

# Should the Best Offense Ever Be a Good Defense?

by

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USAWC STRATEGY RESEARCH PROJECT

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## **Abstract**

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## **Should the Best Offense Ever Be a Good Defense?**

What is the meaning of our retinues, what of our swords? Surely it would never be permitted to us to have them if we might never use them?

—Marcus Tullius Cicero<sup>1</sup>

Military leaders should never place Soldiers, Sailors, Airmen, Marines or Coast Guardsmen at any risk beyond what is manifestly necessary for mission accomplishment. But risk is inherent in every military operation, especially in combat, and the success of select missions depends on assuming greater risk than in others. Nowhere has this reality been brought into sharper focus than in contemporary counter-insurgency (COIN) operations where the use of lethal combat power may be more likely to undermine rather than to advance strategic aims. Within this context, few issues generate greater emotional debate than the question of the scope and authority of servicemembers to use lethal force in the exercise of self-defense.<sup>2</sup>

During any military operation, policy, law, and strategy often demand restraint in the application of force and under certain circumstances may prohibit it altogether. Rules of engagement (ROE) have evolved as the primary command and control tool for regulating and aligning the use of force with political, strategic, and legal imperatives. Striking the delicate balance between achieving the legitimate and necessary application of combat power, and the risk of inhibiting initiative and creating hesitancy of the military force to protect and defend itself, begins with drafting ROE at the strategic level that are not only versatile, understandable, and easily executable, but also “legally . . . sound.”<sup>3</sup>

The focus of this paper is on the legal soundness of the current use-of-force construct in Chairman of the Joint Chiefs of Staff Instruction 3121.01B, the Standing

Rules of Engagement/Standing Rules for the Use of Force,<sup>4</sup> commonly referred to as the SROE. Specifically, the paper examines the SROE rules governing the exercise of self-defense; a vestige of outdated Cold War concepts misaligned to the underlying legal basis for authorizing individuals and unit commanders to exercise self-defense. This misalignment has contributed to a misunderstanding and conflation of the basic legal frameworks governing the use of force during military operations and a growing distortion of tactical level self-defense authorities and principles during recent combat operations.

The reasons for this trend are multifold, but ultimately begin with and emanate from imprecision in the outdated self-defense construct contained in the strategic use-of-force direction to U.S. forces in the SROE, and basic misconceptions about its legal underpinnings. The SROE's unitary self-defense framework, originally designed to provide national self-defense guidance to naval forces operating during the Cold War, is derived from *jus ad bellum* principles inapposite to the use of force at the individual and unit level. Owing to the SROE's *ad bellum* roots, many have long held the flawed view that individual and unit self defense are derivative of the inherent right of national self-defense. As the U.S. position on anticipatory self-defense has broadened, so too has the unitary self-defense framework in the SROE leading to legally infirm use-of-force guidance below the level of national self-defense.<sup>5</sup>

At the same time, and paradoxically, the continued inclusion of "inherent right" language in the SROE self-defense definitions, language lifted directly from Article 51 of the UN Charter, has generated an entrenched misunderstanding among many that individual servicemembers and unit commanders possess an inviolate "natural law" right

of self-preservation independent of their status as members of the military which ultimately prevails over any command-imposed restraints on the use of force. This view misconstrues the actual public authority basis for training, arming, and empowering servicemembers to use force in their capacity as deputized agents of the United States and is inconsistent with basic notions of command and control.<sup>6</sup> Coupled with the intense complexity and pressures of operating and employing force in the volatile, uncertain, complex and ambiguous (VUCA) counter-insurgency (COIN) environments of Iraq and Afghanistan, the imprecision and conflation of authorities has led to a blurring of the traditional and legally mandated demarcation lines between offensive and defensive uses of force, between status-based targeting and conduct-based uses of force, and between Law of Armed Conflict (LOAC) and International Human Rights Law (IHRL) regimes.

Lessons have shown that the success of any military operation depends heavily on the appropriate and disciplined use of force. Undisciplined and overly aggressive uses of force undermine legitimacy.<sup>7</sup> Overly constricting restraints on the authority to use force can degrade commanders' and servicemembers' ability to defend themselves and their units as well as their initiative to accomplish their assigned missions.<sup>8</sup> Both of these countervailing risks can lead to strategic failure. The convergence of a number of factors over the last half-century have brought these risks into sharper focus and demonstrated a heightened need to more tightly "harness military action to political ends."<sup>9</sup> Effective and legally sound ROE simply "are critical to mission accomplishment."<sup>10</sup> This paper argues for a critical reevaluation of the use-of-force

paradigms reflected in the SROE with particular emphasis on the self-defense construct applicable at the individual and small-unit levels.

Part I of this paper will briefly describe how misapplication of the unitary self-defense standard in the SROE during operations in Iraq and Afghanistan has led to an erosion of the line between uses of force in self-defense and offensive targeting under the LOAC. Part II will review the history and general use-of-force construct of the SROE, deconstructing the self-defense provisions and arguing that individual and unit self-defense are neither derivative authorities of the *jus ad bellum* of national self-defense, nor independent rights. In Part III the paper will argue that the authority of military personnel to use force in individual self-defense and the defense of others stems from public authority conferred by and at the discretion of the sovereign, a principle recognized in both domestic and international law. Part IV will discuss the legal regimes relevant to the use of force during military operations, detailing the distinction between LOAC and IHRL use-of-force norms. In Part V, the paper will offer an alternate framework, based on the principles of the public authority justification, for defining the permissible scope of individual and unit self-defense and other non-status-based use-of-force ROE, and suggest necessary adjustments to the current SROE construct.

#### I. Self-Defense and Offensive Targeting—The Blurring Lines

When the 1<sup>st</sup> Marine Division launched the second battle for Fallujah, Iraq in 2004, considered some of the heaviest urban combat U.S. Marines had engaged in since Vietnam, they were instructed that no forces were declared hostile, and restricted to self-defense ROE.<sup>11</sup> At the same time, the ROE instructed the Marines that “individuals within the Fallujah [area of operations] who are carrying arms openly are

demonstrating hostile act/intent unless there is evidence to the contrary; pose an imminent threat to Coalition Forces, and may be attacked . . . .”<sup>12</sup>

In effect, the ROE authorized the Marines to attack a class of individuals on sight—a notion anathema to accepted notions of self-defense. The ROE then subjected this engagement authority to a series of arguably self-contradictory instructions and “reminders,” such as “[a]ttack enemy forces and military targets only.”<sup>13</sup> The purpose of these ROE was well intended—to limit collateral damage in an environment where enemy belligerents openly rejected the principle of distinction and hid among the civilian population.<sup>14</sup> Without saying so specifically, however, the ROE conflated offensive targeting and self-defense concepts, thereby creating unnecessary confusion and potentially questionable uses of force. Unfortunately, this was not an isolated case, but represents a growing and concerning trend in operations driven by the pressures and complexities of the COIN environment.

The terms hostile act and hostile intent (HA/HI), traditionally meant to provide definitional guidance for servicemembers to determine the necessity to use force in self-defense, have become buzzwords for justifying attacks against potential, but not immediate threats.<sup>15</sup> This trend has been exacerbated by the use of these same terms in ISAF offensive, mission accomplishment ROE.<sup>16</sup> U.S. forces have either adopted the NATO understanding of non-imminent HA/HI or applied an aggressive view of SROE self-defense rules.<sup>17</sup>

Further, offensive targeting concepts such as positive identification (PID)<sup>18</sup> have invaded the self-defense formula, contributing to a distortion of the U.S. view of self-defense principles and “negatively shap[ing] the use of force in self-defense . . . .”<sup>19</sup> At

the tactical level, servicemembers are engaging individuals based more on physical characteristics than on conduct presenting an imminent threat.<sup>20</sup> Also, self-defense is often cited as an exception to restrictive mission-accomplishment ROE and a basis to conduct hasty, tactical targeting whenever troops are engaged by insurgents, i.e., situations of troops in contact (TIC).<sup>21</sup> Some units have improperly leveraged the TIC exception to draw insurgents out and thereby trigger self-defense authorities; so-called “baited self-defense.”<sup>22</sup>

Essentially self-defense has been invoked as the default authority for engaging civilians participating directly in hostilities<sup>23</sup>—a category of individuals legitimately targetable in situations of armed conflict based on conduct and temporal circumstances far broader than traditional principles of self-defense would allow. Mischaracterization of these engagements has also led to confusion over the proper application of the distinct rules and principles applicable to *jus in bello* targeting (attacks) and the distinct principles of de-escalation and self-defense related proportionality.<sup>24</sup> This conflation of use-of-force frameworks has even infected official Army training materials, where combatants are incorrectly defined as including “[p]ersons committing a Hostile Act or showing Hostile Intent—take a direct part in hostilities (DPH).”<sup>25</sup>

Rather than restraining the use of force, the concept of self-defense has expanded beyond legally permissible limits and the traditional dividing line between defensive and offensive uses of force has eroded. While the vast majority of these combat engagements are otherwise justifiable under the LOAC, the coopting of self-defense authorities to justify offensive targeting risks misapplication of both regimes in combat, and overbroad application of self-defense rules in future, less hostile

environments.<sup>26</sup> Several commentators with deployment experience have raised similar concerns and called for amendments to the SROE.<sup>27</sup> This paper shares those concerns, but offers a distinct approach to viewing the problem.

## II. The SROE Self-Defense Rules

In order to give military and political leadership greater control over the execution of both combat and non-combat operations, since 1981 the U.S. has issued standing ROE guidance to all U.S. forces operating outside of the United States.<sup>28</sup> Rules of engagement reflect the confluence of policy imperatives, strategic and operational requirements, and law, all translated into constraints and restraints on how commanders and subordinates employ force and conduct operations across the spectrum of peace and conflict. They have evolved into a critical command and control tool for regulating the use of force and “ensuring that a commander’s actions stay within the bounds of national and international law.”<sup>29</sup>

The SROE contain both standing self-defense direction applicable to all U.S. armed forces during all military operations and enumerated supplemental ROE measures that may be authorized at different levels of command for specific contingencies. This basic structure is designed to provide, in a standardized form, standing authority and guidance to commanders and individual servicemembers on the exercise of self-defense, while providing a process for the rapid development of mission specific ROE. Whether standing or mission specific, ROE at every echelon of command must be consonant with the normative frameworks governing the use of force by a state’s armed forces across the spectrum of operations. A review of the evolution of the SROE reveals that the standing individual and unit self-defense rules are improperly grounded in the normative framework of the *jus ad bellum*.

## History of the SROE

The SROE as we know it today did not begin to take shape until the 1980s.<sup>30</sup> Although used at times in Korea and Vietnam, ROE lacked any degree of standardization and with minor exceptions, did not focus on tactical land force operations.<sup>31</sup> It was not until 1981, with the JCS's issuance of The Worldwide Peacetime Rules of Engagement for Seaborne Forces, and their expansion in 1986 in the JCS Peacetime ROE for all U.S. Forces (PROE), that U.S. ROE began to take on the shape of a standardized set of guidance evidencing "a clear statement of national views on self-defense in peacetime that also could smooth the transition to hostilities . . ."<sup>32</sup>

As the name of the 1981 ROE implies, they, and the 1986 PROE were heavily focused on naval operations. This was understandable given the state of tensions with the Soviet Union at the time. The primary purpose of these ROE was "to protect carrier battle groups from a preemptive strike by the Soviet Navy."<sup>33</sup> With naval forces routinely shadowing each other in a delicate game of strategic chess, it was important to prevent a local commander from overreacting to a minor insult or probe and thereby escalating the situation into the outbreak of a conflict that could quickly spiral into World War III.<sup>34</sup>

In addition to extending the applicability of the ROE to all U.S. forces, the most significant development in the 1986 PROE was the adoption of standing authority, approved by the Secretary of Defense, for naval forces to respond not just to actual attacks, but to apply "an accelerated sequence up the scale of force" in anticipation of an imminent attack—that is, an authority to exercise the national right of anticipatory self-defense under the UN Charter.<sup>35</sup>

On October 26, 1988, the JCS modified the PROE primarily to reflect lessons learned from the inconsistent application of the new self-defense authorities in the USS *Stark* and *Vincennes* incidents.<sup>36</sup> Although the 1988 Peacetime ROE were applicable to all military operations, they remained heavily focused on naval operations, applied only to operations short of actual war or prolonged conflict, and were still Cold War oriented. After the fall of the Berlin Wall, however, it became increasingly clear that U.S. ground forces would be deployed and employed in “nebulous situations resulting from peacekeeping and peace-enforcement missions, as well as humanitarian interventions[;]” uncertain situations similar to those the Navy had historically faced requiring “rules to guide their engagements with potentially hostile forces.”<sup>37</sup>

Based on a number of recommendations from an Army led review group,<sup>38</sup> the PROE was eventually replaced in 1994 with the publication of the *Chairman of the Joint Chiefs of Staff Instruction 3121.01, Standing Rules of Engagement for U.S. Forces*.<sup>39</sup> The 1994 SROE have been revised twice and are currently undergoing a third revision, but the basic structure remains in place today.<sup>40</sup>

#### The SROE’s Unitary Self-Defense Framework

The SROE provide for four types of self-defense authority that operate at three levels: national, unit, individual and collective. National Self-Defense is defined as the “[d]efense of the United States, U.S. forces, and in certain circumstances, U.S. persons and their property, and/or U.S. commercial assets from a hostile act or demonstration of hostile intent.”<sup>41</sup> When delegated the authority, “unit commanders may exercise National Self-Defense . . . .”<sup>42</sup>

With respect to unit and individual self-defense, the SROE provide:

Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other U.S. military forces in the vicinity.<sup>43</sup>

Lastly, *Collective Self-Defense* is defined as the “[d]efense of designated non-U.S. military forces and/or designated foreign nationals and their property from a hostile act or demonstrated hostile intent.”<sup>44</sup> Unlike individual and unit self-defense, and national self-defense when delegated, only the President or the Secretary of Defense may authorize U.S. forces to exercise collective self-defense.<sup>45</sup>

The common thread running through all types and levels of self-defense are the SROE concepts of hostile act and hostile intent. The former is defined as “[a]n attack or other use of force against the United States, U.S. forces or other designated persons or property[,]” to include “force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital [U.S. Government] property.”<sup>46</sup> As opposed to an actual attack, a demonstration of hostile intent extends self-defense authority to any threat of imminent use of force that would qualify as a hostile attack if completed.<sup>47</sup>

The hostile act and hostile intent construct is intended to provide understandable and executable guidance for determining when the use of force is necessary; that is, a means of assessing when the conduct of an aggressor is such that it creates the necessity to respond with defensive force.<sup>48</sup> Although necessity is universally accepted as a predicate to exercising self-defense at any level, the hostile act/hostile intent

(HA/HI) framework developed specifically to implement national self-defense authorities.<sup>49</sup>

#### The *Ad Bellum* Roots of the SROE Self-Defense Construct

Even a cursory review of the SROE definitions of hostile act and hostile intent, with their incorporation of the terms “use of force” and “attack,” reveals the direct relationship between the SROE self-defense rules and the *ad bellum* use-of-force framework in the UN Charter.<sup>50</sup> These definitions grew out of the original maritime focused self-defense authorities contained in the PROE, and are based on the prevailing but flawed orthodoxy that all self-defense authorities in the SROE are derivative of the right of national self-defense found in CIL and Article 51 of the Charter.<sup>51</sup>

When originally promulgated, the PROE self-defense authorities extended only to the exercise of national self-defense. As then-U.S. Navy Captain Ashley Roach noted in his seminal 1983 article on ROE, the PROE—the predecessor to the SROE—did not address individual or unit self-defense, but rather “provide[d] guidance on when armed force can be used to protect the larger national interests, such as the territory of the United States, or to defend against attacks on other U.S. forces.”<sup>52</sup> As originally conceived, the authority of a commander to use defensive force to protect his unit (as understood by the Navy) existed as an inherent right independent of the PROE.<sup>53</sup>

