

## THE ETHICS OF ROE

BY

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USAWC STRATEGY RESEARCH PROJECT

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## ABSTRACT

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The purpose of this document is to examine the validity of operational rules of engagement (ROE) that responsible leaders choose to impose upon their subordinates in an effort to honor the *jus in bello* principles of discrimination and proportionality. While this project will not present the reader with a fool-proof solution for establishing ROE in war, it will point out the inadequacies within the current concept and application of ROE itself. While primarily focusing upon the development and implementation of ROE over the past 20+ years, this dialogue also addresses how particular elements of ROE impact the moral decision making responsibilities of soldiers as well as the strategic impact of those decisions. Additionally, over the period discussed (Panama 1989 – Iraq/Afghanistan 2009), the operational ROE issued by commanders underwent significant change. While touted as adjustments due to concerns about operational capabilities, these changes also carried with them not so obvious moral implications.



## THE ETHICS OF ROE

Discussing one of the many dilemmas presented by the concept of war is nothing new. The very act of armed conflict implies the killing of human beings, the destruction of property, a violation of rights, the infliction of pain, moribund suffering and any number of other acts or outcomes generally associated with criminal behavior in a peaceful civil society. Peaceful civilization considers such acts to be criminal for any number of reasons. Perhaps societal values, the establishment of moral authorities, cultural norms, codes of ethics, or the rule of natural law lends a sense of justice to the abhorrence of war and its trappings. It only follows then that one must therefore establish rules to monitor the conduct of civilized war in order to avoid losing one's innate sense of humanity.

The purpose of this short strategic research paper (SRP) is to examine those rules, the rules of engagement (ROE), that responsible leaders impose upon their charges in an effort to avoid the amoral abyss war can become. However, this short document does not promise to conclude with an epiphany revealing the "right way" to establish and implement ROE in the domain of modern warfare. Instead, by pointing out the inadequacies within the concept of ROE itself, perhaps one can discover promise of redemption in an old wisdom. While there does not exist space here to expound upon the ruminations of Alexander's ancient teacher, his thoughts do establish a guidepost for the contemporary leader of today's warriors to contemplate and potentially pursue.

## JCS SROE

The Joint Chiefs of Staff Standing Rules of Engagement (JCS SROE) serve as a commander's guide in the development of mission specific rules of engagement for every commander's specified area of responsibility (AOR). Current doctrine states the JCS SROE is not intended to restrict a commander's "inherent authority and obligation to use all necessary means available and to take all appropriate actions in self defense of the commander's unit" and other friendly forces in the AOR.<sup>1</sup> The guiding ethical principles which govern the practice of ROE implementation are intended to be found in the philosophical moral doctrine commonly termed as the right to self- defense, both at the unit and individual level. However, the current practice of implementing ROE throughout the entire spectrum of conflict lends itself to presenting the common soldier, and leaders, with a potentially perplexing paradox -- one that points to deficiencies inherent within current ROE and the developmental procedures exercised to create the ROE document.

The paradox is this: on the one hand, soldiers are trained to recognize threats and understand they have the authority to use all available means and all appropriate actions to defend themselves and other friendly personnel in their vicinity. On the other hand, commanders are constantly reminded of their responsibility to ensure their soldiers understand when and how this appropriate use of force may be exercised in self-defense. As a result, both individual soldiers and their commanders are cognizant of the fact that their use of force must remain consistent with the lawful orders of their superiors, the rules as outlined in the published unit ROE, and other applicable rules of engagement published for the assigned mission and AOR.<sup>2</sup> While it may appear to be a minor issue of semantics to some, the difference between the JCS SROE stated 'all

*necessary* means available' and the JCS mandate concerning 'all *available* means...(and) *appropriate* actions' represent a potentially mind numbing gulf when confronted with the troubling realities of operational implementation that are often encountered on the modern battlefield. The terms 'available', 'necessary', and 'appropriate' lend themselves to a myriad of possible interpretations. While it may be appropriate to engage a perceived threat with a small caliber weapon, the only effective means available might be a larger caliber area weapon. Additionally, who is to determine the level of urgency in responding to the threat and the necessity of doing so at any particular moment? More importantly, in the aftermath of a life-claiming incident, who, or what, is to be held responsible for the action, or inaction, of the individual soldier? While this SRP will not claim to provide a definitive answer to the last question, it will afford the reader a historical and philosophical analysis of the effectiveness of ROE application through the use of an all too common modern day ethical dilemma and set forth a glimpse of the potential difficulties the current JCS SROE can create on the contemporary battlefield.

### The Case of the Child Warrior

The United States Army has created over two-hundred and fifty training vignettes, or scenarios, which it uses to prepare soldiers in the application of ROE prior to deploying into a potential threat environment. While some cases appear to be fairly clear-cut, or are at least intended to be so, others lend themselves to a seemingly infinite number of realistically possible branches and sequels. This only serves to drive home the fact that, no matter what a soldier trains for, he or she can almost be assured of facing a situation they never encountered in a classroom. However, few circumstances appear to be as troubling, create as much uncertainty, or call for as

much pause, as the case of the child warrior. It is an unfortunate fact that, in many third-world countries, children are often recruited or forced to serve as soldiers. Most are desperate and many are orphaned but all are, undeniably, being viciously abused, if not physically, certainly mentally and emotionally. It is against this unspoken backdrop that our scenario begins.

