



RULES OF ENGAGEMENT:
BALANCING THE (INHERENT) RIGHT AND
OBLIGATION OF SELF-DEFENSE WITH THE
PREVENTION OF CIVILIAN CASUALTIES

Christopher D. Amore*

“Stand your ground; don’t fire unless fired upon,
but if they mean to have a war, let it begin here.”¹

INTRODUCTION

On September 15, 2011, Marine Corps Sergeant (Sgt.) Dakota Meyer was awarded the Congressional Medal of Honor for his actions

* Christopher Amore is a graduate of Brooklyn Law School and an associate at the law firm of Mound Cotton Wollan & Greengrass in New York. Prior to law school, he was a Captain in the United States Army and served as a platoon leader in Iraq from November 2005 to October 2006. The professionalism and discipline of the Soldiers he served with inspired this article. It is dedicated to those who have come under enemy fire and bravely endured to protect their brothers in arms. He would like to thank Ms. Chelsea Hathaway and MAJ R.J. Hughes for their commentary and support throughout the drafting process. The opinions and views expressed in this article, as well as the mistakes, are solely those of the author and do not reflect the views of Mound Cotton Wollan & Greengrass or the United States Army.

¹ Rule of engagement attributed to Captain Jonas Parker at the Battle of Lexington, April 19, 1775.

during an ambush in the village of Ganjgal in Kunar Province, Afghanistan on September 8, 2009.² His citation reads:

Corporal Meyer maintained security at a patrol rally point while other members of his team moved on foot with two platoons of Afghan National Army and Border Police into the village of Ganjgal for a pre-dawn meeting with village elders. Moving into the village, the patrol was ambushed by more than 50 enemy fighters firing rocket propelled grenades, mortars, and machine guns from houses and fortified positions on the slopes above. Hearing over the radio that four U.S. team members were cut off, Corporal Meyer seized the initiative. With a fellow Marine driving, Corporal Meyer took the exposed gunner's position in a gun-truck as they drove down the steeply terraced terrain in a daring attempt to disrupt the enemy attack and locate the trapped U.S. team. Disregarding intense enemy fire now concentrated on their lone vehicle, Corporal Meyer killed a number of enemy fighters with the mounted machine guns and his rifle, some at near point blank range, as he and his driver made three solo trips into the ambush area. During the first two trips, he and his driver evacuated two dozen Afghan soldiers, many of whom were wounded. When one machine gun became inoperable, he directed a return to the rally point to switch to another gun-truck for a third trip into the ambush area where his accurate fire directly supported the remaining U.S. personnel and Afghan soldiers fighting their way out of the ambush. Despite a shrapnel wound to his arm, Corporal Meyer made two more trips into the ambush area in a third gun-truck accompanied by four other Afghan vehicles to recover more wounded Afghan soldiers and search for the missing U.S. team members. Still under heavy enemy fire, he dismounted the vehicle on the fifth trip and moved on foot to locate and recover the bodies of his team members. Corporal Meyer's daring initiative and bold fighting spirit throughout the 6-hour battle significantly disrupted the enemy's attack and inspired the members of the combined force to fight on. His unwavering courage and steadfast devotion to his U.S. and Afghan comrades in the face of almost certain death reflected great credit

² See C.J. Chivers, *Top Medal for Marine Who Saved Many Lives*, N.Y. TIMES, Sept. 15, 2011.

upon himself and upheld the highest traditions of the Marine Corps and the United States Naval Service.³

Unfortunately, Sgt. Meyer's citation does not tell the whole story. Omitted from the narrative is how the Rules of Engagement (ROE) and the misapplication of the law of armed conflict almost cost him his life, and contributed to the death of his fellow soldiers.

A few days after receiving the medal, Sgt. Meyer appeared on the CBS Television Network show "60 Minutes" and told a more complete version of the events that unfolded that day in Ganjgal. He recounted how First Lieutenant (1st Lt.) Michael Johnson, one of the Marines who was surrounded by enemy fire, used his radio to request artillery support by sending in coordinates of the enemy positions, but that lawful request was denied by commanders back at the operations center on base.⁴ Meyer commented, "[t]hey denied it. The Army denied it and told [Johnson] it was, it was too close to the village. . . . And [Johnson] said, 'Too close to the village?' And the last words I heard him say was, 'If you don't give me these rounds right now I'm going to die.'"⁵ 1st Lt. Johnson and the three other Marines trapped in Ganjgal never received artillery or air support. All four Marines died.

According to Army Colonel (Col.) Richard Hooker, the officer who conducted the AR 15-6 investigation⁶ into the events of September 8, 2009, when 1st Lt. Johnson fell silent on the radio Army Captain (Cpt.) Will Swenson, who was trapped by the insurgents just outside Ganjgal, continued the request for artillery and air support. Col. Hooker found that "Captain Swenson probably made nine or ten different calls for fire before he probably gave up in frustration."⁷ Based on the evidence that Col. Hooker uncovered, Cpt. Swenson "was very, very insistent in his

³ *Medal of Honor Recipients: Afghanistan*, U.S. ARMY CENTER OF MILITARY HISTORY, <http://www.history.army.mil/html/moh/afghanistan.html> (last updated Jan. 5, 2012).

⁴ See *60 Minutes* (CBS television broadcast Sept. 18, 2011).

⁵ *Id.*

⁶ DEP'T OF THE ARMY, ARMY REGULATION 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2006) (providing the procedures for conducting investigations in the military and conferring authority upon the investigating officer to make findings and recommendations that are warranted by the facts of the incident being investigated).

⁷ *Id.*

calls for help. No question about that.”⁸ It would be another forty-five minutes into the battle before the first helicopters arrived with the much-needed air support. During the “60 Minutes” interview, Col. Hooker opined: “If we’d gotten supporting aviation on station early in the fight we . . . wouldn’t be sitting here having this conversation. That’s my firm belief.”⁹

The findings and recommendations of Col. Hooker’s AR 15-6 investigation were published, with redactions, on November 25, 2009. As a result of the investigation, two Army officers received general letters of reprimand for their failure to act appropriately on September 8, 2009.¹⁰ Col. Hooker concluded that “[d]uring mission execution on 8 September 2009, the actions of key leaders at the battalion level were inadequate and ineffective, contributing directly to the loss of life which ensued.”¹¹ He noted: “the fire support NCO [non-commissioned officer] on duty . . . took action to provide immediate support to the units in the Ganjgal valley early in the engagement. The USAF JTAC [Air Force Joint Terminal Attack Controller] acted similarly. However, both were overruled by higher echelons.”¹² Col. Hooker concluded: “[t]he perception by [U.S. Marine Corps] and U.S. Army leaders engaged in the Ganjgal valley on 8 September 2009 that . . . elements did not adequately support the mission is accurate. Timely aviation and indirect fire support [were] not provided.”¹³ Although one unnamed officer who received a general letter of reprimand stated that he did not feel constrained by the ROE in Afghanistan at that time, Col. Hooker’s investigation revealed that “that perception clearly existed in the minds of . . . leaders during and after the battle.”¹⁴ This tragic incident is a harsh

⁸ *Id.*

⁹ *Id.*

¹⁰ See Dan Lamothe, *2 Officers Reprimanded Over Ganjgal Mistakes*, MARINE CORPS TIMES, Feb. 21, 2011, available at <http://www.marinecorpstimes.com/news/2011/02/army-officers-reprimanded-over-ganjgal-022111w/>.

¹¹ AR 15-6 Report of Investigation into Operations in the Ganjgal Valley, Konar Province, Afghanistan, 8 September 2009 (Nov. 25, 2009), available at <http://www.captainsjournal.com/2010/02/19/ar-15-6-investigation-of-marine-deaths-in-kunar-province/>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

reminder of the chaos of war, and demonstrates that the law of armed conflict often offers imperfect solutions in its attempt to prevent unnecessary deaths of both soldiers and civilians. The events of September 8, 2009 underscore the dichotomy that exists between enforcing the ROE while at the same time not depriving the war fighter of his lawful right to self-defense on the battlefield. It brings to light a debate that arises in most cases of armed conflict – how to balance the prevention of civilian casualties with the humanitarian and legal right to self-defense. It will be demonstrated throughout this article that commanders and staff officers who draft the policies implementing the ROE have the ability to shift the balance one way or another.

Part I of this article will explore the humanitarian and legal right to self-defense and will show how the lawful use of self-defense is recognized in both domestic and international law. Part I will also address how the U.S. military has interpreted and applied this right through the standing rules of engagement (SROE).

Part II of this article analyzes the history of ROE up through the modern era, allowing this article to identify which factors military leaders consider in the development of the ROE. Additionally, Part II will examine the tactical directives and counterinsurgency (COIN) guidance of Generals Stanley McChrystal and David Petraeus to compare how they adjusted the ROE within the same military campaign at different times and analyze what factors were considered in making those adjustments.

Focusing on the need for U.S. soldiers to defend themselves and their fellow soldiers, this article endorses General Petraeus's directives that allowed soldiers to protect themselves without violating international or domestic law. It will illustrate that while the SROE are designed to balance the achievement of national strategic objectives with the inherent right to self-defense, military leaders can tailor the theater-specific ROE to achieve specific military objectives, but should never do so at the expense of the right to self-defense.

