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RULES OF ENGAGEMENT:

AN UNCLASSIFIED PRIMER

A Thesis

Submitted to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the official policy of the United States Department of Defense, Department of the Army, The Judge Advocate General's School, Army, the Department of National Defence, the Canadian Armed Forces or the Office of the Judge Advocate General of the Canadian Armed Forces.

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**RULES OF ENGAGEMENT:
AN UNCLASSIFIED PRIMER**

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ABSTRACT: This thesis provides a comprehensive unclassified analysis of Rules of Engagement (ROE). Both legal and non-legal factors affect the degree to which such rules restrict the use of force by armed forces during times of peace and war. The legal factors which apply to ROE are the right of self-defence under international law, the laws of war, and, for domestic operations, the domestic laws pertaining to the use of force and aid to civil authorities. The non-legal considerations which also restrict the resort to force have political and military rationales. Further analytical issues are considered in assessing various ROE for peacetime, transitional periods, wartime, and during exercises. Finally, the procedural aspects of drafting, reviewing, modifying, and disseminating ROE are also considered. The thesis is that ROE are a very necessary adjunct to military operations that require a particular expertise which can only be achieved through a cooperative effort of both operational legal advisor and the actual war-fighter.

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At the evening update the CINC [Commander in Chief, General H. Norman Schwarzkopf] was briefed on an incident in which an Iraqi MiG-25 crossed the Saudi border some six to ten miles. Our aircraft in response were locked on and prepared to fire when the MiG-25 turned and flew back across the border. The CINC reminded the operations officer that we do not want to start the war over a single aircraft and that we should carefully review our rules of engagement.¹

I. INTRODUCTION

With the success of the Persian Gulf War in the winter of 1991, the importance and role of rules of engagement (ROE) have received greater attention. In 1983, Captain Ashley Roach, USN, wrote in his definitive article on ROE:

There is a very real need for greater knowledge of Rules of Engagement on the part of strategy and policy personnel, tacticians and operators, and even by our civilian leaders. At present these rules are rarely, if ever, exercised and too few planners and commanders seek contingent approval for additional or relaxed rules.²

Thus, while a few key articles have been written on the topic, there has been no comprehensive up-to-date analysis of ROE. The issues to be considered cover such questions as: what ROE are,

what they purport to do, what influences them, and how they are implemented. The obvious concern for commanders, however, is how their forces can achieve the necessary middle ground between the USS *Stark* (FFG-31)³ and the USS *Vincennes* (CG-49)⁴ incidents. Not firing in self-defence and suffering casualties is as unsatisfactory as either firing too soon, potentially escalating a crisis, or firing at an innocent target.

Such concerns are weighty enough without adding the complexities of coalition force interaction. Such a mode of warfighting now appears to be more likely for future international armed conflicts. For instance, during the Persian Gulf War, an augmented squadron of Canadian Forces (CF) CF-18 aircraft were fully integrated into the United States' Combat Air Patrols (CAPs) schedule over the Persian Gulf. These aircraft protected Canadian, U.S., and other coalition ships that were conducting the maritime interdiction operations in enforcement of the United Nations (U.N.) embargo against Iraq. Later, during OPERATION DESERT STORM, the Canadian pilots flew in support of actual allied combatant operations.⁵ In such circumstances the CF-18 pilots' ROE had to recognize two lines of control. First was the Canadian government's authority over the strategic employment of CF units and their involvement in the region. The second was the tactical control that was exercised by United States commanders through the daily Air Tasking Order (ATO) and by the Airborne Warning and Control System Boeing E-3B/C Sentry (AWACS) aircraft or Aegis class

cruiser controlling their CAP or sweep escort mission. Initially, the pilots' immediate concern was their understanding of the circumstances under which they could fire to protect themselves or others, without unreasonable fear that they were about to start the hostilities.

Rules of engagement regulate the use of force. This is done either through the granting of permission to fire or through restricting the ability to employ the unit's weapons. Obviously, such specifications, definitions of hostile intent, descriptions of the permitted responses to particular threats or indications, and other factors regarding the use of force would be of great use to an adversary. Therefore, much of the actual ROE material, of necessity, is classified. Although this is an unclassified paper, much can be discussed about ROE because the analytical framework for ROEs is not classified, nor should it be. Military lawyers, as well as operational officers need a conceptual basis from which to consider a particular set of ROE or to assist in their drafting. Such a review must ensure that the scope of the ROE are complete and that they are not unnecessarily limited because of a failure to allow all permissible uses of force.

This dissertation will set out this framework for analyzing ROE. Additionally, it will consider how ROE beneficially regulate the use of force in both peace and war. The thesis is that ROE are a very necessary adjunct to military operations that require a

particular expertise which can only be achieved through a cooperative effort of both operational legal advisor and the actual war-fighter.

II. RULES OF ENGAGEMENT

A. Definitions

William Prescott's famous invocation at Bunker Hill on 17 June 1775--"Don't one of you fire until you see the whites of their eyes."--is a classic instance of a rule of engagement.⁶ No doubt there are other early examples, but the late Professor O'Connell claims that the term 'rules of engagement' only originated in Malta in the 1960s.⁷ While O'Connell does not elaborate on its derivation, he does offer an early 1900s example of the sort of latitude given to Royal Navy ships captains that can be construed as a form of ROE.⁸ By virtue of the nature of their operations, naval commanders have always had the most independence from superior direction of their actions.

Even during earlier periods, however, traditions were such that naval commanders had to be responsive to the political will. What was lacking from that period was the communications technology to enable a more strict set of operational limitations while providing for the ability to revise the instructions if conditions warranted. With the "'Nelson touch' tight rules of engagement

[would] inhibit a commander on the spot from taking the requisite initiatives to achieve the objectives of his orders."⁹ Such an approach does offer the politician the opportunity to blame the commander if things go awry.¹⁰ ROE, therefore, afford a prime means by which the National Command Authority (NCA) and operational commanders endeavour to exercise control over the use of force in a crisis or manage a conflict.¹¹

According to one of the principle commentators on ROE, Colonel Hays Parks, USMCR, ROE in the United States in 1979 "were in a state of disorganization only slightly short of anarchy."¹² The Chief of Naval Operations, Admiral Thomas B. Hayward, was the one who was responsible for the standardization of the peacetime ROE (PROE), particularly in the maritime arena; although, these rules did not represent just the views of a single service.¹³ Rather, "they were a clear statement of national views on self-defense in peacetime that also could smooth the transition to hostilities and, for that matter, might be used in many stages of a belligerency."¹⁴ These ROE did this through a compilation of all the references and the inclusion of 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."¹⁵

Now, the controlling definition for the United States Armed Services is that of the Joint Chiefs of Staff (JCS):

Directives that a government may establish to delineate the circumstances and limitations under which its own naval, ground, and air forces will initiate and/or continue combat engagement with enemy forces.¹⁶

The United States Army uses two definitions. The first, which is very similar to the JCS definition, reads as follows:

1. Directives issued by competent military authority that specify the circumstances and limitations under which forces will initiate and/or continue combat engagement with other forces encountered.¹⁷

The second definition creates an ambiguity for interpreting the first definition: "2. [i]n air defense, directives that delineate the circumstances under which weapons can fire at an aircraft [sic]. The right of self-defense is always preserved."¹⁸ This definition, therefore, would imply that self-defence is denied to all forces other than those in air defence operations.¹⁹

As will be demonstrated *infra*, one of the most important areas where force can be applied is in the right of self-defence. This will be most likely in two situations. ROE will prescribe that a unit or individual act in self-defence of either the unit or the nation. Unit self-defence has been defined as:

The act of defending a particular unit of U.S. forces, or an element thereof, against a hostile act or manifestation of hostile intent. The need to exercise unit self-defense may arise in situations ranging from apparently unrelated, localized violence, to terrorist acts, low-level conflicts and prolonged engagements.²⁰

National self-defence is defined as:

The act of defending the U.S., U.S. forces, and, in certain circumstances, U.S. citizens, their property, or U.S. commercial assets from a hostile act or hostile intent. The need to exercise national self-defence may arise in isolated or prolonged regional or global situations that are often related to international instability.²¹

There are other definitions used in ROE, however, they are the classified enunciations of such things as "hostile act" and "hostile intent." These analytical aspects of these concepts will be discussed *infra*.

B. Analytical Structure of ROE

Each of the seminal articles in the area of ROE is emphatic that, whatever they are, ROE are part of the political process whereby armed forces are subordinate to the political will.²² As

equally emphatic is that ROE must not be more restrictive than the law requires unless for very clear reason.²³

But, there is more than political and legal concerns that ROE have to address. Captain Roach illustrated this in his 1983 article with two Venn diagrams.²⁴ The first shows that ROE are a smaller and totally contained subset of the larger set of actions permitted under the law of armed conflict. These laws encompass all the domestic and international law affecting military operations involving the potential use of force.²⁵ He also identified four other influences on ROE: law, operations, diplomacy, and policy.²⁶ In the second Venn diagram he demonstrates how ROE are actually an interaction of these four factors.²⁷

Based on the word diplomacy being used in the broad sense of the "management of international relations,"²⁸ I would argue that diplomatic factors affecting ROE are either of a political nature, as in serving particular political objectives, or they are international legal obligations set either by treaty or customary international law. The best example of the latter is neutrality. As will be shown, one of the prime purposes of ROE is to ensure that neutrals are not inadvertently targeted. Old-fashioned gunboat diplomacy, however, is an example of a diplomatic action involving the show of force that is essentially a political purpose.²⁹

Thus, the regulation of the use of force by various units or personnel of armed services serves several purposes. They range from legal constraints and political aims to military command objectives. Each factor serves a particular goal and will likely affect the nature of the restriction imposed. Just how these factors and their components affect ROE will be considered *infra*.

1. Legal purposes

Rules of engagement are a primary means of ensuring compliance with both international and domestic law. In peacetime, the rules will reflect the right of self-defence under the United Nations (U.N.) Charter.³⁰ In brief, the law requires that such a use of force be based on the principles of necessity and proportionality. The former entails either an armed attack or the threat of imminent attack.³¹ The proportionality element "requires that the use of force be limited in intensity, duration and magnitude to what is reasonably required to counter the attack or threat of attack."³² In wartime, the legal restrictions that ROE will impose will be the law of war, namely the Hague³³ and Geneva Conventions of 1907 and 1949, respectively.³⁴

While other orders and training are also used to achieve the goal of ensuring that the laws are obeyed, especially where the potential use of force is involved, further direction is often necessary and desirable. The Part III below will consider the laws applicable to the use of force.

2. Political purposes

Since military forces in a democratic society must follow the instructions of the government that they serve, ROE facilitate the primary purpose of ensuring that national policy will be followed by those forces in both peace and war.³⁵ Even though he was referring to the naval world, Professor O'Connell noted that "staffs may not have the luxury of time to formulate a reasoned set of rules of engagement, and, in the absence of these, naval operations are likely to be too hesitant for want of certainty or too uncontrolled to be politically acceptable."³⁶

This political control is omnipotent and therefore it can direct action that is more restrictive than required legally. For instance, Admiral Woodward notes that the "political requirements could result in our entering the [British Total Exclusion Zone around the Falkland Islands] with our hands tied behind our backs. I thought it all too possible that I was going to be told again, 'The enemy *must* fire the first shot.'³⁷ The reason for such an approach was "Great Britain wished to be seen as the wronged party, the peace loving victim who had been unfairly attacked and was now being attacked again."³⁸ As will be seen *infra* in Part III, Admiral Woodward was quite correct in insisting upon the right to fire first. However, it was certainly within the political decision making realm to restrict the Royal Navy's application of force in the hopes of activating world opinion.

ROE can provide guidance or pre-approved action for use in controlling a crisis and they offer a mechanism to regulate the shift from peace to war. In wartime, these rules can control the fighting for political reasons. One of the best examples of this is the restrictions imposed on the attacking aircraft in the 1986 bombing of terrorist targets in Libya. The political leadership had a concern that there not be any Americans shot down to become prisoners of war; therefore, the aircraft were permitted only one pass over their targets.³⁹

Even with modern communications technology, the highest levels of government and even the military command structure cannot guarantee instantaneous contact with a particular unit. Given the speed of modern weapons it would be entirely inappropriate for a unit to expect permission to fire be given at from a high level. No nation is expected to suffer a potentially crippling first hit before trying to respond. Therefore, the political leadership must set out some direction on their expectations regarding the utilization of the nation's military resources. As well, the National Command Authority may wish to reserve exclusively for its authorization the use of certain weapons that may be present at the unit or particular types of responses that are within the capability of the force.⁴⁰

3. Military purposes

ROE also serve as guidance to subordinate commanders about the employment of force within their command. As such, they are integral to a unit's deployment for operations. Other than humanitarian assistance operations where there is no risk of violence, any employment of military forces must contemplate the use of force. While foreign missions are likely to be more hazardous, ROE will not be exclusively for such operations. Thus, domestic operations may also involve ROE.⁴¹ While ROE should not be the actual mission statement, they should be crafted so as to clarify or help define the unit's mission. Any additional understanding of the mission that is so provided should enhance the likelihood of the successful accomplishment of the objective.

The most important military aspect of ROE is the establishment of the parameters on the use of force. This applies both to the commander as well as to his personnel. The commander will be bound by the ROE as guidance on the application of the national policy applicable to the mission. While ROE are mainly constraining in nature to prevent overreaction, they could prevent underreaction if the ROE specify permissible responses to expected actions on the part of an adversary. Also, some operations involve threat and counter-threat; thus, ROE will help maintain the balance by not "thrusting the apparent necessity of self-defense too obviously upon the opponent."⁴² ROE will also protect the commander if clear directions on the use of force are given to the troops.⁴³ The

debate whether ROE need to or should restate the basic laws of war will be considered below.

ROE may also characterize the nature of the mission. If a show of force is desired then the ROE may be less constrained than normal peacetime deployments. United States Navy freedom of navigation exercises provide examples of both restricted and liberal ROEs. On 4 January 1989, two F-14 Tomcat fighter aircraft from the USS *John F. Kennedy* (CV-67) were approached head-on by two Libyan MiG-23 Floggers in international waters of the Gulf of Sidra. As the MiGs exhibited hostile intent, the F-14s engaged them with air-to-air missiles and both MiGs were shot down.⁴⁴ At the time, this incident was just the latest of several Gulf of Sidra incidents involving aggressive and hostile acts between the USN and Libyan forces;⁴⁵ this consideration no doubt had driven the definition of "hostile intent" in the ROE.⁴⁶

By contrast, I suspect that the ROE were very restricted for the USN freedom of navigation exercise by the USS *Caron* (DD-970) and the USS *Yorktown* (CG-48) on 12 February 1988 when they were involved in the bumping incident with two Soviet warships in the U.S.S.R.'s territorial waters of the Black Sea.⁴⁷ Normally, however, one would expect that ROE will be designed to maintain a low threat profile for potential adversaries. In doing so, the ROE should prevent the opposition from being placed in a position of reacting in self-defence, as were the two F-14s in January 1989.

It is clear that ROE should not be what the Navy would call 'rudder orders,' in other words, not specific directions for how a commander is to fight his unit.⁴⁸ Instead, they should offer military forces a standardized set of instructions that provide consistency of action among the services and units. Commanders require the maximum discretion possible in directing their forces.

There have been two instances where the highest levels of the U.S. executive have ignored that principle and have instead set out ROE that directed the targets be attacked, the weapons to be used, and the timings of the attacks. These cases exhibit the pitfalls of ROE being too specific and not leaving a commander to decide how best to use his resources in accordance with the principles of war to accomplish the mission. The cases referred to are the bombing of North Vietnam during Operation Rolling Thunder⁴⁹ and the bombing of anti-aircraft artillery and missile sites in Lebanon on 4 December 1983. The latter incident affords a good example of the potential consequences of undue political involvement in military practices.

The action in question was the air strike launched from the U.S.S. *John F. Kennedy* (CV-67) and the U.S.S. *Independence* (CV-62) against Syrian anti-aircraft artillery and missile sites in Lebanon's Bekaa Valley on 4 December 1983. This attack was in retaliation for the bombing of the U.S. Marine Corps barracks in Beirut on 23 October 1983. An F-14 reconnaissance mission that

went through the Valley the day before had been shot at. The on-scene commanders planned to have the aircraft 'go in' at midday so that the pilots would not be blinded by the rising morning sun. The planned crews briefing and loading of the aircraft were thus based on a late morning launch time. Rockeye cluster bombs were selected as the munition to be used because of the targets' dispersal and the inability to pick out individual targets for engagement with more precise munitions. When "Higher Authority" insisted on first light as the time of the attack, the arming of the aircraft and crew briefing became chaotic when the launch time was advanced. Eight aircraft ended up carrying inappropriate ordinance which could have been carried by one A-6 alone. One pilot was killed, another became a POW, and two aircraft were lost out of a strike force of eighteen.⁵⁰ One can conclude that the directions for the attack must have modified or suspended some of the ROE in force at the time.

Such a degree of political control has been soundly condemned.⁵¹ Thankfully, OPERATION DESERT STORM was not so directed with the result that it was a resounding success.⁵²

III. THE LEGAL USE OF FORCE

A. Use of Force Under International Law

1. General principles

Rules of engagement must be founded in the principles of international and national law. Foremost among these rules are the restraints on the use of force under international law, within in which a commander must stay.⁵³ Retorsion⁵⁴, reprisals⁵⁵, and intervention⁵⁶ are three of the four measures of "self-help" known under the classical system of the legal regulation of the use of force;⁵⁷ however, self-defence is the one most applicable to ROE. Self-defence, is not an absolute right to justify "self-preservation"⁵⁸ but is strictly a limited right derived from the corollary of the right to independence.⁵⁹ International law also requires a state to repress international crimes such as piracy and the use of force would be authorized in such an instance where it may not be directly related to the immediate needs of self-defence or the protection of one's nationals.⁶⁰

Where once war was justified under *jus ad bellum*⁶¹ as *bellum justum* or *bellum injustum*⁶² or was seen as the extension of politics,⁶³ now, the unilateral use of force against another state is regulated in international law.⁶⁴ One of the first efforts, the 1928 Pact of Paris (Kellogg-Briand Peace Pact), condemned recourse to war for the "solution of international controversies, and renounce[d war] as an instrument of national policy."⁶⁵ As well,

the efforts of Andrew Carnegie and the League of Nations sought to "impose the rule of law on use of force."⁶⁶

Following the devastation of the Second World War, the United Nations was created as a means of making war "both impossible and illegal--impossible, through a concert of great powers functioning as the Security Council; illegal, by condemning all use of force except that justified by the necessities of self-defence."⁶⁷ The following section will discuss the legal strictures on self-defence imposed by the U.N. Charter.

