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The Commander's Role in Developing Rules of Engagement

Lieutenant Colonel James C. Duncan, U.S. Marine Corps

SINCE PROPERLY CRAFTED RULES OF ENGAGEMENT (ROE) are essential to the success of any operation, the importance of the commander's role in this process cannot be overstated.¹ For each commander, ROE represent an integral part of command and control, and they provide the most effective means of implementing the political goals of civilian leadership, as well as the strategic decisions made by higher headquarters. Effective ROE must be flexible, and they must evolve with the operation. Because commanders are responsible for everything that their forces do or fail to do, they must take care that appropriate direction on the use of force is incorporated into ROE for the guidance of military members placed in harm's way. As in the past, future commanders can expect to face intense pressure to come up with the "right" ROE for their specific operation. To meet this challenge, commanders must be proactive in organizing their staffs so that these command responsibilities are met.

The Joint Chiefs of Staff (JCS) guidance to United States military commanders on the use of force is known as the "Standing Rules of Engagement," and it replaced the JCS "Peacetime Rules of Engagement" on 1 October 1994.² The current version of the "Standing Rules of Engagement" establishes the fundamental procedures and policies for U.S. military commanders during all military conflicts, contingencies and operations. The Standing Rules of Engagement are designed to assist the commander in crafting ROE for assigned missions and to lay down policy on the use of force for self-defense to ensure the safety and survival of the commander's unit and other U.S. forces in the vicinity.

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In past operations, many commanders have delegated the preparation of ROE to their staffs, primarily to the Staff Judge Advocate (SJA). This has led to an ROE development process dominated by the SJA, the level of that dominance varying from command to command. Unfortunately, the SJA's orchestration of ROE development has not encouraged the formulation of ROE closely harmonized with the command's operational plans. Despite this problem, U.S. military forces utilizing the ROE prepared primarily by their SJAs have done exceptionally well; however, the crucial question for operational commanders is whether the ROE development process can be improved. The answer to this question is a resounding yes.

ROE planning for any operation should be done concurrently with the actual planning for the specific mission. Commanders must ensure that ROE are not prepared in isolation from operational planning, a dichotomy that could have disastrous consequences. Developing the "right" ROE requires active participation by a number of officers within the commander's staff. As operations progress, small and overworked staffs can have a negative impact on the quality of ROE. Commanders should prepare for the long haul by making certain that the headquarters staff is capable of a sustained battle-staff rhythm. Of equal importance is the role of the SJA in ROE development. Commanders need the active participation of the SJA, but by no means should the SJA dominate ROE development.

Since the process is similar for most operations, this article will focus on the preparation of ROE for a joint task force (JTF). While the development of ROE should not control the mission, the political or operational influences behind the mission may necessitate a limitation on the level of force to be used. These influences, normally referred to as bases, may be viewed as the specific terrain to which actual ROE must conform.

What Are the Bases for the ROE?

Crafting ROE for a JTF operation requires commanders and their staffs to understand these fundamental bases, to have a good working knowledge of the Standing Rules of Engagement, and to have a firm grasp of the joint planning process. Each basis for ROE is unique, and when integrated into the ROE development process helps shape the application of military force. There are three fundamental bases for U.S. ROE: national policy, operational requirements, and the law.³ Without an adequate understanding of each distinct basis, a command's attempts to prepare ROE will be stymied.

National Policy. Of the three bases, national policy may be the hardest to articulate. National policy is often called the political objective. As Carl von

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Clausewitz argued, the use of military force is simply the means of reaching a political objective:

War is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means. What remains peculiar to war is simply the peculiar nature of its means. War in general, and the commander in any specific instance, is entitled to require that the trend and designs of policy shall not be inconsistent with these means. That, of course, is no small demand; but however much it may affect political aims in a given case, it will never do more than modify them. The political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose.⁴

The “political object” mentioned by Clausewitz is another term for foreign policy. In short, ROE must be consistent with foreign policy objectives. For this reason, the commander and his staff need to understand U.S. foreign policy and the ramifications of that foreign policy for the military operation at hand. Usually, the foreign policy goals or national political objectives are stated in the guidance received from higher headquarters or from the combatant commander within whose area of responsibility the operation will take place.⁵

