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### Should the Best Offenses Ever Be a Good Defense: The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force Rules in the Standing Rules of Engagement

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# Should the Best Offense Ever Be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force Rules in the Standing Rules of Engagement

Colonel Gary P. Corn\*

## ABSTRACT

*The Chairman of the Joint Chiefs of Staff's Standing Rules of Engagement/Standing Rules for the Use of Force (SROE/SRUF) for U.S. Forces provides strategic guidance to the armed forces on the authority to use force during all military operations. The standing self-defense rules in the SROE for national, unit, and individual self-defense form the core of these use-of-force authorities. The SROE self-defense rules are incorrectly built on a unitary jus ad bellum framework, legally inapplicable below the level of national self-defense. Coupled with the pressures of sustained counter-insurgency operations, this misalignment of individual and unit self-defense authorities has led to a conflation of self-defense principles and offensive targeting authorities under the Law of Armed Conflict. In order to reverse this trend and realign individual and unit self-defense with governing legal frameworks, this Article considers self-defense through the lens of the public authority justification to better reflect the status of servicemembers as state actors whose actions are subject to the domestic and international legal obligations of the state.*

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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.<sup>1</sup>

The More Successful the Counterinsurgency Is, the Less Force Can Be Used and the More Risk Must Be Accepted<sup>2</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 some missions depends on assuming greater risk than in others. Nowhere has this reality been brought into sharper focus than in contemporary counterinsurgency (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, both within and outside the armed forces, than the question of whether, and to what degree, servicemembers may use lethal force in the exercise of self-defense.<sup>3</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, military, and legal imperatives. Rules of engagement must strike 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. Achieving this balance begins with drafting ROE at the strategic level that are not only operationally coherent and easily executable, but also firmly grounded in and consonant with the normative frameworks applicable to each particular military operation.<sup>4</sup>

This Article focuses on the legal underpinnings of the current strategic use-of-force direction applicable to the U.S. armed forces

1. Marcus Tullius Cicero, *The Speech of M.T. Cicero In Defense of Titus Annius Milo*, in 3 ORATIONS OF MARCUS TULLIUS CICERO 394 (Charles Yonge trans. 1913).

2. U.S. DEPT OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY ¶¶ 1-27 (2006).

3. Throughout this Article 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 Armed Forces Act, 10 U.S.C. § 101(a)(4)(2012) (defining the armed forces).

4. Colonel Gary P. Corn, *Developing Rules of Engagement: Operationalizing Law, Policy and Military Imperatives at the Strategic Level*, in U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 212, 218-19 (Oxford Univ. Press) (Geoffrey S. Corn, et al., eds. 2016); see INT’L & OPERATIONAL LAW DEPT., THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK, 79-80 (2014) [hereinafter OPERATIONAL LAW HANDBOOK] (describing the purposes of ROE).

commonly referred to as the Standing Rules of Engagement (SROE).<sup>5</sup> Specifically, the Article examines the SROE provisions governing self-defense, which are a vestige of outdated Cold War concepts misaligned with the underlying legal basis for authorizing individuals and small-unit commanders to exercise self-defense at the subnational level.<sup>6</sup> 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.

Consider the case of First Lieutenant Michael Behenna, who was court-martialed in 2009 for shooting and killing a detainee in Iraq while conducting an unauthorized interrogation at a remote location in the desert, during which he was pointing his sidearm at the detainee's head and threatening to kill him.<sup>7</sup> At trial, Lieutenant Behenna did not dispute these facts, but instead claimed that he had shot the detainee in self-defense.<sup>8</sup> He testified that during the interrogation the detainee threw a piece of concrete at him and lunged toward him in an attempt to grab his pistol.<sup>9</sup> The court-

5. The SROE are contained in *Chairman of the Joint Chiefs of Staff Instruction 3121.01B, the Standing Rules of Engagement/Standing Rules for the Use of Force*. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (2005) [hereinafter SROE/SRUF]. *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*.

6. That is, to respond to qualifying threats or hostile actions that do not rise to the level of an attack on the nation as a whole, and therefore do not trigger the nation's inherent right of self-defense under Article 51 of the United Nations Charter. U.N. Charter, arts. 2(4), 51. Admittedly, the line between national and sub-national self-defense is not always easy to demarcate, but not all threats or attacks on individual units will constitute qualifying attacks on the state, and legally coherent ROE must account for the distinct legal nature of potential threats. For example, an infantry platoon with the mission to secure a food-distribution point during a humanitarian assistance/disaster relief operation cannot be understood to be exercising national self-defense when using force to repel an attack by armed bandits attempting to steal the food aid. *See infra* notes 75–78. In contrast, it is reasonable to assume that an attack on a Navy ship (considered a “unit”), by virtue of its nature, typical operational environment, and the level of force needed to affect it, is an attack directed against the nation.

7. *See United States v. Behenna*, 71 M.J. 228, 230–32 (C.A.A.F. 2012) (explaining that Lieutenant Behenna shot and killed the detainee, that he did so while conducting an unauthorized interrogation, that he had deviated from his authorized route to a remote location in the desert to conduct the interrogation, that he had stripped the detainee naked to humiliate him, that the detainee's hands were bound, that Lieutenant Behenna had unholstered his pistol and was pointing it in the detainee's face, and that he had threatened to kill the detainee if he did not provide sufficient answers to Lieutenant Behenna's questions).

8. *Id.*

9. *See id.* at 231 (explaining that Lieutenant Behenna also offered expert testimony to corroborate his testimony).

martial panel was not persuaded, finding him guilty and sentencing him to, *inter alia*, twenty-five years of confinement.<sup>10</sup>

On February 27, 2013, thirty-seven retired flag and general officers, including a former International Security and Assistance Force (ISAF) commander, petitioned the U.S. Supreme Court as *amici curiae* to review and overturn First Lieutenant Behenna's court-martial conviction.<sup>11</sup> The primary issue before the Supreme Court on petition for a Writ of Certiorari was whether the military trial judge provided erroneous instructions to the panel regarding Lieutenant Behenna's self-defense claim.<sup>12</sup> Applying established principles of criminal law, the Court of Appeals for the Armed Forces concluded that any instructional errors were harmless beyond a reasonable doubt because, based on the undisputed facts adduced at trial, Lieutenant Behenna had unlawfully assaulted the detainee with deadly force during an unauthorized interrogation and thus had lost the right to act in self-defense as a matter of law.<sup>13</sup>

For the thirty-seven amici, the notion that a soldier's use of force against a suspected enemy operative in an active combat zone should be judged according to the same principles applicable to "a soldier's stateside barroom brawl" was anathema and a dangerous precedent.<sup>14</sup> According to these retired officers, "no servicemember in a combat zone should categorically forfeit the right to self-defense because his or her conduct was unauthorized."<sup>15</sup>

10. See *id.* at 229–30 (explaining that Lieutenant Behenna was sentenced to a dismissal, twenty-five years of confinement, and forfeiture of all pay and allowances; the convening authority reduced the amount of confinement to twenty years but otherwise approved the sentence as adjudged); *U.S. v. Behenna*, 71 M.J. 521, 534 (A. Ct. Crim. App. 2011) (affirming the findings).

11. Supreme Court of the United States Home Page, Docket, No. 12-802, <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/12-802.htm> [<http://perma.cc/8QQR-BJM4>] (archived Oct. 1, 2015).

12. Lieutenant Behenna, as Petitioner, presented the question as "[w]hether a servicemember in a combat zone categorically forfeits the right to self-defense as a matter of law by pointing a firearm without authorization at a suspected enemy." Brief for Petitioner, *Behenna v. United States*, 2013 U.S. S. Ct. Briefs LEXIS 43 (No. 12-802), <http://www.caaflog.com/wp-content/uploads/Behenna-Cert-Petition-FINAL.pdf> [<http://perma.cc/3RZN-H5YV>] (archived Oct. 1, 2015); Brief of Retired Flag and Gen. Officers & Former Dep't of Def. Official as Amici Curiae Support Petitioner, *Behenna v. United States*, 2013 U.S. S. Ct. Briefs LEXIS 43 (No. 12-802), <http://www.caaflog.com/wp-content/uploads/Behenna-Brief-of-Retired-Flag-and-General-Officers-et-al-2.pdf> [hereinafter *Amici Curiae*] [<http://perma.cc/Q732-C2XV>] (archived Oct. 2, 2015).

13. *Behenna*, 71 M.J. at 234.

14. Amici Curiae, *supra* note 12, at 4. The use of the term "suspected enemy" operative is inaccurate and misleading. First, Lieutenant Behenna's mission was to return the individual to the original point of capture and release him because of a lack of evidence to establish he was an enemy operative. More important, at the time of his murder, the individual was a detainee, a protected status under the Law of Armed Conflict.

15. *Id.* at 2. As the Government correctly pointed out in response, the CAAF's decision did not establish a categorical rule, but was rather tailored to the specific facts

The observation of these retired officers that the “everyday risks to servicemembers in far-flung combat zones around the world are different in kind from the risks inherent in stateside altercations”<sup>16</sup> is no doubt an understatement and should be given great weight when assessing the legality of any particular use of force. What is remarkable about their position, however, is their fundamental misapprehension of the legal implications of what they acknowledge were Behenna’s unauthorized and unlawful conduct, and their related view that the law governing the authority of individual servicemembers to exercise self-defense in such situations is or ought to be different from settled principles of domestic and international law.<sup>17</sup> This misconception should not be surprising, however, given the SROE use-of-force framework these officers have trained on and applied throughout their long and honorable careers.

The Behenna case and the position taken by the amici highlight a growing and concerning 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. 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 foundations. 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 small-unit level.<sup>18</sup>

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.<sup>19</sup> As the U.S. position on anticipatory self-defense has broadened, so too has the unitary self-

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of the case. Brief for The United States in Opposition, On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces at 13, *Behenna v. United States*, 2013 U.S. S. Ct. Briefs LEXIS 43 (No. 12–802), <http://www.caaflog.com/wp-content/uploads/Behenna-opp.pdf> [<http://perma.cc/4FKD-635Y>] (archived Oct. 2, 2015).