2. United Nations Charter

The Charter now provides in Articles 2(3) and 2(4) the basic legal principles regarding the use of force:

3. All members shall settle their international disputes by peaceful means in such manner that international peace and security, and justice, are not endangered.

4. 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, or in any other manner inconsistent with the Purposes of the United Nations.⁶⁸

It was originally envisaged that the Security Council, through either its status or the military enforcement mechanism,⁶⁹ would prevent armed conflict and promote the peaceful settlement of disputes.⁷⁰ Even though the military enforcement regime of the Security Council has never eliminated the use of force as a state instrument,⁷¹ states still endeavour to justify their actions in accordance with the U.N. precepts.⁷² O'Connell notes that "if the law is ineffective the primordial right of self-defence must reassert itself."⁷³ A minority viewpoint further asserts that Article 2(4) was not binding in the absence of either "the effective establishment of collective institutions and methods" or the "Security Council's effective enforcement of the Charter's provisions."⁷⁴ The International Court of Justice (I.C.J.) has held that Article 2(4) is now a customary rule of international law.⁷⁵

Article 2(4) is by no means clear or unambiguous.⁷⁶ As a result, there have been a few interpretations given to it to permit the use of force that actually derogate from its efforts to prohibit the resort to force. These arguments, each of which has been refuted, are: force can be used to "vindicate or secure a legal right," such as to effect a right of passage through an international strait or secure compliance with a judicial or arbitral award; the use of force to recover territory considered by the recovering state to be rightfully its; and the right of intervention for humanitarian assistance.⁷⁷ The latter claim, but only in the manifestation of the rescue or protection of one's

nationals who are imminently threatened in another state's territory, has any validity.⁷⁸ Rescue attempts, however, must meet a three part test: there is an immediate threat of injury, the host state is unwilling or unable to prevent harm to them, and the actions taken must be confined solely to the rescue and not otherwise derogate from the territorial integrity or political independence of the state.⁷⁹ The Entebbe rescue is seen as the classic example of this right; the attempted Tehran hostages rescue and the rescue of U.S. medical students in Grenada have been criticized.⁸⁰

If Article 2(4), despite its ambiguities, is read to prohibit the use of force, then the only entitlement to apply force against another state or its nationals rests with the right of self-defence under Article 51 since self-defence does not fall within any of the three proscriptions in Article 2(4).⁸¹ Certainly self-defence has been the common justification for the occasions when nations have resorted to the use of force. Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in exercise of this right of self-defence shall be immediately reported to

the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁸²

Thus, a state responding to a clear, unprovoked armed attack has the *inherent right of self-defence* (but only until the Security Council has taken the measures necessary to maintain international peace and security). The more difficult question is what is permitted in instances "not amounting to repulse of an armed attack."⁸³

3. Self-defence & anticipatory self-defence

The issue is whether the Article 51 of the Charter recognizes a full right of self-defence or whether it restricts that right.⁸⁴ There are two schools of thought in this regard. The first, the narrow position, restricts the use of force solely to responding to an armed attack by relying on the wording "if an armed attack occurs". Any threat or use of force not coming precisely within this wording would contravene Article 2(4).⁸⁵ The second, broader position, because the article is silent on what constitutes the "inherent right of individual or collective self-defence," allows the broad use of force in anticipation of an *imminent* armed attack.⁸⁶ The inclusion of the words "nothing ... shall impair the

inherent right," shows a clear intent not to restrict the pre-Charter rights.⁸⁷

The majority position supports this latter interpretation. Brierly examines both the preparatory material on the article and the wording of the other languages of the Charter and concludes that it is "not easy to presume an intention in the ... words drastically to impair that right."⁸⁸ States, it is argued, are not required to await the potentially disastrous results of an attack before being able to respond but may respond to preparatory acts as well.⁸⁹ Professor Schachter notes that:

states facing an imminent threat of an attack will take defensive measures irrespective of the law, but it is preferable to have states make that choice governed by necessity than to adopt a principle that would make it easier for a state to launch an attack on the pretext of anticipatory defence.⁹⁰

If one then accepts the right of anticipatory self-defence, the next step is to determine what is the inherent right of self-defence.

4. *The Caroline Case*

When assessing the inherent or customary right of self-defence all the commentators refer to the classic statement from the

*Caroline*⁹¹ incident in 1837.⁹² During the 1837 insurrection in Upper Canada (now the province of Ontario), a group of Canadian militia crossed into New York State to prevent the transport of men and materials into Canada by the privately owned United States steamship *Caroline* which had been operating from U.S. ports.⁹³ In an attack on the ship, two United States citizens were killed and the ship was destroyed by going over Niagara Falls.⁹⁴

The U.S. Secretary of State, John Forsyth, registered an immediate protest with the British Minister in Washington, Henry Fox, demanding redress for the destruction of property and the killing of Americans.⁹⁵ The British Minister responded that the action taken by the militia was justified "by the 'piratical character' of the *Caroline*, by the unwillingness or inability of the United States to enforce its neutrality laws along the Canadian-United States border, and by the necessity of self-defence and self-preservation."⁹⁶ When Alexander McLeod, a British subject, was subsequently arrested in 1840 Henry Fox was the one protesting. He asserted that the attack on the *Caroline* was "a public act, taken in self-defence by persons acting under the authority of superior officers" and therefore, the United States could not proceed against any individuals.⁹⁷ The Secretary of State replied that the matter was within the jurisdiction of New York State and not within the competence of the federal executive.⁹⁸

Daniel Webster, who replaced Forsyth as Secretary of State, subsequently agreed with the British position in respect of the arrest of McLeod, who was subsequently acquitted of all charges.⁹⁹ Webster disagreed strongly, however, with the justification of the action on the basis of self-defence and his reply has become the classic formulation of the right of self-defence. Self-defence must be judged by the circumstances of the case and therefore Britain had to show a:

necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to [show], also, that the local authorities ... did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.¹⁰⁰

There was subsequent debate over the facts of the case regarding whether there was necessity and whether the response was disproportionate. Lord Ashburton subsequently agreed with Secretary Webster that there are limitations on the use of force based on the right of self-defence.¹⁰¹ This statement has been accepted since that time.¹⁰²

5. Necessity and proportionality

Necessity is the requirement that force be used in response to a hostile act or in situations where the hostile intent is evident.¹⁰³ Necessity must also relate to the requirement to use force because other measures are unavailable.¹⁰⁴ Proportionality, as seen in the *Caroline* incident is the requirement that the use of force be "in all circumstances limited in intensity, duration, and scope to that which is reasonably required to counter the attack or threat of attack and to ensure the continued safety of [its national interest]."¹⁰⁵ There need not be proportionality between the attack and the opposing conduct since "[t]he action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered."¹⁰⁶ Rather, "the requirement of the proportionality of the action taken in self-defence ... concerns the relationship between the action and its purpose, namely ... that of halting or repelling the attack...."¹⁰⁷ Finally, measures taken in preparation for self-defence are not contrary to international law.¹⁰⁸

Peacetime rules of engagement will be most concerned with the immediate *in situ* "legitimate use of counter-force" that is short of resorting to war.¹⁰⁹ The resort to force in self-defence must conform to these conditions of necessity, proportionality, and immediacy, each of which is best assessed by the local commander.¹¹⁰ There is dicta to the effect that the necessity test should not be based on hindsight and that states should be granted a certain

amount of latitude in "deciding the necessity of the measures taken."¹¹¹

6. Collective defence

The U.N. Charter does not define the rights of collective defence. While some commentators have suggested that the scope of collective defence is limited to cases of two states both being attacked, others have suggested that the rights apply whenever a state is attacked.¹¹² Still others have claimed that it applies only where there is sufficient proximity of geographical, economic, political, and cultural factors to justify the conclusion that an attack on one was an attack on the other.¹¹³ State practice supports this interpretation where there is a mutual defence pact between the parties.¹¹⁴ Collective self-defence, too, must remain within the requirements of necessity and proportionality to the threat.¹¹⁵

The I.C.J. in *Nicaragua v. U.S.* added two new rules to the right of collective self-defence. The first is that "there must be a declaration by the victim that it is subject to armed attack" and second, that "the victim requested assistance from the state exercising the right of collective self-defence."¹¹⁶ These requirements will complicate the ability of a coalition unit to act in self-defence of another nation's troops who alone are subject to attack, but they can be overcome by effective communications.

B. Law of War Issues

If the act of self-defence has complied with the requirements of necessity and proportionality, it is almost axiomatic that the use of force will not have infringed any other legal norms. The following of these requirements will mean that the counter-force applied will be only against the attacking forces and the imminent threat. This obviates any concerns for unlawful targets and other law of war issues normally present in combatant operations.

Once the decision has been made to use force beyond that required for the immediate needs of unit or national defence, however, such force must conform to the international norms expressed as the laws of war. Thus, wartime rules of engagement and modified PROE for limited engagements¹¹⁷ will have to be in accordance with the laws of war. Two issues predominate in the ROE formulation. The primary issue will be the laws that deal with targeting. The second area is that of permissible weapons. The use of force against a particular target may be legal, but the weapon *per se* may not be legal or the weapon legal but the way it is employed may be illegal because of consequential or collateral damage or injury.¹¹⁸ The law of armed conflict require that the application of force must accord with the tests of military necessity, proportionality, and humanity.¹¹⁹

Military necessity is the principle which justifies those measures not forbidden by international law which are indispensable

for securing the complete submission of the enemy as soon as possible.¹²⁰ The principle of proportionality provides "the link between the concepts of military necessity and humanity" and prohibits damage to non-combatants which is disproportionate to the military need.¹²¹ Humanity is related to necessity and is concerned with the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes.¹²²

C. Use of Force under Domestic Law

1. United States

The use of force within the context of domestic operations is governed by domestic law. *Tennessee v. Garner*¹²³ is considered to be the most relevant statement of the use of force in U.S. domestic disturbance situations.¹²⁴ Only minimum force can be used in response to a domestic disturbance and deadly force is only permissible if all lesser means have been exhausted or are unavailable and the risk of harming innocent persons is not significantly increased.¹²⁵ Additionally, force can only be used to provide for self-defence to avoid death or serious bodily harm, to prevent crime involving serious risk of death or serious bodily harm, to prevent the destruction of vital public health or safety and property, or to prevent the escape of a person who is a serious threat to persons or property.¹²⁶ Appendix F provides three examples of the various restrictions involved in such operations.

2. Canada

In Canada, the use of force is regulated by the *Criminal Code*¹²⁷ and the *National Defence Act*.¹²⁸ Members of the Canadian Armed Forces acting in aid of the civil power have the status of "constables" and are therefore "peace officers" under the provisions of the *Criminal Code*.¹²⁹ They thereby obtain the legal justifications and defenses accorded "peace officers" in the performance of their duties.¹³⁰

In addition, troops outside their home country need to be aware of host country domestic law that may apply to the use of deadly force in self-defence. Ideally, Status of Forces agreements should be address possible immunity from criminal or civil liability.

IV. NON-LEGAL RESTRICTIONS ON THE USE OF FORCE

A. General

As well as the legal restrictions on the use of force, there are other rationales for the political and military leadership to constrain the legal use of force. Often these restriction may not have obvious reasons and the forces will not be advised of the reasons. In any event, the obligation is to follow the directions provided in the ROE. As an example of such a situation, Colonel Parks refers to the U.S. Ambassador's restriction on the use of

napalm in Laos during the Vietnam War because its "signature" could be readily distinguished from artillery fire which could not obviously be attributed to U.S. forces.¹³¹

Whether the restrictions imposed are necessary or desirable will be determined by the particular situation. Such considerations should be part of the drafting process so that no unnecessary restrictions are placed on the troops that may be placed in harms way. This section will also explore the possible problems associated with differences in coalition forces' operating parameters. An obvious problem area is the ratification or non-ratification by coalition governments of Additional Protocol I to the Geneva Conventions of 1949.¹³² Included in this area are possible agreements with a host country respecting the use of force or restrictions on particular weapons.

B. Political/Diplomatic Restrictions

A very significant factor in the success of the Persian Gulf War was the lack of restrictions on the wartime targeting selection made by U.S. Air Forces, Central Command (CENTAF) staff. This was in contrast to the Vietnam experience where political considerations severely limited the choice of what were otherwise legitimate targets.

There may well be valid political and diplomatic reasons to conduct hostilities in a limited form. This decision is quite

legitimately made by the NCA with the net result that restrictions would be imposed on the conduct of military operations employing force. ROE are the vehicle for such restrictions.¹³³ Thus, the ROE may restrict the engagement of certain targets or the use of particular weapons out of a desire not to antagonize the enemy, world opinion, or to keep the hostilities at a restricted level.

These limitations will arise from the strategic decisions regarding the prosecution of the war or by peacetime political policies. Choices can be made about the aggressiveness with which an adversary can be pressured. In wartime, this issue will be most applicable to the air force where the concept of strategic bombing is supported in the Douhet. To engage in such a course of military action, is a political decision. One commentator notes of one of the effects of the strategic bombing during the Gulf War that:

[p]aradoxically, the large-scale bombing of "strategic," yet not obviously military targets (e.g., the electric grid) within Iraq served as a popular affirmation of the Hussein regime's claim of Western hostility and barbarism. This only underscored the regime's claims to be a bulwark against what Iraqis--and many other Middle Eastern peoples--see, with some justification, as an uninterrupted pattern of Western cultural, military, and economic imperialism.¹³⁴

The detrimental effects of untoward political restrictions on the conduct of wartime operations has been noted previously and does not bear further discussion.

C. Military Restrictions

The restrictions on the use of force that are likely to be imposed by military commanders will be for military reasons. The purposes of these restriction will be to conduct operations in accordance with the mission planning and the implementation of the strategic goals. It could go even so far as to restrict the use of force in self-defence. The quote by General Schwarzkopf at the beginning approaches such a situation. Another wartime commander, Admiral Woodward, states that he did restrict his subordinate commanders' right of self-defence. He states:

First and above all, I wanted precise control of when and how the 'war' started. So I invented a local procedure.... Until the moment I released [the signal to start the war], the war, as far as we were concerned, had not started. I had, in effect, taken away some of my commanders' right of self-defence, further restricting the rules from home which allowed them to fire back. But I did not want this war to go off at half-cock, because that would likely cause disastrous confusion and loss of control....¹³⁵

Part of this process is commanders knowing their subordinate commanders. Admiral Woodward wrote in his diary of one of his destroyer captains:

Coward is reading more into the Rules of Engagement than is intended, and fancies starting the war all on his own. ...: Meanwhile I shall have to amplify the ROE so that all the Commanding Officers can know what I'm thinking, rather than apply their own interpretation, which might range from 'Ask them for lunch' to 'Nuke 'em for breakfast'.¹³⁶

He also wrote:

I realized that considerable local amplification of the ROE was going to be critical. I was sure they made excellent sense at the political interface in Whitehall, but they were sometimes less than crystal clear in the front line, where there was no time for debate as to subtleties implied but not stated. In any case I had two senior commanders, in Barrow and Coward, who were basically reading them entirely differently, and I reckoned they, and no doubt others, needed advice as to how we were expected to behave during those vital first exchanges.¹³⁷

An additional aspect of operational control likely to be seen in wartime ROE is the requirement for positive identification of a target. This is to ensure that only legitimate targets are attacked. Denying the combatant the right to attack without positive identification forces two options. One is to go for positive identification, which most often entails moving in closer for a visual confirmation, as was done in with air-to-air engagements in Vietnam.¹³⁸ The other option is not to attack. For bombing missions, the issue then is what to do with the unexpended ordinance.¹³⁹ The whole matter of targets of opportunity then becomes relevant.

1. Tactical

Rules of engagement are a prime vehicle for a commander to direct the conduct of operations of subordinate units in accordance with his broad plan. The permission to engage particular targets, while they may be lawfully engaged under the law of war, may be refused for very valid operational reasons. For example, a senior commander may wish that roads, railroad lines, and bridges not be destroyed so that they may be used in the future by his forces.¹⁴⁰ During the Gulf War, fighter aircraft were placed outside some of the most important cultural properties in Iraq, such as the Temple at Ur. This was done either in the hopes that the aircraft would be shielded from attack or the coalition weakened if the antiquities were damaged.¹⁴¹ The decision was made not to attack these aircraft since they were effectively removed from combat and

any gain from their destruction would have been outweighed if the buildings had been damaged.¹⁴²

This area is affected very much by technology as well. It involves the overall capabilities of the individual unit to conduct hostilities and to determine what adversary units are doing. Also, intelligence assets will provide knowledge of the enemy units, equipment, and capability or operating parameters and these too may cause a commander to restrict operations.

2. Safety

Rules of engagement are supposed to address the use of force; how a weapon is loaded or activated or whether it is loaded or not is not a matter of the use of force. Such steps, however, are a potential escalatory factor if the adversary sees the arming of a weapon. While ROE should not contain rules that are the repetition of safety rules for the operation of a weapon, ROE can have safety purposes as the root of the rule. O'Connell advocates just such safety measures in his scheme for low and high tension naval ROE.¹⁴³ He proposes that in low tension conflicts live weapons not be loaded and that weapons arming switches be set on safe.¹⁴⁴ These are measure taken for fear of possible accidental firing and would detract from the commander to decide whether the threat posed warrants being prepared to respond, either by visibly arming the weapon, or by firing in self-defence.

Safety is a legitimate rationale for an ROE restriction, particularly when it provides a means to prevent blue-on-blue¹⁴⁵ engagements. While the Gulf War was a resounding success in terms of the few casualties that the coalition forces suffered at the hands of enemy action, it made the deaths from friendly fire all the more distressing.

Norman Friedman describes this aspect of the air forces' rules of engagement that were in place during the Persian Gulf War:

One great surprise of the air campaign was the complete absence of self-inflicted aircraft losses (blue-on-blue). ... It seems more realistic to assume that, fighting a relatively immobile opponent, aircraft could be assigned relatively rigid lists of targets, centrally controlled, so that interlopers were relatively easy to detect. The ATO, AWACS, and a *rigid rule of engagement* (ROE) interlopers [sic] were all very important.