The general goal of U.S. national security policy is “to maintain a stable international environment compatible with U.S. national security interests.”⁶ To support this policy, the United States has formulated a global objective of deterring armed attack against its interests. For effective deterrence, one must have the ability to fight at any level of conflict; since the United States has a broad capability to use conventional weapons (including nonlethal ones) as well as nuclear weapons, it should have a very credible deterrent. If deterrence fails, the national policy of the United States permits responses that (1) are proportional to the provocation; (2) are designed to limit the scope and intensity of the conflict; (3) will discourage escalation; and (4) will achieve political and military objectives. Thus the crafter of ROE must be familiar not only with the broad objectives of U.S. foreign policy but also with the specific political objectives to be achieved or supported by a particular mission.

When the mission is unclear or the political leadership or combatant commanders have not plainly articulated their policy on the use of force for the operation, commanders must seek clarification. If the political objective or the mission changes, operational concerns must be reexamined to determine whether modification of ROE is necessary. Furthermore, if a restriction upon the use of force required for operational purposes conflicts with the mission plan, either the plan must be modified or a change to the restriction must be sought. Early identification of inadequacies in the guidance from senior commanders or the civilian leadership, such as the absence of mission clarity because of “mission creep,” or any potential limitation on the use of force otherwise

dictated by operational requirements, is critical to the development of ROE. By confronting these issues from the start, the commander can reduce or prevent the waste of planning time.

As we have seen, national policy objectives interact with operational requirements, and coherent ROE can be crafted only when goals and means are consistent. It is the commander's responsibility to ensure that they are.

Operational Requirements. Within the commander's staff, the primary responsibility for operational matters lies with the operations directorate, or J-3.⁷ Normally, the operational requirements the J-3 sets for a mission mirror the specific planning concepts that the staff has developed regarding unit security and the express and implied taskings. Operational concerns usually focus on the following planning elements: mobilization, employment, sustainment, redeployment of the military force, and rules of engagement.

Another operational matter that may impact upon ROE concerns the types of weapon systems to be used. For instance, if political considerations require that the use of force be in some way curtailed, there may be a need to articulate specific ROE or to issue special instructions interpreting the ROE for component commanders. For this reason, the JTF commander and the J-3 must be aware of the characteristics of all weapons to be used for the mission. This is particularly important for nonlethal systems, which may require specially drafted supplemental ROE to ensure they are used only in appropriate circumstances.

One other important operational consideration is the level of threat for the geographic location of the operation. Changes to the threat should trigger reviews and, if necessary, modifications to the ROE. Complacency or inaction regarding a change in the threat is a recipe for disaster, since the established ROE may no longer be appropriate.

The Law. The third basis for ROE is the law. Here the focus is on the tenets of American domestic law and the obligations of the United States under international law, generally the law of armed conflict. The domestic law of the United States includes the Constitution, federal statutes and regulations, court decisions, and common law.⁸ Although several major bodies of law, such as the law of the sea and the law of neutrality, are part of the larger body of international law and might be applicable to the preparation of ROE, the focus here will be limited solely to the law of armed conflict.

The law of armed conflict has been defined as "that part of international law that regulates the conduct of armed hostilities."⁹ It includes applicable treaty law as well as customary international law—which in 1900 the Supreme Court made a part of U.S. national law.¹⁰ Consistent with international law as a whole, the law of armed conflict is viewed as permissive in nature: a practice not prohibited either by customary international law or by treaty is permitted.

Legal issues surrounding each operation must be examined to make sure that the ROE will comply with the domestic law of the United States and the law of armed conflict. Some principles of the law of armed conflict are harder to apply than others; two of the most difficult are *necessity* and *proportionality*. These principles play a prominent role in determining when force should be used and how much. The primary purpose of ROE is to “provide implementation guidance on the application of force for mission accomplishment and the exercise of the inherent right and obligation of self-defense.”¹¹ All commanders and their staffs must understand these two aspects—mission accomplishment and self-defense—and how to utilize ROE as a risk-management tool.

