, reversing prior instructions that they could fire only if fired upon. That new guidance, allowing for an accelerated sequence up the scale of force, was approved for naval use by the Secretary of Defense in June 1986. Meanwhile, as Admiral Hayward's study progressed, ROE applied by ground and air forces in Vietnam underwent their own development, which was not met with universal appreciation.

The 1968 My Lai massacre intensified ROE familiarization efforts. A panel of senior officers was convened to inquire into My Lai's causes. The panel discussed the two ROE-related pocket cards that all U.S. combatants in South Vietnam were required to always carry, "Nine Rules," and "The Enemy in Your Hands." Officers were required to carry

[7] Major Mark S. Martins, "Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering," 143 *Military L. Rev.* (Winter 1994), 3–160, 35.

[8] U.S. Air Force Capt. Dolph Overton studied radar records of enemy MIG fighters landing inside China. Armed with this information, over the course of four days in 1952, contrary to orders, he flew his F-86 fighter across the Yalu into China, joined groups of landing enemy planes, and shot down five, making him an ace. Called before his commanding officer, he admitted his actions. Overton was grounded, sent home, denied medals for which he had been submitted, and no announcement of his ace status was made for a year. Overton resigned from the Air Force. Twenty-five years later, he was given his medals. Other pilots who violated the ROE in similar fashion, including the Korean War's leading U.S. ace, Capt. Joseph McConnell, also were grounded and/or sent home. Werrell, "Across the Yalu," supra, note 5, at 468–70.

[9] W. Hays Parks, "Righting the Rules of Engagement," U.S. Naval Institute *Proceedings* (May 1989), 83, 84.

a third card, "Guidance for Commanders in Vietnam." Lieutenant General William Peers, the senior My Lai investigating officer, wrote, "Some panel members thought the MACV [Military Advisory Command, Vietnam] policy of requiring soldiers to carry a variety of cards was nothing short of ludicrous."[10] Too often the cards were considered a substitute for training.

General Peers was not alone in his low opinion of Vietnam-era ROE pocket cards for, "[t]he resulting thicket of rules and cards did not effectively transmit to the individual soldier what was expected of him."[11] Senator James Webb, holder of the Navy Cross for combat valor in Vietnam, said of his 1969 arrival in Vietnam, when he was a Marine Corps lieutenant, "[I] was told to read and sign a copy of the rules of engagement. The document ran seven pages. Some of it made sense, but a lot of it seemed an exercise in politics, micromanagement, and preventive ass covering, a script for fighting a war without pissing anybody off."[12] Enlisted personnel disparaged the Vietnam-era ROE, as well. "Grunts had little respect for rules of engagement that prohibited them from burning down a village that had been used as an ambush site with white phosphorous grenades but allowed a jet to do the same thing with bombs dropped from the sky."[13] A few years after the war, Hays Parks wrote, "Since the Vietnam War a sense of frustration, confusion, and distrust has seethed within the operational community with respect to rules of engagement."[14]

During the Vietnam conflict, there was opposition to ROE sufficient to cause General John D. "Jack" Lavelle, commander of the 7th Air Force, to disregard them and order twenty-eight raids on North Vietnamese targets that were prohibited by his ROE. When his apostasy was discovered, in March 1972, General Lavelle was relieved of command, demoted to major general, and forced to retire. Army General Bruce Palmer confirmed, "The purpose of the U.S. restraints on the employment of U.S. airpower was, of course, a political one . . . "[15] As General Creighton Abrams said, however, in testimony before congress about the Lavelle case, "The rules [of engagement] have been forever . . . a source of frustration to many commanders. And they have had to live with them. And they have had to do their job with them."[16] General Lavelle's relief and demotion were a reminder to combatants that, like it or not, political considerations are always one basis of ROE.

In 1988, the Joint Chiefs of Staff issued a set of standing rules called the Peacetime ROE, applicable to all military operations short of actual war or prolonged conflict. The Peacetime ROE could be modified by the commanders-in-chief of unified commands (i.e., major multiservice commands led by full generals or admirals, of which there are eight worldwide, today) to meet contingencies of a given mission. "In turn, each subordinate commander is free to issue ROE specific to his unit, provided that they are neither less restrictive nor otherwise inconsistent with the ROE from higher headquarters. The individual soldier typically learns of the ROE in a briefing from his immediate commander . . . Later, the soldier may consult a pocket-sized card that purports to summarize the

[10] Lt.Gen. W.R. Peers, *The My Lai Inquiry* (New York: Norton, 1979), 230, fn. 1.
[11] Martins, "Rules of Engagement for Land Forces," supra, note 7, at 49, fn. 158.
[12] Robert Timberg, *The Nightingale's Song* (New York: Simon & Schuster, 1995), 152.
[13] Michal R. Belknap, *The Vietnam War on Trial* (Lawrence, KS: University Press of Kansas, 2002), 49.
[14] Parks, "Righting the Rules of Engagement," supra, note 9, at 83.
[15] Gen. Bruce Palmer, Jr., *The 25 Year War* (New York: DaCapo Press, 1984), 125.
[16] Lewis Sorley, *Thunderbolt* (Washington: Brassey's, 1998), 341.

most important and relevant ROE."[17] In cases of war or prolonged armed conflict, the Peacetime ROE would be replaced by separately formulated ROE approved by the Joint Chiefs of Staff.

In 1994, the Peacetime ROE were redesignated the Standing Rules of Engagement (SROE), although little changed but the name. Significant portions of the SROE were, and remain, classified "secret." They were revised in January 2000 to give individual self-defense increased emphasis. The current SROE went into effect in June 2005, and now include Standing Rules for the Use of Force (SRUF).

13.1.1. *Standing Rules of Force (SRUF)*

SRUF apply in domestic civil support missions and land defense missions within U.S. territory.[18] For example, SRUF would have applied, had they existed at the time, to military personnel present at the February 1993 siege and attack at the Waco, Texas, Branch Davidian Compound, where eighty-one Davidians and four Bureau of Alcohol, Tax and Firearms agents died. No military personnel were directly involved in that domestic attack, but soldiers were present to advise law enforcement personnel. Although new and untested, the SRUF applied throughout the Army's and the National Guard's Hurricane Katrina peace-keeping assignments in August and September 2005. The Military Sealift Command has SRUF that are applicable to its civilian seamen and women.[19]

> One could argue that these varying concerns merely create a distinction without a difference. Whether RUF or ROE, we are still referring to what type of force [U.S. combatants] can use, under which circumstances, and when. . . .
>
> ROE military concerns generally involve the tactical and operational implications of performing missions in situations in which host-nation law enforcement and civil authorities are nonexistent, nonfunctional, or resistant to a U.S. military presence. In contrast, RUF military concerns generally presuppose a permissive military environment with a functional civil government capable of enforcing the law and maintaining order.[20]

An important distinction between SRUF and SROE is the different legal regimes that undergird the two. "ROE are generally shaped by international legal obligations, such as the United Nations Charter, international treaties, and customary international law. RUF are generally shaped by domestic or host-nation legal obligations."[21]

Although SRUF are domestically oriented and based on U.S. constitutional law, the current SRUF also contain concepts usually associated with ROE, such as "hostile act," "hostile intent," and "escalation of force." Incorporation of these ROE concepts introduces international law concepts to domestic law–based SRUF, and the possibility of confusion.[22]

[17] Martins, "Rules of Engagement for Land Forces," supra, note 7, at 24. Footnote omitted.
[18] Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B (June 13, 2005), "Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces," Appendix A, para. 1.e.
[19] ALMSC 017/06, "Standing Rules for the Use of Force (SRUF) by MSC [Military Sealift Command] Personnel," (July 10, 2006).
[20] Center for Law and Military Operations (CLAMO), "ROE v. RUF" *Marine Corps Gazette* (March 2006), "website exclusive," available at: http://www.mca-marines.org/gazette/2006/06clamo.html.
[21] Id.
[22] For an examination of SRUF: Maj. Daniel J. Sennott, "Interpreting Recent Changes to the Standing Rules for the Use of Force," *The Army Lawyer* (Nov. 2007), 52.

13.2. What Are "Rules of Engagement"?

Joint Publication 1–02, *Dictionary of Military and Associated Terms*, defines ROE as, "**directives issued by competent military authority that delineate the circumstances and limitations under which U.S. [naval, ground, and air] forces will initiate and/or continue combat engagement with other forces encountered**."

ROE are the primary means of regulating the use of force in armed conflict, and in situations short of armed conflict. They are akin to a tether, with which senior commanders control the use of force by individual combatants. They are the commander's rules for employing armed force, arrived at with the help of military lawyers and implemented by those who execute the military mission. ROE are "based upon three pillars – national policy, operational requirements and law."[23] The foundations of ROE are customary law and LOAC/IHL, along with considerations of political objectives and the military mission. Limitations contained in ROE guard against the escalation of situations involving armed force. They may regulate a commander's action by granting or denying use of particular weapons – artillery or tear gas, for example. In 1994–1995's Operation Uphold Democracy, in Haiti, the ROE specified that only brigade commanders and higher could authorize the use of riot control agents – tear gas.

ROE *never* limit the right and obligation of combatants to exercise self-defense. Nor may ROE authorize a violation of LOAC/IHL. Their provisions may be more restrictive than those of LOAC/IHL, however. For example, they may direct that soldiers not fire at specified targets, or that they use ammunition of no greater than a specified caliber, even though those targets or that ammunition are not prohibited by LOAC/IHL. Also, they may direct that enemy aircraft not be engaged by friendly aircraft without permission of the area air defense commander. In the U.S.–Vietnamese conflict (1965–1972), Air Force pilots flying Operation Rolling Thunder missions were restricted from attacking North Vietnamese dikes. During Operation Just Cause, the 1989 U.S. invasion of Panama, the Joint Task Force Commanding General, Army General Carl Steiner, required that an officer of the grade of at least lieutenant colonel approve all artillery fire that impacted in any populated area.