It was probably even more vital that antiaircraft responsibility was limited to fighters, which were subject to fairly tight control. Antiaircraft guns and missiles, much more difficult to control, were all but prohibited from firing. ...

CENTAF imposed rigid rules of engagement to avoid accidental fighter-on-fighter combat; it was always afraid that a U.S. airplane would shoot down a coalition fighter of a type also used by Iraq.¹⁴⁶

Friedman concludes: "This system of ROE was relatively cumbersome, but it functioned well enough in a sky filled with friendly fighters, against a fairly unaggressive enemy air force."¹⁴⁷

While the fear of friendly fire incidents may have dominated the much of the thinking behind the ROE rules requiring positive ID of potential aerial targets, the concern for firing on a neutral could be even catastrophic for the successful conduct of the war. Such 'blue-on-white' engagements can be considered either as a safety or an international law/policy limitation. It is almost so obvious, it is hardly necessary to state that under international law targeting neutrals is prohibited as long as they are not actively assisting your enemy.¹⁴⁸ Thus, since the legal aspects of neutrality are so certain, the ROE involvement with the matter must be considered as a matter of safety than a matter of legal restriction. The difficult issue will be to what extent can the forces involved determine whether the target is neutral, friendly, or the adversary. Another real-world example will illustrate these issues very effectively.

Admiral Woodward cites an incident during the Falklands War which brings to mind the *Vincennes* shootdown of the Iran Air Airbus just over six years later. The British Naval Task Group on its way towards the British Maritime Exclusion Zone around the Falklands Islands was being shadowed by an Argentine Air Force Boeing 707. The Admiral's concern was:

Am I going to let this 'Burglar' go on reporting our latest position back to Argentinian headquarters, possibly telling their carrier where to send a preemptive air strike? Or am I going to 'splash' him, in flagrant defiance of my own Rules of Engagement, perhaps to save ships and lives in my own forces?¹⁴⁹

Admiral Woodward's solution was to "tweak" his headquarters into leaking information that permission had been granted to shoot the aircraft down, in the hopes that that would dissuade the 707 from venturing out.¹⁵⁰ To his surprise, permission was granted and the ROE were modified so that the Argentine aircraft could be engaged within a certain range of the fleet.¹⁵¹ The next appearance did not result in an intercept but on the evening of 23 April 1982 the aircraft approached at high altitude from the south-east.¹⁵² The Sea Dart system on HMS *Invincible* was locked on outside the ROE engagement range, but yet Admiral Woodward had some doubts that it might be someone else.¹⁵³ The staff confirmed that there were no scheduled commercial air flights over that portion of the South

Atlantic, but twenty seconds from giving the order to fire a check of the plot of the flight's route determined that the aircraft was on a direct line from Durban, South Africa to Rio de Janeiro.¹⁵⁴ The aircraft was a Brazilian airliner.¹⁵⁵ While Admiral Woodward did not make much of the incident at the time¹⁵⁶ he notes:

But if we had made a mistake, it would have meant the kind of world-news furore that so haunted the Soviets after they shot down the Korean 747 on 1 September 1983....

... I have considered that short scenario many times since, searching for the real reason for hesitating at the last moment. I believe I must have been thinking, 'This contact is no immediate threat to me. He is not going to bomb us, the worst he can do is report our position, and do I really need to obliterate him if there is even the tiniest risk of being wrong? Have I met all the criteria for "positive identification" - height, speed, radar, general behaviour?' Yes. But positive identification? Plainly, I tried very hard to find a reason *not* to shoot, without having given much consideration to the consequences of getting it wrong. But in light of the KAL 007 incident, this was another of my lucky days. *If* we had shot that airliner down, it would have probably left the Americans with no choice but

to withdraw their support; the Task Force would have had to be recalled; the Falklands would be the Malvinas; and I would have been court-martialled. These would have been the consequences of the international community's rightful horror at the news of a battle group shooting down several hundred civilians by mistake.¹⁵⁷

These quotations indicate several points about ROE beyond their utility for the safety purposes. Rigid ROE can work and, while they may be seen to be limiting, they may actually enhance military operations. As the Gulf conflict showed, there may be very good tactical or strategic reason for the stringent controls. The reasons for such restrictions may not be readily apparent to other units or services subject to the same rules, but they necessarily must be obeyed.

V. ANALYTICAL CONSIDERATIONS

A. General Considerations

ROE cannot be drafted, reviewed, or implemented without a rational analytical structure behind their formulation. Therefore, this part will consider the various peculiarities, requirements, and technological considerations that have a prominent role in discerning potentially hostile acts or delineating hostile intent.

Also, the interplay between legal and operational input into ROE will also be discussed.

As noted before, the JCS PROE are the means by which the National Command Authority, through the principal commanders, authorize competent military commanders to take those specified actions necessary for the self-defence of the units they command and other nationals and assets.¹⁵⁸ Such directives are fully cognizant of international law and national security objectives.¹⁵⁹

B. Hostile Act and Hostile Intent

As was seen in Part III, the limitations in peacetime on the use of force are restricted by the U.N. Charter to cases of self-defence. Thus, peacetime responses to threats will be defensive in nature with the concepts of necessity and proportionality governing the particular response. The choices made will be dependent upon the determination of whether there is a hostile act or hostile intent. The former instance will provide the clearest entitlement to use force in self-defence. The ROE governing the use of force in cases of a hostile act may restrict which weapons can be employed in such a case or they may only authorize the return of defensive fire.

Obviously, the more specifically hostile acts are described or set out in the ROE, the more particular the authorized response can be prescribed. Such a pre-approved response in an ROE affords a

greater degree of control over the use of force and the possible escalation of the incident. Additionally, such a particularity of the ROE saves the individual from having to decide in the excitement or anxiety of the moment which of several responses to use. For some services, obviously the responses will be limited by the availability of weapons. Thus, a squad of infantry will have less option on how to respond to incoming fire than a large warship with several missiles and gun types from which to choose. Additionally, such specificity will be most beneficial for the smaller units or where more junior leaders are responsible for such decisions. There will be a need for such responses to be clear and understandable and not too complicated for the individual to memorize and to use immediately.¹⁶⁰ Such a benefit is also obtained from early exposure to the ROE and practice or exercising with them.

Hostile intent is the more difficult concept to grasp. Professor O'Connell notes that if there is "no plausible index of the translation of 'hostile intent' into 'hostile act'" a decision has to be made whether to receive the attack in the first instance.¹⁶¹ If the political or military risk is unacceptable, he proposes crafting the rules in such a fashion as to emphasize tactical evasion and defence.¹⁶²

For hostile intent, the interface between the law, operations, and intelligence is most significant. In the more technically

oriented services, namely the air force and navy, where generally only machines do the fighting, the threat will be exhibited by a radar or other electronic indication and a behaviour pattern. With land forces, however, it may only be a particular behavior pattern that demonstrates hostile intent. In the land context it may range from verbal threats and taunts to the actions of loading, aiming, and preparing to fire, perhaps from a position of cover or defence.

Part of the equation of determining the rules of engagement are the value of the unit in question. Some units will be far more valuable--referred to as High Value Assets (HVAs)--and therefore special measures or cautions will be taken.

C. Peacetime ROE

Captain Roach indicates that peacetime ROE "do not address the right to protect the individual, the commanding officer, the unit commander and his command from attack or the threat of imminent attack in situations involving localized conflict, or in low-level situations that are not preliminary to prolonged engagement."¹⁶³ Such concerns are addressed through the standard warning that nothing in the rules is "intended to limit the commander's right of self-defense."¹⁶⁴ Instead, PROE "provide 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 US forces not under your command."¹⁶⁵

1. Army

In the pure peacetime situation, army forces, because they do not regularly operate in close proximity to potential opponents (unlike air and naval forces over or on the high seas), require primarily PROE that address the classic right of self-defence of individuals and sovereignty. Such is the case for the NATO forces stationed in Europe or the U.S troops in Korea. While it may still be a peacetime situation, operations or exercises in an area of tension, peacekeeping operations, humanitarian assistance operations, or non-combatant evacuation operations (NEO) require much more detailed rules to address the possible threats in those circumstances. The factors to consider are the authorized responses to various types of terrorist attacks, sniper fire, and minor acts of aggression, such as rock throwing, simple assaults, and other forms of harassment.

2. Navy

It is the author's perception that the naval community is very familiar with PROE. Because of the nature of the high seas, navies for centuries have had to operate with their potential adversaries present behind, beside, and sometimes among them. Often, the other force's ships have intruded into a formation or affected flight operations. While much of the problem stems from the manoeuvring of the ships and is covered by the 1972 International Regulations for Preventing Collisions at Sea (International Rules of the Road or COLREGS),¹⁶⁶ this treaty was not enough to stop all incidents.

Additional agreements were negotiated between the United States, Canadian, and Royal Navies and the former Soviet Union.¹⁶⁷ In naval PROE many situations and circumstances have been foreseen and certain actions have been assigned a particular rule number and a set response.

Peacetime rules of engagement must address the permissible employment of "systems and platforms for surveillance, targeting and ordinance delivery" since they are the precursors to the use of force. For instance, the activation of fire control radars in the presence of another vessel or aircraft could very likely be seen as hostile intent, if not hostile intent.¹⁶⁸ So too would be the training of an optically guided weapon on an opponent. Also, ROE need to consider the permissible responses to such actions by an adversary. Ideally, the particular radar bands or frequency types should be addressed, based on the known characteristics of the enemy's weapons and the tactical employment of them.

Professor O'Connell describes a graduated set of rules of engagement possible in peacetime naval disputes. He begins with "interrogation, requests to stop, the firing of warning shots and disabling shots when it is necessary to compel submission to visit to search, [and] boarding (which may be courteous or forceful)."¹⁶⁹ He then deals with the escalation of the crisis by the opponent choosing to "invoke its own view of the law."¹⁷⁰ An ideal of this escalation would be the "catching the opponent at a disadvantage"

by the "manipulation of the rules of the road, harassment and interposition."¹⁷¹ The ROE for such situations need to prescribe every course of action taken with the notion of minimum force, including the form of verbal warnings and the intricacies of boarding while underway.¹⁷²

The employment of naval forces abroad will raise different issues from naval units patrolling their coastal waters; the latter situation would make it slightly easier to place a reliance on self-defence.¹⁷³ If the navy is being employed in a political power projection role, the reliance on international law must be even stronger than when at home.¹⁷⁴ O'Connell notes, however, that defence of shipping abroad is similar to the coastal defence role.¹⁷⁵ For instance, during the Iran-Iraq "Tanker War" U.S. naval forces used force in exercise of the right of self-defence. In September 1987, a Navy helicopter observed the *Iran Ajr* laying mines at night in the international shipping lanes. The ship was attacked by gunfire, ceased laying the mines, was subsequently boarded, and then sunk.¹⁷⁶ This was not the only use of force by U.S. forces during this time.¹⁷⁷ Of interest to note is the "modest" French naval forces that were also present made public their ROE which "declare[d] that French warships [would] fire upon forces that refuse[d] to break off attacks on neutral merchant ships when French vessels [were responding] to distress calls from vessels under attack."¹⁷⁸

The use of force and ROE for warships on the high seas may not always rely on self-defence as their basis. Ships used for law enforcement must comply with the international law of visit and search.¹⁷⁹ The doctrine of hot pursuit and the enforcement of national laws or international fisheries agreements must all be consulted for the authority to engage in such actions.¹⁸⁰ The right of hot pursuit and the requirement that it be immediate and continuous¹⁸¹ should not be confused with the right to pursue hostile forces that still pose an immediate threat.¹⁸² ROE limitations in this area will regulate the geographic areas where such pursuit can take place, more than likely prohibiting pursuit into neutral countries, except where that country refuses to stop or is unable to stop such hostile acts from emanating from its territory.¹⁸³ The ROE may also preclude engaging the hostile force in its own country as a way of limiting the conflict.¹⁸⁴

3. Air Force

The United States and Canadian Air Forces also are familiar with PROE from the North American Aerospace Defence (NORAD) Command defensive intercepts of Soviet Tupolev Tu-20 Bear bombers off the North American continent. The ROE in these situations are based around Flight Information Regions (FIR), Air Defence Identification Zones (ADIZ),¹⁸⁵ flight path filings, and the principle of the inviolability of national air space.¹⁸⁶ Unauthorized aircraft intruding into national airspace can, under international law, be required to turn back or to land.¹⁸⁷

Like the naval ROE, air force rules will be technical, in that the indications of a hostile act or hostile intent will come from electronic indications and warnings. So too will the tactical manoeuvring of an adversary display hostile intent. The prime example of this was the 4 January 1989 shooting down of two Libyan MiG-23s over the Gulf of Sidra. The well publicized Head Up Display video recording that captured the pilot's concern at the Libyan aircraft having "jinked back at [him] for the fifth time" demonstrates the tactical importance of such matters.¹⁸⁸

D. Transition to WROE

In addition, PROE need to have a mechanism for the transition from peace rules to wartime rules. This can be done either through the easing of some of the restrictions or, in the event of sudden hostilities, through an immediate change to WROE. The U.S. Army's Operational Law Handbook suggests a three phase ROE: ROE Green when there is no likely threat of hostilities and only normal self-defence and security of key facilities is authorized; ROE Amber when there is a credible threat of attack and while it is an increased state of readiness, there is no increased authorization to engage targets; and ROE Red when there has been an attack or the commander has specifically authorized an attack.¹⁸⁹ These conditions are exemplified by a very unfortunate example.

The Department of Defence Commission that examined the bombing of the Marine barracks at the Beirut International Airport noted

that the Marines deployed in September 1982 to a fairly benign environment, but by mid-March 1983, when a grenade attack wounded five Marines, the conditions had changed.¹⁹⁰ After the destruction of the U.S. Embassy on 18 April, which killed 60 people (including 17 Americans), and additional U.S. casualties from mortar and sniper attacks at the Beirut International Airport, "[b]y the end of September 1983, the situation in Lebanon had changed to the extent that not one of the initial conditions upon which the mission statement was premised was still valid. The environment clearly was hostile."¹⁹¹ Following the bombing of the Embassy, the ROE were changed for the Marines guarding the temporary Embassy (The "Blue Card") but not for the other positions (The "White Card"). The Commission criticized the lack of a change in the ROE from the initial peaceful period to the later period when hostilities were imminent by stating: "The emergence of the terrorist threat brought the guidance and flexibility afforded by the ROE into question. ... the ROE provided in May for the Embassy security contingent should have been explicitly extended to the entire USMNF."¹⁹²

Once a conflict has ended through either a cease fire or an armistice, the ROE need be revised again. The rules will not be full PROE, but rather they will reflect some of the terms and conditions of the cease-fire.¹⁹³

E. Wartime ROE

Wartime rules of engagement should not restrict the use of force to just defensive actions. They should, however, permit the operational commander to seek out, engage, and destroy the enemy forces. The WROE may, however, restrict that responsibility so as to be "consistent with national objectives, strategy, and the law of armed conflict."¹⁹⁴ Such a limitation on the means and methods of warfare will affect a unit's tactics. There is no reason why ROE cannot be used as an operational control on the conduct of offensive operations.

ROE should not be a restatement of the law of war even though the law of war pertains to the use of force. To do so, however, would be cumbersome and not offer the commander any further guidance on the employment of his forces.¹⁹⁵

1. Army

Wartime rules of engagement for land forces will always be concerned about individual self-defence; however, the individual soldier's ability to engage an enemy is fairly restricted. Much of the control over his use of force come from regular training and control from the squad or platoon leader. Some squad weapons may be restricted, such as the use of mines and booby traps. For larger units, where the variety and power of the weapons available increases, additional restrictions may be encountered. Thus, artillery units with various munitions will be concerned about

their ability to engage unseen targets by indirect fire. Engineering units may be restricted in the employment of mine fields. Such restriction could be for operational reasons or for broader political reasons.

2. Navy

The naval warfare is quite unique with several of the 1907 Hague Conventions applying to the war at sea.¹⁹⁶ These conventions, and the naval history that has affected the customary international law in the area, have resulted in a very specialized area of law of naval war.¹⁹⁷

Wartime ROE may differ for separate areas or forces,¹⁹⁸ depending on the particular conditions present. For example, there were two sets of ROE during the Vietnam War for OPERATIONS MARKET TIME and SEA DRAGON.¹⁹⁹ Since the focus of the former operation off the coast of South Vietnam was surveillance and coastal protection, the ROE contained directions regarding the necessary positive identification required and the "specified instant when fire might be directed" depending on whether the vessels were in the territorial sea, contiguous zone, or on the high seas.²⁰⁰ In addition, the ROE dealt with the interception of shipping approaching the contiguous zone of South Vietnam and included directions regarding the use of force in the case of hot pursuit.²⁰¹ Instructions supplemental to the ROE were given in operational orders that covered ROE issues such as foreign warships in the

territorial sea, the instances when ships were to be considered not engaged in innocent passage, identification parameters, the immediate pursuit of a ship that had committed a hostile act versus hot pursuit in pursuit of ship that had contravened South Vietnamese law, the mining of illegal entry points, visit and search procedures and occasions, and the degree of force to be employed.²⁰² OPERATION SEA DRAGON ROE, on the other hand, dealt with the offensive tactical issues of harassment and the interdiction of North Vietnam's supply lines and yet was still expressed in defensive terms.²⁰³ The use of force was confined to the area of the North Vietnamese twelve-mile territorial sea.²⁰⁴

3. Air Force

During the Persian Gulf, the air forces were strictly controlled for the safety reasons noted previously. Maximum use was made of the various aircrafts' EW suites and the controlling USAF E-3 AWACS or USN E-2C Hawkeye to provide information on the presence and type of threat. Norman Friedman states that two independent electronic IDs had to be obtained before an engagement was authorized. The F-15s and F/A-18s had NCTR (noncooperative recognition based on enemy turbine or compressor rate), IFF and another classified system to make the ID, but the F-14s did not.²⁰⁵ Thus, the ROE had to take into account these very technical capabilities. Future aerial conflicts will likely encounter similar problems of beyond visual range identification. The missiles employed on modern aircraft enable such engagements but

the concerns for downing a friendly or neutral aircraft really restrict their employment. This was very much a factor for the situation in Vietnam where the ROE were restricted to visual identification since the electronic capabilities were not as good.