16. Amici Curiae, *supra* note 12, at 6.

17. Although not specifically stated, the clear implication from the CAAF’s opinion was that by his unauthorized actions, Lieutenant Behenna exceeded the scope of his public authority as a combatant to use force, even to control the detainee, and thus could not claim that his actions during the interrogation were legally justified. As such, he was acting in a personal capacity, and his actions amounted to an unlawful assault that deprived him of the right to claim self-defense. *Cf Behenna*, 71 M.J. at 234–35 (explaining that the facts show that Behenna exceeded the scope of his legal authority).

18. See *infra* notes 75–80.

19. See *id.*

defense framework in the SROE, leading to legally infirm use-of-force guidance below the level of national self-defense.<sup>20</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, a right that ultimately prevails over any command-imposed restraints on the use of force.<sup>21</sup>

Although this view reflects genuine concern for the safety and security of the men and women who routinely place themselves in harm’s way in service to the nation, it is inconsistent with basic notions of command and control. More importantly, it fundamentally misapprehends the juridical status of these men and women, their relation to the state, and the normative basis for the state to train, arm, and empower them to use force on its behalf. Servicemembers executing military operations act in a public, not a personal, capacity. As such, defensive use-of-force rules for the military should be grounded in the domestic and human rights law governing the use of force by state actors, reflected in the public authority doctrine, not general principles of individual self-defense.<sup>22</sup>

Coupled with the intense complexity and pressures of operating and employing force in the volatile and uncertain COIN environments of Iraq and Afghanistan, this imprecision and conflation of authorities has led to a blurring of the traditional and legally mandated demarcation lines between offensive and defensive

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20. As set forth in the SROE, certain unit commanders may be delegated the authority to exercise national self-defense. SROE/SRUF, *supra* note 5, at 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 addressed as separate categories from, albeit derivative of, national self-defense. *Id.* This Article 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 and appropriate.

21. See *infra* notes 75–78.

22. 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*, 91 VA. L. REV. 999, 999 (2005) (“[T]he right to self-defense is recognized in all jurisdictions.”). The point of this article is not to challenge that proposition, nor to wade into the debate over the “natural law” nature of the individual right. As set forth herein, while the general principles of individual self-defense may be relevant to understanding how domestic and international law regulate self-help uses of force by state actors, it is the position of this article 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.



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>23</sup> Overly constricting restraints on the authority to use force can degrade commanders' and servicemembers' ability to defend themselves and their units and undermine operational initiative.<sup>24</sup> Both of these countervailing risks can lead to strategic failure.

The convergence of a number of factors over the last half century has brought these risks into sharper focus and demonstrated a heightened need to more tightly "harness military action to political ends."<sup>25</sup> Effective and legally sound ROE are essential to achieving this end and ensuring mission accomplishment.<sup>26</sup> This Article 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 Article briefly describes 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 reviews 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 personal rights. Part III argues that the authority of military personnel to use

23. For example, the infamous My 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., *My Lai Massacre*, HISTORY, <http://www.history.com/topics/my-lai-massacre> [<http://perma.cc/8UPR-26ZJ>] (archived Oct. 2, 2015) (discussing My Lai and the impact on the U.S. war effort); 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 134–35 (J. Boone Bartholomees, Jr., ed., 2004) (same). See generally *United States v. Calley*, 22 U.S.C.M.A. 534 (CMA 1973) (detailing the facts surrounding the Mai Ly Massacre).

24. 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 DEPT OF DEF. COMM. ON BEIRUT INT'L AIRPORT TERRORIST ACT, REPORT OF THE DOD COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT 47–51 (Dec. 20, 1983), <https://www.fas.org/irp/threat/beirut-1983.pdf> [<http://perma.cc/7WVC-EHJS>] (archived Oct. 3, 2015) (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.").

25. Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 34 (1994).

26. See CENTER FOR LAW AND MILITARY OPERATIONS (CLAMO), RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES 1–1 (2000).

force during any military operation, including 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 discusses 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 Article offers an alternate framework, based on IHRL and the principles of the public authority justification, for defining the permissible scope of individual and small-unit self-defense and other non-status-based use-of-force ROE and suggests necessary adjustments to the current SROE construct.

### I. SELF-DEFENSE AND OFFENSIVE TARGETING—THE BLURRING LINES

When the 1st Marine Division launched the second battle for Fallujah, Iraq in 2004—considered the most intense 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>27</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>28</sup>

In effect, the ROE authorized the Marines to attack, in the exercise of self-defense, 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>29</sup> The purpose of these ROE was well intended—to limit civilian casualties in an environment where enemy belligerents openly rejected the principle of distinction and hid among the civilian population.<sup>30</sup> Without saying so specifically, however, the ROE conflated offensive targeting and self-defense concepts, thereby creating unnecessary confusion and potentially authorizing questionable uses of force. Unfortunately, this was not an isolated case, but represents a growing and concerning trend in

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27. See DICK CAMP, OPERATION PHANTOM FURY: THE ASSAULT AND CAPTURE OF FALLUJAH, IRAQ 149–52 (2009).

28. *Id.*

29. *Id.* at 150–51.

30. *Id.* at 151; see also Colin H. Kahl, *How We Fight*, 85 FOREIGN AFF. 83, 94 (2006) (“[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. *Id.*

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 of using force in self-defense, have become buzzwords for justifying attacks against potential, not immediate, threats.<sup>31</sup> This trend has been exacerbated by the use of these same terms in ISAF offensive, mission-accomplishment ROE.<sup>32</sup> U.S. forces have either adopted the NATO understanding of nonimminent HA/HI or applied an aggressive view of SROE self-defense rules.<sup>33</sup>

Further, offensive targeting concepts such as positive identification (PID)<sup>34</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>35</sup> At the tactical level, servicemembers are engaging individuals based more on physical characteristics than on conduct presenting an imminent threat.<sup>36</sup> Also, self-defense is often cited as an exception to

31. See Interview with Scott Halstead, Colonel in U.S. Army (March 25, 2014) [hereinafter Halstead Interview]. 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 U.S. and ISAF ROE at the brigade-level and below. See also *Insurgents Setting IED* (CNN Broadcast Aug. 10, 2009) at 3:26, <http://www.cnn.com/video/?/video/world/2009/08/10/von.afghan.insurgent.usdod&ieref=videosearch> [<http://perma.cc/B7LT-T3WR>] (archived Oct. 5, 2015) (showing helicopter engaging individuals digging a hole in the road in Afghanistan based on hostile intent).

32. 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) [hereinafter *NATO MC 362/1*]; NORTH ATLANTIC TREATY ORGANIZATION (NATO), *NATO LEGAL DESKBOOK* 256 (2nd ed. 2010).

33. 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, Officer in the U.S. Army (February 28, 2014) (this officer requested the author not cite him by name).

34. Positive identification (PID) is defined as a reasonable certainty that the proposed target is a legitimate military target. See *Combined Forces Land Component Command (CFLCC) ROE Card*, reprinted in *OPERATIONAL LAW HANDBOOK*, *supra* note 4, at 107 (defining PID). PID developed as a means of applying the LOAC targeting rule of distinction. See Commander Albert S. Janin, *Engaging Civilian–Belligerents Leads to Self-Defense/Protocol I Marriage*, 27–50–410 ARMY L. 82, 91 (2007) (“Positive identification reiterates the law of war obligation to discriminate between combatants and non-combatants . . .”).

35. Major Eric D. Montalvo, *When Did Imminent Stop Meaning Immediate?: Jus In Bello Hostile Intent, Imminence, and Self-Defense in Counterinsurgency*, 27–50–483 ARMY L. 24, 25 (2013).

36. See *id.* at 27, 33 (describing targeting engagements in Afghanistan being based on physical characteristics constituting PID of hostile intent).

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>37</sup> Some units have improperly leveraged the supposed TIC exception to draw insurgents out and thereby trigger self-defense authorities, so-called baited self-defense.<sup>38</sup>

Essentially, self-defense has been invoked as the default authority for engaging civilians participating directly in hostilities<sup>39</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>40</sup> This conflation of use-of-force frameworks has even infected official Army training materials, which incorrectly define combatants to include “[p]ersons committing a Hostile Act or showing Hostile Intent [as taking] a direct part in hostilities (DPH).”<sup>41</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 co-opting 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>42</sup> Several commentators with deployment experience have raised similar concerns and called for

37. See Major Eric C. Husby, *A Balancing Act: In Pursuit of Proportionality in Self-Defense for On-Scene Commanders*, 27–50–468 ARMY L. 6, 11 (2012).

38. See *id.*

39. See Janin, *supra* note 34, at 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).

40. See Husby, *supra* note 37, at 10.

41. See, e.g., International & Operational Law Division, *The Law of Armed Conflict: The Rules That Govern the Conduct of Soldiers in Military Operations*, Judge Advocate General's Legal Center and School, slides 11–12 (2013), <https://jagu.army.mil/bbcswebdav/institution/JAGU%20Institution/webpages/STPs/STP.html> (mischaracterizing civilians directly participating in hostilities as “conduct-based combatants”).

42. 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. E-mail from Captain Mark E. Gardner, Center for Law and Military Operations, to Colonel Gary P. Corn (March 21, 2014).

amendments to the SROE.<sup>43</sup> This Article shares those concerns but offers a distinct approach to viewing the problem.

## II. THE SROE SELF-DEFENSE RULES

Rules of engagement are generally 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.<sup>44</sup> Developed to give military and political leadership greater control over the execution of both combat and noncombat operations, ROE 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.<sup>45</sup> Since their introduction in the late 1950s,<sup>46</sup> 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>47</sup>

43. See Major John J. Merriam, *Natural Law and Self-Defense*, 43 MIL. L. REV. 86–87 (2010) (calling for SROE reform); Montalvo, *supra* note 35, at 31–33 (calling for SROE reform).

