

## RULES OF ENGAGEMENT AND THE OBLIGATIONS OF THE STRATEGIC COMMANDER

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USAWC STRATEGY RESEARCH PROJECT

**RULES OF ENGAGEMENT AND THE OBLIGATIONS OF THE STRATEGIC  
COMMANDER**

by

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## **ABSTRACT**

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This strategic research paper will consider the body of international law, certain founding documents of the United States and precedential case law which have shaped and defined the inherent right to self-defense; review the Chairman of the Joint Chiefs of Staff Instruction (CJCSI) Standing Rules of Engagement (SROE); study historical engagements which generated strategic results directly related to misperceptions and confusion flowing from the SROE and operational Rules of Engagement (ROE); then recommend language, methods and direction to ensure the inherent right to individual self-defense is better understood and applied. The result will be a recommendation for clear, concise language in the SROE which clarifies every Soldier's inherent right to individual self-defense and compels commanders to exercise their authority, responsibility and obligation to protect their Soldiers.

## RULES OF ENGAGEMENT AND THE OBLIGATIONS OF THE STRATEGIC COMMANDER

The inherent right to self-defense is sacrosanct and must never be taken from a Soldier, Sailor, Marine or Airmen if they are confronted with imminent threat of death or serious bodily injury. Unfortunately, due to unclear and confusing language in the current Chairman of the Joint Chiefs of Staff Instruction (CJCSI), Standing Rules of Engagement (SROE), this right is misunderstood and not effectively exercised. This paper will explore the extent and repercussions of this lack of clarity, then propose changes to the SROE to resolve such problems.

Soldiers have a right to believe that if they kill an attacker while defending themselves or innocent others that they will, in turn, be protected by the law and their chain of command. Such belief is seemingly codified in the Rules of Engagement (ROE) and is reinforced in ROE training, Judge Advocate General (JAG) briefings, and even in general beliefs wrought out of American military culture. Almost every television police drama or western movie depicts instances where the protagonist shoots in self-defense. From a young age we are taught and led to believe that each individual has a right to protect himself and his family. Stopping an aggressor from inflicting harm upon oneself or innocent others is an inalienable right. Self-defense is a law of nature and a natural response. But do Soldiers truly enjoy this right? Does the military chain of command provide the appropriate political and policy “top cover” to better ensure that we are free to act reasonably and appropriately in response to imminent threats? The answer to these questions is, sadly, no. This paper will explore one of the primary causes of this anomaly and recommend changes to the SROE to attenuate it.

Our history, the Holy Bible, the Quran, the US Constitution, The Hague and Geneva Conventions, and current International and Operational Law shape and define the laws of war and the rules of engagement. All unequivocally reference the inherent right of self-defense. Unfortunately, the current version of the CJCSI SROE for US Forces, Theater ROE, Tactical Directives, ROE Cards and media perceptions and misperceptions seemingly contradict and confuse Soldiers' understanding of their inherent right to self-defense. This confusion, contradictory language and beliefs not only lead to the tragic loss of US Soldiers, but have strategic ramifications for Commanders and the leaders of Nations. Strategic leaders must address these inconsistencies to both to protect their Soldiers, Sailors, Airmen and Marines and to prevent tactical engagements from becoming strategic problems.

A review of historical case studies will demonstrate that misperceptions and confusion flowing from the SROE and operational ROE have led to tragic and sometimes strategically consequential errors. Upon considering the body of international law and precedential case law which have shaped and defined the inherent right to self-defense; this paper will make recommendations to redraft the SROE to ensure the inherent right to individual self-defense is better understood and applied. The result will be a recommendation for clear, concise language in the SROE which clarifies every Soldier's inherent right to individual self-defense and compels commanders to exercise their authority, responsibility and obligation to protect their Soldiers.

The Law of War or Law of Armed Conflict is derived from: historical precedent; The Hague and Geneva Conventions; the United Nations Charter; the SROE; and, when applied to US Servicemen, the US Constitution. This paper, however, will focus

on the provisions in these sources governing the use of force, especially force in self-defense.

The “UN Charter provides the essential framework for use of force.”<sup>1</sup> Article 51 states, “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 UN...”<sup>2</sup> While Article 51 applies directly to the rights of states, vice the individual, its wording is a perfect example of some problems extant in the interpretation of self-defense. Does a Soldier, like a nation, have to wait for the armed attack or can he engage an imminent threat before his life or the life of his comrades is taken? The words “if an armed attack occurs” leads to different interpretations. The US, along with many other countries, adheres to an expansive interpretation of Article 51 allowing for the principle of anticipatory self-defense; described as “justifying use of force to repel not just actual armed attacks, but also imminent armed attacks.”<sup>3</sup> The US interpretation of anticipatory use of force in self-defense makes sense legally and tactically.