I. SELF-DEFENSE

A. *The Inherent Right to Self-Defense*

The concept of self-defense has long been a part of most legal systems.¹⁵ For example, the Bible endorses the principle of self-defense in its recognition of the right of the homeowner to kill the unlawful intruder.¹⁶ The Talmud acknowledges a right to use force against aggressors who threaten human interests, or threatened to kill.¹⁷ Saint Thomas Aquinas, a thirteenth century Italian Catholic priest and philosopher, reasoned that the purpose of using deadly force in self-defense was not to kill, but rather to repel the attacker. “[The] force had to be directed against the attack, not the attacker. The death was a side effect of the legitimate purpose rather than the goal itself.”¹⁸

In 1688, English lawmakers, affirming the natural right for people to defend themselves, codified the right to bear arms in the Declaration of Right: “the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.”¹⁹ The Convention Parliament, the legislative body responsible for the drafting of the Declaration of Right, believed that the right to bear arms for the purpose of self-defense was one of the “true auintient and indubitable Rights and Liberties of the People.”²⁰ England’s recognition of the inherent right to self-defense in the seventeenth century would be echoed over three hundred years later by the United States Supreme Court. Interpreting this provision of the Declaration of Right in the landmark Second Amendment case *District of Columbia v. Heller*,²¹ the Court explained that “the right of having and using arms for self-

¹⁵ GEORGE P. FLETCHER & JENS DAVID OHLIN, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY 26 (2008) (“[T]he contours of the idea [of self-defense] have engaged the imaginations of lawyers and philosophers for thousands of years.”).

¹⁶ “If the thief is found breaking in, and he is struck so that he dies, there shall be no guilt for his bloodshed.” Exodus 22:2.

¹⁷ FLETCHER & OHLIN, *supra* note 15, at 27.

¹⁸ *Id.* at 26-27.

¹⁹ Bill of Rights, 1688, 1 W. & M., c. 2 (Eng.).

²⁰ *Id.*; see also David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235, 236 (2008).

²¹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

preservation and defence” was necessary in order to protect “the natural right of resistance and self-preservation.”²²

References to the right of self-defense in the United States prior to *Heller* can be found in the Federalist Papers, state constitutions, and case law. In the eighteenth century, Alexander Hamilton commented that the “original right of self-defense . . . is paramount to all positive forms of government.”²³ Throughout the history of the nation, at least thirty-seven states have agreed with Hamilton by affirming a right to self-defense in their constitutions.²⁴ The state courts have also contributed to the discussion. In 1832, a Kentucky court held that not only was killing in self-defense justified, but that the right to do so was derived from nature.²⁵

[T]he right of necessary defence, in the protection of a man’s person or property, is derived to him from the law of nature, and should never be unnecessarily restrained by municipal regulation. . . . [T]he right of self-defence . . . is founded in the law of nature, and is not, nor can be superseded by the law of society. Before societies were formed, the right of self-defence resided in individuals, and since, in case of necessity, individuals incorporated into society, can not resort for protection to the law of society, that law with great propriety and strict justice considereth them as still, in that instance, under the protection of the law of nature.²⁶

Similar findings have been made, for example, by the state of Ohio: “[b]y universal consent self-defense is recognized as a natural right of every individual and of every collection of individuals;”²⁷ by Oregon: “[t]he law upon that subject is the same as it was 500 years ago. The right

²² *Id.* at 594 (2008) (citing 1 Blackstone 136, 139-40, 144 (1765)).

²³ THE FEDERALIST NO. 28, at 128 (Alexander Hamilton) (Terence Ball ed., 2003).

²⁴ See David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 101-02, 128 (2007).

²⁵ See *Gray v. Combs*, 30 Ky. (7 J.J. Marsh.) 478 (1832).

²⁶ *Id.* at 481 (internal quotation omitted).

²⁷ *R.R. Comm’n of Ohio v. Hocking Valley Ry. Co.*, 91 N.E. 865, 866 (Ohio 1910).

of self-defense is a natural right, inherent in mankind;”²⁸ and by Washington: “[t]he plea of self-defense rests on the natural right.”²⁹

The first documented interpretation in the United States of the legal principle of self-defense in the context of law of armed conflict can be traced back to 1837 and the Caroline Doctrine.³⁰ The Caroline was a U.S. steamboat that came under attack by British ships while it was attempting to deliver supplies to Canadian rebels fighting against the British.³¹ Daniel Webster, U.S. Secretary of State at the time of the Caroline incident, condemned the act and declared that it was not justifiable self-defense. Specifically, he stated that self-defense is only justified “if the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”³² Webster’s definition came to be known as the Caroline Doctrine, and was recognized as a standard in international law until the United Nations presented a competing definition of self-defense in Article 51 of the U.N. Charter.³³

B. *Codified Self-Defense*

Article 51 of the Charter of the United Nations, signed on June 26, 1945, states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . .”³⁴ By referring to this right as “inherent” the Charter acknowledges that the right to self-defense

²⁸ *Konigsberger v. Harvey*, 7 P. 114, 115 (Or. 1885).

²⁹ *State v. McGonigle*, 45 P. 20, 22 (Wash. 1896).

³⁰ See Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT’L L. 319, 323 (2004).

³¹ *Id.*

³² *Id.* (“According to Webster, Britain could have dealt with the Caroline in a more diplomatic manner. He limited the right to self-defense to situations where there is a real threat, the response is essential and proportional, and all peaceful means of resolving the dispute have been exhausted.”).

³³ *Id.*

³⁴ United Nations Charter art. 51 (emphasis added).

predates the drafting of the Charter, and is fundamental to international humanitarian law.³⁵

In the United States, the Chairman of the Joint Chiefs of Staff Instruction (“CJCSI”) 3121.01B,³⁶ which contains the current SROE for the U.S. military, describes the “Inherent Right of Self-Defense” as the empowerment of commanders “with the inherent right and obligation to exercise unit self-defense” and authorizes “military members [to] exercise individual self-defense in response to a hostile act or demonstrated hostile intent.”³⁷ “Hostile act” is defined in CJCSI 3121.01B as “[a]n attack or other use of force against the United States, US forces or other designated persons or property.”³⁸ It can also be “force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital [US government] property.”³⁹ “Hostile intent” refers to “[t]he threat of imminent use of force against the United States, US forces or other designated persons or property.”⁴⁰ As noted in CJCSI 3121.01B, “[i]mminent does not necessarily mean immediate or instantaneous.”⁴¹ The drafters of CJCSI 3121.01B recognize that on the battlefield this determination is not always a bright-line scenario. Whether the use of force against U.S. forces is imminent, thus allowing U.S. forces to invoke their inherent right to self-defense, “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.”⁴²

Despite the apparent inherency of the right to self-defense, a closer examination of the current SROE reveals that the U.S. military

³⁵ See Nicole Deller & John Burroughs, *Jus ad Bellum: Law Regulating Resort to Force*, 30 HUM. RTS. MAG. 8 (2003).

³⁶ The current SROE for US Forces are published by the Chairman of the Joint Chiefs of Staff (CJCS) in Instruction 3121.01B, and approved by the Secretary of Defense.

CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (June 13, 2005) [hereinafter CJCSI 3121.01B].

³⁷ *Id.*, A-2.

³⁸ *Id.*, A-3.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² CJCSI 3121.01 B, *supra* note 36.

may not view the right to be inherent at all levels. Prior to the publication of the current SROE in 2005, the Department of Defense categorized self-defense into four levels: (i) national self-defense, (ii) collective self-defense, (iii) unit self-defense, and (iv) individual self-defense.⁴³ National self-defense is retained at the Presidential or Secretary of Defense (SECDEF) level and is defined as “[d]efense of the United States, U.S. forces, and, in certain circumstances, U.S. persons and their property, and/or U.S. commercial assets from a hostile act or demonstration of hostile intent.”⁴⁴ Collective self-defense, also applicable at the Presidential and SECDEF level, is “[d]efense of designated non-U.S. military forces and/or designated foreign nationals and their property from a hostile or demonstrated hostile intent.”⁴⁵ The definitions of national self-defense and collective self-defense remained unchanged in CJCSI 3121.01B.

This article focuses on unit and individual self-defense; neither of which is explicitly defined in the current SROE. However, the language used in the SROE in place prior to the publication of the current SROE reveals how the U.S. military’s position has changed with respect to unit and individual self-defense. The previous SROE were published in CJCSI 3121.01A on January 15, 2000, prior to both the Afghanistan and Iraq wars, and prior to September 11, 2001. It defined unit self-defense as “[t]he act of defending a particular US force element, including individual personnel thereof, and other US forces in the vicinity, against a hostile act or demonstrated hostile intent.”⁴⁶ Individual self-defense was described as follows:

The inherent right to use all necessary means available and to take all appropriate actions to defend oneself and US forces in one’s vicinity from a hostile act or demonstrated hostile intent is a unit of self-defense. Commanders have the obligation to ensure that individuals

⁴³ See CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, at A-4 (Jan. 15, 2000) [hereinafter CJCSI 3121.01A].

⁴⁴ CJCSI 3121.01 B, *supra* note 36, A-3.

