

**When Did Imminent Stop Meaning Immediate?
Jus In Bello Hostile Intent, Imminence, and Self-Defense in Counterinsurgency**

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*The application of the principles of psychology in small wars is quite different from their normal application in major warfare or even troop leadership. The aim is not to develop a belligerent spirit in our men but rather one of caution and steadiness. Instead of employing force, one strives to accomplish the purpose by diplomacy. A Force Commander who gains his objective in a small war without firing a shot has attained far greater success than one who resorted to the use of arms.*¹

I. Introduction

Notwithstanding the recipe for success detailed in the quotation above, the United States military has been involved in counterinsurgency (COIN) operations in Iraq and Afghanistan for more than ten years.² With the end of major operations in Iraq, and the impending 2014 withdrawal deadline for Afghanistan, it is time for both military and civilian leadership to analyze the lessons learned from those conflicts and integrate them into training methods for U.S. forces going forward. This type of critical analysis is important because Marine Corps and Army doctrine states, and many commentators agree, that COIN will be the prevailing operating environment for the foreseeable future.³ Within this context, it is important to identify operational law-related doctrine and practice that COIN has frustrated. One such area is the Rules of Engagement (ROE),⁴ specifically the Chairman of the Joint Chiefs of Staff Standing Rules of Engagement (SROE) regarding self-defense.⁵ Department of Defense (DoD), Joint

Publication 1-02, *Dictionary of Military and Associated Terms* (JP 1-02), defines ROE as “directives issued by competent military authority that delineate the circumstances and limitations under which U.S. forces will initiate and/or continue combat engagement with other forces encountered.”⁶ Specific to the SROE, the Chairman stated that it “establishes fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations . . . occurring outside U.S. territories.”⁷

Rules of Engagement are magnified in COIN operations because the nature of COIN warfare is much different from the type of conventional warfare that served as the impetus for the Geneva Conventions.⁸ Many COIN principles are counterintuitive to military leaders, and require an alternative tactical mindset. These differences present what the *Counterinsurgency* field manual calls paradoxes for U.S. servicemembers trained on the conventional use of force. The field manual lists nine paradoxes that distinguish COIN from conventional operations, and four of those paradoxes are specifically applicable to the use of force in self-defense: (1) Sometimes, the more you protect your force, the less secure you may be; (2) Sometimes, the more force is used, the less effective it is; (3) Sometimes doing nothing is the best reaction; and (4) Some of the best weapons for counterinsurgency do not shoot.⁹ For the traditionally trained warfighter, these concepts require additional reinforcement to make the mindset of restrained force second nature before deploying to a COIN environment.

Compounding the problem of differences in tactics between a conventional and COIN fight, the enemy in a

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¹ U.S. MARINE CORPS, SMALL WARS MANUAL para. 1-10d (1940).

² Nat’l Def. Res. Inst., *Preface to How is Deployment to Iraq and Afghanistan Affecting U.S. Service Members and Their Families*, at iii (James Hosek ed., 2011).

³ See U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-8 (15 Dec. 2006) [hereinafter FM 3-24] (concluding that “[t]he recent success of U.S. military forces in major combat operations undoubtedly will lead many future opponents to pursue asymmetric approaches”); Commander Albert S. Janin, *Engaging Civilian Belligerents Leads to Self-Defense/Protocol I Marriage*, ARMY LAW., July 2007, at 82, 83 (recognizing that “[t]he lethal problem of civilian-belligerents is now the customary trend in warfare rather than the exception to the rule”).

⁴ See GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 127, 193 (2012) (stating that “ROE have become a key issue in modern warfare and a key component of mission planning for U.S. and many other armed forces” and “self-defense . . . is a significant purpose of the ROE and accounts for much of the force applied in current military operations”); Major Winston S. Williams, *Training the Rules of Engagement for the Counterinsurgency Fight*, ARMY LAW., Jan. 2012, at 42 (finding that U.S. Armed Forces have struggled with achieving the goals of counterinsurgency while not undermining the right to self-defense”).

⁵ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES app. A (13 June 2005) [hereinafter CJCSI SROE 3121.01B].

⁶ JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 270 (15 Aug. 2012) [hereinafter JP 1-02].

⁷ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA422, OPERATIONAL LAW HANDBOOK 84 (2012) [hereinafter OPLAW HANDBOOK].

⁸ See Trevor A. Keck, *Not All Civilians are Created Equal: The Principle of Distinction, the Questions of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare*, 211 MIL. L. REV. 115 (2012) (“Warfare is fundamentally different today than in 1949 when states convened to draft and sign the four Geneva Conventions.”).

⁹ FM 3-24, *supra* note 3, para. 1-148-53.

COIN environment does not comply with the Law of Armed Conflict (LOAC) principle of distinction. This allows the insurgent to blend in with the civilian population, operate more freely within the battlespace, and use U.S. adherence to LOAC against American servicemembers.¹⁰ In addition, the expanding presence of the media within military operations has further scrutinized self-defense SROE in the eyes of the American public, commonly characterizing it as ineffective and limiting the ability of servicemembers to defend themselves.¹¹ The above factors lead to a situation in which self-defense ROE comes under the microscope by

¹⁰ See OPLAW HANDBOOK, note 7, at 21 (declaring that insurgents “deliberately and illegally use the civilian population . . . to conduct or conceal their attacks as a strategy of war”); GARY D. SOLIS, THE LAW OF ARMED CONFLICT (2010) (stating that terrorists in Iraq and Afghanistan do not comply with (LOAC) principle of distinction, making hostile intent and hostile act the only methods to differentiate between combatants and non-combatants); CORN ET AL., *supra* note 4, at 132–33 (“Exercising [distinction] is increasingly difficult on the asymmetric battlefield. No longer are wars fought on battlefields far from concentrations of civilians . . . [t]he soldier is faced with combatants masquerading as civilians, in order to take advantage of the humanity of the warrior, to use the law as a shield of protection against attack.”); Sarah Sewall, *Introduction to FM 3-24*, *supra* note 3, at xxi, xxvii (“[Counterinsurgency (COIN)] is more difficult because insurgents exploit civilians by dress in civilian clothes, hide behind women, use children as spotters, and store weapons in school and hospitals.”); Keck, *supra* note 10, at 115 (finding that “states primarily fight wars against non-state armed groups (NASG) that often violate IHL, and more specifically the principle of distinction. Blending in with noncombatants is often a critical part of the NASG’s strategy in places such as Afghanistan”); Janin, *supra* note 3, at 83 (finding that in today’s insurgencies the “combatants appear to be civilians and base their operations amongst non-combatants”).