The logic behind anticipatory self-defense – that one does not have to wait to “take the first shot” – allows both individuals and nations to use force in self-defense in response to a hostile act or hostile intent. Hostile intent is defined in the SROE as the “imminent use of force against the United States, US forces or other designated persons or property.”<sup>4</sup> If hostile intent is demonstrated to a US force, the US force can apply reasonable and appropriate force – even anticipatorily - in self-defense to protect themselves or others. The focus of this paper is to examine how the guidance provided to US forces –specifically in the SROE – can be better written to ensure a clear understanding of self-defense for our Commanders and Soldiers.

At a strategic level, the lawful authority, domestically and internationally, for United States forces to use force is rooted in the right of self-defense. By keeping all uses of military power – specifically war and war-like actions – founded in self-defense, America will retain the moral high ground, clearly signal its strategic intentions to potential adversaries, and avoid straying into the morass of commitments not rooted in self-defense. This applies to the individual’s right of self-defense as well.

Throughout the mission spectrum, from seemingly benign humanitarian assistance missions to hard fought counterinsurgency operations, most use of force decisions our forces make will be predicated on this right of self-defense. Applying such decisions in the “three block war”<sup>5</sup> environment requires our Strategic Corporals to individually and near-intuitively understand their rights and authorities to use force in self-defense.

### Historical and Legal Background

In order to fully appreciate the right of self-defense, it is worth examining its historical roots. Consistently, since at least 60 B.C., laws and customs have recognized individuals’ inherent right to reasonably defend themselves from an attacker threatening to inflict death or serious bodily injury. Historically, the right of self-defense has been viewed not as a statutory or legal right, but as a divine natural right permanently bestowed upon all persons by virtue of existence. When Thomas Jefferson drafted the Declaration of Independence he quoted liberally from the works of John Locke. Locke argued that the law was based on a state of nature.<sup>6</sup> The natural law comprised universal principles of right and wrong.<sup>7</sup> Locke explained that “each person had to protect his or her own rights”<sup>8</sup> when a condition of lawlessness existed. Once a group of people decides to protect these rights, communities began to establish agreements,

governments, and methods of enforcement to ensure these natural laws were protected. "The right of self-defense is called by Locke the first law of nature."<sup>9</sup> Each person owns his or her own life and no other person has a right to take that life.

Thomas Jefferson borrowing from the works of John Locke wrote in The Declaration of Independence that all men "are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."<sup>10</sup> The word "Life" refers directly to the right to self-defense. The word "Creator" in the Declaration of Independence refers to the Christian Faith and is supported by the Holy Bible, but to the surprise of some Americans, the Islamic Faith shares the same principles. In versus 191-192 of the al-Baqarah chapter of the Quran, the right of self-defense is described as follows "if they attack you, then kill them. Such is the recompense of the disbelievers. But if they cease, then God is Oft-forgiving and most merciful."<sup>11</sup> The inherent, unalienable, or even divine right to self-defense is a law of nature, a founding principle of most religions and is embedded deep in US Law. The right to life is a law of nature and has been protected under US Law at least since the signing of the Declaration of Independence protected repeatedly in US Law. Our founding fathers established government and judicial systems and with these systems codified the inherent right to self-defense.

Three strong examples of US Law have been cited to support the concept of self-defense. The United States Supreme Court cases of *Beard v. United States* and *Brown v. United States*, as well as the Federal Bureau of Investigations' deadly force policy language implemented by Louis Freeh when he was its director, all build upon each other and provide the perfect approach to frame our Soldier's right to self-defense. In

*Beard v. United States*, Beard was defending himself against three assailants whom Beard reasonably believed the assailants intended to take his life. He defended himself and killed one of his aggressors. The *Beard* case is fundamental to the inherent right to self-defense because the case describes the aggressor's intent, Beard's reasonable belief of imminent attack, the right to stand one's ground and the ability to exercise deadly force. The court stated,

[I]f the accused...had at the time reasonable grounds to believe and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obligated to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.<sup>12</sup>

When a Soldier is about to be attacked by an enemy there is often only seconds from the presentation of a threat to death. If the Soldier believes that the attack was imminent, and he had reasonable grounds to believe this, he must have the right to protect his own life. Furthermore, the time and circumstances may not allow a retreat to fight another day. In fact, the time spent thinking about retreat may be all the time available to react and save one's life. Finally, Beard did not need to consider minimum force to defend himself or risk the use of less than deadly force. In fact, the court opinioned that Beard was entitled to use the necessary force to protect his life.

