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Note

Interpreting the Law of War: Rewriting the Rules of Engagement to Police Iraq

Karen P. Seifert*

On May 1, 2003, President Bush declared the end of major combat operations in Iraq.¹ Yet military and civilian casualties continue as U.S. forces engage in a “protracted conflict” with insurgents.² On January 10, 2007, over three years after the declared end of major combat operations, the President committed over twenty thousand additional troops to Iraq.³ The President commented that “past efforts to secure Baghdad failed for two principal reasons: [t]here were not enough Iraqi and American troops . . . , and there were too many restrictions on the troops we did have.”⁴ Soldiers are restricted in their conduct by the rules of engagement (ROE), which are specific

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1. Address to the Nation on Iraq from the U.S.S. *Abraham Lincoln*, 1 PUB. PAPERS 410, 410 (May 1, 2003).

2. Nathan A. Canestaro, “*Small Wars*” and the Law: Options for Prosecuting the Insurgents in Iraq, 43 COLUM. J. TRANSNAT’L L. 73, 74 (2004); see also U.S. DEPT OF DEF., OPERATION IRAQI FREEDOM/OPERATION ENDURING FREEDOM U.S. CASUALTY STATUS (Oct. 2007), available at <http://www.defenselink.mil/news/casualty.pdf> (showing that, as of November 2007, ninety-six percent of U.S. casualties in Iraq occurred after the end of major combat operations); Louise Roug, *Month’s GI Toll Worst in a Year*, CHI. TRIB., Oct. 27, 2006, at 10 (noting that there were ninety-six U.S. troop casualties in October 2006, the highest monthly total since October 2005).

3. Address to the Nation on the War on Terror in Iraq, 43 WEEKLY COMP. PRES. DOC. 19, 20 (Jan. 10, 2007).

4. *Id.*

instructions about what actions are allowed under the law of war.⁵

The law of war limits military conduct during war.⁶ It restricts the type of weaponry that may be used and the targets that may be attacked.⁷ This body of law has developed over hundreds of years of customary use and more recently was codified in international treaties.⁸ The United States, whether as party to such treaties or under international law, must abide by the law of war in its military's actions in Iraq.⁹

5. See U.S. DEP'T OF DEF., DICTIONARY OF MILITARY AND ASSOCIATED TERMS 472 (2001) (as amended through Oct. 17, 2007), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf [hereinafter DOD DICTIONARY] (defining ROE as "[d]irectives 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"); Guy R. Phillips, *Rules of Engagement: A Primer*, ARMY LAW., July 1993, at 4, 7 (describing ROE as the connection between the law of war and the battlefield); see also Ahmad v. Wigen, 726 F. Supp. 389, 405 (E.D.N.Y. 1989) ("[The] government establishes [ROE] over the conduct of its armed forces at a particular time and place.").

6. See Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter 1907 Hague Convention IV] ("[T]he appeal to arms has been brought about by events which their care was unable to avert; [a]nimated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization; [t]hinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible; . . . [the contracting nations] adopted provisions intended to define and govern the usages of war on land."); see also Phillips, *supra* note 5, at 4 (stating that ROE "regulate the use of force," providing soldiers directions as to when force may be used).

7. See 1907 Hague Convention IV, *supra* note 6, Annex, art. 23 (listing conduct not acceptable during war, including the use of weapons that cause unnecessary harm). For a discussion of earlier attempts to define such conduct, see generally Geoffrey Best, *Restraints on War by Land Before 1945*, in *RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICTS* 17 (Michael Howard ed., 1979).

8. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; 1907 Hague Convention IV, *supra* note 6; see also U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 27-10: THE LAW OF LAND WARFARE 4 (1956) (explaining that the "law of war is derived from two principal sources" lawmaking treaties and custom).

9. See Chairman of the Joint Chiefs of Staff Instruction 5810.01C, Implementation of the DOD Law of War Program 2 (2007) [hereinafter Instruction 5810.01C]; W. Hays Parks, Special Assistant to the U.S. Army Judge Ad-

In order to communicate the law of war, the military gives soldiers discrete ROE about when force is authorized and what type of force may be used.¹⁰ The ROE are more than instructions to soldiers; they are a legal interpretation of congressionally enacted law,¹¹ made by members of the executive branch.¹² Like any legal interpretation, the product can vary based on the objectives of the administration.¹³

vocate Gen., Remarks at the Briefing on Geneva Convention, EPW's, and War Crimes (Apr. 7, 2003) (transcript available at http://www.defenselink.mil/transcripts/2003/t04072003_t407genv.html).

10. See J. Ashley Roach, *Rules of Engagement*, 36 NAVAL WAR C. REV. 46, 52 (1983); see also U.S. DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.5 (1989).

11. See U.S. DEP'T OF THE ARMY, *supra* note 8, at 7 (equating treaties with congressional statutes); Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 75 (2007). The Constitution requires that all treaties be ratified by two-thirds of the Senate, and only through congressional approval do treaties become law. U.S. CONST. art. II, § 2, cl. 2. Such treaties are considered the supreme law of the land. U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."); see *Missouri v. Holland*, 252 U.S. 416, 432–33 (1920). Once approved by the Senate, treaties are self-executing and become the internal law of the United States. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796) ("The people of America have been pleased to declare, that . . . laws of any of the States, contrary to a treaty, shall be disregarded."); *id.* at 277 ("Under this Constitution therefore, so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also by the vigour of its own authority to be executed in fact."); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1081–82 (2000) (discussing the constitutional underpinnings of the treaty power); cf. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 240 (15th ed. 2004) (describing efforts by senators in the 1950s to amend the Constitution to avoid this self-execution).

12. The U.S. Constitution vests the power to develop foreign policy in the President and provides that he will also be the commander in chief of the armed forces. U.S. CONST. art. II, § 2, cls. 1 & 2. It is this directive that provides authority for standing ROE to be promulgated from within the executive branch, specifically by the Joint Chiefs of Staff. See Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 HOUS. L. REV. 553, 573 n.80 (2007); Paul E. Jeter, *What Do Special Instructions Bring to the Rules of Engagement? Chaos or Clarity*, 55 A.F. L. REV. 377, 386 (2004). Even more than congressionally enacted law, the entire panoply of law is applicable to U.S. forces in armed conflict—statutory, constitutional, and international. See U.S. DEP'T OF THE ARMY, *supra* note 8, at 7 (stating that the U.S. military must treat treaties with the same respect as it does the Constitution and statutes).

13. See Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431, 466–67

The current ROE instruct soldiers to escalate their force when confronted with a hostile actor. These ROE are meant to ensure proportionality and necessity in the use of force, consistent with law of war principles. However, while these ROE may be useful in a situation in which the enemy's identity is clear, combatants in Iraq are often not so easily identified.¹⁴ Rather, soldiers, like members of a police force,¹⁵ are confronted with individuals of unknown identity.

Insurgent tactics make it nearly impossible for soldiers to distinguish between combatants and noncombatants¹⁶ until combatants are identified by engaging in violent actions. In these situations, soldiers may only have seconds—sometimes less than a second—to assess a threat and act; a mistake may mean death either to the soldiers or to a noncombatant.¹⁷ There is frequently insufficient time to escalate force under the current ROE, which are too restrictive for a policing environment.¹⁸ The current ROE overemphasize some of the principles of the law of war while de-emphasizing, even ignoring, a sol-

(2004) (“[P]olitically enforced rules of engagement will always be a handmaiden of force employment decisions to ensure that the manner in which force is applied conforms to political objectives and perceived risks.” (quoting BENJAMIN S. LAMBETH, *THE TRANSFORMATION OF AMERICAN AIR POWER* 50 (2000) (internal quotation marks omitted)). ROE may restrict the use of force in a manner not required by the law of war in order to keep hostilities from escalating. Cf. CARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Paret eds. & trans., 1984) (“[T]he political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose.”).

14. See, e.g., Parks, *supra* note 9.

15. See Paolo Tripodi, *Iraq: Policing the Police*, CONTEMP. REV., July 1, 2003, at 16, 18–19 (describing the responsibilities of the U.S. military after the fall of Saddam Hussein as a mixture of “constabulary and humanitarian duties” and noting the military’s efforts to keep the peace); Press Release, U.S. Dep’t of Defense, DOD Announces Force Adjustments (Jan. 11, 2007), available at www.defenselink.mil/pubs/word_docs/forceadjustments_011107.doc (stating that the troops deployed as part of the surge would “secure neighborhoods while protecting the local populations” and “assist in achieving stability and security”); see also Julian Borger, *Pentagon Was Warned over Policing Iraq*, GUARDIAN, May 28, 2003, at 11; cf. U.S. DEP’T OF DEF., MEASURING STABILITY AND SECURITY IN IRAQ 29 (2006) (discussing the need to transfer security operations from coalition troops to Iraqi forces).

16. Canestaro, *supra* note 2, at 80 (“The ability of guerillas to melt into the populace . . . is a key component of their military strategy.”).

17. See, e.g., James Lyons, Commentary, *Untie Military Hands*, WASH. TIMES, Jan. 26, 2007, at A18.

18. See *id.*

dier's right to act in self-defense,¹⁹ a right protected above all else.²⁰

This Note argues that although the law of war appropriately limits the use of force, the current ROE are an unfaithful legal interpretation because they unnecessarily restrict troops in a manner not required by law. Part I of this Note identifies the customary law and international treaties that are the foundations of the law of war and defines ROE. Part II argues that the current ROE are an ill fit for soldiers policing Iraq and they endanger the lives of soldiers and civilians. Part III recommends that the military change the ROE for soldiers engaged in police operations in Iraq. Specifically, the Joint Chiefs of Staff should promulgate new ROE for these soldiers based on the U.S. law enforcement model and should create additional law of war training. Congress should allocate funding for this program to spur its development. Ultimately, this proposed interpretation will lead to a more faithful application of the law of war and more protection for soldiers and noncombatants.

I. THE LAW OF WAR AND ITS APPLICATION TO THE BATTLEFIELD

"The laws of war . . . all tend to mitigate the cruelties and misery produced by the scourge of war."²¹ Christian legal theorists first defined the notion of justice in war,²² and custom and international treaties continue to uphold that notion today.²³ The law allows proportional and humane force to be used only when it is militarily necessary,²⁴ and it distinguishes between combatants and noncombatants to mitigate unnecessary

19. W. Hays Parks, *Deadly Force Is Authorized*, U.S. NAVAL INST. PROC., Jan. 2001, at 32, 33.

20. See U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence . . ."); W.A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, ARMY LAW., Nov. 2000, at 1, 5 (noting that the right to self-defense was considered "inherent" even before it was enshrined by the United Nations).

21. The Prize Cases, 67 U.S. (2 Black) 635, 667 (1862).

22. See Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 394-95 (1993).

23. See Geneva Convention IV, *supra* note 8; Geneva Convention III, *supra* note 8; 1907 Hague Convention IV, *supra* note 6.

24. See A.P.V. ROGERS, LAW ON THE BATTLEFIELD 4 (2d ed. 2004) (explaining that the law of war has traditionally accounted for military necessity).

harm.²⁵ The law also guarantees the right to self-defense.²⁶ ROE are interpretations of the law of war for soldiers concerning the issue of how much force can be used under given circumstances²⁷—or, in terms of the soldier's timeless question, "When can I pull the trigger?"²⁸ These instructions are issued by the Joint Chiefs of Staff and further developed by commanders and Judge Advocate Generals (JAGs) in the field.²⁹ The ROE link the law of war to the battlefield.³⁰

A. FOUNDATIONS OF THE LAW OF WAR

The law of war exists to protect "both combatants and non-combatants from unnecessary suffering."³¹ The first expressions of the law of war made two distinctions: *jus ad bellum*, describing the law governing the decision to wage war, and *jus in bello*, describing the rules applied to conduct in war.³² The *jus in bello* doctrine grew to require both the distinction between combatants and noncombatants in war and specific restrictions on the means of warfare to prevent unnecessary suffering and destruction.³³ This distinction between combatants and civilians is part of the modern law of war.³⁴

Customary international law and treaties form the contemporary law of war.³⁵ Customary law is composed of prin-

25. *Id.* at 8.