Additional controls that can be established by ROE include "the use of approach corridors, airspace control zones, restricted operations areas, low-level transit routes, and altitudes and speed restrictions to minimize risks to friendly forces from friendly fire."²⁰⁶ These restrictions reduce the possibility of friendly fire incidents and as well they enable "simultaneous attack of targets near each other by multiple fire support means."²⁰⁷

F. Exercise ROE

Exercise ROE should serve two purposes. The first and primary purpose is to provide the necessary PROE for the exercise of unit or national self-defence in the face of hostile intent or a hostile attack while on exercise. These rules will most likely be required when the forces are on exercise deployment overseas, although it is not impossible for troops to be subject to attack while at home. Most likely, the host nation will be providing the security for the visiting exercise forces and therefore, the ROE should reflect that fact.²⁰⁸

As Captain Roach noted, rules of engagement need to be made part of exercises.²⁰⁹ While the ROE used in an exercise may not be the actual peacetime or wartime ROE for security reasons, they should be realistically crafted to represent the sort of restriction or authorization likely to be encountered in the type of conflict envisioned by the exercise scenario. Those who would be required to apply the ROE need the opportunity to work with ROE and develop the familiarity with the degree of control they exercise over the unit or weapon. Such persons need to determine whether the ROE are crafted sufficiently clearly so as to be understandable, useable, and realistic for the operation. If not, the exercise is the proper moment to discover such weakness and to start the necessary staff work to effect changes.

Admiral Woodward is emphatic in his memoirs that an exercise he conducted with USS *Coral Sea* (CV-43) carrier group in the Arabian Sea in November 1981 taught him a lot about the importance of rules of engagement and maritime exclusion zones. He writes:

but for my part I was interested, for some near-providential reason, in examining how to use exclusion zones to the best advantage. This also covered the intricacies of Rules of Engagement during the most difficult times when you may be moving from apparent peace to obvious war. Just about everything I achieved, every lesson learned in those forty-eight hours, had a

direct and critical influence on my actions six months later in the South Atlantic in a war I could not possibly have foreseen. ... and I was also well aware of how carefully you must study the ramifications of your Rules of Engagement, remembering that they have been drawn up jointly by both politicians and the military.²¹⁰

G. Coalition Rules of Engagement

Future crises where force is used very likely will be fought by coalition troops rather than on a unilateral basis.²¹¹ Part of the process is the defining of "common objectives, strategy and command arrangements, ideally achieving unity of command."²¹² Where there is a lack of "political clarity and unanimity ... national tendencies to oversupervise and control their own forces undercuts the common cause."²¹³ The subordination of units to another nation's commanders and national sensitivities about representation and visibility compound the difficulties of coalition operations.²¹⁴

In the circumstances where coalition forces are operating together under the overall command of one nation, or are integrated into the operations of another force, as the Canadians were during the Gulf War²¹⁵, the rules of engagement will have to be coordinated. One commentator has noted that while the law of armed conflict is binding on all nations each nation in a coalition may not have the same rules of engagement since they are limited by national policy²¹⁶ In the case of the coalition forces in the Gulf

War, CENTAF "succeeded in harmonizing [the national ROEs] through negotiations with representatives of each coalition air force."²¹⁷ As with national ROE, coalition ROE are subject to the same "collateral limitations" of "political considerations, national policy objectives, and operational concerns."²¹⁸

Where the forces fight as fairly autonomous units, particularly land forces which have distinct sectors of responsibility, the problem of different rules of engagement will not be a major problem. Each national force can engage the enemy in keeping with its understanding of the laws of war. Where, however, the target selection is centrally controlled, as with the air campaign of the Gulf War, each nation will probably want its own review mechanism to ensure that the targets allocated to its nation's aircraft conform to its notions of the law of war.²¹⁹ This will be most evident in the case of countries that have now ratified Additional Protocol I to the 1949 Geneva Conventions.²²⁰

VI. PROCEDURAL ISSUES

A. General

Drafting rules of engagement is a critical process. As Professor O'Connell noted, there may not be time, even during an escalating crisis, for adequate rules to be developed and therefore "the drafting operation is likely to be successful only if there

has been the requisite thinking in advance about the questions that could arise, including the tactical factors that enter into the processes of legal appraisal."²²¹ How this process is undertaken and the quality of the participants will determine the eventual success of the rules.

Rules of engagement are designed to be part of an operations plans and orders. This part considers the procedural aspects involved in ROE. The steps are: drafting, reviewing, approving, modifying, and applying ROE. These tasks will be performed by the many authority levels that are involved in ROE procedural matters. The stages where this can be done include the individual service member, units, larger formations, joint or combined forces, and national and coalition command authorities. While the role for each will vary depending on its hierarchy in the chain of command, each level should play a part in the production of ROE. By doing so a more realistic set of rules should result. The lower levels should have the greatest familiarity with the troops' abilities and understandings of the weapons system's capabilities. The higher headquarters should provide the necessary appreciation of the broader strategic, political, or policy goals and parameters.

The primary consideration to be born in mind when drafting either PROE or WROE is that the final version should not restrict or negate the inherent right of self-defence. Wartime ROE also should not limit any more than is absolutely necessary the

commander's discretion in the employment of his forces in furtherance of the mission.

B. Drafting ROE

While there has not been much written on the methodology for drafting ROE, there is often much discussion among legal officers and operational officers over who should draft ROE--lawyer or soldier, sailor, pilot. While the design of anything by "committee" is frowned upon, in the case of ROE, it is absolutely necessary that a team draft these types of rules. The more individuals who are involved in the process, the less the chance something will be missed or misunderstood. No one individual possesses the necessary knowledge or skills to perform the job in isolation. As noted in the second part of this thesis, ROE involve many factors, from the legal to the technical, and from the tactical to the strategic.

Of the three services, it would appear that the army judge advocate could play the greatest role or exercise the most independence in drafting ROE, although this is not suggested as the regular course of action.²²² The employment of army forces is more readily understood and the possible threats are less sophisticated to consider than the naval and air environments. The air force and the navy, on the other hand, have a considerable amount of electronic equipment that advises them of the possible threat such that the legal officer is far from capable of developing the

various indications of possible hostile intent. Radar warning receivers' and other electronic warfare equipment's limitations and capabilities can only be known by the actual operators of such equipment. The input from the operational or line officer in these services, then, is absolutely critical.

The intelligence personnel of all three services will be able to provide information on a potential opponent's order of battle or weapons systems capabilities, battle tactics, and other indicators of intent. Therefore, their advice should also be obtained as a means of helping to define possible hostile intent circumstances. Obviously, operational staff from the applicable headquarters should be part of the process so that the mission and concept of operations can also be considered.

When drafting ROE, one should strive for the maximum clarity. Ambiguities will only result in confusion. Possible delays while clarification is sought could cause casualties; or else, the unit or its personnel may overreact with unpleasant consequences. The ROE need to be logically presented and complete. This will ensure a better understanding of the parameters of the rules and will aid in the memorization or application of the rules. Obviously, brevity is desired but it should not be at the expense of clarity or completeness. The U.S. Army's Operational Law Handbook summarizes the goals of drafting with five rules: (1) make the ROE clear and brief; (2) avoid excessively qualified language; (3)

tailor the language to the audience; (4) separate the ROE by job description; and (5) the ROE must be understandable, rememberable and applyable.²²³

Any discretionary action given to a commander should be clearly indicated. Ideally, ROE should not set out specific tactics. A commander needs to be able to employ his unit as freely as possible, as long as it is consistent with national, strategic, and tactical goals. Thus, the ROE must not be "rudder orders."

WROE should not be a restatement of the law of war. If there is concern, however, that the troops are uncertain about what the law prescribes, if training in the topic has been weak, infrequent, if control over the troops is limited, or it is desired to reinforce a particular aspect of the law of war²²⁴ then ROE can provide a mechanism to make up for these deficiencies. Nor should ROE repeat service doctrine, tactics, or procedures. This would be a duplication of other references. Also, to do so would add nothing to the understanding about the particular limitations on the employment of force set by the NCA that are applicable to the conflict in question.

1. Methodology for drafting

The following is a generic methodology for drafting ROE:

- a. review the warning order and the commander's estimate for the pending operation;
- b. review the existing treaties and any other relevant international agreements, especially where coalition forces are involved;
- c. master the ROE established at the higher levels;
- d. review the standard operating procedures and determine what generic ROE are in effect in the tactical SOP, field SOP, and exercise SOP;
- e. review the OPLAN to determine the mission, the concept of operation and any sub-unit missions;
- f. review all support plans involving the use of force such as fire support and mine plans;
- g. review all coordinating instructions and control measures;
- h. review all the OPLAN annexes for relevant material; and
- i. obtain as much information as possible about the "threat", adversary equipment, and tactics.²²⁵

Having done all this, the drafter's or reviewer's task is to consider whether there is any direction in the material specifying the right or obligation to respond in cases of self-defence. Also, one will have to consider whether there are any specific limiting factors that arise from national, strategic, or tactical requirements. Are there any limitations or restrictions placed on the employment of certain weapons or against certain targets or will that particular drafting level add them? In drafting ROE the authors will want to consider whether anything to be proposed will raise a law of war issue requiring additional approval, coordination or scrutiny.

2. Review, modification, and dissemination

Once ROE are in place they should be reviewed regularly to ensure that they remain current. Such an examination should be done in accordance with directives from higher headquarters if so required. Otherwise there should be a reassessment of the ROE if the unit's role, mission, equipment, or operating area, *i.e.*, the potential threat, change significantly. Such a review obviously needs to be systematic and thorough. Input from subordinates who may have developed some experience with the ROE would also be of benefit.

Rules of engagement are guidance to commanders; yet, there is need for them to be distributed to subordinates in as complete a form as possible commensurate with the security classification and

on a "need to know" basis.²²⁶ Where that is not possible, the commander needs to disseminate an abbreviated or unclassified compilation of the rules to the lowest level necessary. In the case of the army and base or perimeter security personnel for the other services, those individual soldiers on the front line or likely to be exposed to individual small arms fire or terrorist threats will require clear and simple guidance on when they can fire in self-defence or in the protection of others. A common practice has the ROE printed on small card.²²⁷ Included with the Desert Shield ROE card were some "Cultural Do's and Don'ts, but of course, they were not ROE."²²⁸

The air force, on the other hand, probably will only need to pass the rules of engagement to the pilots and air weapons controllers, the ones who are likely to have to engage an enemy. The author's experience in the Gulf War was that the complete ROE package was too comprehensive for the individual fighter pilots. They were very appreciative of the legal officer who distilled the ROE to two small pages for their cockpit reference notebook. The navy's rules of engagement for fighting a ship will need only be disseminated to the combat information center (CIC) personnel as all firing from the ship is controlled by a few principle officers. For special evolutions such as visit, boarding, and search then something akin to army's ROE will have to be produced.

The classification of the ROE will have to be considered in terms of their contents. If the compromising of key definitions such as hostile intent would reveal the unit's perception of the potential threat and the possible responses to a particular action by the enemy, then, obviously the ROE will have to be classified.

As discussed *supra*, troops need to train with realistic if not the actual ROE to develop the necessary familiarity with them. Such a procedure should expose any weakness or confusion with the rules. It would be too late in a crisis that is approaching hostile intent to have to try and find the ROE and determine which rule actually governs. The unit may then find itself responding to an actual hostile act.

Rules of engagement are a matter of operations and command, not law. Therefore, ROEs need to be disseminated through the operational chain of command, not the legal net. The operational legal advisors to each level of command will have a prime interest in them but all changes or requests for modification must emanate from the commander. The attorney's skill with crafting precise language should assist, however, in the preparation of such documentation or messages.

In the more comprehensive ROE packages many situations are covered. Authority may be granted to employ certain measures covered in certain rules and other measures may be reserved for

higher headquarters or the NCA. These particular rules should be clearly numbered so that quick reference can be made to them when seeking their modification or approval. Ideally, draft messages or samples should be prepared ahead of time to enable a quick filling in of the blanks and transmission of the authorization request.²²⁹

In the area of procedures, ROE will benefit from advance preparation. The more forethought that goes into them the more complete and efficient they should be. More situations will be covered or the rules made more workable. Thus, the more time spent in drafting, reviewing, revising, and practicing ROE the better.

VII. CONCLUSION

Even though Captain Roach's plea for greater knowledge of rules of engagement that was quoted in the beginning is still a valid goal, it is apparent from recent events that his 1983 criticism that ROE were only known by the classified documents custodian, were not well understood, and were neither clearly nor comprehensively written is now invalid.²³⁰ That is not to say, however, that more experience, practice, and analysis is not required.

ROE are absolutely critical documents pertaining to the conduct of operations by armed forces. They fulfil a very

necessary and important role in the regulation of the use of force in time of crisis and war. Such a regulation is a function of political control of democratic armed forces, but as well, ROE are a tool for senior commanders. Successful operations and the protection of national interest are enhanced by appropriate rules of engagement.

ROE are complicated because of the legal and non-legal factors affecting the degree to which force can be brought to bear during times of peace, tension, and war. The legal factors which apply to ROE, namely the right of self-defence under international law, the laws of war, and, for domestic operations, the domestic laws pertaining to the use of force and aid to civil authorities are complex matters. The non-legal considerations have political and military rationales which also require particular expertise and understanding.

Thus, it essential that qualified and capable operational legal advisors and war-fighters be a part of the ROE process so that this very necessary adjunct to military operations serves the needs of both the fighting personnel and the nation's interests and security.

NOTES

¹SCHWARZKOPF & PETRE, *IT DOESN'T TAKE A HERO* 372 (1992).

²J. Ashley Roach, *Rules of Engagement*, NAVAL WAR C. REV., January-February 1983, at 46, 46.

³For a description of the events surrounding the Iraqi Exocet missile strike on the USS *Stark* on 17 May 1987, see, Michael Vlahos, *The Stark Report*, PROCEEDINGS, May 1988, at 63.

⁴Much has been written on the shootdown of the Iran Air Airbus, Flight 655, by the USS *Vincennes* on 3 July 1988, see, Norman Friedman, *The Vincennes Incident*, PROCEEDINGS May 1989, at 72; WILL ROGERS & SHARON ROGERS, *STORM CENTER: THE USS VINCENNES AND IRAN AIR FLIGHT 655* (1992); I.C.A.O., *Resolution and Report Concerning The Destruction of Iran Air Airbus on July 3, 1988*, 28 I.L.M. 896 (1989); John Barry and Roger Charles, *Sea of Lies*, NEWSWEEK, July 13, 1992, at 29.

⁵These combat operations included both sweep escort missions and battle field air interdiction. On 30 January 1992, a flight of two CF-18 engaged an Iraqi Exocet-armed TNC-45 patrol boat with both an AIM-7 Sparrow air-to-air missile and 20mm cannon fire. The vessel was disabled sufficiently to enable a USN A-6 Intruder to sink it subsequently. See, *DESERT CATS: THE CANADIAN FIGHTER SQUADRON IN THE GULF WAR 32-33* (David Deere ed., 1991); *GULF AIR WAR DEBRIEF 115* (Stan Morse ed., 1991).

⁶JOHN BARTLETT, *FAMILIAR QUOTATIONS* 368 (Emily M. Beck ed., 50th & 125th Anniv. Ed., 1980). The phrase is also attributed to Israel Putnam [1718-1790], *id.*; Prince Charles of Prussia said at Jagerndorf on 23 May 1745: "Silent till you see the whites of their eyes," *id.*; Frederick the Great directed his troops at Prague on 6 May 1757: "By push of bayonets, no firing till you see the whites of their eyes," *id.*, at 358.

⁷O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 169 (1975).

⁸In 1918, a British squadron of cruisers and a flotilla of destroyers were dispatched to the Baltic "to show the British flag and support British policy as circumstances dictate." These directions were expanded by the following: "A Bolshevik man-of-war operating off the coast of the Baltic Provinces must be assumed to be doing so with hostile intent and should be treated accordingly." *Id.*, at 170.

⁹*Id.*, at 179.

¹⁰*Id.*, at 179. For Admiral "Sandy" Woodward's description of how he was prepared to take the blame for ordering the sinking of the Argentine cruiser *Belgrano* in April 1982, see, WOODWARD, ONE HUNDRED DAYS: THE MEMOIRS OF THE FALKLANDS BATTLE GROUP COMMANDER 155 (1992).

¹¹J. Ashley Roach, "Rules of Engagement" (United States Naval War College Elective, SE 211, 1988-1989) at 1.

¹²W. Hays Parks, *Righting the Rules of Engagement*, PROCEEDINGS, May 1989, at 83, 84 [hereinafter *Righting ROE*].

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.*

¹⁶JOINT CHIEFS OF STAFF, PUBLICATION 1, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS [hereinafter JCS PUB 1] p. 298.

¹⁷DEP'T OF ARMY, FIELD MANUAL 101-5-1, OPERATIONAL TERMS AND SYMBOLS, (21 October 1985) [hereinafter FM 101-5-1] p. 1-63, definition 1.

¹⁸*Id.*, p. 1-63, definition 2.

¹⁹Charles S. Bloodworth, Rules of Engagement: The Second C of C³I, (n.d.) (unpublished manuscript, on file at International Law Division, The Judge Advocate General School, Army), at 1.

²⁰Joint Chiefs of Staff, SECRET Memorandum, Subject: Peacetime Rules of Engagement (PROE), 7 July 1986, at I-3, *quoted in*, CENTER FOR MILITARY LAW AND OPERATIONS & INTERNATIONAL LAW DIVISION, JUDGE ADVOCATE GENERAL'S SCHOOL, ARMY, OPERATIONAL LAW HANDBOOK (JA422), at H-89 (Draft 2d ed., 1992).

²¹*Id.*

²²See, O'CONNELL, *supra* note 7; Roach, *supra* note 2, at 46; George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit*, NAVAL WAR C. REV., May-June 1986, at 69.

²³See, e.g., Roach, *supra* note 2, at 46.

²⁴Both diagrams are reproduced in Appendices A & B; Roach, *supra* note 2, at 47-48.

²⁵*Id.*, at 47.

²⁶Roach, *supra* note 2, at 46.

²⁷In all likelihood, the circles would not be the same size, nor the overlap so symmetrical, "since the relative influence of these four factors will vary depending on the circumstances." *Id.*, at 46.

²⁸THE OXFORD DICTIONARY OF CURRENT ENGLISH (R.E. Allen ed., 7th ed. 1984) 206.