Next, in *Brown v. United States* the Supreme Court affirmed the right to self-defense, explained why "detached reflection" cannot be used in judging self-defense and further clarified Brown's right to kill his assailant without attempting the dangerous act of disarming his assailant or fleeing to safety. The Court stated,

Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is a condition of immunity that one

in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant [or to consider the other alternatives,] rather than to kill him.<sup>13</sup>

It would appear axiomatic that if the Supreme Court gave such deference to a defender when deciding whether to extend immunity from prosecution or liability in a civil case that at least that much deference should be afforded to a Soldier making decisions in a combat environment. The Court's words are perfect for a commander to consider. First "detached reflection" is not something a Soldier will often possess when presented with a hostile attack or an imminent threat. A commander, or lawyer, placed in the position of judging whether a Soldier defended himself as a reasonable man needs to be practical, reasonable and picture an uplifted knife when deciding on a Soldier's split second decision. Additionally, the Supreme Court imposed no requirement to try to flee or to wrestle the weapon from the attacker. In fact, many examples could be given whereby military personnel, law enforcement officers and civilians who were injured or killed for trying to retreat from a deadly attack or to disarm their assailant when the use of deadly force would have stopped the aggressor and saved their lives.

Finally, the FBI policy language put in place in 2000 by then Director Louis Freeh states "If an FBI Agent uses deadly force in self-defense, he or she will not be judged in the clear vision of 20-20 hindsight, but rather how a reasonable Agent would act under circumstances that are tense, uncertain and rapidly evolving."<sup>14</sup> This is sage and practical advice that the drafters of the SROE should heed. Again, FBI Directors and commanders should not judge FBI Agents or Soldiers with "20-20 hindsight" or "detached reflection." Commanders must apply reasonable judgment in hostile, uncertain, changing environments when considering issues of self-defense.

The examples above describe how law enforcement officers, when faced with deadly force can apply deadly force, do not need to attempt retreat and are not obligated to use minimum or less than deadly force. The Supreme Court, as well as the former leader of the FBI, recognizes that after a citizen or law enforcement officer is required to defend themselves with deadly force that judgment and reaction under “20-20 hindsight” and “detached reflection” are too high of standards to judge the actions of someone involved in a tense, rapidly evolving deadly force encounter. Considering how the supreme law of the land defines the inherent right to self-defense, one would expect that the senior leadership within the Department of Defense should similarly define and clarify the rights of Soldiers for self-defense. This is especially true in light of the all-volunteer nature of our force.

### The Evolution of the SROE

Although self-defense is described as far back as the Holy Bible and Quran, the military phrase “Rules of Engagement” first appeared during the Korean Conflict.<sup>15</sup> The fight between US and Soviet fighter aircraft forced the Joint Chief of Staff (JCS) to issue “Intercept and Engagement Instructions.”<sup>16</sup> The JCS formally adopted the term rules of engagement in 1958.<sup>17</sup> The JCS did not issue standing operating procedures on ROE until 1988 because of the Goldwater-Nichols Act of 1986.<sup>18</sup> The Goldwater-Nicholas Act re-arranged the command structure of the US Military so that authority passed through the Chairman, JCS to the combatant commanders. To unify the ROE amongst the combatant commanders, the Chairman published the CJCSI Peacetime ROE (PROE). After several revisions the PROE became the SROE and was last updated in 13 June 2005.<sup>19</sup> The problem for Commander’s, Lawyers and Soldiers extant in the 13 June 2005, CJCSI SROE and is compounded by interpretation by subsequent headquarters,

the use of qualified and confusing language and a misunderstanding of the inherent right to self-defense, especially at the individual level.

The 2000 version of the CJCSI SROE provided a fairly clear definition of “Inherent Right to Self Defense” and “Individual Self-Defense.”<sup>20</sup> The 2005 SROE incorporated the use of confusing, qualified language and the deletion of key definitions, which appears to contradict US Law and possibly limit the inherent right to self-defense, especially at the individual level. The first example is the definition of Self Defense in the 2005 version of the SROE which states,

Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or a demonstration of hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other U.S. military forces in the vicinity.<sup>21</sup>

The 2005 SROE represents a substantive change from the 2000 version. In the 2000 version the language was very strong and clear. “A commander has the authority and obligation to use all necessary means available and to take all appropriate actions...”<sup>22</sup> The language clearly compels the commander to protect his unit and Soldiers. More importantly, the old version did not give the commander the ability to limit individual self-defense. The 2005 definition enables commanders to limit the right to individual self-defense and does not compel them to defend their Soldiers with all means available. To further exacerbate the problem, the 2005 version no longer includes a definition of individual self-defense. The omission does not appear accidental; and the erroneous conclusion many commanders and judge advocates may

might reach is that the default setting for any operational ROE or EXORD is to limit the individual right to self-defense.