26. See U.N. Charter art. 51 (stating that the right to self-defense is "inherent").

27. ROE are the "primary means of ensuring [soldiers'] compliance with both international and domestic law." Phillips, *supra* note 5, at 7.

28. See Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 4 (1994) (stating that ROE provide soldiers with little information about "what, when, and where they can shoot").

29. See CTR. FOR LAW & MILITARY OPERATIONS [CLAMO], RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES 1-20 to -30 (2000) [hereinafter CLAMO HANDBOOK] (describing the Army's ROE development process); Jeter, *supra* note 12, at 388 (describing the Air Force's ROE development process).

30. See Adam Roberts & Richard Guelff, *Introduction to DOCUMENTS ON THE LAWS OF WAR* 1, 7 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

31. U.S. DEP'T OF THE ARMY, *supra* note 8, at 3.

32. INGRID DETTER, *THE LAW OF WAR* 156-58 (2d ed. 2000); Kenneth Anderson, *Who Owns the Rules of War?*, N.Y. TIMES MAGAZINE, Apr. 13, 2003, at 38.

33. Gardam, *supra* note 22, at 397.

34. See DETTER, *supra* note 32, at 135.

35. See FREDERIC DE MULINEN, *HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES* 2 (1987); U.S. DEP'T OF THE ARMY, *supra* note 8, at 4; Canesta-

ciples generally accepted and followed by states over time.³⁶ It requires that force be used in accordance with the principles of "military necessity, humanity, distinction, and proportionality,"³⁷ but it acknowledges the supremacy of the right to self-defense.³⁸ These principles are now enshrined in the Hague³⁹ and Geneva Conventions.⁴⁰

Proportionality requires states to balance the goals of achieving military victory and protecting humanity.⁴¹ Commanders may only take action necessary to secure their military objectives.⁴² The principle of humanity "puts a brake on undertakings which might otherwise be justified by the principle of military necessity"⁴³ in order to minimize unnecessary suffering.⁴⁴ The *United States Army Field Manual* acknowledges that the law of war limits the power to conduct warfare without regard for humanity.⁴⁵

International treaties require combatants to distinguish themselves from civilians⁴⁶ and mandate that civilian casual-

ro, *supra* note 2, at 87–88.

36. DE MULINEN, *supra* note 35, at 2.

37. ROGERS, *supra* note 24, at 4.

38. See U.N. Charter art. 51; Stafford, *supra* note 20.

39. See 1907 Hague Convention IV, *supra* note 6.

40. See Geneva Convention IV, *supra* note 8; Geneva Convention III, *supra* note 8.

41. ROGERS, *supra* note 24, at 17; see also 1907 Hague Convention IV, *supra* note 6, Annex, art. 22 ("The right of belligerents to adopt means of injuring the enemy is not unlimited."); cf. Michael N. Schmitt, *War and the Environment: Fault Lines in the Prescriptive Landscape*, in *THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES* 87, 101 (Jay E. Austin & Carl E. Bruch eds., 2000) (noting that the principle of military necessity "forbids destructive acts unnecessary to secure a military advantage, in other words, acts of wanton destruction").

42. ROGERS, *supra* note 24, at 5; U.S. DEP'T OF THE ARMY, *supra* note 8, at 3, 19–20.

43. ROGERS, *supra* note 24, at 7.

44. *Id.* at 5; Canestaro, *supra* note 2, at 88; see also Geneva Convention IV, *supra* note 8, art. 27 (entitling civilians "to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs"); 1907 Hague Convention IV, *supra* note 6, Annex, art. 23 (stating that it is unlawful to employ warfare that causes unnecessary suffering and that belligerents shall not seize property unless it is "demanded by the necessities of war").

45. U.S. DEP'T OF THE ARMY, *supra* note 8, at 3.

46. Both the Hague and Geneva Conventions define combatants as individuals "(1) to be commanded by a person responsible for his subordinates; (2) to have a fixed distinctive emblem recognizable at a distance; (3) to carry arms openly; and (4) to conduct their operations in accordance with the laws and

ties be avoided.⁴⁷ This does not negate all possibilities of civilian casualties; rather, "civilians working in military objectives, though not themselves legitimate targets, are at risk if those objectives are attacked."⁴⁸ While there is grave risk to civilians in times of war, proportionality requires that states "balance the conflicting military and humanitarian interests."⁴⁹ Proportionality forbids military action in which collateral damage outweighs military necessity.⁵⁰ Therefore, proportionality is required on the macrolevel—commanders must consider what force is appropriate to achieve their objective.

Although the law limits the use of force in war, individuals are always authorized to use deadly force in self-defense. The U.N. Charter proclaims that nothing "impair[s] the inherent right of individual or collective self-defence."⁵¹ This ultimate right supersedes all other directives under the law of war; the soldier is never required by the law to forsake his life in order to uphold the law's principles.

Theoretically, the requirements of the law of war are clear. In application, however, the law is quite murky in an era of warfare in which battlelines are not drawn and combatant sta-

customs of war." 1907 Hague Convention IV, *supra* note 6, Annex, art. 1; Geneva Convention III, *supra* note 8, art. 4. Note also that Protocol I to the Geneva Conventions extends combatant status to individuals who do not necessarily fight according to these restrictions, including paramilitary troops and armed law enforcement. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. III, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. The United States refused to sign Protocol I because of concern that this provision preferenced guerillas over regular armed forces by allowing guerillas the protections of the law of war (e.g., prisoner-of-war status) without forcing them to abide by it. Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 1 PUB. PAPERS 88 (Jan. 29, 1987). Protocol I provides "legal legitimacy to . . . guerilla" combatants. Canestaro, *supra* note 2, at 90–91.

47. ROGERS, *supra* note 24, at 8; Canestaro, *supra* note 2, at 83.

48. ROGERS, *supra* note 24, at 9; *see also* Gardam, *supra* note 22, at 398 ("[T]he immunity of noncombatants from the effects of warfare is not, and has never been regarded as, absolute. Some civilian casualties have always been tolerated as a consequence of military action.").

49. ROGERS, *supra* note 24, at 17; *see also* Gardam, *supra* note 22, at 391. Note, however, that evaluating proportionality is highly subjective because it requires balancing the "minimum losses of one's own combatants and the protection of the other party's civilian population." *Id.* at 409.

50. ROGERS, *supra* note 24, at 19.

51. U.N. Charter art. 51.

tus is not readily discernible because the enemy does not wear uniforms or comply with the law of war.⁵²

B. THE LAW OF WAR IS DISSEMINATED TO THE SOLDIER THROUGH THE ROE

International law requires states to disseminate the law of war to their combatants, which is achieved in the United States through the issuance of ROE.⁵³ The Joint Chiefs of Staff created uniform Standing ROE (SROE) that apply to all U.S. forces,⁵⁴ but lower-level commanders may narrow and tailor the SROE to the individual circumstances of each military operation and mission.⁵⁵ However, the ROE issued to the soldier must comply both with the SROE and the United States' obligations under the law of war.⁵⁶

1. ROE Are Interpretations of and Instructions on the Law of War

The law of war was adopted by Congress through its ratification of the Hague and Geneva treaties.⁵⁷ It is the responsibility of the executive branch to execute this law.⁵⁸ The Depart-

52. Compare Canestaro, *supra* note 2, at 77–81 (describing ruses and tactics of guerillas and insurgents), and *Marines Fire on Mosque to Repel Attacks*, CNN.COM, Apr. 18, 2006, <http://www.cnn.com/2006/WORLD/meast/04/17/iraq.main/index.html> (describing an insurgent attack initiated from the protection of a mosque), with 1907 Hague Convention IV, *supra* note 6, Annex, art. 1 (requiring all belligerents to carry their arms openly), and *id.*, Annex, art. 27 (requiring military commanders to spare religious and historical buildings unless necessary for military purposes). Protocol I, which has not been adopted by several major states, prohibits the use of the civilian population to achieve military goals. Protocol I, *supra* note 46, art. 51(7). The insurgent tactics described in the CNN report, and many others described herein, are direct violations of the law of war.

53. 1907 Hague Convention IV, *supra* note 6, art. 1.

54. Chairman of the Joint Chiefs of Staff Instruction 3121.01A: Standing Rules of Engagement for US Forces, at A-1 (2000) [hereinafter Instruction 3121.01A].

55. See CLAMO HANDBOOK, *supra* note 29, at 1-20 to -30; Jeter, *supra* note 12, at 388.

56. See 1907 Hague Convention IV, *supra* note 6, art. 1 (“Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations [herein]”); Instruction 3121.01A, *supra* note 54, at A-8 (“Except as augmented by supplemental ROE for specific operations, missions, or projects, the [SROE] established herein remain in effect until rescinded.”).

57. 1907 Hague Convention IV, *supra* note 6; Geneva Convention III, *supra* note 8.

58. See U.S. CONST. art. II, § 2, cls. 1 & 2.

ment of Defense (DOD), through the Joint Chiefs of Staff, interprets how the law of war applies in specific military situations.⁵⁹ This interpretation is handed down to the rank and file in the form of the ROE.

ROE are “the closest link which the laws of war [governing the use of force] maintain with the belligerent armed forces in the field.”⁶⁰ ROE require the soldier to use force only in a necessary, proportional, and humane manner as required by the law of war.⁶¹ ROE can never authorize the use of force beyond the limits of the law of war, as to do so would violate the treaty obligations of the state.⁶² It is the individual combatants who wield force against each other; if they fail to understand the limitations of the law of war, its provisions will have no effect. ROE keep the laws protecting “combatants and noncombatants from unnecessary suffering”⁶³ from becoming futile.

However, the ROE are more than a legal interpretation; they are also a political tool.⁶⁴ Interpretations of the law generally allow for some policy influence. ROE may restrict or permit the use of force “to the full extent allowable under international law.”⁶⁵ In some military engagements, ROE are more restrictive than the law requires in order to prevent the escalation of hostilities.⁶⁶ Such ROE are crafted to ensure that the military adheres to executive branch’s policy for the war.⁶⁷

59. See Instruction 3121.01A, *supra* note 54, at A-1 to -3.

60. Roberts & Guelff, *supra* note 30, at 7.

61. Roach, *supra* note 10, at 51; see also U.S. DEP’T OF THE NAVY, *supra* note 10, § 4.3.

62. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 4 (2004).

63. U.S. DEP’T OF THE ARMY, *supra* note 8, at 3.

64. See Roach, *supra* note 10, at 47 (“ROE represent a measure of assurance that national policy will be followed in wartime or in sudden emergencies which do not allow time for communications between Washington and the field.”).

65. DINSTEIN, *supra* note 62, at 4.

66. See C. Peter Dungan, *Rules of Engagement and Fratricide Prevention: Lessons from the Tarnak Farms Incident*, 9 UCLA J. INT’L L. & FOREIGN AFF. 301, 305 (2004) (“[Restrictive ROE] preserve international goodwill, . . . minimize negative opinion of American forces by local populations, and . . . limit the escalation of hostilities”); cf. Martins, *supra* note 28, at 19–20 (noting how ROE during Vietnam were more restrictive to prevent civilian casualties, although these ROE backfired due to a lack of troop training).

67. ROE serve to execute the “overarching national political purpose” by shaping the way in which “the military instrument” is applied to the conflict at hand. Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate’s Primer*, 42 A.F. L. REV. 245, 246 (1997).

ROE are also tactical. They provide soldiers guidance about "what, when, and where they can shoot."⁶⁸ The famous "[d]on't . . . fire until you see the whites of their eyes" instruction given at the Battle of Bunker Hill is an example of how ROE are used tactically.⁶⁹ The DOD defines ROE as "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which . . . forces will initiate and/or continue combat engagement."⁷⁰ This definition highlights the tactical aim of ROE, with which soldiers at the individual level are most concerned.⁷¹

ROE are an intersection of legal requirements and political and tactical objectives. However, it is the legal requirements that govern any political and tactical objectives. Force may only be used to the extent allowed under law.⁷² When ROE are developed in the field, it is the JAG, a military lawyer, who usually tells the commander how his actions are restricted by the law.⁷³

2. The Standing ROE Are the United States' Uniform Interpretation of the Requirements of the Law of War

Despite the long history of directives regarding engagement during military conflict, ROE of general applicability are "distinctly modern."⁷⁴ During the cold war, individual branches of the military first developed ROE,⁷⁵ but today the SROE govern all branches.⁷⁶ Created by the Joint Chiefs of Staff, the SROE are the "basic ROE documents for all U.S. forces during military attacks on the [United States] and during all military operations, contingencies, and terrorist attacks outside the territory of the [United States]."⁷⁷ The SROE apply across "the

68. Martins, *supra* note 28, at 4.

69. See Phillips, *supra* note 5, at 5 (citing JOHN BARTLETT, FAMILIAR QUOTATIONS 368 (Emily M. Beck ed., 15th ed. 1980) (quoting William Prescott)).