The distinction between self-defense and mission accomplishment is easily lost if it is not understood that the meanings of necessity and proportionality are significantly different depending upon whether they are used in the contexts of self-defense or mission accomplishment. Commanders must take steps to prevent errors of this kind, since they can lead to confusion within the command concerning when to use force, thereby placing those executing a mission at greater risk.

The Use of Force in Self-Defense

The right of a sovereign nation to use force in self-defense is a fundamental principle of customary international law, closely related to national independence, national existence, and freedom from outside interference or intervention. It is acknowledged in Article 51 of the United Nations Charter:

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. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The phrase “inherent right of individual and collective self-defense” set forth includes the right of self-defense under customary international law as it existed when the United Nations Charter was written.¹² Encompassed within this concept of self-defense is the right of anticipatory self-defense:¹³ when an imminent threat to a nation’s safety, security, or existence arises, that nation may protect itself through the exercise of proportionate force.¹⁴

Under the Standing Rules of Engagement for U.S. military forces, self-defense has been divided into three main categories. The first, *national*

self-defense, consists of defending “the United States, U.S. forces, and in certain circumstances, U.S. nationals and their property, and/or U.S. commercial assets.”¹⁵ The second, *collective self-defense*, is defined as defending “designated non-U.S. forces, and/or designated foreign nationals and their property, from a hostile act or hostile intent.” Unlike national self-defense, collective self-defense may not be exercised below the national level.¹⁶ The third major category is *unit self-defense*, defined as “defending a particular U.S. force element, including individual personnel thereof, and other U.S. forces in the vicinity, against a hostile act or hostile intent.”¹⁷ Under the Standing Rules of Engagement, *individual self-defense* is a subset of unit self-defense. Since the right of self-defense does indeed extend to the individual, commanders have a duty to ensure that each person under their command has received training on the principles of self-defense as articulated in the Standing Rules of Engagement.¹⁸

To stress the importance of self-defense, the following statement is repeated in bold print eleven times in the Standing Rules of Engagement.

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 self-defense of the commander’s unit and other U.S. forces in the vicinity.¹⁹

The words “all necessary means available” have a special, classified meaning under the Standing Rules of Engagement.²⁰ Even without this definition, however, the intent is clear. In self-defense commanders may take those actions and use those weapon systems not otherwise prohibited.

To explain the phrase “all appropriate action,” the Standing Rules of Engagement state that in self-defense the commander should attempt to de-escalate the situation without employing force. If the situation cannot be controlled without force, proportional force should be used to disable or destroy the imminent threat. That is, the amount of force that lawfully may be used is no more than what suffices to remove that danger. If force is needed, it should not exceed that which is required to decisively counter the hostile act or hostile intent and ensure the continued safety of U.S. forces or other protected personnel or property.²¹ When the hostile force no longer represents an imminent threat, the right to use force in self-defense ends. Since the obligation and authority for self-defense is inherent in command, all commanders have a standing duty to specify when the application of force for unit self-defense is appropriate.

The elements of self-defense are necessity and proportionality. As noted above, the meanings of these principles in the self-defense context are much different from their meanings when applied under the law of armed conflict for mission accomplishment. An understanding of these two principles is crucial to

ROE, for necessity and proportionality, as amplified by the Standing Rules of Engagement, will be the basis for the judgment of the commander as to what constitutes an appropriate response when acting in self-defense.²²

Necessity in Self-Defense. The principle of necessity is the key to determining whether a lawful reason exists for the use of force in self-defense. In this context, necessity refers to the presence of imminent danger due to the actions of adverse parties, forces, or nations. Under the Standing Rules of Engagement, the necessity for self-defense may be triggered by a *hostile act* or demonstration of *hostile intent*.²³ Of these two, hostile intent has always been the more difficult to ascertain. The concept of hostile intent may be viewed as an expression of the national right of anticipatory self-defense at the unit level. An assessment of hostile intent is not based solely on objective criteria but relies in large measure on the evaluation of intelligence information about the past, present, and future activities of a potential adversary and on the experience of the decision maker. A determination of hostile intent is, therefore, largely subjective. However, every commander should be prepared after the fact to explain why he or she felt that hostile intent was present.