ROE are not tactical in nature; they do not instruct soldiers or Marines, sailors or airmen, in how a mission is to be executed. Tactics and ROE are complementary, not synonymous. "ROE are designed to provide boundaries and guidance on the use of force that are neither tactical control measures nor substitutes for the exercise of the commander's military judgment."[24] To say that soldiers charged with committing a LOAC/IHL violation were only following their ROE is often an incorrect use of the term.

In times past, senior politicians have inserted their wishes into the ROE process, with dangerous results for U.S. combatants. During the 1980 Iranian rescue mission, the Carter administration sought to require an impractical shoot-to-wound directive. During the 1982 U.S. involvement in Beirut, Reagan administration officials amended the ROE at several levels, resulting in Marine sentries carrying empty weapons on the morning they were attacked by a truck bomb. (See SIDEBAR, below.) Later in the Reagan

[23] Richard J. Grunawalt, "The JCS Standing Rules of Engagement: A Judge Advocate's Primer," *Air Force L. Rev.* (1997), 245, 247.

[24] Maj. Marie Anderson and Emily Zukauskas, eds., *Operational Law Handbook, 2008* (Charlottesville, VA: Judge Advocate General's Legal Center and School, 2008), 79.

administration, the National Security Council initially directed that U.S. advisors in El Salvador, who often engaged in firefights with insurgents, carry only personal weapons – 9mm pistols but no rifles.[25]

In 1986, the commanding officer of the Army's 75th Ranger Regiment was ordered to deploy a Ranger battalion to an exercise in Honduras, across a major guerrilla infiltration route. The colonel refused to accept the tasking until the ROE were changed from "no live ammunition authorized," to one magazine of live ammunition in a taped-shut ammo pouch, to live ammunition authorized in the weapon but no round in the chamber, to (finally) live ammunition with a chambered round. This time, the risk to U.S. Rangers that an empty weapon represented had been imposed by *military* seniors. Although he could have been relieved of his duties for his intransigence at any point, the Ranger commander's insistence was not career ending.[26]

That was not an isolated instance of ill-considered ROE dictated by military superiors. In October 2000, al Qaeda's suicide bombing of the *USS Cole* in the port of Aden, Yemen, killed seventeen U.S. sailors and nearly sank the ship. The sailors' "'rules of engagement' would have prevented them from firing without first obtaining permission from the *Cole*'s captain or another officer, the crew members said."[27] This was "because of orders issued not by the ship's captain, but from the Navy's Fifth Fleet . . . That directive was based on diplomatic concerns about repercussions should American sailors fire weapons – even as warnings – in the port of an Arab country."[28] The military has no corner on ill-considered ROE decisions, however.

> Higher authorities in the United States on occasion have imposed restrictions on lawful weapons because of political sensitivities. . . . At the time of the 1983 Grenada rescue operation, a request was forwarded . . . for permission to employ riot control agents . . . However, realizing a key vote on modernization of the U.S. chemical weapon deterrence capability was scheduled in the Senate that week, a response to the request was delayed lest the anticipated reaction to the use of riot control agents on Grenada undermine the Senate vote.[29]

Although extraneous pressures bearing on ROE content are always possible, judge advocates usually take the lead in ROE formulation. Orders issued by each of the U.S. Armed Services task judge advocates with training members of their branches in ROE, as well as law of war matters, generally.[30]

[25] Parks, "Deadly Force *Is* Authorized," supra, note 4, at 34.
[26] Id., at 37.
[27] Thomas E. Ricks and Steve Vogel, "USS Cole Guards Told Not To Fire First Shot," *Washington Post*, Nov. 14, 2000, A1.
[28] Steven Lee Myers, "Inquiry Faults the Cole's Captain and Crew," NY *Times*, Dec. 9, 2000, A6.
[29] Parks, "Righting the Rules of Engagement," supra, note 9, at 92–3.
[30] For example, Marine Corps Order 3300.4, "Marine Corps Law of War Program," (Oct. 20, 2003), Enclosure (5), para. 2.b. "Judge advocates also will be prepared to provide instruction to Marines in the law of war and other operational law subjects . . . " The Navy's order, SECNAVINST 3300.1B, "Law of Armed Conflict (Law of War) Program To Ensure Compliance by the Naval Establishment," (Dec. 27, 2005), para. 6.b.(5), does not specifically refer to judge advocates. The Air Force order, Air Force Policy Directive 51–4, "Compliance With the Law of Armed Conflict," (April 26, 1993), does not refer to ROE at all.

SIDEBAR. In June 1982, Israel invaded Lebanon in an effort to end attacks on Israel that were emanating from there. That fall, in an effort to restore calm to the area, the United States participated in a multinational stability effort. U.S. Army Special Forces initiated the training of pro-Western Lebanese forces, and Marines were assigned to protect the Beirut airport. To keep their footprint to a minimum, the Marine component of the Multinational Force, Battalion Landing Team 1/8, of the 24th Marine Amphibious Unit, was billeted almost entirely in the four-story Beirut Airport terminal building.

At 0622 on October 23, 1983, Lance Corporal Eddie DiFranco was in sandbagged sentry Post 7, between a parking lot and the terminal building. He watched a yellow Mercedes truck circle the parking lot, as lost trucks occasionally did, then suddenly accelerate and burst through the barbed-wire barrier between the parking lot and the terminal, heading for the front of the terminal building.[31] Following the ROE, DiFranco had a loaded magazine in his weapon but no round chambered.[32] Lance Corporal DiFranco jerked the charging handle of his M-16 to the rear and let it slam forward, chambering a round, but before he could flick off the safety and raise the weapon to his shoulder, the truck was past him. It roared directly into the lobby of the terminal building – the Battalion Landing Team headquarters – where it detonated its load of an estimated 12,000 pounds of explosives. Two hundred forty-one Marines and sailors died in the blast.

A later investigation of the bombing reported, "The Commission concludes that the . . . ROE contributed to a mind-set that detracted from the readiness of the [Marines] to respond to the terrorist threat which materialized on 23 October 1983."[33]

Today, most U.S. operations are joint operations, often involving a unified geographic commander, such as Southern Command, Central Command, European Command, or Southern Command, or Joint Forces Command, whose forces operate with other countries' armed forces. "The standing ROE (SROE) provide that U.S. forces assigned to be OPCON [under operational control, or command] or TACON [under tactical control, or command] to a multinational force will follow the ROE of the multinational force if authorized by the SECDEF [the Secretary of Defense]."[34] In such cases every effort is made to arrive at a common ROE or, if possible, have common ROE in place

[31] Eric Hammel, *The Root* (New York: Harcourt Brace Jovanovich, 1985), 292–4.

[32] Some sources, for example, Martins, "Rules of Engagement for Land Forces," supra, note 7, at 11, disagree with Hammel, saying that the sentries, including DiFranco, did not have loaded magazines inserted in their weapons. The first two points of the ten-point ROE in effect on the day of the bombing read: "1. When on post, mobile or foot patrol, keep loaded magazine in weapon, bolt closed, weapon on safe, no round in the chamber. 2. Do not chamber a round unless told to do so by a commissioned officer unless you must act in immediate self-defense where deadly force is authorized." Id., Hammel, at 427. If the sentries did not have a loaded magazine in their weapons, they were in violation of their ROE.

[33] Dept. of Defense, *Report of the Commission on Beirut International Airport Terrorist Act* (Dec. 20, 1983), 135.

[34] Anderson and Zukauskas, *Operational Law Handbook, 2008*, 2008), supra, note 24, at 594.

before operations begin.[35] If that proves impractical, U.S. forces will employ their own ROE, after discussing the differences in ROE with the allied forces, and informing subordinate units of the differences they may encounter. The United States does have standing combined ROE with a number of other states. Those standing combined ROE ease joint operations planning.

However, if an American unit is under the *operational control* of a multinational force that employs a different ROE, as opposed to the American unit merely *operating with* a multinational force with a different ROE, the guidance is different. In such cases, unless directed otherwise, the U.S. unit will follow the ROE of the multinational force.[36] (There are occasions when U.S. units are directed otherwise.)

13.3. When SROE/ROE Apply[37]

To understand ROE, one must understand the SROE. Although complementary, the two are quite different. If U.S. forces engage in an unanticipated armed conflict, it is the SROE that apply by default. The SROE apply to all military operations and contingencies outside U.S. territory. Inside U.S. territory, the SROE apply only to air and seaborne homeland defense missions.

"The SROE establish fundamental policies and procedures governing the actions of U.S. force commanders . . . "[38] SROE apply in common Article 2 and common Article 3 armed conflicts and in peace-keeping missions, peace-enforcing missions, and anti-terrorist missions. They also apply in military operations other than war – what the military calls "OOTW," pronounced "OUGHT-wah." SROE do not apply, however, in *posse comitatus* situations – when soldiers are deployed on land within the United States to assist federal or local civilian authority in time of disaster or civil disturbance. That is when the SRUF come into play.

The SROE are always present, applicable to all U.S. armed forces, standing by in the "military supermarket" that is managed by the Pentagon's Joint Staff.[39] It is the Joint Staff that is responsible for developing and maintaining the SROE.[40] The SROE are like a catalogue of provisions from which a military "tactical shopper," with the agreement of the Joint Staff, selects precisely the items that will fit into his military mission shopping basket. In other words, when a specific military task is contemplated, the SROE are the basis for the formation of mission-specific ROE that will apply to that military task alone; the SROE are mined to make up mission-specific ROE.