¹¹ See Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 35 (1994) (finding that “an aggressive and skeptical news media has emerged, willing to question the use of military force . . . and prepared to focus the wrath of the American people on a political leader who appears to have lost control”). See, e.g., Sara A. Carter, *Marine’s Career Threatened by Controversial Rules of Engagement*, WASH. EXAM’R (Jan. 23, 2012), <http://washingtonexaminer.com/marines-career-threatened-by-controversial-rules-of-engagement/article/167369#UGec0EJOTdk> (reporting on an incident involving the use of force in self-defense the reporter stated that some experts believed the Marine involved was placed “in a difficult, if not impossible, situation by unreasonable rules of engagement foisted upon the military by politically sensitive commanders in the Pentagon,” and the Marine’s lawyer asserts that he is “just one of hundreds of cases of troops who have suffered under stringent rules of engagement”); Jason Motlagh, *Petraeus Toughens Afghan Rules of Engagement*, TIME (Aug. 6, 2010) <http://www.time.com/time/world/article/0,8599,2008863,00.html> (responding to General Petraeus’s revision of the tactical directive in 2010, the reporter stated that “servicemen say that the strict rules put them in greater danger, even as they aim to avoid civilian casualties”); Kim Murphy, *Officer Advises Against Court-Martial in Afghanistan Shooting Death*, LA TIMES (Aug. 3, 2012), <http://www.afghanistannewscenter.com/news/2012/august/aug32012.html#a13> (reporting on a shooting incident that involved the death of an Afghan physician the reporter classified the rules of engagement as “strict . . . in attempting to minimize civilian casualties.” In addition, she summarized some soldiers’ comments about “rules of engagement that make it increasingly difficult for soldiers to defend themselves”); Paul Szoldra, *Marine: Strict Rules of Engagement Are Killing More Americans Than Enemy in This Lost War*, BUS INSIDER (Aug. 24, 2012) <http://www.businessinsider.com/one-marines-views-on-afghanistan-2012-8> (A former Marine officer states that the rules of engagement result in servicemembers fighting with “their hands tied behind their back” due to the restrictive nature of the rules of engagement and that “enemy fighters use our rules of engagement and restrictions . . . against us.”).

servicemembers, political leadership, and the public writ large. This scrutiny places an increased burden on military leadership to ensure that self-defense ROE is effective, clear, and continually trained in order to mitigate or avoid potential problems.

Prolonged COIN operations in Iraq and Afghanistan have distorted the U.S. view of anticipatory self-defense, hostile intent, and imminence as they relate to the use of force in a COIN environment, and have negatively shaped the use of force in self-defense, creating greater accompanying risks. More specifically, the expansion of what U.S. forces consider an imminent threat does not comport with the United States’ coalition partners, and has frustrated the application of the common self-defense formula (hostile act or hostile intent + positive identification = authority to use force).¹² The result has been (1) an increased risk of civilian casualties and (2) a self-defense targeting model that in practice looks more like status-based targeting vice the conduct-based model required in COIN. These problems can be mitigated if the SROE’s definitions of hostile intent and imminence return to the form that existed prior to the 2005 SROE.¹³ This shift would require commanders and judge advocates to apply a narrower concept of imminence, defined later in this article. In addition, servicemembers must apply the self-defense formula correctly by first establishing an individual’s hostile intent before obtaining positive identification (PID) of a legitimate military target.

Part II of this article illustrates some of the inherent problems in applying a broad definition of imminence. This analysis calls for a brief review of the historical support for and development of the inherent right to self-defense, the influence of the Bush Doctrine on the concept of imminence, and the codification of anticipatory self-defense in the SROE through the concept of hostile intent. Part II then summarizes the main points of status- and conduct-based targeting, and discusses how those concepts relate to the commonly taught self-defense formula. Next, Part III argues that returning to a narrower definition of imminence and correctly applying the self-defense formula will mitigate the three problems identified in this article. The article concludes with recommendations as to how commanders and judge advocates can shape ROE philosophy, training,

¹² A search of all relevant manuals, orders, directives, regulations, doctrinal publications, and training manuals reveals no official adoption of this self-defense formula. However, based on personal experience of both receiving and providing instruction on self-defense Rules of Engagement (ROE), and after interviewing judge advocates from other services, it is the author’s conclusion that this formula is widely employed as a teaching tool by U.S. forces. The best implied reference to this self-defense formula can be found in Gary Solis’s book, THE LAW OF ARMED CONFLICT, *supra* note 10, at 502, where he states that most “ROE . . . contain other common elements addressing hostile acts, enemy hostile intent . . . and a positive identification requirement.” *Id.*

¹³ The Appendix to this article provides the SROE definition for hostile intent and imminence for all SROEs dating back to 1981.

and employment within the unit to ultimately better support the COIN mission.

II. Laying the Foundation

As it relates to this article, it is important to first frame the problem¹⁴ created by an expanded view of imminence when determining if an individual or group is demonstrating hostile intent. Once the reader understands the parameters of the problem, he might then consider how the inherent right to self-defense, the Bush Doctrine, and the CJCS's definition of hostile intent and imminence have all served to further develop the issue, and can relate those developments to status-and conduct-based targeting, as well as the self-defense formula.

A. Framing the Problem

1. *Imminent No Longer Requires an Immediate or Instantaneous Threat*

The current SROE defines hostile intent as “[t]he threat of imminent use of force against the United States, U.S. forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG property.”¹⁵ The SROE attempts to further clarify the phrase “imminent use of force” by providing that “[t]he determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level. *Imminent does not necessarily mean immediate or instantaneous.*”¹⁶ The SROE successfully provides a definition that can be taught in classrooms and recited in a deployed setting; however, there is no further explanation to help Marines and Soldiers apply it in a fast-paced combat environment. Combined with certain aggravating factors inherent in COIN operations, the SROE's definition creates more problems than it attempts to solve. One very real problem facing U.S. forces is the risk of civilian casualties.

¹⁴ The first step in the Marine Corps planning process is to frame the problem the staff or operational planning team will address. Once accomplished, there is common understanding of what foundational information will be required to conduct meaningful analysis and propose a well-supported decision. U.S. MARINE CORPS, MARINE CORPS WARFIGHTING PUB. 5-1, MARINE CORPS PLANNING PROCESS 2-1 (Aug. 24, 2010).

¹⁵ CJCSI SROE 3121.01B, *supra* note 5, at A-3.

¹⁶ *Id.* (emphasis added).

2. *The Ultimate Problem in COIN: Civilian Casualties*

A primary contributor to the civilian casualty problem is the difficulty in assessing hostile intent within a fast-paced combat environment using the SROE's limited explanation of imminence.¹⁷ Compounding the time and space problem, the SROE's definition of imminent use of force does not comport with our U.S. coalition and NATO partners,¹⁸ making it more difficult to justify some U.S. actions. Overall, the ambiguous standards of hostile intent and imminence, and the resulting broad application by U.S. forces, lead to problems at the tactical and strategic level. However, these issues can be mitigated, and in some cases eliminated, if commanders and judge advocates take deliberate actions to continually reinforce a narrow view of hostile intent and imminence within self-defense ROE.