A small five-man patrol assigned to duty in a third world country is conducting a routine reconnaissance of an urban area known to be a refuge for rebels, thugs, bandits and other undesirables that have been hampering humanitarian efforts by threatening relief workers and stealing aid materials from local inhabitants. Just last week, a nurse associated with Doctors Without Borders was severely beaten and left for dead after her attackers killed her driver and stole a truck full of badly needed medical supplies and equipment. Upon regaining consciousness, she recalls her attackers consisted not only of young men, but of a number of small boys as well. All were seen to be armed with machetes, small caliber weapons and a few even had what appeared to be rocket propelled grenade launchers (RPGs). As the patrol begins to work its way down a long alleyway between streets, a young boy who seems to be no more than ten-years old appears to be carrying an AK-47 at the ready, suddenly turns the corner at the end of the alley a mere five yards away from the soldier on point. There are no doors or means of escape within the alley for the soldier. The dusty light brown seven-foot mud walls are almost twelve inches thick and as hard as cement. Moving towards the end of the alley where the soldier initially entered is not possible as an ox cart has suddenly appeared to seal that route of retreat and has effectively cut the soldier off from the

other four members of his patrol. He is alone. He must ask himself, "What is available? What is appropriate? What is necessary?"

The soldier realizes his only means of available defense is the M-4 which he is also carrying at the ready. He hopes he remembered to chamber the round once the patrol began as he begins his attempt to discern if the un-uniformed child truly presents a threat. That the child is armed with a weapon capable of inflicting deadly harm is unquestionable. Whether the weapon is loaded and operational is something the soldier can neither determine nor move forward quickly enough to examine. Certainly, the boy fits the description of those whom the nurse described in her report concerning the attack only a week earlier. Other soldiers from the unit have also reported encountering children with weapons but none have been fired upon and most have successfully disarmed those with whom they have had direct contact. Initially, upon appearances alone, the lone soldier has no clear indication whether or not the child before him manifests a threat.

However, the boy's actions, upon seeing the soldier, indicate he may be fumbling to either take his weapon off of safe or attempting to charge a round into the chamber. Of course, he might also simply have been startled or stumbled around the corner with his hand and arm movements being those of one innocently trying to compose himself or regain his balance. A more sinister mind might even devise the possibility that the boy has been pushed around the corner by others waiting in ambush who hope to startle and potentially freeze the soldier in order to take advantage of an American soldier's well documented unwillingness to quickly and lethally engage a young child. In any case, the boy has not stopped moving toward the soldier and has not lowered the

barrel of his weapon. Simply having the muzzle of a weapon pointed in one's direction is generally enough of a potential indicator that the weapon bearer is exhibiting an aggressive and harmful motive. Most soldiers understand that a weapon is never to be pointed in the direction of another individual unless one has both authority to do so, this immediate authority being granted by persons in the soldier's chain of command, and willful intent to engage the target as it presents itself. In this instance though, the immediate actions of the child truly give little or no discernable signal as to whether or not he intends to present himself as threat to the life of the soldier.

Can the young child's intent be determined some other way or in some other manner? The eyes are said to be the window to the soul but how does one know what thoughts rest behind the vacant thousand-mile stare of an ill-clad ragamuffin warrior wannabe? Or, can the eyes be as big as saucers simply because the boy is as startled by the appearance of an obviously foreign soldier as the soldier is by the appearance, both physically and temporally, of the child? Of course, the eyes may be dilated by the drug induced stupor which is not uncommon to the males of the region. Ultimately, the many emotions flitting across this window could range from sorrow and hunger to anger and hatred. Looking deeply into that window and determining the heartfelt intentions of his potential adversary is a luxury which the soldier will most likely not have on his side. Only the child will know whether or not he intends himself to be a threat. The soldier's only means to obtaining this knowledge depends upon any number of physical indicators, many of which have already been discussed. In the end, the soldier alone must ultimately make a decision based upon his professional discretionary judgment.

Perhaps it is the determination as to whether the child bears any culpability for his actions that gives this soldier in our scenario the greatest reason for pause. Certainly, if the child does present a threat, this threat is unjustified. The soldier represents a lawful authority responsible for maintaining the peace and safety of those within the community. Intending to do harm to the soldier would be the equivalent of engaging a police officer with deadly force while the officer was attempting to fulfill the rightful and authorized responsibilities and duties for which law enforcement personnel are commissioned. However, culpability also entails considering the possibility of what many philosophers and lawyers term 'excusing conditions.' Clearly, any ten-year old child engaged in the business of soldiering is doing so only under a great deal of duress. It is highly likely that the child has undergone intense forms of non-traditional education and training intended to relieve the child of any standard inhibitions brought about by normally accepted understanding of the differences between actions which are right and those which are wrong. In this case, Jefferson McMahan would most likely argue that the child warrior is an Innocent Attacker "whose (apparent) threatening action is morally unjustified but nevertheless excused or nonculpable."<sup>3</sup> Whether or not an innocent attacker may or may not be killed under the umbrella of self-defense is an argument that is, thankfully, separate from this discussion.

Ultimately, the soldier is left to make his decision as to what is necessary and appropriate based upon his professional discretionary judgment. A judgment in which he concluded he faces what may or may not be a threat and, in that, a potential threat that may or may not be culpable. If the soldier determines the child warrior before him is a threat, be he culpable or not culpable, it appears the JCS SROE affords the soldier

the right to defend himself. Likewise, if the soldier concludes the child warrior he now engages is not a threat, it appears as if culpability becomes a non-issue. However, the JCS SROE has clearly failed to provide the soldier with any guidance which assists the soldier in determining what explicitly constitutes a threat. This is something which will be revisited later but it is an important point which cannot be allowed to pass without mention.