⁴⁵ *Id.*

⁴⁶ CJCSI 3121.01A, *supra* note 43.

within their respective units understand and are trained on when and how to use force in self-defense.⁴⁷

Although CJCSI 3121.01B, and therefore the current SROE, do not expressly define unit or individual self-defense, both are discussed. As commented on in the Operation Law Handbook, published by Judge Advocate General's Legal Center and School, the 2005 SROE refined the definitions of the prior SROE, merging the definitions of "unit" and "individual" self-defense into the general definition of "inherent right of self-defense" suggesting, as further discussed below, that individual self-defense is no longer recognized by the U.S. as absolute.⁴⁸ Under the Policy section of CJCSI 3121.01B, unit self-defense is addressed as follows: "Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent."⁴⁹ Therefore, not only may commanders act in self-defense of their units, but they must act in self-defense if such situation presents itself. Although commanders must often adjust the ROE in response to the various military, political, or legal concerns they are presented with on the battlefield, these concerns, as addressed in the OPLAW Handbook, should "have NO impact on a commander's right and obligation of self-defense."⁵⁰

Additionally, as stated above, individual self-defense is discussed in the current SROE's definition of "Inherent Right of Self-Defense":

Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as a part of a unit, individual self-defense should be

⁴⁷ *Id.* (emphasis added).

⁴⁸ JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 75 (2008) [hereinafter OPLAW HANDBOOK].

⁴⁹ CJCSI 3121.01 B, *supra* note 36, A-2 (emphasis added). For some nations, unit self-defense is only a right. In other nations, "the concept of unit self-defence is both a right and an obligation Some nations permit the right of unit-defence to be limited by orders from higher authority." INT'L INST. OF HUMANITARIAN LAW, RULES OF ENGAGEMENT HANDBOOK 3 (2009) [hereinafter ROE HANDBOOK].

⁵⁰ OPLAW HANDBOOK, *supra* note 48, at 75.

considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit.⁵¹

Not only does the current SROE lack an explicit declaration that individual self-defense is an inherent right, but they also provide that self-defense measures may be further limited by unit commanders. The plain language of the current SROE empowers commanders with the inherent right to unit self-defense, but does not provide individuals with the same inherent right. Enclosure I of CJCSI 3121.01B, which establishes the process for the development of supplemental measures to the ROE, states:

[U]nit commanders may issue supplemental measures to limit self-defense by members of their units. The use of force for mission accomplishment may sometimes be restricted by specific political and military goals that are often unique to the situation.⁵²

These limitations did not exist in the previous SROE published in CJCSI 3121.01A. This was not an oversight. The prior SROE stated that the “purpose of these SROE [was] to provide implementation guidance on the application of force for mission accomplishment and the exercise of the inherent right and obligation of self-defense.”⁵³ In comparison, the current SROE state that the “purpose of the SROE is to provide implementation guidance on the application of force for mission accomplishment and the exercise of self-defense.”⁵⁴ The language between the two is nearly identical except for use of the phrase “inherent right and obligation” in the latter.

This change in the current SROE is a dramatic departure from the prior SROE, as well as from the foundational principles of law recognizing an inherent right to self-defense. While the SROE do not prevent individuals from exercising self-defense, there is a clear shift of responsibility to commanders to ensure self-defense measures are exercised appropriately. When a commander invokes the right to self-defense in fulfilling his obligation to defend the unit, this action may

⁵¹ CJCSI 3121.01 B, *supra* note 36, A-2 (emphasis added).

⁵² *Id.*, I-1.

⁵³ *Id.*, A-1 (emphasis added).

⁵⁴ *Id.*

often clash with mission objectives. As the International Institute of Humanitarian Law notes, “[b]ecause national laws and policies differ, there will not always be consistency . . . as to when the right to use force in self-defence ends and the use of force for mission accomplishment begins.”⁵⁵ As will be discussed below, military leaders in Afghanistan were faced with this challenge when drafting the ROE for soldiers conducting operations against insurgent and Taliban forces.

II. THE RULES OF ENGAGEMENT⁵⁶

A. *Early Rules of Engagement*

Like the right to self-defense, the ROE have long been recognized as an element of international humanitarian law. During the Middle Ages, certain norms regulating warfare were tacitly agreed upon.⁵⁷ “The canonistic doctrine of privilege was rooted in the notion that the public welfare could be promoted in certain circumstances by granting special rights to groups who served the general interests of the community”⁵⁸ Attempts were made to civilize warfare by granting immunity to non-combatants, even though immunity was not an accepted practice.⁵⁹ Groups such as clerics, monks, other religious clergy, travelers, merchants and peasant farmers were spared from harm or death and

⁵⁵ ROE HANDBOOK, *supra* note 49, at 3.

⁵⁶ Under International Law, *jus in bello* (“justice in war”) is the set of laws that regulate actions during the war once it has begun. ROE fall under *jus in bello* since they guide conduct during war. Although the phrase “rules of engagement” was not used formally until the 1950s, the principles embodied in ROE have been used in warfare for hundreds of years. See Karma Nabulsi, *Jus ad Bellum/Jus in Bello*, CRIMES OF WAR, available at <http://www.crimesofwar.org/a-z-guide/jus-ad-bellum-jus-in-bello/>; see also Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 36 (1994) (“Contemporaneous dogfights between American and Soviet aircraft . . . probably provided the impetus for the Pentagon to coin the term ‘ROE.’ . . . These highly charged confrontations likely prodded the [Joint Chiefs of Staff] to issue, on November 23, 1954, a set of ‘Intercept and Engagement Instructions,’ which Air Force and Navy staffers termed ROE. In 1958, the JCS formally adopted and defined the term ‘rule of engagement.’”).

⁵⁷ See generally THEODOR MERON, HENRY’S WARS AND SHAKESPEARE’S LAWS, PERSPECTIVE ON THE LAW OF WAR IN THE LATER MIDDLE AGES 91-93 (1993).

⁵⁸ *Id.* at 91.

⁵⁹ *Id.*

were even afforded some protection for some of their property.⁶⁰ The primary reason for being spared was that their position in society precluded their participation in war.⁶¹

Although women, children, and the elderly were not precluded for the same reasons, they were protected by the secular code of chivalry.⁶² The code of chivalry afforded protection to broader groups of people, typically defined by weakness or innocence: women, children, the elderly, the sick, and other persons who traditionally would not engage in warfare.⁶³ Despite the presumption of innocence granted to these individuals, they would lose their protected status if they took part in the hostilities.⁶⁴ For example, the “chivalric presumption” that women were not strong enough to carry weapons and engage in combat was clearly rebuttable.⁶⁵ Women could, and frequently did, engage in warfare, usually to aid in the defense of cities under siege.⁶⁶ These women who partook in warfare would lose their immunity.⁶⁷

Long before the modern ROE era, the doctrine of privilege and the code of chivalry prevented those engaged in combat from killing at will. Restrictions were placed on combatants to prevent the deaths of the innocent and attempt to promote civility during war.

In 1625, the renowned Dutch philosopher, lawyer, and writer, Hugo Grotius⁶⁸ wrote *De Jure Belli ac Pacis* [On the Law of War and

⁶⁰ *Id.* at 91-92.

⁶¹ *Id.* at 92.

⁶² *See id.*

⁶³ MERON, *supra* note 57, at 92.

⁶⁴ *Id.* at 93.

⁶⁵ *Id.* at 95.

⁶⁶ *Id.*

⁶⁷ *Id.* at 95-96.

⁶⁸ Grotius began his studies at eleven years old at Leiden University. *Hugo Grotius*, GROTIUS CTR. FOR INT’L LEGAL STUDIES (2010), <http://www.grotiuscentre.org/page1182911.aspx>. After graduation, he worked as a lawyer in the Netherlands until his arrest and imprisonment in 1618 when a political group adverse to his ideas took power. *Id.* After escaping to Paris in 1621, he wrote *DE JURE BELLI AC PACIS*, in which “he expounded his ideal of a system of laws, rules and treaties for all nations, and moral duties of nations to strive for altruism in relations with other states.” *Id.* (leading many to consider him the “father of international law.”).

Peace]. In Book III, Chapter IV, The Right of Killing Enemies in a Solemn War, and of Other Hostilities Committed Against the Person of the Enemy, an extensive list is given of scenarios where killing is both justifiable and legal.⁶⁹ Grotius imparts impunity on those who kill another through acts of war:

[I]t is lawful for one Enemy to hurt another, both in Person and Goods, not only for him that makes War on a just Account, and does it within those Bounds which are prescribed by the Law of Nature, as we have said in the beginning of this Book, but on both Sides, and without Distinction; so that he cannot be punished as a Murderer, or a Thief, tho' he be taken in another Prince's Dominion, neither can any other make War upon him barely upon this Account.⁷⁰

Though it may seem that Grotius extends the right to kill to almost any scenario,⁷¹ Chapter XI, Moderation Concerning the Right of Killing Men in a Just War, explains that killing is not always justified in war. For example, those who are unfortunate enough to have been made the subjects of the enemy cannot be justly killed.⁷² Additionally, according to Grotius, all care must be taken to ensure those who are innocent are not killed.⁷³ Special protection should be given to women, children, priests, scholars, merchants, and captives to ensure they are spared from the violence of war.⁷⁴ These Medieval principles would have a lasting effect on the development of the law of war.

B. *The Rules of Engagement in the Modern Era*

Although it may seem apparent that throughout history the primary purpose of the ROE was to regulate the use of force by military personnel, the ROE actually serve three purposes: (1) political, (2)

⁶⁹ See 3 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (Richard Tuck ed., Jean Barbeyrac trans., Liberty Fund 2005) (1625).

