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COMMON RULES OF ENGAGEMENT

FOR THE ARMIES OF THE

UNITED STATES AND AUSTRALIA:

A PROPOSAL STRANDED ON

THE MORAL HIGH GROUND

A Thesis
presented 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 views of either The Judge Advocate General's School, The United States Army, The Australian Army Legal Corps, The Australian Army, or any other American or Australian governmental agency.

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COMMON RULES OF ENGAGEMENT FOR THE ARMIES OF THE UNITED STATES AND AUSTRALIA: A PROPOSAL STRANDED ON THE MORAL HIGH GROUND

by Major Roy H. Abbott

ABSTRACT: This thesis examines the viability of creating a set of standing rules of engagement (ROE) for use in combined operations by the armies of the United States and Australia. It is a critical analysis of the significant factors that influence the selection of ROE. The thesis argues that these factors are subject to deeply different interpretations by the land forces of the two nations and that there are good reasons why their ROE have evolved differently. Perhaps the most important of these reasons is the historic American tendency to view military force as something employed upon a morally inferior enemy. Although the thesis maintains that recent proposals to create a common set of standing ROE are not viable in the short term, it also identifies the factors that must structure the future debate between the countries when seeking agreement on the criteria for using force in combined operations. It also offers short term alternatives to a common set of standing ROE.

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"Whenever and wherever war takes place, it cannot occur unless those who participate in it are given to understand just whom they are and are not allowed to kill, for what ends, under what circumstances, and by what means. A body of men that is not clear in its own mind about these things is not an army but a mob."

Martin van Creveld[1]

I. Introduction

Training a soldier to operate effectively in military operations is a complex challenge. To deliver the desired military result, the soldier is trained in techniques and weapons to destroy the enemy; in short, to kill. However, this destruction must not be the deadly rampaging of an unruly mob, but the structured, controlled direction and application of force, under legally acceptable circumstances. Herein lies the challenge: a soldier is trained to kill so as to win the battle. But killing is not enough. The soldier must at all times adhere to the laws of armed conflict that restrain and temper the force he wields, and in obeying, protect himself also.

The main method by which senior leaders restrain a soldier's actions is by issuing rules of engagement[2] (ROE). Effectively implemented, ROE are one of the legal restraints which differentiate between military actions and those of a disorganized, unruly

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[1] MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR 90 (1991).

[2] *See* Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, not Lawyering*, 143 MIL. L. REV., 1, 36 (1994), at 36, [hereinafter Martins]. The military term "rules of engagement" was coined after Air Force and Navy staff officers drafted a set of intercept and engagement instructions on November 23, 1954. In 1958, the Joint Chiefs of Staff (JCS) formally adopted and defined the term "rule of engagement".

mob. Rules of engagement protect the lives of the soldiers who implement and are subject to them. Soldiers must understand them or confusion will reign. Therefore, they must be simple. Confusion over permitted actions can mean indecision, which can mean death, for innocent civilians or for soldiers. Rules of engagement enable the commander to achieve this military objective while preserving soldiers' lives.

Rules of engagement have assumed international importance in light of recent comments by military leaders urging common ROE among allies.[3] In 1994, the Commander of United States Army forces in the Pacific (USARPAC)[4] proposed a standing set of ROE under which the armies of the Asia-Pacific region could operate in future military operations. The commander, Lieutenant General (LTG) Robert L. Ord III, proposed an ROE "template" which is reproduced at Appendix A. The profound importance of LTG Ord's proposal lies in what is not expressed in the template. It lies in the factors that influence the creation of the ROE themselves. LTG Ord's ROE template dictates the manner and methods by which a combined army would fight. Surely this proposal for common ROE must incorporate an understanding of the factors that influence each country's creation and perception of ROE.

The North Atlantic Treaty Organization (NATO) has considered this issue also.

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[3] These comments were made at the 1994 CGS Exercise. The CGS Exercise is an annual conference held in Australia for senior Army officers by the head of The Australian Army, the Chief of the General Staff (CGS). In 1994, this conference was held in Townsville, Queensland, Australia between 27 June and 1 July inclusive. The theme of the conference was "The Impact of International Law on the Conduct of Operations by Land Commanders".

[4] Lieutenant General Robert L. Ord III, Commander United States Army Pacific Command (USARPAC).

In 1994, the Supreme Allied Commander Europe, General Maddox[5] proposed a standing ROE template, illustrating that the concept of common standing ROE is not merely a product of idiosyncrasies in the Asia/Pacific region. But is it a concept of mutual interest to the United States and Australia? This thesis addresses the viability of the United States and Australia creating a common set of standing ROE. It will guide the reader through a five-step analysis of influential factors:

1. Whether the idea of common ROE even needs to be addressed;
2. Whether the United States and Australia share an understanding of ROE, and if not, what are the differences;
3. To what extent national and military concerns influence ROE;
4. To what extent service-specific concerns influence ROE; and
5. To what extent mission-specific concerns influence ROE.

If these factors can be addressed and understood, it will be the combined military operations of the future that will benefit. In understanding the differences in the interpretation of ROE destined for combined operations, the operational capability of any future combined task force will be enhanced.

Military history is replete with incidents occurring as a result of misunderstandings. Turkey entered World War I on the side of the Central Powers as a result of a misunderstanding of ROE.[6] During this particularly weighty incident, a

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[5] MEMORANDUM FROM EXECUTIVE OFFICER TO SUPREME ALLIED COMMANDER EUROPE, 7 Sep 94.

[6] The following account was drawn from G.J. CARTLEDGE, THE SOLDIER'S DILEMMA: WHEN TO USE FORCE IN AUSTRALIA 185 (1992):

> When World War I broke out, the German battleship, SMS Goeben and its attendant battle cruiser, SMS Breslau, were known to be in the Mediterranean, having been prepositioned by the Germans in anticipation of war.

British naval commander mistakenly interpreted a rule prohibiting him to engage superior forces as precluding him from attacking two German vessels. These vessels--the *SMS Goeben* and the *SMS Breslau*--subsequently went to Turkey and played an important role in coaxing Turkey out of neutral status and into an alliance with Germany. The British Admiralty had merely intended that the commander not attack the Austrian fleet in the event that the fleet left the Adriatic port of Pola.

Every interpretation of ROE will not have the catastrophic consequences of the *Breslau/Goeben* incident. What is critical is that just as two admirals in the same fleet can interpret identical instructions differently, so can two nations. There are real differences that alter the way nations create, interpret and implement ROE. In

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They posed a very real threat to French troop ships bringing troops across from North Africa. The British Admiralty directed the Mediterranean fleet to find and engage the German ships, but added two provisoes or ROE, namely that the British ships were not to:

a. approach the Italian coast closer than six miles; and

b. engage superior forces.

The former proviso was aimed at preventing any incident which would endanger Italy's declared neutrality and create the risk of bringing her into the war on the side of the central powers. By the latter, the Admiralty meant that if the Austrian fleet came out of its Adriatic base in the port of Pola, the British Mediterranean fleet, which could then be overwhelmingly out gunned, should retire until such time as the Austrians could be engaged at less of a disadvantage. The Admiralty did not want to lose valuable ships needlessly. Admiral Troubridge, commander of the British squadron which found the Goeben and Breslau, interpreted the latter rule differently. The range and weight of the weapons on his four ships were no match for that on the German ships, and when he found them he treated them as the 'superior force' referred to by the Admiralty and acted accordingly. Unfortunately, in light of subsequent events, he withdrew and they escaped to Turkey.

The unforeseen consequence was that Germany persuaded Turkey, which was pro German but still neutral, to purchase both ships and incorporate them into the Turkish navy complete with their German officers and crews. Turkey remained divided as to whether or not to commit itself to the Central Powers' cause until, as a consequence of the Goeben and the Breslau shelling Sevastopol and Odessa without Turkish approval or direction, Russia declared war on her. (quoting B. TUCHMANN, AUGUST 1914 (1962).

maintaining that LTG Ord's proposal to create a common set of standing ROE is not viable in the short term, this thesis focuses on these differences. It will be these differences that structure future attempts by the countries to agree on criteria for the use of force in combined operations.

II. The First Step: Whether the Idea of Common ROE Even Needs To Be Addressed?

Prior to assessing the viability of common ROE, the following three propositions must be evaluated:

1. that a genuine need exists for common ROE;
2. that combined operations are a likely proposition; and
3. that circumstances exist which predicate the use of national military force.

This thesis does not address what is frequently called general war. The reason for doing so is twofold. First, given past experiences, it is likely that both nations--the United States and Australia--will be involved in operations other than war (OOTW)[7]. In the foreseeable future, operations like those conducted in Somalia, Cambodia, and the former Republic of Yugoslavia are more likely to occur than general war.[8] Second,

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[7] *See* DEPARTMENT OF ARMY, FIELD MANUAL 100-5, OPERATIONS 13-0 (14 June 1993) [hereinafter OPERATIONS].

[8] *See* Martins, *supra* note 2, endnote 175, (arguing that "'[l]ow intensity conflict receives its grudging due and no more' even as tomorrow's problems call for the Army to prepare to fight 'the savage wars of peace')" (quoting Daniel P. Bolger, *The Ghosts of Omdurman*, PARAMETERS, Autumn 1991, at 33, 31).

operations other than war are generally more constrained by ROE due to the nature and lower intensity of the conflict. The reason for this is that the type of weapons used are likely to be limited. However, because of the slower pace of the conflict, soldiers' actions may be more constrained. As the intensity of conflict escalates towards general war, the scope of action which the ROE covers, increases. Accordingly, the ROE increases.

For example, in Australia, an artillery regiment is an integral part of a brigade formation. In the lower level type of conflict, the formation commander will have many constraints placed on the using artillery, if permitted at all. As the conflict intensifies,

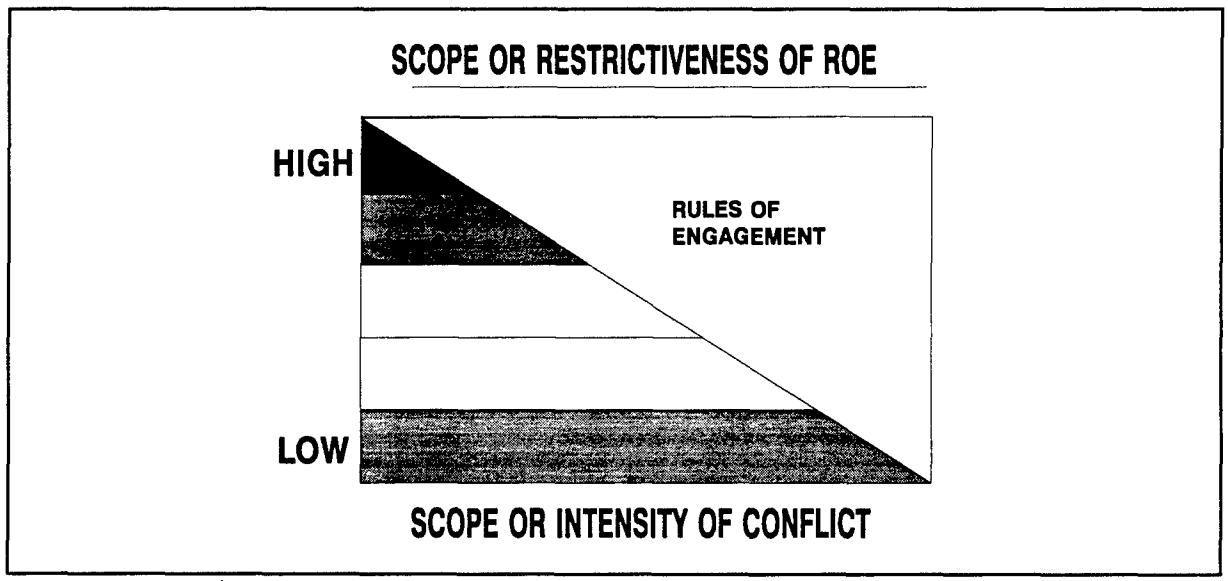

Figure 1

and constraints on the weapons and actions permitted decrease, so the scope of ROE increases. Whereas the commander may not have been permitted previously to use artillery, he may now be allowed to do so. In short, the scope or restrictiveness of the

ROE varies inversely with the scope or intensity of the conflict, as illustrated in *Figure 1.*

A. Does A Genuine Need Exist For Common ROE?

Whatever its actual merits, the need for a common ROE template is widely perceived, having been recognized by political, military, and peacekeeping bodies. A 1993 Report to the Committee on Foreign Relations of the United States Senate stated that "the ambiguity of the situations most peacekeepers find themselves in in civil conflicts results in different peacekeepers interpreting differently their rules of engagement."[9]

The political staff workers who researched that report are not alone in their conclusions. Military commanders have recognized this difficulty and the need to address it. In July 1994, the United States Center for Army Lessons Learned (CALL) published its *Handbook for the Soldier in Operations Other than War.* When dealing with the subject of coalition forces, the CALL stated that the "application of ROE may vary based on the degree of emphasis placed on it by different force commanders."[10] Recognizing these difficulties, CALL stated that "senior coalition commanders must make a concerted effort to standardize interpretation and application of common ROE by all forces in the coalition."[11] The common theme at a recent international military

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[9] STAFF OF SENATE COMM. ON FOREIGN RELATIONS, REFORM OF UNITED NATIONS PEACEKEEPING OPERATIONS: A MANDATE FOR CHANGE, 19 (1993) [hereinafter STAFF REPORT ON THE REFORM OF PEACEKEEPING].

[10] UNITED STATES ARMY, CENTER FOR ARMY LESSONS LEARNED (CALL), PUBLICATION 94-4, HANDBOOK FOR THE SOLDIER IN OPERATIONS OTHER THAN WAR, II-8 (JULY 1994) [hereinafter CALL HANDBOOK].

[11] *See* CALL HANDBOOK, *supra* note 10, at II-8.

conference[12] was the perceived need for common or complementary ROE for combined or United Nations peace support operations.[13]

Now that the need for common ROE has been raised, it is not merely a rhetorical question to ask, "why now"? Effective ROE distinguishes the disciplined army from the mob. A force combined physically but which is not combined in its understanding of its international legal obligations in operations is not able to function at its most efficient and effective level. Combined ROE help conserve and direct the commander's resources. It is the linchpin of understanding between different forces. Common ROE will save the lives of soldiers and enhance all efforts to return to peace. Yes, there is a need for common ROE.

B. Are Combined Operations Likely?

The alliance between the United States and Australia is a clear illustration that combined operations are a reality and that they can be effective. This alliance is the security treaty between the United States, Australia, and New Zealand (ANZUS), which was signed in San Francisco on September 1, 1951. ANZUS provides for the three signatory nations to act in concert against any armed attack against any one of them in the Pacific region. Such armed attack would be construed as being dangerous to the

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[12] The 7th CINCPAC Military and Operations Law Conference was held in Hawaii between Oct. 30, 1994 and Nov. 4, 1994 inclusive.

[13] *See, e.g.*, Memorandum, Brigadier Ian MacInnis, Chief of Staff Land Headquarters to Deputy Chief of the General Staff, subject: Overseas Visit Report - CINCPAC Operations Law Seminar (Nov. 30, 1994) (which contained the post visit report by the attendees to the seminar).

signatory nation's peace and safety, individually and collectively.[14] There is the perception by some that this multilateral alliance is moribund.[15] This is not the case.

The Australian Government believes that "[t]he relationship formalized in the ANZUS Treaty reflects the close alignment of our enduring strategic interests . . . . The relationship . . . is founded on our shared interests in a stable and secure Asia-Pacific region and values and traditions which predate the Cold War[16] and will endure long after it."[17] Practical illustrations of this alliance are the joint military bases located in Australia at Pine Gap and Nurrungar for use by the United States and Australia as well as joint military exercises such as the triennial Australian "Kangaroo" Exercises. The ANZUS Treaty has clearly not fallen into desuetude; nor will current events permit it to do so. The Australian Government views it as being of continued mutual benefit for both nations.[18]See White Paper, *supra* note 18, at 95.[19]

However, within the Pacific region, there is a changing balance of power. The

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[14] DEPARTMENT OF EXTERNAL AFFAIRS, SECURITY TREATY BETWEEN AUSTRALIA, NEW ZEALAND AND THE USA, TREATY SERIES 1952, No 2.

[15] Doug Bandow, *Avoiding War*, FOREIGN POLICY, Winter 1992-93, at 158 [hereinafter Bandow].

[16] The term, Cold War, referred to the international tension and jockeying for power between the former Soviet Union and its acolytes and the Western nations. It was any adversary activity which fell short of any open conflict.

[17] COMMONWEALTH OF AUSTRALIA, DEFENDING AUSTRALIA - DEFENSE WHITE PAPER 1994, at 95 [hereinafter WHITE PAPER].

[18] *Id.* at 95 states that "the alliance will continue to serve the interests of both countries. The United States will benefit from Australia's support: we are closely engaged in regional affairs and sympathetic to most American values and interests. More broadly, the alliance strongly supports the United States' continued strategic presence in the Western Pacific, which is of major strategic interest both for the United States and for Australia, and others in the region."

[19]

converging south-east Asia and south-west Pacific area is the region of primary strategic and economic interest to Australia. "The region's significance to Australia derives from the fact that it is the area in which political and military developments could most affect Australia's strategic interests."[20] It is oft repeated by Australian politicians that the future lies in Asia.

Presently, there is no Soviet or Russian military presence of any mentionable significance. There are, however, causes for concern that could require future combined operations in the region. Sources of regional tensions include the upgrading by China of all three arms of the defense force, incorporating both nuclear and conventional weapon capabilities.[21] Both India and Pakistan are upgrading their defense forces, and at least one of these nations has a nuclear and ballistic missile capability.[22] India possesses the largest Indian Ocean navy, though with limited projection capability from India itself.[23] North Korea has been confirmed recently to have nuclear capability.[24] Japan's "Self-Defense" forces have more fighter aircraft than the six ASEAN countries,[25] Australia, and New Zealand combined, and a larger navy than all the navies of those countries.[26]

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[20] AUSTRALIAN DEFENSE FORCE PUBLICATION, ADFP 1, OPERATIONS SERIES - DOCTRINE, (Nov. 30, 1993) 3-2, [hereinafter DOCTRINE MANUAL].