As the PROE evolved into the SROE, its naval roots carried over. The basic hostile act, hostile intent triggers were incorporated into the SROE to govern both national self-defense and a commander’s “inherent right and obligation” to “use all necessary means available and to take all appropriate actions to defend that commander’s unit and other U.S. forces in the vicinity from a hostile act or

demonstrated hostile intent.”<sup>54</sup> However, the Navy resisted a combined Army and Marine Corps recommendation to include individual self-defense ROE in the SROE, based “on the theory that the Navy fights as units only.”<sup>55</sup> In light of the Navy’s objection, individual self-defense was identified as an element of unit-self defense and relegated to the glossary of the 1994 SROE.<sup>56</sup> At the time, the understanding of the SROE self-defense authorities was that they served to implement the “inherent right . . . derive[d] from customary international law and article 51 of the UN Charter.”<sup>57</sup> Eventually it was incorporated, along with unit-self defense, into the base document under the broader unitary framework outlined above. Thus, the SROE ties all levels of self-defense to Article 51 of the UN Charter.<sup>58</sup>

When subjected to scrutiny the view that all self-defense is derivative of national self-defense reveals itself to be unsound. The U.N. Charter generally regulates interstate conduct and the *jus ad bellum* reflected in Articles 2(4) and 51 governs only those state uses of force that rise above a minimum threshold.<sup>59</sup> Article 51 is not the source of the authority of servicemembers acting individually, or commanders acting to defend their units, to use force in self-defense unless they are repelling an actual or threatened attack that rises to the level of an unlawful use of force against the nation as a whole.<sup>60</sup>

Grounding individual and unit self-defense in the *jus ad bellum* fails to account for a host of situations necessitating state agents to employ force under circumstances that simply do not implicate either Article 2(4) or 51, and confuses the recognized distinction between uses of force at the macro and micro levels.<sup>61</sup> When it comes to the use of force in armed conflict, this distinction is well understood; the *jus ad bellum* regulating the right of a state to resort to war, the *jus in bello* regulating the means and

methods the state's agents may employ in the course of war. The same logic applies with respect to non-LOAC based uses of force at the sub-national level, as evidenced by the limitation in Article 31(c)(1) of the *Rome Statute of the International Criminal Court*, which provides that "participation in a [national defense] operation does not exclude criminal responsibility under the *Statute*."<sup>62</sup>

For example, while guarding a food distribution point during a humanitarian assistance mission, a servicemember confronted by a hostile mob of desperate victims of the disaster might find himself under imminent threat of unlawful violence. It is difficult to conceive how such a localized, disaggregated mob, let alone a single individual, could qualify as an organized armed group initiating a level of hostilities directed at the United States, *qua* a state, such as to rise to the level of an armed attack under Article 51. Classifying the use of defensive force in the foregoing example as a sub-set of national self-defense "blurs the legal personality of the nation and the individual (or unit of individuals)."<sup>63</sup> The nature and scale of actual or threatened force contemplated by the *jus ad bellum* is fundamentally different from and inapposite to regulating defensive force at the sub-national level.

This is not to suggest that the authority of servicemembers to use force in self-defense derives from their individual rights—an argument addressed next. On the contrary, as state agents the authority of servicemembers to use force at any level in the course of their official duties derives from the sovereign. The point is that the *jus ad bellum* is not the normative framework from which the authority stems for sub-national self-defense.

## The “Right and Obligation” of Self-Defense

Another legacy of the PROE is the ardent view among many that self-defense is not only an “inherent right” of all servicemembers, but an absolute, non-derogable obligation of all commanders.<sup>64</sup> This flawed position has contributed to a mindset that commanders can never place limitations on individual self-defense, either through restrictive mission-accomplishment ROE or otherwise, and should not themselves be constrained by similar limitations imposed by higher commands.<sup>65</sup>

With respect to unit self-defense, this view still finds expression in the SROE direction that “[u]nit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.”<sup>66</sup> However, the legal basis supporting this asserted right and obligation has long been assumed but never adequately identified.<sup>67</sup> It is true that the concept of unit self-defense has proliferated throughout the manuals and ROEs of a growing number of militaries around the world, which some have pointed to as evidence of a CIL norm of unit self-defense independent of Article 51.<sup>68</sup> But the evidence cited for the essential proposition that these incantations reflect the *opinio juris* of a sufficient number of states to establish a customary norm is underwhelming and incomplete.<sup>69</sup> This is especially true as it relates to the purported obligatory nature of unit self-defense.<sup>70</sup>

Not all states share the view that unit self-defense is either a right or an obligation, and some readily permit higher authority to subject it to restraints.<sup>71</sup> And while not every use of force in unit self-defense will rise to the level of an armed attack, some might and every use of force risks escalation to that point. If unit self-defense is truly an obligation, its unfettered exercise has the very real potential of usurping the state’s sovereign prerogative over the decision to exercise national self-defense or

otherwise initiate armed hostilities.<sup>72</sup> Those that argue the obligation stems from human rights law fundamentally misconstrue the nature and purpose of that body of law as a check on the use of force by state actors.<sup>73</sup> Thus, while the sovereign is free to assign commanders the duty to defend their units, they are by no means obligated to.

With respect to individual self-defense, the SROE has proved more schizophrenic. When originally incorporated into the 1994 SROE, individual self-defense was identified not as an individual right, but rather as a sub-set of unit self-defense. In 2000 it was elevated to the status of a distinct “inherent right,”<sup>74</sup> only to be downgraded again in 2005 to a sub-set of unit self-defense, and thus subject to limitation by the commander.<sup>75</sup> For those who subscribe to the theory that individual self-defense is an inviolate “natural law” right of self-preservation independent of the individual’s status as a servicemember, this formulation of individual self-defense is anathema and any order aimed at limiting individual self-defense is unlawful and hence unenforceable.<sup>76</sup>

The intentions of those who advance these arguments are laudable. The arguments they advance, however, miss the mark. As one commentator states, “[w]hen we send fine young Americans into harm’s way, we have a moral and legal obligation to provide them with [ROE] that protect their right of self-defense.”<sup>77</sup> The moral obligation to protect our servicemembers to the maximum extent possible consistent with mission accomplishment is undeniable. That there exists a legal obligation to subordinate lawful military orders restricting the use of force to a servicemember’s personal right of self-defense is simply wrong.

As discussed further below, subordination to civil and command authority are defining characteristics of military service.<sup>78</sup> Thus, as the Supreme Court has long

recognized, while servicemembers do not forfeit all rights upon entering service, their rights “must perforce be conditioned to meet certain overriding demands of discipline and duty . . . .”<sup>79</sup> When it comes to employing deadly combat power in the course of one’s official duties as a member of the armed forces of the United States, the demands of discipline and duty are at their zenith.

This is not to suggest that servicemembers cannot or should not be armed, legally and physically, with the ability to defend themselves. The source and scope of the authority to do so, however, is to be found neither in the *jus ad bellum* nor in the independent, non-derogable rights of the servicemember or commander. As explained in greater detail below, based on their unique status, servicemembers act not as independent individuals, but rather as agents of and subordinate to civilian and military leadership to achieve defined military objectives. This distinction is fundamental to understanding the nature and purpose of the use-of-force authorities regulated through ROE. The prevalence throughout the force of the “independent right” theory has colored commanders’ views about the interplay of self-defense and mission accomplishment ROE and threatens to undermine the disciplined application of combat power during operations.

#### The Expansion of Self-Defense Authorities

Imminence has always been a required element of self-defense, both at the macro and micro levels and since its inception the SROE has defined hostile intent to be an *imminent* threat.<sup>80</sup> Although not further defined in the original versions of the SROE, imminence was generally understood to reflect the standard of *ad bellum* anticipatory self-defense derived from the *Caroline* case—that a threat must be “instant, overwhelming, leaving no choice of means, and no moment of deliberation[;]” a

standard that was generally understood to limit self-defense to immediate threats.<sup>81</sup> In 2005, however, the SROE incorporated a definition of imminence for the first time which states that “[i]mmminent does not necessarily mean immediate or instantaneous.”<sup>82</sup>

Given the *ad bellum* roots of the SROE, this expansion of the concept of imminence should not be surprising. It is directly linked to the expanded view of national-level anticipatory self-defense first articulated in the 2002 National Security Strategy—the so-called Bush Doctrine.<sup>83</sup> While such an expansion may be appropriate at the national level, a matter beyond the scope of this paper, extending it whole cloth to individual and unit self-defense is a different matter all together.<sup>84</sup> Coupled with the steady accretion of the definitions of hostile act and hostile intent to include, *inter alia*, threats of force to preclude or impede mission accomplishment, the SROE individual and unit self-defense authorities are inconsistent with basic principles of both domestic and international law governing the use of force by state actors.

Like the definitions of hostile act and hostile intent, this new definition of imminence draws no distinction in its application between the different levels of self-defense outlined above, effecting a broadening of the unitary standard across all levels. Bundling all three levels of self-defense under a single *ad bellum* framework has led to misapplication of and reliance on self-defense to justify offensive uses of force at the tactical and operational level.<sup>85</sup> Discussed further below, this broadening of the concept of self-defense has contributed significantly to obscuring the line between conduct-based and status-based offensive targeting.

### III. The Public Authority to Use Force in Military Operations

Having explained why the individual and unit self-defense authorities in the SROE should not be based in the *jus ad bellum* or notions of independent individual rights, the question remains as to what normative framework should undergird these authorities. The answer is the body of law that regulates the conduct of state actors vis-à-vis individual human beings; that is, IHRL generally, and more specifically the prohibition against arbitrary killings as applied within and outside the context of armed conflict. This conclusion flows from a recognition of the unique legal character of servicemembers as members of a collective body conducting military operations on behalf of the state, not as independent, individual actors.

#### Servicemembers as State, Not Independent, Actors

Since at least the Treaty of Westphalia in 1648 and the consolidation of the monopoly of violence in the sovereign, the law has recognized that members of a state's armed forces are "those by whose agency the sovereign makes war, [and] are only instruments in his hands."<sup>86</sup> The very structure and logic of the LOAC, the body of law most relevant to the *raison d'être* of military forces, is built on the understanding that "members of [the armed forces] act as agents of the group leadership to achieve military goals, not as individuals."<sup>87</sup> This premise is fundamental to the well-accepted principle that only combatants "have the right to participate in hostilities."<sup>88</sup>

The Supreme Court has long recognized the unique nature and status of the military and the obedience to orders that military service demands. Entrance in the armed forces effects a fundamental change in an individual's status, transforming "[h]is relations to the State and public" and imposing on him or her unique duties and responsibilities.<sup>89</sup> As the Court stated in the seminal case of *Parker v. Levy*, the "[military] is not a deliberative body. It is the executive arm. Its law is that of obedience.

No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.”<sup>90</sup>

The subordination and discipline inherent in the nature of this agency relationship serves multiple purposes. It ensures an effective fighting force, subordinate to civil authority, the employment and conduct of which is consonant with nationally defined objectives. It is equally essential to ensuring the state’s ability to comply with its obligations under domestic and international law when it commits its armed forces to action.

This latter purpose is reflected in the law of both command and state responsibility. The LOAC establishes an absolute obligation on commanders and the state itself to prevent and punish war crimes, and holds the state responsible for “all acts committed by persons forming part of its armed forces” in violation of the LOAC.<sup>91</sup> This mirrors the general rule that a state is responsible for the internationally wrongful acts of its state organs, to include individual actors, such as violations of IHRL.<sup>92</sup> Thus, states are equally responsible for, and obligated to regulate, the actions of their armed forces outside of armed conflict.<sup>93</sup>

The suggestion that servicemembers have an absolute right to use force in the course of their official duties independent of their status as state actors ignores the reality of military service, basic notions of command and control, and the state’s obligation to protect the right to life and its responsibility for the actions of its agents that contravene this right. In the military, it is the commander, not the subordinate, who must assess the difficult choices “in meeting the competing demands of operational goals and force protection” and develop command priorities.<sup>94</sup> This proposition is unchallenged

when considered in the context of command-imposed restraints on the use of offensive force in combat. It is axiomatic that servicemembers have no independent right to engage in hostilities. That right is derivative of the sovereign's. Not only can the sovereign regulate its application at will, it is obligated to do so.

Servicemembers are no less agents of the state when conducting non-combat operations, and there is no logical distinction to be drawn regarding the sovereign's right and responsibility to regulate how they use force in furtherance of national objectives.

### The Public Authority Doctrine

The post-Westphalian consolidation in the nation-state of "the monopoly of violence for the maintenance of external and internal [security and] order" presupposes the necessity of the state to delegate use-of-force authority to its agents.<sup>95</sup> Both domestic and international law endorse this principle, subject to distinct limitations defined in law. In recognition of the need for individual actors to employ coercive, and at times lethal force on behalf of the state, the law establishes a logical *quid pro quo* underwriting certain conduct that would otherwise be deemed as criminal.<sup>96</sup> This construct finds expression in the common law "public authority" defense to criminal liability, a doctrine well established in both domestic and international law. Considered in conjunction with the normative frameworks that regulate the sovereign's monopoly on the use of coercive force, the public authority defense offers a useful device for analyzing the proper scope of use-of-force authorities that may be delegated through ROE.

The public authority justification, a sub-norm of the general system of justifications in criminal law,<sup>97</sup> holds that acts committed by a public official "which otherwise would be criminal, such as taking or destroying property, taking hold of a

person by force and against his will, placing him in confinement, or even taking his life, are not crimes if done with proper public authority.”<sup>98</sup> “Indeed, without justification defenses, state officials would be quite unable to perform their most basic functions.”<sup>99</sup> Variants of the public authority justification are contained in the codes of nearly every State in the U.S., and it is implicitly recognized in IHRL instruments as well as the *Rome Statute*.<sup>100</sup> It is specifically provided for in the *Manual for Courts-Martial*.<sup>101</sup>

The general construct of the public authority justification is stated as:

[1]) the actor has a public authority, and . . . there arises the need for action protecting or furthering the particular interest at stake; and [2]) consistent with his authority, the actor engages in conduct . . . when and to the extent necessary to protect or further the interests at stake . . . that is reasonable in relation to the gravity of the harm threatened or the importance of the interest to be furthered.<sup>102</sup>

Stated differently, to invoke the public authority justification, a public official must demonstrate that he or she had the lawful authority to protect or advance a legitimate state interest, conditions arose that triggered his or her authority, and that the actions taken to protect or further the interest were both necessary and proportionate.<sup>103</sup> The harm caused by evoking one’s public authority must be reasonable in relation to the societal interests at stake.<sup>104</sup>

The clearest manifestation of the public authority justification as it pertains to the military involves “the killing of an enemy as an act of war and within the rules of war.”<sup>105</sup> The Model Penal Code’s proposed formulation of the defense considers conduct justifiable when it is either required or authorized by, *inter alia*, “the law governing the armed services or the lawful conduct of war . . . .”<sup>106</sup> This aspect of the public authority justification obviously mirrors the CIL rule of combatant privilege, which accords immunity from prosecution to lawful combatants for acts of violence committed in

accordance with the LOAC.<sup>107</sup> Thus, according to the *Manual for Courts-Martial*, “killing an enemy combatant in battle is justified” and so not unlawful.<sup>108</sup>

Logically, however, the immunity of the combatant privilege and its analog in the public authority justification are not absolute. The specific rules of the LOAC define the outer limits of the use-of-force authority that may be exercised by the state’s agents in pursuit of the state’s interests through armed hostilities. Unless otherwise justified, intentional killings conducted outside those limits exceed the scope of one’s public authority and constitute the war crime of murder.<sup>109</sup>

The public authority justification is not limited to acts of violence committed in the course of hostilities against legitimate military targets. It extends also to conduct required or authorized by “the law governing the armed services” more broadly, as well as to “the law defining the duties or functions of a public officer . . . in the performance of his duties.”<sup>110</sup> Thus, for example, “the use of force by a law enforcement officer when reasonably necessary in the proper execution of a lawful apprehension is justified because the duty to apprehend is imposed by lawful authority.”<sup>111</sup> Just as the LOAC limits the scope of the public authority justification, the same symmetry pertains with respect to domestic and IHRL limitations on the force public officials may use to further the state’s interests.