⁷⁰ *Id.*

⁷¹ Grotius even gives approval for killing prisoners, women, and children in some circumstances. See generally *id.* (throughout the entire book there are discussions of such killings.).

⁷² *Id.* ("They are to be esteemed unfortunate who happen to be in the party of one of the Enemies, without and hostile Disposition towards the other party . . .").

⁷³ *Id.*

⁷⁴ *Id.*

military, and (3) legal.⁷⁵ The ROE serve a political purpose by ensuring the policies and objectives of a nation are reflected in the actions of the military conducting operations abroad, particularly under circumstances where communication with senior level authority is not possible.⁷⁶ The military purpose of the ROE is to establish parameters within which commanders in the field must operate to accomplish a unit's assigned mission.⁷⁷ This includes placing limitations on military units or limiting the use of certain weapon systems so that undesired escalation of hostilities does not occur.⁷⁸ The ROE serve a legal purpose by ensuring that a commander's actions are consistent with both domestic and international law.⁷⁹ Using the ROE to serve all three purposes simultaneously helps provide a framework to assist the United States in achieving its objectives associated with military operations.⁸⁰

The United States Department of Defense defines the ROE as the “[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”⁸¹ They are disseminated in a variety of forms. The ROE may be encompassed in U.S. military doctrine, execution orders, operation orders, deployment orders, or standing directives that are issued by military commanders to combat troops carrying out an assigned mission.⁸² “Whatever their form, they provide authorization for and/or limits on, among other things, the use of force, the positioning and posturing of forces, and the employment of certain specific capabilities.”⁸³

⁷⁵ OPLAW HANDBOOK, *supra* note 48, at 73-74.

⁷⁶ *Id.*

⁷⁷ *Id.* at 74.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 73.

⁸¹ JOINT CHIEFS OF STAFF, JOINT PUB. 1-02: DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 317 (Nov. 8, 2010).

⁸² ROE HANDBOOK, *supra* note 49, at 1.

⁸³ *Id.*

1. Standing Rules of Engagement

The SROE for U.S. Forces are published by the Chairman of the Joint Chiefs of Staff (CJCS) and approved by the SECDEF.⁸⁴ These rules apply to all U.S. forces “during all military operations and contingencies and routine Military Department functions.”⁸⁵ The SROE establish fundamental policies and procedures that regulate the actions of military personnel engaged in armed conflict. Their primary purpose is “to provide implementation guidance on the application of force for mission accomplishment and the exercise of self-defense.”⁸⁶ According to the Purpose paragraph of CJCSI 3121.01B “it is imperative to keep in mind these two purposes . . . as a clear understanding of the differences between the two is critical to the proper understanding and implementation of the SROE.”⁸⁷ The Policy section of CJCSI 3121.01B further emphasizes the objectives of self-defense and mission accomplishment by noting: “Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.”⁸⁸ The self-preservation goals of U.S. national security policy are also addressed. The SROE allow the U.S. to conduct military operations in order to “ensure the survival, safety, and vitality of our nation and to maintain a stable international environment consistent with US national interests.”⁸⁹ The SROE serve as the foundation for further development of the ROE for a specific military operation or campaign.⁹⁰ When a unit embarks on a specific operation or campaign, the SROE will be in effect until commanders publish theater-specific ROE.

⁸⁴ See CJCSI 3121.01 B, *supra* note 36.

⁸⁵ *Id.*, A-1.

⁸⁶ *Id.*

⁸⁷ Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F. L. REV. 245, 247 (1997).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See Major Paul E. Jeter, *What Do Special Instructions Bring to the Rules of Engagement? Chaos or Clarity*, 55 A.F. L. REV. 377, 384, 387-88 (2004) (“The starting point for all ROE should be the SROE. As a crisis forms which may require military action, staffs at the strategic level evaluate and coordinate how the ROE fits into the mission.”).

It should also be underscored that these rules are standing – i.e., they are in effect at all times and not just limited to peacetime operations.⁹¹ Although wartime or theater-specific ROE may be enacted after the outbreak of armed conflict, the SROE are designed to work effectively in prolonged operations as well.⁹²

2. Theater-Specific Rules of Engagement

Theater-specific ROE are developed by staff officers at the strategic level⁹³ during the initial stages, or Crisis Action Phase, of an operation.⁹⁴ Developers of the ROE, and the appropriate authorities, will review the military's objectives and strategies in order to develop the ROE applicable to the mission.⁹⁵ Additionally, theater-specific ROE reflect “political guidance from higher authorities, the tactical considerations of the specific mission, and [the law of armed conflict].”⁹⁶ Therefore, military planners are faced with the challenge of implementing the ROE that enable the warfighter to accomplish the mission, but do not conflict with national objectives or lead to fratricide.⁹⁷ Officers on the planning staff should incorporate development of the ROE into mission analysis in order to “review higher headquarters planning documents for political, military, and legal considerations that affect ROE [and] [a]ssess ROE requirements throughout pre-conflict, deterrence, conflict and post-conflict phases of an operation.”⁹⁸ ROE developers must ensure that the ROE support achievement of the desired end state of the mission.⁹⁹

⁹¹ Grunawalt, *supra* note 87, at 248.

⁹² *Id.*

⁹³ CJCSI 3121.01 B, *supra* note 36, J-1 (“Due to the operational nature of ROE, the Director of Operations (J-3) and his staff are responsible for developing ROE during crisis action planning. Likewise, the Director for Strategic Plans and Policies (J-5) should play a large role in ROE development for deliberate planning.”).

⁹⁴ Jeter, *supra* note 90, at 388.

⁹⁵ *Id.*

⁹⁶ ROE HANDBOOK, *supra* note 49, at 6.

⁹⁷ Jeter, *supra* note 90, at 388 (citing U.S. DEP'T OF AIR FORCE, 12TH AIR FORCE, JUDGE ADVOCATE OFFICE, *Supplement to 612 COS/DOOCOS Operations Duty Officer Guide for an Air Operations Center S1-30*).

⁹⁸ CJCSI 3121.01B, *supra* note 36, J-2.

⁹⁹ *Id.*

Because theater-specific ROE are dependent on mission objectives, the CJCS recognizes the need to allow for changes to the ROE just as mission objectives often change. While conducting course of action (COA) analysis, ROE developers should identify any ROE-making authority normally retained by a higher echelon that must be delegated to subordinate units.¹⁰⁰ This includes refining the ROE to support the different phases of a proposed COA.¹⁰¹ As stated in CJCSI 3121.01B: “[t]he ROE process must anticipate changes in the operational environment and modify supplemental measures to support the assigned mission. Commanders and their staffs must continuously analyze the ROE and recommend modifications required to meet changing operational parameters.”¹⁰²

Enclosure I of CJCSI 3121.01B provides guidance on the development of supplemental measures which enable a commander to alter the SROE in order to accomplish a specific mission.¹⁰³ There are two types of supplemental measures: (1) those that require approval from the SECDEF, and (2) those that allow a commander to place restrictions on the use of force.¹⁰⁴ Generally, those that fall into the first category are permissive; meaning the “particular operation, tactic, or weapon is generally restricted, and either the President [or the] SECDEF . . . implements the supplemental measure to specifically permit the particular operation, tactic, or weapon.”¹⁰⁵ All other supplemental measures (those in the second category) are restrictive in nature, and are delegated to subordinate commanders. Restrictive measures can be implemented by a subordinate commander without having to first get permission from superior officers. Using restrictive measures, a commander may place further restrictions on the use of force despite being authorized to use any weapon or tactic permitted under the ROE or the law of war.¹⁰⁶ A subordinate commander who seeks to restrict the

¹⁰⁰ *Id.*

¹⁰¹ *Id.*, J-3.

¹⁰² *Id.*

¹⁰³ *Id.*, I-1.

¹⁰⁴ OPLAW HANDBOOK, *supra* note 48, at 76.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

SECDEF-approved ROE must notify the SECDEF as soon as possible.¹⁰⁷ From the perspective of subordinate commanders, supplemental measures only allow them to further restrict the SROE. There is no mechanism in place that allows a subordinate commander to broaden the use of force under the ROE, even if he or she believes that doing so is necessary to accomplish the assigned mission. This is problematic since subordinate commanders, who are often most aware of the conditions on the battlefield, essentially play no part in theater-specific ROE development.

If a commander believes “that the existing ROE are unclear, too restrictive, or otherwise unsuitable for his or her particular mission . . . he or she may request additional ROE.”¹⁰⁸ Drafting the request message¹⁰⁹ will be a combined effort between the Judge Advocate (JA) and the operations (J/G/S-3) staff.¹¹⁰ When drafting a ROE request, the subordinate commander and those advising him or her must be mindful of the supplemental measures that require SECDEF approval. A request of this magnitude is rarely approved since ROE developers have already given these items significant consideration.¹¹¹ For the subordinate unit to succeed in getting its ROE request granted, it must provide the requisite justification for the supplemental measure.¹¹² According to the OPLAW Handbook, this can be achieved by demonstrating that the unit has a mission “that earlier ROE planners could not have foreseen, and that the ROE do not quite fit.”¹¹³

The numerous levels of command that a ROE request must go through before reaching the final approval authority further contributes to the difficulty of the process. Prior to finalization, the request may be disapproved by intermediate commands.¹¹⁴ It is therefore recommended

¹⁰⁷ See CJCSI 3121.01B, *supra* note 36, A-2.

¹⁰⁸ OPLAW HANDBOOK, *supra* note 48, at 78.