[21] Paul Dibb, *The Future of Australia's Defense Relationship with the United States*, STRATEGIC AND DEFENSE STUDIES CENTER WORKING PAPER NO. 276, Sep. 1993, at 2 [hereinafter Dibb].

[22] *See* Dibb, *supra* note 20, at 2.

[23] *See id.*

[24] *See id.*

[25] The Association of South East Asian Nations (ASEAN) was established in 1967. It is comprised of the following six nations: Singapore, Malaysia, Thailand, The Philippines, Indonesia, and since 1988, Brunei.

[26] *See id.*

As one Australian commentator has expressed, "[n]one of this means that any of these countries has expansionist ambitions. But large countries do tend to be ambitious and want to increase their influence."[27] Military, ethnic, territorial, and economic circumstances are such that the potential for regional conflict, most likely of a limited nature, is there. The possibility of combined operations in the Asia-Pacific region is not a figment of the overactive imagination of military commanders, but rather a recognition of regional realities.

The United States Army currently has an average of 32,000 soldiers stationed daily in 77 countries around the globe. Additionally, 125,000 troops are forward stationed in Europe, Korea, and Japan.[28] The United States Army is engaged currently in five United Nations peace-keeping operations. This active role regarding international affairs contributes to the potential for combined operations with Australia, and with other nations, as well as unilateral action. Future United States military action in the foreseeable future may occur. One commentator has surmised that "[f]our conditions are most likely to trigger international intervention: first, a state is threatened or attacked by a powerful neighbor; second, a national government collapses, leaving chaos and widespread domestic violence in its place; third, a government or group commits human rights violations on a genocidal scale; or, fourth, a government engages in rogue behavior such as sponsoring terrorism or proliferating weapons of mass destruction, in blatant

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[27] *See id.*

[28] The data in this paragraph is drawn from a speech given by General Gordon R. Sullivan, Chief of Staff U.S. Army at The JAG Corps' 1994 Worldwide Continuing Legal Education Workshop on October 7, 1994. His presentation was entitled "America's Army: Strategic Force . . . Decisive Victory".

disregard of international norms."[29]

United States and Australian armies have fought side by side in military operations since World War I. The most recent experience was the United Nations Assistance Mission for Rwanda (UNAMIR) in 1994, to which both countries sent forces. Types of conflict in which United States and Australian forces have participated range from two world wars to United Nations peace enforcement actions, with the latter prevailing in number. These contemporary peacekeeping/peace enforcement operations are on behalf of either the United Nations or their individual nation governments.

The United Nations has initiated 34 peacekeeping operations since 1948, commencing with the United Nations Truce Supervision Organization (UNTSO) to the most recent operation, United Nations Aouzou Strip Observer Group (UNASOG). As one commentator observed, "[o]ver the past five years a revolution in United Nations peacekeeping has occurred . . . . In that time the United Nations has launched more operations than in the previous 40 years."[30] There have been 21 United Nations peacekeeping operations since 1990 and currently there are 17 operations being coordinated by the United Nations. Of these peace-keeping operations, Australia has contributed defense personnel and forces to sixteen multinational security operations worldwide during the period 1990 to 1993. Australian military personnel and civilian

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[29] Edward C. Luck, *Making Peace*, FOREIGN POLICY, Winter 1992-93, at 145.

[30] MAJOR J.G. WADDELL, AN ADDRESS TO THE LAND HEADQUARTERS OPERATIONS LAW SEMINAR 1994, ON THE SUBJECT OF LEGAL ASPECTS OF PEACEKEEPING, *reprinted in* THE FORCE OF LAW - INTERNATIONAL LAW AND THE COMMANDER, at 47 (Hugh Smith ed., 1994) [hereinafter FORCE OF LAW].

police are participating currently in six major overseas peacekeeping operations.[31] An example of this type of combined peacekeeping operations in the Pacific occurred in late 1994, when "Australia, Canada, New Zealand, the Solomon Islands and Vanuatu created a multinational supervisory team to interrupt Papua New Guinea's blockade of the Pacific island of Bougainville."[32] Australia has continued to play a prominent role in military operations sponsored by the United Nations. This increases the likelihood of combined operations with United States forces in the future.

On the world stage, the Asian-Pacific region has the greatest mutual strategic and economic importance for the United States and Australia. Admiral Charles Larsen, the CINCPAC in 1993, said "our economic future is inextricably linked to the region."[33] The reason for the close scrutiny of the region is pure and simple: economics. Admiral Larsen stated further that "[t]wo-thirds of the world's people live in this region. The largest and fastest growing markets for our exports are here, along with the largest deposits of untapped resources."[34] He surmised further that "American two-way trade with Asia has exceeded United States trade with Europe every year since the late 1970s

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[31] Telephone Interview with Lieutenant Colonel Drew Braban, Command Legal Officer, Land Command Headquarters, in Sydney, Austl., (Mar. 23, 1995). He gave details of the following six United Nations peacekeeping operations:

1. UNTSO United Nations Truce Supervision Organization
2. UNFICYP United Nations Peacekeeping Force in Cyprus
3. UNIIMOG United Nations Iran-Iraq Military Observer Group
4. ONUMOZ United Nations Operation in Mozambique
5. UNMIH United Nations Mission in Haiti
6. UNAMIR United Nations Assistance Mission for Rwanda

[32] *See* Bandow, *supra* note 15, at 173.

[33] Admiral Charles R. Larsen, *Forward Presence: It Shapes our Future*, STRATEGIC REVIEW, Summer 1993, at 74 [hereinafter Larsen].

[34] *See id.*

and today accounts for more than 36 percent of total American world trade."[35] The United States has a vested interest in addressing regional tensions and involving itself in maintaining peace within the region.

Australia's interests are inextricably linked with the Asian/Pacific region. In 1993, almost 70 percent of Australian exports went to the Asia/Pacific region. Australia's commitment was demonstrated by the lead role it played in organizing the Asia-Pacific Economic Cooperation (APEC) Forum.[36] The current Australian government's attitude toward the region "is rooted deeply in our strongly held belief that our future lies with Asia, our belief that Australia's well-being depends upon the continuing economic success of the Asia-Pacific region and that the Australian economy must become more effectively enmeshed and integrated with this dynamic part of the world."[37] Australia's military role in this region is demonstrated by the presence of Australia's peacekeepers in Pakistan, its pivotal role in establishing peace in Cambodia and the many training exchanges and exercises with Asian countries.

Thus, the established and active ANZUS Treaty, the reality of regional tensions, and the active political, economic, and military involvement make possible the confident assessment. Yes, it is both feasible and likely that United States and Australian will conduct combined operations in the future.

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[35] See id.

[36] This was held in Seattle, WA., U.S.A. on 21 Nov 93.

[37] R. Woolcott, *Regional Economic Cooperation*, MONTHLY RECORD, Apr. 1989, at 122.

C. Do Circumstances Exist Which Require the Use of National Military Force?

Carl von Clausewitz, a profoundly influential military theorist, stated that the "subordination of the political point of view to the military would be unreasonable, for policy has created the war; policy is the intelligent faculty, war only the instrument and not the reverse. The subordination of the military point of view to the political is, therefore, the only thing which is possible."[38] Never before has this been so true as it is today. Armed conflict is being actively used as the instrument of politics. Recent international events demonstrate that the national defense force of a country is the practical arm of that country's national politics, and internationally, a practical arm of foreign policy. Whether as an internal or external affair, "there is no military operation of any significance that does not have political consequences."[39]

United States grounding for the use of its armed forces is stated succinctly in its constitution. The Preamble to the United States Constitution states that the People of the United States . . . provide for the common defense . . . of liberty to themselves and their prosperity.[40] In other words, it provides a raison d'etre[41] for the defense force's creation, continued existence and use. This was most recently made apparent in President Clinton's address to the nation delivered on the eve of the Operation Restore Democracy in Haiti. He stated that "we will assure the security and prosperity of the

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[38] CARL VON CLAUSEWITZ, ON WAR, 598 (1943).

[39] General James P. McCarthy, *Commanding Joint and Coalition Operations*, NAVAL LAW C. REV., Winter 1993, at 16 [hereinafter McCarthy].

[40] U.S. CONST. pmbl.

[41] The raison d'etre is French for "the reason or justification for being or existence."

United States with our military strength, our economic power, our consistent efforts to promote peace and growth. But when our national security interests are threatened, we will use diplomacy when possible, and force when necessary."[42] As one political commentator said, "[c]ertainly military security and physical safety must rank at the top of U.S. national interests . . . . national security also means economic security and health. These require open access to natural resources and the sea lanes of international trade."[43]

This is a modern encapsulation of Clausewitz's philosophy of war as instrument of policy. Diplomacy or foreign affairs will be attempted first or when most appropriate. When diplomacy fails or is not deemed appropriate for the situation, the use of the national defense force will be the final, most forceful option available. General Colin Powell, as Chairman of the Joint Chiefs of Staff, stated this succinctly by saying "economic power is essential; political and diplomatic skills are needed . . . but the presence of arms to buttress these other elements of power is as critical to us as the freedom we so adore. Our arms must be second to none."[44]

Australia is prepared to use its defense force in two types of settings: domestic and international. Australia will commit its defense force to an international setting--the focus of this thesis--under two circumstances:

1. Services assisted evacuation (SAE), or

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[42] Text of President Clinton's Address on Haiti, THE WASHINGTON POST, Sep. 16, 1994, at A31.

[43] Larry Diamond, *Promoting Democracy*, FOREIGN POLICY, Summer 1992, at 28 [hereinafter Diamond].

[44] General Colin L. Powell, *U.S. Forces: Challenges Ahead*, FOREIGN AFFAIRS, Winter 1992/93, at 33 [hereinafter Powell].

2. Services protected evacuation (SPE).

This type of operation is "concerned with the safe recovery of Australian or other non-combatants from situations of real or potential peril."[45] The real or potential peril may span "organized military force, riot, civil disorder, terrorists or natural disaster."[46] Services assisted evacuation "will be conducted in a benign environment . . . when the host nation is able to guarantee the security of the evacuation. Military involvement will be limited to "provision of support to Foreign Affairs officials,[47] such as communications, transport and movement and medical support."[48] Services protected evacuations occur when Australian nationals have to be evacuated from a host country when that host country's government is unable to guarantee their protection. A possible example of an SPE would be if the Bougainville conflict escalated and it would be necessary to evacuate Australians; with the consent of the Government of Papua New Guinea.

In both types of services evacuations, the host nation must agree to the insertion of Australian forces. These are the equivalent of the permissive type of United States non-combatant evacuation operations (NEO)[49] which are part of United States doctrine. An example of this type of operation is the evacuation of United States citizens from the

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[45] *See* DOCTRINE MANUAL, *supra* note 19, at 43-1.

[46] *See id.*

[47] The Australian Department of Foreign Affairs is the equivalent of the U.S. Department of State.

[48] *See* DOCTRINE MANUAL, *supra* note 19, at 43-2.

[49] NEOs relocate threatened civilian noncombatants from locations in a foreign nation or host country. These operations may involve U.S. citizens whose lives are in danger. NEOs may occur in peaceful circumstances or in circumstances which have the concurrence of the host nation (permissive) or in circumstances which may require the use of force without the concurrence of the host nation (non-permissive).

United States embassy compound in Mogadishu, Somalia in 1991.

The second circumstance requiring Australia's defense force involvement in an international setting is in "providing defense contingents to United Nations and other multinational peace operations."[50] It is the Australian Government's view that "[i]n some cases, defense's participation in multinational operations directly support Australia's strategic interests."[51] In other cases they do not and are for humanitarian reasons. The critical point of divergence between the United States and Australia is that Australian doctrine does not entertain a non-permissive set of circumstances. Australian SAE or SPE "types of operation are not offensive operations."[52] The other nation must consent to the presence of Australian forces, such as for an SAE or SPE, or for Australian forces to be part of multinational operations, either under the auspices of the United Nations or other regional and alliance interests.

When acts of diplomacy have failed and the use of force needs to be applied, the practical arm of politics will be exercised and human needs met. As one military writer suggested, "[m]ultinational coalition operations are the wave of the future."[53] United States forces are reduced and are scaling back their "forward presence while seeking to respond decisively to regional crises that threaten America's vital interests."[54] The United States National Security Strategy acknowledges that they will likely respond

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50 *See* WHITE PAPER, *supra* note 17, at 105.

51 *See id.* at 104.

52 *See* DOCTRINE MANUAL, *supra* note 19, at 43-1.

53 *See* McCarthy, *supra* note 38, at 20.

54 *See id.*

to future crises through hybrid coalitions that include traditional allies.[55] Yes, circumstances do exist which require the use of national military force.

III. The Second Step: Whether the United States and Australia Share an Identical Understanding of ROE, and if not, What are the Differences?

> "The importance of ROE is that lives are on the line, and they will be put at risk if we don't get it right."
>
> Admiral of the Fleet Sir Julian Oswald, Royal Navy, G.C.B.[56]

A. Defining ROE

Rules of engagement is a phrase used frequently by defense forces and governments today. Although it is used frequently at both the national and international level, it is a term or topic that has not been written about prior to the last ten years.

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[55] NATIONAL SECURITY STRATEGY OF THE UNITED STATES, July 1994, at 10.

[56] Admiral of the Fleet Sir Julian Oswald, Royal Navy, G.C.B., *U.N. Maritime Operations: "Realities, Problems, and Possibilities"*, NAVAL LAW C. REV., Autumn 1993, at 127.

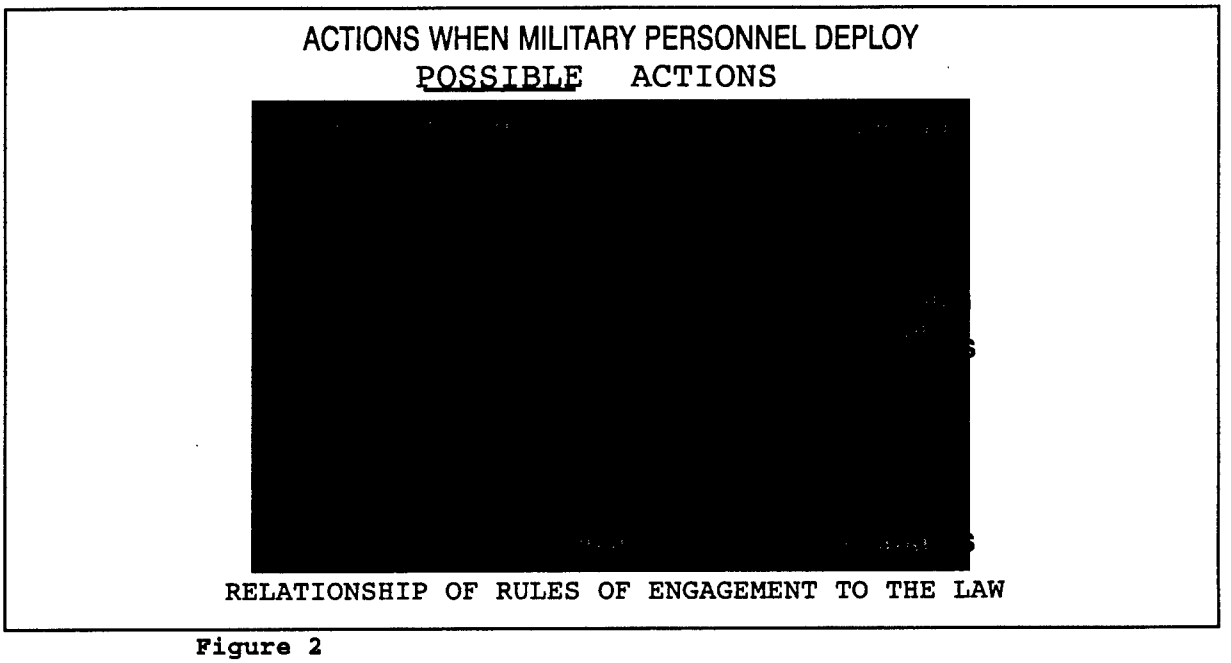

Figure 2

Understanding ROE *vis-a-vis* the laws of armed conflict can be difficult. The Australian forces use diagrams that depict this relationship in an effort to help attorneys and commanders grasp it. Within the context of an armed conflict, the force which belligerents can or may employ against each other covers a spectrum of alternatives as is illustrated in *Figure 2*. These may be titled *Possible Actions.*[57]

The force which a military commander can unleash is unlimited both in what can be attacked and in the methods that can be employed in attacking. They include direct attack on civilian persons and property, rape, pillage, taking no prisoners of war, perfidy

[57] The diagrams shown in figures 2,3 and 4 are adaptions of similar diagrams created by Lieutenant Colonel G.J. Cartledge, Director of International Law, Headquarters Australian Defense Force in Canberra, Austl.

etc. The potential list of possible actions is limitless.

International law, either customary or codified, alters this state of affairs. It curtails and regulates the means and methods of warfare which a military commander can use. The laws of armed conflict place restraints on the conduct of combatants and on their use of particular weapons in the land, sea, and air environments. They do not limit the amount of force that belligerents may use against each other. What the laws do is attempt to codify and order the force permitted to be used against belligerents. In doing this, the laws of armed conflict delineate the military from the civilian in an attempt to contain the violence and prevent it from spreading to surrounding civilians and civilian property.[58] As a result, the range of alternatives that were available previously are now substantially reduced as illustrated in *Figure 3*. These are designated as *PERMISSIBLE ACTIONS*.