44. The United States defines ROE as “directives issued by competent military authority that delineate the circumstances and limitations under which U.S. forces will initiate and/or continue combat engagement with other forces encountered . . . .” JOINT CHIEFS OF STAFF, JOINT PUB. 1–02: DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 270 (2012) (Nov. 8, 2010, as amended through Aug. 15, 2012) [hereinafter JP 1–02]. The International Institute of Humanitarian Law’s *Rules of Engagement Handbook* defines ROE as directives or guidance “issued by competent authorities [that] assist in the delineation of the circumstances and limitations within which military forces may be employed to achieve their objectives.” INT’L INST. OF HUMANITARIAN LAW, SAN REMO HANDBOOK ON RULES OF ENGAGEMENT 1 (2009) [hereinafter SAN REMO HANDBOOK].

45. See Colonel W. Hays Parks, *Righting the Rules of Engagement*, 115 U.S. NAVAL INST. PROC. 83, 84 (1989).

46. 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 MacArthur 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. MacArthur’s failure to obey this direction contributed to his eventual relief from command. See TREVOR FINDLAY, *THE USE OF FORCE IN UN PEACE OPERATIONS* 14 n. 26 (2002); Martins, *supra* note 25, at 35–36; GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 492 (2010).

47. Captain Ashley Roach, *Rules of Engagement*, 1 NAV. WAR COLL. REV. 35, 48 (1983).

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 appropriately tailored, mission-specific ROE. Whether standing or mission-specific, ROE at every echelon of command must be in agreement 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 small-unit self-defense rules are improperly grounded in the normative framework of the *jus ad bellum*.

### A. History of the SROE

The SROE, as they are known today, did not begin to take shape until the 1980s. 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>48</sup> It was not until 1981, with the Joint Chiefs' of Staff 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>49</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>50</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

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48. Some ROE were issued to ground forces during Vietnam, but were generally considered unhelpful. See Solis, *supra* note 46, at 492–93.

49. Parks, *supra* note 45, at 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, *supra* note 25, at 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 also to "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." Parks, *supra* note 45, at 83–84.

50. Colonel W. Hays Parks, *Deadly Force is Authorized*, 127 U.S. NAVAL INST. PROC. 32 (2001).

minor insult or probe and thereby escalating the situation into the outbreak of a conflict that could quickly spiral into World War III.<sup>51</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 not only respond to actual attacks, but also 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>52</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>53</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

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51. See Geoffrey S. Corn & Lieutenant Colonel Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEX. INT'L L.J. 355 (2012); 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*, 27–50–253 ARMY L. 48, 49 (1993).

52. SOLIS, *supra* note 46, at 492; see Parks, *supra* note 45, at 33 (noting that the SROE self-defense rules are based on Article 51 of the UN Charter).

53. TJAGS, IOLD, *supra* note 51, at 48; Parks, *supra* note 45, at 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* 35–4200 (2007) (unpublished thesis, Naval Postgraduate School), [www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA470423](http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA470423) [http://perma.cc/T85V–SDTK] (archived Oct. 4, 2015). 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.” *Id.* 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 (1987)). However, not all agreed, evidenced by subsequent modifications granting more robust self-defense authorities. *Id.*; see also TJAGS, IOLD, *supra* note 51, at 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, *supra*, at 81; TJAGS, IOLD, *supra* note 51, at 48.

the Navy had historically faced requiring “rules to guide their engagements with potentially hostile forces.”<sup>54</sup>

Based on a number of recommendations from an Army-led review group,<sup>55</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>56</sup> The 1994 SROE have been revised twice and are currently undergoing a third revision, but the basic structure remains in place today.<sup>57</sup>

### B. The SROE Unitary Self-Defense Framework

The SROE provide for four types of self-defense authority: 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>58</sup> When delegated the authority, “unit commanders may exercise National Self-Defense . . . .”<sup>59</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

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54. TJAGS, IOLD, *supra* note 51, at 48.

55. 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. See *id.*

56. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, ¶ 5(a) (1994), reprinted in THE JUDGE ADVOCATE GENERAL’S SCHOOL (TJAGS), INT’L & OPERAT’L L. DEPT’ (IOLD), OPERATIONAL LAW HANDBOOK 8–19 (1996) [hereinafter 1994 SROE]; see Parks, *supra* note 45, at 33 (discussing the transition from the PROE to the SROE).

57. See OPERATIONAL LAW HANDBOOK, *supra* note 4, at 80 (describing the revisions and structure of the SROE). 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.

58. SROE/SRUF, *supra* note 5, at A–3.

59. *Id.* The actual authorizations and guidance to unit commanders is classified.



members of their unit. Both unit and individual self-defense includes defense of other U.S. military forces in the vicinity.<sup>60</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>61</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>62</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,” including “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>63</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>64</sup>

60. *Id.* at 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.

CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES A-4 (2000), reproduced in CENTER FOR LAW AND MILITARY OPERATIONS (CLAMO), RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES, App. A (2000) [hereinafter 2000 SROE].

61. SROE/SRUF, *supra* note 5, at A-3.

62. *Id.*

63. *Id.* (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).

64. *Id.* (“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.”).

The HA/HI 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>65</sup> Although necessity is universally accepted as a predicate to exercising self-defense at any level, the HA/HI framework was developed specifically to implement national self-defense authorities.<sup>66</sup>

### C. 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>67</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 customary international law (CIL) and Article 51 of the Charter.<sup>68</sup>

65. *Id.* (“Necessity exists when a hostile act occurs or when a force demonstrates hostile intent.”).

66. 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.” Montalvo, *supra* note 35, at 35 (including an appendix listing the definitions of hostile intent from 1981 to present).

67. 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 Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” The United States considers “use of force” and “armed attack” to be synonymous. Harold Hongju Koh, Remarks at the USCYBERCOM Inter-Agency Legal Conference (Sept. 18, 2012), <http://www.state.gov/s/l/releases/remarks/197924.htm> [<http://perma.cc/YM6G-P2N7>] (archived Oct. 25, 2015). Further, the United States 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 OPERATIONAL LAW HANDBOOK, *supra* note 4, at 6 (discussing the U.S. position on the right of anticipatory self-defense).

68. See YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 220 (4th ed. 2005). The international law scholar encapsulates the view that “from the standpoint of international law, all self-defence is national self-defence.” *Id.* 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. *Id.*; see also Hans Boddens Hosang, *Force Protection, Unit Self-Defence, and Extended Self-*

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 influential 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>69</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>70</sup>

As the PROE evolved into the SROE, its naval roots carried over. The basic HA/HI 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>71</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>72</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>73</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>74</sup> Eventually it was incorporated, along with unit self-defense, into the base document under the broader unitary

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*Defence*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS, 420–22 (Terry D. Gill & Dieter Fleck eds., 2010) (arguing alternative theories with ultimately similar views in 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. *Id.* at 425; Parks, *supra* note 50, at 35 (“The JCS SROE incorrectly ties all ROEs to Article 51 of the UN Charter.”).

69. See Roach, *supra* note 47, at 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*, 27–50–248 ARMY L. 4, 18–22 (1993) (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).

70. See Phillips, *supra* note 69, at 19 (citing Roach, *supra* note 47, at 49). Hence the admonition that “nothing in these rules is intended to limit the commander’s right of self-defense.” Roach, *supra* note 47, at 49.

71. 1994 SROE, *supra* note 56, ¶5.a; 2000 SROE, *supra* note 60, at A–3.

72. Parks, *supra* note 45, at 33, n.2.

73. 1994 SROE, *supra* note 56, ¶ 5.c & Glossary.

74. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 8–4.

framework outlined above. Thus, the SROE ties all levels of self-defense to Article 51 of the UN Charter.<sup>75</sup>

When subjected to scrutiny, the view that all self-defense is derivative of national self-defense reveals itself to be unsound. The UN Charter generally regulates interstate conduct, and the *jus ad bellum* reflected in Articles 2(4) and 51 governs only those uses of force that rise above a minimum threshold and that are taken against states *qua* states.<sup>76</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>77</sup>

Grounding individual and small-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 national and subnational levels.<sup>78</sup> When it comes to the use of force in armed conflict, this distinction is well understood: the *jus ad bellum* regulates the right of

75. See Parks, *supra* note 45, at 33, 35; see also U.S. DEPT' OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NAVAL WARFARE PUBLICATION 1-14M, 4-4 to 4-6 (2007) (describing the SROE and the right of self-defense as emanating from Article 51 of the UN 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*, 27-50-336 ARMY L. 1, 5 (Nov. 2000) (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).

76. See generally Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment 1986 ICJ Rep. 14 (June 27) (discussing the customary international law prohibition against the use of force by states against the political and territorial integrity of other states).

77. See Parks, *supra* note 45, at 35 ("Nothing in the history of the Charter suggests it was intended to apply to the actions of individual service personnel . . ."). This is not to say that an attack against an individual military unit could not constitute an unlawful use of force against the nation, triggering the state's inherent right of self-defense. Quite clearly it can. See *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J.Rep. 163, ¶ 72 (Nov. 2003) ("The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of [national] self-defence.'"). As discussed further *infra*, however, it is just as likely, and perhaps more so, that hostile acts committed against an individual military unit will not be directed at the state or rise to the minimum threshold required by the *jus ad bellum*. Any counter force used must therefore be grounded in IHRL principles of defense of others.

78. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 223 (2005) ("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 United Nations conferring the authority to use force in self-defense on peacekeepers operating under United Nation, as opposed to national, command. Charles P. Trumbull IV, *The Basis of Unit Self-Defense and Implications for the Use of Force*, 23 DUKE J. COMP. & INT'L L. 121, 129-30 (2012).

a state to resort to war and the *jus in bello* regulates 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 subnational 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>79</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 subset of national self-defense "blurs the legal personality of the nation and the individual (or unit of individuals)."<sup>80</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 subnational level.<sup>81</sup>

#### D. 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 also an absolute, non-derogable obligation of all commanders.<sup>82</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

79. Hannah Tonkin, *Defensive Force Under the Rome Statute*, 6 MELBOURNE J. INT'L L. 89, 92–93 (2005). Rome Statute of the International Criminal Court, art. 31, opened for signature July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002). Article 31(1)(c), which provides an affirmative defense of self-defense to alleged war crimes, reads, "[t]he 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." *Id.*

80. Trumbull, *supra* note 78, at 127. In his article, Trumbull identifies a number of critical flaws to the *ad bellum* view of individual and small-unit self-defense. *Id.* at 127–33.