### The Victim: Issues of Necessity and Minimum Force

To this point, I have discussed the status of the potential threat. Now, the conversation must turn to the status of the victim, a victim who represents what some consider being the special understanding of a soldier. From the perspective of the child warrior, one wonders if the presence of the soldier, a foreign soldier mind you, serves as a legitimizing form of provocation. Is there, as some claim, a mutual understanding between soldiers that they may kill one another simply based upon the fact that they are soldiers and that is what soldiers are designed to do?<sup>4</sup> If this is indeed the case, then the child warrior, although some might question his willingness and the manner of his servitude, clearly has the right to engage one he views as the enemy. However, this would be a very liberal and pernicious interpretation of the relationship between soldiers of opposing forces. As alluded to previously, the US soldier is serving in the capacity of law enforcement and, as such, should be afforded all the rights, privileges and respect due one carrying out such duties. Claiming the child warrior had the right to view the US soldier as a threat and engage him with deadly force would be the equivalent of justifying criminals who turn on police personnel with deadly force based upon the presumption that the police, in the carrying out of their duties, served to provoke a

violent response by their foiling of the evil-doer. While the child warrior may 'feel' provoked, he has no inherent right to present himself as a threat.

That the potential victim, the isolated soldier in this instance, must also consider the necessity of his action gives him yet another reason for pause. Does the fact that the JCS SROE indicates he is free to use all necessary means available provide any clear guidance as to what exactly might be considered 'necessary'? Does the term necessary imbue the soldier with an inherent right to self-defense or is it a conveniently ambiguous term which leaves the individual decision maker at the mercy of a momentary rush of adrenaline while lawyers and commanders far removed from the incident may, at their leisure, after study and with great fanfare of reason and rationale, determine that what may have seemed necessary at the time truly was not necessary at all? It seems very troubling to assume that a soldier, who is not even sure if he is facing a viable threat, must also determine if his decision to use lethal force fulfills the requirement of necessity.

Closely related to necessity, and sometimes confused with it, is the requirement to use minimum force. Much like necessity, minimum force descends into ambiguity, especially when combined with an equally homogeneous term such as appropriate actions. In this case, the minimum force reasonably available to the soldier is a small caliber weapon with a maximum effective range that far exceeds the aforementioned five yards separating him from the young boy. To be sure, he most likely also has a knife of some sort and it is reasonable to believe that a young male old enough to serve in the US Army could probably also physically overpower his potential assailant. However, since the time required to cover five yards in this scenario affords the

potential threat more than enough time to discharge his equally lethal weaponry, the minimum force required of the soldier to avoid deadly harm and negate the possible assailant would have to be the M4 which he possesses.

When discussing the lethality of weaponry, issues of proportionality will soon rise to the forefront. In the scenario we have been discussing, the circumstances outline a one-on-one confrontation. However, what if the armed boy was followed by or surrounded by a group of five to ten more children? Would the soldier be correct in engaging the entire group as a potential threat or would he, based on numbers, be forced to put his one life at risk for the lives of five to ten others? For that matter, what number is high enough? Are not all lives equal and should not simply two lives, regardless of whether one of those lives is potentially culpable, count for more than one? Or, based upon his intent to only shoot at the armed boy who is representing the threat, might the soldier rightfully defend himself with the understanding that he is taking refuge under what John Ford terms to be the principle of double effect?<sup>5</sup> However, proportionality also takes into consideration the means by which the soldier may attempt to destroy the threat. The previous paragraph discussed those means of lesser lethality, knives and hand-to-hand combat, but what of those weapons systems that bring a bit more lethal force to the battlefield? What if the soldier only had a light anti-tank weapon (LAW) or mini-gun as his means of defense? Both weapons would reduce the child to an unrecognizable mass in a matter of milliseconds. Does the child present such a deadly threat as to be dealt with by such vicious means even if they are the only ones reasonably available? One can see how such a discussion could quickly spin off into absurdity as we next armed the soldier with a howitzer, to be followed by a tank and

then an A10 Thunderbolt. The list could go on and on but one should begin to grasp the lack of clarity JCS SROE brings to the question of proportionality.

#### External Influences and the Decision to Act

Finally, the soldier must take into account the possibility of side-effects. Not only might these side-effects entail the boy's family members, innocents inadvertently caught in the line of fire, and the soldier's own loved ones who are surely hoping for his safe return, but the soldier has also to be burdened, albeit inadvertently, with considerations concerning potential operational, strategic and political fallout. The prevalence of media personnel on the modern battlefield, coupled with the increased presence of humanitarian oriented non-governmental organizations (NGOs), place the actions of each soldier under a larger number of critical eyes than ever before. The death of a warrior child, even though it may have resulted from a soldier rightfully defending himself, will still be reported as a young child having been killed by US troops. At the local level, how will the community react when an American soldier kills an innocent child that he reasonably believed posed a threat? Community enmity grows into regional hatred which makes the humanitarian mission much more difficult and further complicates international relations on the global stage.

Unfortunately, the soldier does not have the luxury of the time it has taken to write and read this discussion. His decision, which is supposed to be aided by the implementation of basic JCS SROE doctrine, can certainly be drawn up into a philosophical dilemma without such aid. The principles are, or should be, basic to any ethical discussion attempting to establish moral norms within the context of *jus in bello*.

## The Options Analyzed

Ultimately, there exist four possible primary conclusions to the scenario just outlined and analyzed above:

1) The soldier correctly determines the boy is a threat, and exercises his right to self-defense by killing the child.

2) The soldier incorrectly determines the boy is not a threat and is subsequently shot dead by said boy.

3) The soldier incorrectly determines the boy is a threat, and, in exercising his right to self-defense, kills an innocent child.

4) The soldier correctly determines the boy is a non-threat and determines not to engage the potential hostile.

A realistic fifth secondary possibility also exists in that the soldier may correctly determine the boy to be a threat but decides, for any number of possible reasons, not to engage the child and is subsequently the victim of his own moral inhibitions.

(Alternatively, I will assume that, if the soldier determines the boy to be a non-threat, the soldier will indeed not kill the child therefore I will not belabor a possible sixth ending.)