[35] See Cmdr. Mike Spence, "Lessons for Combined Rules of Engagement," U.S. Naval Institute *Proceedings* (Oct. 2000), 56–60, for a discussion of issues in formulating combined ROE.

[36] Appendix A, *Joint Chiefs of Staff Standing Rules of Engagement*; supra, note 18, at para. 1.c.(1).

[37] This section is largely based on: Anderson and Zukauskas, *Operational Law Handbook, 2008*, supra, note 24, Chapter 5.

[38] Army Field Manual 3–24 and Marine Corps Warfighting Publication 3–33.5, *U.S. Army-Marine Corps Counterinsurgency Field Manual* (Chicago: University of Chicago Press, 2007), D-9, at 350.

[39] Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 5810.01, "Implementation of the DOD Law of War Program," (Aug. 12, 1996), para. 5.a. (2) (b) 1. "Ensure that the Joint Operations Planning and Execution System includes appropriate guidance to ensure review of plans and rules of engagement for compliance with the law of war."

[40] The Joint Staff supports the Chairman of the Joint Chiefs of Staff who, among other duties, directs the Staff. The Joint Staff is "purple," that is, staffed by a roughly equal number of select senior Army, Navy, Air Force, and Marine Corps officers. It is the J-3, the Joint Operations Division of the Joint Staff, that develops and maintains the SROE.

Throughout the ROE formulation process and the implementation phase, mission-specific ROE are the commander's responsibility, not her judge advocate's. Responsibility for the content of ROE, and for combatants observing the ROE, reside in the commander. Rarely, commanders and their staffs have defaulted in this responsibility, leaving ROE formation to their military lawyer alone, sometimes leading to ROE that put their men and women at risk.[41] Even more rarely, commanders have used their judge advocate's interpretation of the ROE as an excuse for acting or not acting in a tactical situation.[42] Although judge advocates have a major voice in ROE planning and implementation, they can only recommend. It is the commanding officer who decides.

The basic requirements for employment of SROE, and mission-specific ROE that are developed from them, are military necessity and proportionality. Before armed force may be employed, there must be a military necessity to do so; that is, whether in a common Article 2 or 3 situation, lawful force must be indispensable for securing the submission of the enemy. Also when armed force is employed, that force must be proportional to the threat faced; the loss of civilian life and damage to civilian property must not be excessive in relation to the direct military advantage to be gained. Unit commanders have the obligation to ensure that individuals within their units understand and are trained in when and how to use force in self-defense and in accomplishing the mission.[43]

13.4. Formulating Mission-Specific ROE

No two tactical cases are alike, and no ROE formula applies across the board. In considering how mission-specific ROE come about, however, a typical case might be a noncombatant evacuation order.

The ROE process begins when a deployment order is issued to, for example, a Marine Expeditionary Unit (MEU) afloat off the European coast. The order is to carry out a noncombatant evacuation order in a small country where civil war has erupted. The lives of Americans in the country are at risk, and they must be quickly evacuated: "Execute in 48 hours," may be the order that the Joint Chiefs of Staff initially send to the unified commander – the four-star general located in Florida, in this case, who directs the European MEU's operations. The unified commander passes on the Joint Chiefs' order to the MEU commander afloat off the European coast. "The SROE are in effect," the unified commander's order to the MEU might read, recognizing that the SROE are always in effect until mission-specific ROE can be formulated and approved. The unified commander's order continues, "Request ROE supplemental measures that you

[41] Parks, "Deadly Force *Is* Authorized," supra, note 4.

[42] An example of a judge advocate unfairly blamed for a superior's tactical decision occurred during an early stage of the conflict in Afghanistan. In October 2001, a Taliban convoy suspected to include Taliban leader Mullah Omar was sighted. Expedited permission for an armed Predator to fire on the convoy was denied by Central Command's Commanding General, Tommy Franks. His reported reply to the request to fire was, "My JAG doesn't like this, so we're not going to fire." Thereafter, Gen. Frank's "JAG," a Navy judge advocate Captain who had voiced her qualms about noncombatants who might be in the convoy, was heavily criticized in the unknowing media, sometimes by name; e.g., Seymour M. Hersh, "King's Ransom: How Vulnerable Are the Saudi Royals," *New Yorker*, Sept. 22, 2001, 36; Thomas E. Ricks, "Target Approval Delays Cost Air Force Key Hits," *Washington Post*, Nov. 18, 2001, A1 (a circumspect depiction of the event); Rebecca Grant, "An Air War Like No Other," *Air Force*, Nov. 2002, 31, 34; and, on television, "Face the Nation," Bob Schieffer and Colin Powell, Oct. 21, 2001.

[43] Field Manual 3–24, *Counterinsurgency Field Manual*, supra, note 38, D-10, at 351.

desire"; that is, begin to formulate your mission-specific ROE in coordination with the Pentagon's Joint Staff.

If the time to mission execution is short, the MEU may not have an opportunity to formulate mission-specific ROE and will have to conduct the noncombatant evacuation order with the SROE. In this case there is enough time, so, aboard ship, the MEU commander and his staff, who will execute the noncombatant evacuation order, quickly formulate a plan for the operation. The Marine commander and his staff, including the MEU's judge advocate, review the SROE notebook, including its enclosures and annexes, which are key to forming mission-specific ROE.

The SROE's Enclosure A contains unclassified general-purpose SROEs. Enclosures B–H of the SROE are classified enclosures that provide guidance for various types of operations, such as maritime operations, land operations, antidrug operations, and noncombatant evacuation operations. Embarked aboard Navy shipping that is cruising off the European coast, the Marine MEU commander will use the noncombatant evacuation order guidance as his template, to which he will add supplemental measures to arrive at mission-specific ROE for his unit's assignment.

SROE Enclosure J is unclassified and provides administrative guidelines for incorporating ROE development into the mission-planning process.

Enclosure K contains theater-specific ROE that apply in various geographic areas where combatant units may be called upon to fight. Enclosure L is an unclassified assemblage of ROE previously employed by combatant commanders in their particular areas of responsibility – "here's what the last commander in your location did."

Returning to the noncombatant evacuation-planning example, typically the unit commander, assisted by his military lawyer and other staff officers, decides what supplemental measures to request for the mission. Will an opposing force be declared hostile prior to landing? Can riot control agents be employed? Can international boundaries be crossed if considered necessary? Can artillery fire be preplanned? May the commander detain civilians? Possible supplemental measures are many. Each requested supplemental measure will go through the Joint Staff in the Pentagon, and on to the Joint Chiefs of Staff for approval.

The unit commander turns to SROE Enclosure I, which contains hundreds of numbered ROE "supplemental measures," the bulk of them classified. Some of Enclosure I's supplemental measures are left blank, for unique situations that require formulation of one-time supplemental measures. There are three levels of supplemental measures available. At the lowest level, the on-scene commander, the MEU commanding officer afloat off the European coast in this case, may approve some supplemental measures. The unified commander in Florida can approve a higher level of supplemental measures. At the highest level, only the National Command Authority, the President, and the Secretary of Defense, may approve the most sensitive supplemental measures.

Using secure communications, there are back-and-forth discussions throughout the rapid ROE formulation process between the MEU commander at sea and the Joint Staff at the Pentagon. Within hours, standard and supplemental ROE measures are agreed upon and approved by the Joint Chiefs of Staff; at that point, the MEU has mission-specific ROE. Aboard ship, the ROE are written into the MEU's operation order in an annex that may be twenty pages in length, or more. All of the MEU's component units – the infantry companies, the artillery battery, the helicopter squadron, and so forth – receive a much-condensed version of the ROE. The commanders of the subunits

brief their individual Marines on the ROE in even briefer fashion. If time permits, the mission-specific ROE may be summarized on a single card. To the individual Marine, then, the ROE are a card in his pocket, rather than the twenty-page document arrived at through the harried efforts of planners and commanders aboard his ship, at unified command headquarters in Florida, at the Pentagon, and perhaps at the White House.

Sometimes, formulation of the ROE can be unhurried. An example was the planning stage of the 2003 invasion of Iraq when, among many U.S. Army, Navy, and Air Force units, as well as allied British, Polish, and Danish forces, a Marine Expeditionary Force (MEF) prepared for the coming common Article 2 armed conflict. In their Kuwait staging area, the MEF staff had a lengthy period in which to finely craft mission-specific ROE in coordination with the Pentagon's Joint Staff.

> The MEF's legal office spent the months before the war working up the ROE and then preparing and disseminating presentations for the major subordinate commands . . . [The Marine commander, Major General James Mattis] issued written, detailed guidance on the law of war on at least two occasions . . . In one prewar memorandum he . . . went on to outline eleven commonsense law of war "principles." . . . To drive the message home, General Mattis had his staff judge advocate . . . deliver classes on the law of war and rules of engagement to Division units both before and during the deployment . . . [44]

On March 20, when the Marines finally crossed into Iraq to confront the enemy, each Marine carried an ROE card. ROE pocket cards are the barest summary of the mission-specific ROE, intended as a concise and unclassified distillation to serve as training aid and memory tool. Upon reading an ROE card, one is impressed with its effort to also be a mini-LOAC/IHL primer. Confronted with a crisis in the field, soldiers and Marines will not be able to consult a pocket card, but must rely upon the principles of the ROE they have internalized during training. Along with that training, ROE cards may be a useful tool. Many military officers view them with disfavor, however, because ROE cards are sometimes thought of as substitutes for training and supervision on battlefield conduct.