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[58] This was the substance of a speech which was given at the Operations Law Seminar in 1992 at Randwick Barracks, Sydney, Australia. The speech was by Brigadier W. Rolfe who was the Director-General Defense Force Legal Services. The Australian rank of Brigadier is equivalent of the American rank of Brigadier General.

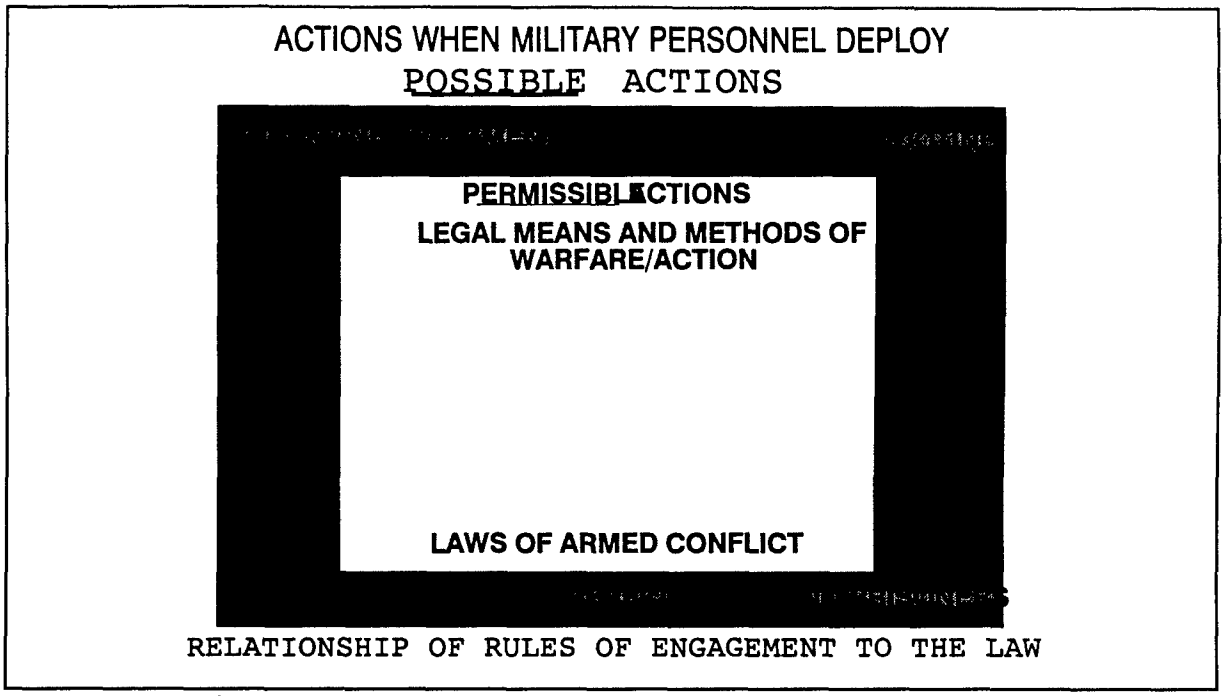

Figure 3

The permissible actions of warfare are all legal means and methods of warfare. They are tempered by the application of the concepts of military necessity, proportionality, unnecessary suffering, surrender, and protection of cultural objects from direct attack. The significant difference between possible and permissible actions is the legality of the alternatives available. The possible and illegal range of actions are far greater than the permissible legal range of actions. With the application of international law, this is to be expected and desired.

The range of means and methods available to a military commander can be further restricted by ROE as illustrated in *Figure 4*. This more limited range of means

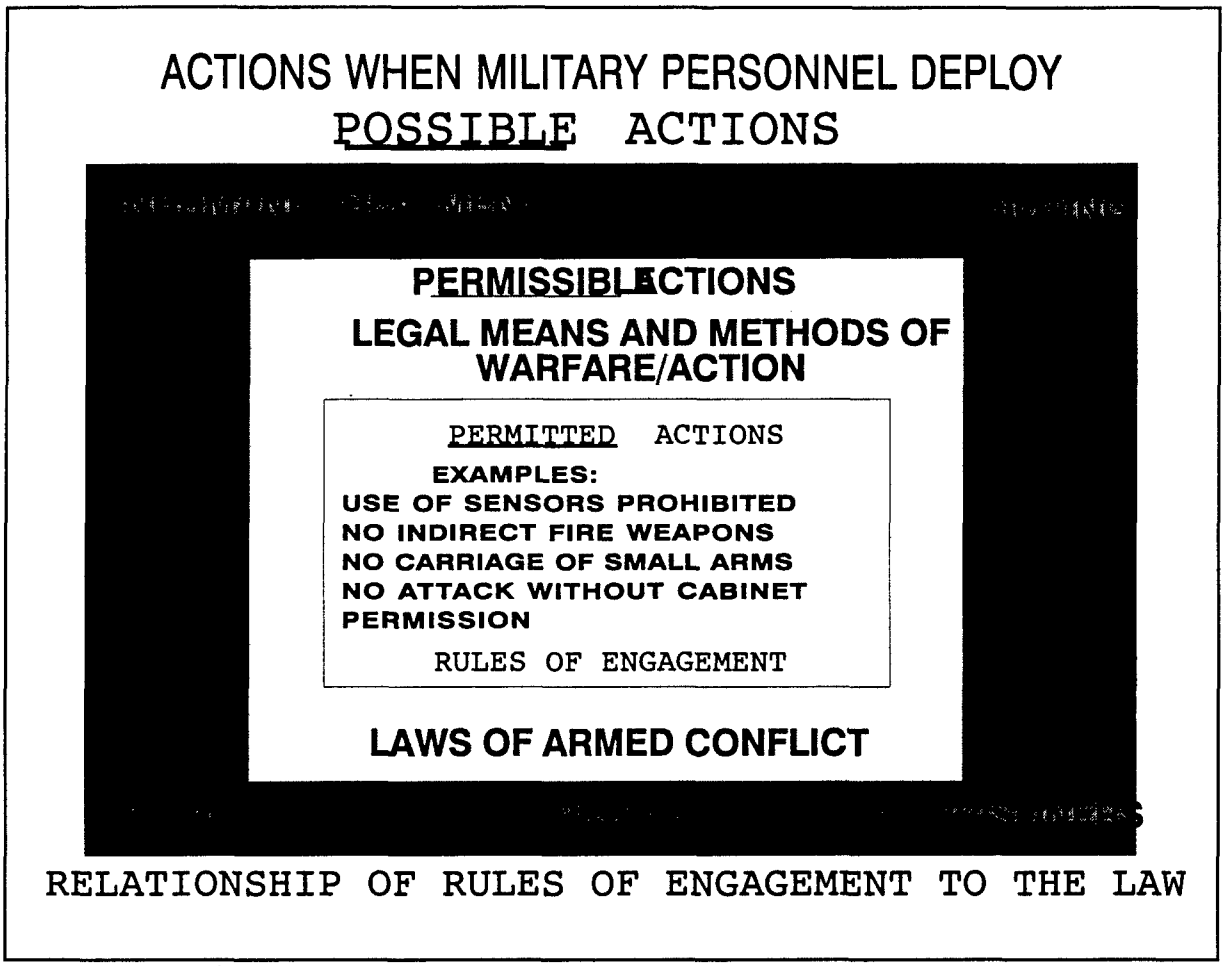

Figure 4

and methods are called *PERMITTED ACTIONS*. These are actions a military commander may use which are permitted by his superiors or national government. The means by which these limitations are communicated to a military commander is by ROE. Examples of such permitted actions may be a prohibition on the use of sensors, no permitted use of indirect fire weapons, no collateral damage being permitted. What is important to recognize is that ROE are a subset of the permissible legal actions. They fall within the scope of permissible actions. Actions which are not permitted under the

ROE are not inherently illegal as is the case between possible and permissible actions. Permitted actions are self-imposed restraints by the national government on the commander or by the commander on subordinate officers.

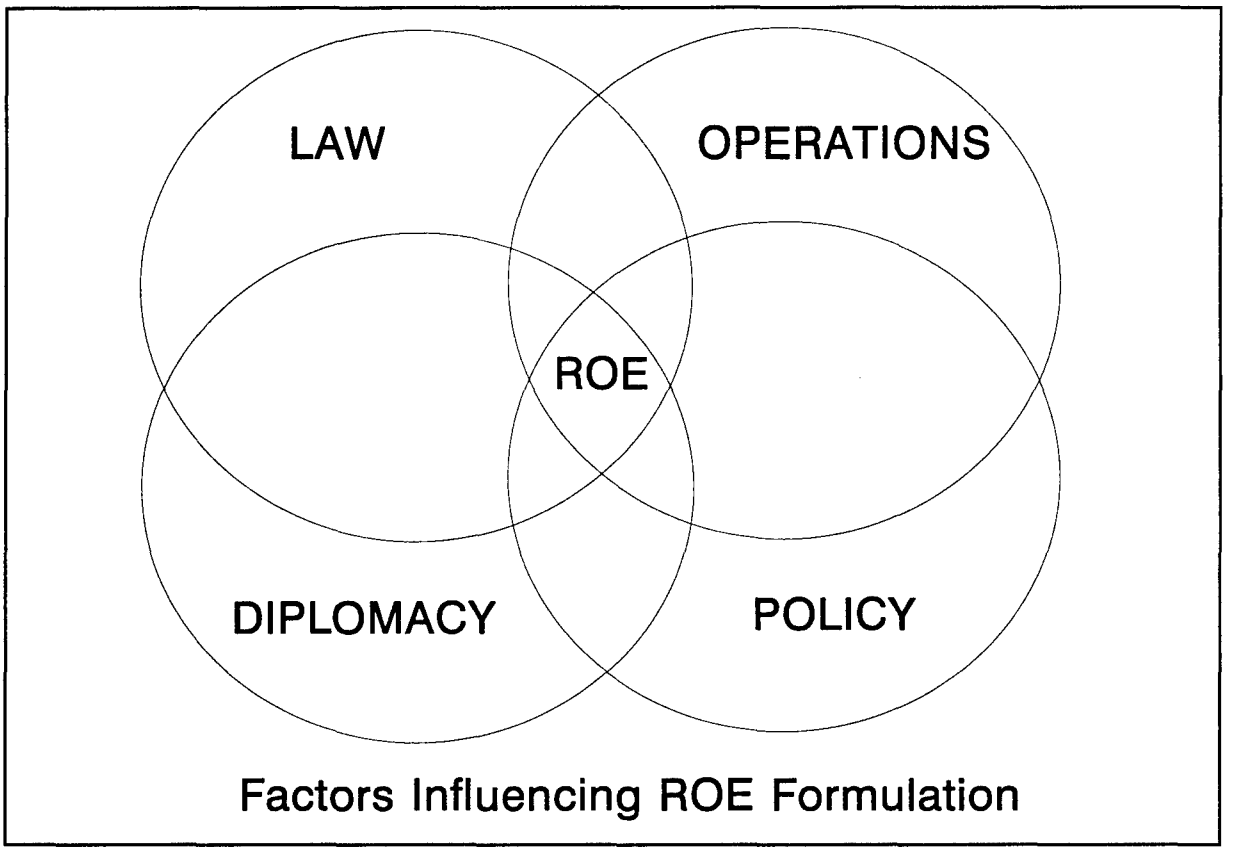

Figure 5

As self-imposed restraints arising from a national government or military commander, "ROE are shaped by the influence or interaction of four factors: international and domestic laws, operational considerations, political and military policy guidance, and diplomatic factors."[59] See *Figure 5*. The influence that each of these factors will exert is totally dependant on the nature of the threat or circumstances to be

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[59] AUSTRALIAN DEFENSE FORCE PUBLICATION, ADFP 3 EDN 1, OPERATIONS SERIES - RULES OF ENGAGEMENT, (July 31, 1992) 1-2, [hereinafter ROE MANUAL].

faced. No one factor is more important than the other. Their interaction is subjective and variable. In other words, the circumstances that influence and dictate the drafting of ROE vary as do the ROE themselves. Rules of engagement are customized for the military operation being planned; shaped and varied by the prevailing influence of international and domestic, operational, political, military, and diplomatic factors. They are not a legal panacea guaranteeing perfect outcomes. In this regard, both the United States and Australia are relatively consistent in their military philosophies regarding the factors that influence ROE.

Some American writers[60] ascribe the influence of only three factors; law, operations and policy; combining political and military policy and diplomatic factors into one all encompassing term. This is a subtle but a significant difference. The combining of military and political and diplomatic factors into one term--that of policy--introduces an aggressiveness not contemplated by the term diplomacy. This aggressiveness is a recurring element of the United States ROE thinking. Within United States military thinking, this is appropriate and acceptable. However, when United States forces participate in combined military operations, they bring an aggressiveness to the construction and interpretation of ROE. This is an example of that difference.

Despite the plethora of material written for use by the United States Army, there is a dearth of material written specifically on ROE. There is frequent reference but there is no publication specifically devoted to ROE.

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[60] Captain Ashley Roach, *Rules of Engagement*, NAVAL WAR C. REV., Jan-Feb 1983, at 46; Col. W. Hays Parks, *Righting the Rules of Engagement*, PROCEEDINGS - NAVAL REV., 1989, at 83; and BRADD C. HAYES, NAVAL RULES OF ENGAGEMENT: MANAGEMENT TOOLS FOR CRISIS, THE RAND CORPORATION, (July 1989).

Department of the Army Field Manual 100-1, *The Army* describes the main United States land force. In that publication, ROE are "the specific expression of restraint in a given situation . . . . ROE often serve a specific political objective, such as avoiding actions which could lead to an expansion of the conflict."[61] In the new field manual on peace operations, *FM 100-23*, ROE are described as "directives that delineate the circumstances and limitations under which U.S. forces initiate and/or continue engagement with belligerent forces."[62]

United States doctrine defines ROE as "directives issued by competent military authority which delineate the circumstances and limitations under which United States forces will initiate and continue combat engagement with other forces encountered."[63] They are not restricted to any level of operations, and thus can set down strategic, operational, or tactical restrictions.

The Australian definition of ROE is "directions to operational and tactical level commanders, which delineate the circumstances and limitations within which armed force may be applied by the Australian Defense Force (ADF) to achieve military objectives, in furtherance of Australian Government policy."[64] The important phrase in this definition is operational and tactical level commanders. These rules are not provided to the soldier himself. The soldier is provided with orders for opening fire (OFOF), an implementing

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[61] DEP'T OF THE ARMY FIELD MANUAL 100-1, THE ARMY, (JUNE 1994) at 33.

[62] DEP'T OF THE ARMY FIELD MANUAL 100-23, PEACE OPERATIONS, 35 (Dec. 30, 1994) [hereinafter PEACE OPERATIONS].

[63] JOINT CHIEFS OF STAFF PUBLICATION 1, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, 317 (Jun. 1, 1987) [hereinafter JOINT PUB. 1)

[64] *See* ROE MANUAL, *supra* note 58, XXXII.

tool distinct from the ROE itself. The standing OFOF are listed at Appendix B.

Australian military doctrine states "[s]implified and unambiguous ROE are necessary for ADF land operations . . . The majority of ROE issued do not apply to the use of small arms. Orders for opening fire can be extracted from ROE and simplified by incorporating only those rules applicable to the use of small arms or other personal weapons."[65] The soldier on the ground has rules that are mission specific--OFOF tailored to his use. The operational commander uses the ROE in their entirety.

The perception of the influence of ROE and how the military deal with them in Australia is positive. The ROE are the means by which the Chief of the Defense Force (CDF) through his operational level commanders will control the application of military force by the Australian Army. The ROE assist in achieving military objectives by:

1. providing standing guidance in peacetime;
2. facilitating and controlling the transition from peace through tension to conflict;
3. controlling the application of force; and
4. facilitating peace restoration.

Assessing these descriptions of ROE and their prospective applications, there is a negativity and pessimism contained within the United States publications compared with the more optimistic Australian objectives. The United States Army appears to view ROE as engagement-oriented. The Australian Army perceives them more as a vehicle for the facilitation of peace through military operations.

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[65] *See id.* at 2-7.

One army sees ROE as a natural consideration that assist a commander in a military operation, enabling or tempering the focus and attention of force used. The other views ROE as a necessary but unwarranted and restrictive intrusion by politics into the conduct of military operations. A United States military officer has expressed it as follows, "On one side stands the politician. His desire is to see the bloodshed stopped by using the military to stand between the antagonists, and by his presence alone cause calm to thrive. On the other side is the warrior. Trained to destroy his nation's foes, he is now charged with refereeing a brawl, frequently without being allowed to grab either side should blows come . . . . The real point is that the rules he must play by may also kill him, and frequently, the rules are stacked against him."[66] He further said, "statesmen desire restrictive ROE in order not to cause deaths that might derail negotiations."[67]

There is a significant difference between the United States and Australian practice. Australian forces, when using the term ROE, do not include the tactical level of operations. ROE have specific application to the strategic and operational levels of command. Addressing the tactical level of operations, the previously mentioned rules, OFOF, are applicable.

The differences of policy and doctrine in ROE that exist between the United States and Australia are real, although not insurmountable. Operational compatibility is possible. However, for a standing, common ROE to exist, these differences must be examined and addressed.

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[66] Major Paul D. Adams, *Rules of Engagement: The Peacekeeper's Friend or Foe?*, MARINE CORPS GAZETTE, Oct. 1993, at 21 [hereinafter Adams].

[67] *See id.* at 22.

B. Why Involve The Judge Advocate?

Traditionally, the issue of ROE has been within the purview of operations staff. The ROE are of the most immediate significance at this level. How does the legal officer figure in this?