Proportionality in Self-Defense. In self-defense, proportionality demands that “the force used must be reasonable in intensity, duration, and magnitude, to the perceived or demonstrated threat based on all facts known to the commander at the time.”²⁴ Proportionality in self-defense, boiled down to the basics, involves determining how much force is necessary to overcome the imminent danger created by a hostile act or demonstration of hostile intent. Although any decision regarding how *much* force is proportionate will be subjective, the goal is to apply sufficient force to handle the threat decisively—but no more than that.²⁵

When the proportionality issue arises in a self-defense context, the need to use force to respond to an imminent threat has already been triggered, and the defender is facing a situation that requires a timely use of force for self-preservation. At this point, proportionality for the defender becomes a process of deciding which weapon systems will provide the force needed to counter the imminent threat. Based on an assessment of the facts, circumstances, intelligence information regarding the imminent threat, and the available weaponry, the defender must decide on the appropriate weapons. Another factor that should be considered by the defender when making this decision is how to control the level, nature and duration of that force in order to reduce or prevent injury to civilians or damage to their property.

The Use of Force for Mission Accomplishment

When force is used to accomplish a mission, it is governed by the principles of necessity and proportionality as they apply under the law of armed conflict. In contrast to the self-defense guidance in the Standing Rules of Engagement, which remains constant, ROE for mission accomplishment must be tailored to the specific needs of the mission. Mission-accomplishment ROE are prepared by modifying, where appropriate, the Standing Rules of Engagement with supplemental measures. Various categories of supplemental measures are set forth in that document, along with the following policy, in bold type:

Supplemental measures do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity.²⁶

As indicated, the right and obligation of self-defense always exists, whatever the supplemental measures. Supplemental measures "define the limits or grant authority for the use of force for mission accomplishment, not for self-defense."²⁷ Through supplemental measures the commander may either grant to subordinate units additional latitude of action or may impose specific constraints on how to carry out a mission.

Confronted with ROE that include constraints, or withhold authorities, that threaten to compromise a command's accomplishment of its assigned mission, the commander must request a change to the ROE by what is called a supplemental measure. Any supplemental measures selected or drafted must be consistent with the three bases for ROE: national policy, operational requirements, and the law.²⁸

Necessity in Mission Accomplishment. In armed conflict, only that amount of force necessary to defeat the enemy may be employed; any application of force unnecessary to that purpose is prohibited. In short, necessity limits the amount and kind of force permitted to that which is authorized by the law of armed conflict.²⁹ For example, the unjustified killing of prisoners of war would be illegal under the law of armed conflict; therefore, the concept of necessity would prohibit the use of force for such a purpose. Necessity, or "military necessity," as it is sometimes called, connotes a limitation on the application of military force.³⁰ It is important to note that military necessity does not mean military expediency. Military expediency may not be used as an excuse to expand the use of force as a matter of necessity in order to sanction violations of protections set forth in the law of armed conflict. Military necessity simply permits commanders to use force to attack lawful military objectives when there is a need to do so. "Lawful military objectives," in turn, are defined as those

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objectives whose "nature, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization at the time offers a definite military advantage."³¹ The term "definite military advantage" is often considered the advantage gained by the neutralization of an enemy's war-fighting and war-sustaining capability.³² Under this principle, force may lawfully be used, as necessary, against places or things that are being used for a military purpose by an adversary, or against the military personnel of that adversary.

Under the Standing Rules of Engagement, once an adversary's military units have been declared hostile by appropriate authority, U.S. military units may engage those forces (including their military equipment and sustainment structure) worldwide, except in neutral territory, *without* first observing a hostile act or a demonstration of hostile intent by that force.³³ An adversary's forces are most often declared hostile for purposes of mission accomplishment.