²⁹O'Connell, in the Mahan tradition, discusses such naval policy in his chapter on rules of engagement. He refers to it as "the despatch of naval units or fleets for the purposes of catalytic without any clear objectives in mind, and in the hope that the navy will do something to resolve the situation and nothing to aggravate it." O'CONNELL, *supra* note 7, at 170. Gunboat diplomacy has been defined as: "the use of threat of limited naval force, in order to secure advantage, or to avert loss, either in furtherance of an international dispute or against foreign nationals within the territory or the jurisdiction of their own state." J. CABLE, GUNBOAT DIPLOMACY: POLITICAL APPLICATION OF LIMITED NAVAL FORCE 21 (1971), *quoted in*, Samuel P. Menefee, *Gunboat Diplomacy in the Persian Gulf? An Alternative Evaluation of a Contemporary Naval Conflict*, 31 VA. J. INT'L L. 567, 567 (1991).

³⁰Charter of the United Nations, June 26, 1945, 59 Stat. 1931, T.S. No. 993, 3 Bevans 1153; amendments to Arts. 23, 27, & 61, adopted by General Assembly, December 17, 1963, [1965] 2 U.S.T. 1134, T.I.A.S. No. 5857; amendments to Art. 109, adopted December 20, 1965, [1968] 5 U.S.T. 5450, T.I.A.S. No. 6529; amendment to Art. 61, adopted December 20, 1971, [1973] 2 U.S.T. 2225, T.I.A.S. No. 7739 [hereinafter U.N. Charter].

³¹Roach, *supra* note 2, at 50.

³²*Id.*

³³The primary Hague Conventions of 1907 for potential ROE purposes are: Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex thereto Embodying Regulations Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631; Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, October 18, 1907, 36 Stat. 2310, T.S. No. 540, 1 Bevans 654; Hague Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines, October 18, 1907, 36 Stat. 2332, T.S. No. 541, 1 Bevans 669 [hereinafter Hague VIII]; Hague Convention IX Concerning Bombardment by Naval Forces in Time of War, October 18, 1907, 36 Stat. 2351, T.S. No. 542, 1 Bevans 681 [hereinafter Hague IX].

³⁴The four Geneva Conventions of 1949 are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,

August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

³⁵Roach, *supra* note 2, at 47.

³⁶O'CONNELL, *supra* note 7, at 169.

³⁷WOODWARD, *supra* note 10, at 108. If these were the rules under which he was obliged to operate, Admiral Woodward noted, "then the first shot must clearly arrive on board one of my less-valuable frigates - not too easy to arrange." *Id.*

³⁸*Id.*

³⁹Parks, *supra* note 12, at 90.

⁴⁰*E.g.*, the use of riot control agents is limited by Exec. Order No. 11850, 40 Fed. Reg. 16187 (1975).

⁴¹For the legal basis of using troops in civil disturbance operations, see, 10 U.S.C. §331--request from a state; 10 U.S.C. §332--enforcement of federal law; 10 U.S.C. §333--protection of civil rights. In Canada, such domestic operations are in "aid of the civil power"; see, *National Defence Act*, R.S.C. 1985, c. N-5, ss. 274-285.

⁴²Roach, *supra* note 2, at 48. See also, O'CONNELL, *supra* note 7, at 180.

⁴³These directions to the troops may not necessarily be the actual ROE since ROE are often classified at a higher level than that of most soldiers or the ROE are contained in operations orders which are not disseminated to lower levels.

⁴⁴See, Ed Magnuson, *Chemical Reaction*, TIME, January 16, 1989, at 14.

⁴⁵For example, in an instance of self-defence on 19 August 1981, two F-14s from the USS *Nimitz* (CVN-68) shot down two Libyan SU-22 Fitters about 60 nautical miles from the Libyan coast after one of the Fitters fired at them during a Sixth Fleet missile exercise. See, Dennis R. Neutze, *The Gulf of Sidra Incident: A Legal Perspective*, PROCEEDINGS, January 1982, at 26. For a more complete description of the many other incidents in the Gulf of Sidra, see, W. Hays Parks, *Crossing the Line*, PROCEEDINGS, November 1986, at 40.

⁴⁶Colonel Parks claims that the ROE for operations near Libya had been slightly altered following these incidents but essentially followed the JCS PROE. Parks, *Righting ROE*, *supra* note 12, at 84.

⁴⁷See, John W. Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage Be?*, 135 MIL. L. REV. 137 (1992); William J. Aceves, *Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea*, 46 NAVAL WAR C. REV. 59 (Spring 1993).

⁴⁸Roach, *supra* note 2, at 46.

⁴⁹For a discussion of the ROE concerns, see, Parks, *Righting ROE*, *supra* note 12, at 83; W. Hays Parks, *Rules of Engagement: No More Vietnams*, PROCEEDINGS, March 1991, at 27 [hereinafter *No More Vietnams*]; J. Terry Emerson, *Making War Without Will: Vietnam Rules of Engagement*, in THE VIETNAM DEBATE; A FRESH LOOK AT THE ARGUMENTS 161 (John Norton Moore ed., 1990); W. Hays Parks, *Rolling Thunder and the Law of War*, AIR U. REV., January-February 1982, at 2 [hereinafter *Rolling Thunder*]; but see, Alfred P. Rubin, *Rolling Thunder Reconsidered*, AIR U. REV., May-June 1982, at 66; J.C. THOMPSON, *ROLLING THUNDER: UNDERSTANDING POLICY AND PROGRAM FAILURE* (1980).

⁵⁰WILSON, *SUPER CARRIER: AN INSIDE ACCOUNT OF LIFE ABOARD THE WORLD'S MOST POWERFUL SHIP, THE USS JOHN F. KENNEDY* 124-154 (1986).

⁵¹*Supra* note 49.

⁵²See, Parks, *No More*, *supra* note ?; HARRY G. SUMMERS, JR., *ON STRATEGY II: A CRITICAL ANALYSIS OF THE GULF WAR* (1992).

⁵³Roach, *supra* note 2, at 49.

⁵⁴"Retorsion is a measure of self-help which, though unfriendly, is within the legal powers of the state employing it and is, therefore, necessarily a legal measure even if it involves the use of force in its application." BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* (Sir Humphrey Waldock ed., 6th ed. 1963) 399. Thus, the enforcement of a domestic policy against another state's vessels in one's territorial sea may amount to retorsion. The use of force would then be governed by domestic law.

⁵⁵Reprisals in peacetime "involves the seizing of property or persons by way of retaliation for a wrong previously done to the state taking reprisals." *Id.*, at 399. Brierly cites three types of reprisals taken before the League of Nations: "(a) embargo of the offending state's ships found in ports and territorial waters of the state that claimed to have been wronged, (b) seizure of its ships or property on the high seas, and (c) pacific blockade." *Id.* Brierly also sets out three conditions for the legitimacy of a reprisal: "(a) there must have been an illegal act on the part of

the other state; (b) they must be preceded by a request for redress of the wrong, for the necessity of resorting to force cannot be established if the possibility of obtaining redress by other means is not even explored; and (c) the measures adopted must not be excessive, in the sense of being out of all proportion to the provocation received." *Id.* at 401. The U.N. Charter now precludes any armed reprisals in peacetime but the legality of economic reprisals is a matter of debate. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 465 (3rd ed. 1979).

⁵⁶Intervention is "often used quite generally to denote almost any act of interference by one state in the affairs of another; but in a more special sense it means dictatorial interference in the domestic or foreign affairs of another state which impairs that state's independence." BRIERLY, *supra* note 54, at 402. *See also*, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, U.N. G.A. Res. 2625 (XXV), 25 U.N. GAOR Supp. (no. 28) at 121, U.N. Doc. A/8028, (1970); Definition of Aggression, U.N. G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631, (1974), 69 A.J.I.L. 480 (1975); the latter document is discussed in VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 677-678 (6th ed. 1992).

⁵⁷BRIERLY, *supra* note 54, at 398.

⁵⁸Brierly notes "self-preservation in the case of a state as of an individual is not a legal right but an instinct; and even if it may often happen that the instinct prevails over the legal duty not to do violence to others, international law ought not to admit that it is lawful that it should do so." *Id.*, at 405.

⁵⁹BRIERLY, *supra* note 54, at 405; *see also*, O'CONNELL, 1 *INTERNATIONAL LAW* 338 (1965).

⁶⁰DEP'T NAVY, *COMMANDER'S HANDBOOK OF THE LAW OF NAVAL OPERATIONS*, NAVAL WARFARE PUBLICATION 9 at 3-6 to 3-7 (1987) [hereinafter NWP 9].

⁶¹O'CONNELL, *supra* note 59, at 323, states that notions of the "just war" were abandoned in the eighteenth century and the decision to go to war was placed beyond legal constraint.

⁶²BRIERLY, *supra* note 54, at 33, 397-398.

⁶³CARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Paret eds. & trans., 1976): "war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means."

⁶⁴W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 26, 28 (Lori F. Damrosch & David J. Scheffer eds., 1991).

⁶⁵T.S. 796, 46 Stat. 2343, 2 Bevans 732, at Art. I. BRIERLY, *supra* note 54, at 409, notes that the Pact of Paris was signed outside the regime of the League of Nations and therefore survives as valid law today.

⁶⁶William D. Rogers, *The Principles of Force, The Force of Principles*, in *RIGHT v. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 95, 96 (Louis Henkin et al. eds., 1989).

⁶⁷*Id.*, at 96.

⁶⁸U.N. Charter, *supra* note 30.

⁶⁹See, Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Articles 39-49, *id.*

⁷⁰For a discussion of the reasons for this failure, see, David Turndorf, *The U.S. Raid on Libya: A Forceful Response*, 14 *BROOK. J. INT'L L.* 187, 202-205 (1988).

⁷¹See, Rogers, *supra* note 66, at 97-100, for a list of recent instances where the U.N. has been unable to prevent armed conflict.

⁷²George Bunn, *supra* note 22, at 71; see generally, Louis Henkin, *supra* note 66, at 37; and Rogers, *supra* note 66, at 95.

⁷³O'CONNELL, *supra* note 59, at 339.

⁷⁴R. St. J. MacDonald, *The Nicaragua Case: New Answers to Old Questions?*, *CAN. Y.B. INT'L L.* 127, 134-135 (1986).

⁷⁵Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, at paras. 187-188.

⁷⁶E.g., does the word "force" in Art. 2(4) include economic, political, and psychological actions along with the physical; is "indirect" force included; and what constitutes a "threat"? Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 *MICH. L. REV.* 1620, 1624-1625 (1984).

⁷⁷*Id.*, at 1625-1629.

⁷⁸*Id.*, at 1629.

⁷⁹*Id.*, at 1629-1630.

⁸⁰The Tehran rescue attempt can be faulted because of doubt over the issues of the exhaustion of peaceful remedies and the imminence of the danger and the Grenada action because it went further than just the rescue. *Id.*, at 1631-1632.

⁸¹MacDonald, *supra* note 74, at 144.

⁸²U.N. Charter, *supra* note 30.

⁸³O'CONNELL, *supra* note 59, at 340.

⁸⁴Turndorf, *supra* note 70, at 212.

⁸⁵BRIERLY, *supra* note 54, at 417.

⁸⁶Schachter, *supra* note 76, at 1633.

⁸⁷BRIERLY, *supra* note 54, at 417.

⁸⁸*Id.*, at 419.

⁸⁹Schachter, *supra* note 76, at 1634. *See also*, O'CONNELL, *supra* note 59, at 343.

⁹⁰*Id.*, at 1634.

⁹¹For a complete discussion of this incident, *see*, Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 *BROOK. J. INT'L L.* 493 (1990).

⁹²*E.g.*, O'CONNELL, *supra* note 59, at 340; BRIERLY, *supra* note 54, at 405; Turndorf, *supra* note 70, at 213.

⁹³Rogoff & Collins, *supra* note 91, at 494-495.

⁹⁴*Id.* at 495.

⁹⁵A formal demand for reparations was deposited in London in May 1838 and the British Foreign Secretary, Lord Palmerston, "indicated a willingness to consider the matter." Nothing was ever done in this regard, however. *Id.* at 496-497.

⁹⁶H.R. Doc. No. 302, 25th Cong., 2d Sess. 3 (1838), *quoted in*, Rogoff & Collins, *supra* note 91, at 497.

⁹⁷Rogoff & Collins, *supra* note 91, at 497.

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Id.*, at 497-498.

¹⁰¹Asburton issued an apology for the violation of U.S. territory that Webster later was accepted. *Id.*, at 500.

¹⁰²See, *id.*, at 501-510; Brierly, *supra* note 54, at 406-408; O'Connell, *supra* note 59, at 340.

¹⁰³NWP 9, *supra* note 60, at p. 4-3, § 4.3.2.

¹⁰⁴MacDonald, *supra* note 74, at 152.

¹⁰⁵*Id.*, at 4-3.

¹⁰⁶(Nicar. v. U.S.), *supra* note 75, at para. 212, *per* Judge Schwebel (dissenting), *quoted in*, MacDonald, *supra* note 74, at 153.

¹⁰⁷*Id.*

¹⁰⁸MacDonald, *supra* note 74, at 144. See also, BRIERLY, *supra* note 54, at 423-424, regarding the legality of British warships transiting the Corfu Channel ready to resort to force from Albanian coastal batteries discussed by the I.C.J. in *The Corfu Channel (Albania v. U.K.)*, Merits, 1949 I.C.J. 4.

¹⁰⁹DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 200 (1988).

¹¹⁰*Id.*, at 201-202.

¹¹¹MacDonald, *supra* note 74, at 152.

¹¹²MacDonald, *supra* note 74, at 146.

¹¹³*Id.*

¹¹⁴*Id.*

¹¹⁵*Id.* See also, DINSTEIN, *supra* note 109, at 250, who adds immediacy to the requirements for collective self-defence.

¹¹⁶MacDonald, *supra* note 74, at 154.

¹¹⁷See for example the bombing of the artillery positions in the Bekaa Valley discussed previously.

¹¹⁸The use of a MK-84 2000 lb bomb to eliminate a sniper in a city building where civilians are known to be sheltering is an example of a legal weapon being employed in an illegal manner.

¹¹⁹Roach, *supra* note 2, at 51.

¹²⁰DEP'T ARMY, THE LAW OF LAND WARFARE (FM 27-10) 4 (1956)[hereinafter FM 27-10. See also, NWP 9 *supra* note 60, at p. 5-1, § 5.2.

¹²¹Canadian Forces, Law of Armed Conflict Manual (2d draft, n.d.), at p. 2-5, § 207.

¹²²*Id.*, at p. 2-3, § 203.

¹²³471 U.S. 1 (1985).

¹²⁴See, OP LAW HB, *supra* note 20, at S-257; DEP'T DEFENSE, CIVIL DISTURBANCE PLAN ("Garden Plot").

¹²⁵*Id.*

¹²⁶*Id.*

¹²⁷R.S.C. 1985, c. C-46.

¹²⁸*Supra* note 41.

¹²⁹Ken W. Watkin, *Legal Aspects of Internal Security: A Soldier's Protections and Obligations (Part I)*, 1 CAN. FORCES JAG J. 51, 58 (1985).

¹³⁰*Id.*, at 60 *et seq.*, & Ken W. Watkin, *Legal Aspects of Internal Security: A Soldier's Protections and Obligations (Part II)*, 2 CAN. FORCES JAG J. 5 (1985).

¹³¹Parks, *supra* note 12, at 91.

¹³²Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), December 12, 1977, 1125 U.N.T.S. 3, *reprinted in* 197-198 INT'L REV. RED CROSS 3 (1977); 16 I.L.M. 1391 (1977); 72 AM. J. INT'L L. 457 (1978); DEP'T ARMY PAMPHLET 27-1-1 (1979)[hereinafter API].

¹³³Whether such a decision is wisely made is another issue, see, *e.g.*, SUMMERS, *supra* note 52, at 48-50, 153-155.

¹³⁴Leo S. Mackay, "Voices from the Central Blue," *Comment and Discussion*, PROCEEDING, March 1993, at 23, 24.

¹³⁵WOODWARD, *supra* note 10, at 107-108.

¹³⁶*Id.*, at 100.

¹³⁷*Id.*, at 107.

¹³⁸See, e.g., Parks, *supra* note 12, at 86. This restriction deprived US pilots of the use of their long range radar guided missiles and showed up the weakness of the USN F-4 Phantoms that did not have a gun when the engagement got to be a close range dogfight.

¹³⁹See, e.g., John G. Humphries, *Operations Law and the Rules of Engagement in Operations Desert Shield and Desert Storm*, AIRPOWER J., Fall 1992, 25, at 38.

¹⁴⁰OP LAW HB, *supra* note 20, at H-86.

¹⁴¹W. Hays Parks, *The Gulf War: A Practitioner's View*, 10 DICK. J. INT'L L. 393, at 417 (1992).

¹⁴²*Id.*

¹⁴³See, O'CONNELL, *supra* note 7, at 180.

¹⁴⁴*Id.*

¹⁴⁵The phrase "amicide" was introduced by the U.S. Army for such a phenomenon. The more commonly used term "fratricide" is incorrect since it involves murder, an unlawful rather than accidental act. Shrader, "Amicide: The Problem of Friendly Fire in Modern War," U.S. Army Command & General Staff College Studies Institute Research Survey No. 1 (1982), *quoted in*, Parks, *supra* note 12, at 93, n. 7.

¹⁴⁶FRIEDMAN, DESERT VICTORY: THE WAR FOR KUWAIT 188 (1991)[emphasis added].

¹⁴⁷*Id.*, at 189.

¹⁴⁸It is so obvious that neutral targets shall not be engaged that it is not stated in any of the 1907 Hague Conventions; only the way neutral states or persons can lose the neutral status is specified. See, Hague Convention No. III Relative to the Opening of Hostilities, October 18, 1907, 36 Stat. 2259; T.S. No. 538, Articles 2 & 3; Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Person in Case of War on Land, October 18, 1907, 36 Stat. 2310; T.S. No. 540; Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, October 18, 1907, 36 Stat. 2415, T.S. No. 545, 3 Martens Nouveau Recueil (Ser. 3) 713, *reprinted in* 2 AM. J. INT'L L. SUPP. 202 (1908) [hereinafter Hague XIII]; FM 27-10, *supra* note 120, at 184, §§ 512-513.

¹⁴⁹Woodward, *supra* note 10, at 101.

¹⁵⁰*Id.*, at 102.

¹⁵¹*Id.*

¹⁵²*Id.*

¹⁵³*Id.*

¹⁵⁴*Id.*, at 102-103.

¹⁵⁵*Id.*, at 103.