Like all justification defenses, public authority justification arises only upon the presence of a triggering condition, and is subject to the principles of necessity and proportionality.<sup>112</sup> That is, the justification is only triggered “when circumstances arise that evoke the use of the actor’s delegated authority.”<sup>113</sup> At that point, the public actor may act, but only to the extent necessary to protect or further the state’s interest at

stake, and only with a degree of force proportionate to the harm to be prevented or the interest to be advanced.<sup>114</sup> Stated differently, the force used must not be excessive under the circumstances.<sup>115</sup>

Unlike the justification of self-defense, the public authority justification need not necessarily be triggered by an actual threat of unlawful violence.<sup>116</sup> “The actor need only be protecting or furthering a legally recognized interest.”<sup>117</sup> The authority of police to effect an arrest, or the targeting of an enemy combatant while in his or her sleep are two examples.<sup>118</sup> But the defense is available only if the government agent is performing a *legal* duty<sup>119</sup> at the time of the alleged offense which permits his or her action in relation to the triggering conduct.

Where that legal duty involves using force to protect against unlawful uses of violence, there is undoubtedly an overlap with the standard justification of self-defense, but the two do not operate equally. Unlike private citizens exercising a personal right, public officials stand in a unique relationship to the public, are held to a higher standard and may not exercise their legal powers arbitrarily.<sup>120</sup> Further, as the sovereign defines the duty with relation to the specific interest to be protected or advanced, it is free to impose a threat trigger and conditions on the authority of its agents to respond.<sup>121</sup> Indeed, the Constitution is understood as requiring the sovereign to just that with respect to U.S. citizens. The arbitrary killing standard of IHRL may compel the sovereign in similar fashion.

As the primary mechanism by which the state regulates how and under what circumstances its agents use force in pursuit of the state’s interests, and as part of the body of the laws governing the armed services, ROE convey public authority to

servicemembers to use force under defined circumstances. To be valid, however, they can convey no greater authority than the sovereign itself can exercise, and must hue to the law applicable to any given situation.<sup>122</sup> A general review of the bodies of law relevant to scoping the use of force during military operations follows.

#### IV. The Regulation of Force During Military Operations

Sergeant Alvin C. York's Medal of Honor winning actions on October 8, 1918, during the Meuse-Argonne offensive are the stuff of legend. After he and seventeen other soldiers infiltrated behind enemy lines, they came under intense fire from a German machine-gun nest which cut down nine of the men, including a superior officer, leaving York in charge of the element.<sup>123</sup> Sergeant York immediately counter attacked into the hasty ambush, returning fire so effectively he killed twenty German soldiers and eventually captured over one hundred more in an action that proved decisive to the operational success of the U.S.'s broader offensive.<sup>124</sup>

Ironically, Sergeant York was staunchly opposed to killing.<sup>125</sup> He was a firm believer in the ancient dictate against homicide that underlies the prohibition against murder in the moral and legal codes of nearly every society in the world. Murder, however, is not synonymous with homicide. Homicide is only criminally sanctioned as murder when it is *unlawful*. Stated differently, under certain limited circumstances strictly defined in law, the killing of another human being is legally permissible. Hence Sergeant York was properly honored as a hero and not condemned as a murderer.

What was it then that gave Sergeant York the legal authority to intentionally take the life of those twenty German soldiers? In contemporary parlance, the most immediate answer is that Sergeant York was acting in his capacity as a privileged belligerent within the context of an international armed conflict, and therefore had the

legal sanction by the rules and customs of warfare to target enemy soldiers with lethal force. Sergeant York's authority, however, derived not from his standing as an individual human being, but rather from his legally defined status as a particular type of agent of the state—a combatant. As discussed in more depth below, the United States vested Sergeant York with the public authority to use deadly force in accordance with the laws of war.

But what of the fact that Sergeant York's life, and those of his men, were under immediate threat of death or grievous bodily harm, conditions that would give rise to the right of an individual in most any society to use deadly force in self-defense or the defense of others? Was Sergeant York exercising this right, or did his combatant authority supplant it? Did these two authorities operate simultaneously to justify his killings? The angels-dancing-on-the-head-of-a-pin nature of these questions might seem apparent. Under either analysis, Sergeant York's actions were justified and thus lawful.

Unfortunately the use-of-force scenarios servicemembers face on today's battlefields are far more uncertain than the circumstances Sergeant York faced in October of 1918. Consider the all-too-common situation of a military checkpoint in Iraq or Afghanistan. Routinely servicemembers have been and continue to be placed at extreme risk and required to make split-second life-or-death judgments about whether a rapidly approaching and non-compliant vehicle is a potential Vehicle Borne Improvised Explosive Device (VBIED) being driven by an enemy belligerent, a civilian directly participating in hostilities, a civilian threatening to inflict death or grievous bodily harm for reasons unrelated to the conflict, or simply an inoffensive civilian misinterpreting the

situation. As state actors, whether, and to what degree these servicemembers can engage the vehicle or its occupants with lethal force depends directly on the answers to these difficult questions. Likewise, providing them with tactically effective yet strategically suitable ROE to guide them through these difficult situations starts with ensuring the ROE are accurately grounded in law.

### The Legal Regimes Governing the Use of Force in Military Operations

It is universally recognized that the authority of a state to employ force is not unfettered. For example, since at least 1949 the right and authority of states, *qua* states, to resort to the use of force has been limited by the international *jus ad bellum* norms reflected in the United Nations Charter.<sup>126</sup> Similarly, the authority that states may lawfully confer on members of their armed forces to employ force on their behalf across the spectrum of peace and war is also circumscribed.

States have an independent legal character in the international order and consequently, international law is established by, and generally for the purpose of, regulating the conduct and relations of states *inter se*.<sup>127</sup> But states are fundamentally human enterprises and can act only through human agents. Further, the effects of state action, especially the employment of force, ultimately fall on individual human beings. As such, states have also developed normative frameworks, principally the LOAC and IHRL, to regulate how they interact with their individual citizens as well as the citizens of other states.<sup>128</sup> The LOAC regulates the conduct of parties to an armed conflict, establishing norms of reciprocal treatment by each party of the citizens of the other, whereas IHRL “deals with the inherent right of the person to be protected at all times against abusive [state] power.”<sup>129</sup> Like the *jus ad bellum*, a primary focus of these normative frameworks is the regulation of the state’s use of force. In contradistinction to

the *jus ad bellum*, however, the LOAC and IHRL frameworks regulate the force states may use at the micro level through their designated agents, under color of state authority, against individual human beings.<sup>130</sup>

Although the LOAC and IHRL are distinct bodies of law, they “share a common ‘core’ of fundamental standards which are applicable at all times . . . .”<sup>131</sup> Both are built on the central principle of humanity—the recognition of the inherent dignity and worth of the human person. Each regime places particular emphasis on the protection of the right to life, a “deeply held principle that is protected in times of both peace and war.”<sup>132</sup> Both regimes also accept that as fundamental as the right to life is, it is not absolute.

The LOAC and IHRL both seek to strike a balance between the principle of humanity and the legitimate interest and obligation of the state to protect its citizens and maintain both internal and external security and public order, which often necessitates the use of coercive, and at times, deadly force.<sup>133</sup> The result of this balance is a normative protection of the right to life that finds its primary expression in the general prohibition against arbitrary killings.<sup>134</sup> Both IHRL and LOAC protect this right by defining distinct limits on when state actors are permitted to use lethal force to protect or further the state’s interests.<sup>135</sup>

Yet there are significant differences between the IHRL and LOAC use-of-force regimes and the set of legally accepted presumptions underlying each. In warfare, “the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources” is accepted as a legitimate object of state action.<sup>136</sup> The LOAC rests on a presumption that every member of the enemy force contributes to the collective threat that the force presents.<sup>137</sup> Thus, the use of

deliberate, pre-meditated violence to disable the greatest possible number of enemy personnel to achieve this legitimate aim is accepted and expressed in the principle of military necessity and the rule of military objective.<sup>138</sup>

In contrast, IHRL “was conceived to protect persons in the power of the state from abuse and does not rest, in principle, on the idea of conduct of hostilities[,]” but what is generally referred to as the law enforcement paradigm.<sup>139</sup> It operates on a presumption that individual humans are inoffensive and have a right to be free from governmental deprivations of life, liberty and property by means of state force or coercion. With respect to lethal force, this presumption is rebuttable only upon the identification of specific individual conduct triggering a circumstance “which justifies only those [coercive] constraints that are necessary to respond to the threat [presented].”<sup>140</sup>

The difference in these basic underlying assumptions and the related normative frameworks they underlie cannot be understated.<sup>141</sup> While both regimes tolerate some governmental uses of force, they create an impassable barrier between the two reflected in operational terms as a status versus conduct-based use-of-force dichotomy.<sup>142</sup> The LOAC “permits state agents to intentionally kill combatants and incidentally kill civilians in circumstances that [IHRL] does not countenance.”<sup>143</sup> That is, the LOAC permits attacks against combatants as a matter of first resort, based solely on the individual’s combatant status. In contrast, outside of situations of armed conflict and within armed conflict when confronting civilians directly, the law does not tolerate status-based targeting. The use of force is always to be applied as a matter of last, not first resort.<sup>144</sup>

Traditionally, the normative frameworks governing the legitimacy of state uses of force have been divided neatly, at least in theory, between the two spheres of peace and war with the *lex generalis* of IHRL applying in peacetime and the *lex specialis* of LOAC applying to situations of armed conflict.<sup>145</sup> However, “the relationship between the two is much more complex than this simple division of responsibilities implies.”<sup>146</sup> Military operations today, especially in situations of non-international armed conflict, implicate an ever greater intermingling or parallel application of these distinct legal regimes which has put intense pressure on the traditional dividing line between the two.<sup>147</sup> Outside of armed conflict, a space in which U.S. forces frequently operate, LOAC based use-of-force authorities are simply unavailable.<sup>148</sup>

One point of important commonality between the LOAC and IHRL is the positive duty that both frameworks place on states to protect the right to life and prevent violations of the related substantive norms contained in each.<sup>149</sup> As part of this obligation, “states must regulate the use of force by their agents in their national law to ensure compliance with applicable international law.”<sup>150</sup> Rules of engagement have evolved as a primary means of meeting this obligation, and as such, must be consonant with the international law standards governing the prohibition against arbitrary killings, a point central to the thesis of this paper. The complex interplay between LOAC and IHRL standards requires greater specificity in the design, training, and application of the rules governing the use of force by U.S. forces in any given situation. This process begins with an understanding of the distinct use-of-force standards applicable in each framework.

## The *Lex Generalis* of IHRL: The Arbitrary Deprivation Standard and Conduct-Based Uses of Force

The question of whether IHRL plays a role in the regulation of military operations during armed conflict is the subject of significant on-going debate.<sup>151</sup> The relative merits of this debate aside, when it comes to developing strategically suitable and acceptable use-of-force rules, it is largely irrelevant. In addition to being specifically contained in the International Covenant on Civil and Political Rights (ICCPR),<sup>152</sup> a treaty to which the United States is a party, the right against arbitrary deprivation of life is considered a rule of customary international law (CIL).<sup>153</sup> As such, it is binding on all states at all times, and is considered part of U.S. law.<sup>154</sup> It is a norm aimed at “realization of the right to life when [states] use force, whether inside or outside their borders.”<sup>155</sup> As a CIL norm it is considered a “fundamental” human right “binding on U.S. forces during all military operations.”<sup>156</sup>

With the exception of attacks against lawful military objectives, it is widely accepted that state actors may only use force when strictly necessary to protect or advance a finite set of legitimate state interests and the amount of force used must be proportionate to the benefit to be achieved.<sup>157</sup> Typically analyzed in the context of law enforcement, IHRL recognizes these interests to include at least the prevention of crime, the lawful arrest of offenders or suspected offenders, and the maintenance of public order and security.<sup>158</sup> Importantly, IHRL also recognizes that states have a legitimate basis to empower their agents to defend themselves and others from unlawful violence under defined circumstances.<sup>159</sup>

However, this should not be understood to be an exhaustive list of state objectives that may be furthered by or at least involve the possible need for some

degree of coercion or force. Military forces are often employed to achieve objectives short of armed conflict, but beyond the core of activities traditionally associated with domestic policing. Non-combatant evacuation operations, or NEOs, personnel recovery and hostage rescue operations, peace operations, and consequence management operations are but a few.<sup>160</sup> Human rights law is sufficiently flexible to accommodate the requirements, to include the use of force, of almost any military operation, subject to the non-derogable baseline principles of necessity, proportionality, and precaution.<sup>161</sup>

Under IHRL, the necessity to use force exists only when other less-harmful means available to achieve a legitimate state aim, such as protecting a sensitive weapons site, would be “ineffective or without any promise of achieving the desired purpose.”<sup>162</sup> This principle of “strict” or “absolute” necessity imposed by IHRL is understood as also requiring that the threat to be averted must be imminent.<sup>163</sup>

Although not entirely inflexible on this point, imminence in IHRL is generally understood to mean immediate.<sup>164</sup>

The IHRL principle of proportionality requires that, in addition to being strictly necessary, the use of force “is only permissible if the threat to be addressed is sufficiently grave to justify endangering” not only the lives of innocent bystanders, but the life of the object of the use of force him or herself.<sup>165</sup> This standard is far less tolerant than the *jus in bello* rule of proportionality discussed below. Any use of force under IHRL must avoid as far as possible any, not just excessive, incidental harm to innocent bystanders.<sup>166</sup>

Finally, the IHRL principle of precaution requires state actors to plan, organize, and control operations so as to minimize to the maximum extent feasible, the need to

resort to the use of lethal force.<sup>167</sup> Like the IHRL principle of proportionality, the beneficiaries of the precautions rule are both innocents as well as the object of the use of force.<sup>168</sup>

In the case of lethal force, the demands of IHRL are at their apogee. The principle of strict necessity generally restricts the state's use of lethal force to a narrow range of circumstances involving immediate threats to the life of the state agent or those he or she is charged with protecting, and only if the threat cannot be neutralized with less intrusive means.<sup>169</sup> In all cases, lethal force may be used only as a matter of last resort.<sup>170</sup>

These general IHRL principles on the use of deadly force find a direct analog in U.S. domestic law. The Supreme Court has long held that the use of deadly force by law enforcement officers constitutes a seizure under the Fourth Amendment to the Constitution and must therefore be reasonable.<sup>171</sup> “[T]he intrusiveness of a seizure by means of deadly force [being] unmatched,” the reasonableness of police uses of force are determined by balancing a “suspect's fundamental interest in his own life,” against the governments “interests in effective law enforcement.”<sup>172</sup>

Although the Supreme Court has never enumerated a specific list of governmental interests that would weigh in favor of justifying the use of deadly force, it and lower courts have generally only found force to be reasonable when the police have probable cause to believe a suspect poses an imminent threat of death or grievous bodily harm either to themselves or to others.<sup>173</sup> Although subtle differences exist between the Supreme Court's use-of-force jurisprudence and IHRL standards, the basic frameworks are consistent.

Thus, outside of situations of armed conflict, use of deadly force by servicemembers is “strictly cause based: there must be a causal connection between the conduct of the object of force and the use of deadly force.”<sup>174</sup> This means that under human rights law, the use of deadly force in the sense of an intentional, premeditated and deliberate killing by state actors cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the sole objective of an operation.<sup>175</sup> Human rights law simply does not tolerate “shoot-to-kill orders.”<sup>176</sup> The exact opposite is true under the LOAC.