70. DOD DICTIONARY, *supra* note 5, at 470.

71. See Martins, *supra* note 28, at 3-4.

72. See DINSTEIN, *supra* note 62, at 4; Dungan, *supra* note 66, at 305 ("[M]odern military missions may be constrained by specific grants of authority under United Nations or military agreements. ROE are necessary to communicate the constraints those agreements place on the use of force.").

73. Dungan, *supra* note 66, at 306 ("[A]ll deployed judge advocates will find themselves at the middle of every ROE issue." (citation omitted)).

74. See Martins, *supra* note 28, at 34.

75. *Id.* at 36.

76. Instruction 3121.01A, *supra* note 54, at A-1.

77. Jeter, *supra* note 12, at 386-87.

continuum of conflict,” from peace operations and operations other than war to fully declared war and prolonged conflict.⁷⁸ In the interest of national security, parts of the SROE remain classified,⁷⁹ although their structure and effectiveness are widely discussed in scholarly works.⁸⁰

Although the SROE recognize a soldier’s right to self-defense under the law of war, they also restrict force in an effort to comply with law of war principles.⁸¹ SROE authorize the use of “all necessary means available” in self-defense, but specify that soldiers should “[a]ttempt to [d]e-[e]scalate the [s]ituation,” use proportional force, and attack only when necessary.⁸² In this way, the SROE “contemplate” that soldiers will use “escalating measures,” starting with firing warning shots and shooting to wound.⁸³ The SROE reflect the traditional concerns of the law of war in protecting combatants from unnecessary suffering and civilians from any harm. Note, however, that such a restriction on escalating the use of force is not required by the law of war when an individual’s life is threatened.⁸⁴ The SROE are consistent with the law of war but this escalation requirement is far more restrictive than the law’s requirements, because the former necessitates a use-of-force continuum.

3. Commanders and Judge Advocates Are Intended to Develop ROE Specific to Each Mission

The SROE are intended to be only the “foundation” and “starting point” for determining ROE on each mission.⁸⁵ Before each mission, a JAG should meet with the commander to determine what specific rules or annexes should apply to the

78. *Id.* at 387.

79. See Instruction 3121.01A, *supra* note 54, at A-2 to A-3.

80. The amount of scholarly work on this topic makes it clear that a meaningful discussion about the subject matter is still possible without knowing specific details of the SROE themselves. See, e.g., Dungan, *supra* note 66; Stafford, *supra* note 20, at 3–9; Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 141–47 (discussing the SROE in the context of unit self-defense).

81. See Instruction 3121.01A, *supra* note 54, at A-13.

82. *Id.*

83. Stafford, *supra* note 20, at 4.

84. U.N. Charter art. 51 (stating that nothing “impair[s] the inherent right of individual or collective self-defence”).

85. Jeter, *supra* note 12, at 387–88.

ROE.⁸⁶ Commanders, together with JAG lawyers, should evaluate their intelligence, their objectives, and the humanitarian risks associated with their mission to create mission-specific ROE.⁸⁷ In theory, ROE should be unique, given this “legislative model for ROE development.”⁸⁸ However, in practice, ROE often remain unchanged from engagement to engagement or are handed down from one unit to the next because of time constraints.⁸⁹ Therefore, the escalation of force model is frequently communicated to troops.

In order to help explain ROE to the troops, commanders or JAGs frequently issue ROE cards⁹⁰ that use acronyms or mnemonic devices to make the rules easier to remember and offer a tangible reminder of what the law of war and the rules of the mission require.⁹¹ They include the principle of proportional force and instruct soldiers to escalate their use of force along a “force continuum”⁹²—soldiers should use lesser means availa-

86. Martins, *supra* note 28, at 29–33.

87. *Id.*

88. Dungan, *supra* note 66, at 309–10 (internal quotation marks omitted).

89. *Id.* at 313–14.

90. See CLAMO, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001–1 MAY 2003) 93 (2004) [hereinafter CLAMO, LEGAL LESSONS LEARNED] (stating that JAGs were “expected” to produce ROE cards); *CLAMO Report: Legal Team Trends at the Combat Training Centers*, ARMY LAW., Feb. 2005, at 14, 17 [hereinafter *CLAMO Report: Legal Team Trends*] (stating that most units bound for Iraq arrive at their combat training centers with ROE cards); *CLAMO Report: National Training Center Transformation and Change—A Primer for Brigade Operational Law Teams*, ARMY LAW., Aug. 2005, at 48, 49 [hereinafter *CLAMO Report: National Training Center*] (instructing JAGs to hand out ROE cards, but noting that this should be done in addition to ROE training).

91. See CLAMO HANDBOOK, *supra* note 29, at 2-4, 2-6. Note that the *CLAMO Handbook*, a main source of ROE guidance for JAGs, is a bit contradictory in that it states that “[a] mnemonic device may be chosen to organize and conceptualize these [law of war] principles, [sic] however the principles and concepts themselves remain of primary importance. Soldiers must know, internalize, and practice putting these principles *into action*.” *Id.* at 2-3. At the same time, the *CLAMO Handbook* provides a template for ROE cards. *Id.* at 2-4, 2-6. These cards can inhibit the “legislative model” of ROE development because they are readily available for JAGs to distribute in lieu of mission-specific ROE. See Dungan, *supra* note 66, at 313–14 (noting that ROE are frequently not tailored to the soldier’s specific mission and describing commanders as “derelict” in their failure to tailor ROE); Parks, *supra* note 19, at 35 (“By and large, ROEs produced by the most lawyer-heavy military in the world are cut-and-paste, copycat products lacking in original thought or analysis and unsuitable for current missions.”).

92. See Parks, *supra* note 19, at 36.

ble, such as shouting or warning shots, before applying force.⁹³ The ROE cards tell soldiers to shoot to wound,⁹⁴ even though soldiers are not trained to do so,⁹⁵ and only to “disable or destroy” as a last resort.⁹⁶ Figures 1–3 illustrate commonly used ROE cards. These cards are often reused without being changed to address the concerns of a specific area or mission in which the soldiers are conducting operations.⁹⁷

While multiple sets of ROE exist, ROE on the whole are strikingly similar, as the sample ROE cards show.⁹⁸ Both the VEWPRIK ROE card and 5 S’s ROE card have a clear force continuum model for how a soldier should respond to an actual attack or the display of hostile intent. Both require a verbal warning followed by a display of the soldier’s weapon.⁹⁹ Both also require some type of physical attack on the potential combatant and warning shots.¹⁰⁰ These cards anticipate that the soldier will at least attempt to go through these steps when confronted with a hostile threat, which, as discussed below, may be impractical. None of the cards defines the soldier’s right to self-defense,¹⁰¹ which a soldier is allowed to use when con-

93. See, e.g., CLAMO HANDBOOK, *supra* note 29, at 2-6.

94. See Instruction 3121.01A, *supra* note 54, at A-13.

95. As one practitioner notes,

Oddly enough [s]oldiers are *not* trained how to shoot to wound or disable. There is no tactical shooting program that provides that training, though some ROE cards at least suggest that they should. Soldiers are trained to shoot center mass, which means at the middle of the largest part of the target that is visible. The lack of coordination between firearms training and written rules further complicates problems with ROE.

Letter from Lieutenant Colonel John Taylor, Officer-in-Charge, Hunter Army Airfield, to author (Sept. 22, 2007) (on file with the *Minnesota Law Review*) (commenting on his twenty-year experience as an Army JAG and legal advisor in Bosnia and Herzegovina, Afghanistan, and Iraq).

96. See Instruction 3121.01A, *supra* note 54, at A-13.

97. See CLAMO Report: *Preparation Tips for the Deployment of a Brigade Operational Law Team*, ARMY LAW., Nov. 2001, at 29, 30–31 (stating that soldiers get ROE cards that “merely restate” the SROE, but timing often makes it difficult to give soldiers the ROE annex that contains mission-specific information about the applicability of the ROE); Dungan, *supra* note 66, at 308 (“ROE development is all too often dropped in the lap of the judge advocate by operations staff officers with more work than time.”).

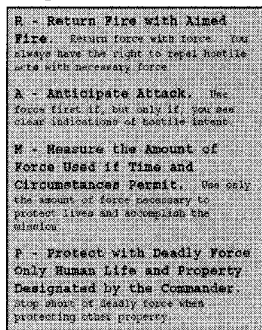
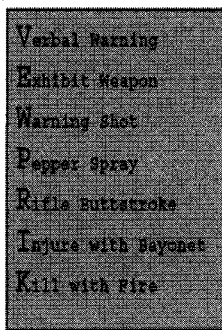
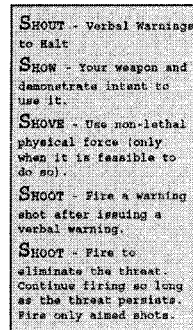
98. As such, references in this Note to “current ROE” are meant to reflect issues systemic to the body of ROE governing soldiers’ actions.

99. See *infra* figs. 2 & 3; see CLAMO HANDBOOK, *supra* note 29, at 2-6.

100. See CLAMO HANDBOOK, *supra* note 29, at 2-6.

101. Figs. 1, 2 & 3; see CLAMO HANDBOOK, *supra* note 29, at 2-4, 2-6.

fronted with deadly hostile intent.¹⁰² Only the Ramp ROE card mentions protecting human life with deadly force and it subordinates this point to the bottom of the card.¹⁰³ Given that the law protects this right above all else,¹⁰⁴ it seems inconsistent that the law is interpreted in this manner.

Fig. 1: RAMP ROE¹⁰⁵Fig. 2: VEWPRIK ROE¹⁰⁶Fig. 3: 5 S's ROE¹⁰⁷

The state is required to impart the law of war to its combatants.¹⁰⁸ If such ROE cards were used only as a reinforcement tool to larger law of war training, perhaps their usage would not be criticized. However, due to insufficient training, soldiers rely heavily on ROE cards.

4. Besides ROE, Many Soldiers Have Little Practical Understanding of the Law of War

The U.S. DOD's Law of War Program requires training for soldiers.¹⁰⁹ However, it is up to the individual commanders and JAGs to plan and execute this training.¹¹⁰ On the whole, the military's use-of-force training is not comprehensive enough to guide soldiers in making use-of-force judgments consistent with the law of war.

102. See Instruction 3121.01A, *supra* note 54, at A-13 (defining when deadly force is appropriate).

103. Fig. 1; see CLAMO HANDBOOK, *supra* note 29, at 2-4.

104. See U.N. Charter art. 51 (stating that nothing "impair[s] the inherent right of individual or collective self-defence").

105. CLAMO HANDBOOK, *supra* note 29, at 2-4.

106. *Id.* at 2-6.

107. *Id.*

108. 1907 Hague Convention IV, *supra* note 6, art. 1.

109. See Instruction 5810.01C, *supra* note 9, at 1-2.

110. *Id.* enclosure A, at 2.

Most soldiers receive basic law of war training at the beginning of their careers.¹¹¹ This training is meant to provide to soldiers the “minimum knowledge required” of the law of war.¹¹² For “deployable” units, training is conducted annually and prior to deployment.¹¹³ Commanders establish the objectives for these training sessions.¹¹⁴

The efficacy of commander-led training is questionable. The Army wants courses to include “specific training objectives” with “a qualified instructor [who] will conduct training in a structured manner . . . and evaluate performance” of “tasks . . . under realistic conditions.”¹¹⁵ However, because each unit conducts its own training, the results can vary.