In a perfect world, each scenario would easily or clearly end with the first or fourth conclusion. However, the fog of war and the willingness of those who would oppose humanitarian operations to use the American soldiers' ingrained prohibitions against certain acts, has shown us that real-world instances, such as those in Somalia and currently occurring in ongoing conflicts, will just as likely end with conclusions two or three as well.

Perhaps I have been too harsh concerning the shortcomings that I perceive to be inherent in the basic JCS SROE. It must be understood that this is simply intended to

serve as a guide to commanders as they develop their own mission specific ROE for their assigned AOR. In light of this, a further investigation and analysis is required. What do we know about the effectiveness of operational ROE that has actually been implemented on the battlefield over the past two decades? How has it changed during that time? How effective have these adaptations been? Do the actual ROE with which soldiers enter into combat better prepare them for answering the problems outlined previously? Those are the questions that must be answered and the answers to those questions must be analyzed in detail. Hopefully, this will lead us to a better understanding of how ROE development, implementation, and subsequent analysis might be better conducted in the future.

### The Recent Evolution of ROE

With the exception of Lieutenant General McChrystal's recently released counterinsurgency guidance, analysis of operational ROE since 1989 demonstrates an increasing leniency allowing soldiers greater freedom to engage those they deem to be hostile agents.<sup>6</sup> With this increasing freedom, ROE statements and instructions have subsequently become longer and more refined with regard to the level of detail addressed. The ROE for Operation Desert Storm in 1991, also known as the Persian Gulf War, was very restrictive and definitive in nature. Soldiers were authorized to engage only combatants and military targets while sparing civilian persons and non-military objects. Furthermore, they were directed to restrict destruction only to what the mission required.<sup>7</sup> From 1993 to 1994, soldiers participating in Operation Restore Hope, part of the United Nations Operations in Somalia (UNOSOM I and II), found themselves operating in a very fluid environment with a ROE that was also very restrictive and specific. Although this ROE was loosened as the operational

environment became more volatile, the use of challenges, disarming and detaining were tactics leaders preferred over the use of force. By 1996, the Implementation Force (IFOR) ROE for those deployed to Bosnia as part of Operation Decisive Endeavor was quite succinct and, while still allowing for obvious instances of self-defense, it also strictly defined those instances when opening fire would be authorized by the command. Only after a series of warnings or actually being fired upon might a commander authorize the use of force. Furthermore, certain locations and property required direct command authorization for the return of fire even if the soldiers received incoming fire from the positions in question. The Stabilization Force (SFOR) that followed IFOR in 1997 as part of Operation Constant Guard in Bosnia received expanded ROE which allowed for the engagement of individuals “who unlawfully commit, or are about to commit, an act which endangers life, or is likely to cause serious bodily harm, in circumstances where there is no other way to prevent the act.”<sup>8</sup> Despite the wording that lends itself to ambiguities already discussed previously, this is certainly a more relaxed ROE which gives the soldier more decision making responsibility, if not authority. By 1998, with the deployment of Task Force Hawk in Kosovo (known as KFOR), phraseology specifically acknowledging each soldier’s inherent right to self defense became the standard heading and opening paragraph in all ROE. This was another significant step in broadening the discretion with which a soldier could determine and engage potential hostile forces. Each adjustment made in the ROE from 1991 to 2000 saw commanders at all levels delegating life and death decision-making authority to the individual soldier. What were formerly strategic political and operational level decisions had now been allocated to the tactical level.

After September 11<sup>th</sup>, 2001, the next major (new) deployment in which soldiers from the United States participated was Operation Enduring Freedom (Afghanistan). For a time, the ROE for this operation was partially classified. However, its two primary tenets, from which all others were derived, provided soldiers with the authorization to engage any target deemed to be demonstrating what may be determined as hostile intent while also invoking a broad definition of a soldier's inherent right to self-defense. Initial ROE for the subsequent deployment in Iraq, Operation Iraqi Freedom, was given an even higher classification and, for quite some time, certain elements of the guidance had not been made public by Central Command. However, it should be clear that, over the past nearly two decades of constant conflict, the restrictions imposed upon soldiers and the manner in which they may defend themselves had become more and more discretionary. Changes indicating a reversion back to the more restrictive ROE of the late 1980's and early 1990's during the 2006-2007 surge and recent developments in Afghanistan stand in stark contrast to the ROE of the early 2000's. Following this apparent fifteen-year trend to its possible, if not logical conclusion, one must assess the ethical foundations of a ROE which allows for the engagement of certain types of targets, be it locations, buildings, or personnel, without those targets demonstrating hostile intent or providing the individual soldier with some overt reason to exercise his inherent right to self defense. More specifically, within the realm of just war theory, is there an equivalent scenario or provision that might assist in assessing the ethical foundations for such a ROE?

### A Soldier's Special Status

Upon the field of battle, soldiers understand, for the most part, that they faced each other as moral equals, not so much in terms of the political ends each seeks to

attain but, rather, in terms of their equivalent individual humanity. Although there are those who attempt to justify the actions of one combatant and villainize the actions of his opponent based upon *jus ad bellum* criteria, this means little to the individual soldier in the intense heat of mortal conflict. While discussing the rules of war, Michael Walzer outlines the two primary types of prohibitions “attached to the central principle that soldiers have an equal right to kill. The first cluster specifies when and how they can kill, the second whom they can kill.”<sup>9</sup> ROE addresses both these concerns but the questions of hostile intent and the right to self defense lend themselves to a discussion more of the second than the first. In general, the great majority of truly professional soldiers limits and restrain themselves within the confines of accepted convention. For most, acquiescence to custom is a point of pride and establishes a line of demarcation between professional military service members and those who might be more aptly described as terrorists, bandits and mere thugs.