New language – “Imminent Use of Force” – is added which states “The determination of whether the use of force against US forces is imminent will be based on an assessment of all facts and circumstances known to US forces at the time and may be made at any level.”<sup>23</sup> This definition is a new subset of the definition of “Hostile Intent” and is a great example of redundant and qualified language which is not necessary. Worse, “Imminent Use of Force” is “based on all the facts and circumstances.”<sup>24</sup> Knowing all the facts and circumstances is not an easy task when presented with an uplifted knife, flying bullets or an inbound RPG round.

The concept of de-escalation is greatly modified in the 2005 document with the guidelines stating, “When time and circumstances permit, the forces committing hostile acts or demonstrating hostile intent should be warned and given opportunity to withdraw or cease threatening actions.”<sup>25</sup> The definition seems counter to the Supreme Court ruling in *Brown* and may not provide prudent tactical guidance under myriad circumstances. Although certain situations might be de-escalated, the modified definition, now listed as a Principle of Self-Defense, only offers more qualified and unnecessary language that might protect the commander’s overarching intent but not the Soldier under attack.

Pursuit is also given a new definition and is listed as a Principle in Self-Defense. The principle gives the “authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrated hostile intents.”<sup>26</sup> Are we now saying that if Soldiers are attacked by

someone and then that attacker flees, our Soldiers cannot continue engaging unless the subject keeps performing overt hostile acts? Such an inference creates untenable situations whereby Soldiers will end up letting their attacker escape out of confusion whether they can still engage after being attacked. The language is unnecessary, over qualified and will allow the enemy to escape.

Such problems might have their etiology in a profound misunderstanding and misapplication of the Law of War principle of Proportionality. Proportionality sets forth the ethical proposition that an attack should not be launched on a military objective if incidental civilian injuries – often referred to as “collateral damage” – would be clearly excessive in relation to the anticipated military advantage gained by the attack. Proportionality is of concern to commanders considering pre-planned air or artillery strikes. It typically has little or nothing to do with the amount of force an individual or squad uses in response to an imminent threat of death or serious bodily injury. It also has little to do with a tactical response for assistance from troops in contact. First, because if the enemy is firing at friendly troops from protected places, under the Law of War the *enemy* is responsible for resultant collateral damage to the protected person, place or thing. Secondly, under most circumstances, it is nearly impossible to create a proportionality issue with small arms fire. This is clearly demonstrated by analogy: if a commander in a Combined Arms Operations Center has the authority to drop a preplanned, targeted JDAM on a high-value target and the ROE allows for the potential of upwards to 25 civilian deaths as a result of that strike then it is axiomatic that at least that much force and risk of civilian collateral damage could be expended in defense of a Soldier. A Soldier’s duty, like that of a police officer, is dangerous enough without the

SROE and those misinterpreting it trying to direct and fine-tune fires and tactics from afar or in hindsight.

As a corollary to this point, Soldiers and Marines are consistently and wrongly instructed that they must have “PID” (Positive Identification) before killing the enemy. Not only is the term PID misleading, but it is a targeting term that has nothing to do with the application of force in self-defense or close-in combat setting were the enemy is performing an overt hostile act: like emplacing an IED. Countless directives and targeting restrictions imposed by higher headquarters have created an enduring hesitancy to fire artillery rounds or provide aviation close air support even when in response to calls for help from troops in contact with the enemy.

Some readers may feel this interpretation is too critical. The *Operational Law Handbook* written the Judge Advocate’s Legal Center states, “ROE are useful and effective only when understood, remembered, and readily applied under stress. They are directive in nature and should avoid excessively qualified language.”<sup>27</sup> In such light, the SROE is over-qualified with layered and nuanced definitions that will only confuse commanders and Soldiers. To better understand the strategic effects of the SROE, it is important to review some historical examples wherein unclear language in the ROE directly and negatively affected the outcome of engagements and caused unnecessary deaths amongst our forces. On October 23, 1983, 220 US Marines, 18 Navy Sailors and three Army Soldiers were killed in Beirut, Lebanon by a truck bomb laden with over 12,000 pounds of explosives.<sup>28</sup> This exemplifies a situation where restrictive ROE resulted in a tactical attack that produced profound strategic consequences for the United States. The Marine White Card issued in Beirut limited Marines to “use the