Proportionality in Mission Accomplishment. What constitutes proportional force under the law of armed conflict is very different from what may lawfully be used in self-defense to respond to a hostile act or to a demonstration of hostile intent. The primary difference involves the end state. In war, the goal is to obtain the submission of the adversary through the defeat of the adversary's military structure or units by overwhelming force. In contrast, self-defense merely allows the use of force to counter the threat posed by an adversary, to ensure the continued safety of one's own forces, and, where applicable, to deter or modify the future behavior of an adversary (a state or terrorist organization).

The principle of proportionality in the law of armed conflict context also requires that a military response or attack not cause damage to civilian property (collateral damage) or death and injury to civilians (incidental injury) that is *excessive* in light of the anticipated military advantage.³⁴ The best decision-making tool available to help the commander determine what constitutes proportionate force for mission accomplishment under the law of armed conflict is the "balancing test."³⁵ This test weighs the possible harmful effects of the contemplated level of force in terms of incidental injury to civilians and collateral damage to civilian property against the expected military advantage. Incidental injury of civilians or collateral damage to civilian property during an attack on a legitimate military target is lawful if the commander—having taken all reasonable precautions to minimize civilian injury and property damage consistent with the accomplishment of the mission and security of the force—can be judged to have reasonably balanced these unavoidable costs to an enemy's civilian population and property against the military advantage to be gained.

Responsibility for Crafting ROE in a JTF

For each JTF operation, the responsibility for ROE resides with the commander. However, time limitations and the multitude of tasks requiring the commander's personal attention often reduce commanders' ability to involve themselves directly in ROE development. Accordingly, JTF commanders must organize their staffs in a manner that will maximize the productivity of their staff officers and at the same time generate timely but thorough ROE.

Commanders may enhance their own efforts and those of their staffs regarding the preparation of the ROE through two organizational techniques: establishing a synergistic atmosphere within the JTF staff, and linking the ROE development process with the activities of mission planners. How well the commander integrates the ROE development process into operational planning and execution will impact directly upon the effectiveness of the operation. In sum, the challenge faced by the commander is to organize a functional procedure that allows for the development of the ROE in tandem with mission planning. The exact method will vary from commander to commander, based upon such factors as the perceived strengths or weaknesses of individual staff officers and battle-staff rhythm.

Under joint doctrine, the staff section with primary responsibility for crafting ROE is the operations directorate; fittingly, this staff section (the J-3) is assigned the principal duties of planning and conducting operations. This does not mean, however, that the J-3 should draft the ROE in a vacuum. The J-3 should be the leader of the staff effort to carry out the commander's vision of the operation, including the essential ROE development process.

Two distinct methods that a commander might use to integrate the ROE development process into mission planning are to establish an ROE cell or a joint planning group (JPG).³⁶ By forming an ROE cell, the commander establishes a special staff working environment that permits necessary individual and group interchanges. The ROE cell promotes these by pulling together the right staff members with the right information at the right times. Since the staff element responsible for the preparation of the ROE is the J-3, the commander should place the operations officer or deputy in charge of the ROE cell. Other members of the ROE cell should include representatives from the intelligence (J-2) and future-plans (J-5) directorates, the staff judge advocate, subject-matter experts, and officers with pertinent warfare subspecialties (such as submarine warfare or air operations). Often an expert, such as an engineer, can provide the ROE cell with a wealth of information; for example, the structural weaknesses of a target, the best weapon or explosives to destroy the target, and the possible environmental impact of a target's destruction. Since the ROE cell works best in a stable, nonfluctuating environment, it should be used primarily during the deliberate planning cycle for a contingency. In addition, the ROE cell function

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should be established early in the planning process, so that individual staff responsibilities and procedures may be set.

The obvious advantage gained from the interaction of the various staff members is the ability to anticipate and brainstorm. The overall quality of the ROE will be improved if the ROE cell is able to examine the effect that proposed ROE may have in existing situations and foreseeable circumstances. By using the ROE cell commanders move one step closer to their ultimate goal, which is to create clear, unambiguous guidance so that there will be no hesitation by the members of their commands when a decision must be made on when and how to use force.

Once established, the ROE cell will be able to handle a number of functions that are vital to the development of ROE. Within the JTF, the ROE cell should become the commander's focal point for interpreting ROE policy guidance from national authorities or the combatant commander, handling potential changes to the ROE based upon threat changes, drafting or reviewing supplemental requests to modify the ROE, and establishing procedures for preparing and developing ROE training packages.