After mission-specific ROE are published, they are not immutable. Commanders at any level may, and often do, request additional or modified ROE in response to new circumstances on the ground. ROE are routinely amended, sometimes as frequently as week to week, while a lengthy operation plays out.[45] Adjacent units on a single battlefield may have differing ROE, reflecting the different units' differing missions. All units, however, have ROE of some nature.

13.5. ROE Content

When mission-specific ROE are formulated, what are their contents? Most ROE are similar, but, because every military mission is unique, no two are exactly the same. All will have one or more common elements and a common philosophic outlook: SROE

[44] Col. Nicholas E. Reynolds, *Basrah, Baghdad, and Beyond* (Annapolis: Naval Institute Press, 2005), 157–8.
[45] C.J. Chivers, "Perfect Killing Method, but Clear Targets Are Few," *NY Times*, Nov. 22, 2006, A1. "The military has also tightened rules of engagement [in Iraq] as the war has progressed, toughening the requirements before a [U.S.] sniper may shoot an Iraqi. Potential targets must be engaged in a hostile act, or show clear hostile intent."

and ROE are usually permissive in nature.[46] That is, in the beginning of the combat operation they allow "commanders the authority and obligation to use all necessary means to defend their units and, for the most part, allows commanders to use any lawful weapon or tactic for mission accomplishment unless specifically restricted from doing so by higher authority. This permissive framework affords commanders wide latitude in shaping ROE unique to their mission."[47] For example, early in the conflict in Iraq, if there was a "troops in contact" situation, if U.S. forces were actually engaging enemy combatants, in keeping with the ROE some requirements for approving supporting fires were ignored; houses could be bombed, aviation assets could be called in, artillery was available, all on a squad leader's say-so.[48] As the conflict progressed, the mission-specific ROE often became more restrictive.

All ROE contain a clear statement of the right to self-defense. Occasionally, ROE also describe escalation-of-force measures. Most contain other common elements addressing enemy hostile acts, enemy hostile intent, dealing with enemy forces declared hostile, and a positive identification requirement.

13.5.1. *The Right to Self-Defense*

The SROE stress the right of self-defense. To an even greater extent than previous versions, the "new" January 15, 2000, SROE emphasize that right:

> Unit Self-Defense. A unit commander has the authority and obligation to use all necessary means available and to take all appropriate actions to defend the unit, including elements and personnel, or other US forces in the vicinity, against a hostile act or demonstrated hostile intent. In defending against a hostile act or demonstrated hostile intent, unit commanders will use only that degree of force necessary to decisively counter the hostile act or demonstrated hostile intent and to ensure the continued protection of US forces.[49]

When employing self-defense, as long as the opposing force remains a threat, it may be pursued and engaged. Unless the ROE specify otherwise, there is no requirement that a self-defense engagement be terminated when the opposing force attempts to break off contact.

Unit self-defense and individual self-defense trump all other ROE provisions. In 2003, immediately before the U.S.–Iraq common Article 2 conflict began, Major General James Mattis, the commanding general of the 1st MEF, went from unit to unit, addressing his Marines. One junior officer recalls, "The theme was rules of engagement, and he wanted

[46] Center for Law And Military Operations (CLAMO), "Rules of Engagement: What Are They and Where Do They Come From?" *Marine Corps Gazette* (April 2002), 59, 60.

[47] CLAMO, "'ROE' Rhymes With 'We'," *Marine Corps Gazette* (Sept. 2002), 78.

[48] A "troops in contact" ROE provision in use in Iraq in 2009: "TROOPS IN CONTACT (TIC). While friendly forces are in contact with enemy forces, either in self-defense (in response to hostile act/intent) or in reaction to a positively identified declared hostile force, the OSC [on-site commander] has approval authority for all counter battery and reactive fire, including all organic and non-organic weapon systems. The OSC is responsible for establishing PID [positive identification] minimizing collateral damage and responding in a proportional manner."

[49] Appendix A, *Joint Chiefs of Staff Standing Rules of Engagement*; supra, note 18, para. 7.c.

to make [several points] very clear. First, commanders had an inherent obligation – not merely a right, but a legal and ethical obligation – to defend their Marines."[50] If civilians were killed in the process, "a commander would be held responsible not for the facts as they emerged from an investigation, but for the facts as they appeared to him in good faith at the time – at night, in a sandstorm, with bullets in the air."[51]

In October 1993, in Mogadishu, Somalia, Army Rangers and Delta Force soldiers of Task Force Ranger were on a mission to capture two lieutenants of the Somali warlord Mohammed Farah Aidid. When the mission went awry, the U.S. force was engaged in a furious fifteen-hour firefight in which eighteen U.S. soldiers were killed and seventy-three wounded, many seriously. Somalia, a failed state, had no army but it did have an abundance of heavily armed civilian fighters, none with uniform or distinguishing sign. Thousands of them were attacking a group of heavily outnumbered American soldiers who were conducting a fighting retreat.

> Moving in from more distant parts were vehicles overflowing with armed men . . . Somalis approached in groups of a dozen or more from around corners several blocks up, and others, closer, darted in and out of alleys taking shots at them . . . The Rangers were bound by strict rules of engagement. They were to shoot only at someone who pointed a weapon at them, but already this was unrealistic. It was clear they were being shot at, and down the street they could see Somalis with guns. But those with guns were intermingled with the unarmed, including women and children . . . Rangers peering down their sights silently begged the gawkers to get the hell out of the way.[52]

Soon, the Rangers were firing on the Somali shooters in the approaching crowds. They knew that, no matter how well aimed their fire, women and children would fall victim to their shooting. Proportionality and collateral damage were subsumed by the onslaught of Somali fighters surrounding them. Unit self-defense does not negate the requirements of proportionality, but self-defense trumps other ROE provisions.

13.5.1.1. A Legal Fine Point: Self-Defense in Human Rights Law and in LOAC/IHL

It is argued by the International Committee of the Red Cross and human rights activists that human rights law has a greater role in LOAC/IHL than the United States acknowledges. As discussed elsewhere (Chapter 1, section 1.4.2.), the argument that the two have a coequal status on the battlefield is resisted by the United States, which sees LOAC/IHL as distinct from human rights law. The United States believes that human rights law was not intended to be, and should not be, controlling in *jus in bello* situations.

The influence of human rights law is illustrated, however, in the issue of self-defense as contained in ROE. It is common to describe returning enemy fire as firing in "self-defense," but be wary of casual use of the legal term of art, "self-defense." Imagine a British patrol in Iraq during the common Article 2 phase of the conflict, before the Saddam Hussein regime fell. The patrol fires on and kills an Iraqi civilian as he fires

[50] Nathaniel Fick, *One Bullet Away* (New York: Houghton Mifflin, 2006), 182.
[51] Id.
[52] Mark Bowden, *Black Hawk Down* (New York: Atlantic Monthly Press, 1999), 18.

an automatic weapon at the patrol. In layman's terms, the killing of the civilian was self-defense, but was it? British Colonel Charles Garraway, warns:

> This [self-defense characterization] is classic human rights law. But the incident was taking place during an international armed conflict. Under the law of armed conflict, the right to use lethal force would depend on whether or not the Iraqi was a legitimate target. If he was a combatant, or a civilian taking an active part in hostilities, he was, as such, a legitimate target and there was no need to justify the soldiers' actions by reliance on self-defense, or the defense of anyone else.[53]

In time of armed conflict, whether international or non-international, when a lawful or unlawful combatant takes up arms against an opponent combatant, he becomes a lawful target. To fire on the lawful or unlawful combatant is simply a lawful use of force and an exercise of the combatant's privilege. Self-defense, as that term is used in domestic law, with its potentially contentious human rights issues, is not an issue. "When evaluating the lawfulness of the Soldier's use of force under international law, reference should be made to [international] humanitarian law alone."[54]

It is unrealistic to expect that the term "self-defense" not be used colloquially in instances where one combatant returns the fire of another, but Colonel Garraway's point should be kept in mind.

13.5.2. *Escalation of Force*

Escalation of force is not a part of ROE, but in Iraq it became a significant related factor. "Escalation of force" indicates that combatants should use lower levels of force when it is possible to do so without endangering themselves or others.[55] If tactical circumstances permit, soldiers are expected to not immediately resort to deadly force. For example, "the proper configuration of a Traffic Control Point will allow Soldiers to identify approaching vehicles sooner, thus providing Soldiers more time to apply warnings (visual signs, loudspeakers, barricades, tire strips, laser pointers, laser dazzlers, warning shots, etc.)."[56] The "time to apply warnings" refers to the escalation of force: If it comes to firing his weapon, a soldier is trained to "apply warnings" by first firing at the approaching vehicle's tires. If the vehicle continues, again warn, this time by firing at the engine block. If the vehicle still continues, the time for warnings is past, fire at the driver. Easier said than done, this is all considered and accomplished in a matter of seconds, perhaps at night in poor visibility, as the car hurtles toward the soldier's position.

Escalation of force is sometimes taught through the phrase, "Shout, show, shove, shoot." A soldier confronted by individuals approaching on foot should "shout" at them to stop, ideally in the local language. If the individuals continue, the soldier should "show" (i.e., brandish) his weapon. If the individuals still continue to advance, they

[53] Charles Garraway, "The 'War on Terror': Do the Rules Need Changing?" 3 *Chatham House* (2006), available at: http://www.chathamhouse.org.uk/pdf/research/il/BPwaronterror.pdf.

[54] Maj. Michelle A. Hansen, "Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict," 194 *Military L. Rev.* (Winter 2007), 1, 47.

[55] In European military practice, the seminal "use of force" case is the European Court of Human Rights', *McCann and Others v. the United Kingdom*, 18984/91 (1995). *McCann* holds that the use of force must not only be proportionate, but that military (and law enforcement) operations, even against suspected terrorists, must be planned so as to minimize possible recourse to deadly force.