minimum degree of force necessary to accomplish the mission.”<sup>29</sup> Crew served weapons were not to be loaded and rounds were not to be chambered in individual weapons unless a commissioned officer gave permission or in self-defense.<sup>30</sup> Although the Beirut Embassy recognized the threat of car and truck bombs and gave the Marines at the Embassy the authority to fire on approaching vehicles; the Marine Commander at the Beirut Barracks “made the conscious decision not to permit insertion of magazines in weapons on interior posts to preclude accidental discharges and possible injury to innocent civilians.”<sup>31</sup> Imagine being a Marine on guard, with no commissioned officer present; a vehicle is approaching at high speed and blasts through the barrier. You attempt to load your individual weapon, insert your magazine, chamber a round and try to get off a shot. Too late, your comrades in arms are dead! Why did a Marine commander restrict you from performing a simple Soldier task like handling a loaded weapon? Moreover, the use of words like “minimum force” (How does one use minimum deadly force?) should be replaced at all times with the words “reasonable or appropriate force.”

What were the strategic ramifications of your impossible position to stop the approaching truck? President Reagan who promised that he would never back down from terrorism withdrew United States Marines from Lebanon four months later.<sup>32</sup> Osama Bin Laden in a 1998 interview with ABC news said, “the US response to the Beirut Bombing showed the decline of American power and the weakness of the American soldier, who is ready to wage cold wars, but unprepared to fight long wars. This is proven in Beirut in 1983, when the Marines fled.”<sup>33</sup> Osama Bin Laden was not the only world leader emboldened to attack. Defense Secretary Donald Rumsfeld, in a

2003 press conference, reflected on being a special envoy to the Middle East during the Beirut Bombings and said the attack taught him to “take the war to them, to go after them where they are, where they live, where they plan, where they hide, go after their finances, go after the people who harbor and assist them.”<sup>34</sup> The Beirut Bombings did not just affect the Marine sentry and his fallen comrades in the barracks, but the strategic policies of the United States and her enemies.

By 1999, well after the Chairman of the Joint Chiefs of Staff SROE were in place to supposedly ensure standards were maintained across combatant commands and in order to avoid another Beirut-like disaster. Unfortunately, the Kosovo Forces (KFOR) ROE card published in 1999 stated, “Use only the minimum force necessary to defend yourself.”<sup>35</sup> This is almost the same statement on the Beirut White Card given to every Marine. “Such insanity as ‘use minimum force’, ‘exhaust all lesser means,’ and ‘don’t shoot fleeing actors’ must not be written into ROE at the operational and tactical level.”<sup>36</sup> The military must stop using language that makes absolutely no sense to Soldiers involved in deadly force encounters in tense, uncertain combat environments.

On September 8, 2009, three Marines and a Navy Corpsman were killed in an ambush in Afghanistan.<sup>37</sup> A McClatchy News Service Reporter, Jonathan Landay, was embedded with the small American Afghan Army Training Team and an Afghan Army Company.<sup>38</sup> The following sentence appeared in the McClatchy News Service article, the Army Times and The New Haven Register: “US commanders, citing new rules to avoid civilian casualties, rejected repeated calls to unleash artillery rounds on attackers dug into the slope and tree lines-despite being told repeatedly that they weren’t near the

village.”<sup>39</sup> What were the new rules that caused our leaders to reject repeated calls for help from forces in contact? The 6 July 2009 Tactical Directive says:

The use of air-to-ground and indirect fires against residential compounds is only authorized under very limited and prescribed conditions...this directive does not prevent commanders from protecting the lives of their men and women as a matter of self-defense where it is determined no other options are available to effectively counter the threat.<sup>40</sup>

Did the tactical directive published by ISAF Headquarters really restrict the needed artillery rounds that might have saved United States and Afghan forces? The U.S. Army training team had called for fire but the artillery unit believed the aggressors were in a populated town. The leaders of the artillery unit thought close air support was on the way within in a few minutes.<sup>41</sup> Additionally, the U.S. training team had an Afghan National Army infantry platoon fighting alongside them. The artillery unit mistakenly and unnecessarily believed that the CAS and infantry provided the U.S. training team with other options. Unfortunately, the CAS did not arrive for over an hour and the U.S. training team and their Afghan National Army infantry platoon was overwhelmed by the attacking insurgents.

Maybe the artillery did not fire because they believed the insurgents were in the village – again, a profound misunderstanding of the principle of proportionality – or that CAS and infantry provided other options. As an interesting corollary, even domestic law in the United States does not require law enforcement officers to respond with the least intrusive means or seek other option when confronted with an imminent threat of death or serious bodily injury. One would imagine that American warriors in combat would be afforded a similar deference.