One weakness of the ROE cell is that it is less effective for time-sensitive crisis action planning for the "branches and sequels" that may arise during operational planning. Crisis planning disrupts the normal functions of an ROE cell and stretches the officers in it too thin. In short, conducting crisis action planning inside the ROE cell would dramatically increase its battle-staff rhythm. For crisis action planning, the JTF commander may prefer to activate a JPG to adjust the ROE. In order to have the flexibility to handle ROE development for both deliberate and crisis action planning, the commander may decide to create an ROE cell and a JPG, but to create both a commander must have a robust and experienced JTF staff.

The JPG would become the core element for crisis action planning within a JTF. An effective JPG should be smaller in size than an ROE cell, but it should include the SJA (or his deputy) along with key members from the J-2, the J-3, and the J-5. With the staff judge advocate in the JPG, the requisite synergy will be present for the concomitant development of the ROE *and* the operational courses of action. The primary benefit of the JPG is that it permits early elimination of courses of action that cannot be supported by the underlying bases upon which the ROE must be developed. After the crisis action planning is complete and the execution phase begins, the commander should stand down the JPG and use the ROE cell for all ROE issues until the next crisis situation arises.

Throughout the operation, the commander should emphasize to the staff that ROE development is continuous and that it does not end with the execution phase of the operation. Should the mission or the threat change, the ROE must be reviewed.

For a JTF operation, commanders must organize their staffs to provide the setting most conducive for the development of ROE. One recommended approach is for the commander to create an ROE cell and, if needed, a JPG. No single staff section within the JTF should be allowed to dominate the preparation of the ROE. Commanders and the members of the ROE cell and JPG must have a firm understanding of national policy, operational requirements, and law as they apply to the JTF operation.

The commander should encourage the staff to be vigilant in identifying issues affecting the development of the ROE. Once essential issues are known, the ROE cell should review the potential supplemental measures in the Standing Rules of Engagement, or draft new ones to satisfy those issues. Development of the ROE for the operation should parallel the operational planning and the preparation of the courses of action for each mission. Any special capability the command needs should be scrutinized in light of the bases of ROE. If a conflict arises between the mission and the ROE, either the mission must be changed or the ROE must be modified.

Commanders also would be wise to ensure that the communication links within their staffs allow all information relevant to the use of force to find its way smoothly and quickly into the ROE cell (or the JPG). For example, the ROE cell (or JPG) must be provided with the special characteristics of weapon systems that may be used. This type of information would be critical, since it might influence a decision regarding what, if any, supplemental measures may be required for the proper employment of that weapon. By creating an ROE cell (and, where required, a JPG), commanders can set the stage for the generation of ROE tailor-made for their operations.

Notes

1. The term "ROE" is defined for U.S. military forces as "rules which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered." Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02 (Washington, D.C.: 23 March 1994), p. 329.

2. Chairman, Joint Chiefs of Staff Instruction [CJCSI] 3121.01, Subj: "Standing Rules of Engagement for US Forces" 1 October 1994. CJCSI 3121.01 was modified in 1999 by CJCSI 3121.01A (1999) [hereafter "Standing Rules of Engagement"], p. 1. The "Peacetime Rules of Engagement for US Forces" were promulgated by a memorandum of the Secretary of the Joint Staff on 28 October 1988.

3. For a discussion of the ROE bases, see Richard J. Grunawalt, "The JCS Standing Rules of Engagement: A Judge Advocate's Primer," *Armed Forces Law Review*, vol. 42, 1997, p. 247, and J. Ashley Roach [Capt., JAGC, USN], "The Rules of Engagement," *Naval War College Review*, January-February 1983, pp. 47-48.

4. Carl von Clausewitz, *On War*, ed. Michael Howard and Peter Paret (Princeton, N.J.: Princeton Univ. Press, 1984), p. 87.

5. Each combatant commander receives guidance on foreign policy objectives for his area of responsibility from the National Command Authorities (NCA), the president and the Secretary of Defense. For the United States, the president has the overall responsibility to establish and implement foreign policy, as laid down in the Constitution, Art. II.