#### The *Lex Specialis* of LOAC: Attacks and Status Based Targeting

As noted, the single most distinctive aspect of what some refer to as the conduct of hostilities paradigm is its acceptance of status-based uses of force. It is broadly accepted that the *lex generalis* prohibition against arbitrary killing applies equally in times of war.<sup>177</sup> However, within the context of armed conflict, what constitutes an arbitrary killing is determined first by reference to “the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”<sup>178</sup>

Unlike situations of peace, international law “recognize(s) that the use of lethal force is inherent to waging war[,]” where the “ultimate aim of military operations is to prevail over the enemy’s armed forces.”<sup>179</sup> The central LOAC norm of military objective, which permits the targeting of enemy combatants with lethal force as a matter of first resort, reflects this reality. However, balancing this reality against humanitarian concerns, the international community has long agreed that military forces are not only restricted as to the means and methods they can employ against enemy personnel,<sup>180</sup> the basic authority to conduct attacks at all is also limited.

It is a core principle of the LOAC that attacks—understood to be *any* acts of violence against the enemy, whether conducted in the offense or defense<sup>181</sup>—can be directed only against military objectives, including combatants,<sup>182</sup> but never against civilians (unless and for such time as they participate directly in the hostilities), non-combatants or civilian objects. This basic rule of distinction is amplified in the LOAC prohibitions on indiscriminate and disproportionate attacks and the obligation imposed on those planning and executing attacks to adhere to a series of precautionary rules “aimed at avoiding or minimizing harm to civilians and civilian objects.”<sup>183</sup> While harm to civilians and non-combatants is to be avoided, harm incidental to an attack on a lawful objective is not itself prohibited unless it is anticipated to be excessive in relation to the direct and concrete military advantage to be gained.<sup>184</sup> Because the principle of military necessity is already factored into these specific targeting rules, it is not available as a justification for violating these LOAC proscriptions, even when force is employed defensively.

Thus, on the one hand, LOAC admits of the exceptional authority to target individuals with lethal force as a matter of first resort; an authority anathema to IHRL. On the other hand, the authority is strictly limited to targeting the narrow class of individuals that can be reasonably identified as combatants, legal or otherwise.<sup>185</sup> With the exception of targeting civilians who lose their protection from attack while directly participating in hostilities, the LOAC contains no other provisions authorizing the use of potentially deadly force against a human being. For operations short of war, the LOAC is simply unavailable as a justification for employing force at all.

## The Hybrid of Civilians Directly Participating in Hostilities

Nothing has challenged this traditional dichotomy between war and peace use-of-force authorities, between conduct and status-based targeting regimes, more than the sustained COIN operations in Iraq and Afghanistan where enemy insurgents openly and routinely eschew the LOAC and violate the principle of distinction as a deliberate stratagem to gain tactical and strategic advantage.<sup>186</sup> In this environment, U.S. and coalition forces are regularly confronted with hostile actors who they cannot positively identify as members of the declared enemy force, and thus must presume at first instance to be protected civilians immune from attack.<sup>187</sup> Further complicating the use-of-force calculus is the fact that often, the conduct these individuals engage in does not necessarily present the type of actual and immediate threat of lethal violence to U.S. or partner forces traditionally understood as sufficient to trigger the use of force in self-defense.<sup>188</sup>

However, it is undisputed that within the context of armed conflict, civilians can lose their protection against attack by engaging in certain “hostile” conduct against a party to the conflict. This rule, expressed in Articles 51 and 13 of Additional Protocols I and II respectively, provides simply that “[c]ivilians shall enjoy the protection afforded by this [section/part] unless and for such time as they take a direct part in hostilities.”<sup>189</sup> On its face, this rule may seem straightforward enough. Civilians who take up arms and commit “hostile” acts against a party to the conflict forfeit their protected status under the LOAC and may be targeted with lethal force.<sup>190</sup>

However, the exact contours of the DPH exception, both as to the specific meaning of “direct participation” and the temporal parameters of the rule, have been and remain the subject of intense debate.<sup>191</sup> These debates occur within and without the

Department of Defense, as well as among the U.S. and our allies, which has led to a lack of clear policy guidance on the parameters of implementing the rule in actual operations.<sup>192</sup> What is important for present purposes is the fact that, even applying a narrow interpretation of the DPH rule, it is evident that it straddles the line between traditional status-based targeting authorities and peacetime self-defense rules in as much as it is legitimate basis for offensive targeting, based solely on a determination of conduct. As such, and in the absence of clear policy guidance, self-defense authorities have frequently been invoked at the operational and tactical level as the basis for targeting presumptive civilians taking direct part in hostilities.<sup>193</sup>

On the one hand, like members of an enemy belligerent force, civilians who directly participate in hostilities are considered “legitimate target[s]” and may be made the object of deliberate attack.<sup>194</sup> On the other hand, unlike members of an enemy force, civilians are presumed to be inoffensive and may only be made the object of attack based on their actual conduct, and only for so long as they continue to engage in that conduct.<sup>195</sup> Unlike traditional principles of self-defense, however, the temporal limitation on DPH-targeting is not based on imminence.<sup>196</sup> Also, and again applying a narrow interpretation of the rule, the range of conduct that would deprive a civilian of his or her protection from attack is broader than actions that threaten directly death or grievous bodily harm.<sup>197</sup>

The expansion of the operational understanding of self-defense authorities in general, and the meaning of hostile act and hostile intent specifically, should not be surprising. Much of the discussion of the DPH rules in the official commentaries to Protocols I and II invokes “hostile act” language, and thereby offers a tempting

analogy.<sup>198</sup> The *ad bellum* gloss of the SROE with its broad notions of anticipatory self-defense adds considerably to this temptation.<sup>199</sup> For units operating under NATO ISAF ROE, non-imminent hostile acts or demonstrations of hostile intent are legitimate basis for conducting offensive attacks.<sup>200</sup>

Applying the rule of DPH in Iraq and Afghanistan has proved exceptionally difficult. While debates continue without progress over the exact contours and meaning of the rule, servicemembers are forced to confront enemy belligerents and hostile civilians on a daily basis. The lack of clear operational guidance on the DPH rule has put intense pressure on the only other use-of-force authority available to servicemembers when interacting with presumptive civilians—self-defense. This pressure has had the negative effect of broadening the concept of self-defense to meet the realities on the ground, in effect converting a limited peacetime use-of-force authority into a quasi-offensive targeting regime. While the practical effect of this conflation may be *de minimis* in combat operations where the LOAC would justify the vast majority of engagements, the potential for this overbroad interpretation and application of self-defense authorities to bleed over to non-combat operations is all too real, and calls for a recalibration of the use of force construct in the SROE.

#### V. Toward a New Use-of-Force Construct for the SROE

As demonstrated throughout this paper, anchoring SROE individual and unit-self defense authorities to the *jus ad bellum*, when coupled with the pressures of operating for over a decade in a COIN environment, has led to a distortion of those authorities to the point of misalignment with governing domestic and international legal standards. Further, the concepts of hostile act and hostile intent have evolved into DPH-related

offensive targeting terms no longer suitable as ROE guidance for the legitimate exercise of self-defense.

To right this ship, a substantial revision of the SROE self-defense construct, at least with respect to individual and unit self-defense, is needed. As ROE are the sovereign's tool for regulating how and under what circumstances its agents use force on its behalf, any revisions must be grounded in and reflect the restraints and constraints imposed on the sovereign by law, not the rights of individual servicemembers.

That being said, providing self-defense authorities to commanders and individual servicemembers will nearly always be necessary for force protection, and additional use-of-force authorities short of status-based rules may also be legally appropriate and necessary for mission accomplishment. As the circumstances of each mission will vary widely, these authorities should be tailored and scaled to ensure they are consonant not only with law, but with the political and strategic imperatives governing each particular operation.

#### Individual and Unit Self Defense—Getting Back to the Roots.

There is no question that the basic right of individuals to use deadly force to counter immediate threats of death or grievous bodily harm is an ancient and universal principal recognized in the domestic law of most all nations.<sup>201</sup> As emphasized throughout this paper, however, servicemembers “and civilians are not similarly situated: [servicemembers] act with state authority, they are often not permitted to retreat, and they are trained and expected to use force.”<sup>202</sup> Servicemembers' status as state actors exercising the most coercive power the state can bring to bear has a profound impact on how the core defensive-force principles of necessity, proportionality,

and imminence scope their public authority to use force, even in self-defense.<sup>203</sup> As one commentator noted with respect to law enforcement officers:

[These differences] reveal the deep dual structure of policing. Police officers use force as an authorized form of state coercion, but they do so in tense and often emotionally charged interpersonal encounters. An officer using force to arrest a subject is neither entirely a neutral actor, detached and disinterested, charged with carrying out the will of the state, nor entirely an individual acting in the heat of the moment, vulnerable and in harm's way, perhaps vengeful and afraid. Strangely but inevitably, he is both.<sup>204</sup>

The same holds true for servicemembers, taking into account the exponentially higher and uncertain threat environments they typically operate in, as well as the greater capability and capacity armed forces have to employ coordinated and overwhelming violence against a threat.

Like police, this “combination of state authority and human agency” distinguishes servicemembers’ uses of force “from other forms of state coercion and from other forms of justified force by individuals.”<sup>205</sup> When state actors use force for immediate self-protection, they do so “as part of the exercise of [their] official authority.”<sup>206</sup> Thus, while universally accepted standards of self-defense are useful to understanding the law’s tolerance of self-help uses of force generally, it is the public authority justification more broadly, interpreted through the lens of domestic and human rights law governing the use of force by state actors, which should form the basis of formulating defensive use of force rules for the military.

A public authority analysis starts with identifying whether the state can point to an interest important enough to justify protecting or advancing it through the delegation of deadly force authority to its agents. In the case of individual and unit self-defense, the interest is clear. Protection generally, and force protection specifically, are considered

military functions essential to preserving the force's ability to fight and secure the Nation's vital interests.<sup>207</sup> As noted earlier, IHRL recognizes that the use of force by a state actor to defend him or herself is a legitimate state aim, as does U.S. domestic law.<sup>208</sup> The inclusion of variants of self-defense authorities in human rights documents and the ROEs of a growing number of states and international organizations is solid evidence that public authority self-defense is considered among the "general principles of the law recognized by civilized nations" and thus part of international law.<sup>209</sup>

The next step is to identify the permissible contours of public authority individual and unit-self defense. Again, domestic constitutional law and IHRL provide sufficient guideposts for drafting legally sound and tactically coherent self-defense ROE.

The principles of absolute or strict necessity, proportionality, and the stricter notion of imminence reflected in both the public authority justification and IHRL norms should form the basis for individual and unit-self defense rules. At least with respect to law enforcement officials, the generally accepted IHRL framework for the use of defensive deadly force is reflected in the United Nation's *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life . . . and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.<sup>210</sup>

The Department of Justice's deadly force policy, grounded in the Supreme Court's Fourth Amendment seizure cases, is nearly identical: "Law enforcement officers . . . may use deadly force only when necessary, that is, when the officer has a reasonable

belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.”<sup>211</sup>

Offered more for illustration than recommendation, the following could serve as a baseline rule of individual self-defense, which could be built on and adjusted to expand the scope of protective authority consistent with the threat environment and mission-accomplishment considerations: *Individual Self-Defense and Defense of Others – You are authorized to use force, up to and including deadly force, when strictly necessary to defend yourself or members of your unit [or specify others] in the immediate vicinity against a violent act or imminent threat of a violent act likely to cause death or grievous bodily harm. Use no more force than necessary to decisively counter the act or threat of violence. In all cases, deadly force should be used only as a matter of last resort.*

With respect to unit self-defense, commanders should no longer be issued misleading guidance that they have an independent right and obligation to defend their units with deadly force without regard to broader mission imperatives or command imposed restraints. Like individual self-defense, unit self-defense is an authority conferred by and exercised at the discretion of the sovereign. In delegating the authority to exercise unit self-defense, the sovereign may, as a matter of policy, assign as a duty to the commander the defense of his or her unit, but is not legally bound to do so. Again, the following formulation is offered by way of example: *Unit Self-Defense – You are authorized [and have the duty] to use force, up to and including deadly force, when strictly necessary to defend your unit or other units in the vicinity against a violent act or imminent threat of a violent act likely to cause death or grievous bodily harm to any member of your unit or other units in the vicinity. Use no more force than*

*necessary to decisively counter the act or threat of violence. Deadly force should be used only as a matter of last resort.*

Adoption of these or a similarly limited construct would better align self-defense authorities with applicable law. Stripped of inappropriate and overbroad standing authority to consider “force used directly to preclude or impede the mission and/or duties of U.S. forces”<sup>212</sup> as legally sufficient to justify the use of deadly force in all circumstances, as well as legally misleading terms such as “inherent right and obligation,” would help restore the line between offensive targeting and IHRL conduct-based uses of force. Aligning self-defense authorities with public authority justification principles would also reduce servicemembers’ exposure to potential criminal jeopardy for their uses of force. Albeit somewhat more exacting, the standards align closely with common self-defense principles.

Lastly, while these revamped standards could be re-issued as standing authority in the SROE, given the VUCA environment in which the armed forces are employed, moving these authorities to the mission accomplishment supplementals would allow for greater tailoring of the ROE to the threat and mission environment.

### Beyond Self-Defense

Military forces are frequently employed in uniquely hostile and dangerous environments short of armed conflict to further state objectives distinct from law enforcement, such as peacekeeping, counter-piracy, hostage rescue and non-combatant evacuation operations (NEO) to name a few. Each involves the pursuit of unique state interests and implicates distinct threats and challenges. As such, “[w]hile the standards of human rights law remain the same even in situations approaching armed conflict, they have to be applied in ways that are realistic in the context.”<sup>213</sup> And

while the principles of necessity and proportionality are never lifted, they “must allow for considerable flexibility in interpretation in order to accommodate the specificities of each operational context.”<sup>214</sup>

Even in the context of traditional policing, domestic U.S. law and IHRL both recognize the legitimacy of the state conferring public authority on its agents to use force beyond situations of immediate self-protection. Law enforcement agents have much broader use-of-force authority than the narrow right of individual citizens to act in self-defense. Law enforcement officers are generally permitted to use deadly force when strictly necessary “to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape.”<sup>215</sup> The law recognizes that, subject to the principles of strict necessity, proportionality, and precaution, the use of force under these circumstances is required for the state to further its legitimate interest in maintaining law and order. And while the IHRL conversation usually centers on these narrow policing authorities, the law is not so rigid as to exclude other state interests as equally legitimate such that the state may authorize its agents to defend them with lethal force when strictly necessary.

Consider, for example, the UN’s view on the need to authorize UN peacekeepers to use force to defend not only themselves, but the mandates they are enforcing. The UN, through the Department of Peacekeeping Operations (DPKO),<sup>216</sup> has developed model ROE for the peacekeeping missions it oversees, recognizing that “[i]n the volatile and potentially dangerous environments into which contemporary peacekeeping operations are often deployed . . . ROE . . . should be sufficiently robust to ensure that

a United Nations peacekeeping operation retains its credibility and freedom of action to implement its mandate.”<sup>217</sup> The UN’s model ROE clearly contemplate use of force authority beyond self-defense, that is, for mission accomplishment.<sup>218</sup>

But use of force for mission accomplishment is not an open-ended authority as it currently exists in the SROE. It is narrowly tailored to the specific mission the UN peacekeepers are to perform under the relevant mandate. So, for example, the ROE for the UN Stabilization Mission in Haiti (MINUSTAH) authorize the use of force beyond self-defense, but only for a specific list of purposes “consistent with the relevant provisions of Security Council resolution 1542” which established the mission.<sup>219</sup> This authority includes the defense of UN facilities, installations and equipment, “to ensure security and freedom of movement of its personnel . . . .”<sup>220</sup>

Of course the authority to use force does not automatically equate to the authority to use lethal force. As we have seen, outside of situations of armed conflict, IHRL typically sees no room for state actors using lethal force except when absolutely necessary to protect life, and even then only when used as a matter of last resort. Whether a state could ever lawfully employ lethal force for the purpose of protecting vital interests other than lives is highly questionable. What is clear from the foregoing, however, is that providing U.S. servicemembers with standing authority to consider any efforts to impede U.S. forces from accomplishing un-specified missions as sufficient to trigger the use of lethal force is beyond legally suspect. Any ROE measures authorizing the use of force beyond immediate individual and unit self-defense should only be issued based on a thorough determination that force is necessary to achieve a legitimate state interest, and should always be narrowly tailored to accomplishing those

defined ends. As such, ROE authorizing the use of force for mission accomplishment should be removed to Enclosure I of the SROE as mission-accomplishment serials.