At the same time, those who are acknowledged as noncombatants are, quite understandably, not afforded the equal right to kill or, more importantly, be killed. This is a significant and sensitive matter which necessarily assists in the distinguishing of right and wrong actions in combat. For the purposes of this discussion, noncombatant refers to those who have either chosen not to take up arms in the pursuit of active combat or for whom the choice does not arise. Let this suffice for our understanding of the term. In most instances, noncombatants are morally innocent with regard to the wrongful aggression of their nation state. There may be noncombatants who are morally guilty. Leaders in government and public figures who may have taken part in fomenting an often times fickle and ignorant public into an unjust war are, most likely,

more guilty of wrongdoing than the poor conscripts they enlist to do their bidding. To further delineate the differences between morally guilty and innocent combatants as well as morally guilty and innocent noncombatants is a topic to be discussed elsewhere and has already been addressed to a greater extent by men such as Lawrence A. Alexander and Robert K. Fullinwider in their respective writings.<sup>10</sup>

### The Instance of Obliteration Bombing

In his article, "*The Morality of Obliteration Bombing*," John C. Ford argues forcefully against the implementation of obliteration bombing as a strategy to be considered and utilized during a time of war. This is an excellent example of a tactic by which noncombatants who possess no hostile intent and present no threat worthy of invoking an individual soldier's right to self defense might easily be the victims of war. Ford acknowledges that the line between combatant and noncombatant is one that is not easily determined. There exists no viable utilitarian methodology which assigns measureable values with regard to degrees of innocence or guilt. Who is less innocent, the munitions factory worker monitoring the measurements of gunpowder into red, green and white bags for use by artillerymen or the fanatically nationalistic professor who mentored and molded the state leader now marching his nation off into some ill-advised war of conquest? Who is guiltier of sustaining the war effort, the contracted baker constantly turning out daily rations of bread for the sustainment of troops in the front lines or the newspaper editor fomenting war fever with blistering headlines and inflammatory allegations concerning the designated enemy? One might argue that the newspaperman and professor exhibit hostile intent while the baker and factory worker are threats due to the raw war materials they produce thus enabling their country's soldiers to sustain the fight. In any case, both arguments, while they can be made, are

a stretch and the threats posed by such individuals to the individual soldier are minimal at best. To be sure, the tactic of obliteration bombing does not discriminate between professions.

At the same time, a ROE which does not require a demonstration of hostile intent, be it specific or general, or justification to kill via the right to self defense, also does not discriminate. Such a ROE, in the absence of these restrictions, could be understood to allow for the killing of not only those described above but the slaughter of children and the elderly as well. Actions previously considered to be unconscionable would be afforded a wholesale permissiveness that is unthinkable. Only common decency and a humane conscience would stand in the way of potential butchery. Like the advocates of obliteration bombing, those who put forth such a ROE would invoke claims of “the enemy did it first or, military necessity demands it; or it is justified by way of reprisal; or, the situation is desperately abnormal;” or, this is an instance of total war.<sup>11</sup> The problem with such a ROE is that it effectively does away with the distinction between noncombatants and combatants, innocent and guilty, culpable and nonculpable, thus nullifying their effectiveness as useful moral norms. The importance of maintaining this distinction has not gone unnoticed by scholars.

### The Moral View

Jefferson McMahan writes, “The fundamental distinction that determines who is and who is not a permissible target for attack in war is the distinction between the morally guilty and the morally innocent.”<sup>12</sup> He acknowledges that one of the troubling challenges with such a theory involves the very ability to discriminate between the morally guilty and the morally innocent. Furthermore, the *Moral View*, as McMahan terms it, requires that considerations of *jus ad bellum* and *jus in bello* cannot be logically

independent. While those involved in fighting an unjust war are then inherently unjust combatants, they may also be morally innocent for a variety of reasons to include ignorance or coercion. Likewise, if the unjust combatants cannot appeal to reasons indicating innocence, they become culpable attackers and are thus legitimate targets for engagement. Unlike the *Orthodox View*, which clearly distinguishes between combatants and civilians, the *Moral View* allows for the probability that there exist, within the civilian population, those who are morally guilty. Pro (unjust) war politicians, public figures and civilian advocates would fall into this category.

On first glance, it appears the *Moral View* affords advocates of an unrestricted ROE with an avenue leading to ethical justification. Within any civilian population, traditionally granted the immunities associated with noncombatants, there exist those who would be considered morally guilty or culpable for the unjust war. According to the *Moral View*, such status would then make them liable to attack by those executing a just war in a just manner. However, for those attempting to adhere to the *Moral View*, there arises the problem of discriminating between morally guilty and morally innocent unjust combatants. The traditional delineations associated with uniforms, certain articles of identifying clothing and/or weapons are no longer primary in identifying persons with hostile intent. McMahan indirectly acknowledges this shortcoming when he writes, “while the *Moral View* may seem excessively restrictive in the constraints it imposes on the killing of combatants, it may also be more permissive in its implications for the killing of civilians.”<sup>13</sup> While it is the permissiveness of killing civilians that aligns with a less restrictive ROE, the inability to discriminate between culpable and innocent unjust attackers as well as culpable and innocent civilians is problematic. The *Moral View*

does allow for greater freedom in the attacking of civilians but its commensurate requirement of discrimination based upon culpability and innocence makes it more cumbersome than those requirements set forth by the more traditional Orthodox View. As a result, the *Moral View* is neither a practical tool to be used in the implementation of such a ROE nor the kind of carte blanche such a ROE requires.