81. 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 subnational self-defense.

82. See OPERATIONAL LAW HANDBOOK, *supra* note 4, at 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.").

themselves be constrained by similar limitations imposed by higher commands.<sup>83</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>84</sup> However, the legal basis supporting this asserted right and obligation has long been assumed but never adequately identified.<sup>85</sup> It is true that the concept of unit self-defense has proliferated throughout the manuals and ROE 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>86</sup> But the evidence cited for the essential proposition that these incantations sufficiently reflect *opinio juris* such as to establish a customary norm is underwhelming and incomplete.<sup>87</sup> This is especially true as it relates to the purported obligatory nature of unit self-defense.

83. 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*, 31 U. BALT. L. REV. 157, 163–65 (2002) (asserting that individual self-defense cannot be constrained); see also OPERATIONAL LAW HANDBOOK, *supra* note 4, at 81 (“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* OPERATIONAL LAW HANDBOOK, *supra* note 4, at 103.

84. SROE/SRUF, *supra* note 5, at A–2.

85. See Lieutenant Commander Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 126–27 (1998) (“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, *supra* note 78, at 122 (noting the same).

86. Trumbull, *supra* note 78, at 133–34.

87. 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 Niagara 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 for 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, *Principles of International Law on the Use of Force by States in Self-Defence* 7 (Chatham House: The Royal Institute of Int’l Affairs Working Paper no. 05/01, 2005) (quoting letter of Daniel Webster); see also Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT’L L. 493 (1990) (discussing the *Caroline* incident).

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>88</sup> And while not every use of force in unit self-defense will rise to the level of an armed attack, the possibility exists 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>89</sup> Those who argue that 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>90</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 subset of unit self-defense. In 2000, it was elevated to the status of a distinct "inherent right,"<sup>91</sup> only to be downgraded again in 2005 to a subset of unit self-defense, and thus subject to limitation by the commander.<sup>92</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>93</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>94</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.

88. See SAN REMO HANDBOOK, *supra* note 44, at 3 (noting that not all countries consider unit self-defense to be an obligation).

89. Trumbull, *supra* note 78, at 128–29.

90. See Stephens, *supra* note 85, at 145–48 (arguing that human rights law prohibits states from limiting unit self-defense).

91. 2000 SROE, *supra* note 60, at A–4.

92. See SROE/SRUF, *supra* note 5, at A–2. At least for those individuals assigned and acting as part of a unit. *Id.* Presumably, anyone not so assigned retains an independent right of self-defense.

93. See, e.g., Stephens, *supra* note 85, at 147–48 (explaining the importance of the right to life).

94. Bolgiano, et al., *supra* note 83, at 1.

As discussed further below, subordination to civil and command authority is a defining characteristic of military service.<sup>95</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>96</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, are 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 subordinates 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 of the force of the “independent right” theory has colored commanders’ views on the interplay of self-defense and mission-accomplishment ROE and threatens to undermine the disciplined application of combat power during operations.

### E. The Expansion of Self-Defense Authorities

Imminence has always been a required element of self-defense, both at the national and subnational levels, and since its inception the SROE has defined hostile intent to be an *imminent* threat.<sup>97</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>98</sup> In 2005, however, the SROE incorporated a definition of imminence for the

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95. See Lieutenant Colonel Mark S. Martins, *Deadly Force Is Authorized, but Also Trained*, 27–50–346 ARMY L. 1, 14 (Oct. 2001). 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.” *Id.*

96. *Parker v. Levy*, 417 U.S. 733, 743–44 (1974) (internal citations omitted).

97. Montalvo, *supra* note 35, at 28.

98. See Merriam, *supra* note 43, at 77–78 (citing Letter from Secretary of State Daniel Webster, to Lord Ashburton (Apr. 24, 1841)).



first time, which states that “[i]mmminent does not necessarily mean immediate or instantaneous.”<sup>99</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>100</sup> While such an expansion may be appropriate at the national level—a matter beyond the scope of this Article—extending it whole cloth to individual and unit self-defense is a different matter altogether.<sup>101</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 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>102</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.

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99. SROE/SRUF, *supra* note 5, at A-3. Contrast this SROE guidance with NATO's, which defines imminence as meaning “the need to defend is manifest, instant, and overwhelming.” NATO MC 362/1, *supra* note 32, ¶ 7.

100. See Merriam, *supra* note 43, at 80; Montalvo, *supra* note 35, at 29. 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.” NAT'L SECURITY COUNS., The National Security Strategy of the United States of America 15 (Sept. 17, 2002).

101. Much has been written about the legitimacy of the Bush Doctrine, a matter beyond the scope of this Article. 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. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 5–6; see also Wilmhurst, *supra* note 87, at 7 n.12; Rogoff & Collins, *supra* note 87, at 496.

102. See Merriam, *supra* note 43, at 44 (explaining the use of anticipatory self-defense leading to preemptive military action).

### 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, IHL generally, and more specifically the prohibition against arbitrary killings as applied both 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.

#### A. 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>103</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 [the state's] military goals, not as individuals."<sup>104</sup> This premise is fundamental to the well-accepted principle that only combatants "have the right to participate in hostilities."<sup>105</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 affects a fundamental change in an individual's status, transforming "[h]is relations to the

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103. Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflicts*, 98 AM. J. INT'L L. 1, 11–12 (2004) (quoting EMMERICH DE Vattel, *THE LAW OF NATIONS*, bk. III, ch. II, § 6 (Joseph Chitty ed., 1834) (Gaunt reprint 2001) (1758)).

104. Geoffrey Corn & Chris Jenks, *Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts*, 33 U. PA. J. INT'L L. 313, 333–34 (2011).

105. 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. An essential condition of 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 that is under a command responsible to that state for the conduct of its subordinates. *Id.*; Geneva Convention, Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 75 U.N.T.S. 135. Otherwise, the state would have no means of ensuring that its agents comply with the state's obligations under the LOAC. *Id.*

State and public” and imposing on him or her unique duties and responsibilities.<sup>106</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>107</sup>

The subordination and discipline inherent in the nature of this agency relationship serve multiple purposes. They ensure an effective fighting force subordinate to civil authority, the employment and conduct of which is aligned with nationally defined objectives. They are 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>108</sup> This mirrors the more general rule that a state is responsible for the internationally wrongful acts of its state organs, including individual state actors, such as violations of IHRL.<sup>109</sup> Thus, states are equally responsible for, and obligated to regulate, the actions of their armed forces outside of situations of armed conflict.<sup>110</sup>

The suggestion that servicemembers have an absolute right to use force in the course of their official duties independent of their

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106. *U.S. v. Bell*, 366 U.S. 393, 402 (1961) (citing *In re Grimley*, 137 U.S. 147, 151–52 (1890)).

107. *Parker v. Levy*, 417 U.S. 733, 743–44 (1974) (citations omitted).

108. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 530–36 (vol. 1 Int’l Comm. of the Red Cross 2005) (citing Hague Convention IV Laws and Customs of War on Land: 18 October 1907, 36 Stat. 2277, art. 3 (entered into force Jan. 26, 1910)); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 91, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978).

109. See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, arts. 2, 4, 2 Y.B. Int’l L. Comm’n 2 U.N. Doc. A/56/10 (2001).

110. U.S. domestic law imposes analogous obligations and responsibility on the federal government to ensure that 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. See 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, including acts done beyond the scope of the official lawful authority if the acts are done while the official is purporting to act in the performance of his or her duties); Federal Tort Claims Act 28 U.S.C. §§ 2671–2680 (2012) (describing the United States’ liability and federal court jurisdiction); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (subjecting federal agents to individual liability for violating constitutional rights).

status as state actors ignores the reality of military service, basic notions of command and control, the state's non-derogable 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>111</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. Not only can the sovereign regulate its application at will, it is obligated to do so. Servicemembers are equally agents of the state when conducting noncombat operations, and there is no logical distinction to be drawn between the sovereign's responsibility to regulate how its agents use force during armed hostilities and when they do so in furtherance of national objectives in situations not amounting to war.

### B. *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>112</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>113</sup> This construct finds expression in the common law "public authority" defense to criminal liability, a doctrine well established in domestic U.S. law and reflected in general principles of 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.

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111. U.S. v. Rockwood, 52 M.J. 98, 108 (1999).

112. See Watkin, *supra* note 103, at 12 (noting that the power to "authorize its agents to use force is solidly entrenched in positive law terms in the state").

113. 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. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 16.

The public authority justification, a sub-norm of the general system of justifications in criminal law,<sup>114</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>115</sup> “Indeed, without justification defenses, state officials would be quite unable to perform their most basic functions.”<sup>116</sup> Variants of the public authority justification are contained in the codes of nearly every state in the United States,<sup>117</sup> and it is implicitly recognized in the universally accepted LOAC principle of combatant immunity, IHRL instruments, general principles of international law,<sup>118</sup> and the *Rome Statute*.<sup>119</sup> The general construct of the public authority justification is stated as follows:

[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

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114. 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. 1 PAUL H. ROBINSON ET AL., *CRIMINAL LAW DEFENSES* § 24 (1984 & Supp. 2009).

115. ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 1093 (1982).

116. Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1104 (2008).