### Conclusion

Whenever the Nation deploys its servicemembers into harm's way, it has an unquestionable moral obligation to arm them, physically and legally, with the best means available to allow them to accomplish their mission and return home safely and with honor. At the same time, the importance of properly regulating the force US servicemembers use on behalf of the Nation cannot be overstated. It is one of the most challenging but strategically critical aspects of modern military operations. The past ten-plus years of operations in Iraq and Afghanistan have shown time and again the negative strategic impact that results from poorly calibrated uses of force. Commanders at every echelon must continually balance the need to achieve strategic, operational, and tactical objectives against the risk to both innocent civilians and US forces inherent in the conduct of military operations, especially in hostile environments.

Legally sound ROE are the command and control foundation for ensuring the appropriate and legitimate employment of lethal combat power across the spectrum of peace and war. As such, it is imperative that ROE are firmly grounded in the normative frameworks applicable to the use of force in any given military operation. The intense complexities and pressures of sustained COIN operations against asymmetric, unprincipled enemies have exposed significant flaws in the standing self-defense construct of the SROE, the cornerstone of the military's strategic use-of-force control structure. As the US military continues to withdraw forces from Afghanistan and prepares to bring active combat operations to an end, it is imperative that it draw from

lessons learned and seize the opportunity of this strategic inflection point to critically review and amend the SROE's use-of-force framework.

This paper has identified the conceptual shortcomings of the SROE's use-of-force rules—specifically the flawed legal premises underlying the standing rules of unit and individual self-defense. The long-held orthodoxy that based these rules on inapplicable *jus ad bellum* principles has contributed directly to their misappropriation as an alternative basis for the offensive targeting of civilians directly participating in hostilities. This distortion in conceptualization of the law of individual and unit-self defense must be corrected to ensure the US meets its obligations under domestic and international law, as well as to provide greater clarity and operational flexibility in the future when our forces will inevitably confront the problem of enemies who deliberately violate the fundamental LOAC rule of distinction.

The starting point for this necessary reframing of the SROE self-defense rules is the recognition that servicemembers act not as independent citizens, but as state actors—members of the unique collective body of the armed forces representing the US in the international sphere and subject always to the legal regimes regulating the means, methods, and circumstances in which it uses coercive force against individual human beings. That is, the international legal prohibition against arbitrary killings.

Analyzing the use-of-force rules through the alternative framework of the public authority justification, the paper has offered recommended revisions to the SROE self-defense rules that would better align individual and unit-self defense with accepted domestic and international law standards. While these recommendations narrow the scope of self-defense below the national level, they also call for inclusion of appropriate

supplemental ROE and guidance on the concept of DPH in order to provide commanders with a more legally precise and operational flexible authority for targeting hostile civilians in the context of armed conflicts. To allow for the necessary tailoring of all tactical and operational use-of-force authorities, the paper further recommends that these rules, to include individual and unit-self defense rules, be moved from the standing authorities in Enclosure A of the SROE to the supplemental measures in Enclosure I.

How forces respond to anticipated and unanticipated threats, and how they employ force to achieve their assigned missions is primarily a function of training and discipline. But training can only be as effective as the standards on which it is based. Legally suspect standards carry the inexorable risk of causing legally suspect actions that inevitably cause strategic damage. A recalibration and framing of the SROE use-of-force construct will better serve to avoid these risks and provide commanders with legally sound tools to better exercise mission command of their forces on behalf of the Nation.

#### Endnotes

<sup>1</sup> Marcus Tullius Cicero, “The Speech of M.T. Cicero In Defense of Titus Annius Milo,” in *3 Orations of Marcus Tullius Cicero*, trans. C.D. Yonge (London: Bell & Sons, 1913), 394.

<sup>2</sup> Throughout this paper the term “servicemember” is used to refer to members of the armed forces of the United States—the Army, Navy, Air Force, Marine Corps and the Coast Guard when operating as part of the Navy. See 10 U.S.C. § 101(a)(5)(2012).

<sup>3</sup> The Judge Advocate General’s Legal Center and School (TJAGLCS), International and Operational Law Department (IOLD), *Operational Law Handbook*, (Charlottesville, VA: The Judge Advocate General’s Legal Center and School, 2013), 75.

<sup>4</sup> U.S. Joint Chiefs of Staff, *Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces (SROE/SRUF)*, CJCSI 3121.01B, (Washington, DC: U.S. Joint Chiefs of Staff, June 13, 2005). CJCSI 3121.01B is classified Secret. The unclassified portions pertaining

to the standing self-defense authorities are reprinted in Chapter 5 of the *Operational Law Handbook*.

<sup>5</sup> As set forth in the SROE, certain unit commanders may be delegated the authority to exercise national self-defense. U.S. Joint Chief of Staff, *Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces (SROE/SRUF)*, CJCSI 3121.01B, A-3. Under certain circumstances, threatened or actual uses of force by foreign forces or non-state actors may rise to the level of a threatened attack on the United States, giving rise to the nation's inherent right of anticipatory self-defense. As defined in the SROE, unit and individual self-defense are distinct from, and operate at a level below national self-defense. *Ibid.* This paper focuses only on the law and authorities relevant to the use of force below the level of national self defense. When a unit commander is delegated the authority to take action in national self-defense, *ad bellum* principles are relevant.

<sup>6</sup> There is no question that the basic right of individuals to act in self-defense is an ancient and universal principle recognized in the domestic law of most all nations. See Schlomit Wallerstein, "Justifying the Right of Self-Defense: A Theory of Forced Consequences," *Virginia Law Review* 91, no. 4 (June 2005): 999 ("the right to self-defense is recognized in all jurisdictions"). The point of this paper is not to challenge that proposition, nor to wade into the debate over the "natural law" nature of the right. It is the position of this paper, however, that servicemembers executing military missions act not in a personal, but in a public capacity; a determinative distinction when assessing the use-of-force authority the state may confer on them as agents of the state.

<sup>7</sup> For example, the infamous Mai Lai massacre and subsequent cover up are widely recognized as significant contributing factors to the loss of public support for the Vietnam War. See, e.g., *History*, "Mai Lai Massacre," <http://www.history.com/topics/my-lai-massacre> (accessed March 13, 2014); Douglas Borer, "Why A Winning Strategy Matters: The Impact of Losing In Vietnam and Afghanistan," in *U.S. Army War College Guide to National Security Policy and Strategy*, ed. J. Boone Bartholomees, Jr. (Carlisle, PA: U.S. Army War College, 2004), 134-135. For the facts surrounding the Mai Lai massacre, see *U.S. v. Calley*, 48 C.M.R. 19 (CMA 1973).

<sup>8</sup> Such as in the case of the devastating car-bomb attack on the U.S. Marine compound at the Beirut International Airport on October 23, 1983, that killed 241 U.S. Marines. See Department of Defense Commission on Beirut International Airport Terrorist Act, *Report of the DoD Commission on Beirut International Airport Terrorist Act*, (Washington, DC: Department of Defense, October 23, 1983), 47-51, <https://www.fas.org/irp/threat/beirut-1983.pdf> (accessed March 14, 2014)(addressing the ROE and concluding that the mission statement, the original ROE, and the implementation in May 1983 of dual "Blue Card" - "White Card" ROE contributed to a mind-set that detracted from the readiness of the [United States contingent of the Multinational Force] to respond to the terrorist threat which materialized on 23 October 1983.").

<sup>9</sup> Major Mark S. Martins, "Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering," in Department of the Army, *Military Law Review*, Army Pamphlet 27-100-143 (Washington, DC: U.S. Department of the Army, Winter, 1994), 34.

<sup>10</sup> Center for Law and Military Operations (CLAMO), *Rules of Engagement (ROE) Handbook for Judge Advocates* (Charlottesville, VA: The Judge Advocate General's School, 2000), 1-1.

<sup>11</sup> Dick Camp, *Operation Phantom Fury: The Assault and Capture of Fallujah, Iraq* (Minneapolis, MN: Zenith Press, 2009), 149-152.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid., 150-151.

<sup>14</sup> Ibid., 151. See also, Colin H. Kahl, "How We Fight," *Foreign Affairs*, 85, No. 6 (November/December 2006): 94, in ProQuest (accessed March 27, 2014) ("[T]he [M]arines engaged in a series of ferocious close-quarters battles with scores of insurgents thoroughly mixed in with the civilian population."). Despite these challenges, all indications are that the Marines went to great lengths and exercised extreme restraint in order to minimize civilian casualties. Kahl, "How We Fight," 94.

<sup>15</sup> Colonel Scott Halstead, interview by author (March 25, 2014). Colonel Halstead, a career Army Infantry officer, served multiple tours in Iraq and Afghanistan as a Battalion S3 (Operations Officer) and Brigade Deputy Commander. During his deployments, he was directly involved in approximately 650 targeting decisions applying both US and ISAF ROE at the brigade-level and below. See also, "Insurgents Setting IED," August 10, 2009, CNN, streaming video, 3:26, <http://www.cnn.com/video/?/video/world/2009/08/10/von.afghan.insurgent.usdod&ieref=videosearch> (accessed March 21, 2014)(showing helicopter engaging individuals digging a hole in the road in Afghanistan based on hostile intent).

<sup>16</sup> The 421 to 424 series of ISAF ROE, based on NATO MC 362/1, authorize the deliberate targeting of persons or targets demonstrating hostile intent or acts that *do not* constitute an imminent attack. MC 362/1 defines imminent as "manifest, instant, and overwhelming." North Atlantic Treaty Organization, *NATO Rules of Engagement*, NATO MC 362/1, (2003); North Atlantic Treaty Organization (NATO), *NATO Legal Deskbook*, 2nd ed. (Brussels, Belgium: NATO, 2010), 256.

<sup>17</sup> As one Marine judge advocate described, rather than seek authority from higher headquarters to strike targets under the 421 series ROE, units frequently justified attacks citing a robust interpretation of hostile act/hostile intent with an expanded definition of imminence in order to strike targets. Interview with confidential source, February 28, 2014 (This officer requested the author not cite him by name).

<sup>18</sup> Positive identification (PID) is defined as a reasonable certainty that the proposed target is a legitimate military target. See CFLCC ROE Card, reprinted in TJAGLCS, IOLD, *Operational Law Handbook*, 103. PID developed as a means of applying the LOAC targeting rule of distinction. See Commander Albert S. Janin, JAGC, USN, "Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage," in Department of the Army, *The Army Lawyer*, Army Pamphlet 27-50-410 (Washington, DC: U.S. Department of the Army, July, 2007), 91 ("Positive identification reiterates the law of war obligation to discriminate between combatants and non-combatants.").

<sup>19</sup> Major Eric D. Montalvo, "When Did Imminent Stop Meaning Immediate?: *Jus In Bello* Hostile Intent, Imminence, and Self-Defense in Counterinsurgency," in Department of the Army, *The Army Lawyer*, Army Pamphlet 27-50-483 (Washington, DC: U.S. Department of the Army, August, 2013), 25.

<sup>20</sup> Ibid., 27, 33 (describing targeting engagements in Afghanistan being based on physical characteristics constituting PID of hostile intent).

<sup>21</sup> Major Eric C. Husby, "A Balancing Act: In Pursuit of Proportionality in Self-Defense for On-Scene Commanders," Department of the Army, *The Army Lawyer*, Army Pamphlet 27-50-468 (Washington, DC: U.S. Department of the Army, May, 2012), 11.

<sup>22</sup> Ibid., 11.

<sup>23</sup> See Janin, "Engaging Civilian-Belligerents," 86-93 (discussing the use of the SROE self-defense authorities as the basis for targeting civilians directly participating in hostilities in Iraq and Afghanistan).

<sup>24</sup> Husby, "A Balancing Act," 10.

<sup>25</sup> See also, International & Operational Law Division, "The Law of Armed Conflict: The Rules That Govern the Conduct of Soldiers in Military Operations," briefing slides with scripted commentary, Charlottesville, VA, The Judge Advocate General's Legal Center and School, October 2, 2013, slides 11-12, <https://jagu.army.mil/bbcswebdav/institution/JAGU%20Institution/webpages/STPs/STP.html>. (mischaracterizing civilians directly participating in hostilities as "conduct-based combatants.").

<sup>26</sup> For example, soldiers from the 82nd Airborne Division deployed to Haiti as part of Operation Unified Response, the Department of Defense humanitarian assistance, disaster relief operation in 2010, arrived with an overly aggressive mindset regarding self-defense and ROE based on their recent combat deployments to Afghanistan. Captain Mark E. Gardner, Center for Law and Military Operations, e-mail message to author, March 21, 2014.

<sup>27</sup> See Major John J. Merriam, "Natural Law and Self-Defense," in Department of the Army, *Military Law Review*, Army Pamphlet 27-100-206 (Washington, DC: U.S. Department of the Army, Winter, 2010), 86-87; Montalvo, "When Did Imminent Stop Meaning Immediate?," 31-33.

<sup>28</sup> Colonel W. Hays Parks, U.S. Marine Corps Reserve, "Righting the Rules of Engagement," *U.S. Naval Institute Proceedings* 115, no. 5 (May 1989): 84. Rules of engagement are defined as rules, either in the form of guidance or directives issued by competent authority that delineate the circumstances and limitations under which military forces may initiate, and/or continue using force against other forces, individuals, or objects encountered. U.S. Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02 (Washington, DC: U.S. Joint Chiefs of Staff, November 8, 2010, as amended through August 15, 2012), 270.

<sup>29</sup> Captain Ashley Roach, "Rules of Engagement," *Naval War College Review*, 36, no. 1 (January-February 1983): 49.

<sup>30</sup> ROE as a term and a recognized concept began to emerge in the 1950s in the form of special instructions issued to govern U.S. air operations. In 1954, the Joint Chiefs of Staff (JCS) issued "Intercept and Engagement Instructions" to the Air Force, and in 1958 officially adopted their sobriquet—rules of engagement. During the Korean War, "General Douglas McArthur received orders from Washington that American bomber aircraft were neither to enter Chinese airspace nor destroy the Shuiho Dam on the North Korean side of the Yalu River"—orders that

were clearly aimed at reducing the risk of direct Chinese intervention in the conflict and possible nuclear escalation. McArthur's failure to obey this direction contributed to his eventual relief from command. See Martins, "Rules of Engagement for Land Forces," 35; Trevor Findlay, *The Use of Force in UN Peace Operations* (Stockholm: Stockholm International Peace Research Institute, 2002), 14, n.26; Gary D. Solis, *The Law of Armed Conflict* (New York, NY: Cambridge University Press, 2010) 492.

<sup>31</sup> Some ROE were issued to ground forces during Vietnam, but were generally considered unhelpful. See Solis, *The Law of Armed Conflict*, 492-93.

<sup>32</sup> Colonel W. Hays Parks, U.S. Marine Corps Reserve, "Righting the Rules of Engagement," *U.S. Naval Institute Proceedings* 115, no. 5 (May 1989): 83-84. Colonel (Retired) Parks served as the Law of War Advisor to The Judge Advocate General of the Army from 1978 to 2002. See also, Martins, "Rules of Engagement for Land Forces," 42. These nascent ROE were the result of a study directed by Admiral Thomas B. Hayward in 1979 intended not only to achieve greater standardization, but to also "bring together in a single document [the] 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." Of Engagement, "Righting the Rules," 83-84.

<sup>33</sup> Colonel W. Hays Parks, U.S. Marine Corps Reserve (Retired), "Deadly Force is Authorized," *U.S. Naval Institute Proceedings*, 127, no. 1 (January 2001): 32.