How U.S. forces view the concepts of hostile intent and imminence within anticipatory self-defense is pivotal because it informs the actual employment of force. In a COIN environment, a narrow view of hostile intent and imminence results in a more restrained use of force, a stated goal in COIN. On the other hand, a broad application of hostile intent and imminence gives a servicemember greater authority to engage perceived threats, which increases the risk of civilian casualties. Recognizing that the civilian population is the center of gravity¹⁹ in COIN operations,²⁰

¹⁷ See CORN ET AL., *supra* note 4, at 193 (concluding that the concept of hostile intent is “difficult to put into practice”); YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENCE 205 (5th ed. 2011) (finding that there the term imminence “may mean different things to different people” and that “[t]here is no authoritative definition of imminence in the context of an armed attack”); SOLIS, *supra* note 10, at 506 (declaring that a “bright-line” cannot exist for determining hostile intent); Lieutenant Colonel Mark S. Martins, *Deadly Force is Authorized, But Also Trained*, ARMY LAW., Oct. 2001, 1, at 5 (stating that concept of hostile intent is difficult to define “require[ing] elaboration and further definition . . .”); Major John J. Merriam, *Natural Law and Self-Defense*, 206 MIL. L. REV. 43, 64 (2010) (quoting John Yoo as stating that “international law does not supply a precise or detailed definition of what it means for a threat to be sufficiently imminent to justify the use of force in self-defense as necessary”).

¹⁸ See SOLIS, *supra* note 10, at 506 (stating that America's aggressive stance on hostile intent embodied in the U.S. SROE is not shared by many countries); Janin, *supra* note 3, at 93 (recognizing that the British operate under ROE that are “not as aggressive as, the U.S. SROE, with respect to hostile intent”); Merriam, *supra* note 19, at 78–80 (finding that the U.S. SROE on anticipatory self-defense are “dramatically different” than the NATO equivalents and the British were unwilling to follow the United States after if revised the definition of imminence in the 2005 SROE); David A. Sadoff, *A Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEO. J. INT'L L. 523 (2009) (placing the United States in a small group of States, which includes Israel, that subscribes to an expansive view of anticipatory self-defense); Lieutenant Colonel W. A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing*, ARMY LAW., Nov. 2000, 1, at 5–6 (stating that differing views on what constitutes hostile intent and imminence leads other countries to view our actions as excessive).

¹⁹ JP 1–02, *supra* note 6, at 39 (defining center of gravity as “[t]he source of power that provides moral or physical strength, freedom of action, or will to act”).

²⁰ FM 3–24, *supra* note 3, para. 3-76.

civilian casualties become a real problem when imminence is applied in an overly broad manner.²¹ The prevention of civilian casualties is such an important issue in a COIN fight that even Mullah Omar, the recognized leader of the Taliban in Afghanistan, issued guidance to his fighters to limit the indiscriminate use of force.²²

3. Status-Based Targeting in a Conduct-Based Environment

An important factor that has influenced the application of anticipatory self-defense is the length of time U.S. forces have been involved in COIN operations in Iraq and Afghanistan. The last ten years have marked the longest sustained period U.S. ground forces have been involved in COIN-centric operations.²³ This prolonged exposure to an environment filled with uncertainty has made servicemembers hyper-vigilant, leading to the engagement of targets that do not meet the definition of hostile intent under the SROE.²⁴ The result of this practice is movement toward a targeting model that looks more like status-based targeting vice conduct-based targeting. Stated another way, servicemembers are engaging targets in self-defense based on physical characteristics and a perceived threat, not on the individual's conduct. This leads to the unintentional killing of civilians because, for example, they meet the description of a military-aged-male, or MAM.²⁵ Further aggravating the

²¹ Martins, *supra* note 11, at 4 (stating that a danger of not properly training Marines and Soldiers in ROE can lead to an overly aggressive use of force that could harm civilians.); Merriam, *supra* note 17, at 82 (2010) (arguing that an "expanded standard if imminence" may increase the chance for the mistaken killing of civilians).

²² Katharine Fortin, *Mullah Omar Urges The Taliban to Avoid Civilian Deaths*, ARMED GROUPS & INT'L L. BLOG (Aug. 21, 2012) <http://armedgroups-internationallaw.org/2012/08/21/mullah-omar-urges-the-taliban-to-avoid-civilian-deaths-a-cause-to-celebrate/> (quoting Mullah Omar's decree directed towards other Taliban fighters to "employ tactics that do not cause harm to life and property of the common countrymen. The instructions given to you for the protection of civilian losses are, on you, a religious obligation to observe.").

²³ INST. OF MED., RETURNING HOME FROM IRAQ AND AFGHANISTAN 17 (2010) (finding that OIF and OEF are the "longest sustained U.S. military operation").

²⁴ See SMALL WARS MANUAL, *supra* note 1, at 1-16b ("Uncertainty of the situation and the future creates a certain psychological doubt or fear in the minds of the individual concerned . . ."); e-mail from Colonel Eric M. Smith, Dir., Capabilities Development Directorate, Marine Corps Combat Dev. Command & former Commanding Officer, Regimental Combat Team 8, Afghanistan (Nov. 26, 2012) [hereinafter Colonel Smith e-mail] (on file with author) (responding to a question about the effect of prolonged COIN operations, he explained that "[t]he wars in Iraq and Afghanistan have heavily influenced the current military view of hostile intent and imminent threat. For the main, the impact is negative.").

²⁵ The term military-aged-male, or MAM, was both formally and informally used in Iraq as a means of identifying potential insurgent(s) or threats to U.S. forces. This term was eliminated from the military vernacular because it was applied too broadly by servicemembers, which led to unnecessary detentions and the unsupportable use of deadly force.

problem, improper engagements are justified after the fact by commanders and judge advocates under an expanded self-defense model in an attempt to "protect" the individual Marine or Soldier. While the above is best classified as a mind-set problem in how Marines and Soldiers process information on the battlefield, it further increases the risk of civilian casualties when put into practice.

B. Inherent Right of Self-Defense, the Bush Doctrine, and the Chairman of the Joint Chiefs of Staff Definition of Hostile Intent

1. Development of Individual Self-Defense

Any meaningful discussion of anticipatory self-defense and imminence must involve an understanding of their historical development as concepts within customary international law, and then as policy within U.S. SROE. While there is some disagreement among scholars, it is a commonly held belief that self-defense derives from natural law and "is as old as history and has long been founded on the simple notion that every rational being . . . must conclude that it is permissible to defend himself when his life is threatened with imminent danger."²⁶ The origins of self-defense date back to Roman jurists who believed a natural law existed "that was universal and derived from reason."²⁷ While Roman society was one of the first to address natural law self-defense principles, it was Saint Thomas Aquinas's *Summa Theological* that framed self-defense as a concept rooted within a moral code that was "not derived but rather self-evident."²⁸ With the development of self-defense in natural law, the next historical step was a connection between theoretical belief and application to individual or State action.

Hugo Grotius, a Dutch jurist and student of Aquinas's early work, furthered the concept of self-defense in his book "*De Jure Belli ac Pacis*, which earned him the title of the 'father of international law,'" because he began applying the concept of self-defense to the "nation-state and internal order organized around it."²⁹ Although absent from Aquinas's writings, Grotius specifically addressed the concepts of anticipatory self-defense and the accompanying immanency requirement:

²⁶ Merriam, *supra* note 17, at 44-46. *Contra* DINSTEIN, *supra* note 17, at 191 (asserting that referencing natural law as the source of the right to self-defense, while "common in popular publications and even in some official pronouncements—is unwarranted").