In accordance with the 2005 version of the SROE, the obligation and responsibility of the artillery unit’s leadership was to exercise unit self defense when a

hostile act occurred. This begs the question of why such an obligation and responsibility was ignored. The many articles published after the attack clearly describes a U.S. force facing a direct attack and attempting to save themselves, their unit and the Afghanistan Army Soldiers serving with them. Why didn't all available American or Coalition forces respond with all necessary means available and take all appropriate actions to protect these Soldiers and our allies? Perhaps because the 2005 watered-down version of the SROE does not require leaders to use all necessary means or all appropriate actions but instead to "exercise unit self-defense." It also leaves an apparent gaping hole in command prerogative that is often filled with overly-restrictive operational ROE.

The problem in this specific example was the use of confusing and overqualified language in the Tactical Directive and the SROE. The tragedy is this language can be directly linked to the unnecessary deaths of four U.S. servicemen. Furthermore, the press reporting of the incident presents exactly the type of information opportunity that our enemies will trumpet.

Instead, both the SROE and resultant tactical Directives should use strong language like "it is the right and obligation of leaders to protect Soldiers under attack." More importantly, in extremis situations like the one above, Soldiers should be authorized to use all the means and resources available to ensure their self-defense. Instead, we say "where it is determined no other options are available" and "authorized under very limited and prescribed conditions."<sup>42</sup> The ability of commanders to limit or restrict individual self-defense, combined with a small U.S. training team requesting artillery support in a life and death situation, all mixed with the "fog and friction of war"

resulted in the unnecessary loss of four U.S. Servicemen. Additionally, our Afghan allies who fought and lived that day probably lost faith in the will of U.S. forces to protect them.

The article referenced in the preceding example was distributed widely, all while President Obama considered his strategy for Afghanistan. Such incidents do nothing to strengthen the will of the American people to support our strategic policies in Afghanistan. Events like this begin to wear at the fiber of public support for a long, difficult conflict. Such is one of the strategic effects of not committing ourselves to the authority, responsibility and obligation to defend Soldiers, Sailors, Marines and Airmen.

#### Problems with Theater ROE

Unclear words, unnecessary language and seemingly oxymoronic definitions continue to confuse Soldiers and their commanders in Iraq and Afghanistan. Both theater ROE cards list Positive Identification (PID) as a requirement to engage a target. Both theater cards list the requirement at the front of the card. As discussed earlier, PID is a targeting term that has nothing to do with the authority to use force in self-defense. Any use of it should be changed to Target ID (TID). The current definition on the Iraqi ROE Card for PID “is a reasonable certainty that the target is a legitimate military target.”<sup>43</sup> The fog and friction of war rarely allows “positive” and reasonable certainly seems a fair bit less certain than positive. More importantly, PID is a targeting concept that has nothing to do with responding to an aggressor who is committing a hostile act or hostile intent. Unfortunately, the Iraq and Afghanistan theater ROE cards place the definition of PID on the very next line just below the right to self-defense. PID is not even listed as a term in the SROE but appears on every ROE card since Desert Storm.

An AH-64 Apache pilot recently deployed in Afghanistan stated that PID had to be cleared through Brigade before they could engage. The pilot went on to explain that “many bad guys escaped while clearing fires through the ground Brigade Headquarters.” The pilot was happy to report that PID did not have to go through Brigade in the case of a “Troops in Contact”(TIC). If troops are under fire the only thing needed is a good target handover.

Many of the ROE Card and Escalation of Force (EOF) Card problems start and must be remedied at the CJCSI SROE level. From the top down, it must unequivocally reaffirm the inherent right to self-defense. We have to make the “inherent right to individual self-defense” an unchangeable, clear and concise statement. Even an attorney within the JCS office mistakenly claimed, “The new change made it clear that individual self-defense no longer existed.”<sup>44</sup> Besides being untrue, such a statement and belief should be remedied by the addition of clear, concise statements to include “you may use deadly force if you reasonably believe yourself or innocent others to be in imminent danger of death or serious bodily injury”<sup>45</sup> and “nothing in these rules limits the inherent right of self-defense.”<sup>46</sup> As importantly, the SROE should unequivocally state that subordinate commanders do not have the authority to restrict the inherent right of self-defense but that they also have an affirmative duty to exercise it when their units or friendly forces are attacked. It is unfortunate that leaders need to be told to “go to the sound of the guns” especially when a call for help goes out from brother warriors.