Operational law[68] is "that body of domestic, foreign, and international law that impacts upon the activities of United States forces in war and operations other than war."[69] This is fundamentally identical to Australian operations law. In order for the soldier to devote his whole effort to his task, the judge advocate is involved. Any matter of legal significance, which has the potential to divert the soldier's attention and effort, is an operational matter. As one commentator said, "[b]y its nature, operations law transcends normally defined legal disciplines and incorporates, for the first time in a legal regime, relevant substantive aspects of international law, criminal law, administrative law, and procurement fiscal law."[70]

The legal officer[71] "is more an operations staff officer than a personnel and administrative functionary."[72] Rules of engagement are drafted by operations staff

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[68] The Australian Defense Force uses the nomenclature of operations law to describe what American military forces call operational law. Suffice it to say, they are fundamentally the same thing; just expressed differently.

[69] THE JUDGE ADVOCATE GENERAL'S SCHOOL, INTERNATIONAL AND OPERATIONAL LAW DIVISION PUBLICATION JA 422, OPERATIONAL LAW HANDBOOK, A-1, (1994) [hereinafter JA 422].

[70] Lieutenant Colonel David E. Graham, *Operational Law - A Concept Comes of Age*, THE ARMY LAWYER, 11 (1987).

[71] The Australian equivalent for a judge advocate is a legal officer.

[72] BRIGADIER P. ABIGAIL, COMMANDER 3 BRIGADE, AN ADDRESS TO THE CGS EXERCISE 1994, ON THE SUBJECT OF THE IMPACT OF INTERNATIONAL LAW ON THE PLANNING AND CONDUCT OF BRIGADE OPERATIONS, *reprinted in* Force of Law, *supra* note 29 at 85 [hereinafter ABIGAIL].

officers, and the judge advocate as one of these officers plays an integral part in their design and drafting. The judge advocate is not a legal commissar; rather, he is a specialist advisor to the commander. He does not draft the ROE. His job is to advise the operations staff ensuring compliance with international law.

In short, there are differences between what constitutes ROE for the United States and Australia. These differences are both real and significant.

IV. The Third Step: To What Extent do National and Military Concerns Influence ROE?

A common thread of cultural agreement running between the United States and Australian national and military influences on ROE is succinctly expressed by a former commander of the Operations Deployment Force (ODF) for the ADF.[73] He said "Australians know how to hate an enemy. They despise injustice and those who commit atrocities, whether in the name of some cause or for simple gratification."[74] There is no doubt that the sentiments expressed in this statement are fervently held and believed by the United States and Australians alike. It goes to the grass roots of each country's values. It is the very reason why national governments jointly commit their defense forces to specific operations; to fight against an enemy committing injustices and atrocities.

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[73] Brigadier Peter Abigail AM.

[74] *See* ABIGAIL, *supra* note 71, at 79.

Yet the reasons for the commitment of the United States Army to international operations transcends this basic reason. The United States Army has been used by successive United States administrations for the furtherance of the historical concept of manifest destiny. As one writer said, "[t]his concept arose out of the culture of the mid 19th century and . . . was a phrase used by contemporaries and historians to describe and explain the continental expansion of the United States in the 1840's."[75] He further stated that "[i]t implied that the United States was destined by the will of Heaven to become a country of political and territorial eminence. It attributed the probability and even the necessity of this growth to a homogeneous process created by certain unique qualities in American civilization - the energy and vigor of its people, their idealism and faith in democratic institutions, and their sense of mission now endowed with a new vitality. It assigned to the American people the obligation to extend the area of freedom to their less fortunate neighbors."[76]

This characterizes a very powerful national influence on the United States and its armed forces. From the words of the Star Spangled Banner, "then conquer we must when our cause is just"[77] to President Clinton's speech on the eve of the Haitian

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[75] NORMAN A. GRAEBNER ED., MANIFEST DESTINY, xv (1968) [hereinafter GRAEBNER].

[76] *See id.*

[77] RALPH L. WOODS, FAMOUS POEMS AND THE LITTLE-KNOWN STORIES BEHIND THEM 311 (1968). The words of the United States National Anthem are stated below:

Oh, say, can you see, by the dawn's early light,
What so proudly we hail'd at the twilight's last gleaming?
Whose broad stripes and bright stars, through the perilous fight,
O'er the ramparts we watched were so gallantly streaming,
And the rockets' red glare, the bombs bursting in air,
Gave proof through the night that our flag was still there;
Oh, say, does that star-spangled banner yet wave,
O'er the land of the free and the home of the brave?

On the shore dimly seen, through the mists of the deep,

operation quoted above at page 14, it is ever present in United States society. But today it is an intent which motivates action justified by the term "democratization." United States international policy is imbued with the pursuit of democratization in and for other nations deemed less democratic. One commentator expresses it as, "[b]y promoting democracy abroad, the United States can help bring into being for the first time in history a world composed of stable democracies."[78] He adds, "[w]here governments are striving to institutionalize democracy for the first time, they, as well as independent groups in their societies, should be rewarded with increased assistance."[79] The United States perceives itself as having a responsibility to actively pursue this process, especially in areas of strategic and economic interest. Conversely, this type of national value is foreign to Australia. While not desiring the perpetration of injustice, Australia does not see itself as the world's policeman. Australians were involuntarily thrown together as convicts and dumped in a far away land; compared with the free and idealistic colonizers of the United States. Australia was colonized by convicts from Great Britain as a direct

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Where the foe's haughty host in dread silence reposes,
What is that which the breeze, o'er the towering steep,
As it fitfully blows, half conceals, half discloses?
Now it catches the gleam of the morning's first beam,
In full glory reflected, now shines on the stream;
'Tis the star-spangled banner; Oh long may it wave
O'er the land of the free and the home of the brave.

Oh, thus be it ever when freemen shall stand,
Between their lov'd homes and the war's desolation;
Blest with vict'ry and peace, may the heav'n-rescued land
Praise the Power that hath made and preserved us a nation.
Then conquer we must, when our cause it is just,
And this be our motto:- "In God is our trust";
And the star-spangled banner in triumph shall wave
O'er the land of the free and the home of the brave.

[78] *See* Diamond, *supra* note 42, at 27.

[79] *See id.* at 43.

result of the American colonies winning the American War of Independence. Britain needed somewhere to deposit and store her undesirable and excessive convict population. Free settlers followed later.

As one writer on the interaction of the United States and Australian cultures said, "Religious intensity did not characterize those who went to Australia compared with the pursuit of religious freedom which characterizes American colonial immigration."[80] There was no sense of divine mission and blessing in coming to Australia. In fact, the Established church was often viewed with suspicion and contempt. Contrasting with this was the self-motivated journey in search of political and religious freedom undertaken by the earliest and many later immigrants to the United States. The same United States and Australian cultural writer further states, "The difference in religious outlook remains a major contrast between the two nations."[81] There is no missionary zeal in Australia's history and outlook.

This fundamental difference has a profound impact on the operations in which each country involves itself and why. Australia is involved in operations as a result of self-defense or on behalf of another nation that has requested involvement, or in response to protecting and evacuating its own citizens or United Nations operations. The United States has been or is involved in conflicts for these same reasons *and* for the additional and express motivation of democratization.

As previously stated, manifest destiny is important in the United States even

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[80] GEORGE W. RENWICK, A FAIR GO FOR ALL: AUSTRALIAN/AMERICAN INTERACTIONS, 10 (1991) [hereinafter RENWICK].

[81] *See id.*

today. It is vitally connected to the contemporary concept of moral high ground. Moral high ground is a term used frequently by politicians and soldiers[82] alike. Despite the frequency of the phrase, it is difficult to define. From a political perspective, the phrase means "a place from which unpopular but morally elevated political decisions are defended. To occupy it, one must stake it out. Some find themselves on the high ground after an unpopular vote and are forced to defend it on the grounds that it was right."[83]

It is a phrase used frequently by United States military personnel,[84]my emphasis.[85]Testimony by General Charles A. Horner, USAF, CINCNORAD, CINCSPACE before the Senate Armed Services Committee, Federal Information Systems Corp., April 22, 1993.[86]Scott Peterson, *Somalia Crisis Turns to Quagmire as Clinton Hardens Resolve,* Christian Science Monitor, Oct 6, 1993 at 1.[87]Mike Tharp,

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[82] In this context, the word soldier is meant in the inclusive sense. It includes all members of the military; officers and soldiers alike.

[83] PAUL DICKSON AND PAUL CLANCY, THE CONGRESS DICTIONARY - THE WAYS AND MEANINGS OF CAPITOL HILL 220 (1993).

[84] General Horner, as USCINCSPACE, gave testimony in 1993 before the Senate Armed Services Committee. He used the phrase when he was talking about an international ballistic missile early warning center. He said that "such a program may
have a farther reaching impact than might originally have been anticipated - affording the United States the *moral high ground*

[85]in accelerating negotiations for international nuclear disarmament." FEDERAL INFORMATION SYSTEMS CORP., Apr. 22, 1993;

[86] it was used to describe the situation, that existed in Somalia, after the shooting down of two U.S. Army Black Hawk helicopters in October 1993. "We lost the *moral high ground* on 12 July, said one U.N. official."

[87]Scott Petersen, *Somalia Crisis Turns to Quagmire as Clinton Hardens Resolve,* CHRISTIAN SCIENCE MONITOR, Oct. 6, 1993 at 1; and one final example of the use of the phrase is describing the situation in Bosnia, after the discovery of a mass grave containing the bodies of 150 Serbs, allegedly dumped there by Muslim troops. "It is very hard to see who maintains the *moral high ground* said one U.N. military official." Mike Tharp, *Bosnia's Last Best Hope,*

Bosnia's Last Best Hope, U.S. News and World Report, May 24, 1993, at 44.[88] but without definition. I believe it is best defined as the moral justification of unpopular military operations to either the national or international communities. It implies moral superiority over those who would disagree or resist the military action taken. The United States military psyche shares with the national psyche the need to be reassured that divine providence continues to sanction its military action. President Lyndon Baines Johnson stated in 1965 that "American life makes no sense without religion."[89] The United States military as a sub-culture avails itself also of this rationale. The United States regards itself as "the last best hope on earth and . . . still holds the power and bears the responsibility for its remaining so."[90] This last best hope has at its disposal the military might to implement its national values on the world stage. As the last Chairman of the Joint Chiefs of Staff said, "America's armed forces are as much a part of the fabric of United States values--freedom, democracy, human dignity and the rule of law--as any other institutional, cultural or religious thread."[91] Thus the manifest destiny/moral high ground position influences international policy creation as well as the individual soldier.

This goes further than the just war doctrine[92] for self defense. Australians do not

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[88] U.S. NEWS AND WORLD REPORT, May 24, 1993, at 44.

[89] *See* RENWICK, *supra* note 79, at 27.

[90] *See* Powell, *supra* note 43, at 32.

[91] *See id.* at 33.

[92] The Just War doctrine is a theological doctrine that has been applied to the justification of war in an international context. According to this doctrine, participation in a war is morally justified if and only if, certain conditions are met. These conditions relate to the circumstances in which a state may legitimately resort to war (jus ad bellum) and to the way in which the war is conducted (jus in bello). A country may legitimately resort to war if and only if:

A. war is declared by a competent authority;

believe that their actions are sanctioned by a power greater than themselves. They do not possess any sense of divine destiny or moral superiority. Involvement in military operations is tempered by its very different national and military psyche.

As strikingly different pivotal, national, and military influences, these factors shape and mould international policy for the United States and Australia. The military actions considered as acceptable arms of policy differ considerably for each nation. To reach the goal of common standing ROE, these differences must be confronted.

V. The Fourth Step: To What Extent do Service-Specific Concerns Influence ROE?

A. Service Doctrine

Doctrine is the philosophical skeleton of an army. It provides the framework from which the actions of the army are articulated. When an analysis is made of an army, doctrine must always be an important part of that analysis.

Doctrine for the United States is the "fundamental principles by which military forces or elements thereof guide their actions in support of national objectives. It is

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B. war is a last resort and all available peaceful means of settling the dispute have been tried and failed;
C. war has been commenced for the sake of a just cause, such as self-defense; and
D. if there is a reasonable probability of success against the opposing belligerent.

In addition to these preceding four conditions, to other conditions must be met governing the conduct of the war. These are that:

E. the harm judged likely to result from a particular military action should not be disproportionate to the good at which it is aimed; and
F. non-combatants should be immune from direct attack.

authoritative but requires judgement in application."[93] The vital term is authoritative. Authoritative means "having the sanction or weight of authority"[94] which in turn is defined as "the right to control or command."[95] Thus, doctrine is authoritative and controlling.

The United States recognizes the significance and influence of defense doctrine. It "lies at the heart of its professional competence. It is the authoritative guide to how Army forces fight wars and conduct operations other than wars."[96] The United States Army is currently doctrine-based, though this has not always been the case. One of the lessons learned from the Korean War was the need for doctrine to create a training base to supplement strategy and enhance command and control.[97] United States Army doctrine today bears parallel to the hydra.[98] If doctrine is insufficient or ineffective, it will be lopped and replaced. As one commentator has observed that "[t]he U.S. military is currently producing a host of doctrinal manuals"[99] to provide a firm framework on which to hang command and control and training. He further commented, "[f]or the U.S. military, the goal is to modify and create technologies and force structures within

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[93] *See* JOINT PUB.1, *supra* note 62, at 118.

[94] Random House Unabridged Dictionary, 2nd Ed., at 139 [hereinafter Random House].

[95] *See id.*

[96] *See* OPERATIONS, *supra* note 7, at v.

[97] JAMES ADAMS, SECRET ARMIES, 41 (1987).

[98] The hydra was a mythical water or marsh serpent that had nine heads. If any of the heads was cut off, it would grow back as two.

[99] David Jablonsky, *U.S. Military Doctrine and the Revolution in Military Affairs*, PARAMETERS, Autumn 1994, at 29 [hereinafter Jablonsky].

the overarching doctrinal framework that add to warfighting effectiveness."[100]

Implicit to the implementation of strategy and tactics are the principles of war. United States doctrine states that "[f]undamental to operating successfully across the full range of military operations is an understanding of the Army's doctrinal foundations."[101] Australian Army doctrine says that "[t]he principles of war are maxims about waging war and apply to all levels of war."[102] It further says that "[t]hey are not absolute nor is there a standardized list of principles between nations. Indeed nations change their principles from time to time."[103] Whereas doctrine is authoritative, the principles of war are a number or group of factors that a commander takes into account when deciding on an appropriate strategy or use of tactics.

There are differences between the United States and Australian principles of war that give different complexions to the interpretation and application of ROE and influence the possibility of combined operations. United States and Australian Army doctrine use nine and ten principles of war respectively. *See Figure 6.* Four of these principles share identical titles:

1. offensive,
2. economy of force,
3. security, and
4. surprise.

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[100] *See id.* at 30.

[101] *See* OPERATIONS, *supra* note 7, at 2-4.

[102] *See* DOCTRINE MANUAL, *supra* note 19, 1-4.

[103] 8. *See id.*

AMERICAN	AUSTRALIAN
PRINCIPLES OF WAR	**PRINCIPLES OF WAR**
1. OBJECTIVE	1. SELECTION & MAINTENANCE OF THE AIM
2. OFFENSIVE	2. OFFENSIVE ACTION
3. MASS	3. CONCENTRATION OF FORCE
4. ECONOMY OF FORCE	4. ECONOMY OF EFFORT
5. MANEUVER	5. FLEXIBILITY
6. UNITY OF COMMAND	6. COOPERATION
7. SECURITY	7. SECURITY
8. SURPRISE	8. SURPRISE
9. SIMPLICITY	9. ADMINISTRATION
	10. MORALE

Figure 6

Two principles used in United States doctrine are not replicated in Australian doctrine. These two principles are mass and simplicity. Mass does not have the same implication as that of the Australian principle of concentration of force. Additionally, the simplicity principle is not found in Australian doctrine. The difference of these two principles adds extra dimensions to comparative ROE interpretations, creating significant differences.

The United States principle of mass means "to mass the effects of overwhelming combat power at the decisive place and time."[104] Australian doctrine has the principle of concentration of force. It is defined as "to achieve success in any operation, it is important to concentrate forces superior to those of the enemy where and when required to provide the potential for decisive action."[105] This descriptive difference between the two principles has profound implications for common ROE.

The term overwhelming for the United States is decisive. United States doctrine states that "[t]he American people expect decisive victory and abhor unnecessary casualties. They prefer quick resolution of conflicts and reserve the right to reconsider their support should any of these conditions not be met."[106] Linking this with the United States understanding of low-level conflicts, "the levels of war are defined more by the

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104 *See* OPERATIONS, *supra* note 7, at 2-4.

105 *See* DOCTRINE MANUAL, *supra* note 19, at 1-5.

106 *See* OPERATIONS, *supra* note 7, at 1-3.

consequences of their outcome,"[107] and that "the levels of war apply not only to war but also to operations other than war,"[108] the fundamental object is that United States doctrine dictates that overwhelming and decisive combat power will be used in a low-level type of conflict.

United States doctrine transposes the principles of general war to operations other than war. The Operations field manual lists a number of activities or types of military operations that could be regarded as OOTW. Types of operations contemplated are noncombatant evacuation operations (NEOs), arms control, support to domestic authorities, humanitarian assistance and disaster relief, security assistance, nation assistance,[109] support to counterdrug operations, peacekeeping operations, peace enforcement, show of force, support for insurgencies and counterinsurgencies and finally raids and attacks.[110] Putting into action the United States doctrinal principle of mass, the reaction when confronted with these types of operations is to intensify the force applied to achieve a decisive military victory, rather than moderate to in order to stabilize the situation. This occurred in Somalia during Operation Restore Hope. America's National Security Advisor, Anthony Lake, stated that one of the lessons learned from the Somalian experience was "that we must bring our forces to bear in sufficient mass to get

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[107] *See id.*

[108] *See id.*

[109] Nation assistance is defined as supporting a host nation's efforts to promote development, ideally through host nation resources. *See id.* at 13-6.