¹⁰⁹ The format for an ROE request message can be found in Appendix F to enclosure I of CJCSI 3121.01B.

¹¹⁰ OPLAW HANDBOOK, *supra* note 48, at 76 (discussing how Enclosure J of CJCSI 3121.01B goes a step further and suggests creation of an ROE Planning Cell).

¹¹¹ *Id.* at 78.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

that subordinate commanders keep close contact with the JAs at their higher headquarters in order to facilitate the process.¹¹⁵ Having a liaison with higher headquarters “may prove instrumental in having close cases approved, and in avoiding lost causes.”¹¹⁶ The process will arguably be most difficult for the subordinate commander who operates out of a small remote forward operating base with limited access to the higher headquarters where the unit’s JA would be located. This commander, who best understands how the ROE are limiting the unit’s ability to accomplish its mission, will likely have no recourse for getting a change to the ROE. When the force requirements stated by a subordinate commander are at odds with the force that higher command believes is necessary to accomplish the mission, the ROE may provide more confusion than clarity on the battlefield.

C. Rules of Engagement in Afghanistan

1. The Rules of Engagement under General Stanley McChrystal

General (Gen.) Stanley McChrystal was commander of the Joint Special Operations Command (JSOC) from September 2003 to August 2008.¹¹⁷ After a successful career as a special operations commander, Gen. McChrystal was nominated by President Obama to command all conventional forces in Afghanistan, and was confirmed by the Senate in June 2009.¹¹⁸ His command included responsibility for all U.S. military forces, as well as all NATO¹¹⁹ operations.¹²⁰

¹¹⁵ *Id.*

¹¹⁶ OPLAW HANDBOOK, *supra* note 48, at 76.

¹¹⁷ COUNCIL ON FOREIGN RELATIONS, *Biography of General Stanley McChrystal* (2010), <http://www.cfr.org/afghanistan/biography-general-stanley-mcchrystal/p19396> [hereinafter *Gen. McChrystal Bio*].

¹¹⁸ *Id.*

¹¹⁹ “The North Atlantic Treaty Organization (NATO) is an alliance of 28 countries from North America and Europe committed to fulfilling the goals of the North Atlantic Treaty signed on 4 April 1949. In accordance with the Treaty, the fundamental role of NATO is to safeguard the freedom and security of its member countries by political and military means.” Frequently Asked Questions, NATO,

<http://www.nato.int/cps/en/natolive/faq.htm> (last updated Mar. 11, 2009).

¹²⁰ *Gen McChrystal Bio.*, *supra* note 117.

Shortly after taking command, Gen. McChrystal published his Tactical Directive¹²¹ for NATO's International Security Assistance Force (ISAF) in Afghanistan.¹²² Although much of the Directive is classified, portions of it were released to the public "to ensure a broader awareness of the intent and scope of Gen. McChrystal's guidance to ISAF and [U.S.] forces" on the ROE and the use of force in Afghanistan.¹²³ Despite the fact that some portions of the Tactical Directive are classified, the purpose and intent of Gen. McChrystal's ROE are clear.

The focus of the Tactical Directive was the reduction of civilian casualties (CIVCAS). Noting the importance of winning the support of the Afghanistan population, Gen. McChrystal stated: "[g]aining and maintaining that support must be our overriding operational imperative – and the ultimate objective of every action we take."¹²⁴ Although he recognized the fact that the military must be able to use the weapons at its disposal, winning would not be based on increasing "the number of Taliban we kill, but instead on our ability to separate insurgents from the center of gravity – the people."¹²⁵ According to Gen. McChrystal this would be achieved by reducing civilian casualties, avoiding excessive collateral damage, and respecting and protecting the local populace from violence in order to gain their support.¹²⁶ Specific restrictions in the Tactical Directive included limiting the use of close air support (CAS) in residential areas, using air-to-ground munitions and indirect fires in residential areas in only very limited and prescribed scenarios, forbidding

¹²¹ A "directive" is defined as:

1. A military communication in which polity is established or a specific action is ordered.
2. A plan issued with a view to putting it into effect when so directed, or in the event that a stated contingency arises.
3. Broadly speaking, any communication which initiates or governs action, conduct, or procedure.

JOINT CHIEFS OF STAFF, JOINT PUB. 1-02: DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 162 (amended through Oct. 31, 2009).

¹²² Gen. Stanley McChrystal, *Tactical Directive*, NATO/ISAF UNCLASS (July 6, 2009), available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf [hereinafter *Tactical Directive*].

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

entry into an Afghan home without the participation of Afghan National Security Forces (ANSF), and an absolute prohibition of ISAF forces on entering, firing upon, or firing into a “mosque or any religious or historical site except in self-defense.”¹²⁷ Further, any searches or entries into such a structure would only be conducted by ANSF.¹²⁸ The ROE also prevented troops from firing at Taliban members if it presented a risk of causing civilian casualties.¹²⁹ Under Gen. McChrystal’s ROE, troops were forbidden from shooting in these situations even if it meant allowing the enemy to escape.¹³⁰

Gen. McChrystal’s Tactical Directive contained the following note: “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 (specific options deleted due to operational security) are available to effectively counter the threat.”¹³¹ So, while Gen. McChrystal seemed to recognize a commander’s right to unit self-defense, the Tactical Directive contained no indicia of a *soldier’s right* to individual self-defense.

Within a month of publishing his Tactical Directive, Gen. McChrystal issued his ISAF Commander’s Counterinsurgency (COIN) Guidance.¹³² His key points were to embrace the people of Afghanistan,

¹²⁷ *Id.*

¹²⁸ *Tactical Directive*, *supra* note 122.

¹²⁹ Karl Gotthardt, *New Rules of Engagement Issued to NATO Forces by Gen McChrystal*, NOWPUBLIC, (July 2, 2009, 2:10 PM) <http://www.nowpublic.com/world/new-rules-engagement-issued-nato-forces-gen-mcchrystal>.

¹³⁰ *Id.*

¹³¹ *Tactical Directive*, *supra* note 122.

¹³² Counterinsurgency, or COIN, is a military doctrine employed to defeat an insurgency. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY x (2006) (“COIN campaigns are often long and difficult. Progress can be hard to measure, and the enemy may appear to have many advantages. Effective insurgents rapidly adapt to changing circumstances. They cleverly use the tools of the global information revolution to magnify the effects of their actions. They often carry out barbaric acts and do not observe accepted norms of behavior. However, by focusing on efforts to secure the safety and support of the local populace, and through a concerted effort to truly function as learning organizations, the Army and Marine Corps can defeat their insurgent enemies.”); *see also* Michael T. Hall and Stanley A. McChrystal, *ISAF Commander’s Counterinsurgency Guidance*, ISAF (Aug. 2009), http://www.nato.int/isaf/docu/official_texts/counterinsurgency_guidance.pdf.

partner with the ANSF, help develop the government's capacity and accountability, and to "get better every day."¹³³ Building on the strategy laid out in his Tactical Directive, Gen. McChrystal reiterated the importance of winning the support of the Afghan people with every action taken by the military.¹³⁴ "Protecting the Afghan people is the mission."¹³⁵ He stressed the need for the military to see things through the eyes of the people, to protect them from violence and intimidation, while operating in a way that respected their religion and culture.¹³⁶

According to Gen. McChrystal, to succeed in a COIN fight, the military would have to abandon a conventional approach which he believed could be self-defeating.¹³⁷ Because insurgents hide amongst the Afghan people, taking the fight to them with aggressive offensive tactics significantly raises the risks of civilian casualties and collateral damage.¹³⁸ These secondary effects increase support for the insurgents and even "create[] more willing recruits" to the insurgency.¹³⁹ Gen. McChrystal noted that the U.S. could "not win simply by killing insurgents."¹⁴⁰ He recognized the challenges of changing the mindset of how military personnel typically think.

Perhaps one of the more illustrative examples of the impact of Gen. McChrystal's ROE was the ambush in the village of Ganjgal in September 2009. Four Marines, eight Afghan troops, and an interpreter were killed in eastern Afghanistan during that firefight, which lasted several hours.¹⁴¹ A U.S. journalist embedded with the Marines reported

¹³³ DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY x (2006).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Hall & McChrystal, *supra* note 132.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Report: Marines Killed in Ambush Denied Support*, MARINE CORPS TIMES (Sept. 10, 2009, 9:53 AM), http://www.marinecorpstimes.com/news/2009/09/marine_ambush_090909w/; *see also* Bill Roggio, *4 Marines, 9 Afghan Troops Killed in Kunar Ambush*, THREAT MATRIX: A BLOG OF THE LONG WAR JOURNAL (Sept. 9, 2009, 12:49 PM), http://www.longwarjournal.org/threat-matrix/archives/2009/09/4_marines_9_afghans_troops_kil.php ("Yesterday's ambush in

that the unit “walked into a trap, a killing zone of relentless gunfire and rocket barrages from Afghan insurgents hidden in the mountainsides and in a fortress-like village where women and children were replenishing their ammunition.”¹⁴² The Marines requested artillery support to counter the enemy ambush, but the requests were repeatedly denied by their commanders who feared the artillery would inflict civilian casualties.¹⁴³ Although the Pentagon refuted the idea that artillery support was denied because of Gen. McChrystal’s Tactical Directive, during the investigation of the incident, one of the officers under investigation stated that fire support was denied “for various reasons including: lack of situational awareness of locations of friendly elements [and] proximity to the village.”¹⁴⁴

This was not an isolated incident. In another situation, a unit was being hit with mortar fire while conducting a nighttime mission.¹⁴⁵ A request was made for a 155 millimeter illumination artillery round¹⁴⁶ in order to reveal the location of the enemy.¹⁴⁷ The unit reported that the request was denied “on the grounds that it may cause collateral

the eastern Afghan province of Kunar will certainly raise additional questions about the restrictive rules of engagement (ROE). . . . The Afghan and US troops were denied artillery and air support that could have suppressed the heavy Taliban fire that was raining down from the slopes.”).