<sup>34</sup> Geoffrey S. Corn & Lieutenant Colonel Gary P. Corn, "The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens," *Texas International Law Journal* 47, no. 2 (Spring 2012): 355. See also The Judge Advocate General's School (TJAGS), International & Operational Law Department (IOLD), "International Law Note, 'Land Forces' Rules of Engagement Symposium: The CLAMO Revises the Peacetime Rules of Engagement," in U.S. Department of the Army, *The Army Lawyer*, Army Pamphlet 27-50-253 (Washington, DC: U.S. Department of the Army, December 1993), 48-49.

<sup>35</sup> Solis, *The Law of Armed Conflict*, 492; Parks, "Deadly Force Is Authorized," 33 (noting that the SROE self-defense rules are based on Article 51 of the UN Charter).

<sup>36</sup> TJAGS, IOLD, "'Land Forces' Rules of Engagement Symposium," 48; Parks, "Deadly Force Is Authorized," 33. On May 17, 1987, thirty-seven sailors were killed when an Iraqi Mirage jet fired two Exocet missiles at the USS *Stark* erroneously believing it was a commercial vessel bound for an Iranian port. The *Stark* was patrolling in the Persian Gulf for what have been described as ambiguous purposes during the "Tanker War" phase of the Iran-Iraq War. Stephen Andrew Kelley, *Better Lucky Than Good: Operation Earnest Will as Gunboat Diplomacy*, Thesis, (Monterey, CA: Naval Postgraduate School, June, 2007), 35-42, available at [www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA470423](http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA470423). The official investigation into the *Stark* incident deemed the existing rules of engagement (ROE) to have been sufficient "to enable *Stark* to properly warn the Iraqi aircraft" and "to defend herself against hostile intent without absorbing the first hit." *Ibid.* at 41 (citing Rear Admiral Grant Sharp, *Investigation Report: Formal Investigation Into the Circumstances Surrounding the Attack on USS Stark (FFG-31) on 17 May 1987*, 32 (Washington: Department of Defense, 1987)). However, not all agreed, evidenced by subsequent modifications granting more robust self-defense authorities. *Ibid.* See also TJAGS, IOLD, "'Land Forces' Rules of Engagement Symposium," 48.

The attack on the *Stark* also contributed to the initiation of Operation Earnest Will—the U.S. protection of reflagged Kuwaiti Tankers, and the more direct U.S. involvement that eventually led to the *Vincennes* incident, another tragic event on the opposite end of the ROE self-defense spectrum. On July 3, 1988, the U.S.S. *Vincennes*, also on duty in the Persian Gulf, erroneously identified an Iranian commercial airliner, Iran Air Flight 655, as an inbound hostile aircraft and shot it down, killing 290 civilians. Kelley, *Better Lucky Than Good*, 81; TJAGS, IOLD, “Land Forces’ Rules of Engagement Symposium,” 48.

<sup>37</sup> TJAGS, IOLD, “Land Forces’ Rules of Engagement Symposium,” 48.

<sup>38</sup> To address the deficiencies in the 1988 Peacetime ROE, the U.S. Army Deputy Chief of Staff for Operations tasked a group of eighteen senior line officers and military lawyers to develop recommendations for the JCS on how to improve the land forces portion of the PROE. The group’s recommendations were far more comprehensive than the original tasking called for, urging needed revisions to the entire document to reflect its applicability to the full spectrum of joint operations. *Ibid.*

<sup>39</sup> Parks, “Deadly Force Is Authorized,” 33.

<sup>40</sup> See TJAGLCS, IOLD, *Operational Law Handbook*, 74. The current version of the SROE is contained in the 2005 SROE/SRUF. While assigned to the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff, the author served as a principal action officer for the pending draft revision of CJCSI 3121.01B.

<sup>41</sup> U.S. Joint Chiefs of Staff, Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces (SROE/SRUF), CJCSI 3121.01B, A-3.

<sup>42</sup> *Ibid.* The actual authorizations and guidance to unit commanders is classified.

<sup>43</sup> *Ibid.*, A-2. Previous versions of the SROE addressed each level of self-defense separately. For example, the 2000 version provides:

*National Self-Defense.* Defense of the United States, U.S. forces, and in certain circumstances, U.S. persons and their property, and/or U.S. commercial assets from a hostile act or demonstration of hostile intent.

*Unit Self-Defense.* The act of defending a particular U.S. force element, including individual personnel thereof, and other U.S. forces in the vicinity, against a hostile act or demonstrated hostile intent.

*Individual Self-Defense.* The inherent right to use all necessary means available and to take all appropriate actions to defend oneself and US forces in one’s vicinity from a hostile act or demonstrated hostile intent is a unit of self-defense. Commanders have the obligation to ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense.

U.S. Joint Chiefs of Staff, *Standing Rules of Engagement for US Forces*, CJCSI 3121.01A, (Washington, DC: U.S. Joint Chiefs of Staff, January 15, 2000), A-4, reproduced in CLAMO, *ROE Handbook*, App. A.

<sup>44</sup> U.S. Joint Chiefs of Staff, *Standing Rules of Engagement*, A-3.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.* Defining “force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital [U.S. Government] property” as a *per se* hostile act also risks forces using force in excess of domestic and international legal authority. See Lieutenant Commander Dale Stephens, “Rules of Engagement and the Concept of Unit Self Defense,” *Naval Law Review*, 45, (1998): 142.

<sup>47</sup> U.S. Joint Chiefs of Staff, *Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces (SROE/SRUF)*, CJCSI 3121.01B, A-3. (“The threat of imminent use of force against the United States, U.S. forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG property.”).

<sup>48</sup> U.S. Joint Chiefs of Staff, *Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces (SROE/SRUF)*, CJCSI 3121.01B, A-3 (“Necessity. Exists when a hostile act occurs or when a force demonstrates hostile intent.”).

<sup>49</sup> As defined in the Worldwide PROE, hostile intent referred only to “the threat of imminent use of force by a foreign force against the United States or U.S. forces.” The definition expanded slightly in the 1986 PROE to account for “terrorist unit(s)/organization[s]” as well as the national right to protect citizens and their property. In 2000, the definition expanded further to include “the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG property.” See Montalvo, “When Did Imminent Stop Meaning Immediate?,” 35 (Appendix listing the definitions of hostile intent from 1981 to present).

<sup>50</sup> UN Charter, arts. 2(4) & 51. Article 2(4) provides in pertinent part: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . .” Article 51 provides: “Nothing in the present Chapter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the UN until the Security Council has taken measures necessary to maintain international peace and security . . . .” The U.S. considers “use of force” and “armed attack” to be synonymous. Remarks of Harold Hongju Koh to the USCYBERCOM Inter-Agency Legal Conference, (September 18, 2012). <http://www.state.gov/s//releases/remarks/197924.htm> Discuss anticipatory self-defense. Further, the US considers the inclusion of the term “inherent” in Article 51 as incorporating into the Charter the customary law right of national self-defense, which includes the right of anticipatory self-defense. See TJAGLCS, IOLD, *Operational Law Handbook*, 5.

<sup>51</sup> This view is encapsulated in noted international law scholar Yoram Dinstein’s view that “from the standpoint of international law, all self-defence is national self-defence.” Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge, UK: Cambridge University Press, 2005), 220. Thus, according to Dinstein, when military forces employ force at the tactical level in

response to a small-scale armed attack, what he terms an “on the spot reaction,” it is only quantitatively but not qualitatively different from a response by the entire military structure. *Ibid.* Hans Hosang, while acknowledging alternative theories, ultimately adopts a similar view. Hans Boddens Hosang, “Force Protection, Unit Self-Defence, and Extended Self-Defence,” in *The Handbook of the International Law of Military Operations*, ed. Terry D. Gill and Dieter Fleck (New York, NY: Oxford University Press, 2010), 420-422 (arguing that the “best view is that [the right of unit-self defense is an] expression of the right of national self-defence of the State . . .”). This mindset is evident in the evolution of the self-defense construct in the SROE. Parks, “Deadly Force Is Authorized,” 33, 35 (“The JCS SROE incorrectly ties all ROEs to Article 51 of the UN Charter.”).

<sup>52</sup> Roach, “Rules of Engagement,” 49 (“[T]he ROE do not address the right to protect the individual, the commanding officer, the unit commander and his command from attack or from the threat of imminent attack in situations of localized conflict, or in low-level situations that are not preliminary to prolonged engagement.”). See also Lieutenant Commander Guy R. Phillips, “Rules of Engagement: A Primer,” in Department of the Army, *The Army Lawyer*, Army Pamphlet 27-50-248, (Washington, DC: U.S. Department of the Army, July, 1993), 18-22 (Noting that the PROE, the predecessor to the SROE, did not address individual or small-unit self-defense, and equating the concepts of hostile act and hostile intent to the *ad bellum* norms in the UN Charter).

<sup>53</sup> Phillips, “Rules of Engagement: A Primer,” 19 (quoting Roach, “Rules of Engagement,” 49). Hence the admonition that “nothing in these rules is intended to limit the commander’s right of self-defense.” Roach, “Rules of Engagement,” 49.

<sup>54</sup> U.S. Joint Chiefs of Staff, *Standing Rules of Engagement for US Forces*, CJCSI 3121.01, (Washington, DC: U.S. Joint Chiefs of Staff, October 1, 1995), para. 5.a., reprinted in The Judge Advocate General’s School (TJAGS), International & Operational Law Department (IOLD), *Operational Law Handbook*, (Charlottesville, VA: 1996), 8-19; U.S. Joint Chiefs of Staff, *Standing Rules of Engagement for US Forces*, CJCSI 3121.01A, A-3.

<sup>55</sup> Parks, “Deadly Force Is Authorized,” 33 & n.2; CJCSI 3121, 8-17.

<sup>56</sup> *Ibid.*

<sup>57</sup> TJAGS, IOLD, *Operational Law Handbook*, 8-4.

<sup>58</sup> Parks, “Deadly Force,” 33, 35. See also, U.S. Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations*, Naval Warfare Publication 1-14M (Washington, DC: Department of the Navy, July, 2007), 4-4 to 4-6 (Describing the SROE and the right of self-defense as emanating from Article 51 of the U.N Charter); Lieutenant Colonel W.A. Stafford, “How to Keep Military Personnel From Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force,” in Department of the Army, *The Army Lawyer*, Army Pamphlet 27-50-336 (Washington, DC: U.S. Department of the Army, November, 2000), 1, 5 (identifying the UN Charter as the source of the self-defense rules in the SROE and the authorization to use force to respond to demonstrations of “hostile intent” as reflecting the CIL right of anticipatory self-defense).

<sup>59</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984 ICJ Rep. 392, June 27, 1986.

<sup>60</sup> Parks, "Deadly Force Is Authorized," 35 ("Nothing in the history of the Charter suggests it was intended to apply to the actions of individual service personnel . . .").

<sup>61</sup> Antonio Cassese, *International Criminal Law*, (New York, NY: Oxford University Press, 2<sup>nd</sup> ed., 2005), 223 ("Plainly, [individual self-defense] must not be confused with self-defence under public international law. The latter relates to conduct by States or State-like entities, whereas the former concerns actions by individuals against other individuals."). The Article 51 approach also fails to account for the UN conferring the authority to use force in self-defense on peacekeepers operating under UN, as opposed to national, command. Charles P. Trumbull IV, "The Basis of Unit Self-Defense and Implications for the Use of Force," *Duke Journal of Comparative & International Law*, 23, no. 1 (Fall, 2012): 129-30.

<sup>62</sup> Hannah Tonkin, "Defensive Force Under the Rome Statute," *Melbourne Journal of International Law*, 6, no. 1 (May, 2005): 89, <http://www.law.unimelb.edu.au/files/dmfile/download0b0f1.pdf>. Article 31(1)(c), which provides an affirmative defense of self-defense to alleged war crimes, reads, "The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph." Rome Statute of the International Criminal Court, UN Doc. A/CONF. (1998), 2187 U.N.T.S. 90 (entered into force July 1, 2002), art. 31.

<sup>63</sup> Trumbull, "The Basis of Unit Self-Defense," 127. In his article, Trumbull identifies a number of critical flaws to the *ad bellum* view of individual and small-unit self-defense. *Ibid.* 127-33.

<sup>64</sup> TJAGS, IOLD, *Operational Law Handbook* (1996), 8-4 ("The SROE make it abundantly clear that the right of self defense may not be derogated, i.e. the commander always maintains the right and obligation to defend his unit.").

<sup>65</sup> See Major David Bolgiano, et al., "Defining the Right of Self-Defense: Working Toward the Use of a Deadly Force Appendix to the Standing Rules of Engagement for the Department of Defense," *University of Baltimore Law Review*, 157, (Spring, 2002) 163-65, in Lexis-Nexis (March 18, 2014). See also TJAGLCS, IOLD, *Operational Law Handbook*, 75 ("Authority to use force in mission accomplishment may be limited in light of political, military, or legal concerns, but such limitations have NO impact on a commanders's right and obligation of self-defense."). A typical caveat written into ROE states, "Nothing in these rules limits your inherent right of self-defense." See Task Force Hawk ROE Card, reprinted in TJAGLCS, IOLD, *Operational Law Handbook*, 97.

<sup>66</sup> U.S. Joint Chiefs of Staff, *Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces (SROE/SRUF)*, CJCSI 3121.01B, A-2.

<sup>67</sup> Stephens, "Rules of Engagement and the Concept of Unit Self Defense," 126 ("While the right of unit self defense is fundamental to all international military legal codes, there has been little sustained assessment of its legal basis."). See also, Trumbull, "The Basis of Unit Self-Defense," 122.

<sup>68</sup> Trumbull, "The Basis of Unit Self-Defense," 133-34.

<sup>69</sup> Additionally, those who argue in favor of non-Article 51 based self-defense rights often point to the *Caroline* incident for support—the very same precedent cited in support of the right of anticipatory *national* self-defense. The *Caroline* incident involved an exchange of diplomatic letters between the United States and Great Britain regarding an attack by the latter against Canadian rebels inside the United States. In 1837, British troops set fire to a steamer, the *Caroline*, on the U.S. side of the Niagra River, alleging self-defense in that the *Caroline* had been used to transport Canadian rebels across the border to attack British forces. Then U.S. Secretary of State Daniel Webster filed a strong objection to the British action and justification, stating “[i]t will be for . . . [Her Majesty’s] Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation” and the action must not be “unreasonable or excessive, since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.” Elizabeth Wilmhurst, et al., *Principles of International Law on the Use of Force by States in Self-Defence*, (London, England: Chatham House, 2005), 7, n.12 (quoting letter of Daniel Webster), <http://www.chathamhouse.org/publications/papers/view/108106>. See also Martin A. Rogoff & Edward Collins, Jr., “The Caroline Incident and the Development of International Law,” *Brooklyn Journal of International Law*, 16, no. (1990): 493, in Westlaw (accessed March 30, 2014).

<sup>70</sup> See, IHL, *Rules of Engagement Handbook*, 3 (noting that not all countries consider unit self-defense to be an obligation).

<sup>71</sup> *Ibid.*

<sup>72</sup> Trumbull, “The Basis of Unit Self-Defense,” 128-29.

<sup>73</sup> Stephens, “Rules of Engagement and the Concept of Unit Self Defense,” 145-48 (arguing that human rights law prohibits states from limiting unit self-defense).

<sup>74</sup> U.S. Joint Chiefs of Staff, *Standing Rules of Engagement for US Forces*, CJCSI 3121.01A, A-4.

<sup>75</sup> U.S. Joint Chiefs of Staff, *Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces (SROE/SRUF)*, CJCSI 3121.01B, A-2. At least for those individuals assigned and acting as part of a unit. *Ibid.* Presumably, anyone not so assigned retains an independent right of self-defense.

<sup>76</sup> See, e.g., Stevens, “Rules of Engagement and the Concept of Unit Self-Defense,” 147-48.