[110] *See id.* 13-4 to 13-8.

the job done."[111] He further stated that any forces which were going to be deployed under similar circumstances in the future "will establish a commanding presence with the numbers, equipment and robust rules of engagement they need to defend themselves and accomplish their mission."[112] The United States has a huge arsenal of weaponry at its disposal and the political and doctrinal intent to use it. Thus the statement of General Colin Powell, as Chairman of the Joint Chiefs of Staff, assumes a more significant meaning than before. "It is one thing to say that a nation's soldiers must go to war thinking that their defense force is the best in the world. It is quite another thing to say that when the Armed Forces go to war, they must win every time."[113] This "another thing" is the belief that when the United States does go to war, it must and will always win.

To illustrate the vastly different Australian principle of concentration of force is the analogy of a magnifying glass and light. When the Australian Army is committed to operations, there is a limit to the amount of weaponry available. There is no huge arsenal. Weaponry is either contained within the particular unit or can be called on from external sources, but it is not unlimited nor sufficient to support a principle of mass. Thus the Australian principle of concentration of force has developed. It is imperative that any force applied is applied in the most concentrated and effective form. The Australian doctrine manual states that "[p]roper application of the principle of

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[111] Anthony Lake, *Bosnia: America's Interests and America's Role*, FOREIGN POLICY BULLETIN, May/June 1994, at 18 [hereinafter Lake].

[112] *See* Lake, *supra* note 106, at 18.

[113] JOINT CHIEFS OF STAFF PUBLICATION 1, JOINT WARFARE OF THE U.S. ARMED FORCES, i (Nov. 11, 1991) [hereinafter JOINT WARFARE].

concentration of force in conjunction with other principles of war may permit a numerically inferior force to achieve local superiority sufficient to defeat a potentially superior enemy."[114]

To the contrary, United States Army doctrine states that "mass seeks to smash the enemy not sting him . . . . massing effects, *rather than concentrating forces,*[115] can enable numerically inferior forces to achieve decisive results."[116] These principles differ vastly from each other: Australian concentration of what force is available leading to possible superiority versus the United States "mass and smash." In the former, ROE are an enabling device, an assist; in the latter, ROE may be an impediment to victory. Herein lies a radical difference of doctrine.

The next principle of comparison--simplicity--is defined as "preparing clear, uncomplicated plans and concise orders to ensure thorough understanding."[117] United States doctrine says that "[s]implicity contributes to successful operations. Simple plans and clear, concise orders minimize misunderstanding."[118] Simplicity as conceptualized here is the catalyst for the overly prescriptive approach adopted by the United States Army regarding ROE. Desire for clear, uncomplicated plans and concise orders is paradoxically the reason why standing ROE for the United States Army are, by Australian Army standards, too extensive. In aiming for simplicity, United States

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114 *See* DOCTRINE MANUAL, *supra* note 19, at 1-5.

115 My emphasis.

116 *See* OPERATIONS, *supra* note 7, at 2-5.

117 *See id.* at 2-6.

118 *See id.*

doctrine pigeonholes itself. The United States military doctrine attempts to simplify what soldiers have to categorize, remember, and apply. Simplicity is the principle underlying the creation of standard ROE such as the Standing Rules of Engagement (SROE) for United States forces. These standardized ROE are distributed from the Chairman of the Joint Chiefs of Staff[119] down to any forces assigned to specific CINC control.[120] This results in a rigid, complex, and overly prescriptive SROE when compared with Australian ROE.

In an attempt to standardize the SROE for the whole army, a template mentality has arisen. To simplify the task for soldiers, ROE have been comprehensively drafted and designed to categorize potential operations containing similar factors. However, when radically different operations arise, such as occurred in Somalia with Operation Restore Hope, these ROE become a "square peg in a round hole." They act to limit the soldier by not providing what the United States intends them to provide; that is, an answer to most problems with which the soldier will be confronted.

The template mentality has successfully operated in many operations in which the United States defense forces have been involved. If it had not, doctrine would have experienced pressure to change, deleting this principle. It is most likely that this principle is suited to the United States Army because of the army's size. Command and administration in so large an army necessitates very precise specialization and concise delineation of actions and tasks by each individual soldier. Australia, by comparison,

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[119] CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION (CJCSI) 3121.01, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, Oct. 1, 1994, 1.

[120] U.S. COMMANDER IN CHIEF PACIFIC INSTRUCTION (USCINCPACINST) S3710.2G, CJCS STANDING RULES OF ENGAGEMENT, Dec. 19, 1994, 1.

does not have the number of personnel to warrant this degree of doctrinal direction. However, simplicity as conceptualized in United States ROE is not readily adaptable to low-level operations other than war which is most likely to be the type of combined operations in which the United States and Australia will be involved in the future.

Australia's ROE are drafted for and apply to strategic and operational levels, but predominantly the operational level. The individual soldier on the ground is issued the simpler OFOF rules, allowing him to use his initiative to military advantage. Whereas "the American approach is not a very collaborative one . . . subordinates have less to contribute to . . . decisions."[121], the Australian approach allows and even insists that the soldier decide. There is a danger here that Australian soldiers, if not trained sufficiently, may make decisions which fall outside of their authorized actions and in doing so endanger their lives and others and unwittingly disobey orders. This situation has perhaps arisen out of the reality of Australia's small defense force. Leaders are not impelled to control the vast numbers of soldiers and weaponry and supervise their actions which the United States defense forces must. Whereas the United States errs on the side of caution, it is a valid criticism of Australian ROE that the soldier may be given too much latitude.

Attempting to create an authoritative and predictable framework of ROE for the United States soldier to follow, it is incumbent on the soldier to follow that authoritative and predictable ROE. This creates difficulty if the soldier does not act in accordance with the ROE template or responds unilaterally to a dynamic situation. Present is the

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[121] *See* RENWICK, *supra* note 79, at 48.

institutionalized fear that the soldier will have disciplinary action taken against him. The usual article of the Uniform Code of Military Justice (UCMJ) is dereliction in the performance of duty.[122] This creates two forms of limits on the United States soldier. One is the limit of the ROE template; the other is the limit on the ground curtailing his initiative. If the ROE do not specifically prescribe for a military situation, then the ROE is presumed deficient. The ROE are amended rather than allowing the soldier to interpret and formulate an appropriate response.

The Australian strength lies in encouraging stronger lateral thinking on the soldiers's part. As one commentator says "Australians are . . . seen as more willing to take risks than Americans are, which can make for less bureaucratic restraint, more innovation, and stronger lateral thinking."[123] The weakness of Australian ROE lies in that it can be perceived by the United States as leaving much to chance.

The United States approach is strong in that it attempts to standardize each commander's and soldier's knowledge and understanding. Its weakness lies in its rigid template approach. Perhaps as one author commented, "size has begotten conservatism."[124] A table of some relevant differences in approach taken from a cross-cultural study is illustrated in *Figure 7*.[125] Decision making, taking risks, and approaches to conflict--all skills relevant to armed conflict--are addressed briefly.

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[122] 10 U.S.C. 932 (1900) Article 92 (defining the crime of "Failure to Obey Order or Regulation).

[123] *See* RENWICK, *supra* note 79, at 50.

[124] *See id.*

[125] *See id.* at 58-59.

These differences of principles of war do not create an insurmountable obstacle in the pursuit of common standing ROE. They do, however, create very real differences in the creation and implementation of ROE and military force governed by the ROE. Before creating standing ROE for combined United States and Australian operations, these differences of principle must at best be resolved, and at the least, understood by all members of the force.

THEME	AMERICANS	AUSTRALIANS
Decision Making	* Top down; senior management has "big picture" *Assume subordinates have less to contribute to organizational decisions *Information need not be shared	* Collaboration between management and employees *Assume subordinates share equal interests and capabilities *Information should be shared

THEME	AMERICANS	AUSTRALIANS
Taking Risks	* Cautious risk takers	* Ready to have a go at anything
Conflict	* Uncomfortable with conflict * Avoid argument * Concerned about what others think	* Comfortable with conflict *Invite argument *Not concerned about what others think

Figure 7

B. ROE as Policy or Law

Needless to say, from national governments to soldiers, The United States and Australia have differing approaches to ROE. The Chief of the General Staff[126] said, "[i]n Australia, unlike the United States . . . ROE are not law or a subset of the law. They are parameters established by Government within which the Australian Defense Force may perform its duty; they are policy."[127] From the Australian perspective, ROE are policy driven downwards from government to soldier via the formation or battalion

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[126] The Chief of the General Staff (CGS) is the equivalent of the Chief of Staff, United States Army with one exception. In Australia, the rank of the CGS is Lieutenant General compared with the rank of General for the Chief of Staff, U.S. Army.

[127] LIEUTENANT GENERAL J.C. GREY AO., AN ADDRESS TO THE CGS EXERCISE 1994, ON THE SUBJECT OF INTERNATIONAL LAW AND THE CONDUCT OF OPERATIONS BY LAND COMMANDERS, *reprinted in* FORCE OF LAW, *supra* note 29, at 69.

commander. They are promulgated by the CDF on specific direction from the government. There are no standing ROE for the Australian Army similar to the SROE which the United States Army uses. Australia does have standing OFOF for the Australian soldier. Unlike the United States approach to its SROE, these rules are not designed to be overly prescriptive and applicable for military response in every conceivable situation with which a soldier may be confronted.

The standing OFOF encapsulate four fundamental principles that must be understood. They are the foundation on which all ROE are initially premised by the Australian Army. The four basic principles follow:

1. Soldiers remain under immediate military command;

2. If soldiers have to use force, they are to use minimum force of a proportional nature;

3. Each soldier has the inherent right of self-defense for himself, his unit, and protected persons in his custody; and

4. If a soldier has to fire his weapon, he shoots to kill, unless ordered otherwise.

As no standing ROE exist for the Australian Army, each individual military operation has ROE specifically tailored to meet the operational needs of the military in unison with government direction and policy. Legal input is provided to the CDF at this level. The ROE are not written at the brigade or battalion level and forwarded up the chain of command for approval; they are downward driven directives. After the ROE are issued, clarification can be sought and changes can be submitted from this lower level

of command. This is contrary to the United States approach.

Australian ROE do not contain any specific reference to the laws of armed conflict, unlike United States ROE. The knowledge of the laws of armed conflict is assumed to have been learned by the Australian soldier in his training, and there is no requirement to repeat these specific laws or principles in the ROE or OFOF. It is believed this would complicate and cloud the salient issues addressed by the ROE or OFOF. An example of Australian resistance to the cluttering of the OFOF occurred when Australian forces were recently deployed to provide protection to the peace conference delegates on Bougainville in late 1994. The OFOF issued were identical to the standard OFOF given to soldiers in their military training, apart from the inclusion of the indigenous language to supplement the warning before firing a weapon.

C. International Conventions and Treaties.

The international conventions and treaties signed on behalf of and ratified by individual nations significantly affect the way in which ROE are selected as well as interpreted. No single factor is more authoritative and influential than these international conventions and treaties. In the United States and Australia, the law plays a pivotal role in our societies. This is because it determines the manner in which our respective armies will conduct themselves on operations. Australian doctrine says that "[a] nation at war, or involved in any other form of armed conflict, has legal obligations

to conduct hostilities according to the principles of international law."[128] It states further that "[t]he primary sources of the Law of Armed Conflict (LOAC) are:

a. treaties which States have ratified, such as the Hague and Geneva Conventions, Inhumane Weapons Convention, Chemical Weapons Convention and Biological Warfare Convention;

b. judgements of international courts;

c. general rules of warfare recognized by nations; and

d. Protocols I and II Additional to the Geneva Convention."

It is the most basic requirement that "operational plans and rules of engagement need to be consistent with the LOAC."[129] The basic reasons why any army will comply with the laws of armed conflict are contained within the Australian soldier's mnemonic;[130] PRIDE. *See Figure 8.*[131] A large number of major treaties and conventions govern the conduct of

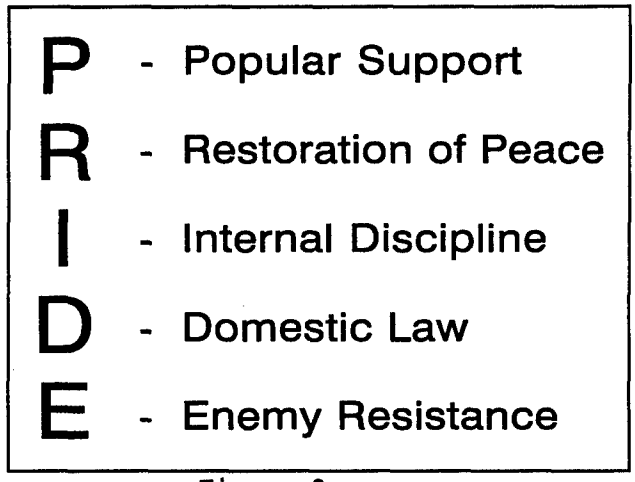

Figure 8

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[128] *See* DOCTRINE MANUAL, *supra* note 19, at 37-1.

[129] *See id.*

[130] A mnemonic is a phrase or formula intended to assist the memory. In this case, each letter of the word represents a different idea or factor which contributes to the concept.

[131] This mnemonic was devised by the author for use in the teaching of Operations Law. It was first used in Nov. 1992 when the author had to deliver a lecture to the International Committee of the Red Cross in Melbourne, Victoria, Austrl. The presentation was entitled, "Operations and the Law of Armed Conflict." It has been used in the training of Australian soldiers in the Operational Deployment Force (ODF).

warfare. Warfare as envisioned by this thesis may involve more than the land environment. It may involve implications regarding the sea and air environments. A list of the more significant treaties and conventions is at Appendix C. Included on that list are conventions and treaties ratified[132]ISSAC PAENSON, MANUAL OF THE TERMINOLOGY OF PUBLIC INTERNATIONAL LAW (LAW OF PEACE) AND INTERNATIONAL ORGANISATIONS, 284, (1983)[hereinafter PAENSON].[133]*See* PAENSON, *supra* note 115, at 286.[134] by the United States and Australia. Of the 24 more significant treaties and conventions, the United States has ratified 13. Australia has ratified all 24. With the election of a Republican controlled congress, it is uncertain whether any previously proposed ratifications will actually occur.

The United States Army abides by the general provisions of the unratified treaties and conventions as it coincides with domestic and international purposes. However, these unratified treaties are not law and there is no legal obligation or direction requiring the United States to continue to apply the provisions of these treaties to its conduct of operations when it is not in its interests to do so.

The administration of one President may interpret the provisions of any treaty in

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[132] The following explanation was drawn from ISSAC PAENSON, MANUAL OF THE TERMINOLOGY OF PUBLIC INTERNATIONAL LAW (LAW OF PEACE) AND INTERNATIONAL ORGANISATIONS 284 (1983):

> Ratification is a separate, distinct and subsequent act to that of signing a treaty or convention. By signing a treaty, a nation's representatives have signified and expressed their approval of the treaty.

[133] Ratification is the final approval or confirmation of a negotiated and signed treaty by the organ competent according to the constitutional law of the ratifying state ... Ratification expresses in solemn form the consent of the state to be bound by the Treaty.

[134] Ratification means that the treaty has been incorporated as part of a country's domestic law.

a particular manner. This does not mean that later presidents are bound by these interpretations. In 1987, the legal advisor to President Reagan, Abraham Sofaer, stated that "a President was free to depart from a previously held treaty interpretation unless three conditions had been met. Under the Sofaer Doctrine the Executive's representation to the Senate can be relied upon only if it had been 'generally understood,' 'clearly intended,' and 'relied upon' by the Senate during the treaty ratification process."[135] It is possible for an administration of a President to reinterpret a treaty which has been signed by a previous administration and it is possible for an administration to decline to be bound by the principles contained in an unsigned treaty or convention. This occurred during the Reagan Administration in 1985, with regard to its reinterpretation of the 1972 Treaty on Anti-Ballistic Missile Systems (ABM Treaty).[136] This does not preclude the United States and Australia from participating in combined operations. It does however make it possible for the United States to alter or revoke its compliance with treaties previously ratified or honored.

Two examples illustrate the differences of interpretation of ratified treaties. A convention can be signed and ratified by both the United States and Australia, yet the interpretations are not the same, resulting in potentially different consequences. There will be different implications for the United States Army compared with the Australian Army.

The Convention on the Prohibition of Military or any Other Hostile Use of

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[135] David A. Koplow, *Constitutional Bait and Switch: executive Reinterpretation of Arm Control Treaties*, U. PA. L. REV., 1989, at 1374 [hereinafter Koplow].

[136] *See* Koplow, *supra* note 128, 1370.

Environmental Modification Techniques (ENMOD) has been ratified by both nations. The United States interpretation, and I venture to say the correct interpretation, is that the ENMOD Convention bans the use or manipulation of the environment as a weapon.[137] Australia interprets this convention as meaning that "Australia . . . undertakes not to engage in military, or any other hostile use of environmental modification techniques which have widespread, long term or severe effects as the means of destruction, damage or injury to the any other State party."[138] What is implied by this interpretation of this article of the ENMOD Convention is that Australia will not use weapons in the environment which have the effect of widespread, long-term, or severe effect on the environment. This is a difference which has the potential for conflicting selection of military action by the United States and Australia.

The second example is regarding the *Geneva Convention Relative to the Protection of Civilian Persons in time of War (Geneva 4)*. United States Army doctrine defines the act of military occupation in accordance with the Hague Regulations article 42.[139] The United States Manual of the Law of Land Warfare says that "[t]erritory is considered occupied when it is actually placed under the authority of a hostile army. The occupation extends only to the territory where such authority has been established and

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[137] MAJ RICHARD WHITAKER, ENVIRONMENTAL ASPECTS OF OPERATIONS, SUBJECT OUTLINE, INTERNATIONAL AND OPERATIONAL LAW DIVISION, TJAG School, 1994, at 3.

[138] AUSTRALIAN DEFENSE FORCE PUBLICATION, ADFP 37 EDN 1(DRAFT), THE LAWS OF ARMED CONFLICT, (1994), 1-21 [hereinafter LOAC].