¹⁴² Jonathan S. Landay, ‘We’re Pinned Down:’ 4 U.S. Marines Die in Afghan Ambush, *MCCLATCHY* (Sept. 8, 2009) [hereinafter *4 U.S. Marines Die in Afghan Ambush*], <http://www.mcclatchydc.com/2009/09/08/75036/were-pinned-down-4-us-marines.html>.

¹⁴³ *Report: Marines Killed in Ambush Denied Support*, *supra* note 141; *see also 4 U.S. Marines Die in Afghan Ambush*, *supra* note 142 (“U.S. commanders, citing new rules to avoid civilian casualties, rejected repeated calls to unleash artillery rounds at attackers dug into the slopes and tree lines – despite being told repeatedly that they weren’t near the village.”).

¹⁴⁴ Jonathan S. Landay, *Officers Blamed in Afghan Ambush that Killed 5 U.S. Troops*, *MCCLATCHY* (Feb. 17, 2010), <http://www.mcclatchydc.com/2010/02/17/85883/xxxx.html>.

¹⁴⁵ George F. Will, *An NCO Recognizes a Flawed Afghanistan Strategy*, *WASH. POST* June 20, 2010.

¹⁴⁶ U.S. DEP’T OF ARMY, *FIELD MANUAL 3-09* p. 2-16, *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm3_09.pdf. An illumination artillery round detonates in the air and is designed to emit light in order for soldiers on the ground to observe people or objects obscured by the darkness. It is not designed to be used as an offensive weapon.

¹⁴⁷ Will, *supra* note 145.

damage.”¹⁴⁸ One non-commissioned officer from the unit was baffled since “the only thing that comes down from an illumination round is a canister, and the likelihood of it hitting someone or something was akin to that of being struck by lightning.”¹⁴⁹

The same NCO also recalled a mission where his unit again came under heavy gunfire and was attacked with rocket-propelled grenades (RPGs). When the unit sent a radio request for artillery support, they were asked by higher command where the closest civilian structure was.¹⁵⁰ Having been denied the request, the NCO later commented, “[j]udging distances . . . can be difficult when bullets and RPGs are flying over your head.”¹⁵¹ The unit then requested smoke artillery rounds to be fired to screen their position. Higher command granted this request. However, fearful of collateral damage, they had the round deliberately aimed one kilometer away from the requested site, rendering the “smoke mission useless and leaving [them] to fend for [them]selves.”¹⁵²

Despite initial reports of success in reducing CIVCAS,¹⁵³ Gen. McChrystal faced much criticism for imposing ROE that many felt were too restrictive and placed troops at greater risk of harm.¹⁵⁴ Criticism also

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Laura King, *New Tactics Cut Afghan Fatalities*, L.A. TIMES, Aug. 28, 2009, at A20 (“Western troops have killed far fewer Afghan civilians since the top U.S. general imposed strict new rules of engagement aimed at addressing one of the contentious issues of the conflict . . . Military officials credit the marked decrease to a tactical directive issued July 2 by Gen. Stanley A. McChrystal . . .”).

¹⁵⁴ C.J. Chivers, *Warriors Vexed by Rules for War*, N.Y. TIMES, June 23, 2010, at A11 [hereinafter *Warriors Vexed by Rules for War*]. Indicative of the sentiment of many of the troops, a soldier being interviewed for the article stated the following: “I wish we had generals who remembered what it was like when they were down in a platoon . . . Either they never have been in real fighting, or they forgot what it’s like.” *Id.* *See also* Marc Schenker, *Under Obama, Rules of Engagement in Afghan War Are Extreme Political Correctness Which Slow Down US Troops*, ASSOCIATED CONTENT, Feb. 10, 2010, http://www.associatedcontent.com/article/2719863/under_obama_rules_of_engagement_in.html?cat=75 (reporting statements from service members that the rules of engagement are overly restrictive and cause “[t]he problem [of] isolating where the enemy is”).

came from those who believed the ROE were a product of “extreme political correctness” from the Obama administration.¹⁵⁵

Another criticism of Gen. McChrystal’s strict ROE was that by reducing the risks to civilians, the Taliban gained a strategic advantage.¹⁵⁶ One Army Major observed that prior to the ROE being constricted by Gen. McChrystal, firefights were often brief, typically lasting thirty minutes.¹⁵⁷ The Taliban would ambush U.S. forces and quickly flee the area knowing that additional firepower would likely be called in.¹⁵⁸ Under the ROE implemented by Gen. McChrystal, however, the process for requesting fire support or CAS became more difficult, and was only authorized under very limited conditions. The Taliban became aware of this and “seem[ed] noticeably less worried about an American response” to their ambush attacks.¹⁵⁹ As a result, firefights became considerably longer in duration, increasing exposure of troops to Taliban small arms fire.¹⁶⁰ When CAS was available, it was often of little help because pilots were also bounded by the ROE restrictions regardless of what ground troops were communicating to the pilots.¹⁶¹ Pilots were prohibited from attacking fixed targets unless they could visually confirm from their aircraft the enemy firing on U.S. or Coalition Forces.¹⁶² In some of these situations, patrol leaders adopted the absurd tactic of having their soldiers briefly expose themselves to the enemy in an attempt to draw fire

¹⁵⁵ Schenker, *supra* note 154 (“Retired Major General Scales . . . [made] the long-overdue point that the rules of engagement under Obama are ‘overly restrictive’ and that they go too far . . .”).

¹⁵⁶ *Warriors Vexed by Rules for War*, *supra* note 154 (“Some rules meant to enshrine counterinsurgency principles into daily practices, they say, do not merely transfer risks away from civilians. They transfer risks away from the Taliban.”).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (“One Marine infantry lieutenant . . . said he had all but stopped seeking air support while engaged in firefights. He spent too much time on the radio trying to justify its need, he said, and the aircraft never arrived or they arrived too late or the pilots were reluctant to drop their ordnance.”).

¹⁶¹ *Id.*

¹⁶² *Warriors Vexed by Rules for War*, *supra* note 154.

from the enemy.¹⁶³ Only after a visual confirmation of attacking insurgents could the pilot then engage the enemy.¹⁶⁴

The principle espoused in Gen. McChrystal's Tactical Directive and COIN Guidance has been referred to as "courageous restraint." Those who support these policies argued that soldiers "[should] refrain from using lethal force, even at risk to themselves, in order to prevent possible harm to civilians."¹⁶⁵ In April 2010, the NATO commander of troops in southern Afghanistan, British Maj. Gen. Nick Carter, suggested the creation of a new medal to be awarded to troops who demonstrate "courageous restraint" on the battlefield.¹⁶⁶ In his opinion, "courageous restraint" should be viewed as "an act of discipline and courage not much different than those seen in combat actions."¹⁶⁷ Some viewed Maj. Gen. Carter's proposal as an effective way of reducing CIVCAS by providing an incentive for troops to "think twice before calling in an airstrike or firing at an approaching vehicle if civilians could be at risk."¹⁶⁸ Others, however, responded with an immediate negative reaction, believing that the creation of such a commendation could place soldiers in even more danger.¹⁶⁹ Lt. Gen. Sir Nick Parker, the United Kingdom's top general in Afghanistan at the time, acknowledged that the rules for engaging Taliban insurgents needed to be "re-examined" following protests from soldiers that the rules were too restrictive.¹⁷⁰ In an interview, he

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Chris Carter, *NATO's Contemptible "Courageous Restraint" Medal*, HUMAN EVENTS, May 18, 2010, available at <http://www.humanevents.com/article.php?id=37012>.

¹⁶⁶ Sebastian Abbot, *A Medal for 'Courageous Restraint'? NATO Seeks To Avoid Killing Afghan Noncombatants*, ASSOCIATED PRESS, May 4, 2010 available at http://www.cleveland.com/world/index.ssf/2010/05/a_medal_for_courageous_restrai.html.

¹⁶⁷ *Id.*

¹⁶⁸ J.P. Freire, *NATO Rewarding "Courageous Restraint" Awards*, WASH. EXAMINER, May 9, 2010, available at <http://washingtonexaminer.com/article/3997>.

¹⁶⁹ See William H. McMichael, *Hold Fire, Earn a Medal*, MARINE CORPS TIMES, May 11, 2010, available at http://www.marinecorpstimes.com/news/2010/05/military_restraint_medal_051110mar; Chris Carter, *NATO's Contemptible "Courageous Restraint" Medal*, HUMAN EVENTS, May 18, 2010, available at <http://www.humanevents.com/article.php?id=37012>.