117. It is also specifically provided for in the U.S. military’s *Manual for Courts-Martial*. MANUAL FOR COURTS-MARTIAL, UNITED STATES RULE FOR COURTS-MARTIAL (RCM) 916(c) (2012) [hereinafter MCM]. 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.” *Id.*

118. See Statute of the International Court of Justice art. 38, U.N. Charter Annex, Jun. 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945) (explaining that the general principles of international law are understood to be those general principles of law recognized by civilized nations). The criminal codes of most states recognize some form of the public authority doctrine. See, e.g., KODI PENAL I REPUBLIËS SË KOSOVËS [CRIMINAL CODE] art. 21, 2 FLETORJA ZYRTARE REPUBLIKES TE SHQIPERISE’ 29 (1996) (Alb.) (exercising a right or fulfilling a duty); *Criminal Code Act, 1995*, div. 10.4 (self-defense), div. 10.5 (lawful authority) (Austl.); 2848 art. 23 de CÓDIGO PENAL [C.P.], de 07 de Dezembro de 1940, Diário Oficial da União [D.O.U.] de DATE (Braz.); Criminal Code R.S.C. 1985, c. C-46, s. 45, c. 12, s. 1 (Canada); Penal Law 5737-1977, § 34m(1) (Isr.) (“No person shall bear criminal responsibility for an act, which he committed under any of the following circumstances: (1) he was lawfully obligated or authorized to commit it.”); C.P. art. 20 § 7 (Spain).

119. See Rome Statute of the International Criminal Court art. 31, opened for signature Jul. 17, 1988, 2187 U.N.T.S. 90 (entered into force July 1, 2002). 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, *supra* note 79, at 93.

relation to the gravity of the harm threatened or the importance of the interest to be furthered.<sup>120</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>121</sup> The harm caused by evoking one's public authority must be reasonable in relation to the societal interests at stake.<sup>122</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>123</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>124</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>125</sup> Thus, according to the *United States' Manual for Courts-Martial*, "killing an enemy combatant in battle is justified" and so not unlawful.<sup>126</sup> So long as the state actor, in this case a combatant, uses force consistent with the *lex specialis* targeting rules of the LOAC, his or her actions will be deemed necessary and proportionate as a matter of law.

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>127</sup> This was exactly the issue presented in the *Behenna* case.<sup>128</sup>

120. 2 PAUL H. ROBINSON ET AL., CRIMINAL LAW DEFENSES § 141 (1984 & Supp. 2009).

121. *Id.* See U.S. v. Rockwood, 52 M.J. 98, 112 (1999) (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").

122. 2 ROBINSON ET AL., *supra* note 120, § 141.

123. PERKINS & BOYCE, *supra* note 115, at 1093.

124. MODEL PENAL CODE, § 3.03(1)(d) (AM. LAW INST. 1981).

125. See Watkin, *supra* note 103, at 15 (discussing provisions in Additional Protocol I to the 1949 Geneva Conventions regarding privileged classes in combat); OPERATIONAL LAW HANDBOOK, *supra* note 4, at 16 (discussing privileges of combatants and protected persons).

126. MCM, *supra* note 117, at II-110, RCM 916(c), Discussion.

127. See WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW (2d ed. 2003); see also *State v. Gut*, 13 Minn. 341, 357 (1868) ("That it is legal to kill an alien enemy in the

The public authority justification is not limited, however, 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>129</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>130</sup> Just as the LOAC limits the scope of the public authority justification as it pertains to uses of force in armed conflict, the same symmetry pertains to domestic and IHRL limitations on the force public officials may use to further the state's interests outside of or unrelated to hostilities.

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>131</sup> That is, the justification is only triggered "when circumstances arise that evoke the use of the actor's delegated authority."<sup>132</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>133</sup> Stated differently, the force used must not be excessive under the circumstances.<sup>134</sup>

Unlike the justification of self-defense, the public authority justification need not necessarily be triggered by an actual threat of unlawful violence.<sup>135</sup> "The actor need only be protecting or furthering a legally recognized interest."<sup>136</sup> The authority of police to affect an arrest or the targeting of an enemy combatant while in his or her

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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 as a private right. This point of overlap between the interests of the state and the individual are addressed below.

128. See *supra* notes 7-17 and accompanying text.

129. MODEL PENAL CODE, *supra* note 124, § 3.03(1)(a), (d).

130. MCM, *supra* note 117, at II-110, RCM 916(c), Discussion.

131. See ROBINSON ET AL., *supra* note 114, § 24 (discussing how the balancing of harms relates to public authority defenses).

132. *Id.*

133. See *id.*

134. See, e.g., U.S. v. Rockwood, 52 M.J. 98, 112 (1999) ("[T]he issue is whether the duress or necessity was such that a reasonable person, under like circumstances, would have been impelled to do what was done by the defendant."); NAT'L COMM'N ON THE REFORM OF FED. CRIMINAL LAW, FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW 48 (§ 607) (1971) (discussing limits on the use of force, excessive force, and deadly force).

135. See ROBINSON, *supra* note 114, § 141.

136. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 215 (1982).

sleep are two examples.<sup>137</sup> But the defense is available only if the government agent is performing a *legal* duty at the time of the alleged offense that permits his or her action in relation to the triggering conduct.<sup>138</sup>

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>139</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>140</sup> Indeed, the Constitution is understood as requiring the sovereign to do just that with respect to U.S. citizens. The arbitrary killing standard of IHRL may compel the sovereign in a similar fashion.

ROE form part of the body of laws governing the armed services and serve 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. As such, they serve as a primary means to 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 hew to the law applicable to any given situation.<sup>141</sup> A general review of the bodies of law relevant to scoping the use of force during military operations follows.

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137. ROBINSON, *supra* note 114, § 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. *Id.* § 141.

138. 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 id.* § 148 ("[J]ustification may arise either from (1) the issuance of a lawful military order by a superior officer or (2) from the law governing the armed forces or the conduct of war."). In the case of the latter, the related defense of obedience to orders is implicated. *See id.* (discussing how conduct by military personnel is lawful if they are acting in response to a given order that is lawful on its face); *see also* MCM, *supra* note 117, at II-110, R.C.M. 916(d) (discussing obedience to orders).

139. *See* Thorburn, *supra* note 116, at 1107, 1121.

140. *Id.* at 1105.

141. *See* THE TURKEL COMMISSION, THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010 pt. 1, 242 (2011) (citing McCann and others v. United Kingdom, App. No. 18984/91, Eur. Ct. H.R., Judgment (1995), 156).



## 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 that cut down nine of the men, including a superior officer, leaving York in charge of the element.<sup>142</sup> Sergeant York immediately counterattacked into the hasty ambush, returning fire so effectively that he killed twenty German soldiers and eventually captured over one hundred more in an action that proved decisive to the operational success of the United States' broader offensive.<sup>143</sup>

Ironically, Sergeant York was staunchly opposed to killing.<sup>144</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 almost 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? Or 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

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142. DOUGLAS V. MASTRIANO, *AMERICAN WARRIORS: ALVIN YORK: A BIOGRAPHY OF THE HERO OF THE ARGONNE* 104–07 (2014).

143. *Id.* at 107–16.

144. See *id.* at 25–27, 29, 34–35 (discussing how York's religious beliefs conflicted with the task of war).

either analysis, Sergeant York's actions would be considered 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 noncompliant vehicle is: (1) a potential vehicle-borne improvised explosive device being driven by an enemy belligerent; (2) a civilian directly participating in hostilities; (3) a civilian threatening to inflict death or grievous bodily harm for reasons unrelated to the conflict; or (4) simply an ordinary car driven by 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 complex situations starts with ensuring that the ROE are accurately grounded in law.

#### *A. 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 of states, *qua* states, to resort to the use of force has been limited by the international *jus ad bellum* norms reflected in the UN Charter.<sup>145</sup> Also circumscribed is 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.

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>146</sup> But states are fundamentally human enterprises

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145. See OPERATIONAL LAW HANDBOOK, *supra* note 4, at 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 chapter 1 of the Operational Law Handbook, *supra* note 4. Although the scope and content of the *jus ad bellum* remains less than settled, it is not the focus of this Article.

146. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (AM. LAW INST.) (1987) ("International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states

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 *lex generalis* of IHRL and the *lex specialis* of LOAC, to regulate how they interact with their individual citizens as well as the citizens of other states. 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 rights of the person to be protected at all times against abusive [state] power.”<sup>147</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 subnational level through their designated agents, under color of state authority, against individual human beings.<sup>148</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>149</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>150</sup> At the same time, and importantly, both regimes also accept that as fundamental as the right to life is, it is not absolute.

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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 *id.* § 201 (defining state in international law).

147. Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISRAELI L. REV. 1 (Dec. 2007).

148. See RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 8 (2002) (discussing Articles of Hague Conventions that regulate the actions of states against noncombatants); United Nations Human Rights, Office of the High Commissioner for Human Rights, *Your Human Rights, International Law*, <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx> [<http://perma.cc/N5PQ-XE67>] (archived Oct. 4, 2015) (“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 fulfill human rights.”).

149. See *Prosecutor v. Delalic*, Case No. IT-96-21-A, Appeals Judgment, ¶ 149 (Int’l Crim. Trib. For the Former Yugoslavia Feb. 20, 2001) (Celebici 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.”).

150. Watkin, *supra* note 103, at 9; see also INT’L COMM. OF THE RED CROSS, REPORT: INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 14, 31C/11/5.1.2 (Oct. 2011), <https://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> [<https://perma.cc/4NTU-7J7K>] (archived Oct. 25, 2015) (“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.”).

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>151</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>152</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>153</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>154</sup> The LOAC rests on a presumption that every member of the enemy force contributes to the collective threat that the force presents.<sup>155</sup> Thus, the use of deliberate, premeditated 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>156</sup>

151. See Watkin, *supra* note 103, at 10 (noting that the normative structures "must also account for the taking of life so as to maintain social order").

152. 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. Compare International Covenant on Civil and Political Rights, art. 6.1, Dec. 16, 1966, 999 U.N.T.S. 171, 174 ("right to life"), and Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S. 221, 224 ("right to life"), with Organization of American States, American Convention on Human Rights art. 4.1, Nov. 21, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143, <https://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> [<https://perma.cc/BS96-S64Z>] (archived Oct. 4, 2015) ("Every person has the right to have his life respected.").