### The Principle of Double Effect

Both Michael Walzer and John C. Ford address the principle of double effect in their discussions concerning just war theory.<sup>14</sup> The impetus for the argument centers upon the permissibility of actions which are likely to bring about consequences normally considered to be evil; primarily, the death of noncombatants. For such an outcome to be considered acceptable it must satisfy three conditions as outlined by Ford or four conditions as outlined by Walzer. Walzer's conditions are actually nothing more than a clearer expression of Ford's so, since Walzer is more comprehensive and easily understood, his format better suits the topic at hand. The conditions are as follows:

1) The act is good in itself or at least indifferent, which means, for our purposes, that it is a legitimate act of war.

2) The direct effect is morally acceptable – the destruction of military supplies, for example, or the killing of enemy soldiers.

3) The intention of the actor is good, that is, he aims only at the acceptable effect, the evil effect is not one of his ends, nor is it a means to his ends.

4) The good effect is sufficiently good to compensate for the allowing evil effect; it must be justifiable under Sidgwick's proportionality rule.

The question which must now be answered is whether or not a ROE that does not stipulate a potential target demonstrate hostile intent, or require the soldier taking action

to invoke his inherent right to self defense, can meet the conditions as they have been set forth here.

The simple act of engaging a target, during a time of war, is certainly legitimate. However, in most instances, this means the target subject to engagement has definitely been identified as a part of the enemy elements or serving in a significant material supporting role towards the war effort. Therefore, the direct effect of engaging the identified target is certainly morally acceptable. The troubling element of such a theory concerns those effects which are indirect or side consequences, of the primary action. Perhaps, in the act of destroying an ammunition depot, one also destroys part of a school or a hospital and some of those inside such facilities. Likewise, it might be possible to destroy enemy soldiers while at the same time killing noncombatants in the area of conflict. The measurement of proportionality is meant to counter such problems so one might consider the fourth condition to be capable of canceling out the potential ill effects associated with the second condition. While a weak constraint, due primarily to the leniency it affords the soldier engaging in lethal action, proportionality nonetheless requires that one at least consider and measure both the good and evil effects of a proposed action.

The crux of the entire principle, however, revolves around the third condition. One must only intend the good effect, as evil as it may be. In other words, the soldiers tasked with destroying the ammunition depot must only intend to destroy the depot and the collateral damage suffered by the hospital or school cannot be intended. Similarly, if an engagement with enemy soldiers results in civilian noncombatant deaths as well as the deaths of known combatants, only those who were known to be enemy soldiers

could have been rightly intended to be killed. The actions of the soldiers who damaged the school and hospital, as well as the actions of those who killed the noncombatants, were unintentional with regards to those unfortunate ends, be they foreseen or unforeseen, and therefore are capable of not being considered immoral.

Unfortunately, a ROE which does not require a demonstrated hostile intent or activities necessitating a soldier invoke his right to self defense, is, realistically, also unfettered by requirements which analyze intention. If one is not required to demonstrate the legitimacy of a proposed target, then one also need not be concerned with solely intending to engage combatants. A soldier might decide to kill every combatant and noncombatant in Iraq and, with seeming immunity, declare, "I only intended to kill those who were enemy combatants, guerillas and insurgents. The fact that I also killed innocents and noncombatants is merely a foreseeable but unfortunate side effect." Proponents of proportionality should be pointing out the absurdity of such a defense but, if mission requirements and military necessity deemed such actions as required, the weaknesses of proportionality would be mightily exposed. Granted, this is an instance of wildly hypothetical absurdity that Robert Holmes alludes to in his book On War and Morality.<sup>15</sup> However, without at least a minimally restrictive ROE, the requirement for discrimination between combatants and noncombatants or the morally culpable and nonculpable is, in effect, no longer in effect.

I can only conjecture that, if Harry S. Truman had spoken to G.E.M. Anscombe concerning her opposition to Oxford's conferring upon him an honorary degree, the issue of intention may have never been addressed in what would most assuredly have been a short exchange.<sup>16</sup> What if, though, Mr. Truman told Miss Anscombe that, in

dropping the atomic bombs upon Hiroshima and Nagasaki, he had only intended to destroy targets of military significance? What if he continued on that the thousands of civilian deaths were simply foreseen side effects and that the bombing was deemed to be a military necessity due to the disproportionate number of anticipated allied casualties an invasion of Japan would entail? On a smaller scale, could not a soldier who calls in an artillery strike upon an occupied building, intending only to kill combatants, claim that he too did not intend to kill noncombatants but that there were foreseeable civilian deaths resulting from actions of military necessity? Perhaps the soldier was simply gripped by rage, fear, or in possession of a sadistic nature. There is no way to judge his intent as it is internal to him alone. A ROE void of requiring certain targets be in possession of discernable hostile intent or serving to invoke one's right of self defense potentially opens the floodgates to such instances of excessiveness.

### Naked Soldiers

In his book, Good-bye to All That, Robert Graves recounts the story of encountering a German soldier taking a bath behind the German front lines during the trench warfare phase of World War I.<sup>17</sup> Recall the earlier discussion of a soldier's special status. As a sniper, Graves would have been well within his rights to kill the bathing soldier who was apparently enjoying a temporary false sense of security. Evidently, Graves had some material indication that he was indeed viewing a soldier. Since most soldiers do not have military insignia tattooed to their bodies, one must assume that the soldier's uniform items, weapons and/or gear were visible nearby. Even if this is all true, the German soldier, while in the midst of his bathing regimen, clearly was not, at the moment, demonstrating hostile intent towards Graves or his sergeant. Furthermore, the naked unarmed soldier was certainly not an immediate

threat requiring Graves to exercise his right to self defense. However, few would question the permissibility of Graves shooting the poor fellow if he had chosen to do so. Why is this so? Succinctly put, soldiers are allowed to kill soldiers and that is understood amongst all combatants. It is a pernicious business, as some are wont to say, but it is the nature of the beast we call war.