²⁷ *Id.* at 48.

²⁸ *Id.* at 49.

²⁹ *Id.* at 54 (quoting EDWARD DUMBAULD, *THE LIFE AND LEGAL WRITINGS OF HUGO GROTIUS* 59 (1969)).

When our lives are threatened with immediate danger, it is lawful to kill the aggressor . . . [however] the danger must be immediate, which is one necessary point. Though it must be confessed, that when an assailant seizes any weapon with an apparent intention to kill me I have a right to anticipate and prevent the danger. For in the moral as well as the natural system of things, there is no point without some breadth.³⁰

Fast-forwarding more than 200 years, the concept of anticipatory self-defense was again at the forefront of international law in the famous Caroline Case. The Caroline Case involved the British burning and sinking of a U.S.-flagged ship suspected of providing personnel and arms to Canadian rebels.³¹ In a series of letters between Daniel Webster, the U.S. Secretary of State, and the British government, Webster “asserted that the right to self-defense does not exist unless one can show a *necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.*”³² This statement by Secretary Webster is widely held to be the “modern formulation of the right to anticipatory self-defense in international law.”³³ It also serves as the primary basis for the concept of hostile intent and imminence within U.S. doctrine and policy. However, while the Caroline Case provided a theoretical standard for the right to anticipatory self-defense, the principles articulated by Secretary Webster were not immediately operationalized. This issue was remedied by the development of ROE.

2. Rules of Engagement and the Chairman’s Standing Rules of Engagement

Rules of Engagement are “intended to give operational and tactical military leaders greater control over the execution of combat operations.”³⁴ It is important to recognize that ROE are “not LOAC or International Humanitarian Law, nor are they mentioned in the Geneva Conventions or Additional Protocols. They are also not domestic law. They are military directives.”³⁵ Many considerations inform ROE development, including customary international law, treaty obligations, domestic

law, and policy in order to provide Marines and Soldiers with a framework on the use of force in combat operations and military operations other than war.³⁶ Recognizing that ROE can come in varying forms within the chain-of-command, U.S. forces are issued common baseline ROE through the SROE.

As compared to the history of U.S. involvement in armed conflict, the regulation of the use of force through SROE is a relatively new concept.³⁷ The first SROE-like document was the *Worldwide Peacetime ROE for Seaborne Forces*, published in 1981, which focused on a naval ship’s ability to fire a first strike against foreign flagged vessels.³⁸ As the SROE concept continued to develop, military leadership realized that ground forces needed their own specific guidance on the use of force in self-defense.³⁹ While the title and substance of the SROE has changed since 1981, a constant was the continued restatement of the inherent right to self-defense.⁴⁰ In addition, also dating back to the 1981 SROE was the authority to use deadly force against a person or group demonstrating hostile intent.⁴¹ In defining hostile intent the 1981, 1986, 1994, and 2000 SROEs all required an imminent threat of force, with no further explanation or definition.⁴² However, relevant to this article is the additional definition of imminence found in the current 2005 SROE eliminating the requirement for an imminent threat to be immediate, which was based on a concurrent change in national self-defense policy.

³⁶ See *id.* at 498 (“SROE apply in common Article 2 and common Article 3 conflicts and in peace-keeping mission, and anti-terrorist mission. They also apply in military operations other than war.”); Janin, *supra* note 3, at 91 (Rules of Engagement “coordinate political, military, and legal purposes and . . . ensure law of war compliance”).

³⁷ W. Hays Parks, *Deadly Force Is Authorized*, U.S. NAVAL INST. PROC. 32 (Jan. 2001) (stating that “rules of engagement have been with us for some time, [but,] their formulation is recent”).

³⁸ *Id.* at 33.

³⁹ See SOLIS, *supra* note 10, at 491–94. After a full review of use of force incidents in Vietnam there was a recognition by military leadership that there needed to be a specific ground force ROE, therefore, the JCS issues ROE for ground forces in 1988 designated the Peacetime ROE. The next revision of the ROE came in 1994 and was formerly designated by the JCS as the Standing ROE. Since 1994, there have been two additional revisions of the SROE with publishing in 2000 and 2005. *Id.*

⁴⁰ The author, in conjunction with a researcher from the Pentagon Library, Information Management Division, conducted a review of the SROE directives from 1981 to the present and found a statement in all five documents that declared a right to self-defense.

⁴¹ The author, in conjunction with the a researcher from the Pentagon Library, Information Management Division, conducted a review of the SROE directives from 1981 to the present and found all documents contained the concept of hostile intent.

⁴² The author, in conjunction with the a researcher from the Pentagon Library, Information Management Division, conducted a review of the SROE directives from 1981 to the present and found that they all contained a definition of hostile intent that required a threat of the imminent use of force.

³⁰ *Id.* at 56–57 (quoting HUGO GROTIUS, *DE JURE BELLI AC PACIS* 76–77 (1625)).

³¹ *Id.* at 59.

³² *Id.* at 60 (emphasis added).

³³ *Id.* at 59.

³⁴ CORN ET AL., *supra* note 4, at 126.

³⁵ SOLIS, *supra* note 10, at 490.

3. The Bush Doctrine's Influence on the Standing Rules of Engagement

A primary source for determining the national policy on self-defense is the National Security Strategy (NSS). Under federal law, the President is responsible for submitting his NSS to Congress, which, among other things, must describe “the . . . national defense capabilities of the United States necessary to deter aggression and to implement the national security strategy of the United States.”⁴³ While not specifically addressed in every NSS, world events have required the president to explain the nation’s policy on the use of force in self-defense. Dating back to 1950, at the beginning stages of the Cold War, President Truman issued National Council Report 68 (NSC-68),⁴⁴ which asserted America’s anticipatory self-defense policy of not striking first “unless it is demonstrably in the nature of a counter-attack to a blow . . . *about to be delivered*.”⁴⁵ A more expansive view of anticipatory self-defense was promulgated by President Bush in his 2002 NSS after the terrorist attacks on September 11th.⁴⁶ The “Bush Doctrine” took a clear stance on the use of force in response to anticipated developing threats:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat . . . [w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries The greater the threat, the greater the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.⁴⁷

Prior to President Bush’s 2002 NSS, the 2000 SROE

⁴³ 50 U.S.C. § 404a (2012).

⁴⁴ THE EXECUTIVE SEC’Y ON UNITED STATES OBJECTIVES AND PROGRAMS FOR NAT’L SECURITY, NSC 68, A REPORT TO THE NATIONAL SECURITY COUNCIL (14 Apr. 1950) (this document was previously classified Top Secret, but was declassified on 27 February 1975), *available at* http://www.trumanlibrary.org/whistlestop/study_collections/coldwar/documents/pdf/10-1.pdf (This document was previously classified Top Secret, but was declassified on 27 February 1975.).

⁴⁵ *Id.* at 53 (emphasis added).