Training usually occurs in a classroom environment¹¹⁶ and is often focused on what the rules are instead of on making judgments about when those rules apply.¹¹⁷ Too often, such reviews are “perfunctory ‘check the block training events’ that provide little practical [or] tactical guidance to [s]oldiers on the ultimate question, ‘[W]hen can I pull the trigger?’”¹¹⁸ For example, marines testified that they were given a PowerPoint lecture on the rules before being sent to Iraq, but at no time were they tested on their ability to follow ROE and execute the law of war.¹¹⁹

The importance of judgment-based training has been noted by other authors,¹²⁰ and certainly some training schemes seem

111. See, e.g., U.S. Department of the Army Regulation 350-1, Army Training and Leader Development 81 (2007) [hereinafter Army Regulation 350-1] (providing basic law of war training as part of Army personnel entry training); see also William B. Caldwell, Multi-National Force—Iraq, Rules of Engagement Not Vague (Feb. 9, 2007), http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=9810&Itemid=128 (referring to the training received by soldiers).

112. Army Regulation 350-1, *supra* note 111, at 81.

113. *Id.*

114. *Id.*

115. *Id.*

116. See *CLAMO Report: Legal Team Trends*, *supra* note 90, at 17; Edward P. Ash, Training the Strategic Corporal: Presenting Alternatives in Law of War Training 44 (May 6, 2007) (unpublished M.M.A.S. thesis, U.S. Army Command and General Staff College) (available at <http://handle.dtic.mil/100.2/ADA471703>).

117. Cf. Martins, *supra* note 28, at 75–77 (detailing the importance of training above and beyond the memorization of ROE mnemonic devices).

118. Letter from Lieutenant Colonel John Taylor to author, *supra* note 95.

119. See Tony Perry, *Defining the Time to Kill*, L.A. TIMES, July 31, 2007, at 1.

120. See, e.g., *CLAMO Report: National Training Center*, *supra* note 90, at

to be on the right track. In Afghanistan, one JAG developed training scenarios based on likely interactions between soldiers and civilians, and then had small groups work to apply the law of war to these situations.¹²¹ The groups were then critiqued by the entire class.¹²² Another JAG conducted individual training with each soldier before his deployment to ensure that the soldiers fully understood the significance of the law.¹²³ However, some of the practices are suspect; one JAG merely made a videotape of use-of-force scenarios for marines to watch on their plane trips to Kuwait.¹²⁴

Additionally, many of the units which conduct support operations in Iraq receive little training on how to apply ROE in crowd control and policing activities.¹²⁵ "Not all units perform enough marksmanship and close-quarters combat training."¹²⁶ The military does provide some simulated training, but it does not have the capabilities of advanced virtual reality training used by domestic law enforcement.¹²⁷ The Army's virtual training exercises do not respond to the soldier's actions and are not specifically written for the use of deadly force.¹²⁸ The Army's virtual training centers provide live simulations, but they are not focused specifically on policing or solely on law of war application.¹²⁹

49–50 (encouraging JAGs to perform realistic training exercises so soldiers can better apply their knowledge when at the training centers); Martins, *supra* note 28, at 75–77 (stressing that training is more than memorization of ROE).

121. CLAMO, LEGAL LESSONS LEARNED, *supra* note 90, at 94 n.51.

122. *Id.*

123. *Id.* at 95 n.52.

124. *Id.* at 94 n.51.

125. Borger, *supra* note 15, at 11 (stating that military police often receive only one day of training on how to deal with civilian crowds).

126. See Mark S. Martins, *Deadly Force Is Authorized, But Also Trained*, ARMY LAW., Sept./Oct. 2001, at 1, 16.

127. See David G. Bolgiano, *Firearms Training System: A Proposal for Future Rules of Engagement Training*, ARMY LAW., Dec. 1995, at 79, 81.

128. *Id.*

129. See CLAMO Report: *National Training Center*, *supra* note 90, at 48–50 (describing the extensive efforts to provide real-life situations at the training centers and noting that there are an "increased number of ROE issues that JA[G]s must address"); *id.* at 50–54 (noting a number of other issues addressed during the training simulations other than the law of war); Ash, *supra* note 116, at 44 (observing that law of war training is intended to be "integrated" into the "combat training center rotations (currently brigade-level, 20-day mission rehearsal exercises)").

Ultimately, there is a disconnect; the Center for Law and Military Operations reported that, on the whole, soldiers arrive at predeployment combat training centers with an inadequate knowledge of how to apply the law of war.¹³⁰ Soldiers generally understand the rules “but have not internalized them.”¹³¹ As such, soldiers can have trouble applying the “appropriate use of force” in “difficult and realistic” live training simulations.¹³² For many soldiers, the ROE cards given to them by their commanders or JAGs may be their best understanding of the law of war. Without appropriate practical, judgment-based ROE training that employs simulated real-world scenarios and requires soldiers to properly apply ROE as they would while deployed, executing the law of war is incredibly difficult.

If one compares the ROE cards against law of war requirements, the steps prescribed on the cards are not contrary but they are also not necessarily helpful in a practical manner to soldiers on the ground. Naval Admiral James A. Lyons Jr. noted, “These ROEs might sound fine to academics gathering at some esoteric seminar on how to avoid civilian casualties in a war zone. But they do absolutely nothing to protect our combat troops who have to respond in an instant to a life or death situation.”¹³³ It is when these ROE are applied by soldiers policing Iraq in the real world of instantaneous life and death decision making that problems arise, because the current ROE overemphasize other law of war principles while de-emphasizing the right to self-defense.

II. THE CURRENT ROE ARE AN ILL FIT FOR POLICE OPERATIONS IN IRAQ AND THEY ENDANGER SOLDIERS AND CIVILIANS

The current ROE interpret the law of war in a manner that is unnecessarily restrictive for soldiers policing Iraq’s streets. The tactics employed by insurgents in Iraq make it difficult for U.S. soldiers to distinguish between civilians and combatants.¹³⁴ This ambiguity is especially problematic for soldiers involved in police-type operations and activities, due to their

130. See *CLAMO Report, Legal Team Trends*, *supra* note 90, at 17.

131. *Id.*

132. *Id.*

133. Lyons, *supra* note 17.

134. See, e.g., Parks, *supra* note 9.

increased interaction with civilians.¹³⁵ These deficiencies place both soldiers and noncombatants at unnecessary risk. This results in a misapplication of the law of war and provides an incentive for insurgents to continue to violate the law.

A. INSURGENT TACTICS COMPLICATE THE LAW OF WAR FOR SOLDIERS POLICING IRAQ

Insurgents in Iraq practice guerilla warfare.¹³⁶ “A key component” of the guerillas’ strategy is their ability to “melt into the populace.”¹³⁷ Hiding amidst the noncombatant civilian population provides the element of surprise integral to the guerillas’ success.¹³⁸ Guerilla warfare creates a problem of distinction; when guerillas mix with civilian noncombatants, it is extremely difficult for soldiers to determine an individual’s status.¹³⁹

These tactics are prevalent in Iraq,¹⁴⁰ where the greatest resistance to U.S. forces are private militias that “purposely conceal[] their combatant status, conceal[] their weapons, [and] wear[] no part of a uniform . . . in order to engage in acts of treachery or perfidy.”¹⁴¹ Insurgent tactics of roadside bombs,

135. See Borger, *supra* note 15, at 11.

136. See Canestaro, *supra* note 2, at 77–81; see also ROGERS, *supra* note 24, at 33, 39 (noting that “some of the stiffest resistance” in the Iraq war was not from the Iraqi Army but from fighters in private militias, many of whom concealed themselves as civilians in order to strike against soldiers).

137. Canestaro, *supra* note 2, at 80; see also Alexandra Zavis, *The Conflict in Iraq: U.S. Offensive in Diyala Province*, L.A. TIMES, June 21, 2007, at 1 (“Confronted with an assault, many drop their weapons and melt away, only to return when U.S. forces turn their attention elsewhere.”).

138. See ANTHONY JAMES JOES, *RESISTING REBELLION: THE HISTORY AND POLITICS OF COUNTERINSURGENCY* 12 (2004) (describing surprise as “the primary and decisive weapon of successful guerillas”).

139. See W. Thomas Smith, Jr., *Spinning Haditha*, TOWNHALL.COM, June 26, 2006, http://www.townhall.com/columnists/WThomasSmithJr/2006/06/26/spinning_haditha (“[I]nsurgents are un-uniformed, unconventional fighters who move freely throughout the community during the day, and become bushwhackers at night. They routinely use women and children as human shields, and often coerce the latter into the service of operating guerrillas.”); The Captain’s Journal, <http://www.captainsjournal.com/2006/11/23/unleash-the-snipers/> (Nov. 23, 2006) (“The marines say insurgents know the rules, and now rarely carry weapons in the open. Instead, they pose as civilians and keep their weapons concealed in cars or buildings until just before they need them.”).

140. See The Captain’s Journal, *supra* note 139.

141. *Id.* Insurgents also frequently masquerade as Iraqi or U.S. military to achieve their ends. See, e.g., *Bombs at Baghdad Market Kill 15; 7 U.S. Troops Die*, CNN.COM, Jan. 27, 2007, <http://www.cnn.com/2007/WORLD/meast/01/27/>

Improvised Explosive Devices (IEDs), and small arms fire—all of which require concealment for success—account for the bulk of U.S. casualties.¹⁴² Insurgents have admitted to the press that the United States “is not fighting an army We hit and move. We’re more like groups of gangs that can’t be pinned down and can’t be stamped out.”¹⁴³

These tactics are particularly problematic for soldiers engaged in “stability and support operations.”¹⁴⁴ Such operations are similar to police work; both include patrolling streets, providing building security, and maintaining checkpoints.¹⁴⁵ These duties entail numerous interactions with the civilian population, requiring soldiers to constantly evaluate every encounter. For instance, because cell phones can be used to detonate roadside bombs, every Iraqi on a roadside with a cell phone becomes a potential threat.¹⁴⁶ A soldier confronted with this situation must make an instantaneous judgment as to whether an actual threat exists.¹⁴⁷ Because the soldier does not know whether the individual is an insurgent or a noncombatant civilian, the sol-

iraq.main/index.html (“Attackers have been reported wearing Iraqi Army, national police and commando uniforms, as well as uniforms that resemble U.S. military attire.”).

142. Iraq Coalition Casualty Count, <http://www.icasualties.org/oif/Details.aspx> (last visited Dec. 4, 2007) (detailing the cause of death for U.S. soldiers killed in Iraq).

143. Michael Ware, *The New Rules of Engagement*, TIME, Dec. 12, 2005, at 34, 38 (quoting Abu Mohammed, a strategist for a prominent Islamic national group) (internal quotation marks omitted).

144. See U.S. DEP’T OF THE ARMY, FIELD MANUAL 3-07: STABILITY OPERATIONS AND SUPPORT OPERATIONS §§ 1-4, 1-6 (2003), available at http://www.dtic.mil/doctrine/jel/service_pubs/fm3_07.pdf; see also DOD DICTIONARY, *supra* note 5, at 506 (defining “stability operations” as “encompassing various military missions, tasks, and activities conducted . . . to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief”).

145. See Borger, *supra* note 15, at 11; Rachel Bronson & William L. Nash, Op-Ed, *Swing from Fighting to Policing*, INT’L HERALD TRIB. (N.Y.), Apr. 15, 2003, at 6.

146. See Scott Peterson, *Outside Baghdad, a Close Encounter with a Roadside Bomb*, CHRISTIAN SCI. MONITOR, Oct. 7, 2004, at 4 (“The cellphone needed only a call to trigger the explosion.”); see also *Car Bomb Attacks Kill, Wound Iraqis; Soldiers Find Roadside Bomb*, AM. FORCES PRESS SERV., Mar. 6, 2006, http://www.defenselink.mil/news/Mar2006/20060306_4402.html (noting that a roadside bomb found in Baghdad consisted, in part, of a “130 mm round in a bag with a cell phone”).