<sup>77</sup> Bolgiano, et al., “Defining the Right of Self-Defense,” 1.

<sup>78</sup> Martins, “Deadly Force IS Authorized,” 14. Now Brigadier General Martins rejects the notion that servicemembers have an “unqualified and personal right” to fire at will, noting that “[s]oldiers in a platoon, more so than a policeman responding to a call with his partner in a patrol car, take action within a chain of command . . . [and] are required to follow orders.”

<sup>79</sup> *Ibid.*

<sup>80</sup> Montalvo, “When Did Imminent Stop Meaning Immediate?” 28.

<sup>81</sup> Merriam, “Natural Law and Self-Defense,” 77-78.

<sup>82</sup> U.S. Joint Chiefs of Staff, *Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces (SROE/SRUF)*, CJCSI 3121.01B, A-3. Contrast this SROE guidance with NATO’s, which defines imminence as meaning “that the need to defend is manifest, instant, and overwhelming.” North Atlantic Treaty Organization, *NATO Rules of Engagement*, para. 7.

<sup>83</sup> Montalvo, “When Did Imminent Stop Meaning Immediate?,” 29; Merriam, “Natural Law and Self-Defense,” 80. The core of the Bush Doctrine was the assertion that “[w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries . . . . The greater the threat, the greater the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.” George W. Bush, *The White House, National Security Strategy of the United States of America*, (Washington, DC: The White House, September 17, 2002), 15.

<sup>84</sup> Much has been written about the legitimacy of the Bush Doctrine, a matter beyond the scope of this paper. At a minimum, it marked a clear departure from the traditionally accepted understanding of imminence derived from the *Caroline* doctrine, that a threat needed to be “instant, overwhelming, leaving no choice of means, and no moment of deliberation,” which had previously guided U.S. self-defense policy. TJAGLCS, IOLD, *Operational Law Handbook*, 5-6. See also Wilmhurst, et al., *Principles of International Law on the Use of Force by States*, 7, n.12.; Rogoff & Collins, “The Caroline Incident and the Development of International Law,” 16.

<sup>85</sup> Merriam, *Natural Law and Self-Defense*, 44.

<sup>86</sup> Kenneth Watkin, “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflicts,” *The American Journal of International Law*, 98, no. 1 (January, 2004) 11-12, in JSTOR (accessed March, 03, 2014) (quoting Emmerich de Vattel, *The Law of Nations*, (1758), bk. III, ch. II, § 6 (Joseph Chitty ed., 1834)(Gaunt reprint 2001)).

<sup>87</sup> Geoffrey Corn & Chris Jenks, “Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts,” *University of Pennsylvania Journal of International Law*, 33, no. 2 (Winter, 2011), 333-334.

<sup>88</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 43, June 8, 1977, 1125 U.N.T.S. 3, <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>. An essential condition for being conferred the status of combatant and the accordant right to engage in hostilities is that the individual be a member of a force belonging to a state which is under a command responsible to that state for the conduct of its subordinates. *Ibid.*; Geneva Convention, Relative to the Treatment of Prisoners of War, art. 4, August 12, 1949, 75 U.N.T.S. 135. Otherwise, the state would have no means of ensuring its agents comply with the state’s obligations under the LOAC.

<sup>89</sup> *U.S. v. Bell*, 366 U.S. 393, 401 (1961)(citing *In re Grimley*, 137 U.S. 147, 151-52 (1890)).

<sup>90</sup> *Parker v. Levy*, 417 U.S. 733, 743-44 (1974)(citations omitted).

<sup>91</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law Study* (New York: Cambridge University Press and The International Committee of the Red Cross,

2005), 530-36 (Rule 149) (citing Regulations Concerning the Laws and Customs of War on Land, annexed to Hague Convention IV Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, art. 3; AP I, art. 91).

<sup>92</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/10 (New York: UN General Assembly, 2001), arts. 2, 4, [http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf).

<sup>93</sup> U.S. domestic law imposes analogous obligations and responsibility on the Federal government to ensure its agents do not engage in arbitrary or abusive conduct or otherwise violate citizens' rights. Those who do so "under color of law" are subject to prosecution, and expose themselves and the Federal government to civil liability. 18 U.S.C. § 242 (2012)(making it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States, to include acts done beyond the scope of the officials lawful authority if the acts are done while the official is purporting to act in the performance of his or her duties.); 28 U.S.C. § 2671, et seq. (2012)(Federal Tort Claims Act); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)(subjecting Federal agents to individual liability for violating constitutional rights).

<sup>94</sup> *U.S. v. Rockwood*, 52 M.J. 98, 108 (1999).

<sup>95</sup> Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflicts," *The American Journal of International Law*, 98, no. 1 (January, 2004), 11-12 (The power to "authorize its agents to use force is solidly entrenched in positive law terms in the state.").

<sup>96</sup> This premise is fundamental to the well-accepted principle that only combatants "have the right to participate in hostilities" and are thus accorded "combatant immunity" from criminal prosecution for killings or other violence committed in compliance with the LOAC. TJAGLCS, IOLD, *Operational Law Handbook*, 16.

<sup>97</sup> In general, the law of justifications is based on the common law "choice of evils" doctrine which holds that a legally recognized harm may be outweighed by the need to avoid an even greater harm or to further a greater societal interest. Paul H. Robinson, et al., *Criminal Law Defenses*, Vol. I, (St. Paul, MN: West Publishing Company, 1984 with supplementation through 2009), § 24, in Westlaw (March 25, 2014).

<sup>98</sup> Rollin M. Perkins & Ronald N. Boyce, *Criminal Law*, (St. Paul, MN: Foundation Press, 3<sup>rd</sup> ed 1982), 1093.

<sup>99</sup> Malcolm Thorburn, "Justifications, Powers, and Authority," *Yale Law Journal*, 117, no. 6, (April, 2008): 1104.

<sup>100</sup> Rome Statute of the International Criminal Court, art. 31(1)(c), Jul. 1, 2002, 2187 U.N.T.S. 90. Article 31(1)(c) provides the defense of self-defense within the context of war crimes, but by its terms and the broader terms of the Statute, a combatant who uses force to repel the unlawful use of force by a civilian directly participating in hostilities need not rely on self-defense as a justification, because he or she had the authority to target the civilian under the LOAC and so the case-in-chief would lack an essential element. Tonkin, "Defensive Force Under the Rome Statute," 93.

<sup>101</sup> Joint Service Committee on Military Justice, *Manual for Courts-Martial, United States*, (Washington, DC: Department of Defense, 2012), II-110 (Rule for Courts-Martial (RCM) 916(c)). Rule for Courts-Martial 916(c) states that a “death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.”

<sup>102</sup> Paul H. Robinson, et al., *Criminal Law Defenses*, Vol. II, (St. Paul, MN: West Publishing Company, 1984 with supplementation through 2009), § 141, in Westlaw (March 25, 2014).

<sup>103</sup> *Ibid.* See Rockwood, 52 M.J. at 112 (denying Army captain public authority defense in the absence of “legal authority—international or domestic, military or civil—that suggest[ed] he had a ‘duty’ to abandon his post in counterintelligence and strike out on his own to “inspect” the [Haitian] penitentiary.”).

<sup>104</sup> *Ibid.*

<sup>105</sup> Perkins & Boyce, *Criminal Law*, 1093.

<sup>106</sup> American Law Institute (ALI), *Model Penal Code*, (Philadelphia, PA: American Law Institute, 1981), § 3.03(1)(d), accessed in Westlaw (March 25, 2014).

<sup>107</sup> Watkin, “Controlling the Use of Force,” 15. TJAGLCS, IOLD, *Operational Law Handbook*, 16.

<sup>108</sup> *Manual for Courts-Martial*, II-110, RCM 916(c), Discussion.

<sup>109</sup> Wayne R. LaFave, *Substantive Criminal Law* (St. Paul, MN: West Publishing, 2nd ed., 2003), 136. See also, *State v. Gut*, 13 Minn. 341, 357 (1868)(“That it is legal to kill an alien enemy in the heat and exercise of war, is undeniable; but to kill such an enemy after he has laid down his arms, and especially when he is confined in prison, is murder.”). Self-defense may afford a separate justification, both as a public authority and a private right. This point of overlap between the interests of the state and the individual are addressed below.

<sup>110</sup> ALI, *Model Penal Code*, § 3.03(1)(a) & (d).

<sup>111</sup> *Manual for Courts-Martial*, II-110, RCM 916(c), Discussion.

<sup>112</sup> Robinson, *Criminal Law Defenses*, Vol. I, § 24.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> See, e.g., Rockwood, 52 M.J. at 112; National Commission on the Reform of Federal Criminal Law, *Final Report of the National Commission on Reform of Federal Criminal Law*, (Washington, DC: U.S. Government Printing Office, 1971), 48 (§ 607).

<sup>116</sup> Robinson, *Criminal Law Defenses*, Vol. II, § 141.

<sup>117</sup> Paul H. Robinson, “Criminal Law Defenses: A Systematic Analysis,” *Columbia Law Review*, 82, no. 2 (March, 1982): 215.

<sup>118</sup> Robinson, *Criminal Law Defenses*, Vol. I, § 24, n. 8. More benign examples typically cited are a bus driver or train conductor's authority to order rowdy individuals off of a bus or train. Robinson, *Criminal Law Defenses*, Vol. II, § 141.

<sup>119</sup> For servicemembers, the duty may arise from general delegations of authority or the law governing the armed forces generally, or it may arise from the issuance of a specific order by a superior. See Robinson, *Criminal Law Defenses*, Vol. II, § 148. In the case of the latter, the related defense of obedience to orders is implicated. *Ibid.* See also, R.C.M. 916(d).

<sup>120</sup> Thorburn, "Justifications, Powers, and Authority," 1107, 1121.

<sup>121</sup> *Ibid.*, 1105 ("[T]he scope of the justification available to the actor is defined quite precisely by the terms of her warrant.").

<sup>122</sup> See The Turkel Commission, *The Public Commission to Examine the Maritime Incident of 31 May 2010*, Part 1 (Jerusalem: The Public Commission to Examine the Maritime Incident of 31 May 2010, January, 2011), 242 (citing *McCann and others v. United Kingdom*, App. No. 18984/91, Eur. Ct. H.R. , Judgment (1995), 156).

<sup>123</sup> Douglas V. Mastriano, *Alvin York: A Biography of the Hero of the Argonne*, (Lexington: University Press of Kentucky, 2014), 104-107.

<sup>124</sup> *Ibid.*, 107-116.

<sup>125</sup> *Ibid.*, 25-27, 29, 34-35.

<sup>126</sup> TJAGLCS, IOLD, *Operational Law Handbook*, 2. The modern *jus ad bellum* provides only two bases for a state to lawfully resort to the use of force in its international relations: pursuant to a Security Council authorization under Chapter VII of the Charter, or in the legitimate exercise of national self-defense pursuant to Article 51. Like its distant relative, the right of individual self-defense and defense of others, this latter right is limited by the principles of necessity, timeliness, and proportionality. For a discussion of the *jus ad bellum* and the authority of states to resort to force, see *ibid.*, Chpt. 1. Although the scope and content of the *jus ad bellum* remains less than settled, it is not the focus of this paper.

<sup>127</sup> See The American Law Institute, *Restatement (Third) of Foreign Relations Law of the United States*, Vol. I, (St. Paul, MN: American Law Institute Publishers, 1987), 22 (§ 101) ("International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical."). See also *ibid.*, 72 (§ 201) (defining state in international law).

<sup>128</sup> *Ibid.*, 22 (§ 101).

<sup>129</sup> Cordula Droege, "The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict," *Israeli Law Review*, 40, No. 2 (December, 2007): 1.

<sup>130</sup> See René Provost, *International Human Rights and Humanitarian Law*, (New York: Cambridge University Press, 2002), 8; United Nations Human Rights, Office of the High

Commissioner for Human Rights

<http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>. (“International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights.”).

<sup>131</sup> Prosecutor v. Delalić, Appeals Judgment, No. IT-96-21-A, para. 149 (Feb. 20, 2001)(Čelebići case)(The LOAC and IHL frameworks “share a common ‘core’ of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted.”)

<sup>132</sup> Watkin, “Controlling the Use of Force,” 9. See also International Committee of the Red Cross, *Report, International Humanitarian Law and The Challenges of Contemporary Armed Conflicts* (Geneva: International Committee of the Red Cross, October, 2011), 14, <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> (“There is no doubt that [international humanitarian law] and human rights share the same aims, that is to protect the lives, health and dignity of persons.”).

<sup>133</sup> Watkin, “Controlling the Use of Force,” 10 (The normative structures “must also account for the taking of life so as to maintain social order.”).

<sup>134</sup> The right to life is set out in all major human rights treaties although the wording varies. The International Covenant on Civil and Political Rights and the European Convention on Human Rights use the phrase ‘the right to life’ while the American Convention on Human Rights refers to the right to respect for life.

<sup>135</sup> As discussed further below, what constitutes an unlawful use of force in the context of armed conflict is fundamentally different from what is tolerated outside the ambit of hostilities. What is important, however, is the recognition that in either situation, the authority states may confer on their agents to employ force on their behalf is not unfettered.

<sup>136</sup> Droege, “The Interplay Between International Humanitarian Law and International Human Rights Law,” 344; U.S. Department of the Army, *The Law of Land Warfare*, Field Manual 27-10 (Washington, DC: U.S. Department of the Army, July 18, 1956, with Change 1, July 15, 1977), para. 3.

<sup>137</sup> International Committee of the Red Cross (ICRC), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), 635 (discussing article 52 and the rule of military objective).

<sup>138</sup> Geoffrey Corn, “Mixing Apples and Hand Grenades, The Logical Limit of Applying Human Rights Norms to Armed Conflict,” *International Humanitarian Legal Studies*, 1 (2010): 74 (The LOAC accepts as legitimate the “application of deadly force as a measure of first resort against operational opponents during armed conflict.”).

<sup>139</sup> Droege, “The Interplay Between International Humanitarian Law and International Human Rights Law,” 344.

<sup>140</sup> Corn, “Mixing Apples and Hand Grenades,” 62.

<sup>141</sup> Ibid., 74. (“The most profound distinction between regulating government power in armed conflict versus peacetime exists in relation to the application of deadly force by government actors in both cases.”).

<sup>142</sup> TJAGLCS, *Operational Law Handbook*, Chpt. 5.

<sup>143</sup> Oona A. Hathaway, et al., “Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law,” *University of Minnesota Law Review*, 96, No. 6 (June, 2012): 1926.

<sup>144</sup> Christof Heyns, Special Rapporteur, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, United Nations General Assembly, 68<sup>th</sup> Session, UN Document A/68/382 (September 13, 2013), 8, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/473/63/PDF/N1347363.pdf?OpenElement> (accessed March 26, 2014).

<sup>145</sup> Watkin, “Controlling the Use of Force,” 2 (“[T]he normative frameworks for regulating life and death are often discussed in terms of two distinct spheres of activity, “armed conflict” and “peace.”). The *lex generalis, lex specialis* construct derives from the Roman principle *lex specialis derogate legi generali*, meaning an applicable specific rule displaces one of general application. Major Colin Cusack, “We’ve Talked the Talk, Time to Walk the Walk: Meeting International Human Rights Law Standards for U.S. Military Investigations,” in Department of the Army, *Military Law Review*, Army Pamphlet 217-100-217 (Washington, DC: U.S. Department of the Army, Fall 2013), 56 (citing Cordula Droege, “Elective Affinities? Human Rights and Humanitarian Law,” *International Review of the Red Cross*, 90, no. 871 (September, 2008): 522).

<sup>146</sup> Watkin, “Controlling the Use of Force,” 2.

<sup>147</sup> Corn, “Mixing Apples and Hand Grenades,” 62-63, 70 (“[A]s the nature of conflict moves down the spectrum from international to non-international, the potential need for human rights supplementation increases due to the reduced extent of LOAC regulation.”).