[56] Anderson and Zukauskas, *Operational Law Handbook*, 2008, supra, note 24, 81.

should be "shoved" (i.e., be physically restrained, at which point, in practice, it would be far too late to avert an armed enemy). Finally, if they still advance, they may be fired upon.[57]

ROE are interpreted in a reasonable way. In exercising self-defense, a soldier is not necessarily required to employ each option before escalating to the next higher force level,[58] and when circumstances dictate, the soldier may go immediately to deadly force. In Iraq, during the 2003 dash to Baghdad by tank-mounted U.S. forces:

> Gruneisen ordered Peterson to speed through the [traffic] circle. He wanted to just plow through the circle, past the [enemy] trucks and soldiers . . . As they rolled into the circle, Hernandez saw a yellow pickup truck speeding toward them with two men in the front seat. There wasn't time for a warning shot – no time to determine whether these were wayward civilians or militiamen trying to ram them. Hernandez got off a burst from the M-240 [machinegun]. He saw a spray of blood stain the windshield and watched the passengers go down.[59]

The circumstances of each case determine if immediate deadly force is, or is not, the best response. Meanwhile, there are four terms that often appear in ROE, knowledge of which will help in understanding ROE.

13.5.3. *Hostile Act*

Appendix A of the SROE defines a number of SROE/ROE/SRUF terms, including "hostile act": "**An attack or other use of force against the United States, US forces, and in certain circumstances, US nationals . . . It is also force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel and vital US Government property.**"[60] A hostile act is "simply the actual use of armed force – attacking."[61]

When a hostile act is involved, immediate firing on the opposing force or individual is permitted because of the opponent's *conduct*, rather than his *status*. That is, regardless of the individual's status – civilian, combatant, or protected person – his conduct in firing on you renders him a legitimate target without the necessity of determining his status. As the U.S. Supreme Court has written, "Detached reflection cannot be demanded in the presence of an uplifted knife."[62]

In late 2005, in the town of Haditha, where seventeen Iraqis, most of them noncombatants, were killed by a squad of Marines, the squad leader fired on four dismounted and unarmed Iraqi taxi passengers and the driver, killing all five. "[The squad leader] has said he shot the five men, but only after they ran away, which he believed constituted a

[57] A "use of force" ROE provision in use in Iraq in 2009: "**GRADUATED FORCE**. If individuals pose a threat to Coalition Forces by committing a hostile act or demonstrating hostile intent, US Forces may use force, up to and including deadly force, to eliminate the threat. When time and circumstances permit, use the following graduated measures of force when responding to hostile act or hostile intent: Shout verbal warnings to halt; Show your weapon and demonstrate intent to use it; Physically restrain, block access, or detain; Fire a warning shot (if authorized); Shoot to eliminate the threat."

[58] This is in keeping with U.S. Supreme Court jurisprudence relating to civilian law enforcement use of deadly force. *Illinois v. Lafayette*, 462 U.S. 640 (1983).

[59] David Zucchino, *Thunder Run* (New York: Grove Press, 2004), 43.

[60] Appendix A, *Joint Chiefs of Staff Standing Rules of Engagement*, supra, note 18, at para. 5.g.

[61] Capt. Ashley Roach, "Rules of Engagement," *Naval War College Rev.* (Jan.–Feb., 1983), 50.

[62] *Brown v. United States*, 41 S. Ct. 501, 502 (1921).

hostile act that allowed him to use deadly force."[63] This is evidence of the squad leader's unfamiliarity with the ROE. Even in Iraq in 2005, the ROE did not allow firing on unarmed individuals not involved in a combat incident only because they were fleeing. If the squad leader was aware of other factors, that could change the calculus.

A hostile act is usually clear: Someone is firing at you. A hostile act can be something less than weapons fire, however. Under certain circumstances, it could be considered a hostile act if an individual initiates a cell phone call from a rooftop location as you approach a vehicle choke point. The ICRC's report on direct participation in hostilities makes this point. (Chapter 6, section 6.4.1.) Hostile acts are such whether occurring in a common Article 2 or 3 conflict or a peace-keeping or peace-enforcing mission. Upon the occurrence of a hostile act by an opposing force or individual, one may immediately exercise self-defense, including deadly force.

Whereas hostile acts are usually self-evident, determining what constitutes "hostile intent" is more difficult.

13.5.4. *Hostile Intent*

There can be no bright-line test for what constitutes hostile intent. To be overly cautious in assessing intent may lead to the death of fellow combatants. Yet, being too quick to presume hostile intent may result in the death of innocent noncombatants. The circumstances of combat, in which a decision to fire or not fire sometimes must be made virtually instantly, only complicates the decision. The SROE define hostile intent as, **"The threat of imminent use of force against the United States, U.S. forces, and in certain circumstances, U.S. nationals . . . Also, the threat of force to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property."**[64] This definition is broad and gives considerable discretion to the individual perceiving the actions of others. "Many countries do not share the aggressive American [hostile intent] stance, woven into the fabric of the Standing ROE. Nonetheless, that stance is the one carried in the pockets of American troops everywhere."[65] The interpretation of hostile intent can indeed be aggressive. Marine Sergeant Major Brad Kasal, awarded the Navy Cross for his heroism in the 2004 second battle of Fallujah, writes,

> Keyholing [attacking a house by employing two rockets, the first to punch a hole in the wall, and a second thermobaric rocket through the same hole to collapse the house] was not exactly what higher headquarters had in mind when it promulgated the ROE for Fallujah . . . According to its tenets someone inside a building had to display hostile intent before the Marines could engage him. When the rules were followed precisely they often put the young Marines taking the risks at a significant disadvantage, so they were quietly ignored.[66]

As Sergeant Major Kassel suggests, "hostile intent" is sometimes given an elastic definition by troops in contact with the enemy. If so, military necessity and proportionality had best

[63] Paul von Zielbauer, "At Marine's Hearing, Testament to Violence," *NY Times*, Sept. 1, 2007, A4.
[64] Appendix A, *Joint Chiefs of Staff Standing Rules of Engagement*, supra, note 18, para. 5.g., at 5.h.
[65] Lt.Col. W.A. Stafford, "How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force," *The Army Lawyer* (Nov. 2000), 1, 5.
[66] Nathaniel R. Helms, *My Men Are My Heroes* (Des Moines, IA: Meredith Books, 2007), 184.

be given consideration, as well. Today, in Iraq and Afghanistan, terrorists' disregard of the distinction requirement "means that their enemy is barely able to discriminate between combatants and non-combatants. The only criteria left are those of 'hostile intent' and of the 'hostile act,' as defined in the rules of engagement. While these concepts have been defined by NATO, the somewhat theoretical sounding definitions can quickly become unclear in practice . . . And this is certainly true in situations where events are taking place in quick succession."[67]

Explaining what constitutes hostile intent can be challenging, akin to a divine epiphany for soldiers who must make a decision in seconds while on patrol in the mean streets of an Afghan village. "[T]he key in determining whether or not the use of force in self-defense is authorized against a demonstration of hostile intent is a keen awareness of what constitutes a threat. Soldiers must be able to recognize indicators of both hostile intent and existing capabilities to accomplish what is intended."[68] Harsh experience and a steep learning curve may be the best, if most harsh, teacher. "Determining the existence of a hostile act or demonstration of hostile intent is a function of the professional military judgment of the on-scene commander."[69] Sometimes the on-scene commander is a nineteen-year-old squad leader.

13.5.5. *Declared Hostile*

Only high level commanders, the National Command Authority, the Joint Chiefs of Staff, or regional commanders, may declare an enemy force hostile. Doing so reflects issues of national self-defense as much, or more than, concern for U.S. combatant forces.

"Once a force is declared hostile by appropriate authority, U.S. units need not observe a hostile act or a demonstration of hostile intent before engaging that force. The responsibility for exercising the right and obligation of national self-defense and declaring a force hostile is a matter of the utmost importance demanding considerable judgment of command . . . "[70]

Being declared hostile "clears the decks" for units to shoot on sight opposing forces or individuals. In Iraq, "'Declared hostile' meant there were no rules of engagement. It meant shoot first and ask questions later."[71] During the 2003 armored thrust to Baghdad by U.S. forces, a tank commander unexpectedly sighted a group of uniformed enemy soldiers through his tank's gun sight:

> A dozen Iraqi soldiers in green uniforms were leaning against a building, chatting, drinking tea, their weapons propped against a wall. They were only a few hundred meters away, but they seemed oblivious to the grinding and clanking of the approaching armored column. "Sir, can I shoot at these guys?" LaRocque asked. The rules of engagement said anyone in a military uniform or brandishing a weapon was a legitimate target. "Uh, yeah, they're enemy," Ball replied . . . Through the tank's magnified sights,

[67] Th.A. van Baarda and D.E.M. Verweij, *Military Ethics: A Dutch Approach* (Leiden: Martinus Nijhoff, 2006), 85.
[68] Maj. Steven A. Gariepy, "On Self-Defense," (2008) (Unpublished paper in partial fulfillment of Master of Laws degree, Judge Advocate General's Legal Center and School) (on file with author).
[69] Grunawalt, "The JCS Standing Rules of Engagement," supra, note 23, at 252.
[70] Appendix A, *Joint Chiefs of Staff Standing Rules of Engagement*, supra, note 18, at para. 6.
[71] Fick, *One Bullet Away*, supra, note 50, 237.

> Ball could see their eyes, their mustaches, their steaming cups of tea. LaRocque mowed them down methodically, left to right.[72]

No hostile intent or hostile act was required. When an opposing force is declared hostile, as Iraqi army forces were at the time of the U.S. invasion, they may be engaged on sight. The basis for engagement is shifted from conduct to status;[73] the target does not have to do anything (*conduct*), such as fire on friendly forces or show some cloudy hostile intent. As soon as they are positively identified (*status*) they may be engaged with deadly force. The ROE requirement of "military necessity" is considered met.