147. See JOES, *supra* note 138, at 12–13 (describing the tactics of guerilla warfare such as using surprise attacks and blending in with the civilian population).

dier cannot be sure if reasonable force requires a verbal warning, a warning shot, or deadly force. Failure to appropriately determine the individual's status could result in either the death of an innocent civilian or the death of the soldier.¹⁴⁸

B. THE CURRENT ROE ARE INAPPROPRIATE FOR POLICING IN IRAQ AND RESULT IN HARM TO SOLDIERS AND CIVILIANS

As discussed above, the current ROE practically require an escalation of the use of force.¹⁴⁹ This requirement is not easily applied to policing activities in a hectic and confusing real-world Iraq.¹⁵⁰ Escalation of force causes soldiers to hesitate in their reactions, providing insurgents with more time to strike against them and the civilians the soldiers seek to protect.¹⁵¹ The current ROE overemphasize the principles of proportionality and humanity while restricting the soldier's right to self-defense in a manner not required by the law. This eventually results in a misapplication of the law of war on the streets of Baghdad.

1. Soldiers Receive ROE that Interpret the Law of War in an Unclear and Overly Restrictive Manner for Policing in Iraq

ROE cards attempt to impart the law of war to soldiers, but legal concepts are difficult to effectuate on the ground. "Proportionality" and "necessity" become complicated when a soldier cannot distinguish between combatant and civilian, as is the case with soldiers involved in policing. Although the SROE define "proportionality" and "necessity,"¹⁵² the versions of ROE soldiers receive seldom define these terms.¹⁵³ Even when defined, terms "that confound even seasoned scholars of

148. See, e.g., Lyons, *supra* note 17.

149. See, e.g., CLAMO HANDBOOK, *supra* note 29, at 2-4 to -9 (describing escalation-of-force training methods).

150. See Lyons, *supra* note 17 (observing that ROE "might sound fine to academics gathering at some esoteric seminar" but do "nothing to protect our combat troops who have to respond in an instant to a life or death situation").

151. See, e.g., Perry, *supra* note 119, at 1.

152. See Instruction 3121.01A, *supra* note 54, at A-11.

153. E.g., CLAMO HANDBOOK, *supra* note 29, at 2-4 (describing the techniques used to train soldiers and providing an example of materials distributed to soldiers); see also Dungan, *supra* note 66, at 312-13 (noting that soldiers receive training materials introducing the "cryptic elements" of "necessity" and "proportionality," which are unlike the typical "bright-line rules that soldiers are accustomed to receiving and trained to follow").

international law”¹⁵⁴ are difficult for a twenty-year-old soldier with limited armed combat experience to understand and apply in an instant. The ROE provide rules but not the training to understand how the law applies.

The ROE interpret the law of war’s mandate for proportionality by instructing soldiers to apply force based on a continuum, as discussed above. The model encourages the soldier to wait to respond in hopes that the “aggressors will abruptly change their minds.”¹⁵⁵ Admiral Lyons notes that some soldiers are instructed to use force only after satisfying a seven-step process:

- (1) You must feel a direct threat to you or your team.
- (2) You must clearly see a threat.
- (3) That threat must be identified.
- (4) The team leader must concur that there is an identified threat.
- (5) The team leader must feel that the situation is one of life or death.
- (6) There must be minimal or no collateral risk.
- (7) Only then can the team leader clear the engagement.¹⁵⁶

This ROE model ingrains orderly checklists in the soldier’s mind in the hope that he will go through each step when presented with a potential threat.¹⁵⁷ This approach is not effective in close-quarters combat because the delays caused by these models are both impractical and dangerous in insurgent warfare, where mere seconds make the difference between life and death.¹⁵⁸ “If our soldiers or Marines see someone about to level an AK-47 in their direction or start to . . . receive hostile fire from a rooftop or mosque, there is no time to go through a seven-point checklist before reacting.”¹⁵⁹ The soldier must react correctly, immediately.

Following a checklist increases a soldier’s response time, consequently endangering his life.¹⁶⁰ The use of mnemonic de-

154. See Dungan, *supra* note 66, at 312.

155. Thomas D. Petrowski, *Use-of-Force Policies and Training: A Reasoned Approach*, FBI L. ENFORCEMENT BULL., Oct. 2002, at 25, 29.

156. See Lyons, *supra* note 17.

157. See Parks, *supra* note 19, at 32 (“Hicks’ law states that if a response is trained for a given stimulus, the subconscious mind must examine each response prior to reacting.”). Although the ROE do not state that soldiers must escalate their use of force, in all practicality, this is what they espouse. *Id.*

158. Soldiers have little time to make decisions in insurgent warfare because of the surprise nature of insurgent attacks. See JOES, *supra* note 138, at 12.

159. Lyons, *supra* note 133.

160. *E.g., id.* (noting that the checklist does “absolutely nothing to protect

vices or acronyms, while "purport[ing] to make it easy to remember the steps of the continuum[,] . . . result[s] in guaranteed hesitation in the face of a threat."¹⁶¹ Furthermore, by delaying a soldier's reactions, ROE checklists inhibit a soldier's ability to defend himself.¹⁶² By practically requiring checklists, the ROE overemphasize proportionality while diminishing the right to self-defense.

Additionally, many of the ROE cards and models fail to specifically instruct the soldier about his legal right to self-defense.¹⁶³ The SROE are clear that nothing limits a soldier's "inherent right of self-defense."¹⁶⁴ However, none of the sample ROE cards clearly state when a soldier is entitled to use deadly force.¹⁶⁵

Furthermore, some of the authorized steps on the force continuum, such as "Injure with Bayonet" and use "Rifle Buttstroke,"¹⁶⁶ are outdated and impractical in counter-insurgent warfare. For instance, whether soldiers even use their bayonets while on patrol, which itself is somewhat unlikely,¹⁶⁷ it is unreasonable to assume that stabbing someone with a bayonet is somehow not using deadly force. While this is not true for "use Rifle Buttstroke," both of these steps assume that the soldier will be in hand-to-hand combat. If a threatening individual has displayed hostile intent and is close enough to be injured with a soldier's bayonet or rifle butt, that individual is a deadly hostile threat.¹⁶⁸

our combat troops who have to respond in an instant to a life or death situation").

161. Petrowski, *supra* note 155, at 29 (noting that the officer will be forced to "eliminate all less intrusive force options").

162. See Lyons, *supra* note 17.

163. See Dungan, *supra* note 66, at 312-13 (describing how "boilerplate language" used to inform soldiers of their right to self-defense is criticized by military practitioners as "unhelpful").

164. See Instruction 3121.01A, *supra* note 54, at A-10.

165. See *supra* figs.1, 2 & 3.

166. See *supra* fig.2.

167. See *Last Charge for the Bayonet—A Victim of Modern Warfare*, SUNDAY TELEGRAPH (London), Sept. 15, 2002, at 9 (describing bayonets as "redundant" and weapons of last resort reserved for close quarters combat). Arguably, soldiers carrying weapons with bayonets may also make Iraqis fearful, undermining the ability of U.S. troops to succeed in their mission.

168. In every fight involving a soldier (or a police officer), there is at least one weapon—the soldier's. If a suspect is close enough to the soldier to present a threat, there is a possibility that the suspect will overcome the soldier and use the soldier's weapon against him. Cf. FED. BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED

These steps act as a restriction on the soldier's right to use force; their effect is to limit the soldier's ability to immediately react to displays of deadly hostile intent. They ask the soldier to use lesser means first, but the soldier has a right under the law to use self-defense by whatever means necessary.¹⁶⁹ The ROE are a poor interpretation of the law of war.¹⁷⁰

2. The Current ROE Endanger Soldiers and the Civilians They Protect in a Way Unanticipated by the Law of War

Unclear and overly restrictive ROE have proven a life and death problem. Soldiers will follow the ROE to a fault.¹⁷¹ ROE are orders that are not taken lightly by the soldier; failure to follow the ROE can result in a court-martial for insubordination.¹⁷² As early as Vietnam, critics challenged ROE as overly restrictive.¹⁷³ Numerous incidents have emerged in which soldiers followed ROE to the detriment of themselves and the civilians they were trying to protect.

Formulaic ROE disable soldiers from using their judgment. After Vietnam, Senator Barry Goldwater stated that he was "ashamed of [his] country for . . . allow[ing] such restrictions to

16 tbl.12 (2003), available at <http://www.fbi.gov/ucr/killed/leoka03.pdf> (detailing the number of federal law enforcement officers killed with their own firearms over a ten-year period). The soldier must then use his judgment to determine whether hostile intent has been displayed, including considering what type of individual would approach an armed soldier if he was unarmed himself. See Instruction 3121.01A, *supra* note 54, at A-13 (defining when deadly force is appropriate).

169. See U.N. Charter art. 51. Compare Instruction 3121.01A, *supra* note 54, at A-8 ("[U.S.] forces always retain the right to use . . . individual self-defense in response to a hostile act or demonstrated hostile intent."), with *id.* at A-12 ("Hostile [i]ntent [is t]he threat of imminent use of force against the United States, [U.S.] forces, and in certain circumstances, [U.S.] nationals, their property, . . . foreign nationals[,] and their property.").

170. Certainly this discussion turns on whether the hostile intent displayed is deadly. The question then turns to whether soldiers are trained or directed to identify deadly intent, which is undoubtedly more difficult in insurgent warfare.

171. Cf. ROMEO DALLIER, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA 233, 264 (2003) (suggesting that the ROE used in the U.N.'s Rwandan peacekeeping mission restricted soldiers' ability to respond to the genocide); Ingvar Carlsson, *The U.N. Inadequacies*, 3 J. INT'L CRIM. JUST. 837, 843-44 (2005) (noting criticism of U.N. forces in peacekeeping operations for adhering to ROE that prevented the use of force except in self-defense).

172. See 10 U.S.C. §§ 890-891 (2000).

173. See, e.g., 121 CONG. REC. S17, 558 (1975) (statements of Sen. Goldwater and Sen. Thurmond) (criticizing the restrictions placed on American soldiers in Vietnam).

have been placed upon men who were trained to fight, men who were trained to make decisions . . . , and men who were risking their lives.”¹⁷⁴

In 1983, a marine failed to fire at a truck driver who barreled through a secured area, detonating a truck bomb, and causing the deaths of 241 marines and sailors at the Beirut Airport barracks.¹⁷⁵ The DOD Commission that investigated the incident determined that restrictive ROE “contributed to a mind-set that detracted from the readiness” of the marine.¹⁷⁶ Over twenty years later, soldiers are facing the same situation. In 2005, Al Qaeda commander Abu Musab al-Zarqawi drove a speeding car through two clearly marked checkpoints in Iraq.¹⁷⁷ The soldiers held their fire because they could not make a positive identification of al-Zarqawi.¹⁷⁸ In both of these instances, the speeding cars should have been considered imminent threats, particularly given the use of car bombs.¹⁷⁹ Under the law of war, the soldiers then would have been justified in their use of deadly force.¹⁸⁰

ROE have failed to adequately provide functional guidance and have restricted the legal right to self-defense. In Bosnia, Serbs with nail-tipped clubs attacked four U.S. soldiers who did not defend themselves with deadly force because the senior soldier present had ordered them not to use their weapons.¹⁸¹ Two of the soldiers’ injuries were so severe that they were medically discharged; the senior soldier was awarded a medal for exercising restraint and following his ROE.¹⁸² But under the law of war, this was a situation in which the use of deadly force in self-defense would have been justified.

174. *Id.* (statement of Sen. Goldwater).

175. *See* Martins, *supra* note 28, at 3, 10–12.

176. *See* U.S. DEPT OF DEF., REPORT OF THE DOD COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ATTACK 135 (1983).

177. Kyndra Rotunda, Op-Ed, *Denying Self-Defense to GIs in Iraq*, CHRISTIAN SCI. MONITOR, Mar. 2, 2007, at 9.

178. *Id.*

179. *Id.* (noting that under traditional rules, a vehicle speeding through a checkpoint is ordinarily considered deadly force).

180. *See* U.N. Charter art. 51; Instruction 3121.01A, *supra* note 54, at A-8 (“[U.]S[.] forces always retain the right to use necessary and proportional force for unit and individual self-defense in response to a hostile act or demonstrated hostile intent.”).

181. *See* Parks, *supra* note 19, at 33.

182. *Id.*

This problem persists in Iraq, where more than one-third of soldiers surveyed stated that they had been in threatening situations where they were “unable to respond” because of restrictive ROE.¹⁸³ Soldiers reported that insurgents would throw burning gasoline-filled bottles at their vehicles, but the soldiers were unable to respond due to restrictive ROE.¹⁸⁴ Other soldiers stated they were not allowed to respond with force when insurgents dropped large chunks of concrete from the tops of buildings and overpasses onto their vehicles.¹⁸⁵ This restriction on the soldiers’ right to fight back not only miscommunicates the law, which protects the soldiers’ right to self-defense, but also disserves the soldiers who risk their lives for the sake of their country.