The decision for the final wording should be the Chairman and the language should include something to the effect that the “inherent right to individual self-defense

may not be modified at any level". My proposed definition of the Inherent Right to Self-Defense is:

Commanders have the inherent authority, responsibility and obligation to use all necessary means available and to take all appropriate actions in the self-defense of their unit and other US forces in the vicinity of a hostile act or demonstration of hostile intent. ROE supplemental measures apply only to the use of force for mission accomplishment and nothing in the SROE limits this inherent right or your authority, responsibility and obligations as a commander in the use of force for the self-defense of Soldiers. The on-scene commander or individual response to a particular hostile act or intent will decide what constitutes an appropriate action based on necessity and proportionality. Commanders should never limit the individual right to self-defense unless for the sole purpose of enhancing collective self-defense.

The SROE should also include guidance on post-incident assessment, to include an admonition that commanders not to judge their Soldiers in 20-20 hindsight or with detached reflection but as a reasonable person facing a tense, uncertain and rapidly evolving situation. The definition of Individual Self-Defense would be "The inherent right to use all necessary means available and to take all appropriate actions to defend oneself and U.S. forces from a hostile act or hostile intent." The brevity of this definition is vital and would be placed on the top of every ROE card. Furthermore all the qualified language and unnecessary principles need to be removed from the SROE.

The United States forces are owed this simple, clear and concise definition of Individual Self-Defense. The self-defense portion of the ROE would be placed only on one side of an ROE card or on a stand-alone self-defense card. These rules would be exactly the same from the CJCSI SROE to the pocket of every Soldier. The self-defense side of the ROE card would be modifiable by the Chairman only. The fixed portion of ROE for self-defense would enable all leaders to explain, train and fight under the guidelines in peace, training and war. Tactical directives, operations orders and verbal

orders could change ROE in each theater for specific missions or entire theaters but the “inherent right to individual self-defense” should never be changed or abrogated.

The new definition would allow for a near-revolution in ROE training. Leaders at all levels could be taught the rules, values and rights associated with individual self-defense from basic training throughout a military career. The effect would be to enhance the probability of killing dangerous adversaries that need to be killed and at the same time diminishing the probability of killing innocent non-combatants, as our forces would learn true target discrimination and how to assess threats more accurately under stress. Once incorporated into schools at all levels, such realistic training scenarios would provide consistent guidance on individual self-defense throughout a Soldier’s career. The challenge of teaching and disseminating the theater and mission specific ROE would remain, but the days where a charging vehicle is met by hesitation and uncertainty would be over. No longer would a Soldier calling for close air support while under heavy attack by the enemy be told “We cannot support you because of the new ROE.” And maybe Osama Bin Laden wouldn’t be able to use examples like Beirut as a sign of the weakness of American resolve or U.S. servicemen’s unwillingness to fight when confronted with an imminent threat. The understanding and support of the American people would also be strengthened by clear, concise guidance that reaffirms the inherent right to individual self-defense. If America is to preserve the strength and resiliency of an all-volunteer force, the social contract with her citizens needs to remain intact. Continual diminution of the right of self-defense, especially in combat, will erode that contract.

American Soldier, Sailor, Airmen and Marine are warriors of the highest values and ethos: the good guys. The Rules of Engagement help keep their moral compass straight. As stated in the JTF-Haiti Rules of Engagement Card given to every Soldier helping in earthquake disaster relief “The choices you make will have a strategic impact!”<sup>47</sup> The Senior Leaders of the Armed Forces must ensure that the SROE and ROE issued to every Soldier allows them to make the correct tactical and strategic choices, beginning with self-preservation.

The Chairman of the Joint Chiefs of Staff’s Standing Rules of Engagement must be changed to reflect the inherent right of Soldiers, Sailors and Marines to individual self-defense. This right must be understood as a law of nature and a rule of the highest military leader to ensure Soldiers can protect themselves and that their leaders have the authority, responsibility and obligation to protect them when they are in imminent danger or under attack.

## Endnotes

<sup>1</sup> Major Derek I. Grimes, eds., *Operational Law Handbook* (Charlottesville, VA, The Judge Advocates General’s Legal Center and School, 2005), 4.

<sup>2</sup> United Nations, *Charter of the United Nations, Statute of the International Court of Justice and Interim Arrangements* (San Francisco, Department of State, 1945), 10-11.

<sup>3</sup> Grimes, *Operational Law Handbook*, 5.

<sup>4</sup> Major John Rawcliffe and Captain Jeannine Smith, eds., *Operational Law Handbook* (Charlottesville, VA, The Judge Advocates General’s Legal Center and School, 2006), 104.