153. 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.

154. Droege, *supra* note 147, at 344; U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ch. 2 (July 18, 1956, with Change 1, July 15, 1976).

155. See INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 635 (Yvez Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY] (discussing article 52 and the rule of military objective).

156. See Geoffrey Corn, *Mixing Apples and Hand Grenades, The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT'L HUMAN. LEGAL STUDIES 52, 74 (2010) (explaining that the LOAC accepts as legitimate the "application of deadly force as a measure of first resort against operational opponents during armed conflict").

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 rather what is generally referred to as the law enforcement paradigm.<sup>157</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>158</sup>

The differences in these basic underlying assumptions and the related normative frameworks they underpin cannot be understated.<sup>159</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>160</sup> The LOAC “permits state agents to intentionally kill combatants and incidentally kill civilians (within clearly proscribed limits) in circumstances that [IHRL] does not countenance.”<sup>161</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, as well as within armed conflict when confronting civilians directly, neither body of law tolerates status-based targeting. The use of force is always to be applied as a matter of last, not first, resort.<sup>162</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>163</sup> However, “the

157. Droege, *supra* note 147, at 344.

158. Corn, *supra* note 156, at 62.

159. See *id.* at 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 contexts.”).

160. See OPERATIONAL LAW HANDBOOK, *supra* note 4, at 81–82 (discussing rules of engagement).

161. Oona A. Hathaway et al., *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 U. MINN. L. REV. 1883, 1926 (2012).

162. See Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions) *Report on Extrajudicial, Summary or Arbitrary Executions*, ¶ 21, U.N. Doc. A/68/382 (September 13, 2013).

163. See Watkin, *supra* note 103, at 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. See Major Colin Cusack, *We’ve Talked the Talk, Time to Walk the Walk: Meeting International Human Rights Law Standards*

relationship between the two is much more complex than this simple division of responsibilities implies.”<sup>164</sup> Military operations today, especially in situations of noninternational 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>165</sup> Outside of armed conflict, a space in which U.S. forces frequently operate, LOAC-based use-of-force authorities are simply unavailable.<sup>166</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>167</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>168</sup> ROE

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for U.S. Military Investigations, 217 MIL. L. REV. 48, 56 (2013) (citing Cordula Droegge, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INT’L REV. OF THE RED CROSS 501, 522 (2008)).

164. Watkin, *supra* note 103, at 2.

165. See Corn, *supra* note 156, at 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.”).

166. 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, 3, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Field] (defining the triggering conditions for LOAC application to international and non-international armed conflicts respectively); Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, arts. 2, 3, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, arts. 2, 3, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva POW]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 2, 3, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Civilians].

167. 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 Civilians, *supra* note 166, art. 146 (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, *supra* note 155, at 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 Field, *supra* note 166, art. 47; Geneva Sea, *supra* note 166, art. 48; Geneva POW, *supra* note 166, art. 127; Geneva Civilians, *supra* note 166, art. 144; see also U.S. Dep’t of Def. Dir. 2311.01E, DoD Law of War Program, ¶ 5.7.2 (May, 2006, certified current as of Feb., 2011) (mandating the implementation of effective programs to prevent violations of the law of war, including law of war training and dissemination).

168. NILS MELZER, HUMAN RIGHTS IMPLICATIONS OF THE USAGE OF DRONES AND UNMANNED ROBOTS IN WARFARE 34 (2013) (citing Art. 6(1) of the ICCPR). As Melzer correctly asserts, “National laws and doctrines, rules of engagement and other

have evolved as a primary means of meeting this obligation, and as such must be consistent with the international law standards governing the prohibition against arbitrary killings, a point central to the thesis of this Article. 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.

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

The question of whether and to what extent IHRL does or should play a role in the regulation of military operations during armed conflict is the subject of significant ongoing debate.<sup>169</sup> The relative merits of this debate aside, when it comes to developing strategically suitable and acceptable rules for the use of lethal force, it is largely immaterial. In addition to being specifically contained in the International Covenant on Civil and Political Rights (ICCPR),<sup>170</sup> a treaty to which the United States is a party, the specific human right against arbitrary deprivation of life is considered a rule of CIL.<sup>171</sup> As such, it is binding on all states at all times and is considered part of

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legislative or executive instruments authorizing the use of force in police, military, counter-terrorism or operations must strictly align with internationally recognized [IHRL] standards except where such operations are directed against legitimate military targets in an armed conflict." *Id.*

169. See, e.g., INT'L COMM. OF THE RED CROSS, EXPERT MEETING: THE USE OF FORCE IN ARMED CONFLICTS, INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGMS (Gaggioli, ed., 2013) [hereinafter ICRC Expert Meeting] (providing an account of the debates that took place at the meeting); OPERATIONAL LAW HANDBOOK, *supra* note 4, at 52–53 (discussing how IHRL interacts with LOAC when applying them to armed conflict). 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. See U.S. Dep't of State, United States Fourth Periodic Report to the United Nations Committee on Human Rights ¶¶ 506–07 (2011), <http://www.state.gov/g/drl/rls/179781.htm> [<http://perma.cc/7DB2-GNAL>] (archived Oct. 25, 2015) ("Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination.").

170. See International Covenant on Civil and Political Rights, art. 6.1, 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.").

171. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶¶ 24–25 (July 8, 1996) (discussing how use of nuclear weapons may violate Art. 6.1 of ICCPR); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 ¶ 106 (July 9, 2004) (declaring that the protection offered by human rights conventions does not cease during armed conflict). It is also considered to be a general principle of international law and a rule of *jus cogens*. Heyns, *supra* note 162, ¶ 30.

U.S. law.<sup>172</sup> It is a norm aimed at “realization of the right to life when [states] use force, whether inside or outside their borders.”<sup>173</sup> As a CIL norm, it is considered a “fundamental” human right that “binds a State’s forces during all [military] operations.”<sup>174</sup>

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>175</sup> This rule of general application seeks to strike the delicate balance between the obligation of the state to maintain security and order and the right of individuals to be free from unreasonable coercive state action. In the context of armed conflict, this general rule is addressed in the LOAC’s powerful, but limited, rules governing lethal attacks against identified enemy belligerents.<sup>176</sup> Outside the realm of armed conflict, the prohibition against arbitrary killing is typically analyzed in the context of law enforcement operations, where IHRL recognizes the prevention of crime, the lawful arrest of offenders or suspected offenders, and the maintenance of public order and security as interests the state may protect or advance with necessary and proportionate force.<sup>177</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>178</sup>

However, this is not an exhaustive list of state interests 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 in situations short of armed conflict, but beyond the core of activities traditionally associated with domestic policing. Noncombatant evacuation operations (NEO), personnel recovery and hostage rescue operations, peace operations, and consequence

172. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111. (AM. LAW INST. 1987).

173. Heyns, *supra* note 162, ¶ 43; see MELZER, *supra* note 168, at 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.”).

174. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 51–52.

175. See MELZER, *supra* note 168, at 32–33; Droegge, *supra* note 147, at 345; see also Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, art. 3 (Dec. 17, 1979) (“Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”).

176. See *infra* notes 198–220.

177. See ICRC Expert Meeting, *supra* note 169, at 7.

178. 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*, ¶ 9 (September 7, 1990), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx> [<http://perma.cc/2D37-MQHL>] (archived Oct. 25, 2015).



management operations are but a few.<sup>179</sup> Human rights law is sufficiently flexible to accommodate the requirements, including the use of force, of almost any military operation, subject to the non-derogable baseline principles of necessity, proportionality, and precaution.<sup>180</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>181</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>182</sup> Although not entirely inflexible on this point, imminence in IHRL is generally understood to mean immediate.<sup>183</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 also sufficiently grave to justify endangering” not only the lives of innocent bystanders, but also the life of the individual against whom force is used.<sup>184</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>185</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>186</sup> Like the IHRL principle of proportionality, the beneficiaries

179. See generally Joint Chiefs of Staff, Joint Pub. 3-0, Joint Operations, at I-7 (Sept. 17, 2006, incorporating Change 1, Feb. 13, 2008) [hereinafter JP 3-0] (listing types of military operations).

180. See Case of Figovenov and Others v. Russia, App. Nos. 18299/03 and 27311/03, Eur. Ct. H.R., ¶ 226 (2012) (finding no violation of Article 2 of the European Convention on Human Rights (right to life) on account of the decision by Russian authorities to resolve a mass hostage crisis by force and to use the gas); see also MELZER, *supra* note 168, at 14, 30 (discussing how international legal frameworks will apply to unmanned drones). These are IHRL principles and should not be confused with their LOAC homonyms, described below.

181. MELZER, *supra* note 168, at 31; ICRC Expert Meeting, *supra* note 169, at 8.

182. See MELZER, *supra* note 168, at 31; Droege, *supra* note 147, at 344-45.

183. Ben Emmerson, (Special Rapporteur on the Promotion of Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Report of the Special Rapporteur on the Promotion of Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 60, UN Document A/68/389 (September 18, 2013) (“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).

184. MELZER, *supra* note 168, at 32.

185. ICRC Expert Meeting, *supra* note 169, at 9.

186. MELZER, *supra* note 168, at 33; see Figovenov, Nos. 18299/03 & 27311/03, ¶ 202.

of the precautions rule are innocents as well as the individual against whom force is used.<sup>187</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>188</sup> In all cases, lethal force may be used only as a matter of last resort.<sup>189</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 of the Constitution and must therefore be reasonable.<sup>190</sup> "The 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 government's "interests in effective law enforcement."<sup>191</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 the police themselves or to others.<sup>192</sup> Although subtle differences exist between the Supreme Court's use-of-force

187. Figovenov, Nos. 18299/03 & 27311/03, ¶ 202.

188. Hathaway, *supra* note 161, at 1926–27; MELZER, *supra* note 168, at 30.

189. See HEYNS, *supra* note 162, at 8.

190. See *Tennessee v. Garner*, 471 U.S. 1, 7 (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."); *Brower v. County of Inyo*, 489 U.S. 593, 596–97 (1989) (showing that, 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); *Rochin v. California*, 342 U.S. 165, 172–73 (1952) (illustrating that, 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*).