⁴⁶ Sadoff, *supra* note 18, at 560–61.

⁴⁷ THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 17, 2002) [hereinafter NSS 2002].

defined hostile intent as “the threat of imminent use of force against . . . U.S. forces”⁴⁸ There was no further definition of imminence. However, after President Bush promulgated his 2002 NSS, the SROE was revised and included a definition of imminence that did not require an immediate or instantaneous threat.⁴⁹ It is important to recognize that President Bush’s statement in the 2002 NSS was referencing the use of force in a *jus ad bellum* context—“the law dealing with . . . how States initiate armed conflict”⁵⁰—however, the expansion of imminence and national anticipatory self-defense by the President had a direct influence on the changing definition of imminence and hostile intent in the 2005 SROE,⁵¹ which are *jus in bello* policies—the “law governing the conduct, [or means and methods,] of hostilities.”⁵² Stated another way, the flexibility President Bush needed to defend the nation against developing asymmetrical threats bled over to the individual Marine and Soldier making real-time self-defense targeting decisions in a COIN environment. This leads to the question: What type of targeting model are U.S. servicemembers employing under an expanded view of imminence and anticipatory self-defense in a COIN environment? While it should be conduct-based targeting, it may, in practice, look more like status-based targeting, which is impermissible within a self-defense context and contrary to U.S. and international law.

C. Status- versus Conduct-Based Targeting and the Self-Defense Formula

Every decision to use force is based upon either a status- or conduct-based targeting model. The established process within which targeting decisions are made will differ from one theatre or unit to another,⁵³ but a commander’s decision to use force, at its core, is based on a potential target’s status

⁴⁸ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES encl. A (15 Jan 2000).

⁴⁹ *Supra* note 16.

⁵⁰ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, LAW OF ARMED CONFLICT DESKBOOK 10 (2012) [hereinafter LOAC DESKBOOK].

⁵¹ See Janin, *supra* note 3, at 90 (asserting that “the law governing the use of force in self-defense is a macrocosm of the choices to be made at the tactical level of warfare”); Merriam, *supra* note 17, at 80 (finding that the expansion of imminence and anticipatory self-defense in President’s Bush’s 2002 NSS is reflected in the 2005 SROE revised definition of imminence with respect to hostile intent); Sadoff, *supra* note 18, at 561 (stating that a nation’s application of anticipatory self-defense may influence that same nation’s ROE).

⁵² LOAC DESKBOOK, *supra* note 50, at 135.

⁵³ See SOLIS, *supra* note 10, at 530 (recognizing that “military forces employ strict protocols in making targeting decisions . . . [which] improve and mature, change to meet conflict circumstances, and seldom remain static for long”).

or conduct.⁵⁴ Article 4 of the Third Geneva Convention⁵⁵ and Article 51 of the Additional Protocol 1 to the Geneva Conventions⁵⁶ do not use the formal terms of status- and conduct-based targeting, but both serve to codify customary international law relating to these two targeting methods.

1. The Basics of Status-Based Targeting

Status-based targeting is the use of force against (1) an individual serving in a nation's armed force, (2) a member of an organized armed group, or (3) a declared hostile force.⁵⁷ Commonly, members of a nation's armed force are classified as combatants,⁵⁸ while members of an organized armed group are comprised of non-state actors classified as either unprivileged belligerents or unlawful combatants.⁵⁹ Article 4 of the Third Geneva Convention provides the framework definitions for individuals categorized as combatants.⁶⁰ Specifically, Article 4(A)(1), (2), (3), and (6) classify as combatants those individuals who are members of an armed force, militia, volunteer corps, or spontaneous organized resistance.⁶¹ The SROE also addresses status-based targeting

within the context of a declared hostile force.⁶² The current 2005 SROE defines a declared hostile force as "any civilian, paramilitary or military force or terrorist(s) that has been declared hostile by appropriate U.S. authority."⁶³ The authority referenced in the SROE remains at "the National Command Authority, the Joint Chiefs of Staff, or regional command"⁶⁴ levels, and once declared hostile, an individual or group can be attacked anywhere they are found without having to commit a hostile act or demonstrate hostile intent.⁶⁵ However, it is important to recognize that even if a commander is conducting status-based targeting he must first obtain positive identification (PID) of the target before engaging,⁶⁶ and in many instances the basis of PID is the target's conduct.

2. Conduct-Based Targeting and Self-Defense in Counterinsurgency

Conduct-based targeting is the use of force against individuals engaged in activities deemed hostile by the servicemember observing the conduct.⁶⁷ This targeting method is recognized in Article 51(3) of Additional Protocol I, which permits the targeting of noncombatants, otherwise known as civilians, "for such time as they take a direct part in hostilities."⁶⁸ While the definitions of "for such time" and "direct participation" are widely debated within the international community,⁶⁹ an exact definition is not necessary. The significant principle within Article 51(3) is that an individual's conduct can make them a legitimate military target.

Like Article 51(3), the SROE also recognizes the concept of conduct-based targeting through its self-defense

⁵⁴ While the concepts of status- and conduct-based targeting applies to the use of force against individuals and inanimate objects (buildings, bridges, etc.), this article focuses exclusively on the targeting of individuals.

⁵⁵ Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T 3114, 75 U.N.T.S. 31 [hereinafter GC III].

⁵⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), annex I, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

⁵⁷ See LOAC DESKBOOK, *supra* note 520, at 138.

⁵⁸ See CORN ET AL., *supra* note 4, at 165 (stating that combatants are those individuals described in Article 4(A)(1), (2), (3), and (6) of the Third Geneva Convention and that combatant status is granted exclusively by the State).

⁵⁹ *Id.* at 170 (stating that "modern armed conflict is driving a reevaluation of the idea and even the ICRC seems to recognize the need to make special allowances for organized armed groups that are taking a part in hostilities as structured participants").

⁶⁰ See *id.* at 165.

⁶¹ GC III, *supra* note 55, art. 4(A) (categorizing as combatants those individuals that are

(1) members of the armed force of a Party to the conflict; (2) members of other militias and member of other volunteer corps . . . belonging to a Party to the conflict and operating in or outside their own territory . . . provided that such militias or volunteer corps . . . fulfill the following conditions: (a) commanded by a person responsible for his subordinates, (b) [have] a fixed distinct sign recognizable from a distance, (c) carry arms openly, (d) conduct their operations in accordance with the laws and customs of war; (3) members of regular armed forces who profess allegiance to a government or an authority no recognized as the Detaining Power . . . [and] (6) inhabitants of a non-occupied territory,

who on approach of the enemy spontaneously take up arms to resist the invading force.

Id.

⁶² See LOAC DESKBOOK, *supra* note 520, at 138.

⁶³ CJCSI SROE 3121.01B, *supra* note 5, para. 3d.

⁶⁴ See SOLIS, *supra* note 10, at 597.

⁶⁵ CJCSI SROE 3121.01B, *supra* note 5, para. 2b (stating that "[o]nce a force is declared hostile by appropriate authority, U.S. units need not observe hostile act or demonstration of hostile intent before engaging that force"). See CORN ET AL., *supra* note 4, at 165 (stating that combatants are "targetable anywhere and anytime").