[139] The Hague Regulations refer to the regulations respecting the laws and customs of war on land which are annexed to The Convention Respecting the Laws and Customs of War on Land which was signed at The Hague on October 18, 1907 and in commonly referred to as Hague IV.

can be exercised."[140] Geneva 4 states that the convention "shall . . . apply to all cases of partial or total occupation of the territory of a High Contracting Party even if the said occupation meets with no armed resistance."[141] Preceding that paragraph is the proviso that "the convention shall only apply to all cases of declared war or *of any other armed conflict which may arise* between two or more of the High Contracting Parties, *even if a state of war is not recognized between them.*"[142]

The significance of this paragraph is that there must be a state of international armed conflict before the provisions of this convention are triggered into operation. If there is no international armed conflict, and there is no sovereign nation to call for, or object to, the proposed intervention, Geneva 4 has no application at all; except for article 3. It prescribes, in the case of a non-international conflict, a set of minimum standards that should be complied with by a High Contracting Party. This was the approach adopted by the UNITAF[143] and the United States judge advocates located in the region.

However, this interpretation was not agreed to by all members of UNITAF. The Australian legal officer upheld the view that Geneva 4 did apply in its entirety. In his opinion, "the Fourth Geneva Convention . . . states that the convention applies to all cases of partial or total occupation of the territory of a High Contracting Party, even if the occupation meets with no armed resistance. Somalia ratified the four Conventions of

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[140] DEP'T OF THE ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, 138, July 1956, [hereinafter FM27-10].

[141] 4th Geneva Convention, Article 2 para 2.

[142] My emphasis.

[143] Unified Task Force Somalia - UNITAF.

1949 without reservations on 12 July 1963. There being no other qualifying factors it must therefore be assumed that the provisions of the Convention applied to the circumstances in Somalia."[144] Here is an example of differing interpretations of international law in an operation participated in by the United States and Australia. These differing interpretations are from countries that have each ratified the Geneva Conventions of 1949. One nation claims that Geneva 4 applies whilst the other claims that it does not. Once again the nuances of definition and interpretation by different nations representatives assume prominence.

This is a significant factor to be considered when considering the viability of standing ROE between the United States and Australia. Separate to the issue of differing interpretations of ratified treaties is the reality that more international conventions have been ratified by Australia thus forming part of its domestic law. For the United States, many of the same international conventions are not ratified and part of the domestic law. There is no legal obligation to obey them. It is political expediency and moral responsibility that dictates whether the unratified conventions are to be complied with or not.

VI. The Fifth Step: To What Extent Mission-Specific Concerns Influence ROE?

> "But by then the rules of engagement (ROE) were changing fast enough to make a soldier's head spin. My guys are blown out by all the confusion."

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[144] MAJOR M.J. KELLY, AN ADDRESS TO THE LAND HEADQUARTERS OPERATIONS LAW SEMINAR 1994 ON THE SUBJECT OF LEGAL REGIMES AND LAW ENFORCEMENT ON PEACE OPERATIONS, *reprinted in* FORCE OF LAW, *supra* note 29, at 191.

Company Commander,
Operation Uphold Democracy.[145]

Remaining issues relevant specifically to operations rather than the previously mentioned national military and service induced influences are considered in this part of the thesis. These have been termed mission-specific influences.

A. Self-Defense

The first mission-specific influence to be considered is the issue self-defense. This is fundamental to the soldier. His life depends on it. The soldier can function neither efficiently nor effectively if this issue has not been clearly resolved. It is held by the United States and Australian Armies that the soldier has the inherent and overriding right of self-defense. The United States Army Peace Operations Manual states "in peace operations, *as in all operations,*[146] the inherent right of self defense applies."[147] This was confirmed by the SJA to the Chairman of the Joint Chiefs of Staff. Discussing the SROE the SJA stated that "these rules do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in the self defense of his unit and that of all other United States forces in the vicinity."[148]

The Australian statement on self-defense is as follows: "ROE cannot diminish the

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[145] Colonel David H. Hackworth, *Dealing With Rotten Cops*, NEWSWEEK MAGAZINE, Oct. 3, 1994, at 32.

[146] My emphasis.

[147] *See* PEACE OPERATIONS, *supra* note 61, at 34.

[148] Interview with Colonel J.P. Terry, Staff Judge Advocate to the Chairman of the Joint Chiefs of Staff, in Washington D.C. (Jan. 6, 1995) [hereinafter Terry].

fundamental right of individual or collective self defense in the event of an armed attack, given under Article 51 of the United Nations Charter."[149] This article states that "nothing in the present charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[150]

So does the concept of self-defense have a consistent meaning for both the United States and Australia? The reality is that the legal concept of self-defense has differing interpretations for each country. These differences could have differing operational consequences if they are not identified and addressed.

United States doctrine has a wide interpretation of national self-defense. It says, "United States military forces have traditionally been called upon when United States lives and property are threatened abroad."[151] It is stated in the SROE that United States national security policy serves to protect the United States, United States forces, and in certain circumstances, United States citizens and their property, United States commercial assets, and other designated non-United States forces, foreign nationals, and their property from hostile attack. United States national security policy is guided, in part, by the need to maintain a stable international environment compatible with United

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149 *See* DOCTRINE MANUAL, *supra* note 19, at 38-2.

150 United Nations Charter art. 51.

151 JOINT CHIEFS OF STAFF PUBLICATION, NATIONAL MILITARY STRATEGY OF THE UNITED STATES, 14 (Jan 1992).

States national security interests.[152]

Yet again President Clinton's speech delivered on the eve of Operation Restore Democracy expresses this interpretation.

Australian doctrine defines self-defense as being either national or unit self-defense. "National self-defense is the right of Australia to use armed force (singly or with allies) to protect its sovereign territory, waters, airspace (including citizens and property *therein*[153]) against actual armed attacks or threats of anticipated armed attack."[154] It does not include, within the definition of an act of self defense, the protection of individual private citizens or property located outside of Australian sovereign territory. This is not provided for, by any Australian military doctrine.[155] The definition of national self-defense is not expansive.

Herein exists the fundamental difference of United States versus the Australian definition of self-defense. A military author commented, "[i]f United States citizens, diplomats or military personnel are attacked or held captive in an attempt to induce a change in American policy, the political independence of our nation has clearly been subjected to attack."[156] Protecting one's own nationals is regarded as consistent with the

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[152] CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION (CJCSI) 3121.01, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, Oct. 1, 1994, A-3 [hereinafter CJCSI].

[153] My emphasis.

[154] *See* ROE MANUAL, *supra* note 58, at 2-1.

[155] The services assisted evacuations (SAE) and services protected evacuations (SPE) are both predicated by the fact that the foreign nation has given its permission for Australian forces to be inserted into that nation's sovereign territory.

[156] Lieutenant Colonel James P. Terry, *An Appraisal of Lawful Military Response to State-Sponsored Terrorism*, NAVAL WAR C. REV., May-June 1986, at 62 [hereinafter Terry 1].

act of national self-defense according to United States policy. Used as legal justification for acting to protect is under Article 51 of the United Nations Charter. It is also contained in the preamble to the United States Constitution. The preamble states that it is to provide for the common defense of the people. The national security interest has been threatened by the threat to one's nationals.[157]

The second aspect of self-defense is that of unit self-defense. Australia sees this as "the inherent right of ADF elements (as agents of Australia) to spontaneously defend themselves or designated entities . . . against actual armed attacks or immediate threats of armed attack."[158] Australian doctrine states that "[u]nlike national self-defense (in which AS[159] Government makes decisions on the use of force, other than in unforeseen circumstances) ROE are not issued for unit self defense, since it is ADF elements in forward or isolated positions which must necessarily determine when, and how much, self-defensive force is required."[160] This Australian interpretation of self-defense is significant in that it substantiates the proposition previously discussed. That proposition is that ROE is more open for the soldier on the ground to interpret according to the prevailing situations versus the prescriptive template provided by the United States.

United States SROE contain four pages[161] relating to the definition of self-defense, the elements of self-defense, the authority to exercise self-defense, and actions

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157 Lieutenant Colonel Richard J. Erickson, *Use of Armed Force Abroad: An Operational Law Checklist*, THE REPORTER, Vol.15. NO.2, at 6.

158 *See* ROE MANUAL, *supra* note 58, at 2-2.

159 Australian (AS).

160 *See* ROE MANUAL, *supra* note 58, at 2-2.

161 See CJCSI, *supra* note 145, at A-4 to A-7 inclusive.

that can be taken in self-defense. Comparable ROE for Australian soldiers involved in the multi-national supervisory team[162] deployed to Bougainville was contained in less than two pages and delineated the upper constraints of the use of force in the anticipated circumstances.

A major difference between United States and Australian ROE at the unit self-defense level is the incorporation within the United States ROE of the definition of hostile act and hostile intent within the expansive United States definition of national self-defense.

A hostile act is defined by the United States SROE as "an attack or other use of force by a foreign force or terrorist unit (organization or individual) against the United States, United States forces, and in certain circumstances, United States citizens, their property, United States commercial assets, and other non-designated non-United States forces, foreign nationals and their property. *It is force used directly to preclude or impede the mission and/or duties of United States forces, including the recovery of United States personnel and vital United States Government property.*[163] When a hostile act is in progress, the right exists to use proportional force, including armed force, in self-defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat."[164] Hostile intent includes "the threat of imminent use of force by a foreign force or terrorist unit"[165] in the circumstances elaborated upon in

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162 *See* Bandow, *supra* note 15, at 173.

163 My emphasis.

164 *See* CJCSI, *supra* note 145, at A-5.

165 *See id.*

dealing with a hostile act.

In contrast, Australian ROE defines a hostile act "as the use of armed force against friendly units, personnel, installations or territory."[166] The definition of hostile intent is "the demonstration by a potentially hostile force, unit or individual of preparation to commit an immediate hostile act."[167] The significance of this section dealing with what constitutes a hostile act is two-fold. Firstly, on a mission specific basis it shows how by Australian standards, United States ROE tend to be rigidly prescriptive and standardize the soldier's behavior to an unnecessary level. Australian ROE provides more latitude in determining if, when and by how much self-defensive force will be utilized. Each approach may be appropriate in different circumstances however the differences of understanding and permitted action are real. The second reason for including the entire definition of a hostile act is to explain the curious United States concept of defense of mission. Defense of the mission of the military force as well as unit self-defense is a legitimate use of self-defense.[168] When using force in the act of self-defense, Australian soldiers would be permitted to use instant and overwhelming force to protect themselves. But the force used would be closely regulated so that "only hostile units which are either singly or collectively prosecuting an armed attack . . . may be engaged with the aim of quickly terminating self-defensive action. Potentially hostile forces which are beyond the range of their known weapon capabilities and not closing on

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[166] RULES OF ENGAGEMENT, COMBINED FORCE - BOUGAINVILLE, at 2 [hereinafter ROE CF].

[167] *See* ROE CF, *supra* note 159, at 2.

[168] *See* Terry, *supra* note 141.

friendly forces would not be attacked without specific authority."[169] There is no authority to neutralize or destroy a vague threat as is contained in the United States definition.

The United States concept of defense of mission is a wider interpretation of self-defense than that contemplated by Australian concept. What the United States doctrine permits is the use of force to eliminate belligerents, of the same persuasion (political or otherwise) who preclude or impede the mission or duties of United States forces. It is an open ended ticket for a military commander to use deadly force if the soldiers under his military command are impeded. No thought must necessarily be given to whether they are acting within or outside of the scope of their authority. This goes beyond what Australian doctrine regards as the legitimate use of force in self-defense. For combined operations to succeed within a common standing ROE, the issue of self-defense must be resolved. What each force is permitted to implement as self defense must be decided before operations can be combined.

B. Proportional Force Vs Proportionality

Proportionality and proportional force are ubiquitous terms used in discussions regarding international law by both the United States and Australia. However, the interpretations attributed by each nation to the terms are not synonymous. The best exposition of what constitutes proportionality is contained in the ICRC[170] Handbook on the Law of War. It states that "an action is proportionate when it does not cause

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169 *See* OPERATIONS, *supra* note 7, at 38-2.

170 International Committee of the Red Cross and Red Crescent (ICRC).

incidental civilian casualties and damages which are excessive in relation to the value of the expected result of the whole military operation."[171] The principle of proportionality is a balancing test for the military commander. He has to use sufficient force to accomplish his military objective. But in so doing, he has to balance the force that he will use and equate that to the mission he has been given. The commander must make a subjective judgement about the collateral damage which he will cause and decide whether it will be excessive. No definitive criteria is given or exists by which an objective assessment, of what is disproportionate or excessive in the circumstances, can be meaningfully made.

The principle of proportionality does not provide for an objective assessment to be made of something that is intrinsically subjective and which is based upon an assessment of information which was available at the relevant time; not later. Cynically, one might state that collateral damage can be regarded as proportionate if the military strategies result in victory. If the military strategies result in defeat, the conclusion could be drawn that more collateral damage might have been proper in the circumstances.

Proportionality does not mean that a commander must lose lives of his own soldiers in a morbid equation which weighs their lives with collateral damage to civilians and civilian property: "suicide is not a requirement for soldiers under the laws of war,"[172] as one authority has put it. This interpretation of the proportionality principle is

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[171] FREDERIC DE MULINEN, HANDBOOK ON THE LAW OF WAR FOR THE ARMED FORCES, 92 (1987).

[172] Telephone Interview with Colonel W. Hays Parks, Chief of International Law, Office of The Judge Advocate General of the Army, (Feb. 21, 1995).

followed by the United States using the principle of war called mass, previously elaborated upon. As one judge advocate said, "[t]he previous Chairman stated, and this view is concurred with the current Chairman, that United States forces will use overwhelming force to defend themselves. But that overwhelming force has to be directed discretely so that the fallout will not be disproportionate."[173]

This principle is best illustrated by the example of the United States raid on Libya on April 14, 1986. One writer has says "[t]he key question is whether sufficient effort was made by the United States to minimize the incidence of collateral damage. It might seem that the use of such a large force by the United States was in itself disproportionate. The choice of weaponry used against Libya was deliberate, and actually designed to reduce the number of potential civilian casualties."[174] The fact is that the definition of proportionality is not stated in any of the major military publications.[175]

Australian doctrine defines proportionality as "a concept which seeks to limit the use of force in relation to an adversary's military actions, or the anticipated and

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[173] *See* Terry, *supra* note 141.

[174] Major Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law: Legal Analysis of the United States Raid on Libya on April 14, 1986*, NAVAL L. REV., Winter 1988, at 93.

[175] The major military publications are such as:
a. Department of the Army Field Manual 100-5, Operations;
b. Department of the Army Field Manual 100-23, Peace Operations;
c. Department of the Army Field Manual 27-10, The Law of Land Warfare; and
d. Joint Chiefs Of Staff Publication 1, Department of Defense Dictionary of Military and Associated Terms.
The closest thing to a definition appears in FM 27-10 at paragraph 41 where it states, "loss of life and damage to property must not be out of proportion to the military advantage to be gained."

accumulative military potential of one's own actions. It must justify the loss of life to non-combatants and protected persons, the damage to their property, or cultural objects which is out of proportion to the military advantage that would be gained from such action. There must be an acceptable relationship between the legitimate destruction and any undesirable collateral damage that is consequent to such military action."[176] On the face of it there would not appear to be any real divergence of interpretation. But that is when dealing with the principle of proportionality, not with that of proportional force.

The United States and Australia do not use the phrase "proportional force" identically. From the Australian perspective, proportional force means the graduated response that a soldier may legally use to counter a hostile act. For example, proportional force includes, in increasing order, the following acts:

1. open display of weapons,
2. verbal warning,
3. physical restraint,
4. pointing of weapons, and
5. firing of those weapons.[177]

If the firing of weapons is warranted, proportional force dictates that a soldier is permitted to return fire. He is strictly limited to firing enough bullets to achieve his purpose. This is not the equivalent to the amount of force used in association with the

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[176] *See* LOAC, *supra* note 131, at XXXIV-9.

[177] These are very similar to the ROE contained in Appendix A, A-3 and to the M in RAMP. The letter M stands for "measure the amount of force that you use . . . . [u]se only the amount of force necessary to protect lives and accomplish the mission.", *See* Martins, *supra* note 2, at 86.

principle of proportionality. Proportional force of the type meant by and used by Australian doctrine is the force being brought to bear to bring the situation to a successful conclusion. It does not mean that overwhelming force may be used to counter a hostile act. It means a "proportional response commensurate with the threat."[178] To put it simply, "[t]he level of force must be balanced with the requirement to minimize the cost in ADF and allied military casualties, non-combatant casualties and damage to property, cultural objects and the natural environment."[179] All of these factors are considered with equal emphasis. This is quite distinct from the force being employed in compliance with the principle of proportionality. There, consideration is only made of the incidental civilian casualties and property damage and nothing else.

Australian doctrine states that "[w]hat goes unrecognized is that [proportional force] has quite two distinct aspects to the use of firearms ... The first is that force should not be employed until it becomes essential. The second aspect is that the amount of force used should be only sufficient to overcome resistance."[180] Proportional force is referred to as minimum force at times. Whatever it is referred to by, the title of proportional or minimum force, the fact that force has to be applied "does not necessarily imply the application of 'minimum' combat power nor the maneuver of 'minimum' forces."[181]

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[178] *See* ROE MANUAL, *supra* note 58, at 2-2.

[179] *See* ROE MANUAL, *supra* note 58, at 2-2.

[180] P.A.J. Waddington, *Overkill or Minimum Force*, THE CRIMINAL LAW REVIEW, Oct. 1990, at 696.

[181] *See* ROE MANUAL, *supra* note 58, at 2-2.

Proportional force is succinctly described in the British Manual of Military Law. This description, though of no official application in Australia, best describes the state in the Australian domestic law. It says, "[w]hat force is reasonable depends on the answers to two questions of fact:

(a) What circumstances may be considered; and

(b) What, on the basis of those circumstances is reasonable?"[182] The facts of the R v. Thain[183] and Attorney-General for Northern Ireland's Reference (No. 1 of 1975)[184]

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[182] Manual of Military Law Part 2, 5-7.