<sup>5</sup> Charles C. Krulak, "The Strategic Corporal: Leadership in the Three Block War," *Marines Magazine* (January 1999).

<sup>6</sup> J.W. Pelston, *Understanding the Constitution Twelfth Edition* (New York, Harcourt Brace Jovanovich, 1991), 4.

<sup>7</sup> *Ibid.*, 5.

<sup>8</sup> Ibid., 4.

<sup>9</sup> Natural Right to Self Defense, <http://www.mcrkba.org/w0.html> (accessed December, 17, 2009).

<sup>10</sup> National Defense University Press Publications, *The Declaration of Independence and the Constitution of the United States of America* (Washington DC, National Defense University Press, 1995), 28.

<sup>11</sup> Youssef H. Aboul-Enein and Sherifa Zuhur, *Islamic Rulings on Warfare* (Carlisle, PA, Strategic Studies Institute, 2004), 8.

<sup>12</sup> David G. Bolgiano, *Combat Self-Defense Saving American's Warriors from Risk-Adverse Commanders and their Lawyers* (Little White Wolf Books, 2007), 37-38.

<sup>13</sup> Ibid., 39.

<sup>14</sup> Ibid., 23.

<sup>15</sup> Major Mark S. Martins, "Rules of Engagement for Land Forces: A Matter of Training Not Lawyering," *Military Law Review* Volume 143 (Winter 1994): 36.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid., 23.

<sup>19</sup> Rawcliffe and Smith, *Operational Law Handbook*, 97.

<sup>20</sup> Grimes, *Operational Law Handbook*, 104-105.

<sup>21</sup> Rawcliffe and Smith, *Operational Law Handbook*, 103.

<sup>22</sup> Grimes, *Operational Law Handbook*, 104.

<sup>23</sup> Rawcliffe and Smith, *Operational Law Handbook*, 104.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid., 105.

<sup>27</sup> Grimes, *Operational Law Handbook*, 95.

<sup>28</sup> Wikipedia, [http://en.wikipedia.org/wiki/1983\\_Beirut\\_barracks\\_bombing](http://en.wikipedia.org/wiki/1983_Beirut_barracks_bombing) (accessed December, 13, 2009).

<sup>29</sup> Martins, "Rules of Engagement for Land Forces: A Matter of Training Not Lawyering," 11.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid., 12.

<sup>32</sup> Rick Hampson, "25 years later, bombing in Beirut still resonates," October 15, 2008, linked from *USA Today*, <http://usatoday.printthis.clickability.com/pt/cpt?action=cpt&title=25+years+later> (accessed December 13, 2009).

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Grimes, *Operational Law Handbook*, 114.

<sup>36</sup> Bolgiano, *Combat Self-Defense Saving American's Warriors from Risk-Adverse Commanders and their Lawyers*, 58.

<sup>37</sup> Dan Lamothe, "Fire support at issue after ambush kills 4," *Army Times*, September 21, 2009.

<sup>38</sup> Diana West, "Everyone but U.S. is protected in Afghanistan," September 15, 2009, linked from *New Haven Register* at <http://www.newhavenregister.com/articles/2009/09/15/opinion/> (accessed October 7, 2009).

<sup>39</sup> Ibid.

<sup>40</sup> "Tactical Directive," July 6, 2009, linked from *Headquarters International Security Assistance Force Kabul Afghanistan*, at [http://www.nato.int/isaf/docu/official.../Tactical\\_Directive\\_090706.pdf](http://www.nato.int/isaf/docu/official.../Tactical_Directive_090706.pdf) (accessed January 22, 2010).

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<sup>42</sup> "Tactical Directive," [http://www.nato.int/isaf/docu/official.../Tactical\\_Directive\\_090706.pdf](http://www.nato.int/isaf/docu/official.../Tactical_Directive_090706.pdf).

<sup>43</sup> Grimes, *Operational Law Handbook*, 117.

<sup>44</sup> Bolgiano, *Combat Self-Defense Saving American's Warriors from Risk-Adverse Commanders and their Lawyers*, 58.

<sup>45</sup> Ibid., 16.

<sup>46</sup> Ibid., 58.

<sup>47</sup> "JTF-Haiti Rules of Engagement Card (UNCLAS)," January 19, 2010, linked from *United States Southern Command Partnership for the Americas*, at [https://southcom.mil/DIRANDLNOS/PFACC/haiti\\_hadr/Staff](https://southcom.mil/DIRANDLNOS/PFACC/haiti_hadr/Staff) (accessed January 22, 2010).