⁶⁶ See SOLIS, *supra* note 10, at 508 (finding that friendly forced must first positively identify a target's status before engaging with deadly force).

⁶⁷ LOAC DESKBOOK, *supra* note 520, at 138.

⁶⁸ AP I, *supra* note 56, art. 51(3).

⁶⁹ While outside the scope of this article, see LOAC DESKBOOK, *supra* note 50, at 20–21, for a further discussion of the direct participation in hostilities debate.

policies and accompanying concepts of hostile act and hostile intent.⁷⁰ As stated in the SROE, “[u]nit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstration of hostile intent.”⁷¹ Targeting decisions shift when employing force in self-defense because “immediate firing on the opposing force or individual is permitted because of the opponent’s *conduct*, rather than his *status*.”⁷²

When operating in a COIN environment, Marines and Soldiers almost exclusively employ a conduct-based targeting model when deciding whether to use deadly force.⁷³ As discussed earlier in this article, the center of gravity in a COIN environment is the civilian population; however, as a deliberate tactic, insurgent fighters violate the principle of distinction in order to disguise themselves as noncombatants. This presents an obvious identification problem for U.S. forces. Even if the appropriate authority declared insurgent forces hostile, shifting U.S. forces to a status-based targeting model, the only method to PID an insurgent who does not wear an identifiable uniform is to observe his conduct.⁷⁴ As a result “[t]he practical and legal constraints of PID make status-based engagements very rare . . . [placing] U.S. armed forces in a reactive posture”⁷⁵ based on the conduct they observe. Recognizing the necessity to employ a conduct-based targeting model in COIN operations, Marines and Soldiers require a practical, useful framework to process their observations and determine if deadly force is authorized.

The self-defense formula—hostile act or demonstrated hostile intent plus positive identification of the enemy permits the use of deadly force (HA/HI + PID = Use of Force)—is the framework used by Marines and Soldiers to make conduct-based self-defense decisions.⁷⁶ Separating the two elements of the equation, the presence of a hostile act and/or hostile intent satisfies the military necessity principle of LOAC, and the requirement to have PID of the enemy satisfies the distinction principle under LOAC.

While the SROE defines both hostile act and hostile intent for the servicemember, it fails to provide an operational definition for PID.⁷⁷ Joint Publication 1-02 defines PID as “identification derived from observation and

analysis of target characteristics including visual recognition, electronic support systems, non-cooperative target recognition techniques, identification friend or foe systems, or other physics-based identification techniques.”⁷⁸ As is evident from an initial reading, this definition is not useful for the individual Marine or Soldier patrolling the streets of Iraq and Afghanistan. With references to electronic support systems and physics-based identification techniques in the Joint Publication, it is clear the definition is more practical for deliberate targeting in a command operations center, not for Marines and Soldiers on patrol. However, a more pragmatic standard has developed based on the “international criminal law general intent standard of honest and reasonable belief.”⁷⁹ As it relates to the use of force in self-defense, positive identification is “a reasonable certainty that the proposed target is a legitimate military target.”⁸⁰ Stated another way, “PID is about recognizing hostile intent and hostile acts.”⁸¹

III. The Way Forward

As demonstrated in Parts I and II of this article, the COIN environment presents the individual Marine and Soldier with difficult targeting scenarios without the benefit of clear, tangible guidance from the SROE. The practical result has been a broadening of what constitutes hostile intent and an imminent threat, as well as a confused application of the self-defense formula. This has led to an increased risk of civilian casualties and a targeting process that looks more like status-based targeting than the required conduct-based model. This article makes three recommendations to correct these problems: (1) return to a more traditional, narrow definition of hostile intent and imminence; (2) apply the self-defense formula correctly by recognizing hostile intent first and then gaining PID; and (3) require both commanders and judge advocates to forcefully incorporate these two recommendations into their overall ROE philosophy, pre-deployment training packages, and review of combat actions during the deployment.

A. Return to Traditional Imminence

Operating under U.S. SROE in a COIN environment, realistic limitations must be placed upon the meaning U.S. forces apply to the phrase “threat of imminent use of

⁷⁰ CJCSI SROE 3121.01B, *supra* note 5, app A to encl A.

⁷¹ *Id.* para. 2a.

⁷² SOLIS, *supra* note 10, at 505.

⁷³ Janin, *supra* note 3, at 91.

⁷⁴ *Id.*

⁷⁵ *Id.* at 93.

⁷⁶ *Supra* note 12.

⁷⁷ *See* SOLIS, *supra* note 10, at 508.

⁷⁸ JP 1-02, *supra* note 6, at 245.

⁷⁹ SOLIS, *supra* note 10, at 508.

⁸⁰ OPLAW HANDBOOK, *supra* note 7, at 103–04 (reprinting the Operation Iraqi Freedom Combined Forces Landing Component Commander ROE card promulgated 311334Z Jan 03 & the Operations Iraqi Freedom Multi-National Coalition – Iraq ROE card promulgated 27 Mar. 2007).

⁸¹ SOLIS, *supra* note 10, at 508.

force.”⁸² As stated by Dr. Yoram Dinstein, a preeminent operational law scholar,⁸³ “[t]he use of force in self-defense cannot be based on grounds of assumptions, expectations, or fear of what is sometimes called a latent threat.”⁸⁴ While any self-defense ROE must give servicemembers the ability to defend themselves before absorbing the “first punch,” it cannot be so broad as to permit the use of force against overly anticipated threats. Solving this “quick trigger-finger” problem requires redefining the term imminent.

1. 2005 SROE Definition of Imminent Use of Force Is Not Necessary

The current SROE should be revised by removing the additional definition of “imminent use of force” and returning to the pre-2005 standard. As discussed in Part II, since the inception of the SROE in 1981, hostile intent required the threat of the imminent use of force without any further explanation. This left military leaders and individual servicemembers to apply the plain and traditional meaning of the term imminent. It was not until President Bush espoused his expanded view of national anticipatory self-defense that the explanatory language was added—defining imminent in the negative as “not necessarily meaning immediate or instantaneous.”⁸⁵ While the expanded definition of anticipatory self-defense was necessary in the *jus ad bellum* use of force based on an uncertain and evolving asymmetrical threat, it was not necessary for the *jus in bello* application by individual Marines and Soldiers on the ground.⁸⁶

2. Support for a Return to Traditional Imminence and Assumption of Greater Risk

Some commanders and judge advocates share the view that an additional definition of imminence was not needed. A former battalion and regimental combat team commander with multiple tours in Iraq and Afghanistan believes “there was no need for the addition” and that it “muddied the

waters for no clear gain.”⁸⁷ Supporting his opinion, the former commander was unaware of “a Marine [operating under the pre-2005 definition of hostile intent] who would not pull the trigger when their life was truly in danger.”⁸⁸ Expanding the definition tended to “open the door for [individual] ROE to be confused with [deliberate] targeting.”⁸⁹ A judge advocate with operational experience at division, brigade, and special forces commands believes Soldiers understood their authority to engage people demonstrating hostile intent prior to the 2005 SROE revision. He was “not clear what [the] change accomplished.”⁹⁰ The judge advocate recommends the United States return to a natural law definition of imminence espoused in the Caroline Case. He believes imminent means immediate and a subsequent return to the traditional definition will “enhance the perceived legitimacy of the defensive use of force”⁹¹