191. *Id.* at 9.

192. See, e.g., *Scott v. Harris*, 550 U.S. 372, 382 (2007); *Graham v. Connor*, 490 U.S. 386, 396 (1989); Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1120 (2008) (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 state's institutions of criminal law, usually by enabling a lawful arrest; (2) protecting public order; and (3) protecting the officer from physical harm).

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>193</sup> This means that under IHRL, 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>194</sup> Human rights law simply does not tolerate “shoot-to-kill” orders.<sup>195</sup> The exact opposite is true under the LOAC.

### C. *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>196</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>197</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>198</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>199</sup> but also limited as to the basic authority to conduct attacks at all.

193. Corn, *supra* note 156, at 76.

194. Emmerson, *supra* note 183, at 17.

195. Watkin, *supra* note 103, at 18. Nor does U.S. law. See *Idaho v. Horiuchi*, 253 F.3d 359, 377 (vacated as moot by *Idaho v. Horiuchi*, 266 F.3d 979 (9<sup>th</sup> Cir. 2001)) (describing Federal Bureau of Investigations rules of engagement that permit agents to hide in the bushes and gun down men who posed no immediate threat as “wartime rules” patently unconstitutional for a police action).

196. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. ¶ 25.

197. *Id.*

198. ICRC, *supra* note 150, at 18.

199. See Hague Convention IV art. 22, Oct. 18, 1907, <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=56AA246EA8CFF07AC12563CD0051675A> [<https://perma.cc/E7Y5-AJNL>] (archived Oct. 3, 2015); Additional Protocol I, *supra* note 105, 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.”).

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>200</sup>—can be directed only against military objectives, including combatants,<sup>201</sup> but never against civilians (unless and for such time as they participate directly in the hostilities), noncombatants, 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>202</sup> While harm to civilians and noncombatants 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>203</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 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>204</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.

200. See Additional Protocol I, *supra* note 105, art. 49.

201. See *id.* art. 52(2) (defining military objective); ICRC COMMENTARY, *supra* note 155, at 635 (explaining that 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”) (quoting the Preamble of the Declaration of St. Petersburg).

202. ICRC, *supra* note 150, at 19; see THE LAW OF LAND WARFARE, *supra* note 154, ¶ 41 (instructing U.S. Army commanders that “[t]hose 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,” this brief, but important directive reflects the base principles of conflict regulation that lie at the heart of the LOAC and that define the legal boundaries of the targeting process).

203. Additional Protocol I, *supra* note 105, arts. 51, 57; OPERATIONAL LAW HANDBOOK, *supra* note 4, at 13.

204. See Watkin, *supra* note 103, at 16; Additional Protocol I, *supra* note 105, art. 57 (explaining that 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”).

### D. *The Hybrid of Civilians Directly Participating in Hostilities*

Nothing has challenged this traditional dichotomy between war and peace use-of-force authorities and between conduct and status-based targeting regimes more than the sustained COIN operations in Iraq and Afghanistan in which 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>205</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>206</sup> Further complicating the use-of-force calculus is the fact that the conduct in which these individuals engage often 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>207</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>208</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>209</sup>

However, the exact contours of the DPH exception, both as to the specific meaning of "direct participation" and the temporal

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205. Corn & Jenks, *supra* note 104, at 314.

206. See Additional Protocol I, *supra* note 105, art. 50(1) ("In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.").

207. See Interview with Colonel Scott Halstead, *supra* note 31. 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.

208. Additional Protocol I, *supra* note 105, art. 51(3); see 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.

209. See ICRC COMMENTARY, *supra* note 155, at 618 (further explaining that "[t]he 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 as long as he takes a part in hostilities.").

parameters of the rule, have been and remain the subject of intense debate.<sup>210</sup> These debates occur within and outside of the Department of Defense, as well as between the United States and its allies, which has led to a lack of clear policy guidance on the parameters of implementing the rule in actual operations.<sup>211</sup> It is important for present purposes that, even applying a narrow interpretation of the DPH rule, the rule straddles the line between traditional status-based targeting authorities and peacetime self-defense rules inasmuch as it is a legitimate basis for offensive targeting based solely on a determination of conduct. As such, in the absence of clear policy guidance, self-defense authorities have frequently been invoked at the operational and tactical levels as the basis for targeting presumptive civilians taking direct part in hostilities.<sup>212</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>213</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>214</sup> Unlike traditional

210. See generally INT’L COMM. OF THE RED CROSS [ICRC], INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) (prepared by Nils Melzer) [hereinafter INTERPRETIVE GUIDANCE], [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report\\_res/\\$File/direct-participation-guidance-2009-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf) [<https://perma.cc/W5AC-SS7B>] (archived Oct. 3, 2015) (illustrating the intensity of this debate through an expression of strong opposition). See also, e.g., Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5, 6 (May 2010) (explaining that many of the experts who participated in the six-year project to produce the guidance withdrew their names from the final product); W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769, 783–84 (2010) (discussing additional meetings of experts to address issues related to direct participation); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 693–94 (2010) (explaining that the Interpretive Guidance lacks clarity and precision in its analysis of direct participation issues).

211. The author makes this observation based on his personal experience as a judge advocate practicing international and operational law for over twenty years, including 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, *supra* note 34, at 89 (“The United States interprets ‘direct part’ more broadly than the Additional Protocol I signatories.”).

212. See, e.g., Janin, *supra* note 34, at 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.”).

213. ICRC COMMENTARY, *supra* note 155, at 618; see OPERATIONAL LAW HANDBOOK, *supra* note 4, at 20 (emphasizing the importance of distinguishing between legitimate targets and civilians not taking part in hostilities).

214. Corn, *supra* note 156, at 68–69.

principles of self-defense, however, the temporal limitation on DPH-targeting is not based on imminence.<sup>215</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 directly threaten death or grievous bodily harm.<sup>216</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>217</sup> The *ad bellum* gloss of the SROE with its broad notions of anticipatory self-defense adds considerably to this temptation.<sup>218</sup> For units operating under NATO ISAF ROE, nonimminent hostile acts or demonstrations of hostile intent are legitimate bases for conducting offensive attacks.<sup>219</sup>

Applying the rule of DPH in COIN operations 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, including the DPH rule, would justify the vast majority of engagements, the potential for this overbroad interpretation and application of self-defense authorities to bleed over to noncombat operations is all too real and calls for a recalibration of the use-of-force construct in the SROE.

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215. See ICRC COMMENTARY, *supra* note 155, at 619 (showing that 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).

216. See INTERPRETIVE GUIDANCE, *supra* note 210, at 66 (identifying acts such as gathering of intelligence and equipping, instructing, and transporting of personnel as sufficient preparatory acts).

217. ICRC COMMENTARY, *supra* note 155, at 618–19 (discussing “hostile acts” as conduct lifting civilian immunity from attack).

218. See Janin, *supra* note 34, at 91–93.

219. NATO LEGAL DESKBOOK, *supra* note 32, at 243.

## V. TOWARD A NEW USE-OF-FORCE CONSTRUCT FOR THE SROE

As demonstrated throughout this Article, anchoring SROE individual and small-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 small-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 preservation, and in certain instances additional use-of-force authorities short of status-based rules may also be legally appropriate and necessary for mission accomplishment. The IHRL arbitrary killing standard "must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct[,] and the operational choices which must be made in terms of priorities and resources."<sup>220</sup> 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 also with the strategic, political, and military imperatives governing each particular operation.

### A. Individual and Small-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 principle recognized in the domestic law of most all nations.<sup>221</sup> As emphasized throughout this Article,

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220. Case of Figoenov and Others v. Russia, App. Nos. 18299/03 and 27311/03, Eur. Ct. H.R., ¶ 209 (2012).

221. See Prosecutor v. Kordic Case No. IT-95-14/2-T, Judgment, ¶ 451 (Feb. 26, 2001) (noting that the principle of self-defense enshrined in the Rome Statute, art. 31(1)(c) "reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law"); Wallerstein, *supra* note 22, at



however, servicemembers and civilians are not similarly situated. Like police, and even more so, "[servicemembers] act with state authority, they are often not permitted to retreat, and they are trained and expected to use force."<sup>222</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 bound their public authority to use force, even in self-defense.<sup>223</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>224</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 in 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>225</sup> When state actors use force for immediate self-protection, they do so as part of the exercise of their official authority.<sup>226</sup> Thus, while universally accepted principles 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 small-unit self-defense, the interest is clear. Protection generally, and force protection specifically, are considered military functions essential to preserving

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999 ("the right to self-defense is recognized in all jurisdictions"); Watkin, *supra* note 103, at 34.

222. Harmon, *supra* note 192, at 1120.

223. *Id.*

224. *Id.* at 1120–21.

225. *Id.* at 1121.

226. *Maryland v. Soper*, 270 U.S. 9, 33 (1926); see Harmon, *supra* note 192, at 1150 ("Police 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.").

the force's ability to fight and secure the nation's vital interests.<sup>227</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>228</sup> The inclusion of variants of self-defense authorities in human rights documents and the ROE 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>229</sup>

The next step is to identify the permissible contours of public authority individual and small-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 small-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>230</sup>

The Department of Justice's deadly force policy, grounded in the Supreme Court's Fourth Amendment seizure cases, is nearly identical: "[l]aw 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>231</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*

227. JP 3-0, *supra* note 179, at 29–30.

228. See Harmon, *supra* note 192, at 1155–59 (discussing the legitimate state interest in preserving police forces and allowing officers to defend themselves).

229. Statute of the International Court of Justice, 59 Stat. 1031, art. 38(1).

230. *Basic Principles on the Use of Force*, *supra* note 178, ¶ 9.