In light of this, fast forward to present day Iraq or Afghanistan and consider the same situation, with minor modifications, related by a soldier on patrol. Upon topping a small ridge, this soldier happens upon an individual bathing in a small ravine. The area concerned has been quite hostile to coalition forces lately and friendly casualties have mounted over the past few weeks. The bather could be an unfriendly soldier, guerilla, or insurgent. It is equally likely that the individual is a shopkeeper, farmer, or baker. There is no identifying clothing to be seen nor does a weapon appear to be in the vicinity. Again, as with the German soldier, this individual is neither demonstrating hostile intent nor acting in a manner that might excite the soldier to invoke his right to self defense. However, based upon a loosely unrestrictive ROE, the soldier on patrol might be acting fully within his delegated authority to shoot and kill the unsuspecting bather. What if the bather was a woman or even a child? In regions fraught with insurgents and instances of guerrilla warfare-like tactic, such presumed innocents are as likely to be adversaries as they are to be at least indifferent. Again, this ROE allows the soldier freedom to decide whether or not to engage. Whatever the final outcome, neither the soldier who pulls the trigger nor the one who passes on by have violated an uninhibited standing operational ROE void of the traditional indicators of hostile intent and self defense requirements.

## The End Results

On a battlefield where enemy combatants cannot readily be discerned from innocents and noncombatants, and the gap is quickly closing if it has not closed already, commanders find themselves faced with a multifaceted dilemma. Should soldiers effectively be afforded absolute immunity from culpability with regard to the killing of innocents and noncombatants via the implementation of a ROE that forgoes the long adhered to and understood pre-engagement requirements of hostile intent and the right to self defense? Might such tactical and operational safeguards on the soldier's behalf jeopardize the entire endeavor on the strategic and geopolitical level? The positions of modern just war moralists, evaluating actions based primarily on their outcome, offer little practical application outside the academic realm. Classic morality and just war theory offers a glimmer of hope by establishing an important moral assignment to the intentionality of an action apart from its end results. The careful consideration and development of an intention based ROE, coupled with an effective evaluation and assessment approach based on individual case studies which apply elements of both objective and subjective morality, may provide commanders with the tools necessary for dealing with the growing ROE challenge.

## Can ROE be Ethical?

Over the past twenty years, the traditional distinctions between combatants and noncombatants have begun to blur. No longer do noble knights and their armies of paid mercenaries line up neatly facing one another over an open field. Nor do opposing armies, distinctly dressed in appropriate colors, flags waving and bands playing, take time to assemble themselves according to the tactics of the day in order to 'properly' initiate hostilities. Modern warfare does not even allow for the digging of endless trench

systems that are easily marked on common maps thus giving commanders at least a bird's eye view of where the 'good guys' and the 'bad guys' have positioned themselves. Today's battles are fought in dusty streets, rugged unforgiving mountain terrain and steamy, densely foliated areas where the lines of demarcation are confusing at best and coolly described as fluid. Often, at least one side does not wear any manner of distinctive uniform or utilize standardized weapon systems. Even the combatants themselves are non-traditional as, in many countries, women and children have freely enlisted, joined out of necessity, or been forced into the service of those wielding some form of power. In such an indistinguishable and sometimes bizarre arena, soldiers often find themselves faced with moral decisions no one wants to make. However, out of a desire for self-preservation and necessity, such are the decisions we ask our soldiers to make on an almost daily basis in our world's present state of affairs.

Ethicists such as Judith Thomson, Robert Fullinwider and Michael Otsuka try to provide us with neat formulas to use as a basis for determining when the killing of another human being is justifiable. Unfortunately, due to the indeterminate nature of many features on the modern battlefield, including the combatants, the application of such seemingly neat methodologies becomes muddled and confused. This confusion multiplies almost exponentially as the number of nested factors possessing moral implications themselves also increase.

When engaged in combat operations, especially in those instances undertaken for reasons of providing or facilitating humanitarian aid, soldiers will undoubtedly face serious decisions with far reaching moral implications. Unfortunately, the soldier does not have the luxury of pondering these instances for a period of time most would

consider sufficient. Unlike the academics and ethicists who dedicate considerable amounts of time creating extreme examples for philosophical arguments, these soldiers must live in the here and now, dealing with realities and conditions those outside the military profession can only imagine and likely never experience.

However, the value of the intellectual exercise should not be overlooked. Without commanders taking into consideration the many possibilities their soldiers may confront, they fail to properly prepare their men and women for the moral dilemmas they will most certainly face in ever increasing numbers. The basic precept that soldiers should refrain from targeting and engaging noncombatants is fundamental to the establishment of ethical foundations within the military profession. Colonel Anthony E. Hartle points out the three factors which shape any nation's professional military ethic consist of societal norms, international law, and the requirements of the military profession.<sup>18</sup> Therefore, within the profession of arms rests an onus of responsibility with regard to the education and training of soldiers.

However, with so many ethical models available to consider, how does a leader, not to mention the soldier who must eventually apply the model in a life or death scenario, determine which one is the right one? Is the right of self-defense absolute as in the Hobbesian tradition or is the best template for such determinations that of the domestic analogy as represented by the *Orthodox View* of Just War Theory? Perhaps the solution is somewhere in the middle such as the *Collective View* or best outlined by those proponents of the *Moral View*. I believe this confusion and wide-spread disagreement between scholars, military professionals, politicians and activists is indicative of a larger failure.