The result of requiring “imminent” to mean “immediate” is a necessary burden of COIN operations: the assumption of greater risk. Greater risk assumption, and the resulting reduction in the use of force, will further mitigate the possibility of civilian casualties, which turn tactical gains into strategic losses.⁹² The Counterinsurgency Field Manual succinctly states the importance of minimizing civilian casualties: “In COIN, killing a civilian is no longer just collateral damage; it undermines the goal of COIN.”⁹³ Obviously, this is a counterintuitive concept to many military leaders trained in conventional warfare and force protection measures. However, more than ten years of COIN operations in Iraq and Afghanistan have proven that the acceptance of greater risk is a prerequisite to mission accomplishment.⁹⁴ The former battalion and regimental

⁸² CJCSI SROE 3121.01B, *supra* note 5, app. A.

⁸³ Dr. Dinstein is currently a professor Emeritus at Tel Aviv University. He has guest-lectured all over the world and delivered a series of lectures at the Hague Academy of International Law. He is a member of the Institute of International Law and was also a member of the Executive Council of the American Society of International Law. Dr. Dinstein has written extensively, including a six-volume treatise on international law and his latest book, *War Aggression and Self-Defence*, is in its 5th edition. His writings have been cited by judges of the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia.

⁸⁴ DINSTEIN, *supra* note 17, at 206.

⁸⁵ CJCSI SROE 3121.01B, *supra* note 5, encl. A.

⁸⁶ See DINSTEIN, *supra* note 17, at 192 (stating that “[s]elf-defence (*sic*) exercised by States (legal entities) is not to be equated with self-defence (*sic*) carried out by physical persons”).

⁸⁷ Colonel Smith e-mail, *supra* note 24.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Merriam, *supra* note 17, at 87.

⁹¹ *Id.*

⁹² U.S. MARINE CORPS CTR FOR LESSONS LEARNED, CIVILIAN CASUALTY MITIGATION: SUMMARY OF LESSONS, OBSERVATIONS AND TACTICS, TECHNIQUES AND PROCEDURES FROM MARINE EXPEDITIONARY BRIGADE – AFGHANISTAN (MEB-A)—APRIL 2010, at 8 (29 July 2010) [hereinafter CIVILIAN CASUALTY MITIGATION AAR] (finding that reducing civilian casualties requires the assumption of additional risk, which is necessary to win the civilian population).

⁹³ Sewall, *Introduction* to FM 3-24, *supra* note 3, at xxv.

⁹⁴ See, e.g., *id.*, para. 7-13 (“Combat requires commanders to be prepared to take some risk, especially at the tactical level However, in COIN operations, commanders may need to accept substantial risk to de-escalate a dangerous situation.”); Major Trent A Gibson, Hell-Bent on Force Protection: Confusing Troop Welfare with Mission Accomplishment in Counterinsurgency (Apr. 8, 2009) (unpublished Masters of Military Science thesis, Marine Corps University) (on file with author) (concluding that “our military leaders must embrace the unconventional view inherent in our new counterinsurgency doctrine which places the immediate, near-term cost of success upon the shoulders of the Soldiers and Marines executing COIN

combat team commander, referred to previously, views risk in the COIN environment as follows: “In a COIN fight we must accept more risk. We accept it to protect innocents because (1) it is morally imperative and (2) it furthers the mission.”⁹⁵

B. The First Step Is Hostile Act or Hostile Intent, Not Positive Identification

The order in which a servicemember applies the self-defense formula is important to its proper application. In a typical addition equation, it does not matter how the values on the left side of the equal sign are combined. Whether the values are added in the order listed, or in a more convenient combination, the answer is always the same. The self-defense formula cannot be treated in the same manner.

Marines and Soldiers must first establish either a hostile act or hostile intent before they move to the PID aspect of the self-defense formula.⁹⁶ The consequence of obtaining PID before a hostile act or hostile intent is the employment of an improper targeting model in defensive COIN operations. If a servicemember initially determines an individual is a target based on PID, they are making a status-based targeting decision pursuant to the individual’s physical characteristics.⁹⁷ Once an individual is positively identified as a “bad guy” under a status-based targeting model, seemingly innocuous conduct is misperceived as a hostile act or hostile intent, permitting the use of deadly force. The result is an increase in alleged self-defense engagements and unnecessary risk to surrounding civilians.

This faulty status-based determination is the result of a hyper-vigilant mental state resulting from the increased number of deployments executed by Marines and Soldiers over the last ten years. The compressed and frequent deployment cycle gives Marines and Soldiers a false sense of familiarity with the local population’s culture and enemy techniques, tactics, and procedures.⁹⁸ However, as stated

operations”), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a508083.pdf>.

⁹⁵ Colonel Smith e-mail, *supra* note 24.

⁹⁶ CIVILIAN CASUALTY MITIGATION AAR, *supra* note 92, at 8 (requiring an observation of hostile intent or hostile act as imperatives before gaining positive identification).

⁹⁷ Physical characteristics that raise a servicemember’s awareness and cause them to determine the individual is a legitimate military target include: holding a cell phone, riding on a red motorcycle, wearing a red turban, etc.

⁹⁸ Colonel Smith e-mail, *supra* note 24 (Marines “serving for multiple years in one small geographic area leads one to believe that one knows the inner workings of the adversary’s mind, when in fact this is not the case. For example, after 2 [sic] deployments to Iraq, a Marine believes that he knows for a fact that ‘when a bomb goes off, the only people on the street for the next 30 minutes are bad guys.’ This is worsened if the Marine was trained by others who also had multiple deployments. We are smart people, and

earlier, COIN operations require conduct-based targeting because the enemy does not distinguish itself from the civilian population and must be identified based on observed conduct. Commanders and judge advocates must recognize that frequent deployments are creating hyper-vigilant servicemembers and employ ROE training that addresses the potential problems.

C. Influence and Role of the Judge Advocate

1. A Deliberate Command Philosophy

As the principal legal advisor to the commander, judge advocates can exercise a tremendous amount of influence on ROE development, training, employment, and review within military units. Even with this influence, “commanders are solely responsible for the ROE philosophy in their unit, but as the size of the unit increases a commander must use surrogates to convey intent and in many instances that surrogate is the judge advocate.”⁹⁹ Recognizing these facts, judge advocates must have a conversation with the commander regarding the commander’s self-defense philosophy in a COIN environment, specifically with regard to hostile intent and imminence.¹⁰⁰

In addition, judge advocates should work with their commanders to establish internal orders, rules, and policies to define left and right limits for common situations. Contrary to some opinions, rules can be established in a fluid combat environment that serve as a basis for decision-making in individual circumstances.¹⁰¹ However, it is also important to realize that “ROE philosophy is not derived from ROE classes, but from constant interaction between the commander and his subordinates. Commanders must try and weave ROE into all of their communications.”¹⁰² Commanders and judge advocates should take the additional step of ensuring that members of their units not only understand when they can shoot, but also when they should not shoot even though legally permitted.¹⁰³

assume that after years of conflict, we should be able to derive intent, but the fact is that we cannot.”).