<sup>148</sup> The LOAC applies only to cases of declared war or armed conflict. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 2 and 3, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, arts. 2 and 3, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention, Relative to the Treatment of Prisoners of War, arts. 2 and 3, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 2 and 3, Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>149</sup> See, e.g., International Covenant on Civil and Political Rights (ICCPR), art. 6, Dec. 16, 1966, 999 U.N.T.S. 171. (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 75 U.N.T.S. 287 (Establishing the obligation to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the LOAC; to prosecute or extradite them; and to suppress “all (other) acts contrary to the Convention . . . other than grave breaches.”); ICRC, *Commentary on the Additional Protocols*, 594 (“In the opinion of the International Committee, [the requirement to suppress acts contrary to the Convention] covers

everything which can be done by a State to avoid acts contrary to the Convention being committed or repeated.”). Also, under the Geneva Conventions, states are explicitly required to “include the study [of the law of armed conflict] in their programmes of military . . . instruction, so that the principles thereof may become known to all their armed forces.” Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 47, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, art. 48, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention, Relative to the Treatment of Prisoners of War, art. 127, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 144, Aug. 12, 1949, 75 U.N.T.S. 287. See also Department of Defense, *DoD Law of War Program*, Directive 2311.01E, (Washington, DC: U.S. Department of Defense, May, 9, 2006, certified current as of Feb. 22, 2011), para. 5.7.2 (mandating the implementation of effective programs to prevent violations of the law of war, including law of war training and dissemination.).

<sup>150</sup> Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, (Brussels, Belgium: European Union, 2013), 34 (citing Art. 6(1) of the ICCPR). As Melzer correctly asserts: “National laws and doctrines, rules of engagement and other legislative or executive instruments authorizing the use of force in police, military, counter-terrorism or operations must strictly align with internationally recognized law enforcement standards except where such operations are directed against legitimate military targets in an armed conflict.” *Ibid.*

<sup>151</sup> See, e.g., International Committee of the Red Cross (ICRC), *Expert Meeting: The Use of Force in Armed Conflicts, Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (Gloria Gaggioli, ed., Geneva: ICRC 2013); TJAGLCS, IOLD, *Operational Law Handbook*, 46-47. The weight of authority favors a complementary approach to applying these two bodies of law during situations of armed conflict. The United States appears to have adopted the complementary approach, leaving the question of which international law rule will apply to a fact-specific determination. U.S. Department of State, United States Fourth Periodic Report to the United Nations Committee on Human Rights (Washington, DC: U.S. Department of State, December 30, 2011), para. 506-507, <http://www.state.gov/g/drl/rls/179781.htm> (accessed March 30, 2014).

<sup>152</sup> International Covenant on Civil and Political Rights, art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>153</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8, 1996), paras. 24-25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9, 2004), para. 106. It is also considered to be a general principle of international law and a rule of *jus cogens*. Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 24.

<sup>154</sup> See *Paquete Habana The Lola*, 175 U.S. 677 (1990); The American Law Institute, *Restatement (Third) of Foreign Relations Law of the United States*, Vol. I, § 111.

<sup>155</sup> Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 9. See Melzer, *Human Rights Implications*, 19 (“[T]he prohibition of murder and extrajudicial execution reflects a universal standard applicable whenever and wherever States resort to lethal force outside the conduct of hostilities.”).

<sup>156</sup> TJAGLCS, IOLD, *Operational Law Handbook*, 47-48.

<sup>157</sup> See Melzer, *Human Rights Implications*, 32-33; Droege, “The Interplay Between International Humanitarian Law and International Human Rights Law,” 345. See also, Code of Conduct for Law Enforcement Officials Adopted by General Assembly Resolution 34/169 of 17 December 1979 (“Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”).  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>.

<sup>158</sup> ICRC, *Expert Meeting: The Use of Force in Armed Conflicts*, 7.

<sup>159</sup> See Eighth United Nations Conference on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, (New York, NY: United Nations Secretariat, September 7, 1990), Art. 9,  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx> (accessed March 30, 2014).

<sup>160</sup> U.S. Joint Chiefs of Staff, *Joint Operations*, Joint Publication 3-0 (Washington, DC: U.S. Joint Chiefs of Staff, September 17, 2006, incorporating Change 1, February 13, 2008), I-7.

<sup>161</sup> Melzer, *Human Rights Implications*, 14, 30. These are IHRL principles and should not be confused with their LOAC homonyms, described below.

<sup>162</sup> Melzer, *Human Rights Implications*, 31; ICRC, *Expert Meeting: The Use of Force in Armed Conflicts*, 7-8.

<sup>163</sup> Melzer, *Human Rights Implications*, 31; Droege, “The Interplay Between International Humanitarian Law and International Human Rights Law,” 345.

<sup>164</sup> Ben Emmerson, *Report of the Special Rapporteur on the Promotion of Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, United Nations General Assembly, 68<sup>th</sup> Session, UN Document A/68/389 (September 18, 2013), 17 (“Outside situation of armed conflict, the use of deadly force by the State is lawful only if strictly necessary and proportionate, if aimed at preventing an *immediate* threat to life and if there is no other means of preventing it from materializing.”)(emphasis added).

<sup>165</sup> Melzer, *Human Rights Implications*, 32.

<sup>166</sup> ICRC, *Expert Meeting: The Use of Force in Armed Conflicts*, 9.

<sup>167</sup> Melzer, *Human Rights Implications*, 33.

<sup>168</sup> *Ibid.*

<sup>169</sup> Hathaway, “Which Law Governs During Armed Conflict?,” 1926-27; Melzer, *Human Rights Implications*, 30.

<sup>170</sup> Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 8.

<sup>171</sup> *Tennessee v. Garner*, 471 U.S. 1, 9 (1985) (“[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement

of the Fourth Amendment.”). Although *Garner* and its progeny address uses of force in the context of law enforcement, the Court’s subsequent definition of a seizure as “a governmental termination of freedom of movement through means intentionally applied” is not, on its face, limited to the law enforcement context. *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989). Even if the use of force during military operations were deemed not to qualify as seizures, they would still have to satisfy the Fifth and Fourteenth Amendment’s prohibitions against deprivations of life, liberty or property without due process of law. Uses of force would, in that case, be measured against the substantive due process “shocks the conscience” standard first articulated in *Rochin v. California*, 342 U.S. 165, 172-73 (1952).

<sup>172</sup> *Ibid.*

<sup>173</sup> See, *Scott v. Harris*, 550 U.S. 372 (2007); *Graham v. Connor*, 490 U.S. 386 (1989). See also Rachel A. Harmon, “When Is Police Violence Justified?,” *Northwestern University Law Review*, 102, No. 3 (Summer 2008): 1119, <https://www.law.northwestern.edu/lawreview/v102/n3/1119/LR102n3Harmon.pdf> (accessed March 30, 2014). Drawing on traditional concepts of criminal law, Professor Harmon identifies three distinct state interests for which the Fourth Amendment permits police uses of force: 1) facilitating the states institutions of criminal law, usually by enabling a lawful arrest; 2) protecting public order; and 3) protecting the officer from physical harm.

<sup>174</sup> Corn, “Mixing Apples and Hand Grenades,” 76.

<sup>175</sup> Emerson, *Report of the Special Rapporteur*, 17.

<sup>176</sup> *Watkin*, “Controlling the Use of Force,” 18. Nor does U.S. law. See *Idaho v. Horiuchi*, 253 F.3d 359, 377, vacated as moot, 266 F.3d 979 (9<sup>th</sup> Cir. 2001)(Describing Federal Bureau of Investigation rules of engagement as permitting agents to hide in the bushes and gun down men who posed no immediate threat as “wartime rules” patently unconstitutional for a police action.)

<sup>177</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8, 1996), para. 25.

<sup>178</sup> *Ibid.*

<sup>179</sup> ICRC, *Report, International Humanitarian Law and The Challenges of Contemporary Armed Conflicts*, 18.

<sup>180</sup> Hague Convention IV, art. 22; Additional Protocol I, art. 35(1)(“In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”). “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.”

<sup>181</sup> Additional Protocol I, art. 49.

<sup>182</sup> *Ibid.*, art. 52(2) (defining military objective). Although Article 52(2) refers only to objects, it is understood to include enemy personnel within its meaning. According to the ICRC’s Official Commentary to the rule, “[i]t should be noted that the definition is limited to objects but it is clear that members of the armed forces are military objectives . . . .). ICRC, *Commentary to the Protocols*, 635 (quoting the Preamble of the Declaration of St. Petersburg).

<sup>183</sup> ICRC, Report, *International Humanitarian Law and The Challenges of Contemporary Armed Conflicts*, 19. United States Army commanders are instructed that:

Those who plan or decide upon an attack . . . must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.

U.S. Department of the Army, *The Law of Land Warfare*, para. 41. This brief, but important directive reflects the base principles of conflict regulation that lie at the heart of the LOAC and which define the legal boundaries of the targeting process.

<sup>184</sup> Additional Protocol I, arts. 51, 57; TJAGLCS, IOLD, *Operational Law Handbook*, 13.

<sup>185</sup> Watkin, "Controlling the Use of Force," 16. The LOAC rule of Precautions in the Attack requires "everything feasible [be done] to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives . . ." Additional Protocol I, art. 57.

<sup>186</sup> See Corn & Jenks, "Two Sides of the Combatant Coin," 314.

<sup>187</sup> Additional Protocol I, art. 50(1) ("In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.").

<sup>188</sup> A typical example would be an individual observed engaging in activity that could reasonably be interpreted as an act precedent to emplacing an improvised explosive device (IED), but doing so at a place where U.S. or partner forces will not transit for hours or days, a scenario typically encountered in Afghanistan. Colonel Scott Halstead, interview by author, Carlisle, PA, March 25, 2013.

<sup>189</sup> Additional Protocol I, art. 51(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 13, June 8, 1977, 1125 U.N.T.S. 609. Articles 51 and 13 are considered to reflect customary norms.

<sup>190</sup> ICRC, *Commentary on the Additional Protocols*, 618-19.

The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. Thus, a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for such time as he takes a part in hostilities.

Ibid.

<sup>191</sup> The intensity of this debate is reflected in the strong opposition expressed to the International Committee for the Red Cross' 2009 *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, to include by many of the experts who participated in the six-year project to produce the guidance and the withdrawal of their names from the final product. Compare Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, (Geneva, Switzerland: International Committee of the Red Cross, 2009, 78, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/p0990> with Michael N. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis," *Harvard National Security Journal*, 1, (May 5, 2010), <http://harvardnsj.org/2010/05/the-interpretive-guidance-on-the-notion-of-direct-participation-in-hostilities-a-critical-analysis/> (accessed March 20, 2014); W. Hays Parks, "Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect," *New York University Journal of International Law & Politics*, 42, no. 3 (Spring, 2010); Kenneth Watkin, "Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance," *New York University Journal of International Law & Politics*, 42, no. 3 (Spring, 2010).

<sup>192</sup> The author makes this observation based on his personal experience as a judge advocate practicing international and operational law for over twenty years, to include as a deputy legal counsel to the Chairman of the Joint Chiefs of Staff, and as the Chief, Operational Law Branch in the Office of The Judge Advocate General of the Army. See also, Janin, "Engaging Civilian-Belligerents," 89 ("The United States interprets 'direct part' more broadly than the Additional Protocol I signatories . . .").

<sup>193</sup> See, e.g., Janin, "Engaging Civilian-Belligerents," 89 ("In transitioning from a defensive to an offensive perspective, no 'bright line' exists to demarcate when a civilian becomes a lawful target. The determination is fact sensitive and framed by the context of self-defense.").

<sup>194</sup> ICRC, *Commentary on the Additional Protocols*, 618-19; TJAGLCS, IOLD, Operational Law Handbook, 30.

<sup>195</sup> Corn, "Mixing Apples and Hand Grenades," 68-69.

<sup>196</sup> Even under the International Committee of the Red Cross's narrow interpretation of DPH, a broad range of conduct precedent and antecedent to actual violent acts can qualify as DPH.

<sup>197</sup> ICRC, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 66 (identifying acts such as gathering of intelligence and equipping, instructing, and transporting personnel as sufficient preparatory acts.).

<sup>198</sup> ICRC, *Commentary on the Additional Protocols*, 618-19 (discussing "hostile acts" as conduct lifting civilian immunity from attack.).

<sup>199</sup> Janin, "Engaging Civilian-Belligerents," 89-93.

<sup>200</sup> NATO, *NATO Legal Deskbook*, 243.

<sup>201</sup> See *Prosecutor v. Dario Kordic, Mario Cerkez*, Case No. IT-95-14/2-T, Judgment, para. 451 (Feb 26, 2001) (Noting that the principle of self-defense enshrined in the Rome Statute, at

art. 31(1)(c) “reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law.”), [http://www.icty.org/x/cases/kordic\\_cerkez/tjug/en/kor-tj010226e.pdf](http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf); Wallerstein, *Justifying the Right of Self-Defense*, 999 (“the right to self-defense is recognized in all jurisdictions”); Merriam, *Natural Law and Self-Defense*, 46.

<sup>202</sup> Harmon, “When Is Police Violence Justified?,” 1120.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid., 1120-21.

<sup>205</sup> Ibid., 1121.

<sup>206</sup> *Maryland v. Soper*, 270 U.S. 9, 42 (1926). See also Harmon, “When Is Police Violence Justified?,” 1150 (“[P]olice uses of force are a form of state coercion, and it is fundamentally the limits of the state’s authority that the Fourth Amendment defines.”).

<sup>207</sup> U.S. Joint Chiefs of Staff, *Operations*, III-29 – 30.

<sup>208</sup> See Harmon, “When Is Police Violence Justified?,” 1155-59 (Discussing the legitimate state interest in preserving police forces.).

<sup>209</sup> Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, art. 38(1).

<sup>210</sup> *Basic Principles on the Use of Force*, para. 9.

<sup>211</sup> United States Attorney General (USAG), “Policy Statement: Use of Deadly Force,” memorandum, Washington, D.C., October 17, 1995, <http://www.justice.gov/ag/readingroom/resolution14b.htm>.

<sup>212</sup> U.S. Joint Chiefs of Staff, *Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces (SROE/SRUF)*, CJCSI 3121.01B, A-3.

<sup>213</sup> Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 8.

<sup>214</sup> Melzer, *Human Rights Implications*, 30.

<sup>215</sup> *Basic Principles on the Use of Force*, para. 9. Similarly, U.S law enforcement officers are authorized to use deadly force to prevent the escape of a fleeing felon when the officer has probable cause to believe that the subject has committed a violent felony or his escape poses an imminent danger of death or grievous bodily harm to the officer or another person. USAG, “Policy Statement: Use of Deadly Force,” I.A. The Department of Justice is based on the leading Supreme Court cases of *Tennessee v. Garner*, 47 U.S. 1, and *Graham v. Connor*, 490 U.S. 386.

<sup>216</sup> DPKO provides political and executive direction to UN Peacekeeping operations around the world and maintains contact with the Security Council, troop and financial contributors, and parties to the conflict in the implementation of Security Council mandates. *United Nations*,

Department of Peacekeeping Operations, <https://www.un.org/en/peacekeeping/about/dpko/> (accessed March 30, 2014).

<sup>217</sup> United Nations, Department of Peacekeeping Operations, *United Nations Peacekeeping Operations Principles and Guidelines* (New York: United Nations, 2008), 25. See also United Nations, Department of Peacekeeping Operations, *United Nations Infantry Battalion*, Vol. II, (New York: United Nations, August, 2012), Annex C (providing model ROE for peacekeepers).

<sup>218</sup> *Ibid.*, 254-56.

<sup>219</sup> Department of Peacekeeping Operations, Military Division, *Rules of Engagement (ROE) for the Military Component of the United Nations Stabilization Mission in Haiti (MINUSTAH)* (New York: United Nations, 2008), para. 14h, on file with author.

<sup>220</sup> *Ibid.*