[183] This is an unreported Northern Ireland case of Regina v. Thain which was heard on Oct. 24, 1985. It is drawn from the British Army's Manual of Military Law Part 2 at 5-10.

A private soldier was a member of a patrol when other members of the patrol were assaulted and scattered by a group of unarmed youths who threw stones at them. The defendant chased after one of them who was running away from the scene. Three times, the defendant called upon the youth to stop or he would fire. The third time the youth partly turned as he was running. tThe defendant shot him dead.

At the trial, the defendant claimed that he had opened fire in defense of himself and other members of the patrol, believing honestly that the young man, whose left hand had gone out of sight, was reaching for a pistol and was going to use it. At the scene and after the incident, the defendant had not mentioned the possibility of the deceased having been armed to anyone. Nor had he made a search of the deceased's body to locate the hidden weapon. On cross-examination, he admitted that he had not mentioned the possibility of the deceased having had a weapon in his possession to anyone until a year after the event.

The trial judge, sitting without a jury, rejected the defendant's evidence as a concocted defense and expressed himself satisfied beyond reasonable doubt that the defendant had no honest belief that the deceased was going to draw a gun and was going to shoot him. The defendant was convicted of murder and sentenced to life imprisonment.

[184] The headnote of Attorney-General For Northern Ireland's Reference (No. 1 of 1975) [1976] 3 W.L.R. 235 states:

A soldier serving in Northern Ireland was a member of a patrol searching for terrorists. During the patrol, an unarmed man was challenged and ran away. The accused soldier shot and killed him as he fled. The area in which the incident occurred was one in which troops had been attacked and killed by the Provisional Irish Republican Army (I.R.A.). It was an area in which soldiers faced a real threat to their lives and where the element of surprise attack by the I.R.A. was a real threat.

The patrol had been briefed to expect attack and to be wary of being led into an ambush. They had also been briefed that the nearby farm buildings (where the deceased lived) were places where terrorists might be hiding. When the deceased ran off, the accused was 70 yards from the other members of the patrol. Individual pursuit by the accused was inhibited by the knowledge of the possibility of ambush. The accused stated in evidence that he honestly

illustrate the practical application of just what is proportional force and how precarious the soldier's position may be regarding his actions. This has been made more than apparent by the British case of Private Clegg[185]. This case demonstrates more than any other case the nature of what is proportional force. In that case, three bullets were regarded as sufficient or proportional in the act of self-defense. The fourth bullet was deemed to be excessive force; not proportional. This statement of the British law is equivalent to the law as it stands in Australia.

The United States does not have a specific legal term called proportional force. It does have a comparable standard relating to the use of force, in United States society. In one leading textbook, it states that "[i]n determining how much force one may use in self-defense, the law recognizes that the amount of force which he may use must be reasonably related to the threatened harm which he seeks to avoid."[186] There is no comparable United States legal concept to that of proportional force as used by Australian doctrine. Under United States military law one may respond to a simple fistic

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and reasonably believed that he was dealing with a member of the I.R.A. The accused was charged with murder, duly tried and acquitted.

[185] The following account was by Colin Randall, *Three bullets were legal; the fourth was ruled murder,* THE DAILY TELEGRAPH, Dec. 24, 1994.

Close to midnight on Sep. 30, 1990, on the fringe of a fiercely republican (sic) area of west Belfast, Pte Lee Clegg opened fire on a stolen Vauxhall Astra as it roared away from an Army checkpoint. In line with his understanding of the Army's yellow card definition of the life-threatening circumstances in which a soldier can resort to lethal force, the young paratrooper
fired four bullets from his standard SA80 rifle. In the eyes of the law, the last of those shots made him a murderer. Clegg . . . acted in accordance with his training, believing the car to contain I.R.A. gunmen.

While the vehicle's three teenagers were certainly dangerous nuisances, they were not terrorists, but joyriders. . . . One car had already crashed through the roadblock. . . . The courts found his first three shots were fired with the aim of protecting Aindow. But by the fourth shot, the car and the perceived threat to life had passed and with them, Clegg's justification for firing. . . . Clegg was jailed for life for murder.

[186] WAYNE R. LAFAVE AND AUSTIN W. SCOTT, CRIMINAL LAW SECOND EDITION, 455 (1986)

assault with similar force.[187] Use of deadly force is not permitted. But when a person believes that he is in danger of losing his life or will suffer grievous bodily harm, he may use deadly force.[188]

The following comments were made by the SJA for UNITAF in Operation Restore Hope. He said of the concepts of minimum force and proportionality that "these concepts were not new to Operation Restore Hope; they apply broadly to occasions when deadly force is not authorized."[189] As a soldier related to me in Somalia, "proportional force means deciding whether or not the situation warrants using my weapon. But if I decide to use it, there is no restriction on whether I use one bullet or the entire clip. It depends on my judgement. Once I use deadly force, that is it."[190]

Regardless of whether United States law regarding the use of force by domestic police differs, if at all, from the Australian perspective, United States military doctrine does not incorporate the concept of proportional force to the application of deadly force; whereas Australian military doctrine does do so.

The United States concept of proportional force differs from the Australian concept. However, the United States concept and interpretation are understandable and appropriate within its context. For the United States defense forces, the concept of proportional force is the practical application of the principle of proportionality. It is the

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[187] U.S. v Jones, 3 MJ 279 (C.M.A. 1977) and U.S. v Perry, 36 C.M.R. 377 (C.M.A. 1966).

[188] U.S. v Jackson, 36 C.M.R. 101 (C.M.A. 1966).

[189] F.M. Lorenz, *Law and Anarchy in Somalia*, PARAMETERS, Winter 1993-94, at 34.

[190] Words paraphrased from an interview which the author had with an American military policeman in Somalia between May 1 and May 12, 1993.

use of overwhelming deadly force to overcome any hostile act. This is in accordance with the previously described principle of war called mass. Applying this concept of mass practically to any military operation, including the previously mentioned self-defense, one is confronted with the compliance with the principle of proportionality, not the concept of proportional/minimal force.

For the United States, the principle of proportionality permits the use overwhelming force to overcome a hostile act. In doing so there is an acute awareness of the potential for one's own military casualties. Therefore, deadly force is unleashed in an overwhelming manner to destroy or neutralize the pertinent hostile act. Force is utilized to comply with this proportionality principle. This force is called proportional force but from an Australian interpretation, it is not proportional force. Within United States military doctrine, the principles of mass, hostile act, self defense and proportional force are meaningful and useful. However, within the context of the creation of standing ROE for combined operations they are inappropriate. Standing ROE must address these major differences between the understanding of proportional force and the principle of proportionality. The Australian concept of proportional response is directly relative to the severity of the threat. The United States doctrine has not fully absorbed this nexus and is orientated towards high intensity conflict and general war.[191]

C. Timeliness and Relativity

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[191] Interview with Lieutenant Colonel Bill Nagy, Mission Planning Service, Department of Peacekeeping Operations, United Nations (Jan. 19, 1995) [hereinafter Nagy].

These two mission-specific influences are best dealt with together as they are intrinsically related. Relativity and timeliness are crucial when acting in self defense.

Relativity is the causal connection "between the response and the action prompting the response. It is response related to the incident."[192] These two factors are very much within the consideration of the right to use self defense by any United Nations military force. Relativity means that if the act of self defense is exercised against another belligerent, the retaliatory action is being taken only against that unit, installation or area from which the hostile act has been received. It is a concept which looks at countering the possibility of the conflict escalating. Timeliness means that the response must be suitably connected by time to the hostile act which is being opposed. Any response must be closely timed to coincide with, or at least follow on in a natural time sequence from the hostile act. Any acts of self-defense must be as an immediate response to a previously committed hostile act. They must be directed against the persons or area immediately responsible for the hostile act.

Australian doctrine embraces this imperative though not under this title. It says that "[f]orce used in self defense must be closely regulated in terms of time, space and degree of intensity. Only hostile units which are singly or collectively prosecuting an armed attack (or forces integral to the attack) may be engaged with the aim of quickly terminating self-defensive action. *Potentially*[193] *hostile forces which are beyond range of their known weapon capabilities and not closing on friendly forces should not be attacked*

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192 *See* Nagy, *supra* note 184.

193 My emphasis.

without specific authority."[194] The singular important point in the Australian doctrine is the in-built braking mechanism. Australian forces are not permitted to take the fight beyond those who have committed the hostile act. The forces which have prosecuted the hostile act are dealt a retaliatory blow both swift and commensurate with the threat which they have posed; not what it is believed that they will pose in the future.

These concepts of timeliness and relativity are not present in United States doctrine. United States doctrine, in this regard, is guided by two factors. The first is the principle of war entitled mass, discussed previously. This must be coupled with the concept of self-defense. The use of force has to comply with criteria of necessity and proportionality according to United States legal doctrine.[195] Yet, the concept of proportionality is in accordance with the war principle of proportionality, not the concept of proportional force as understood and dictated by Australian domestic law. One legal commentator said, that "[b]ecause the relationship between objective and threat is often unclear in the low intensity conflict arena, a strategy to fight . . . must always focus on the underlying political purpose of the states."[196] He further states that "[i]t must be clearly and unequivocally the policy of the United States to fight back - to resist challenges, to defend our interests and to support those who put their own lives on the line in a common cause. Implementation of this proactive policy requires that we make fullest use of all the weapons in our arsenal . . . . While we should use our military

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[194] *See* DOCTRINE MANUAL, *supra* note 19, at 38-2.

[195] Lieutenant Commander J. Winthrop, *Attack on the Iraqi Intelligence Service Headquarters*, The Army Lawyer, Aug. 1993, at 46 [hereinafter Winthrop].

[196] *See* Terry 1, *supra* note 149, at 66.

power only if conditions justify it and other means are not available, there will be instances, ... where the use of force is our only alternative. In this circumstance, our action would be fully justified as a necessary defensive measure to eliminate a continuing threat or to save United States lives."[197]

Colonel James Terry, legal advisor to the Chairman of the Joint Chiefs of Staff, describes the concept of "linkage" which encapsulates the American stance regarding relativity. He says, "[w]hen a clear linkage to a supporting state exists, we must publicize that relationship and attack with discrimination only those targets which most affect the well-being of the state sponsor. The 'center of gravity' in the sponsoring state must always be that target whose destruction will most significantly undermine the target state's will to commit future acts of terror against us."[198] This stance with regard to terrorism can be translated into the type of response that the United States Army will have in the operational settings which are the subject of this thesis. It is applying the concepts of mass and self-defense in a manner that would not be contemplated by the Australian Army in this type of armed conflict. An example will serve to illustrate the point.

One writer's comments are that "[o]n 26 June 1993, Two United States warships launched 23 Tomahawk land attack cruise missiles at the Iraqi Intelligence Service Headquarters in Baghdad, Iraq. Twenty of the missiles struck the intended target, inflicting what Pentagon spokesmen described as significant damage to the building. The

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197 *See id.*

198 *See id.*

remaining three missiles struck a neighboring residential area . . . In his letter advising Congress of his action, President Clinton stated that the attack was in response to the Iraqi orchestrated attempt to assassinate former President Bush during his visit to Kuwait in April of 1993."[199] This illustrates the United States attitude towards relativity and timeliness. Here, 23 cruise missiles were launched some two months after the catalyst for such action. Suffice it to say that this type of response does not come within the bounds of the Australian interpretation of what relativity and timeliness are.

D. Mission Creep

Australian doctrine says that "ROE are authorized for use in specific operational situations or for specific missions. Commanders are authorized to keep authorized ROE under review so that timely changes may be made or requested to meet changing operational conditions."[200] This is a common factor between the United States and Australia. The changing circumstances will always dictate a change in the ROE. The major factor is the rate at which circumstances change. The more prescriptive and standardized ROE are drafted, the more rapidly the need for change occurs.

It is under these circumstances that what euphemistically is called mission creep occurs. Mission creep is a frequently used United States military term. All operations contemplate a change in the ROE. Mission creep has no precise definition. It has been described as "a positive development in that each new estimate of the situation and

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[199] *See* Winthrop, *supra* note 188, at 45.

[200] *See* DOCTRINE MANUAL, *supra* note 19, at 38-2.

importance of rapidly adjusting the mission and tasks is appropriate."[201] In Somalia, "political agendas of key participants in the operation sought to expand the UNITAF activities and areas of operation beyond its initial, carefully limited scope defined by the mission of securing the environment for humanitarian relief operations."[202] A senior United States Army officer said that "[t]he mission creep phenomenon underscores the importance of developing a definitive mission statement - a statement that ensures parties involved understand the limits of the commander's charter,"[203] rather than the continual redrafting of ROE in an attempt to meet the needs of a dynamic operation. Mission creep described within United States experience is a United States phenomenon. It is a direct result of the United States Army's "preoccupation with template solutions."[204] In drafting ROE, "they have tried to simplify the decision-making process"[205] in conformity with the "simplicity" principle of war. In so doing, there has arisen the complication of implementing rigid ROE in a dynamic operation, with resulting mission creep.

E. Command and Control

The command and control of military forces assigned to peace operations is an

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201 UNITED STATES ATLANTIC COMMAND, MULTI-SERVICE PROCEDURES FOR FOREIGN HUMANITARIAN ASSISTANCE OPERATIONS, VERSION 3, Oct. 1993, at 4-17 [hereinafter USACOM].

202 *See id.* at 3-3.

203 Major General Waldo D. Freeman et al, *Operation Restore Hope: A US CENTCOM Perspective*, MILITARY REVIEW, Sep. 1993, at 67.

204 *See* Nagy, *supra* note 184.

205 *See id.*

area in which the United States and Australia and deviate. As one commentator says, "[w]hen United States forces are under the operational control of a United Nations commander:

> * United States commanders will maintain the capability to report separately to higher United States military authorities; and
>
> * United States commanders will refer orders that are illegal under United States or international law, are imprudent and unnecessarily risk United States
>
> lives, or are outside the mandate of the United Nations mission to which the United States has agreed to higher authorities.
>
> If a United States commander is unable to resolve a significant difference with the United Nations commander leading the operation:
>
> * the United States will in all cases reserve the right to terminate [their] participation at any time and to take whatever actions are necessary to protect United States forces. Of course, United States units will remain at all times under United States administrative control."[206]

Nowhere was this made more apparent than in Operation Restore Hope in Somalia. The United States CENTCOM retained tactical control over the combat forces which the United States had sent there. There were "two linear chains of command in Somalia. The United States chain of command which was separate from that of the

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[206] Colonel James P. Terry, *The Evolving U.S. Policy for Peace Operations*, S. ILL. U. L.J., Fall 1994, at 127 [hereinafter Terry 2].

United Nations chain of command."[207] The United States tactical commander was dual-hatted with respect to command and control arrangements. This command and control arrangement hampered rescue arrangements by the United Nations rescue teams such that "with good co-ordination before hand, United Nations rescue teams could have saved lives that were lost."[208]

The other significant feature of United States command and control arrangements is regarding NEOs. The Department of State has primary responsibility regarding the operation..[209] "The Chief of Diplomatic Mission or Principal Officer of Department of State is lead United States official for the protection and evacuation of United States combatants. The Chief of Mission is responsible for drafting evacuation plans. The Department of Defense, through the Chairman of the Joint Chiefs of Staff co-ordinates the deployment of United States forces in support of NEOs."[210]

Australian doctrine states that in relation to United Nations style of operations, "command is vested, by the Security Council, in the Secretary-General who will appoint the force commander. The Australian contingent will be placed under operational control of the United Nations Force Commander who is responsible for operational tasking . . . National command responsibilities . . . would include administrative and

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[207] Interview with Colonel Couton, Chief of Staff to the Secretary-General's Military Advisor, United Nations, at New York N.Y. (Jan. 19, 1995) [hereinafter Couton Interview].

[208] *See* Couton Interview, *supra* note 200.

[209] See EXECUTIVE ORDER 12656 AND DEPARTMENT OF DEFENSE DIRECTIVE 3025.14, PROTECTION AND EVACUATION OF U.S. CITIZENS AND DESIGNATED ALIENS IN DANGER AREAS ABROAD (Nov. 5, 1990).

[210] LIEUTENANT COLONEL KEVIN WINTERS, NONCOMBATANT EVACUATION OPERATIONS (NEOS) SUBJECT OUTLINE, TJAG School, at 15-2.

logistic procedures."[211]

If any Australian contingent were part of a larger combined force, "the combined force commander (CFC) would be responsive through the Combined Chiefs of Defense Committee (CCDC) which consists of the military leaders of the participating nations . . . . The CCDC would exercise full command or operational command."[212] National command of forces would be retained by the chief of the respective defense force exercised through national contingent commanders.

Australian doctrine states that "[i]n circumstances where a combined force is deployed to assist a government restore or maintain authority, the force would be responsive to a heads of mission council for tasking. The council would comprise the heads of mission of member nations of the combined force and the national contingent commanders."[213] In no way would such a council exercise any practical command over the Australian military force. Such advice would be simply that; advice.

VII. Conclusion

This thesis commenced by questioning whether the creation of a common set of standing ROE between the United States and Australia was viable. It proposed a five-step analysis by which factors influencing the ROE of each nation could be identified

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211 *See* DOCTRINE MANUAL, *supra* note 19, at 35-2.

212 *See id.* at 7-14.

213 *See id.*

and compared. This thesis has now come full circle, as illustrated in *Figure 9*.