⁹⁹ *Id.*

¹⁰⁰ FM 3-24, *supra* note 3, at 182 (stating that “commanders must ensure Soldiers and Marines understand the rules of engagement, which becomes more restrictive as peace and stability return”).

¹⁰¹ While the author was deployed to Afghanistan as a Command Judge Advocate to a Regimental Combat Team, the commander promulgated fragmentary orders and policies within the regiment that provided definitions and rules on how to deal with individuals suspected of spotting. Spotting was the practice of local national observing the actions of friendly forces and reporting those actions to other insurgents.

¹⁰² Colonel Smith e-mail, *supra* note 24.

¹⁰³ CIVILIAN CASUALTY MITIGATION AAR, *supra* note 92, at 10 (A former Battalion Commander in Afghanistan explained, “Commanders on the ground, from the squad leader on up, have to have a complete

2. Reviewing Investigations and Underwriting Good-Faith Mistakes

Finally, when reviewing investigations involving self-defense ROE decisions, commanders and judge advocates must hold all servicemembers to the definition of imminence and hostile intent suggested in this article. At the conclusion of an investigation, commanders should not shy away from finding that a ROE violation occurred, even if the commander believes the Marine or Soldier acted in good faith. Determining that an ROE violation occurred accomplishes two things: (1) provides opportunities for commanders to conduct more focused ROE training based on a substantiated problem and (2) increases the credibility of the commander in the eyes of higher headquarters and the public because he accepts responsibility for a mistake and takes corrective action.

Moreover, prolonged U.S. involvement in COIN operations has demonstrated that leadership is willing to accept good faith misapplications of the ROE and not subject Marines or Soldiers to punishment or even a court-martial for a split-second decision.¹⁰⁴ This is because the Army and Marine Corps must institutionally “underwrite honest [ROE] mistakes and tell [its members] that such mistakes help the entire [unit] improve at performing difficult missions.”¹⁰⁵ Ultimately, proactive and integrated involvement in self-defense ROE by the commander and judge advocate will lead to better training, more effective employment, and a commander who retains freedom of movement and maneuver within his battlespace.

IV. Conclusion

After more than ten years of COIN operations in Iraq and Afghanistan, U.S. forces have expanded the application of anticipatory self-defense, imminence, and hostile intent to a point that strains our credibility and, at times, detracts from mission accomplishment. The result is an increased risk of civilian casualties and a targeting model that has shifted away from the conduct-based targeting required in COIN operations and looks more like status-based targeting based on a civilian’s physical characteristics. This is a byproduct of the increased number and duration of deployment tours by Marines and Soldiers making them hyper-vigilant to the

operating environment. As stated in this article’s introductory quotation from the 1940 Marine Corps’ Small Wars Manual, small wars, or COIN in modern parlance, requires “principles of psychology . . . different from their normal application in major warfare of even troop leadership.”¹⁰⁶

Marines and Soldiers conducting COIN operations must have clear, understandable authority to use force in self-defense against demonstrations of hostile intent. Specific to the COIN environment, the authority to use force must be delicately balanced against the requirement of restrained force in order to protect and positively influence the civilian population. Compounding the difficulty restrained force presents, insurgents fail to distinguish themselves from the civilian population (usually in the hope of provoking an overly aggressive response from U.S. forces). In many instances, that overly aggressive response produces civilian casualties or destruction of civilian property, which further alienates the civilian population—undermining COIN efforts. The tools provided Marines and Soldiers operating in such an uncertain environment are the SROE concepts of self-defense in response to hostile act or hostile intent, and the self-defense formula that operationalizes the military directive for individual servicemembers.

To combat these problems, both judge advocates and commanders must first recognize a problem exists, and then institute a ROE philosophy as well as a training program that sets left and right lateral limits on what constitutes an imminent threat of force under the SROE. At a national strategic level, the SROE should be revised, returning to the pre-2005 definition of hostile intent. While the president’s decisions to use force against asymmetric threats may require broader, more flexible authority, the same is unnecessary for the Marine and Soldier on the ground. At the tactical level, an imminent use of force should mean the threat is immediate and instant. This is the paradigm shift that is required to more effectively conduct COIN operations now and in the future.

understanding of the ROE. The ROE answers the question ‘Can I do this?’, but then you have to ask ‘Should I?’ Just because I can, doesn’t mean I should.”).

¹⁰⁴ Martins, *supra* note 17, at 12 (finding that “the facts do not support the assertion” that commanders will court-martial servicemembers for good-faith ROE mistakes); Colonel Smith e-Mail, *supra* note 24 (stating that “mistakes happen in war, and we cannot criminally charge those Marines who fail to meet the standard of performance in determining hostile act or hostile intent”).

¹⁰⁵ Martins, *supra* note 17, at 11.

¹⁰⁶ *Supra* note 1.

Appendix

SROE Definitions of Hostile Intent

1. Worldwide Peacetime ROE for Seaborne Forces, 1981

Hostile Intent – The threat of the imminent use of force by a foreign force against the United States or U.S. forces. Evidence of hostile intent may lead to the force being declared hostile. Whether or not a force is declared hostile, where the hostile intent amounts to a threat of imminent attack, the right exists to use proportional force in self-defense by all authorized means available.

2. JCS Peacetime Rules of Engagement, 26 June 1986

Hostile Intent – Hostile intent is the threat of the imminent use of force by a foreign force or terrorist unit(s)/organization against the United States or U.S. forces, U.S. citizens and their property, or U.S. commercial assets. Where there is preparation for imminent use of armed force, the right exists to use proportional force, including armed force, in self-defense by all authorized means available in order to deter or neutralize the potential attacker or, if necessary, destroy the threat.

3. CJCSI 3121.01, JCS Standing Rules of Engagement, 1 Oct 1994

Hostile Intent – Hostile intent is the threat of imminent use of force by a foreign force or terrorist unit (organization or individual) against the United States, U.S. forces, and in certain circumstances, U.S. citizens, their property, U.S. commercial assets, or other designated non-U.S. forces, foreign nationals and their property. When hostile intent is present, the right exists to use proportional force, including armed force, in self-defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat.

4. CJCSI 3121.01A, Standing Rules of Engagement for US Forces, 15 January 2000

Hostile Intent – The threat of imminent use of force against the United States, U.S. forces, and in certain circumstances, U.S. nationals, their property, U.S. commercial assets, and/or other designated non-U.S. forces, foreign nationals and their property. Also, the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG property.

5. CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force by US Forces, 13 June 2005

Hostile Intent – The threat of imminent use of force against the United States, U.S. forces or other designated persons or property. It is also the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG property.

Imminent Use of Force – The determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.