A "declared hostile" ROE provision in use in Iraq in 2009: "DECLARED HOSTILE FORCES. CRD, CENTCOM [Commander-in-Chief, Central Command] has designated certain Iraqi military and paramilitary forces (former regime security forces, conventional and/or unconventional air, ground, and naval forces) as declared hostile forces. Since the end of major combat operations, these forces have transitioned from overt conventional resistance to insurgent methods of resistance. This declaration continues to apply to Former Iraqi Military and Paramilitary personnel who are operating as insurgent individuals or groups that continue hostilities against the Iraqi Government and MNF [Multi-National Forces]. These individuals and/or groups may be engaged and destroyed. Hostile armaments, munitions, and equipment are also included in this category. All pre-planned kinetic strikes against these targets must be executed in accordance with the collateral damage considerations required by the CDEM [Collateral Damage Estimation Methodology] and these ROE."

There follows a list of ten Iraqi groups, members of which are declared hostile: Special Republican Guard, Special Security Organization, Directorate of General Security, Iraqi Intelligence Service/Directorate of General Intelligence, Directorate of Military Intelligence, Ba'ath Party Militia, Mojahedin E-Khalk, Fedayeen Saddam, Al Quds, and Mahdi Army and armed supporters of Muqtada Al-Sadr.

13.5.6. *Positive Identification*

Before a U.S. combatant can fire on an individual or group, even those declared hostile, or those committing hostile acts, many ROE require that the targeted individual or group be positively identified.

Positive identification (PID) is undefined in the SROE, leaving it to combatants to apply the plain meaning of the phrase. PID is about recognizing hostile intent and hostile acts. If a soldier is returning enemy fire, the ROE only requires that he do so on a target he has positively identified; he cannot "spray and pray" that he hits an enemy combatant rather than a civilian child.

What if a soldier believes he has positively identified his enemy target, but he is in error, and instead he fires and kills a civilian? If prosecution is considered, what legal standard should be applied to his act? The international criminal law general intent standard of honest and reasonable belief applies. "The mistake of fact must be honestly, and reasonably, made on the basis of the conditions prevailing at the time of the commission

[72] Zucchino, *Thunder Run*, supra, note 59, at 10.
[73] The Judge Advocate General's Legal Center & School, *Operational Law Handbook*, 2006 (Charlottesville, VA: JAGC&S, 2006), 92.

of the unlawful act."[74] As the military tribunal said in its 1948 judgment in the case of Nazi *Generaloberst* Lothar Rendulic, "[W]e are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal."[75] The U.S. Supreme Court has enunciated a similar standard for domestic law enforcement officers.[76]

In 1994, over Iraq, a failure of PID had tragic results. During Operation Provide Comfort, a U.S. Air Force E-3 Airborne Warning and Control System (AWACS) aircraft was controlling other U.S. aircraft patrolling Iraq's no-fly zone. The E-3 alerted two Air Force F-15 fighters to the presence of two enemy helicopters that were, in fact, friendly. There had been prior erroneous alerts to "enemy" aircraft. "AWACS aircraft incorrectly have cleared Navy fighter aircraft to engage civilian airliners and U.S. Air Force C-5 aircraft misidentified as Iraqi fighters. Navy pilots' insistence on positive visual identification prevented other tragedies."[77] In this case, several other operational failures followed the E-3's misidentification, including the F-15 pilots' own misidentification of the targets. The F-15s shot down two U.S. Army UH-60 Black Hawk helicopters, killing twenty-six passengers and crew. "[T]his was not an 'accidental' shoot down. Two Air Force pilots failed to follow their rules of engagement and caused the deaths of 26 persons."[78]

Other LOAC/IHL considerations may be applicable even when there is positive identification. Pilots, for example, cannot always engage ground targets that have been PID'd as hostile.

> "Those insurgents are wily," said . . . the commanding officer of [a fighter squadron aboard a deployed aircraft carrier, the *USS*] *Roosevelt* . . . "They will meld themselves within the population. They will fire from areas that they know that if we put a bomb in there, it's going to look bad. . . . If it was positively identified hostile in Iraq, you took it out . . . Here [in Afghanistan], just because it's positively identified as hostile, you've still got to mitigate the other things around."[79]

If the pilot fires a missile, is it likely to kill civilians as well as insurgents? One civilian? Ten? How many insurgents are likely to be killed? One insurgent? Ten? Is the target the head of al Qaeda in Afghanistan? Or is he a Taliban messenger? Does the pilot, *can* the pilot, know which? In seconds, despite PID, the pilot must consider issues of distinction, military necessity, and proportionality.

In Afghan ground combat, what if Corporal A is watching a group of individuals approach a friendly position on his right flank. Suddenly he sees two men in the group thrust up two rocket propelled grenades (RPGs) from the midst of the group, then lower

[74] Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001), 264.
[75] *U.S. v. List*, "The Hostage Case," XI TWC (Washington: GPO, 1950), 1113, 1296.
[76] *Graham v. Connor*, 490 U.S. 386 (1989), 396. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."
[77] Hays Parks, *Friendly Fire: The Accidental Shootdown of U.S. Black Hawks Over Northern Iraq* (book review), U.S. Naval Institute's *Proceedings* (Aug. 1999), 83, 84.
[78] Id. Also see Maj. Dawn R. Eflein, "A Case Study of Rules of Engagement in Joint Operations: The Air Force Shootdown of Army Helicopters in Operation Provide Comfort," *Air Force L. Rev.* (1998), 33.
[79] Elisabeth Bumiller, "From A Carrier, Another View of America's Air War in Afghanistan," *NY Times*, Feb. 24, 2009, A6.

them back into invisibility. Corporal A quickly radios Sergeant B at his position on the right flank, "The guys coming up on your position are enemy – I just saw their RPGs!" "Are you sure?" the sergeant responds. "I'm positive!" Corporal A answers. May Sergeant B, who has the group in sight, but has seen nothing suspicious, open fire on the group on the basis of Corporal A's PID? The answer is not found in any ROE but, yes, PID is "transferable," and Sergeant B may act on Corporal A's PID.

A "positive identification" ROE provision in use in Iraq ground combat in early 2009: **"Positive Identification (PID) of all targets is required prior to engagement. PID is a reasonable certainty that the individual or object of attack is a legitimate military target in accordance with these ROE."**

13.6. ROE Issues

In March 2003, Delta Company, 1st Light Armored Reconnaissance Battalion, 1st Marine Division, was preparing for the invasion of Iraq from their position across the Iraqi border, in Kuwait. Predeployment training included a procession of exercises, practices, and classes. The company commander attended one of his company's ROE classes:

> Capt Portiss taught a class for the company on the standing rules of engagement, and soon every Marine seemed to be asking a situational question . . . Portiss patiently answered each question until I finally stepped in . . . I paraphrased what General Wilhelm had said when he was the commanding general. "If the enemy initiates contact with you, the question is proportionality of your return fires. If you initiate contact with the enemy, the question is what collateral damage you may cause . . . Marines, this is the important thing. If you perceive yourselves to be in danger, then you either return fire or initiate fire on the enemy. Period." I thought it was a simple matter, but it had been legally complicated over the previous ten years or more.[80]

A continuing ROE problem is troop compliance. Lax enforcement of ROE restrictions are quickly sensed by junior combatants, leading to battlefield excesses, as happened in the Vietnam conflict. In contrast, overly restrictive ROE, and frequent prosecutions for violations, may make troops hesitant to take action when immediate force is necessary.

In Somalia's Operation Restore Hope (1992–1993), the ROE prevented U.S. soldiers from using armed force to stop massive looting and theft.[81] Worse, when six soldiers were court-martialed for violating the ROE, "soldiers . . . perceived that prosecution would follow every decision to fire."[82] Soon, soldiers hesitated to fire even when fired upon. In 2004, in Mahmudiyah, Iraq, a Marine lieutenant complained, "we had become an 'ineffective occupier' and not because of the [insufficient] number of troops . . . but because of our overly restrictive Rules of Engagement and our discomfort with killing the guys that needed to be killed . . . "[83]

[80] Maj. Seth W.B. Folsom, *The Highway War* (Washington, DC: Potomac Books, 2006), 56.
[81] Col. Frederick M. Lorenz, "Law and Anarchy in Somalia," 23 *Parameters* (1993–1994), 39.
[82] Maj. Mark S. Martins, "Rules of Engagement For Land Forces: A Matter of Training, Not Lawyering," 143 *Military L. Rev.* (1994), 64.
[83] Capt. Ilario Pantano, *Warlord* (New York: Threshold Editions, 2006), 315.

SIDEBAR. In February 1993, during a platoon-size sweep of a Somali village for weapons and munitions reported to be there, Army Specialist James Mowris saw a Somali run from the approaching platoon. Mowris chased the man and fired, he said, a warning shot into the ground to make him stop. The shot killed the running Somali. "Specialist Mowris' platoon did not understand and had not received training on the written ROE . . . "[84] A general court-martial convicted Mowris of negligent homicide.[85] An Army colonel in Somalia commented, "[b]ecause of this case, soldiers in some cases were reluctant to fire even when fired upon for fear of legal action. It took weeks to work through this . . . "[86] The court-martial convening authority set aside Mowris's conviction, perhaps as a result of the hesitation to fire that Mowris's court-martial quickly generated in his unit.

There is no prescribed solution to lax enforcement/strict enforcement issues. A commander can only provide strong ROE training, be aware of the potential problem, and have faith that his/her subordinate officers and noncommissioned officers will do the right thing.