¹⁵⁶Admiral Woodward wrote in his diary simply: "Intercepted a Brazilian Airliner - international scene?" *Id.*

¹⁵⁷*Id.*, at 103-104 [emphasis in original].

¹⁵⁸NWP 9, *supra* note 60, at 4-4.

¹⁵⁹*Id.*, at 4-4.

¹⁶⁰Such was the case for the Canadian pilots in the Gulf War. As a back-up, however, they were controlled by either an AWACS or a USN ship. They did not always have direct communication with Canadian authorities. The author was advised by a Royal Air Force (RAF) Squadron Leader who participated in the Gulf War that their aircrews were supported by an air weapons controller who was receiving the same radar picture as the AWACS. Through coded radio transmissions from this controller and the senior British officer present, the authorization to fire would have been given even if the weapons free order had already been granted by the AWACS. This retained the element of national control over the RAF aircraft.

¹⁶¹O'CONNELL, *supra* note 7, at 172.

¹⁶²*Id.*

¹⁶³Roach, *supra* note 2, at 49.

¹⁶⁴*Id.*

¹⁶⁵*Id.*

¹⁶⁶28 U.S.T. 3459, T.I.A.S. No. 8587, 33 U.S.C. § 1602.

¹⁶⁷*See*, U.S.-U.S.S.R. Agreement on the Prevention of Incidents On and Over the High Seas, 25 May 1972, 23 U.S.T. 1168, T.I.A.S. No. 7379, and its 22 May 1973 Protocol, 24 U.S.T. 1063, T.I.A.S. No. 7624; Canada-U.S.S.R. Agreement Concerning the Prevention of Incidents at Sea Beyond the Territorial Sea, 20 November 1989; U.K.-U.S.S.R. Agreement Concerning the Prevention of Incidents at Sea Beyond the Territorial Sea, 1986, U.K.T.S. No. 5 (1987), 37 INT'L

& COMP. L.Q. 420 (1988). See also, U.S.-U.S.S.R. Agreement on the Prevention of Dangerous Military Activities, 28 I.L.M. 877 (1989).

¹⁶⁸O'CONNELL, *supra* note 7, at 82.

¹⁶⁹*Id.*, at 171.

¹⁷⁰*Id.*

¹⁷¹*Id.*

¹⁷²*Id.*, at 175.

¹⁷³*Id.*, at 173.

¹⁷⁴*Id.*

¹⁷⁵*Id.* See also, J. Ashley Roach, *Missiles on Target: Targeting and Defense Zones in the Tanker War*, 31 VA. J. INT'L L. 592 (1991); F.L. Wiswall, Jr., *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf*, 31 VA. J. INT'L L. 619, 623 (1991).

¹⁷⁶David L. Peace, "Major Maritime Events in the Persian Gulf War" in *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)*, AM. SOC'Y INT'L L. PROC. 146, 151 (1988).

¹⁷⁷See, *id.*, at 152-153; Ronald O'Rourke, *Gulf Ops*, PROCEEDINGS, May 1989, at 54; Bud Langston, *The Air View: Operation Praying Mantis*, PROCEEDINGS, May 1989, at 66; J.B. Perkins, *The Surface View: Operation Praying Mantis*, PROCEEDINGS, May 1989, at 66; David L. Peace, *Major Maritime Events in the Persian Gulf Between 1984 and 1991: A Juridical Analysis*, 31 VA. J. INT'L L. 545 (1991).

¹⁷⁸Frank L. Wiswall, "Remarks," *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Part II)*, AM. SOC'Y INT'L L. PROC. 594, 596 (1988).

¹⁷⁹O'CONNELL, *supra* note 7, at 174.

¹⁸⁰William J. Fenrick, *Legal Limits on the Use of Force by Canadian Warships Engaged in Law Enforcement*, 18 CAN. Y.B. INT'L L. 113, 114, 123-128, 143 (1980). Because of the Posse Comitatus Act, 18 U.S.C. § 1385, U.S. warships are precluded from aiding civilian law enforcement authorities in keeping the peace and arresting felons; however, for the purposes of narcotic interdiction, naval vessels can undertake such activities where there is a Coast Guard officer present who is trained in and authorized to arrest, search, and seize property. NWP 9, *supra* note 60, at §§ 3.12, 3.12.4. For the powers in hot pursuit, piracy, and the suppression of slavery, see *id.*, at § 3.9, § 3.4, & § 3.5 respectively.

¹⁸¹See, e.g., NWP 9, *supra* note 60, at § 3.9.

¹⁸²Roach, *supra* note 2, at 50.

¹⁸³*Id.*

¹⁸⁴*Id.*

¹⁸⁵See, the FAA regulations at 14 C.F.R. part 99.

¹⁸⁶See e.g., NWP 9, *supra* note 60, § 2.5.

¹⁸⁷*Id.*, at § 4.4.

¹⁸⁸Magnuson, *supra* note 44, at 16.

¹⁸⁹OP LAW HB, *supra* note 20, at H-95.

¹⁹⁰Report of the DOD Commission on the Beirut International Airport Terrorist Act, October 23, 1983 (December 20, 1983), at 39 [hereinafter Long Commission].

¹⁹¹*Id.*, at 39-40.

¹⁹²*Id.*, at 47.

¹⁹³Parks, *supra* note 141, at 419.

¹⁹⁴NWP 9, *supra* note 60, at 5-4.

¹⁹⁵OP LAW HB, *supra* note 20, at H-86. The OP Law Handbook recommends that such restatements of the Hague and Geneva Conventions be placed instead in the Field Standard Operating Procedures (FSOP), *id.*

¹⁹⁶Hague Convention VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, October 18, 1907, *reprinted in*, DEP'T ARMY, II INTERNATIONAL LAW (DA PAM 27-161-2), at 279; Hague Convention VII Relating to the Conversion of Merchant Ships into Warships, October 18, 1907, *reprinted in*, DEP'T ARMY, II INTERNATIONAL LAW (DA PAM 27-161-2), at 283; Hague VIII, *supra* note 33; Hague IX, *supra* note 33; Hague XIII, *supra* note 148.

¹⁹⁷See, e.g., Frank Russo, *Targeting Theory in the Law of Naval Warfare*, 40 NAVAL L. REV. 1 (1992); W.J. Fenrick, *Legal Aspects of Targeting in the Law of Naval Warfare*, 29 CAN. Y.B. INT'L L. 238 (1991); Wolff H. von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part I, The Traditional Law*, 29 CAN. Y.B. INT'L L. 283 (1991); Jane Gilliland, *Submarines and Targets: Suggestions for New Codified Rules for Submarine Warfare*, 73 GEO. L.J. 975 (1985).

¹⁹⁸For a discussion of the problems inherent in having different rules applying, see, Long Commission, *supra* note 190.

¹⁹⁹O'CONNELL, *supra* note 7, at 176.

²⁰⁰*Id.*

²⁰¹*Id.*

²⁰²*Id.*

²⁰³*Id.*, at 177.

²⁰⁴*Id.*

²⁰⁵FRIEDMAN, *supra* note 146, at 189. See also, Parks, *supra* note 12, at 87.

²⁰⁶Parks, *Righting ROE*, *supra* note 12, at 87.

²⁰⁷*Id.*

²⁰⁸OP LAW HB, *supra* note 20, at H-90.

²⁰⁹*Supra*, note 2.

²¹⁰WOODWARD, *supra* note 10, at 67.

²¹¹Waldo D. Freeman *et al*, *The Challenges of Combined Operations*, MIL. REV., November 1992, at 2, 4.

²¹²*Id.*

²¹³*Id.*, at 5.

²¹⁴*Id.*, at 6.

²¹⁵In the case of the CAPs over the Gulf during Desert Shield, Canadian CF-18s were acting under the overall command of CENTCOM. Later during the war, particularly during the strategic bombing campaign, the "Desert Cats" were fully integrated into bombing missions as sweep escort for the bombers.

²¹⁶Humphries, *supra* note 139, at 27.

²¹⁷*Id.*, at 40, n. 13.

²¹⁸*Id.*, at 28. LTC Humphries claims that the Desert Storm ROE regularly contained 20 pages of off-limits targets that were driven by political considerations. *Id.*, at 41, n. 52.

²¹⁹The first draft of the CENTAF WROE was 18 pages long but was distilled to only four pages covering the "generic precepts for coalition operations." *Id.*, at 29-30. These rules were supplemented by appendices that addressed rules for "unique, sensitive US operations." *Id.*

²²⁰*Supra* note 132.

²²¹O'CONNELL, *supra* note 7, at 170.

²²²Charles Bloodworth in his unpublished paper proposes a methodology for drafting ROE at the U.S. Army Divisional level. He suggests that a staff team composed of a Team Chief from the G3 Operations or Plans section, the Division Ammunition Officer, the Division Aviation Officer, the Fire Support Coordinator, an Engineer Staff Officer, an Intelligence Staff Officer, the Operation Law Attorney, "representatives of supporting services, especially the Air Force Tactical Air Control Party and the Navy/Marine Air and naval Gunfire Liaison Company (ANGLICO)" and coordination with the Provost Marshal and Civil Affairs units. Bloodworth, *supra* note 19, at 13.

²²³OP LAW HB, *supra* note 20, at H-87.

²²⁴*Id.*, at H-85.

²²⁵John Rolph, "Rules of Engagement (ROE)", Lecture Outline, Tab "K", 13th Operational Law Course Handbook, The Judge Advocate General's School, Army, at K-9 (on file in the International Law Division), *see also*, OP LAW HB, *supra* note 20, at H-88.

²²⁶*Id.*, at H-85.

²²⁷For examples, *see* Appendices C and D.

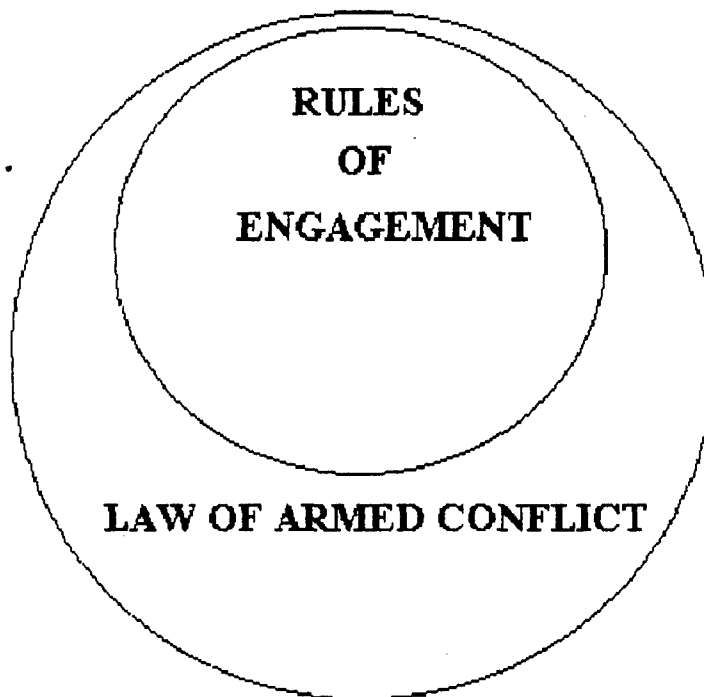
²²⁸OP LAW HB, *supra* note 20, at H-96.

²²⁹Admiral Woodward, the Commander of the Falklands Task Group describes in his memoirs how he circumvented the chain of command to get the ROE changed so that HMS *Conqueror* could engage the *Belgrano* while outside of the Total Exclusion Zone. The Admiral mused: "how can I startle everyone at home into the required and early action?" He initiated a signal to the *Conqueror* ordering her to attack but at the same time "instituted the formal process" to have the ROE amended. He had his Staff Officer Operations contact the Duty Officer in Northwood, England to explain the rationale for his actions and to "grease the skids" for he hoped would happen. Mrs. Thatcher's War Cabinet approved the amendment that next morning. WOODWARD, *supra* note 10.

²³⁰Roach, *supra* note 2, at 52.

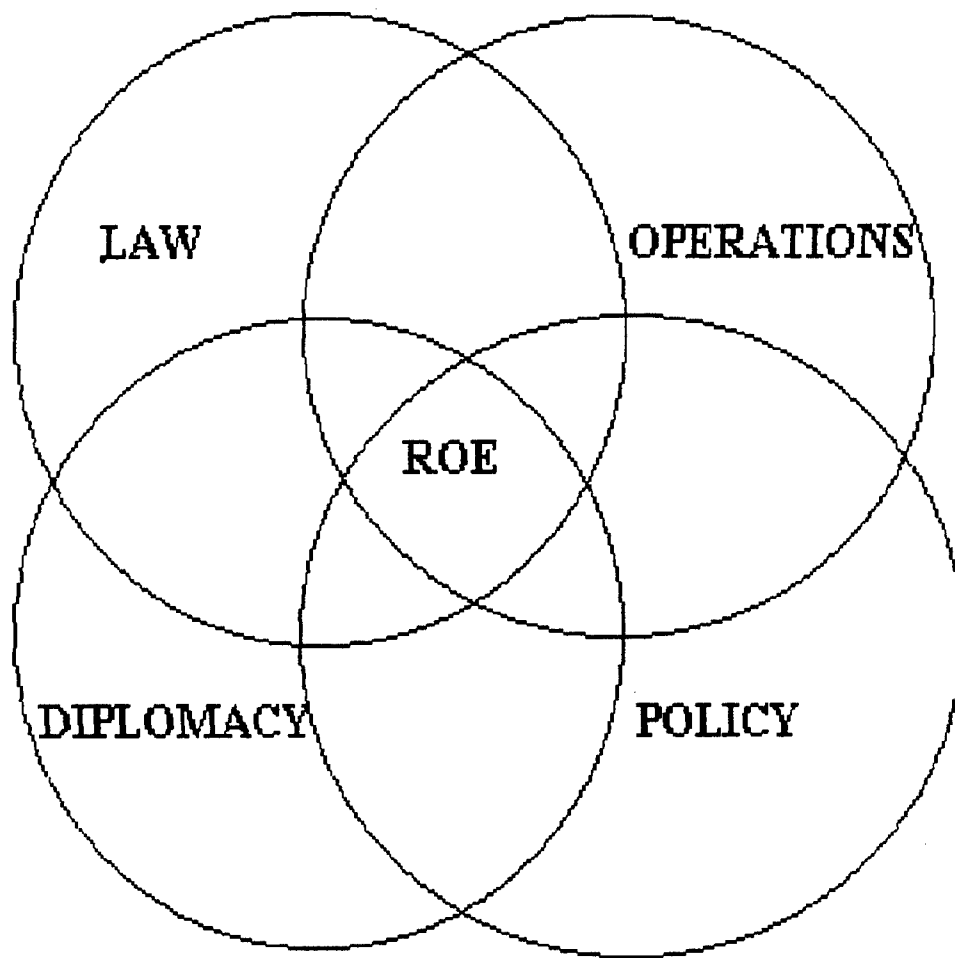
APPENDICES

Appendix A - Venn Diagram I¹



¹J. Ashley Roach, *Rules of Engagement*, NAVAL WAR C. REV., January-February 1983, at 46, 47.

Appendix B - Venn Diagram II²



²J. Ashley Roach, *Rules of Engagement*, NAVAL WAR C. REV., January-February 1983, at 46, 48.

Appendix C - WROE Samples:

Rules of Engagement for the Individual Soldier¹

1. Shoot all enemy soldiers in uniform, day or night, unless obviously attempting to surrender or defect.
2. Shoot all armed civilian personnel accompanying enemy armed forces, or present in their vehicles, bases or forts.
3. Challenge all unarmed unidentified persons within your area of operations. If they do not immediately surrender, capture them, using force is necessary.
4. Shoot all enemy vehicles, armored or unarmored, day or night, unless marked with a protective insignia (red cross, white flag etc.).
5. Shoot all civilian vehicles carrying enemy forces or supplies. Do not shoot civilian vehicles transporting civilian personnel, even if escorted in convoy by enemy military vehicles.
6. Fire from artillery & mortars may be utilized against enemy forces as defined above when controlled by one of the following techniques:
 - a. Direct Lay.
 - b. Forward Observer (ground or air, to include RPV).
 - c. Counterbattery Radar (FIREFINDER) coordinates.
 - d. Enemy forces identified and confirmed by ground surveillance radar (GSR) and/or remote sensors (REMBASS).
 - e. Final Protective Fires established around US or Allied defensive positions.

¹101st Airborne Division ROE 3" x 5" card for infantry soldiers (on file at International Law Division, TJAGSA).

Annex ___ (Rules of Engagement) to ___ OPLAN²

References:

- a. DOD Directive 5100.77 DOD Law of War Program.
- b. FM 27-10, The Law of Land Warfare.
- c. DA Pam 17-1-1, Protocols of the Geneva Conv.s of 12 Aug 1949.

Time Zone Used Throughout the OPLAN: UNIFORM.

1. SITUATION

a. General.

- (1) These ROE will apply to all US and combined combat operations under this OPLAN.
- (2) All practical means will be employed to limit the risk to the lives and property of friendly forces and civilians and to avoid the violation of operational and national boundaries.
- (3) The law of war governs the conduct of all Joint Task Force (JTF) H combat operations (reference a). The provisions of applicable treaties and other international agreements and an analysis of the principles and rules of warfare are contained in reference b. Commanders and staff will apply these principles as applicable in the following areas:
 - (a) Methods and means of waging warfare including NBC warfare.
 - (b) Targeting.
 - (c) Stratagems.
 - (d) Employment and coordination of weapons systems.
 - (e) Treatment of civilian personnel and property.
 - (f) Treatment of EPW and other detained persons.
 - (g) Wounded, sick and medical units, personnel and facilities.
- (4) Commanders will ensure that all policies, plans, orders, target lists, and procedures concerning the conduct of military operations are consistent with the law of war and applicable international law. Legal review and guidance from servicing Judge Advocates (JA) will be obtained prior to implementation of the above as the tactical situation permits.
- (5) Subordinate commands will not modify or interpret these ROE except to impose additional restrictions as appropriate.
- (6) Nothing in these ROE shall infringe on the inherent right of a commander to exercise self-defense and take immediate action against an enemy direct attack with all lawful and appropriate means necessary to save US lives.

²Center for Military Law and Operations & International Law Division, Judge Advocate General's School, Army, OPERATIONAL LAW HANDBOOK JA422, at H-92 to H-95 (Draft 2d ed., 1992).