In Iraq, insurgents take advantage of the restrictive ROE in order to achieve results. In Kirkuk, insurgents often pretended to have car problems so that they could pull up next to watchtowers and scout U.S. forces.¹⁸⁶ Insurgents know that soldiers will not fire when unarmed civilians may be harmed, and they use this knowledge to their advantage.¹⁸⁷ In Ramadi, marines received fire from snipers who had prestaged weapons and then ran back and forth across the street without the weapons to make the marines believe they were unarmed civilians.¹⁸⁸ This is the “waking nightmare” of U.S. troops in Iraq: being “thrust into a battlefield—but purposely hamstrung by absurd restrictions.”¹⁸⁹

Ultimately, what has occurred is a problem of legal interpretation. The law of war requires justice in war but it also allows for self-defense. Both are important. The United States’

183. OFFICE OF THE SURGEON OF THE MULTINATIONAL FORCE IN IRAQ & OFFICE OF THE SURGEON GENERAL, UNITED STATES ARMY MEDICAL COMMAND, MENTAL HEALTH ADVISORY TEAM (MHAT) IV: OPERATION IRAQI FREEDOM 05-07 FINAL REPORT 13 (2006) [hereinafter MHAT REPORT], available at http://www.armymedicine.army.mil/news/mhat/mhat_iv/MHAT_IV_Report_17_NOV06.pdf (surveying a sample of more than 1000 soldiers and over 400 marines who served in Iraq).

184. See *id.* (noting that the soldiers “were prohibited from responding with force for nearly a month until the ROE were changed”).

185. *Id.* at 13–14.

186. The Captain’s Journal, <http://www.captainsjournal.com/2007/02/13/rules-of-engagement-and-pre-theoretical-commitments/> (Feb. 13, 2007).

187. *Id.*

188. See David J. Danelo, *A Day in Ramadi (Part 2 of 2)*, U.S. CAVALRY ON POINT, Jan. 18, 2007, <http://uscavonpoint.com/articles2/Article.aspx?id=1062>.

189. Elan Journo, *Rules of Engagement Intolerable for U.S. Troops*, PROVIDENCE J., Aug. 6, 2007, <http://www.scrippsnews.com/node/25912>.

interpretation weighs one more heavily than the other. The resulting application of the law of war rewards the insurgent for violating the law and failing to distinguish himself from non-combatant civilians. The ROE create a perverse incentive for an insurgent not to follow the law of war, because in violating the law he is more successful at defeating his enemies who are hampered by the law. And yet these individuals have no "regard for human life . . . [Their] victims are looked upon as expendable: cannon fodder in order to achieve their objectives."¹⁹⁰ Such unfairness only frustrates those soldiers who follow the law and is inconsistent with the law's intent.

III. SOLDIERS CONDUCTING POLICE OPERATIONS NEED NEW ROE AND INCREASED TRAINING, SIMILAR TO THAT OF U.S. LAW ENFORCEMENT OFFICERS

The Joint Chiefs should rewrite the ROE for soldiers engaged in police-type operations, using the model of U.S. law enforcement as a guide. Congress should call attention to this issue and provide additional funding to the military for the development of new ROE and training. The U.S. federal law enforcement policy provides a clear and simplified model for the new ROE and is a legal interpretation consistent with the law of war. Although simplified rules may decrease the emphasis on proportionality and necessity, increased situational judgment-based training will help instill these values in soldiers. While this solution would be an institutional change for the military, it will ultimately result in more accurate and effective execution of the law of war.

A. CONGRESS SHOULD PUSH FORWARD THE DEBATE TO ENCOURAGE THE EXECUTIVE BRANCH TO DEVELOP NEW ROE

A key issue in crafting the solution to this legal misinterpretation is how it will be enacted. The very people who created the ROE have the power to solve this problem: the executive branch.¹⁹¹ For the courts or legislature to tell the military how to instruct its own subordinates would be a violation of the se-

190. See Lyons, *supra* note 17.

191. The U.S. Constitution grants the President, as the commander in chief of the armed forces, power to develop foreign policy. See U.S. CONST. art. II, § 2, cls. 1 & 2.

paration of powers.¹⁹² However, Congress should push for reform in this area and encourage change through monetary incentives.

1. Congressional Action Should Encourage the Development of New ROE

While Congress cannot control the execution of the law,¹⁹³ it can draw attention to the issue, change the law, and allot money for the issue. Congress should raise awareness about this issue through floor debates or through congressional hearings. Congress previously discussed this issue after the Vietnam War.¹⁹⁴ Just as members of Congress argued that the Vietnam ROE were overly restrictive in a manner not required by the law of war,¹⁹⁵ Congress today should renew the debate on the use of ROE in the Iraq war. Additionally, Congress should call attention to the issue through congressional hearings.¹⁹⁶ Hearings are a powerful tool for reviewing the actions of the executive branch and the military.¹⁹⁷ These actions would shed light on the issues soldiers face in adhering to the

192. Congress retains the constitutional power to “make Rules for the Government and Regulation of the land and naval Forces,” as well as the power to provide for and maintain the armed forces. U.S. CONST. art. I, § 8, cls. 12–14. This potentially conflicts with the President’s power to command the armed forces. *See* U.S. CONST. art. II, § 2.

193. Because ROE are legal interpretations of treaties that are congressionally enacted law, the executive branch has the exclusive power to execute the law in the manner it deems fit. *See* U.S. CONST. art. II, § 2.

194. 121 CONG. REC. S17, 558 (1975) (statements of Sen. Goldwater and Sen. Thurmond).

195. *See id.* (statement of Sen. Goldwater) (“It is absolutely unbelievable that any Secretary of Defense would ever place such restrictions on our forces.”).

196. For example, hearings on the treatment of Iraqi prisoners brought public scrutiny to the rules and practices of the U.S. military in Iraq. *See Treatment of Iraqi Prisoners* (C-SPAN television broadcast May 7, 2004) (transcript available at http://www.globalsecurity.org/military/library/congress/2004_hr/040507-rumsfeld.pdf) (including the testimony of Secretary of Defense Donald H. Rumsfeld before the Senate and House Armed Services Committees).

197. *See* Stephen G. Dormer, *The Not-So Independent Counsel: How Congressional Investigations Undermine Accountability Under the Independent Counsel Act*, 86 GEO. L.J. 2391, 2397 (1998) (“Congress has broad powers at its disposal to fulfill the role of accountability provided by the Constitution. These powers allow inquiry into almost any matter and give Congress the authority to conduct hearings contemporaneously with criminal prosecutions. Moreover, Congress is endowed with tools that enable it to compel evidence and testimony in furtherance of its broad investigatory power.”).

ROE and may push the debate towards change. While advocating for change in this area is permissible, Congress should not go so far as to dictate new ROE.¹⁹⁸

Congress holds the power of the purse,¹⁹⁹ which can be very effective in eliciting change. The DOD budget is discussed for weeks in both the House and Senate chambers, and the war budget is already divided among the specific needs of the military.²⁰⁰ For this solution to have real effect, Congress should earmark additional funds for this issue. It is unlikely that a development of new ROE would progress far without the resources necessary to make it a reality.

Congress could pass additional legal requirements that would force the creation of new ROE. In 2005, Congress passed a new law governing the rules for interrogating prisoners of war (POWs), which had an impact on how the military adheres to the Geneva Conventions.²⁰¹ This action did not specifically change the law, but rather was an addendum to the law that already governed the military's treatment of POWs.²⁰² Similarly, Congress could write a bill that upheld the United States' current treaty obligations under the Hague and Geneva Conventions but perhaps required the military to distribute information regarding the right to self-defense as part of any ROE handout. However, this action may tread on the President's powers as commander in chief and executor of the law under Article II of the Constitution.

198. Such action would be a violation of the separation of powers guaranteed by the Constitution. *Compare* U.S. CONST. art. II, § 2, cl. 2 (establishing that the President is the commander in chief of the armed forces with authority to appoint executive officers), *with* U.S. CONST. art. I, § 1, cl. 1 (vesting all legislative powers in Congress).

199. *See* U.S. CONST. art. I, § 8, cls. 1 & 12 ("The Congress shall have the power . . . To raise and support Armies . . .").

200. *See generally* H. COMM. ON APPROPRIATIONS, SUMMARY: 2008 DEFENSE APPROPRIATIONS FULL COMMITTEE MARKUP (2007), <http://appropriations.house.gov/pdf/DefenseSummaryFC.pdf> (detailing the measures outlined in the Defense Appropriations Bill for 2008).

201. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739-44 (to be codified as amended in scattered sections of 10, 28, and 42 U.S.C.); *see also* Josh White, *President Relents, Backs Torture Ban*, WASH. POST, Dec. 16, 2005, at A1.

202. *See* 151 CONG. REC. S12, 381 (daily ed. Nov. 4, 2005) (statement of Sen. McCain) (noting that a prohibition against cruel, inhumane, and degrading treatment has been a longstanding principle in both law and policy in the United States).

Congress must step carefully because the ROE are also directives from the military leadership to their subordinates.²⁰³ The change should ultimately arise from the executive branch itself.

2. The Executive Should Mandate the Development of New ROE

The President, as commander in chief, has the power to change the ROE.²⁰⁴ With attention brought to the issue by Congress, the President should push for change in this area. An executive mandate or the creation of an advisory committee to suggest changes on the subject may be extremely effective.²⁰⁵ However, this solution stands to alienate the military commanders who themselves developed the current ROE. Furthermore, presidents are likely to defer to military commanders on such issues that ultimately affect the way in which the military institution operates.²⁰⁶

The best solution would be for the President to quietly suggest such a change at the uppermost level, the Joint Chiefs of Staff. The Joint Chiefs must follow the President's orders and, as the senior military advisors to the President and Secretary of Defense,²⁰⁷ they are best equipped to execute such a solution.

203. See DOD DICTIONARY, *supra* note 5, at 470 (stating that ROE are directives).

204. U.S. CONST. art. II, § 2, cl. 1 (establishing that the President is commander in chief of the armed forces); see also Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807, 825 (2006) ("[T]he President of the United States, by virtue of the Commander in Chief Clause, possesses the full military and executive power of the nation with respect to . . . matters of military strategy and tactics; specific and general military objectives; [and] the rules of engagement with the enemy . . .").

205. See, e.g., Exec. Order No. 12,961, 60 Fed. Reg. 28,507 (May 31, 1995) (creating an advisory committee on Gulf War Veterans' Illnesses which advised both the President and the Secretary of Defense).

206. See Remarks Following a Meeting with Military Leaders and an Exchange with Reporters, 43 WEEKLY COMP. PRES. DOC. 509 (Apr. 23, 2007) ("I believe strongly that politicians in Washington shouldn't be telling generals how to do their job . . ."); see also Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1827 ("Civilians will want to delegate authority in war policy to take advantage of the specialization of the military . . .").

207. See Goldwater-Nichols Department of Defense Reorganization Act of 1986, 10 U.S.C. § 151(b)(1) (Supp. IV 2006) ("The Chairman of the Joint Chiefs of Staff is the principal military adviser to the President, the National Security Council, the Homeland Security Council, and the Secretary of Defense.").

There may, however, be some resistance from the Joint Chiefs on this issue. The ROE have become an increasingly hot topic in the press and within the military.²⁰⁸ High-level officers have advocated changing the ROE, but the current military administration has yet to publicly consider any reform.²⁰⁹ The Joint Chiefs themselves developed the SROE²¹⁰ and may not be open to reconsidering their own policy. Yet, the Joint Chiefs may be more willing to consider a change given the persistent state of war in Iraq and the mounting casualties, both civilian and military.²¹¹ Political pressure and discussion on this issue will help move the debate forward.