There will always be problems interpreting ROE. After the U.S. invasion of Iraq, in early 2003, soldiers of the Army's 3rd Infantry Division were pushing toward Baghdad. One night, an infantry company was guarding a small town on the Division's route of advance. "Not appreciating the night vision capability of the U.S. forces, [the insurgents] had shut off the electricity to provide themselves with a cover of darkness. Uncertain as to whether the ROE allowed them to shoot the Iraqis as they retrieved arms from the battlefield, the U.S. soldiers withheld their fire."[87] Seeking tactical direction from a document never meant to serve that purpose, soldiers were intimidated into not firing on the enemy because that tactical situation was not covered in their ROE.

Lieutenant General Ricardo Sanchez relates an event in Kosovo, in 2000, when he commanded Multi-National Brigade East, as a brigadier general. While on a routine patrol, a military police platoon commander found his route cut off by a dead-end valley and, blocking his exit, a mob of hostile Serbs. From adjacent surrounding mountains, a group of Serbs began rolling rocks, boulders, even tree trunks, down on the patrol. As the patrol slowly retreated from the valley and attempted to detour around the Serb blocking force, Sanchez flew to the scene in a helicopter. He recalled,

> I could clearly see the Serbs attacking the soldiers. So I got on the radio and spoke directly with the MP commander. "Sir, we're taking all kinds of injuries," he said . . . "You've got to fight back," I said. "But, sir, I can't fire into the mob. There are some women and children up front." "Well, you're going to have to make a decision on the ground . . . but if you are taking this level of casualties, I recommend that you shoot to drive them back." After a couple of hours, the MPs finally withdrew . . . During the after-action review, I asked the commander why he had not opened fire. "Sir, I just didn't know if the rules of engagement allowed me to do that," he said. "I was afraid there might be an

[84] Martins, "Rules of Engagement for Land Forces," supra, note 7, at 18.
[85] *U.S. v. Mowris* (GCM, Fort Carson, Colorado, July 1993).
[86] Martins, "Rules of Engagement for Land Forces," supra, note 7, at 66.
[87] Michael R. Gordon and Lt.Gen. Bernard E. Trainor, *Cobra II* (New York: Pantheon Books, 2006), 226.

> investigation if we had killed someone." "First of all, the rules of engagement do allow you to open fire in a situation like that," I said. "Second, you should never, ever allow the fear of an investigation to hinder your decision-making process when engaged with the enemy . . . Always use your best judgment based on what you know at the time . . . " But what happened in Kosovo was a significant learning experience for both of us. I realized that training for rules of engagement had to be conducted by warfighters and not by lawyers."[88]

In that account, General Sanchez relates that a lieutenant of his command, in combat, lacked an understanding of his ROE and failed to take appropriate self-defense measures when his soldiers were being killed and wounded, but General Sanchez blames "lawyers." Does that indicate a lack of appreciation for the responsibilities of command and a misunderstanding of whose responsibility ROE *always* are? Because of their specialized training and experience, judge advocates play a major role in the formulation of ROE and, by service regulation, are responsible for training personnel in the ROE. It is the commander and the commander alone who is responsible for the content of his/her ROE and for ensuring that subordinates are trained in, and understand, those ROE.

13.7. Summary

ROE are relatively new to U.S. Armed Forces. They reflect the commander's need to control the use of force by subordinate combatants, and ROE are the means of doing that. In a day when "the strategic corporal" can, either through the wise use of firepower or its disastrous use, virtually decide battles, commanders need such a tool.

ROE also are a tool occasionally misused by efforts of senior commanders or political agents to micromanage tactical engagements, by tying combatants' hands through overly restrictive provisions, or by paying scant attention to ROE training until it goes wrong. Subordinates may inadvertently misuse ROE by failing to understand their intent and their limits or by consciously evading their mandates.

The value of ROE is not found in a card in a corporal's pocket. It is in the guidance and authority that mission-specific ROE provide a commander in executing the mission. Beyond that, LOAC/IHL training, combined with leadership at all levels, is the real guarantor of battlefield conduct that accords with LOAC/IHL.

CASES AND MATERIALS

THE DEATH OF MR. ESEQUIEL HERNANDEZ

Introduction. *On May 20, 1997, at a crossing of the Rio Grande River near Redford, Texas, four Marines, led by Corporal B_____, were temporarily assigned to Joint Task Force-6 (JTF-6).*

[88] Lt.Gen. Ricardo Sanchez, *Wiser in Battle* (New York: Harper Collins, 2008), 125.

The Marines' mission was to observe the river crossing and report suspected undocumented aliens and narcotics traffic they might observe to U.S. domestic law enforcement authorities located at the nearby Presidio Border Patrol Station. On May 20, the four-man team was on its first mission. The Marines were authorized by the SROE (version of October 1, 1994) to use force. Congress had specifically authorized use of military forces for such interdiction missions as an exception to the prohibition of using the Armed Forces in a posse comitatus *role.*

Military personnel assigned to JTF-6 were trained in the JTF's ROE during mission planning and training phases from February 22 to April 8, and April 13–22, and April 23–25, although how much of the training pertained specifically to ROE could not be determined. There is no evidence that Corporal B_____s' team received training in domestic use-of-force standards.

Early in the evening, the team saw a goat herder and, near the river, a man on horseback. The Marines had been briefed that drugs were often transported on horseback, with armed individuals accompanying them as scouts. Corporal B____ radioed his sightings to the Tactical Operations Center. Soon after he radioed the Center, the goat herder, later identified as Esequiel Hernandez, at a range of approximately 120 meters fired two shots at the Marine team from his .22 rifle. Corporal B_____ ordered his team to chamber a round in their M16 rifles, and they moved to higher ground. (The Marines did not know that Mr. Hernandez was an eighteen-year-old high school student who lived 500 meters from the Marines' position. Neither did they know that he had reportedly also fired on law enforcement officers three months before.) B____ radioed the Tactical Operations Center, "As soon as he readies that rifle back downrange" (i.e., aims at the team again), "we're taking him." A lance corporal manning the Center's radio responded, "Roger, fire back." Corporal B____ reported that Mr. Hernandez was "ducking down" and hiding while looking for the team. Now a sergeant on the Tactical Operation Center's radio instructed B____, "You're to follow the ROE."

While maneuvering his team across the high ground, Corporal B_____ saw Hernandez raise his rifle and aim at another team member, Lance Corporal B, at a range of approximately 130 meters. Before Hernandez fired, B_____ fired one round, killing Mr. Hernandez.

JTF-6 immediately conducted a formal investigation and concluded that Corporal B____'s actions were consistent with the ROE. Two Texas grand juries and a federal grand jury also investigated. All three declined to indict the corporal.

Prodded by a media and public outcry over the killing of Mr. Hernandez, the Marine Corps appointed a major general to yet again investigate the shooting. The general, in turn, requested Marine Colonel W. Hays Parks to provide his expert opinion to determine if the shooting was in accord with the SROE. At the time, Parks was retired from the Marine Corps and was employed as the Special Assistant for Law of War Matters to the Judge Advocate General of the U.S. Army.

The following are extracts from Colonel Parks's report:[89]

4. Questions. . . . I [Parks] share the reticence expressed by the JTF-6 commander to reach conclusions inconsistent with or beyond those made in the JTF-6 investigation, due to his (and my) "inability to place myself into the shoes of the Marines on the ground and to fully understand and appreciate their thought processes while they moved from the point where they were initially fired upon to the point where the fatal shot occurred." Any decision as

[89] Col. W.H. Parks report to Maj.Gen. J.T. Coyne; Subj.: "Request for Expert Opinion Concerning Compliance with Rules of Engagement," (Nov. 15, 1997). On file with author. Footnotes omitted.

to the actions of Corporal B____ necessarily must be based upon the information reasonably available to him at the time, and not what became known after the incident.

Military forces operating within the United States are subject to U.S. domestic law standards regarding the use of deadly force, not rules of engagement for armed conflict . . . In articulating a standard [for domestic law enforcement officers], the [Supreme] court has stated that the decision to resort to deadly force is one of "objective reasonableness . . . at the moment" that decision is taken. Continuing, the court [in *Graham v. Connor*, 490 U.S. 386 (1989)] has stated that, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." The calculus of reasonableness "must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." The court has acknowledged [*Graham v. Connor*, 396] that "the test of *reasonableness* is not capable of precise definition or mechanical application." But if a police officer – or a military member discharging his or her duties within the United States – "reasonably believes that an individual poses a threat of serious physical harm . . . to the officer or others," resort to deadly force is authorized. [*Tennessee v. Garner*, 471 U.S. 1, 11 (1985).] This standard is set forth in relevant Department of Defense and Marine Corps directives. [DOD Directive 5210.56, (25 February 1992), Subject: Use of Deadly Force and the Carrying of Firearms by DOD Personnel Engaged in Law Enforcement and Security Duties; and Marine Corps Order 5500.6F over POS, (20 July 1995), Subject: Arming of Security and Law Enforcement Personnel and the Use of Force.]

Based upon my review of the materials provided me, I see no reason to disagree with the conclusion reached by the JTF-6 investigating officer that "The Joint Chiefs of Staff . . . Standing Rules of Engagement . . . , which were in effect for this mission, were followed." . . .

. . . [R]ecent decisions are particularly relevant . . . [T]he Ninth Circuit stated [*Scott v. Henrich*, 978 F.2d 481 (9th Cir. 1992), withdrawn and reissued, 34 F. 3d 1498 (2 November 1994).] that "the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them." Continuing, the court stated:

> Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.