(7) Coalition forces, including those operating under _____ (US) Corps control, have a national obligation to abide by the provisions of reference c. Interoperability problems arising from reference c will be referred immediately to the servicing JA.

(8) The forces of the Republic of Lusada are declared "allied." The forces of the nations of Alges, Belgrano, and Guincho are declared "neutral." The forces of the nation of Zapita are declared "hostile."

b. Assumptions. Higher headquarters will not modify or supplement these ROE while combat operations continue in Lusadan territory.

2. MISSION

To provide ROE guidance to assure successful defense of the Republic of Lusanda's territory against attack by insurgent and/or Zapitan regular forces and avoid actions that could lead to the introduction of third national hostile forces and widen the war.

3. EXECUTION

a. Definitions.

(1) Close Air Support. Air attacks against hostile targets which are in close proximity to friendly forces and which require detailed integration of each air mission with the fire and movement of those forces.

(2) In Contact. A unit is considered in contact when it is engaged with an enemy force and being fired upon.

(3) Low Intensity/Mid Intensity Combat Operations. All US military operations in the Republic of Lusada will be considered low intensity combat operations until mid intensity operations are declared by the Commander, JTF-H.

(4) Populated Areas. The cities of Roberta, Ordvilla, Schoonervilla, and any other built-up urban areas are designated as such on operational map sheets.

b. Surface Weapons. The subparagraph applies to the conduct of fire in both low and mid intensity combat operations to include the employment of indirect and direct fire surface weapons and navy gunfire.

(1) Every effort will be made to observe fires regardless of the target location. Unobserved fires will only be employed when absolutely necessary for mission accomplishment and will meet the following criteria:

(a) No unobserved fires will be directed against targets in populated areas unless:

1. Unit is in contact and in serious danger of being overrun, or
2. Authorization is granted by the JTF-H Commander.

(b) Unobserved fire may be directed against all clearly identified targets in uninhabited or

sparsely inhabited areas if deemed essential by the tactical unit commander directing the fire.

(2) All fire missions directed against known or suspected targets in populated areas must preclude the unnecessary destruction of civilian persons and property.

(a) The decision to conduct indirect fire (artillery and mortar) missions in populated areas is retained by the commander _____, or higher level commander and will not be delegated further.

(b) Direct fire weapons (e.g., tank, AT missile, recoilless rifle) may be used in a direct fire role in populated areas when necessary at the discretion of the tactical commander controlling the fire.

(c) Prior to initiating fires in populated areas, attempts will be made with leaflets, loudspeakers, or other appropriate means to secure the evacuation of the civilian populace if the tactical situation permits.

c. Air Operations. This subparagraph defines operational restrictions and ROE for the employment of fixed and rotary-wing aircraft in support of Corps ground forces during both low and mid intensity combat operations. This subparagraph applies to all USAF close air support (CAS) and Army aviation missions, but does not apply to USAF battlefield air interdiction (BAI) missions.

(1) All pilots will receive an air or ground briefing to determine the disposition of friendly forces and civilians prior to initiating an air attack.

(2) CAS and helicopter gunship missions require:

(a) Attacking aircraft be under the control of or in direct communications with a Forward Air Controller (FAC) or Forward Observer (FO) who has visual contact with the enemy force and can define the target area and location of friendly forces and civilians.

(b) A target area which is visually or otherwise clearly marked or identifiable.

(c) Two-way radio communication between both the FAC/FO and CAS aircraft and between the FAC/FO and friendly forces on the ground.

(3) Air attacks directed against known or suspected enemy targets in populated areas must preclude unnecessary danger to civilians and destruction of civilian property. The following must be adhered to:

(a) The decision to conduct air attacks against populated areas will be retained by the commander, _____, or higher level commander and will not be delegated further.

(b) Air attacks directed against populated area must always be closely controlled by a FAC or FO.

(c) Prior to initiating air attacks against populated areas, attempts will be made with

leaflets, loudspeakers, or other appropriate means to secure the evacuation of the civilian populace if the tactical situation permits.

(4) Munitions will be jettisoned only in designated jettisoned areas in daylight (VFR) or under positive radar control (night/IFR conditions) except when emergency threatens injury to the crew or serious damage to the aircraft.

(5) Commander, _____, shall prescribe ROE and restrictions for air-to-air combat and BAI missions.

d. Chemical.

(1) Lethal or incapacitating chemical weapons will not be employed unless the following criteria are met:

(a) Verified prior use of chemical weapons by Zapitan forces.

(b) Release authority is delegated to Commander JTF-H from National Command Authority (NCA).

(c) Release authority will not be delegated below the JTF-H level.

(2) Riot Control Agents (RCA) will not be employed by the US Forces without express US Presidential authorization and only in defensive military modes to save lives such as:

(a) Use in riot control situations in areas under direct and distinct US military control to include controlling rioting EPW.

(b) Use in situations where civilians are used by the enemy to mask or screen attacks and civilian casualties and be reduced by RCA employment.

(c) Use in rescue/recovery missions in remote isolated areas, of downed aircrews and passengers, and escaping prisoners.

(d) Use in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists, and paramilitary forces.

(3) The sole exception to (2) above is that the US SECDEF may authorize the use of RCA by US Forces in security operations to protect or recover nuclear weapons.

(4) Herbicides will not be employed by US Forces except for the control of vegetation within US bases and installations or around their immediate defensive perimeters.

f. Incendiary. Large caliber incendiary weapons (e.g., WP, napalm) will not be employed in populated areas except in extraordinary conditions. The decision to employ incendiary weapons in populated areas will be retained by the JTF-H Commander and will not be delegated further.

g. All commanders will refrain from attacking prohibited targets/areas listed in Annex ____ (Civil-Military Operations). Questions concerning targeting and collateral damage to civilian personnel/property will be directed to the servicing JA.

h. Tactical Operations.

(1) During all phases of combat operations in the Republic of Lusada, ground and air commanders will exercise caution to insure that all international boundaries and air or sea space of other nations are respected. To this end:

(a) No ground or air operations, to include "hot pursuit" of enemy forces in contact, will be conducted across any international boundary or within any nation's air or sea space (except that belonging to the Republic of Lusada) without authorization from the Commander, JTF-H.

(b) No fires or air strikes will be directed across any international boundary or within any nation's air or sea space (except that belonging to Rep. of Lusada) without authorization from the Commander, JTF-H.

(2) During low intensity combat operations between US and enemy forces, the following additional ROE will apply:

(a) US ground and air commanders (USAF and US Army) will make every effort to prevent violations of Zapitan international boundary. To this end:

1. US ground forces will refrain from approaching closer than one kilometer (km) to the Zapitan border except when:

a. Reconnaissance missions require patrolling closer to the Zapitan border and patrols have been briefed on the exact location of the border.

b. US forces are in contact with enemy forces located within the one km border zone and the commander, _____, or higher level commander, has authorized pursuit of enemy forces to the border. In such cases, fire will be directed so that it does not fall onto Zapitan territory regardless of the location of enemy forces. All combat occurring within the one km border zone will be reported immediately to the Commander, JTF-H.

2. US air commanders (USAF and US Army) will ensure that:

a. All aircraft commanders are briefed on the exact location of the Zapitan Border and the one km border zone.

b. No air attacks are directed against hostile ground targets within one km border zone unless authorized by the commander _____, or higher level command. All such attacks will be reported immediately to the Commander, JTF-H.

(b) All US commanders will make every effort to avoid detection and contact with regular Zapitan forces. If US forces are in contact with regular Zapitan forces located across the Zapitan border, every effort will be made to terminate the contact and extricate US forces from the area.

(3) The above listed ROE of subparagraph (2)P [sic] will not apply to US forces engaged in mid intensity combat operations against regular Zapitan forces invading the Republic of Lusada, other ROE in this Annex will remain in effect during such operations.

Desert Storm ROE³

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

- A. Do not engage anyone who has surrendered, is out of battle due to sickness or wounds, is shipwrecked, or is an aircrew member descending by parachute from a disabled aircraft.
- B. Avoid harming civilians unless necessary to save US lives. Do not fire into civilian populated areas or buildings which are not defended or being used for military purposes.
- C. Churches, Shrines, Schools, Museums, National Monuments, and any other historical or cultural sites will not be engaged except in self-defense.
- D. Hospitals will be given special protection. Do not engage hospitals unless the enemy uses the hospital to commit acts harmful to US forces, and then only after giving a warning and allowing a reasonable time to expire before engaging, if the tactical situation permits.
- E. Booby traps may be used to protect friendly positions or to impede the progress of enemy forces. They may not be used on civilian personal property. They will be recovered or destroyed when the military necessity for their use no longer exists.
- F. Looting and the taking of war trophies are prohibited.
- G. Avoid harming civilian property unless necessary to save US lives. Do not attack traditional civilian objects, such as houses, unless they are being used by the enemy for military purposes and neutralization assists in mission accomplishment.
- H. Treat all civilians and their property with respect and dignity. Before using privately owned property, check to see if publicly owned property can substitute. No requisitioning of civilian property, including vehicles, without permission of a company level commander and without giving a receipt. If an ordering officer can contract the property, then do not requisition it.
- I. Treat all prisoners humanely and with respect and dignity.
- J. ROE Annex to the OPLAN provides more detail. Conflicts between this card and the OPLAN should be resolved in favor of the OPLAN.

REMEMBER

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

³Center for Military Law and Operations & International Law Division, Judge Advocate General's School, Army, OPERATIONAL LAW HANDBOOK JA422, at H-98 (Draft 2d ed., 1992).

Desert Shield/Storm Special Operations Forces ROE
in Iraq⁴

NOTHING IN THESE ROE LIMITS YOUR RIGHT TO TAKE APPROPRIATE ACTION IN SELF-DEFENSE!

THE FORCES OF IRAQ HAVE BEEN DECLARED HOSTILE AND MAY BE ATTACKED. THIS INCLUDES ALL IRAQI MILITARY PERSONNEL AND VEHICLES TRANSPORTING THE ENEMY OR THEIR SUPPLIES.

- A. Do not attack civilians unless they commit a hostile act or it is clear they are about to commit a hostile act against SOF. If a civilian does nothing, they are no threat and may not be attacked.
- B. Don't fire into civilian populated areas or buildings, which are not being defended or being used for military purposes.
- C. Treat all civilians and their property with respect and dignity. You may use enemy public property for military purposes, but you may not use enemy private property without your commander's permission. If private property is used, a receipt must be given.
- D. Treat all prisoners humanely and with respect and dignity.
- E. Do not engage anyone who has surrendered, is out of battle due to sickness or wounds, is shipwrecked, or is an aircraft crew member descending by parachute from a disabled aircraft.
- F. Should a civilian come across SOF during a reconnaissance mission, the civilian may not be attacked unless they commit a hostile act or show hostile intent.
- G. Civilians may be detained by SOF for their own safety and the safety of SOF; however, they must be given the same treatment as EPW's. If necessary they may be restrained and left in an area where they will be found or eventually escape.
- H. Use only the minimum force required to regain custody of any detainees attempting to escape. Deadly force may only be used in self-defense to a hostile act or clear display of hostile intent.
- I. SOF are not required to wear a particular uniform and may use legitimate ruses such as wearing the enemy's uniform to infiltrate the enemy's lines. During actual combat however, SOF must wear their own uniform to distinguish them as combatants.
- J. ROE Annex to the OPLAN provides more detail. Conflicts between this card and the OPLAN should be resolved in the favor of the OPLAN.

⁴Center for Military Law and Operations & International Law Division, Judge Advocate General's School, Army, OPERATIONAL LAW HANDBOOK JA422, at H-97 (Draft 2d ed., 1992).

REMEMBER:

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

Appendix D - PROE Samples:

Sample Rules of Engagement for Exercises
Utilizing JOPS Format⁵

1.(U) **PURPOSE:** This appendix establishes policies and procedures governing actions to be taken by _____ ground forces operating on land during peace time against hostile acts or demonstrations of hostile intent by foreign forces.

2.(U) **POLICY: NOTHING IN THESE RULES NEGATES A COMMANDERS' RIGHT AND RESPONSIBILITY TO TAKE ALL NECESSARY AND APPROPRIATE ACTION FOR HIS UNIT'S SELF DEFENSE.**

3.(U) **ADDITIONAL GUIDANCE FOR RESPONDING TO HOSTILE ACTS:** In the event _____ ground forces are attacked by an armed foreign force or terrorist units(s) within the AOR the military on-the-scene commanders will comply with the following:

a.(U) _____ ground forces shall not fire until fired upon, unless there is clear evidence of hostile intent.

b.(U) Response to hostile fire directly threatening _____ forces will be rapid, decisive, and directed at the source of hostile fire, using only that amount of force necessary and proportional to eliminate the threat.

4.(U) **THE USE OF FORCE:**

a.(U) The "use of passive force" is the employment of physical means which will normally not result in physical harm to individuals, installations, and equipment. Examples of possible use of passive force are displaying weapons to discourage hostilities or the removal of unauthorized persons from military installations or training areas.

b.(U) The "active use of force" is the employment and use of means that may result in physical harm to individuals, installations, and equipment. Examples of active use of force are use of rifle butts, and in extreme cases, weapons fire.

c.(U) Responsibility for the protection of US forces in _____ against civil disturbances and similar incidents rests primarily with the _____ government. If possible, _____ police/military forces should first be used to contain the threat or deter an attack. However, ultimate responsibility for the protection of US forces and/or installation remains with the US commanding officer. In the event _____ forces are unable or unwilling to provide the necessary protection to US forces, the measures outline _____ should be utilized.

⁵Center for Military Law and Operations & International Law Division, Judge Advocate General's School, Army, OPERATIONAL LAW HANDBOOK JA422, at H-91 to H-92 (Draft 2d ed., 1992).

5. (U) PRINCIPLES FOR THE USE OF FORCE:

a.(U) Neither passive nor active force may be used unless the _____ authorities have attempted to counter the threat and the security of _____ personnel is still jeopardized.

b.(U) Active use of force is authorized only as a last resort when other means have failed. Again, no US soldier will discharge his weapon if members of the _____ authorities are providing adequate security. Deadly force is only authorized to protect life, not property.

c.(U) Live ammunition will be issued only to US _____ personnel who are deployed in the FTX area during Phase II of _____.

d.(U) Team leaders will physically maintain and control all ammunition. Weapons will not be locked and loaded until the active conditions for the use of force have been met.

e.(U) Active use of force is authorized only in self-defense. Deadly force, i.e. ... weapons fire, may only be used when there is an immediate threat to the life of _____ personnel.

f.(U) Only when _____ personnel are being subjected to direct attack by forceful means, may weapons be fired without prior warning.

(1)(U) In all other instances, a vocal warning will be given and two warning shots fired before resorting to aimed fire.

(2)(U) Weapons fire will be discriminate. Stop the adversary with minimum damage. Fire should be terminated as soon as the situation permits.

g.(U) When the use of active force is considered, the senior officer or NCO on the scene is responsible for ordering or executing the actions deemed necessary.

h.(U) Common sense and good judgement by all personnel is of greatest importance.

Desert Shield PROE⁶

THESE ARE PEACETIME RULES OF ENGAGEMENT. NOTHING IN THESE RULES LIMITS THE RIGHTS OF INDIVIDUAL SOLDIER TO DEFEND THEMSELVES OR THE RIGHTS AND RESPONSIBILITIES OF LEADERS TO DEFEND THEIR UNITS.

- A. You may not conduct offensive military operations (raids, ambushes, etc).
- B. You may use force in self-defense in response to attacks or threats of imminent attack against US or host nation forces, citizens, property, or commercial assets
- C. You are not permitted to enter the land, sea, or airspace of other countries--besides the host nation.
- D. If you inadvertently enter territorial land, sea, or airspace of another country, you may use force in self-defense to withdraw.
- E. You may not seize property of others to accomplish your mission in peacetime.
- F. Proper contracting processes must be followed to obtain supplies and other items necessary to accomplish the mission.
- G. Treat all persons and property with respect and dignity. Remember we are at peace.

REMEMBER

- 1. We are not at war.
- 2. These rules are in effect unless hostilities begin.
- 3. Know the wartime ROE and follow them if hostilities begin.

CULTURAL DOs AND DON'Ts

DO:

- A. Be friendly and courteous. A handshake accompanied with the phrase Al-Salaama 'Alaykum (Peace be upon you) is the most common form of greeting.
- B. If you smoke (most Arab men do), offer to share cigarettes with those present.
- C. Sit properly in chairs: upright with feet on the ground.
- D. When in doubt, observe locals and imitate their behavior.
- E. Avoid contact with Arab women. If introduced, be polite but do not stare or engage in any lengthy conversations.

DON'T:

- A. Make critical comparisons of your religion vs. Islam
- B. Ask an Arab not to smoke.
- C. Point your finger or use your index finger to beckon people: it is considered demeaning.
- D. Use alcohol.
- E. Possess or use pornographic or sexually explicit material.

⁶Center for Military Law and Operations & International Law Division, Judge Advocate General's School, Army, OPERATIONAL LAW HANDBOOK JA422, at H-96 (Draft 2d ed., 1992).

Panama Security Instructions⁷

NOTHING IN THESE RULES NEGATES IN ANY WAY YOUR RIGHT TO TAKE ALL NECESSARY AND APPROPRIATE ACTIONS FOR YOUR PERSONAL SELF-DEFENSE AND FOR THE DEFENSE OF YOUR UNIT.

RULES FOR LEADERS:

1. A commander will take all steps necessary and appropriate for his/her unit's self-defense.
2. Use only the minimum force necessary to control the situation.
3. If possible when returning fire, use selected marksmen.
4. Without endangering your unit or risking the success of the mission, take measures to minimize risk to civilians.
5. Riot control agents may only be used when authorized by the division commander or his designated representative.
6. Upon cease fire, take necessary measures to maintain control and to assist any injured.

RULES FOR INDIVIDUALS:

1. If fired upon, fire back if necessary in self-defense.
2. If it reasonably appears that you are about to be fired upon, fire if necessary in self-defense.
3. When returning fire, aim directly at its source. Do not spray your fire into a general area.
4. Cease firing when the threat is over.
5. Allow anyone trying to surrender to do so.
6. Treat innocent civilians with respect.