6. "Standing Rules of Engagement," p. A-3.

7. See Joint Chiefs of Staff, *Unified Action Armed Forces (UNAAF)*, Joint Publication 0-2 (24 February 1995), pp. IV-12 through IV-14. The J-3, one of the standard staff directorates, assists the JTF commander in

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the decision-making and execution processes of a mission. Other standard JTF directorates include the J-1 (manpower and personnel), J-2 (intelligence), J-4 (logistics), J-5 (plans and policy), and the J-6 (command, control, communications and computer [C4] systems). In addition, a JTF staff has special staff groups that "furnish technical, administrative and tactical advice and recommendations to the commander and other staff officers" (*ibid.*, p. IV-13). Examples of special staff groups are the SJA, the medical officer, the dental officer, the comptroller, and the public affairs officer. The sole function of the members of the staff and the special staff groups is to support the JTF commander. Staff members have only the authority delegated to them by the commander. *Ibid.*, p. IV-12.

8. Common law is defined as "those principles and rules of action . . . which derive their authority solely from usages and customs" (*Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 6th ed. [St. Paul, Minn.: West, 1990]), p. 276). As used here, common law refers to the legal theory and customs of the United States, as distinguished from the Constitution and from statutory law that has been enacted by Congress.

9. Joint Publication 1-02, p. 215.

10. Customary international law is defined as a custom, practice or usage that has attained "a degree of regularity and is accompanied by a general conviction among nations that behavior in conformity with that practice is obligatory" (U.S. Navy Dept., *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5.2.1/COMDT PUB P5800.1 (hereafter NWP 1-14M) [Washington, D.C.: 15 November 1997], pp. 5-8). The U.S. Supreme Court ruled on customary international law in *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 299 (1900).

11. "Standing Rules of Engagement," p. A-1.

12. J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed. (New York: Oxford Univ. Press, 1963), pp. 416-21; Gerhard von Glahn, *Law among Nations: An Introduction to Public International Law*, 7th ed. (Boston: Allyn and Bacon, 1996), pp. 562-5; and NWP 1-14M, p. 4-10. For a discussion of self-defense as an inherent right see Yoram Dinstein, *War, Aggression and Self-Defence*, 2d ed. (Cambridge: Grotius; New York: Press Syndicate of the University of Cambridge, 1994), pp. 179-82.

13. An excellent discussion of anticipatory collective self-defense may be found in George K. Walker, "Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said," in *The Law of Military Operations: Liber Amicorum Professor Jack Grunawalt*, ed. Michael N. Schmitt, Naval War College International Law Studies, vol. 72 (Newport, R.I.: Naval War College Press, 1998), pp. 365-425.

14. For a discussion of the right of anticipatory self-defense as it relates to targeting see S. V. Mallison and W. T. Mallison, "Naval Targeting: Lawful Objects of Attack," in *The Law of Naval Operations*, ed. Horace B. Robertson, Jr., Naval War College International Law Studies, vol. 64 (Newport, R.I.: Naval War College Press, 1991), p. 241. The negotiating history of Article 51 shows that necessary and reasonable anticipatory self-defense was intended to be an essential element of individual and collective self-defense. *Ibid.*, pp. 263-4, and Stanimir A. Alexandrov, *Self-Defense against the Use of Force in International Law* (The Hague: Kluwer Law International, 1996), pp. 97-9 and 143-4.

15. "Standing Rules of Engagement," p. A-4.

16. *Ibid.*

17. *Ibid.*

18. *Ibid.*, pp. A-4, A-6, GL-16. Under the Standing Rules of Engagement individuals have "the inherent right to use all means available and to take all appropriate action to defend themselves and other U.S. forces in their vicinity" (p. A-4).

19. *Ibid.*, p. A-2.

20. For the classified definition of "all necessary means available," see the "Standing Rules of Engagement," p. GL-6.

21. *Ibid.*, p. A-6.

22. *Ibid.*, pp. A-4 and GL-24.