. . . There are perhaps a dozen lawful ways in which the situation might have been handled, including the use of deadly force when Mr. Hernandez fired the first time. . . . The issue is whether the decisions taken by Corporal B____ were those of a reasonable man, and whether it was reasonable for Corporal B_____ to believe that Esequiel Hernandez, who previously had fired at the Marines and now was pointing his rifle at Lance Corporal B, posed an imminent threat of serious bodily harm . . . I believe the decisions taken by Corporal B_____ on 20 May

1997, including the decision to resort to deadly force, were those of a reasonable man under the circumstances.

5. a. Rules of engagement. The basic ROE reference document for the mission . . . may be legally correct for the purposes for which it was intended, but it is an inappropriate set of terms of reference for military support to domestic law enforcement operations for the following reasons.

Colonel Parks goes on to illustrate the deficiencies of the 1994 SROE for domestic use. Those SROE were revised in 2000, and those were, in turn, replaced by the 2005 SROE discussed in this chapter. The 2005 SROE were accompanied by implementation of the SRUF, for use in domestic civil support missions and land defense missions within U.S. territory. (See Chapter 13, section 13.1.1.) The SRUF are intended to address situations like this case. Parks's report concludes:

5.d. ROE cards. There is a certain popularity for ROE cards, highly-abbreviated summaries of larger ROE principles. The ROE card issued JTF-6 personnel, including [Corporal B____'s team], is representative.

ROE cards and similar aspects of ROE training represent a military tendency to reduce each aspect of training to the "bare bones." However, there is no substitute for effective training and learning. ROE cards seldom are able to provide adequate information to properly reinforce previous training, and it is unlikely that a soldier, sailor, airman or Marine will have time to refer to his or her ROE card when the occasion presents itself to make decisions based upon the ROE training previously received . . .

ROE cards also are prone to poor drafting and inconsistency. The JTF-6 ROE card . . . is not an accurate statement of U.S. domestic law relating to the use of deadly force. An ROE card that promulgates improper information is contrary to the leadership principle of clarity of orders, and may cause confusion for those who must live or die by them.

Recommend the JCS and military services conduct an assessment as to the continued value of ROE cards.

Conclusion. *Colonel Parks's report illustrates the distinction between SROE and today's SRUF. It also lays out the standard to be employed when exercising deadly force. Although the cases he cites relate to domestic law enforcement, the guidelines they provide are equally applicable to the use of deadly military force in armed conflicts. He also forcefully notes the dangers of ROE cards, a concern that, more than a decade after Parks's report, many military officers continue to share.*

In 1998, the U.S. government paid the family of Mr. Hernandez $1,900,000 in settlement of their wrongful death suit.

ROE CARDS

Introduction. *MNC-I, Multi-National Corps – Iraq, "stood up" on May 15, 2004, to replace the former U.S. headquarters in Iraq, CJTF [Combined Joint Task Force] 7. The MNC-I ROE card, double-sided and 2 ¾ inches by 4 ½ inches in size, as most ROE cards are, was employed by MNC-I in late 2005 into 2006. Emphasis and underlining are as in the original card. On the actual card, very small type was necessarily used. The face of the card read*:

MNC-I ROE CARD

Nothing on this card prevents you from using necessary and proportional force to defend yourself

1. You may engage the following individuals based on their conduct:
   a. Persons who are committing hostile acts against CF [Corps forces].
   b. Persons who are exhibiting hostile intent towards CG.
2. These persons may be engaged subject to the following instructions:
   a. Positive Identification (PID) is required prior to engagement.

PID is a reasonable certainty that the proposed target is a legitimate military target. If no PID, contact your next higher commander for decision.

   b. **Use Graduated Measures of Force**. When time and circumstances permit, use the following degrees of graduated force when responding to hostile act/intent: (**1**) shout verbal warnings to halt; (**2**) show your weapon and demonstrate intent to use it; (**3**) Block access or detain; (**4**) fire a warning shot; (**5**) shoot to eliminate threat.
   c. **Do not target or strike** anyone who has surrendered or is out of combat due to sickness or wounds.
   d. **Do not target or strike** hospitals, mosques, churches, shrines, schools, museums, national monuments, and any other historical and cultural sites, civilian populated areas or buildings **UNLESS** the enemy is using them for military purposes or if necessary for your self-defense.
   e. **Do not target or strike** Iraqi Infrastructure (public works, commercial communication facilities, dams), Lines of Communication (roads, highways, tunnels, bridges, railways) and Economic Objects (commercial storage facilities, pipelines) **UNLESS** necessary for self-defense or if ordered by your commander. If you must fire on these objects, fire to disable and disrupt rather than destroy.
   f. ALWAYS minimize incidental injury, loss of life, and collateral damage.

The obverse of the same card read:

3. The use of force, including deadly force, is authorized to protect the following:
   - Yourself, your unit, and other friendly forces
   - Detainees

   - Civilians from crimes that are likely to cause death or serious bodily harm, such as murder or rape
   - Personnel or property **designated by the OSC** when such actions are necessary to restore order and security
4. In general, WARNING SHOTS are authorized ONLY when the use of deadly force would be authorized in that particular situation.
5. **Treat all civilians and their property with respect and dignity**. Do not seize civilian property, including vehicles, unless the property presents a security threat. When possible give a receipt to the property's owner.
6. **You may DETAIN civilians based upon a reasonable belief that the person:** (**1**) must be detained for purposes of self-defense; (**2**) is interfering with CF mission accomplishment; (**3**) is on a list of persons wanted for questioning, arrest or detention; (**4**) is or was engaged

in criminal activity; or (5) must be detained for imperative reasons of security. **Anyone you detain MUST be protected**. Force, up to and including deadly force, is authorized to protect detainees in your custody. You MUST fill out a detainee apprehension card for EVERY person you detain.

7. **MNC-I General Order No. 1 is in effect**. Looting and the taking of war trophies are prohibited.
8. **ALL personnel MUST report any suspected violations of the Law of War committed by any US, friendly or enemy force**. Notify your chain of command, Judge Advocate, IG [Inspector General], Chaplain, or appropriate service-related investigative branch (e.g. CID, NCIS).

Conclusion. *After reading the MNC–I ROE card, would you agree or disagree with Colonel Parks's statement in his Hernandez case report that, "ROE cards . . . represent a military tendency to reduce each aspect of training to the 'bare bones' . . . ROE cards seldom are able to provide adequate information to properly reinforce previous training, and it is unlikely that a soldier, sailor, airman or Marine will have time to refer to his or her ROE card when the occasion presents itself to make decisions based upon the ROE training . . . "?*

DESERT STORM ROE

Eleven years before the MNC-I ROE card was issued in Iraq, in the Persian Gulf War U.S. forces were issued this ROE card for Operation Desert Storm (January 16–21, 1991). Desert Storm was the combat phase of the UN-authorized mission to eject invading Iraqi forces from Kuwait. They are "a good example of rules of engagement issued by many states when contemplating a straightforward international armed conflict between the armed forces of different states. They are, in effect, a distillation of the Geneva Conventions and related treaties, or of customary international law."[90] *Like the MNC-I ROE card just examined, this Desert Storm card was slightly smaller than a playing card, with print on both sides. This ROE card, based on 1988 ROE, is in many respects similar to that issued to MNC-I troops, based on the 2000 SROE, but is less sophisticated and easier to understand*:

ALL ENEMY MILITARY PERSONNEL AND VEHICLES TRANSPORTING THE ENEMY OR THEIR SUPPLIES MAY BE ENGAGED SUBJECT TO THE FOLLOWING RESTRICTIONS:

A. Do not engage anyone who has surrendered, is out of battle due to sickness or wounds, is shipwrecked, or is an aircrew member descending by parachute from a disabled aircraft.
B. Avoid harming civilians unless necessary to save U.S. lives. Do not fire into civilian populated areas or buildings which are not defended or being used for military purposes.
C. Hospitals, churches, shrines, schools, museums, national monuments, and other historical or cultural sites will not be engaged except in self-defense.

[90] Peter Rowe, "The Rules of Engagement in Occupied Territory: Should They Be Published?" 8–2 *Melbourne J. of Int'l L.* (2007), 327, 331.

D. Hospitals will be given special protection. Do not engage hospitals unless the enemy uses the hospital to commit acts harmful to U.S. forces, and then only after giving a warning and allowing a reasonable time to expire before engaging, if the tactical situation permits.
E. Booby traps may be used to protect friendly positions or to impede the progress of enemy forces. They may not be used on civilian personal property. They will be recovered and destroyed when the military necessity for their use no longer exists.
F. Looting and the taking of war trophies are prohibited.
G. Avoid harming civilian property unless necessary to save U.S. lives. Do not attack traditional civilian objects, such as houses, unless they are being used by the enemy for military purposes and neutralization assists in mission accomplishment.
H. Treat all civilians and their property with respect and dignity. Before using privately owned property, check to see if publicly owned property can substitute. No requisitioning of civilian property, including vehicles, without permission of a company level commander and without giving a receipt. If an ordering officer can contract the property, then do not requisition it.
I. Treat all prisoners humanely and with respect and dignity.
J. ROE annex to the OPLAN provides more detail. Conflicts between this card and the OPLAN should be resolved in favor of the OPLAN.

REMEMBER

1. FIGHT ONLY COMBATANTS.
2. ATTACK ONLY MILITARY TARGETS.
3. SPARE CIVILIAN PERSONS AND OBJECTS.
4. RESTRICT DESTRUCTION TO WHAT YOUR MISSION REQUIRES.

Conclusion. *Is it better to have a more detailed ROE card? Do greater specificity and smaller type merely increase chances that the card will go unread? Is it immaterial, as the cards will go unread by many troops no matter how specific or how general?*