## The Beginning of a Conclusion

The belief that moral theories can be uniformly applied to the non-uniform circumstances encountered in combat is, at best, an irresponsible enterprise. John Dewey tells us, “the inert, stupid quality of current customs perverts learning into a willingness to follow where others point the way, into conformity, constriction, surrender of skepticism and experiment.”<sup>19</sup> He asserts such theories fail to recognize that each and every circumstance is unique in a multiplicity of ways. Any attempt at establishing sterile checklists with the intent of determining guilt, innocence, noninnocence, or any other moral status of combatants and noncombatants is fruitless. The many military scenarios outlined previously demonstrate the challenge of such an endeavor. If men and women of professed deep intellectual aptitudes cannot agree upon moral determinations in the most innocuous of cases, that of humanitarian aid, how can they hope to discover a consensus in the most pernicious, fluid and complex of all environments, that of war?

I believe the only possible solution is one Dewey himself identified almost a century ago. Each circumstance of armed conflict must not be evaluated based upon unintelligent habit as established by customary moral standards. Indeed a new analogy must be developed which intelligently adapts customs into case-based moral standards.<sup>20</sup> Only by analyzing each situation as a unique instance, can society hope to find an evenly based application of morality, or immorality, in times of conflict and war. Basic, fundamental moral principles must still ring true but the new analogy must also incorporate a balance of modern realist, and historic idealist, considerations concomitant with present world realities and circumstances.

## Finding a New Analogy in Old Wisdom

Traditional ROE provides the soldier with a decision procedure meant to infuse the soldier's reasoning mechanisms with an enabling moral compass. However, what if ethical theory, the foundational ability to discern right and wrong, does not require a decision procedure and is, in fact, effectively immune from such patterned and predetermined mathematical modes of thought? This is where Alexander's teacher, Aristotle, would have modern theorists begin the search for answers to the riddle of ROE. In the combination of virtues, both those of the intellect and those of character, is where practical wisdom enables ethical virtue to flourish.<sup>21</sup> A man's character therefore, when properly formed, informs his ethical decision making without necessitating decision templates, matrices or sets of pre-established rules meant to guide his actions in situations when there exists no time for reflection or guidance. The guidance must come from within and be therefore instinctual. How does the army of a nation garner this instinctual moral capacity thus ensuring itself against immoral and unethical behavior in the fog of individual conflict? Aristotle seems to have lit the way to an answer - - the development of individual virtue. Whether the path is one soldiers and nations can afford to follow is the question that now looms.

## Endnotes

<sup>1</sup>U.S. Department of Defense, *Joint Chiefs of Staff Instruction of Standing Rules of Engagement for US Forces*, CJCSI 3121.01A. (Washington, DC: Department of Defense, January 15, 2000), Encl. A, Par. 2.a.

<sup>2</sup>U.S. Department of the Army, *Rules of Engagement (ROE) Handbook for Judge Advocates* (Washington, DC: Center for Law and Military Operations (CLAMO), May 1, 2000), 3-26.

<sup>3</sup>Jefferson McMahan, "Self Defense and the Problem of the Innocent Attacker." *Ethics: An International Journal of Social, Political, and Legal Philosophy*. Volume/Edition 104 (January 1994): 263.

<sup>4</sup>Micahel Walzer, *Just and Unjust Wars*. Third Edition. (New York, New York: Basic Books, 2000), 36-37.

<sup>5</sup>John C. Ford, "The Morality of Obliteration Bombing," in *War and Morality*, ed. Richard A. Wasserstrom, (Belmont, California: Wadsworth Publishing 1970), 26.

<sup>6</sup>LTG Stanley A. McChrystal, Commander, International Security Assistance Force, "ISAF Commander's Counterinsurgency Guidance," Headquarters, International Security Assistance Force, Kabul, Afghanistan. August 27, 2009.

<sup>7</sup>U.S. Department of the Army, *Rules of Engagement (ROE) Handbook for Judge Advocates* (Washington, DC: Center for Law and Military Operations (CLAMO), May 1, 2000), C-20.

<sup>8</sup>Ibid., C-10.

<sup>9</sup>Walzer, *Just and Unjust Wars*, 41.

<sup>10</sup>Robert K. Fullinwider, "War and Innocence," *A Philosophy and Public Affairs Reader*, (1975). Lawrence A. Alexander, "Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider," *A Philosophy and Public Affairs Reader*, (1976).

<sup>11</sup>Ford, "The Morality of Obliteration Bombing," 20-21.

<sup>12</sup>Jefferson McMahan, "Innocence, Self-Defense and Killing in War," *The Journal of Political Philosophy*, 2, no. 3 (1994): 205. Note: McMahan is currently a professor in the Department of Philosophy at Rutgers University. He is one of the foremost respected thinkers with regard to philosophies surrounding the concept of killing and the morality of war. One of his papers identifies boy soldiers, like many conscripted in parts of Africa, as innocent attackers.

<sup>13</sup>Ibid., 458.

<sup>14</sup>Walzer, *Just and Unjust Wars*, 153. Ford, "The Morality of Obliteration Bombing," 26.

<sup>15</sup>Robert Holmes, *On War and Morality* (Princeton, New Jersey: Princeton University Press, 1989), 195.

<sup>16</sup>G.E.M. Anscombe, "Mr. Truman's Degree," *The Collected Philosophical Papers (Volume III) – Ethics, Religion and Politics* (Oxford, United Kingdom: Oxford University Press, 1981), 312.

<sup>17</sup>Walzer, *Just and Unjust Wars*, 140.

<sup>18</sup>Anthony E. Hartle, *Moral Issues in Military Decision Making* (Lawrence, Kansas: University of Kansas Press, 1989), 100-103.

<sup>19</sup>John Dewey, *The Middle Works, 1899-1924, Volume 14: Human Nature and Conduct, 1922* (Carbondale and Edwardsville, Illinois: Southern Illinois University, 1988), 47.

<sup>20</sup>Ibid., 54-55.

<sup>21</sup>Jeff Chuska, *Aristotle's Best Regime: A Reading of Aristotle's Politics VII.1-10* (Lanham, Maryland: University Press of America, Inc., 2000), 111.