23. *Hostile act* is defined as "an attack or other use of force by any civilian, paramilitary, or military force or terrorist(s) with or without national designation against the United States, U.S. forces, and in certain circumstances, U.S. nationals, their property, U.S. commercial assets, and other designated non-U.S. forces, foreign nationals and their property" (*ibid.*, pp. GL-13 and GL-14). *Hostile intent* is defined as "the threat of [the] imminent use of force against the United States, U.S. forces, and in certain circumstances, U.S. nationals, their property, U.S. commercial assets, and/or other designated non-U.S. forces, foreign nationals and their property" (*ibid.*, p. GL-14).

24. *Ibid.*, p. A-5.

25. For subjectivity, see Leslie C. Green, *The Contemporary Law of Armed Conflict* (Manchester, U.K.: Manchester Univ. Press, 1993), p. 331.

26. "Standing Rules of Engagement," p. J-1.

27. *Ibid.*

28. See Grunawalt.
29. Bursleigh C. Rodick, *The Doctrine of Necessity in International Law* (New York: Columbia Univ. Press, 1928), pp. 58–9, 119.
30. NWP 1–14M, p. 5–4. See also Green, pp. 118–9, and Geoffrey S. Corn [Maj., USA], “International & Operational Law Note (Principle 1: Military Necessity),” *Army Lawyer*, July 1998.
31. Protocol I, Art. 52 (2), reprinted in Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War*, 2d ed. (Oxford, U.K.: Clarendon Press, 1989), p. 417. The United States considers this statement part of the customary international law. U.S. Defense Dept., General Counsel, letter of 22 September 1972, reprinted in *American Journal of International Law*, vol. 67, 1973, pp. 123–4.
32. See NWP 1–14M, p. 8–2.
33. In neutral territory, which includes neutral airspace, neutral water, and neutral land, all acts of hostility are prohibited (1907 Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, chap. I, “The Rights and Duties of Neutral Powers” [hereinafter 1907 Hague Convention V], Art. 1, reprinted in Roberts and Guelff, eds., p. 63). When a neutral state is unwilling, unable, or otherwise fails to enforce its obligation to prevent unlawful belligerent use of its territory, under the law of neutrality an exception arises that allows for the engagement of belligerent forces operating within the neutral’s territory by the other belligerent (Green, pp. 260–1 and NWP 1–14M, p. 7–6). For U.S. military forces, this exception is known as “self-help.” For a discussion of self-help see von Glahn, pp. 529–52; Dinstein, p. 175; and Alexandrov, pp. 11–9. For hostile act or intent, “Standing Rules of Engagement,” p. A-5, which specifies authority in the U.S. military to declare a force hostile.
34. For collateral damage, the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 [hereinafter Protocol I], and Relating to the Protection of Victims of International Armed Conflict, 12 December 1977, Part IV, Section I, Art. 57 (4), reprinted in Roberts and Guelff, eds., 2d ed., p. 420. See also NWP 1–14M, pp. 8–4, 8–5. For incidental injury, Protocol I, arts. 48, 49, 50, and 57 (4), reprinted in Roberts and Guelff, pp. 414–20; and Green, p. 120. See also NWP 1–14M, pp. 8–4, 8–5. For military advantage, Protocol I, Art. 57, reprinted in Roberts and Guelff, pp. 419–20.
35. For a discussion of the balancing test see Michael Bothe et al., *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Convention of 1949* (The Hague: Martinus Nijhoff, 1982), pp. 309–11.
36. On ROI cells, Commander Dave Wagner, U.S. Navy, in a presentation on 8 August 1997 at the Naval Justice School, Newport, R.I., stated that Brigadier General M. R. Berndt (U.S. Marine Corps, Director, Joint Training Analysis and Simulation Center and the J-7, U.S. Atlantic Command) had approved the inclusion of the ROI cell concept in drafts of the Joint Tactics, Techniques and Procedures Publication. For joint planning groups, conversation with Cdr. Wagner, Joint Training Analysis and Simulation Center/U.S. Atlantic Command, 12 February 1998. See also “Standing Rules of Engagement,” Enclosure L, pp. L-1 through L-4.



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