¹⁷⁰ Thomas Harding, *Britain's Top General in Afghanistan Admits "Courageous Restraint" Must Change*, THE TELEGRAPH (July 11, 2010),

suggested that troops in more hostile regions should be able to use “all the tools at their disposal.”¹⁷¹ Critical of “courageous restraint,” Lt. Gen. Parker noted that with regards to the ROE policy, NATO leadership had “over-corrected” and now the ROE should be brought back in line without alienating the population.¹⁷² He recognized the importance of ensuring that troops “have the right degree of manoeuvre on operations to deal with the circumstances they face.”¹⁷³ As discussed in the next section, at least one other general shared Lt. Gen. Parker’s concerns.

2. The Rules of Engagement under General David Petraeus

In June 2010, after one year of command, President Obama relieved Gen. McChrystal of his command in Afghanistan.¹⁷⁴ Gen. McChrystal was replaced by his boss and mentor, Gen. David Petraeus.¹⁷⁵ Prior to taking command in Afghanistan, Gen. Petraeus commanded Multi-National Force-Iraq. Prior to that command, he was the commander of the U.S. Army Combined Arms Center at Fort Leavenworth, where he oversaw the development of the Army/Marine Corps Counterinsurgency Manual.¹⁷⁶

Like Gen. McChrystal, Gen. Petraeus also issued Tactical Directives shortly after assuming command in Afghanistan.¹⁷⁷ Gen. Petraeus’s Tactical Directives are also classified; however, the unclassified portions reveal that the central concept of his Tactical Directive was “disciplined use of force” and not “courageous restraint”.¹⁷⁸ Gen.

<http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/7884017/Britains-top-general-in-Afghanistan-admits-courageous-restraint-must-change.html>.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Helene Cooper & David E. Sanger, *Obama Fires Afghan Commander, Citing Need for Unity in the War*, N.Y. TIMES, June 24, 2010, at A1.

¹⁷⁵ *Id.*

¹⁷⁶ Thom Shankner, *Win Wars? Today’s General Must Also Meet, Manage, Placate, Politick and Do P.R.*, N.Y. TIMES, Aug. 13, 2010, at A11.

¹⁷⁷ *General Petraeus Issues Updated Tactical Directive: Emphasizes “Disciplined Use of Force”*, ISAF RELEASES, Aug. 1, 2010, available at <http://www.isaf.nato.int/article/isaf-releases/general-petraeus-issues-updated-tactical-directive-emphasizes-disciplined-use-of-force.html>.

¹⁷⁸ *Id.*

Petraeus's Directive does not suggest that there is any downside to killing the enemy. He noted that "[p]rotecting the Afghan people does require killing, capturing, or turning the insurgents."¹⁷⁹ Coalition forces must continue to pursue the Taliban tenaciously, so long as the fight is conducted "with great discipline and tactical patience."¹⁸⁰ Gen. Petraeus added that all assets must be used to protect military personnel and the Afghan security forces.¹⁸¹ Troops must be given the confidence to "take all necessary actions when it matters most."¹⁸² More importantly, unlike Gen. McChrystal, Gen. Petraeus alluded to the inherent right of individual self-defense: "All commanders must reinforce the right and obligation of self-defense of coalition forces, of our Afghan partners, and of others as authorized by the rules of engagement."¹⁸³ This strong language promoting the use of force to defeat the enemy and the right of self-defense was balanced with renewed efforts to prevent civilian casualties.

Gen. Petraeus articulated to his subordinates the need to balance the "relentless pursuit of the Taliban and others who mean Afghanistan harm . . . [with] compassion for the Afghan people."¹⁸⁴ Believing the Afghan people to be the "center of gravity in this struggle," he emphasized that "[e]very Afghan civilian death diminishes our cause."¹⁸⁵ He noted the "moral imperative both to protect Afghan civilians and . . . bring all assets to bear to protect our men and women in uniform."¹⁸⁶ Gen. Petraeus believed that the best way to accomplish this was by partnering Coalition Forces with Afghan forces. Noting that "[s]ome civilian casualties result from a misunderstanding or ignorance of local customs and behaviors," Gen. Petraeus believed that partnering with Afghan forces could help generate greater situational awareness and improve relations between coalition forces and the Afghan populace.¹⁸⁷

¹⁷⁹ *Id.* (emphasis added).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *General Petraeus Issues Updated Tactical Directive: Emphasizes "Disciplined Use of Force"*, *supra* note 177.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

To sum up his goal of combining an aggressive pursuit of the enemy with a reduction of civilian casualties, Gen. Petraeus concluded: “Take the fight to the enemy. And protect the Afghan people and help our Afghan partners defeat the insurgency.”¹⁸⁸

The only specific Rule of Engagement published in the unclassified version of Gen. Petraeus’s Tactical Directive pertained to the use of artillery:

Prior to the use of fires, the commander approving the strike must determine that no civilians are present. If unable to assess the risk of civilian presence, fires are prohibited, except under [one] of the following two conditions (specific conditions deleted due to operational security; however, they have to do with the risk to ISAF and Afghan forces).

(NOTE) This directive, as with the previous version, 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.¹⁸⁹

It is apparent that Gen. Petraeus was concerned with a repeat of the fatal situations discussed earlier, where troops were denied support and could not defend themselves. The verbiage in Gen. Petraeus’s Tactical Directive demonstrated his commitment to balancing protection of the force with protection of the civilian population. The Directive also demonstrated that it sought to prevent conflicts in the interpretation of the ROE experienced under Gen. McChrystal. Although the conditions for the use of artillery was redacted in the unclassified version of the Tactical Directive, one can infer that commanders now had greater authority to use fire support assets during operations if the risk to the force caused troops to invoke their inherent right to self-defense.

In conjunction with his Tactical Directive, Gen. Petraeus also published his COIN Guidance for all NATO, ISAF, and U.S. Forces in

¹⁸⁸ *Id.*

¹⁸⁹ *General Petraeus Issues Updated Tactical Directive: Emphasizes “Disciplined Use of Force”*, *supra* note 177.

Afghanistan.¹⁹⁰ Gen. Petraeus reiterated his objective of protecting the Afghan people, again referring to them as the “center of gravity.”¹⁹¹ This was the first objective listed among several and clearly the most important. However, he also realized the importance of empowering the warfighter to use force to achieve these objectives. “Pursue the enemy relentlessly . . . get our teeth into the insurgents and don’t let go. When the extremists fight, make them pay. Seek out and eliminate those who threaten the population.”¹⁹² As long as soldiers and Marines were fighting with discipline, Gen. Petraeus encouraged the use of force if it was vital to mission accomplishment. “Fight hard and fight with discipline. Hunt the enemy aggressively, but use only the firepower needed to win a fight. We can’t win without fighting, but we also cannot kill or capture our way to victory.”¹⁹³

3. Differences between Gen. Petraeus’s and Gen. McChrystal’s Rules of Engagement Policies

Although Gen. Petraeus clearly endorsed the importance of preventing civilian casualties, the language in his Tactical Directive and his COIN Guidance differs from Gen. McChrystal’s in several aspects. While Gen. McChrystal downplayed the importance of killing the enemy, Gen. Petraeus recognized the importance of pursuing the enemy with a controlled aggression – aggression that could be balanced with achieving the military objectives of winning the support of the Afghan people. A British officer who worked with Gen. Petraeus compared the two approaches as follows: “Gen. McChrystal imposed courageous restraint as a mantra whereas the big theme of Gen. Petraeus was a strategic patience.”¹⁹⁴ This is more than just semantics. While “courageous restraint” was interpreted as a passive approach that placed troops in considerable danger, Gen. Petraeus’s message was to use a slow strategic

¹⁹⁰ Gen. Petraeus, *COMISAF’s Counterinsurgency Guidance*, (Aug. 1, 2010), available at <http://graphics.nytimes.com/packages/pdf/world/2010/COMISAF-MEMO.pdf>.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Toby Harnden & Damien McElroy, *Gen. David Petraeus To Review “Courageous Restraint”*, THE TELEGRAPH, June 24, 2010, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/barackobama/7852684/Gen-David-Petraeus-to-review-courageous-restraint.html>.

build up to get all elements in place, while at the same time prizing the importance of momentum by taking the fight to the insurgents hiding amongst the people.¹⁹⁵

From a legal perspective, both Generals' ROEs complied with CJCSI 3121.01B, which bestows upon commanders, not individuals, the inherent right and obligation to exercise unit self-defense. However, Gen. McChrystal's command prevented troops from shooting the enemy if there was a risk to civilians and promoted a sense of restricted use of force. These factors combined to create an environment that encouraged commanders to violate the rule that required them to implement self-defense measures when no other options existed to counter the threat to the unit. Even though Gen. McChrystal's Tactical Directive was not intended to deprive commanders of their right to protect the lives of the men and women in their unit, as demonstrated above, numerous situations arose where legitimate requests for air support and artillery were denied by commanders despite the fact that troops requesting it were in harm's way and there was little or no threat to civilians on the battlefield.

The ROE under Gen. Petraeus were consistent with the general principles of self-defense as recognized by case law and U.S. policy in place since the time of Daniel Webster.¹⁹⁶ Gen. Petraeus's Tactical Directive and COIN Guidance, which allowed troops to "take all necessary actions when it matters most," and authorized the use of "firepower needed to win a fight," resonates with Webster's position that the principle of necessity should be applied to all actions in self-defense when the defensive act must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."¹⁹⁷ Therefore, as long as the commanders on the battlefield made a determination based on all facts and circumstances known on the battlefield that the use of force was necessary to defend their units, their actions would be deemed legal under the ROE and the law of war.