B. THE ROE SHOULD BE REWRITTEN BASED ON THE DOMESTIC LAW ENFORCEMENT STANDARD FOR SOLDIERS INVOLVED IN POLICE OPERATIONS

With the funds allotted by Congress, the Joint Chiefs of Staff should develop new ROE for soldiers engaged in police operations, using the U.S. federal law enforcement standard as a guide. A two-pronged solution should address both the creation of new ROE and judgment-based training to ingrain this new standard, which would only apply to soldiers involved in policing activities. Creating new ROE based on the law enforcement model is unrealistic unless supplemented with additional law of war training. Training is the safeguard to ensure that a soldier's use-of-force decisions comply with the law of war requirements.

Although others advocate different changes to ROE formulation or training,²¹² this solution advocates adoption of a domestic law enforcement model for military policing. Also, it is

208. Compare Lyons, *supra* note 17 (stating that ROE bind the hands of soldiers), with Caldwell, *supra* note 111 (arguing that the current ROE are adequate).

209. See, e.g., Caldwell, *supra* note 111 (discussing ROE, but as Spokesman from the Multi-National Force for Iraq, refraining from considering reforms).

210. See Instruction 3121.01A, *supra* note 54, at A-1.

211. See, e.g., Arwa Damon et al., *Iraqi Officials: Truck Bombings Killed at least 500*, CNN.COM, Aug. 15, 2007, <http://www.cnn.com/2007/WORLD/meast/08/15/iraq.main> (detailing the death toll for a day in Iraq in which over three hundred civilians were also injured).

212. See, e.g., Dungan, *supra* note 66, at 318–20 (advocating for a more “elaborative language,” additional emphasis on status identification, more appropriate tailoring, and better training); Martins, *supra* note 28, at 76–85 (arguing for revisions that “refine terms and distinctions” currently employed, while acknowledging historical trends and implementing new training models).

novel in that it is tailored to soldiers involved in a particular function—police operations. It does not overreach by trying to change the ROE or training for the entire military in every operational situation. To do so would be to admit that the current ROE are inapplicable in all military situations, which is untrue. Rather, this solution acknowledges that the current ROE are useful in some traditional combat situations but do not fit military policing in Iraq.

1. New ROE Should Be Created Only for Soldiers Engaged in Police Operations

The current ROE have a place in modern day warfare. They can be used when nation states engage in combat operations where troops prepare to take or defend an objective that is protected by another uniformed armed force. In those situations, the problem of distinguishing civilians from combatants and insurgents is eliminated, or at least lessened.²¹³ Commanders have information at their fingertips about the identity of their targets and have time to make reasoned judgments about the use of force.²¹⁴ However, the ROE should differ when soldiers are engaged in police-type operations. These situations are intrinsically different from combat where the enemy's identity is obvious. Soldiers policing streets are confronted with and must respond to immediate, unknown threats in a manner similar to what police officers do domestically on a daily basis.²¹⁵

Issuing different ROE for soldiers performing a policing function would be an institutional change. The Joint Chiefs created the SROE because they wanted a uniform model for all instances.²¹⁶ Commanders may be concerned that issuing sepa-

213. See CLAMO HANDBOOK, *supra* note 29, at 1-7, 1-23 to -24 (describing the commander's process of mission analysis, including "relocating civilians on the battlefield").

214. See *id.* at 1-22 to -24 (detailing the mission analysis process).

215. See JOES, *supra* note 138, at 12-13 (describing insurgents' surprise tactics); Ware, *supra* note 143, at 35 (relaying comments by insurgents about their tactics); cf. PETER SCHARF & ARNOLD BINDER, THE BADGE AND THE BULLET 71 (1983) (describing police encounters in which officers must instantly react to armed confrontation).

216. See Instruction 3121.01A, *supra* note 54, at A-9 ("Purpose and Scope: [T]he SROE establish fundamental policies and procedures governing the actions to be taken by [U.S.] force commanders . . . during all military operations, contingencies, terrorist attacks, or prolonged conflicts outside the territorial jurisdiction of the United States To provide uniform training and planning capabilities, this document is authorized for distribution to commanders at all levels and is to be used as fundamental guidance for training

rate ROE for soldiers in policing functions would restrict the commander's ability to change ROE as necessary. However, the Joint Chiefs could prescribe new ROE for police operations and still give commanders authority to adjust ROE as necessary. A "one size fits all" model is not always the answer. But if the Joint Chiefs defined different ROE for police operations, it would provide commanders with a starting point, a baseline from which to operate, similar to what the SROE already provide.²¹⁷

The Joint Chiefs would need to define specifically what types of activities qualify as police operations. This definition may be similar to that of stability and support operations, as previously discussed.²¹⁸ If it is less inclusive, it should at a minimum include patrols and security duties, because these are the instances in which a soldier is most likely to be caught off-guard, like a police officer. These situations are best suited for the new ROE because the soldier must exercise his judgment.

2. The Domestic Law Enforcement Model Can Be a Guide to Interpret the Law of War for Soldiers Engaged in Police-Type Operations

The ROE for soldiers conducting police operations in Iraq should be developed based on the law enforcement model. The law enforcement model is better suited for policing than the current ROE. Despite some dissimilarity, the law enforcement model can be applied to police operations in Iraq. The domestic law underlying the law enforcement model is consistent with the law of war and would uphold the principles of necessity, humanity, proportionality, and self-defense. A use-of-force model that is acceptable in the U.S. domestic constitutional environment will meet international standards under the law of war.

and directing their forces." Note, however, that the DOD has previously adopted different rules in different circumstances. DOD employees engaged in peacetime security activities are guided under different rules than the SROE. See U.S. Department of Defense Directive No. 5210.56, Use of Deadly Force and the Carrying of Firearms by DOD Personnel Engaged in Law Enforcement and Security Duties (2001).

217. See Jeter, *supra* note 12, at 388 (stating that the SROE are only a "starting point" for developing mission-specific ROE).

218. See U.S. DEP'T OF THE ARMY, *supra* note 144, at 1-4, 1-6.

a. The Law Enforcement Model Provides a Clear Standard that Respects and Relies on the Officer's Judgment

The FBI's policy for use of force provides a simple and clear standard, instructing officers that they may (1) use deadly force in the "presence of an *imminent danger*" that they reasonably believe will cause death or serious physical injury to themselves or others and (2) use deadly force against a fleeing attacker who is reasonably believed to be a continued threat.²¹⁹ The new ROE, based on this model, should be clear that if the soldier does not believe the threat is deadly, he should resort to lesser uses of force such as verbal threats or physical force.

The law enforcement model has been developed through case law. Under *Graham v. Connor*,²²⁰ police officers' use of force must be "objectively reasonable in light of the facts and circumstances confronting them."²²¹ The Supreme Court flatly refused to apply a "20/20 hindsight" policy, showing the Court's insistence upon respecting an officer's judgment.²²² In *Tennessee v. Garner*, the Supreme Court held that deadly force could be used against a fleeing suspect if there is "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."²²³ The Supreme Court's holding gives credence to the officer's judgment.

Both federal agencies and state legislatures have developed similar rules under this guidance. The FBI's straightforward standard "anticipates an immediate threat" to human life and reserves the use of force for those instances.²²⁴ Deadly force is authorized against a fleeing suspect who has committed a felony by means of deadly force or whose escape would result in an imminent threat to the community.²²⁵ States have codified the use-of-force standard for law enforcement in statutes that nearly mirror this standard. For instance, Minnesota justifies the use of force "only when necessary" to "protect the . . . officer or another from apparent death or great bodily harm," to stop a person who "has committed or attempted to commit a felony in-

219. John C. Hall, *FBI Training on the New Federal Deadly Force Policy*, FBI L. ENFORCEMENT BULL., Apr. 1996, at 25, 27–29.

220. 490 U.S. 386 (1989).

221. *Id.* at 397 (citations omitted).

222. *See id.* at 396–97.

223. 471 U.S. 1, 11 (1985).

224. *See* Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. NAT'L SECURITY L. & POL'Y 285, 310 (2005).

225. *See* Hall, *supra* note 219, at 27–28.

volving the use or threatened use of deadly force,” or to capture a person who has committed a felony and who will be a lethal threat to others if not captured.²²⁶ Nationwide, state standards are quite similar.²²⁷

The law enforcement model is by no means perfect. It anticipates use of force when the officer has a “reasonable belief” that such force is “necessary.”²²⁸ This is a subjective standard that can be interpreted differently by officers and courts. Some might argue that these words make the policy just as vague as that imparted in the RAMP ROE card, discussed above.²²⁹ Additionally, even the clearest use-of-force policy may be difficult to apply given the “physiological effects of stress in survival situations.”²³⁰ In recognition of this difficulty, the law enforcement model advocates intensive dynamic training.²³¹ If training is increased, it will no longer be necessary to tell soldiers to use different levels of force, because they will be able to apply force correctly without going through each step of the force continuum.²³²

New ROE based on the law enforcement model would give more deference to the soldier’s judgment. In normal combat operations, restricting the soldier’s judgment may be a legitimate goal so that the commander may wield force as desired. But in police operations, where a soldier does not have a battle plan or know what threats may occur, such micromanaging restrictions only cause the soldier to hesitate instead of react.²³³ Hesitation

226. MINN. STAT. § 609.066 (2004).

227. See, e.g., ALA. CODE § 13A-3-27 (LexisNexis 2005); N.C. GEN. STAT. § 15A-401(d)(2) (2005). Some jurisdictions permit deadly force to prevent escape only where the fleeing suspect also committed a felony. Compare MINN. STAT. § 609.066 (felony requirement), with Office of Investigative Agency Policies, U.S. Department of Justice, Resolution 14, Attachment A: Policy Statement on the Use of Deadly Force ¶ 1B (1995), available at <http://www.usdoj.gov/ag/readingroom/resolution14b.htm> (no felony requirement).

228. See Office of Investigative Agency Policies, *supra* note 227, ¶ 1.

229. See *supra* fig.1.

230. See Dean T. Olson, *Improving Deadly Force Decision Making*, FBI L. ENFORCEMENT BULL., Feb. 1998, at 1, 3.

231. *Id.* at 5–8 (stating that such training focuses on simulating and dealing with the stress of life and death situations).

232. See Thomas D. Petrowski, *Use-of-Force Policies and Training: A Reasoned Approach (Part Two)*, FBI L. ENFORCEMENT BULL., Nov. 2002, at 24, 25 (stating that threat assessment training is the best way to help officers understand a use-of-force policy).

233. Cf. George T. Williams, *Force Continuums: A Liability to Law Enforcement?*, FBI L. ENFORCEMENT BULL., June 2002, at 14, 15–16 (describing such issues for law enforcement).

does have utility—it can prevent soldiers from making judgment errors. Unfortunately, it also allows insurgents to capitalize on their mission planning and execution, resulting in unnecessary civilian and military casualties.²³⁴ The new ROE must be coupled with additional training in threat assessment to ensure the soldier's judgment is sound. Such training should be based on the effective law enforcement training model, as discussed below.

b. For Policing, the Law Enforcement Model Is Superior to the Current ROE

Several notable differences exist between the current ROE and the law enforcement model for use of force. A prime example is the force continuum principle. The current ROE use “last resort” language, which encourages soldiers to use deadly force only if no other means are available.²³⁵ Force continuum models were previously used by law enforcement starting in the 1960s,²³⁶ but they are not required by U.S. law.²³⁷ More recently, law enforcement models have moved away from force continua, recognizing that requiring “escalating and de-escalating according to a progressive scale limits the spontaneity and flexibility of officers in the field to protect themselves and the public.”²³⁸ Law enforcement agencies recognize that force continua are impractical.²³⁹ Many departmental rules note that “shooting to wound” is unrealistic given the miss rates of even highly trained officers.²⁴⁰ Not aiming for the target’s “center mass” in-

234. See Martins, *supra* note 28, at 10–12 (describing the casualties that resulted from hesitation in Beirut). Compare JOES, *supra* note 138, at 12–13 (noting that guerillas rely on surprise), with Parks, *supra* note 19, at 36 (describing how checklists increase soldiers’ reaction time).

235. See Bolgiano, *supra* note 127, at 80.

236. See Williams, *supra* note 233, at 14.

237. See *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994) (“There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used.”).

238. Williams, *supra* note 233, at 15 (“[O]fficers who hesitate during use-of-force incidents often are injured or even killed, demonstrating the grave consequences of adhering too closely to force continuum policies.”); see also Petrowski, *supra* note 155, at 29 (“While virtually every force continuum provides that such progressing through force options may not be appropriate in all use-of-force situations, the seed of hesitation is inescapably planted.”).