231. Memorandum from the United States Attorney General (USAG) on Resolution 14 (Oct. 17, 1995), <http://www.justice.gov/ag/readingroom/resolution14b.htm> [<http://perma.cc/RLT3-DG4H>] (archived Oct. 4, 2015).

*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 small-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 small-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. And as with individual self-defense, unit self-defense should be constructed on the domestic and IHRL principles governing the defense of others. 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 IHRL principles of strict necessity, proportionality, and imminence. The deletion 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>232</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 than the current SROE construct, the suggested formulas align closely with universally accepted self-defense principles.

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232. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 81.

### B. 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 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>233</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>234</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>235</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 force, up to and including lethal force, when strictly necessary.

Consider, for example, the United Nations’ view on the need to authorize UN peacekeepers to use force to defend not only themselves, but also the mandates they are enforcing. The United Nation, through the Department of Peacekeeping Operations

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233. HEYNS, *supra* note 162, at 8.

234. MELZER, *supra* note 168, at 30; see *Case of Figovenov and Others v. Russia*, App. Nos. 18299/03 and 27311/03, Eur. Ct. H.R., ¶¶ 209–11 (2012) (explaining that “authorities’ positive obligations under Article 2 of the Convention are not unqualified”).

235. *Basic Principles on the Use of Force*, *supra* note 178, ¶ 9; see Memorandum from USAG, *supra* note 231 (stating that 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 of grievous bodily harm to the officer or another person). The Department of Justice memorandum is based on the leading Supreme Court cases of *Tennessee v. Garner*, 471 U.S. 1, and *Graham v. Connor*, 490 U.S. 386.

(DPKO),<sup>236</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>237</sup> The United Nations’ model ROE clearly contemplate use of force authority beyond self-defense—that is, for mission accomplishment.<sup>238</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>239</sup> This authority includes the defense of UN facilities, installations, and equipment “to ensure security and freedom of movement of its personnel . . . .”<sup>240</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 uncertain at best. What is clear from the foregoing, however, is that providing U.S. servicemembers with standing authority to treat any efforts to impede U.S. forces from accomplishing unspecified 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

236. See UNITED NATIONS PEACEKEEPING: DEPARTMENT OF PEACEKEEPING OPERATIONS, <https://www.un.org/en/peacekeeping/about/dpko/> [<https://perma.cc/745W-958T>] (archived Oct. 4, 2015) (showing that the 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).

237. UNITED NATIONS, DEPARTMENT OF PEACEKEEPING OPERATIONS, UNITED NATIONS PEACEKEEPING OPERATIONS PRINCIPLES AND GUIDELINES 35 (2008); see UNITED NATIONS, 2 DEPARTMENT OF PEACEKEEPING OPERATIONS, UNITED NATIONS INFANTRY BATTALION MANUAL, 251–55 (2012) (providing model ROE for peacekeepers).

238. UNITED NATIONS INFANTRY BATTALION MANUAL, *supra* note 237, at 251–55.

239. Department of Peacekeeping Operations, Military Division, *Rules of Engagement (ROE) for the Military Component of the United Nations Stabilization Mission in Haiti (MINUSTAH)*, ¶ 14(h), (2008) (on file with author).

240. *Id.*

thorough analysis and determination that, in the course of the particular operation, force will be necessary to achieve a legitimate state interest and should always be narrowly tailored to accomplishing those defined ends.

### *C. Standing versus Mission Accomplishment ROE*

As noted earlier, the SROE contain both standing self-defense authorities applicable during all military operations and an enclosure containing enumerated supplemental ROE measures that may be authorized at different levels of command for specific contingencies or operations. This basic structure is designed to provide, in a standardized form, authority to units and individuals to exercise self-defense at all times, while providing a process for the rapid development of mission-specific ROE, which will always depend on the legal, policy, and military circumstances prevailing at the time.

Owing to its expeditionary nature and history, its significant ongoing presence around the globe, and the risks inherent in these operations, the United States has issued standing self-defense ROE guidance to all U.S. armed forces operating outside of the United States since 1986. These standing ROE can and do serve strategically significant and valid ends. They are an important conflict management tool and establish a baseline against which, in the absence of specific orders or guidance, U.S. forces can train and operate consistent with nationally established thresholds for initiating and/or continuing combat engagements or otherwise using force.

In regard to the exercise of national self-defense, providing standing guidance to those commanders delegated national self-defense authority makes sound policy and military sense and is consistent with the history and ad bellum foundations of the SROE. But the case is not as strong when it comes to issuing individual and small-unit self-defense as standing authorities.

No two military operations or missions are ever the same. The circumstances, objectives, basis, and conditions will always vary and evolve during the course of any given operation, so too must the ROE, if they are to be operationally relevant and effective. "Developing and implementing ROE is a dynamic process that must be flexible enough to meet changes in the operational situation."<sup>241</sup> As the name implies, and in contradistinction to standing ROE, mission-accomplishment ROE are narrowly tailored rules issued for specific missions or operations. They generally take the form of a series of individual measures used to define the limits on, or to grant authority for, the

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241. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 97.

use of force.<sup>242</sup> Mission-accomplishment supplementals are the most effective means for aligning use-of-force authorities with political, military, and—most importantly—legal prescriptions.

It is true that U.S. forces are constantly stationed or deployed around the globe, often exposing them to unique risks. Even the most benign employment of the military, such as in a humanitarian assistance mission, will always involve some degree of risk to the executing forces from hostile groups or individuals. There is simply no civilian analog to military forces conducting even humanitarian assistance, disaster relief, or peacekeeping operations, which will have unique tasks, organization, weapons, and missions—not to mention an open and recognizable presence in a foreign territory.<sup>243</sup>

Based on the unequaled and near-omnipresent threats U.S. forces face, reasonable grounds can be advanced in favor of issuing standing individual and small-unit self-defense authorities, and like national self-defense, the decision is ultimately a policy judgment. However, for many of the reasons set forth in this Article, including the fundamental legal differences underlying the different self-defense regimes and the myriad operational contexts in which U.S. forces operate, issuing individual and small-unit self-defense authorities as mission-specific supplemental measures would better serve the core purposes of ROE.<sup>244</sup>

It is nearly always the case that U.S. forces are deployed and employed only to execute defined missions pursuant to specific operational orders. These orders can, and generally do, include mission-specific ROE based on a detailed mission analysis, particularly an assessment of the threat environment, force protection requirements, and the extent to which coercive force will

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242. See *id.* at 97–98 (explaining that, according to the SROE, “supplemental measures” are intended to: (a) provide enough of the framework underlying the policy and military guidance to enable the commanders to appropriately address unforeseen situations when immediate decisions and reactions are required; (b) provide clear and tactically realistic military policy and guidance to commanders on the circumstances in which use of force can be used for mission accomplishment; and (c) enable subordinate commanders to request additional measures needed to carry out their mission).

243. See Martins, *supra* note 95, at 2 (responding to Parks, *supra* note 50, at 32–37 and explaining that “individual soldiers . . . facing bad actors . . . get no help from legal formulas for when deadly force is authorized”); see also UNITED NATIONS PEACEKEEPING OPERATIONS PRINCIPLES AND GUIDELINES, *supra* note 237, at 35 (explaining the political implications of United Nations peacekeeping operations and the need for sound judgments).

244. See JP 3–0, *supra* note 179, ch. V, at 1 (explaining that modern military operations vary in scope, purpose, and conflict intensity across a range that extends from military engagement, security cooperation, and deterrence activities to crisis response and limited contingency operations and, if necessary, to major operations). The nature of the strategic security environment may require U.S. and/or other forces to engage in several types of joint or multinational operations simultaneously across the range of military operations—such as civil support, humanitarian assistance, peacekeeping or peace enforcement, counterdrug, and low, mid, and high intensity armed conflict to name a few—and what is referred to as the conflict continuum.

be needed to accomplish the mission. As with other use-of-force authorities, tailoring individual and small-unit self-defense to the specific operational construct and mission imperatives would more effectively balance force protection with strategic ends.

While the advisability of limiting individual and small-unit self-defense authorities to mission-specific supplemental measures is open to reasonable debate, there should be little, if any, question with respect to issuing conduct-based use-of-force authorities beyond the core authority to exercise immediate individual or small-unit self-defense. As we have seen, the legality, not to mention the strategic suitability, of empowering U.S. forces to employ force to achieve national objectives is always context dependent, as is the level and scope of force that may be exercised. The use-of-force authorities necessary and appropriate for earthquake relief missions in Haiti, for example, cannot compare to those necessary for special operations forces to conduct a hostage rescue operation against armed bandits in the middle of the Somali desert.<sup>245</sup>

Consonant with policy, military, and legal imperatives, conduct-based use-of-force authorities should be mission tailored no different than status-based targeting restraints and constraints effected through mission-accomplishment ROE. For operations conducted in the context of armed conflict, self-defense authorities should be drafted in synchronization with, and not as a substitute for, legally distinct DPH-based ROE.

## VI. 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 U.S. 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 U.S. forces inherent in the conduct of military operations, especially in hostile environments.

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245. See Chris Lawrence, *US Special Forces Rescue Somali Aid Workers*, CNN (Jan. 26, 2012), <http://www.cnn.com/2012/01/25/world/africa/somalia-aid-workers/> [<http://perma.cc/UW2D-Y4GR>] (archived Oct. 4, 2015).



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 U.S. 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 use-of-force framework.

This Article has identified the conceptual shortcomings of the SROE's use-of-force rules—specifically the flawed legal premises underlying the standing rules of individual and small-unit 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 small-unit self-defense must be corrected to ensure that the United States meets its obligations under domestic and international law, as well as to provide greater clarity and operational flexibility in the future when U.S. 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 United States 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 Article has offered recommended revisions to the SROE self-defense rules that would better align individual and small-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 operationally 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 Article further recommends that these rules,

including individual and small-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 would better mitigate these risks and provide commanders with legally sound tools to better exercise mission command of their forces on behalf of the nation.

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