¹⁹⁵ See *id.*

¹⁹⁶ Letter of Secretary of State Daniel Webster to Lord Ashburton (Aug. 6, 1842), available at http://avalon.law.yale.edu/19th_century/br-1842d.asp.

¹⁹⁷ *Tactical Directive*, *supra* note 122; Gen. Petraeus, *COMISAF's Counterinsurgency Guidance*, *supra* note 190 (emphasis added).

The military leaders in charge in Afghanistan on September 8, 2009, either failed in their assessment or felt the ROE prevented them from providing the necessary response. Although Gen. McChrystal's ROE endorsed the commander's right and obligation of self-defense, the commanders in Ganjgal that day exercised what they believed was their right to deny troops needed support, despite numerous request from lower ranking troops, even though CJCSI 2121.01B specifically states that the assessment of whether or not force is required for unit self-defense "may be made at any level."¹⁹⁸ Unfortunately, a commander's right to exercise self-defense, as described in Gen. McChrystal's ROE, was overshadowed by the idea that holding fire was a better approach. The examples discussed in this paper suggest that military leaders had taken "courageous restraint" too far and denied troops CAS and artillery support when it was clearly necessary. Gen. Petraeus recognized this shortcoming and adjusted the ROE appropriately.

Both Gen. McChrystal and Gen. Petraeus believed that preventing civilian casualties was critical to the success of the mission in Afghanistan. COIN doctrine requires winning the support of the people in order defeat an insurgency. If civilians are constantly being killed, it will be difficult to win that support. To help minimize the impact of the Afghan war on civilians, the Human Rights Unit of the United Nations Assistance Mission in Afghanistan (UNAMA HR) compiled a report on CIVCAS in Afghanistan to "monitor the situation of civilians, to coordinate efforts to ensure their protection, to promote accountability and to assist in full implementation of the fundamental freedoms and human rights provisions of the Afghan Constitution and international treaties to which Afghanistan is a State party."¹⁹⁹

From July 2008 to April 2009, ISAF caused twenty-eight percent of civilian deaths in Afghanistan.²⁰⁰ This was the highest rate of ISAF

¹⁹⁸ CJCSI 3121.01 B, *supra* note 36.

¹⁹⁹ United Nations Assistance Mission in Afghanistan (UNAMA), *Afghanistan: Report on Protection of Civilians in Armed Conflicts, Mid Year Report 2010* (Aug. 2010), available at <http://www.unhcr.org/refworld/docid/4c6120382.html>.

²⁰⁰ Anthony H. Cordesman & Arleigh A. Burke, *The Afghan-Pakistan War: Status in 2009*, CTR. FOR STRATEGIC & INT'L STUDIES, Apr. 12, 2009, available at http://csis.org/files/090701_status_of_2009.pdf.

caused civilian deaths for the prior two years²⁰¹ and a likely contributor to the issuance of Gen. McChrystal's Tactical Directive in July 2009. If the goal of the Tactical Directive was simply to reduce CIVCAS numbers, then it was a success. By June 2010, civilian casualties caused by Pro-Government Forces (PGF) decreased by thirty percent compared to the first six months of 2009.²⁰² Additionally, civilian deaths attributed to PGF aerial attacks had decreased by sixty-four percent compared to the same period in 2009.²⁰³ These numbers did not, however, lead to a more stable Afghanistan, nor was life safer for civilians as one might erroneously conclude.

By June 2010, despite the successes of ISAF in lowering CIVCAS-related incidents, overall injuries and deaths to civilians had actually increased by thirty-one percent compared with the same period in 2009.²⁰⁴ This was due to the increased activity of Anti-Government Elements (AGEs).²⁰⁵ More than seventy-five percent of all civilian casualties were caused by AGEs, a fifty-three percent increase from 2009.²⁰⁶ Where PGF-caused deaths had decreased by twenty-nine percent from 2009, AGEs increased their killings to 920 in the first half of 2010—a forty-nine percent increase from the prior year.²⁰⁷ There was also a sharp increase in AGE-caused deaths of women and children.²⁰⁸

²⁰¹ *Id.*

²⁰² Pro-Government Forces (PGF) is a term used by the United Nations to describe all Afghan Government forces, including Afghan Army and Afghan National Police, as well as all International Military Forces, including US and NATO forces. *Afghanistan: Report on Protection of Civilians in Armed Conflicts, Mid Year Report 2010*, *supra* note 199.

²⁰³ *Id. at i.*

²⁰⁴ *Id.*

²⁰⁵ Anti-Government Elements “encompass all individuals and groups currently involved in armed conflict against the Government of Afghanistan and/or International Military Forces. They include those who identify as ‘Taliban’ as well as individuals and groups motivated by a range of objectives and assuming a variety of labels.” *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ “UNAMA HR recorded 39 women and 74 child deaths as a result of both IED explosions and suicide attacks in the first half of 2010. This is a 44 per cent increase in deaths of women and 155 per cent increase in child deaths compared to the same period in 2009.” *Afghanistan: Report on Protection of Civilians in Armed Conflicts, Mid Year Report 2010*, *supra* note 199, at 10.

Taliban and insurgent forces increased their use of improvised explosive devices (IEDs),²⁰⁹ suicide attacks,²¹⁰ and intimidation tactics.²¹¹

Not only was Afghanistan less safe for civilians in 2010 compared to 2009, but Coalition Forces also suffered greater casualties. For the first six months of 2010, NATO troops suffered 323 fatalities.²¹² That was a 105% increase from the same period in 2009.²¹³ For the entire year of 2010, there were 711 fatalities, up from 521 in all of 2009.²¹⁴ While the ROE adjustments may have decreased CIVCAS incidents caused by Coalition Forces, overall civilian casualties were up due to increased Taliban and insurgent activity. Troop fatality rates increased as well. The stricter ROE were ineffective at reducing civilian casualties, and seem, instead, to have increased them by allowing the enemy to exploit an over-disciplined force.

CONCLUSION

Since the early days of American military combat, the principle of self-defense has been recognized as an inherent right, rooted in nature and impervious to societal influences. Many States have acknowledged this right in their own courts and constitutions, and as a nation it has been adopted as a standard in the U.S.'s understanding of international law. Although the U.S. Military seems to have limited the right at the individual level, at the unit level it is not only the right of a commander, but it is an obligation to be exercised in defense of the unit. This right and obligation have become critical elements to the ROE, and only

²⁰⁹ "IEDs kill and injure more civilians than any other tactic used in the conflict. . . . IEDS accounted for 374 (29 per cent) of the total number of civilian deaths in the first six months of 2010 . . ." *Id.* at 2.

²¹⁰ "In the first six months of 2010, 183 civilians died as a result of suicide attacks These figures reflect an increase of 20 percent from the same period in 2009 and an increase of 43 per cent from the last half of 2009." *Id.* at 3.

²¹¹ "AGEs greatly intensified their intimidation campaign against supporters, or those perceived to be supportive of the Government and the international community. The campaign included abductions, assassinations and executions of civilians and Government officials." *Id.* at 6.

²¹² *Operation Enduring Freedom, Fatalities by Year and Month*, ICASUALTIES.ORG, <http://icasualties.org/OEF/ByMonth.aspx> (last visited Dec. 29, 2012).

²¹³ *Id.*

²¹⁴ *Id.*

through adherence to the foundational principles of the law of war can the ROE be implemented to ensure the safety of troops on the battlefield and serve to prevent civilian casualties.

In the COIN environment of Afghanistan, the ROE were altered in an attempt to reduce civilian casualties. In retrospect, it is apparent that this unfortunately was done at the expense of the troops' ability to defend themselves. Gen. McChrystal's ROE minimized the inherent right of self-defense as defined by the United Nations and prior versions of the SROE, and that are supported by the foundational principles of the law of war. While the strict ROE and the concept of "courageous restraint" were initially successful at reducing civilian casualties caused by U.S. and NATO forces, the total number of civilian casualties actually increased due to greater insurgent activity. Additionally, soldiers and Marines, like those in Ganjgal, consistently found themselves in positions of greater danger while their commanders refrained from providing them with the necessary support in order to uphold the ROE. As seen in the incidents discussed in this article, artillery support and CAS were often denied to troops attempting to invoke their inherent right to self-defense and lives were lost as insurgents won small victories in prolonged firefights.

In the summary of his investigation into the ambush in Ganjgal, Col. Hooker stated: "[t]he events of 8 September 2009 . . . reinforce the principle that when in doubt, our bias must be to support troops in contact."²¹⁵ Under the command of Gen. Petraeus, implementation of the ROE that ensured compliance with the law of war and protected innocent civilians from the violence of armed conflict was attainable without depriving warfighters of their right to self-defense. By partnering with Afghan forces, pursuing the enemy aggressively, and renewing efforts to reduce civilian casualties through tactical patience, Gen. Petraeus was able to use the ROE to achieve military objectives. Furthermore, he was able to accomplish this while also allowing the U.S. to achieve its political and legal objectives during combat operations

²¹⁵ AR 15-6 Report of Investigation into Operations in the Ganjgal Valley, Konar Province, Afghanistan, 8 September 2009 (Nov. 25, 2009), *available at* <http://www.captainsjournal.com/2010/02/19/ar-15-6-investigation-of-marine-deaths-in-kunar-province/>.

without compromising the safety of the troops responsible for executing the mission.





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