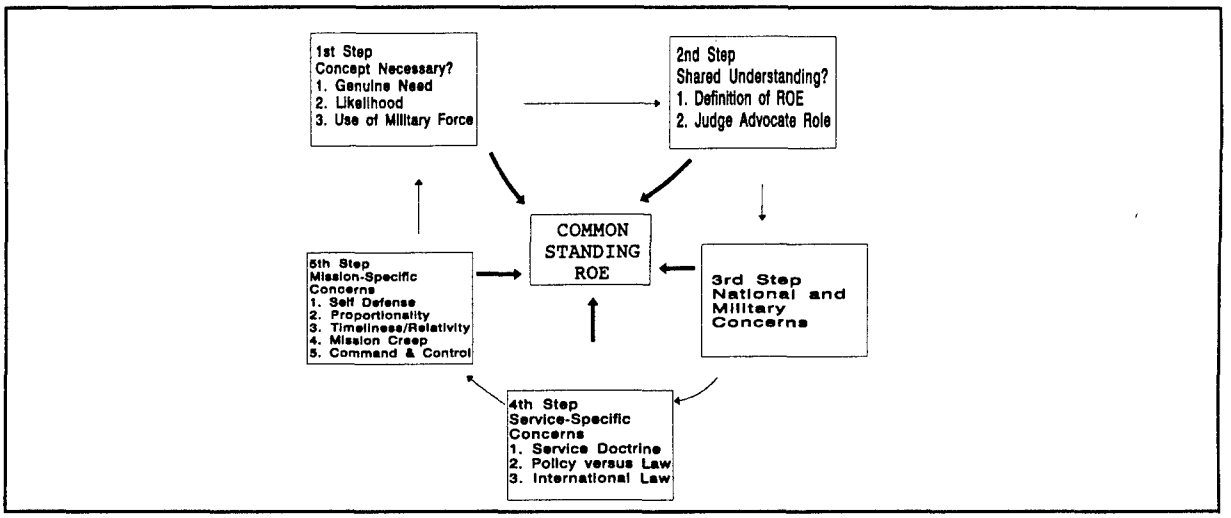

Figure 9

Part II was the first step, which queried whether the idea of common ROE even needed to be addressed. After noting that the scope of conflict varies inversely with the scope or restrictions of ROE, Part II identified the rationale underpinning the use of ROE. This rationale is the effective and efficient application of force, which is the single distinguishing feature between the actions of a disciplined army and those of a mob. Part II further noted that a genuine need exists for common ROE and that combined operations between the United States and Australia are likely.

Finally, Part II reviewed the circumstances that exist which require the use of national force and concluded that, although there were similarities, there was a substantial divergence doctrinally. The divergence consisted of the United States tendency to use military force in non-permissive circumstances whereas the Australian

doctrine is silent about it. The implication of this divergence in doctrine is that the Australian Government would not countenance such use of military force.

Part III was the second step. It addressed whether the United States and Australia share a common understanding of ROE. Rules of engagement were defined and illustrated with respect to how they fit into the LOAC. The difference between the countries in this area lies in a form of aggressiveness within the definition of diplomacy that permeates United States military doctrine and is a recurring theme in all combined operations involving United States forces. Finally, Part III concluded that judge advocates serve crucial but distinct roles in the two countries.

Part IV was the third step. It identified to what extent national and military concerns influence ROE. Part IV identified the historical concept of manifest destiny and how that concept influenced the application of United States military force. But it went further. It showed how this historical concept has led to the development of doctrine regarding the application of force today. Part IV identified the concept of the moral high ground and illustrated just how much this concept is woven into United States culture and military doctrine.

Part V contained the fourth step. This part addressed to what extent service-specific concerns influence ROE. It compared United States doctrine with Australian doctrine. Once again, the recurrent theme of aggressiveness was present, specifically with regard to the principle of war called mass. Part V identified that this principle of war was not the same as the Australian principle called concentration of force. But the analysis went further. It looked at another United States principle of war--simplicity--

and demonstrated how compliance with this principle has caused the United States approach to ROE to be unnecessarily complicated, at least by Australian standards. Finally, this part contrasted the influence of international conventions and treaties. Not only have the nations ratified different international conventions and treaties but they are interpreted differently in Washington and Canberra.

Part VI was the fifth and final step. This part identified to what extent mission-specific concerns influence ROE. There were five mission-specific influences identified. Part VI noted the United States interpretation of self-defense has a wider meaning than the Australian one. Doctrinally, the United States differs from Australia in two significant respects. First, the United States has a more expansive definition of self-defense. Second, the United States doctrine incorporates defense of mission expansively by comparative Australian standards.

Part VI also contrasted the United States and Australian approaches to proportionality and proportional force. As elsewhere, interpretations of these terms diverge--indeed the United States military has no concept resembling the latter term. Mass, the principle of United States doctrine, has changed the United States military perception of these concerns. Timeliness and relativity are still crucial notions that differ in the two systems.

Part VI further observed that mission creep is a specifically United States phenomenon, due principally to the United States practical application of the simplicity principle. The command and control approaches of each nation differ primarily because the United States commander must wear two hats whereas the Australian commander

must wear only one.

What then is the upshot of this thesis? The national interpretation of any ROE is the result of the confluence or interaction of all the influences that have been described in this thesis. First impressions of ROE are that they are relatively simple. Simple, in the sense that soldiers are being told what force they are permitted to use in military operations. But this is oversimplifying the matter. Rules of engagement are the result of the interaction of the preceding influences. It is not possible to compartmentalize or pigeonhole the extent that each of these influences will play. This is because there will never be a standard set of subjective circumstances to which they will apply. All of these influences will have a different impact regarding the nature of the military operation. This is a valid approach.

But these influences will have a more significant impact when dealing with two countries' influences on ROE. It is obvious from the forgoing analysis that the United States and Australian approaches to ROE do not intermesh well. The safety and effectiveness of troops in combined operations, however, depend on continued effort to mesh these approaches. During a deployment, they "will all too often be faced with the need to make quick decisions in difficult circumstances . . . . lying behind a log or a wall, perhaps under fire."[214]

That these various concerns exist to varying degrees in influencing each nation's approach to ROE does not mean that approach either of the United States or Australia is fundamentally flawed. There are specific reasons why each nation's approach to ROE

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[214] *See* Abigail, *supra* note 71, at 88.

has evolved in its particular way. That each nation diverges from a common approach does not preclude combined operations in the future, but if those combined operations are going to be effective, we must replace the template mentality reflected in Appendix A with frequent analysis of the five steps in this thesis. In this sense, these steps must be iterative. The iterative nature of the analysis justifies the arrow between steps 5 and 1 in *Figure 9*. Over time, as the two nations develop combined doctrine, publish it in manuals, and train together, the outcome of the analysis may yield a true body of combined rules of engagement. For the short term, however, the product will be an iterative process of analysis rather than anything resembling a template. Let this thesis be the catalyst for the development of United States and Australian military synergy. United we stand, divided we fall. As one perceptive observer of American society has observed, "[r]espect for the law and the freedom it provides is perhaps the fundamental authority structure in the United States. . . . Americans therefore tend to respect structures of authority; they are accustomed to them and need them as a predictable framework within which to function."[215] Let us hope that a template mentality spawned by this respect does not leave both nations stranded on their respective versions of the moral high ground.

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[215] *See* RENWICK, *supra* note 79, at 45.

Presented by LTG Robert L. Ord III
Commander, United States Army Pacific
CGS Exercise, 28 June 1994

ASIA - PACIFIC ARMIES
LAND FORCES RULES OF ENGAGEMENT

1. (U) Situation. Basic OPLAN/OPORD.

2. (U) Mission. Basis OPLAN/OPORD.

3. (U) Execution

a. (U) Concept of the Operation

(1) (U) If you are operating as a unit, squad, or other formation, follow the orders of your leaders.

(2) (U) Nothing in these rules negates your inherent right to use reasonable force to defend yourself against dangerous personal attack.

(3) (U) These rules of self-protection and rules of engagement are not intended to infringe upon your right of self defense. These rules are intended to prevent indiscriminate use of force or other violations of law or regulation.

(4) (U) Commanders will instruct their personnel on their mission. This includes the importance of proper regard for the local population and the need to respect private property and public facilities. Expect that all missions will have the inherent task of force security and protection.

(5) (U) ROE cards will be distributed to each deploying soldier (see card following this appendix).

b. (U) Rules of Self-protection for all soldiers

(1) (U) Forces will protect themselves from threats of death or serious bodily harm. Deadly force maybe used to defend your life, the life of another coalition soldier, of the life of persons under Coalition control. You are authorized to use deadly force in self-defense when:

(a) (U) You are fired upon;

(b) (U) Armed elements, mobs, and/or rioters threaten human life;

(c) (U) There is a clear demonstration of hostile intent in your presence;

(2) (U) Hostile intent of opposing forces can be determined by unit leaders or individual soldiers if their leaders are not present. Hostile intent is the threat of imminent use of force against Coalition forces or other persons in those areas under the control of Coalition Forces. Factors you may consider include:

(a) (U) Weapons: Are they present? What types?

(b) (U) Size of the opposing force

(c) (U) If the weapons are present, the manner in which they are displayed; that is, are they being aimed? Are the weapons part of a firing position?

(d) (U) How did the opposing force respond to the forces?

(e) (U) How does the force act towards unarmed civilians?

(f) (U) Other aggressive actions.

(3) (U) You may detain persons threatening or using force which would cause death, serious bodily harm or cause interference with mission accomplishment. You may detain persons who commit criminal acts in areas under Coalition control. Detainees should be given to military police as soon as possible for evacuation to central collection points (see paragraph d below).

c. (U) Rules of Engagement. The relief property, foodstuffs, medical supplies, building materials and other end items, belong to the relief agencies distributing to the populace. Your mission includes safe transit of these materials to the populace.

(1) (U) Deadly force may be used only when:

(a) (U) Fired upon;

(b) (U) Clear evidence of hostile intent exists (See above for factors to consider to determine hostile intent);

(c) (U) Armed elements, mobs, and/or rioters threaten human life.

(2) (U) In situations where the deadly force is not appropriate, use the minimum force necessary to accomplish the

mission.

(3) (U) Patrols may use deadly force if fired upon or if they encounter opposing forces which evidence a hostile intent. Non-deadly force or a show of force should be used if the security of Coalition forces is not compromised by doing so. A graduated show of force includes:

(a) (U) An order to disperse;

(b) (U) Show of force/threat of force by Coalition forces that is greater than the force threatened by the opposing force;

(c) (U) Warning shots aimed to prevent harm to either innocent civilians or the opposing force;

(d) (U) Other means of non-deadly force;

(e) (U) If this show of force does not cause the opposing force to abandon its hostile intent, consider if deadly force is appropriate.

(4) (U) Use of barbed wire fences is authorized.

(5) (U) Unattended means of force (e.g. mines, booby traps, trip guns) are NOT authorized.

(6) (U) If Coalition forces are attacked or threatened by unarmed hostile elements, mobs, and/or rioters, Coalition forces will use the minimum amount of force reasonably necessary to overcome the threat. A graduated response to unarmed hostile elements may be used. Such a response can include:

(a) (U) Verbal warnings to demonstrators in their native language;

(b) (U) Show of force, including the use of riot control formations (see below for rules about using RCAs);

(c) (U) Warning shots fired over the heads of hostile elements;

(d) (U) Other reasonable uses of force, to include deadly force when the element demonstrates a hostile intent, which are necessary and proportional to the threat.

(7) (U) All weapons systems may be employed throughout the area of operations unless otherwise prohibited. The use of weapons systems must be appropriate and proportional considering the threat.

(8) (U) Coalition forces will not endanger or exploit the property of the local population without their explicit approval. Use of civilian property will usually be compensated by contract or other form of payment. Property that has been used for the purpose of hindering our mission will be confiscated. Weapons may be confiscated and demilitarized if they are used to interfere with the mission of Coalition forces (see rule (10) below).

(9) (U) Operations will not be conducted outside of the landmass, airspace, and territorial seas. However, any Coalition force conducting a search and rescue mission shall use force as necessary and intrude into the landmass, airspace, or territorial sea of any country necessary to recover friendly forces.

(10) (U) Crew-served weapons are considered a threat to Coalition forces and the relief effort whether or not the crew demonstrates hostile intent. Commanders are authorized to use all necessary force to confiscate and demilitarize crew-served weapons in their area of operations.

(a) (U) If an armed individual or weapons crew demonstrate hostile intentions, they may be engaged with deadly force.

(b) (U) If an armed individual or weapons crew commit criminal acts but do not demonstrate hostile intentions. Coalition forces will use the minimum amount of force necessary to detain them.

(c) (U) Crew-served weapons are any weapon system which requires more than one individual to operate. Crew-served weapons include, but are not limited to, tanks, artillery pieces, antiaircraft guns, mortars, and machine guns.

(11) (U) Within those areas under the control of Coalition forces, armed individuals may be considered a threat to Coalition forces and the relief effort, whether or not the individual demonstrates hostile intent. Commanders are authorized to use all necessary force to disarm and demilitarize groups of individuals in those areas under the control of Coalition forces. Absent a hostile or criminal act, individuals and associated vehicles will be released after any weapons are removed/demilitarized.

d. (U) Use of Riot Control Agents (RCAs). Use of RCAs requires the approval of Coalition Commander. When authorized, RCAs may be used for purposes including but not limited to:

(1) (U) Riot control in the area of operations including the dispersal of civilians who obstruct roadways or otherwise impede distribution operations after less mans have

failed to result in dispersal;

(2) (U) Riot control in detainee holding areas or camps, in and around material distribution or storage areas;

(3) (U) To protect convoys from civil disturbances, terrorists, or paramilitary groups.

e. (U) Detention of Personnel. Personnel who interfere with the accomplishment of the mission or who use or threaten deadly force against Coalition forces, Coalition or relief material distribution sites, or convoys may be detained. Persons who commit criminal acts in areas under the control of U.S. forces may be likewise detained.

(1) (U) Detained personnel will be treated with respect and dignity.

(2) (U) Detained personnel will be evacuated to a designated location for turn-over to military police.

4. (U) Service Support. Basic OPLAN/OPORD.

5. (U) Communication and Signal. Basic OPLAN/OPORD.

ASIA - PACIFIC ARMIES

LAND FORCES RULES OF ENGAGEMENT

Nothing in these rules of engagement limits your right to take appropriate action to defend yourself and your unit.

a. You have the right to use force to defend yourself against attacks or threats of attack.

b. Hostile fire may be returned effectively and promptly to stop a hostile act.

c. When coalition forces are attacked by unarmed hostile elements, mobs, and/or rioters, you should use the minimum force necessary under the circumstances and proportional to the threat.

d. You may not seize property of others to accomplish your mission.

e. Detention of civilians is authorized for security reasons or in self defense.

REMEMBER

* The coalition is not at war.
* Treat all persons with dignity and respect.
* Use minimum force to carry out mission.
* Always be prepared to act in self - defense.

ORDERS FOR OPENING FIRE (OFOF)
LOW LEVEL OPS IN AUSTRALIA
UNOPPOSED DEPLOYMENT OVERSEAS

1. Your immediate commander on the spot will order any change in the states of weapon readiness. While your commander will normally issue the order to open fire, you always have the right to use appropriate force to protect yourself and those it is your duty to protect. Whenevr possible a warning should be given before opening fire.

2. You must only use the **MINIMUM FORCE** necessary. **MINIMUM FORCE** includes, in increasing order:

a. open display of weapons,
b. verbal warning,
c. barring access to the point being protected,
d. physical restraint,
e. pointing weapons, and
f. firing weapons.

3. If you have to fire: **FIRE ONLY ENOUGH ROUNDS TO ACHIEVE YOUR PURPOSE.**

4. You are not to use force if at all possible and your conduct must cause the least posible concern, fear or danger to the local population.

MAJOR CONVENTIONS AND TREATIES GOVERNING WARFARE.**

No.	Name of Convention or Treaty	Ratified By	
		Aust.	U.S.A.
1.	Declaration Renouncing the Use, in Time of War, Explosive Projectiles Under 400 Grams Weight	Yes	No
2.	Declaration Prohibiting the Use of Expanding Bullets (Dum-Dums)	Yes	No
3.	Hague III: Convention Relative to the Opening of Hostilities	Yes	Yes
4.	Hague IV: Convention Concerning the Laws and Customs of War on Land	Yes	Yes
5.	Hague V: Convention Respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land.	Yes	Yes
6.	Hague VI: Convention Relating to the Status of Merchant Ships at the Outbreak of Hostilities.	Yes	No
7.	Hague VII: Convention Relating to the Conversion of Merchant Ships into Warships.	Yes	No
8.	Hague VIII: Convention Relative to the Laying of Automatic Submarine Contact Mines.	Yes	Yes
9.	Hague IX: Convention Concerning the Bombardment by Naval Forces in Time		

	of War.	Yes	Yes
10.	Hague XI: Convention Relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime War.	Yes	Yes
11.	Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.	Yes	Yes
12.	Convention on the Prevention and Punishment of the Crime of Genocide.	Yes	No
13.	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.	Yes	Yes
14.	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea.	Yes	Yes
15.	Geneva Convention Relative to the Treatment of Prisoners of War.	Yes	Yes
16.	Geneva Convention Relative to the Protection of Civilian Persons in		

	Time of War.	Yes	Yes
17.	Convention for the Protection of Cultural Property in the Event of Armed Conflict.	Yes	No
18.	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and their Destruction.	Yes	Yes
19.	Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques.	Yes	Yes
20.	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).	Yes	No
21.	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).	Yes	No
22.	Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be		

	Deemed to be Excessively Injurious or to have Indiscriminate Effects and Protocols I, II and III.	Yes	No
23.	United Nations Convention on the Law of the Sea.	Yes	No
24.	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons.	Yes*	No

* This convention will enter into force 180 days after the 65th instrument of ratification has been lodged. At the time of writing this thesis, the writer had been unable to confirm whether or not this had occurred.

** The material contained in this appendix was drawn from the collection of conventions, resolutions and other documents compiled in the book by DIETRICH SCHINDLER AND JIRI TOMAN, THE LAWS OF ARMED CONFLICT, (1988).