THREE INTERRELATED LEGAL PRINCIPLES APPLY TO ALL OPERATIONS:

1. **Military necessity:** Measures which are not otherwise forbidden by international law are justified when necessary to secure the complete submission of the enemy as soon as possible. Military necessity does not justify any of the measures expressly prohibited by the law of war.
2. **Proportionality:** The application of combat power and resulting destruction of life and property should not be disproportionate to the military advantage gained thereby.
3. **Avoidance of unnecessary suffering:** Destruction or injury to persons or property is prohibited unless necessary to gain some military advantage against the enemy. Where military necessity dictates the engagement of a target, weapons will be employed in such a manner as to minimize collateral damage to the extent practical, but in no event will minimization take precedence over U.S. lives.

⁷Center for Military Law and Operations & International Law Division, Judge Advocate General's School, Army, OPERATIONAL LAW HANDBOOK JA422, at H-99 (Draft 2d ed., 1992).

UNDER THE LAWS OF WAR YOU MUST:

- Treat captives and detainees humanely.
- Respect civilians and their property.
- Avoid forbidden targets, tactics, and techniques.
- Prevent and report to your superior(s) any crime committed under the laws of war.

Appendix E - Anti-Drug Operations ROE Sample:

JTF Drug ROE⁸

1. Force may be used to defend yourself and others present.
2. Do not use force if other defensive measures could be effective.
3. Use only minimum force necessary.
4. You may detain any person who poses an imminent threat of serious bodily harm to you or others present, release to civilian LA soonest.
5. You may pursue hostile forces only to defend or retrieve military personnel.
6. You may not pursue hostile forces into another nation's territory without command authority.

RULES OF ENGAGEMENT

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

- A. When possible, warn the enemy first and asked [sic] to surrender.
- B. Armed force is the last resort.
- C. Armed civilians will only be engaged in self-defense.
- D. Civilian aircraft will not be engaged without approval from above Division level unless it is in self-defense.
- E. Avoid harming civilians unless necessary to save US lives. If possible, try to arrange for the evacuation of civilians prior to any US attack.
- F. If civilians are in the area, do not use artillery, mortars, armed helicopters, AC-130, tube or rocket launched weapons, or M551 main guns against known or suspected targets without the permission of a ground maneuver commander LTC or higher (for any of these weapons).
- G. If civilians are in the area, all air attacks must also be controlled by a FAC or FO.
- H. If civilians are in the area, close air support (CAS), white phosphorous, and incendiary weapons are prohibited without approval from above Division level.
- I. If civilians are in the area, infantry does not shoot except at known enemy locations.
- J. If civilians are not in the area, you can shoot at suspected enemy locations.

⁸Center for Military Law and Operations & International Law Division, Judge Advocate General's School, Army, OPERATIONAL LAW HANDBOOK JA422, at H-101 (Draft 2d ed., 1992).

- K. Public works such as power stations, water treatment plants, dams and/or other utilities may not be engaged without approval from above Division level.
- L. Hospitals, Churches, Shrines, Schools, Museums, and any other historical or cultural site will not be engaged except in self-defense.
- M. All indirect fire and air attacks must be observed.
- N. Pilots must be briefed for each mission on the location of civilians and friendly forces.
- O. No booby traps. No mines except as approved by Division Commander. No riot control agents without approval from above Division level.
- P. Do not harm civilian property unless necessary to save US lives.
- Q. Treat all civilians and their property with respect and dignity. Before using privately owned property, check to see if any publicly owned property can substitute. No requisitioning of civilian property without permission of a company level commander and without giving a receipt. If an ordering officer can contract for the property, then do not requisition it. No looting. Do not kick down doors unless necessary. Do not sleep in their houses. If you must sleep in privately owned buildings, have an ordering officer contract for it.
- R. Treat all prisoners humanely and with respect and dignity.
- S. Annex R to the OPLAN provides more detail. Conflicts between this card and the OPLAN should be resolved in favor of the OPLAN.

DISTRIBUTION: 1 for every soldier deployed to include all ranks.

Appendix F - Civil Disturbance ROE Samples:

Special Orders for all Military Personnel
Engaged in Civil Disturbance Operations⁹

1. Carry out your assigned duties in a military manner and present a neat military appearance at all times. Be sure that everything you do reflects credit upon your country, the military service, your unit and yourself.
2. Have regard for the human rights of all persons. Be as courteous toward civilians as possible under the circumstances. Do not mistreat anyone or withhold medical attention from anyone needing it. Do not damage property unnecessarily.
3. Use only the minimum amount of force required to accomplish your mission and, if necessary, to defend yourself. When under the control of an officer, you will load or fire your weapon only on his orders. When not under the control of an officer, you will load or fire your weapon only when required to protect your own life or the lives of others. To protect specified property designated as vital to public health or safety, or to prevent the escape of persons endangering life or vital facilities; you are not authorized to use firearms to prevent offenses which are not likely to cause death or serious bodily harm, nor endanger public health or safety.
4. When firing is necessary, shoot to wound, not to kill.
5. When possible, let civilian police arrest lawbreakers. But when assistance is necessary or in the absence of the civil police, you have the duty and the authority to take lawbreakers into custody. Take such persons to the police or designated military authorities as soon as possible. Cooperate fully with the police by safeguarding evidence and completing records as instructed.
6. Allow properly identified news reporters freedom of movement, so long as they do not interfere with the mission of your unit.
7. Do not talk about this operation or pass on information or rumors about it to unauthorized persons; refer all civilians who ask for information about what you are doing to your commanding officer.
8. Become familiar with these special orders, and carry this card on your person at all times when engaged in civil disturbance operations.

⁹Center for Military Law and Operations & International Law Division, Judge Advocate General's School, Army, OPERATIONAL LAW HANDBOOK JA422, at H-102 to H-105 (Draft 2d ed., 1992).

Civil Disturbance ROE¹⁰

(Taken from 1969 example: US domestic disturbances)

IN THE EVENT THAT THE JTF IS ORDERED TO CONDUCT CIVIL DISTURBANCE OPERATIONS, THE FOLLOWING ROE WILL BE FOLLOWED:

APPLICATION OF FORCE.

In performing its mission, the JTF may find it necessary to be actively involved in helping to prevent criminal acts and in helping to detain those responsible for them. This active involvement is authorized, subject to the restraints on the use of force set forth below.

The primary rule which governs the actions of federal forces in assisting federal and local authorities to restore law and order is that at all times only the minimum force is used as required to accomplish the mission. This paramount principle should control both the selection of appropriate operational techniques and tactics, and the choice of options for arming the troops. Pursuant to this principle, the use of deadly force (i.e., live ammunition or any other type of physical force likely to cause death or serious bodily harm) is authorized only under extreme circumstances where certain specific criteria are met as set forth below.

To emphasize limitations on use of firepower and to restrict automatic fire, ensure that rifles with only a safe and semiautomatic selection capability are used as the basic individual weapon for troops in the civil disturbance area. Orders will be issued to all troops that individual weapons capable of automatic fire will not be fired in the automatic/burst mode, except on the order of competent authority as delegated by the JTF commander.

JTF personnel are authorized to use non-deadly force to control the disturbance, to prevent crimes, and to apprehend or detain persons who have committed crimes; however, the degree of force used must be no greater than that reasonably necessary under the circumstances. The use of deadly force, however, in effect invokes the power of summary execution and can, therefore, be justified only by extreme necessity. Accordingly, its use is not authorized for the purpose of preventing activities which do not pose a significant risk of death or serious bodily harm (e.g., curfew violations or looting).

If a mission cannot be accomplished without the use of deadly force, and deadly force is not permitted under the guidelines authorizing its use, accomplishment of the mission must be delayed

¹⁰Center for Military Law and Operations & International Law Division, Judge Advocate General's School, Army, OPERATIONAL LAW HANDBOOK JA422, at H-102 to H-105 (Draft 2d ed., 1992).

until sufficient non-deadly force can be brought to bear. In such situations, the JTF Commander should report the situation and seek instructions from higher authority. All the requirements of the subparagraph below must be met in every case in which deadly force is employed.

THE USE OF DEADLY FORCE IS AUTHORIZED ONLY WHERE ALL THREE OF THE FOLLOWING CIRCUMSTANCES ARE PRESENT:

- lesser means have been exhausted or are unavailable;
- the risk of death or serious bodily harm to innocent persons is not significantly increased by use; and
- the purpose of its use is one or more the following:
 1. Self-defense to avoid death or serious bodily harm;
 2. Prevention of a crime which involves a substantial risk of death or serious bodily harm (for example, setting fire to an inhabited dwelling or sniping), including the defense of other persons;
 3. Prevention of the destruction of public utilities or similar property vital to public health or safety; or
 4. Detention or prevention of the escape of persons who have committed or attempted to commit one of the serious offenses referred to in the paragraphs immediately above.

Military personnel have the right under the law to use reasonably necessary force to defend themselves against violent and dangerous personal attack. The limitations described in this paragraph are not intended to infringe this right, but to prevent the unauthorized or indiscriminate firing of weapons and the indiscriminate use of other types of deadly force.

In addition, the following policies in the use of deadly forces will be observed:

- when firing ammunition, the marksman should if possible aim to wound, rather than kill;
- when possible, the use of deadly force should be preceded by a clear warning to the individual or group that use of such force is contemplated or imminent.
- warning shots will not be fired. Such firing constitutes a hazard to innocent persons and can create the mistaken impression on the part of citizens or fellow law enforcement personnel that sniping is widespread.
- Even when authorized pursuant to the above, deadly force must be employed only with great selectivity and precision against the particular threat which justifies its use. The receipt of sniper fire--however deadly--from an unknown location can never justify "returning the fire" against any or all persons who may be visible on the street or in nearby buildings. Such an indiscriminate response is far too likely to result in casualties among innocent bystanders or fellow law enforcement personnel. The appropriate response is to take cover and attempt to locate the source of the fire so that the threat can be neutralized.

Issue of live ammunition to JTF personnel is authorized.

Positive control will be exercised at all levels of command concerning the issue of live ammunition to the individual. The ammunition will be controlled at company level or higher and the actual issue authorized only on order of the company commander after authority has been received through the chain of command from the JTF Commander. Ammunition will be issued to anti-sniper teams only--on an "as required" basis and under the same conditions outlined above.

Individuals must be cautioned that if they are issued live ammunition they are authorized to load and fire their weapon only on order of an officer, when an officer is present. If no officer is present, then loading and firing will be in accordance with the following guidance: "you will load or fire your weapon only when required to protect your own life or the lives of others, to protect specific property designated as vital to public health or safety, or to prevent the escape of persons endangering life or vital facilities; you are not authorized to use firearms to prevent offenses which are not likely to cause death or serious bodily harm nor endanger public health or safety." Personnel will be reminded that inadvertent or accidental firing of weapons could in itself precipitate a civil disorder situation.

To prevent the unjustified use of deadly weapons, it is critically important for an officer to retain positive control over the loading of weapons until such time as the need for such action is clearly established.

The presence of loaded weapons in tense situations may invite the application of deadly force in response to provocations which, while subject to censure, are not sufficient to justify its use; the presence of loaded weapons also increases the hazard that the improper discharge of a weapon by one or more individuals will lead others to fire on the mistaken belief that an order to fire has been given. Officers should be clearly instructed, therefore, that they have a personal obligation to withhold permission for loading until circumstances indicate a high probability that deadly force will be imminently necessary and justified pursuant to the criteria set forth above. Strong command supervision must be exercised to ensure the loading of weapons is not authorized in a routine, premature, or blanket manner.

The JTF Commander may, at his discretion, delegate the authority to authorize the use of deadly force, provided that the person to whom such delegation is made understands the constraints upon the use of deadly force set forth above.

Stringent controls will be placed on the use of bulk-type riot control agent dispersers (e.g., portable, vehicular-mounted, and helicopter-mounted dispersers). Selection of disseminating devices

will be governed by the size, temper, and composition of the disorderly elements. Aerial dispersers will not be employed where ground force options and dispersers can accomplish the desired result. Initial use of the cs "baseball" grenades is, in most cases, desirable in preference to bulk-type disperses.

The fixing of the bayonet to the individual weapon as a force option should be selected with caution. Adverse reaction could be provoked solely by seeing this force option. The use of scout or sentry dogs by the JTF is prohibited. Explosive detector dog teams may be employed IAW the provisions of the appropriate AR.

Custody and detention of civilians. Whenever possible, civilian police authorities should take civilian personnel into custody; when assistance is necessary, or in the absence of civilian police, federal military forces have the responsibility to detain or take into custody rioters, looters or others committing offenses. In any case, military personnel will furnish any information required by civilian police to execute an arrest form. Should a situation arise necessitating detention of civilian personnel, civil police, possibly in collaboration with local department of justice personnel, will operate/maintain or provide detention facilities. The JTF will not operate confinement facilities for civilians without specific authority from the executive agent.

Searches. In carrying out their mission, JTF personnel may conduct searches of individuals and private property (including vehicles) without a judicial warrant only in the following circumstances:

- If they have reason to believe that an individual is armed or is carrying instruments of violence, and that the individual presents an immediate risk of harm to the JTF personnel or others, they may search the individual for weapons.
- If they have reason to believe that an individual who has committed violence is hidden in a building, they may search that building without a judicially issued search warrant only in the following circumstances:
 1. they may enter the building believed to have been entered by the individual when in immediate pursuit of that individual, and then search the building for the individual or any weapons that might be used to further his escape.
 2. they may enter the building and search for the individual when there is reason to believe that the delay necessary to obtain a search warrant would result in the escape of any weapons or evidence sought.
 3. they may enter the building when there is reason to believe that entry is necessary to prevent injury to persons or serious damage to property, to protect public safety, or to render aid to someone who is in danger.

They may stop and search an automobile without a judicially issued search warrant when there is reason to believe that the automobile contains weapons or instruments of violence and/or contains an individual reasonably believed to have committed violence.

In carrying out the JTF mission, it may be necessary to conduct searches of private property (including automobiles) in other situations. As a general rule, such searches should be carried out by local and federal civil law enforcement personnel because of their greater familiarity with standards for searches, including procedures for obtaining and using judicial warrants. However, where JTF personnel have thoroughly reviewed the evidence forming the basis of a request for JTF personnel to search, and where that evidence leads to the conclusion that the requested search is reasonably necessary to the accomplishment of the JTF mission and that there is an immediate danger of violence, destruction of evidence, or escape of violent persons unless the search is conducted without delay, the JTF personnel may conduct the search immediately. In all other cases, responsibility for the search is to be turned over to local authorities.

As soon as reasonably convenient, JTF personnel who have conducted a search will fully document the reasons for the search, including:

1. The information upon which the search was based;
2. The sources of the information upon which the search was based;
3. The reasons JTF personnel found to conclude that the information was factual;
4. The identity and location of the persons or things sought; and
5. The circumstances which gave rise to the conclusion that an immediate search was necessary to protect JTF personnel or others, to prevent the escape of violent persons, or to prevent the loss or destruction of weapons or evidence.

Should the JTF Commander believe that in order to fulfill the mission there is no alternative to an application of force or other action which is at variance with the intent or wording of these ROE, the JTF Commander should discuss the matter with the senior civilian representative and thereafter obtain approval from the operating agent/supported CINC.

PRIOR TO PARTICIPATION IN CIVIL DISTURBANCE OPERATIONS, ALL JTF PERSONNEL WILL BE BRIEFED ON:

- the specific mission of the unit.
- Rules governing the application of force as they apply to the specific situation.
- An orientation of the local situation, specifically addressing types of abuse which military personnel may be

expected to receive and the proper response to these types of abuse.

Los Angeles Civil Disturbance ROE (1992)
Joint Task Force, L.A.¹¹
(as of 020100 May 1992)

A. Every serviceman has the right under law to use reasonable and necessary force to defend himself against violent and dangerous personal attack. The limitations described below are not intended to infringe this right, but to prevent the indiscriminate use of force.

B. Force will never be used unless necessary, and then only the minimum force necessary will be used.

- (1) Use non-deadly force to:
 - (A) Control the disturbance.
 - (B) Prevent crimes.
 - (C) Apprehend or detain persons who have committed crimes.
- (2) Use deadly force only when:
 - (A) Lesser means of force exhausted or unavailable; and
 - (B) Risk of death or serious bodily harm to innocent persons is not significantly increased by the use; and
 - (C) Purpose of use
 - 1 - self-defense to avoid death or serious bodily harm;
 - 2 - prevention of crime involving death or serious bodily harm;
 - 3 - prevention of destruction of public utilities which have been determined vital by the TF commander;
 - 4 - detention or prevention of escape of persons who present a clear threat of loss of life.
- (3) When possible, the use of deadly force should be preceded by a clear warning that such force is contemplated or imminent.
- (4) Warning shots will not be used.
- (5) When firing, shots will be aimed to wound, if possible, rather than kill.
- (6) Weapons will not be fired on automatic.
- (7) When possible, let civilian police arrest lawbreakers.
- (8) Allow properly identified news reporters freedom of movement, so long as they do not interfere with your mission.
- (9) Do not talk about this operation or pass on information or rumors about it to unauthorized persons: refer them to your commander.
- (10) JTF Commander withholds authority for use of riot control agents and sniper teams.

¹¹Center for Military Law and Operations & International Law Division, Judge Advocate General's School, Army, OPERATIONAL LAW HANDBOOK JA422, at H-106 to H-107 (Draft 2d ed., 1992).

C. Arming Orders

ARMING ORDER	RIFLE	BAYONET SCABBARD	BAYONET	PISTOL	BATON	AMMUNITION MAG/CHAMBER	CONTROL
AO-1	SLING	ON BELT	SCABBARD	HOLSTER	BELT	IN POUCH/ EMPTY	OIC/NCOIC
AO-2	PORT	ON BELT	SCABBARD	HOLSTER	BELT	IN POUCH/ EMPTY	OIC/NCOIC
AO-3	SLING	ON BELT	FIXED	HOLSTER	HAND	IN POUCH/ EMPTY	OIC/NCOIC
AO-4	PORT	ON BELT	FIXED	HOLSTER	HAND	IN POUCH/ EMPTY	OIC/NCOIC
AO-5	PORT	ON BELT	FIXED	HOLSTER	HAND	IN WEAPON/ EMPTY	OIC/NCOIC
AO-6	PORT	ON BELT	FIXED	IN HAND LOCKED/ LOADED	BELT	IN WEAPON	OIC

NOTE: the above ROE utilized by JTF L.A. were adapted from the generic ROE contained in the Army's GARDEN PLOT CIVIL DISTURBANCE PLAN, and modified slightly based upon input from Department of the Army, CINCFOR, and the JCS Staff.