239. See Williams, *supra* note 233, at 14–16.

240. See David Bolgiano et al., *Defining the Right of Self-Defense: Working Toward the Use of a Deadly Force Appendix to the Standing Rules of Engage-*

creases the “likelihood . . . that bullets will miss their mark,” leaving the officer open to additional attack.²⁴¹ Warning shots and shooting to wound are “non-lethal responses to an immediate threat of deadly force,”²⁴² and such a “detached” response is not expected or demanded when the officer reasonably fears for his life.²⁴³

In fact, escalatory actions, such as warning shots or shooting to wound, are sometimes flatly banned by departmental rules because they may cause injury to bystanders and diminish an officer’s strategic use of surprise.²⁴⁴ ROE that require escalatory actions have also failed in this manner.²⁴⁵ In Somalia, a soldier fired warning shots to halt a group of civilians and accidentally killed a civilian.²⁴⁶ When sentencing the soldier, the court-martial panel noted that “the use of warning shots . . . was contrary to standards of due care.”²⁴⁷ As discussed below, instead of adhering to a force continuum, law enforcement officers receive judgment-based training that requires them to analyze situations so that their initial use of force is correct and adequate.²⁴⁸

A force continuum may be a useful tool in reining in soldiers’ use of force. By listing less aggressive options, the force continuum ensures that soldiers only use deadly force when necessary in order to uphold the law of war principles.²⁴⁹ Additionally, Lieutenant Colonel Mark S. Martins, U.S. Army, argues that the ROE do not actually require the soldier to follow the steps exclusively, but the soldier can use deadly force immediately.²⁵⁰ However, placing deadly force as last in a sequence cannot help but send an implicit message that deadly force should only be used as a last resort, regardless of comments to the contrary from JAGs who provide ROE briefings to

ment for the Department of Defense, 31 U. BALT. L. REV. 157, 171–72 (2002).

241. See DAVID KLINGER, INTO THE KILL ZONE 35 (2004).

242. See *Bolgiano et al.*, *supra* note 240, at 167, 171 (noting that law enforcement officers are not required to shoot to wound or fire warning shots).

243. See *Brown v. United States*, 256 U.S. 335, 343 (1921) (“Detached reflection cannot be demanded in the presence of an uplifted knife.”).

244. See *Bolgiano et al.*, *supra* note 240, at 171.

245. See *Martins*, *supra* note 28, at 3, 5.

246. See *id.* at 5.

247. *Id.* at 3 (citation omitted).

248. See *Williams*, *supra* note 233, at 18.

249. See *ROGERS*, *supra* note 24, at 4 (“[T]he modern law of war takes full account of military necessity.”).

250. See *Martins*, *supra* note 126, at 16.

soldiers.²⁵¹ The issue is both how the ROE interpret the law of war and how soldiers use the ROE to apply the law of war. If the ROE are written in such a way in which soldiers believe they must go through a force continuum, which many have stated they do,²⁵² then the ROE are not faithful legal interpretations of the law of war.

c. The Law Enforcement Model Is Applicable to Soldiers Policing Iraq

At first glance the law enforcement model seems to be an ill fit, as there appears to be little similarity between U.S. law enforcement and the U.S. military engaged in Iraq. United States law enforcement officers seldom deal with snipers and roadside bombs. Soldiers do not experience commonplace police interactions, such as traffic violations, domestic disturbances, or public fighting. Annual law enforcement deaths rarely rise above seventy-five officers nationally,²⁵³ compared with the over three thousand troops lost due to hostile fire in Iraq since March 2003.²⁵⁴ But the reality is that soldiers are placed in "police type situations where a more discriminating use of force is required."²⁵⁵

When comparing the perspective of a soldier and that of a police officer, the mindset and feelings of each are quite similar. Soldiers in Iraq have difficulty distinguishing between combatants and noncombatants.²⁵⁶ This problem is analogous to the problem faced by police officers throughout the United States. Criminals do not wear uniforms and are often difficult to distinguish from innocent bystanders until they manifest their status through hostile action. A soldier confronted with a suspicious individual who may set off a roadside bomb asks the same questions as a police officer who encounters a potential suspect

251. *A Soldier's Task: Use Force Appropriately*, CTR. FOR ARMY LESSONS LEARNED [CALL] NEWSL. (U.S. Army Training & Doctrine Command, Ft. Leavenworth, Kan.), May 1996, at B-1, B-5; *see also* Martins, *supra* note 126, at 7 (noting that it is "easy to concur" that this creates a last-resort mentality).

252. *See* Perry, *supra* note 119 (summarizing the testimony of marines that they are required to go through three force-escalating actions before unleashing deadly fire).

253. Bureau of Justice Statistics, U.S. Dep't of Justice, Homicide Trends in the U.S.: Law Enforcement Officers Killed, <http://www.ojp.usdoj.gov/bjs/homicide/leok.htm> (last visited Dec. 4, 2007).

254. U.S. DEP'T OF DEFENSE, *supra* note 2.

255. Bolgiano, *supra* note 127, at 79.

256. *See* Canestaro, *supra* note 2, at 83.

on the street.²⁵⁷ In either case, the soldier or officer does not know the suspect's intent and capabilities and must make a split-second determination about the threat. The soldier's feelings of anxiety when the individual attempts to place a call on his cell phone are similar to those the officer feels when a suspect reaches behind his back, perhaps for a weapon.²⁵⁸ In either case, the soldier or officer knows that the failure to correctly judge this threat may cost him his life. The issue is not what stimuli to which the officer or soldier must respond but how the officer or soldier chooses to respond to those stimuli.

It is true that soldiers are not police officers. They are not part of the community, they do not have the language skills to communicate with civilians, and they do not necessarily command the same respect as police officers.²⁵⁹ But the new ROE would not seek to transform soldiers into police officers. Soldiers would continue to identify themselves as part of the military and operate according to international law. Rather, the new ROE would allow better communication between the state and the soldier about the law of war and when it applies. While the streets of Baghdad are certainly different from the streets of New York City, how the soldiers and officers are trained in applying force can be consistent.

Law enforcement use-of-force directives and training have proven successful for national and local police forces. Law enforcement officers face an annual average of almost eleven

257. Compare Williams, *supra* note 233, at 15–16 (describing police officers' feelings of physical anxiety and stress when encountering situations of unknown danger and how such feelings limit their ability to react), and Office of Cmty. Oriented Policing Servs., U.S. Dep't of Justice, Use of Force, <http://www.cops.usdoj.gov/Default.asp?Item=1374> (last visited Dec. 4, 2007) (discussing police reactions), with MHAT REPORT, *supra* note 183, at 14–15 (surveying soldiers who served in Iraq and finding that many felt "intense fear, helplessness, and horror" during events in their deployments, such as "[s]niper fire without obvious so[u]rce" and "[a]mbush on patrol"), and *id.* at 21 (finding that acute stress and anxiety resulted from many deployment experiences).

258. See Olson, *supra* note 230, at 3 ("[V]isual narrowing, auditory exclusion, decreased fine motor skills, and other symptoms . . . affect officers in life-threatening situations . . ."); Williams, *supra* note 233, at 14–16.

259. See Cesar G. Soriano & Steven Komarow, *Poll: Iraqis Losing Patience*, USA TODAY, Apr. 29, 2004, at 1A ("Bearing the brunt of Iraqis' ill feeling: U.S. troops. The most visible symbol of the occupation, they are viewed by many Iraqis as uncaring, dangerous and lacking in respect for the country's people, religion and traditions."); cf. Jefferson Morley, *The War's Toll on Iraqi Civilians*, WASH. POST, Sept. 21, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A37968-2004Sep21.html> ("[T]he U.S. military may have replaced Saddam Hussein as the biggest threat to Iraqi civilians.").

thousand assaults with a dangerous weapon, and yet in only three percent of those situations did the officer kill the suspect.²⁶⁰ This statistic illuminates the success of police officers in use-of-force objectives and training. The law enforcement use-of-force model has helped train officers to discriminate about the proper use of force, and, more importantly in keeping with one of the stated goals of the military, would train soldiers to show the type of restraint that some see as necessary for success in Iraq.²⁶¹

d. The Law Enforcement Standards Comply with the Law of War

New ROE based on the law enforcement model would still comply with the law of war. *Graham* authorizes deadly force if the law enforcement officer reasonably believes it is necessary to defend himself or others.²⁶² Such action is likewise permitted under the law of war, as the right to self-defense is “inherent” and defense of others falls under the right to “collective self-defence.”²⁶³

Under *Garner*, deadly force may be used to prevent escape if the suspect commits a crime using deadly force or if the suspect threatens others.²⁶⁴ Similarly, the law of war allows at-

260. See Petrowski, *supra* note 155, at 28 (citations omitted); see also Office of Cmty. Oriented Policing Servs., *supra* note 257 (“[L]ess than half of 1 percent of an estimated 44 million people who had face-to-face contact with a police officer were threatened with or actually experienced force.”). While a comparison to soldiers in Iraq would be useful, such information is not available given the state of affairs in war. Although the military does track when soldiers use their weapons, it is impractical for the military to track all civilian encounters. See *Skepticism, Hope Greet ‘Surge’ Strategy*, USA TODAY, Jan. 13, 2007, at 11A (quoting a marine’s comments about the military’s practice of investigating escalation of force); David “Bo” Bolgiano & Jim Patterson, *Investigating Our Soldiers to Death*, WORLDNETDAILY, Nov. 9, 2007, http://worldnetdaily.com/news/article.asp?ARTICLE_ID=58583 (discussing investigations of shooting incidents in Iraq).

261. Cf. Lionel K. McPherson, *Excessive Force in War: A “Golden Rule” Test*, 7 THEORETICAL INQUIRIES L. 81, 92 (2006) (calling the ROE in Iraq “permissive” and attributing thousands of civilian deaths to this ROE failure).

262. See *Graham v. Connor*, 490 U.S. 386, 396 (1986); see also Office of Investigative Agency Policies, *supra* note 227, ¶ 1.

263. See U.N. Charter art. 51; see also Instruction 3121.01A, *supra* note 54, at A-8 (“[U.S.] forces always retain the right to use necessary and proportional force for unit and individual self-defense in response to a hostile act or demonstrated hostile intent.”); *id.* at A-11 (“Collective Self-Defense[:] The act of defending designated non-U[.]S[.] forces . . . and/or designated foreign nationals and their property from a hostile act or demonstrated hostile intent.”).

264. See *Tennessee v. Garner*, 471 U.S. 1, 3, 11 (1985).

tacks against retreating belligerents because they may continue to be dangerous in the future.²⁶⁵ However, U.S. law limits the use of deadly force to those fleeing who remain an immediate threat to the community.²⁶⁶ This limitation ensures that deadly force is used only when necessary to achieve the objective of stability. Thus, a change in the format of ROE that mirrors the U.S. law enforcement model would still comply with the law of war.

Furthermore, new ROE based on the law enforcement model would continue to uphold the underlying principles of the law of war. The new ROE would still support the principle of necessity,²⁶⁷ because the use of deadly force would be restricted to instances in which there is a threat of death or serious physical injury. The new ROE would uphold proportionality²⁶⁸ by restricting the use of deadly force to situations where it is necessary to combat a threat to human life or achieve a military objective. The new ROE do run the risk of increasing the loss of innocent lives, because they enable soldiers to react faster, making increased training on threat assessment absolutely necessary. The new ROE would focus more on the soldier's inherent right to self-defense, which has been left out or diminished in many versions of the ROE that soldiers receive. The law enforcement model places the right to self-defense up front, instructing soldiers that they have the right to use deadly force in the presence of an imminent danger. The new ROE would give this right of the soldier the preeminence it deserves under the law of war.

3. New ROE Should Be Supplemented with Dynamic Judgment-Based Training to Teach the Law of War

If the military creates new ROE for troops conducting police-type operations, increased training would also be necessary. The law enforcement model provides judgment-based training on the use of force, which is important given increased deference to the officer's judgment under this model. Unlike most traditional military training, which is rules-based, new training must depart from the traditional military training and

265. U.S. DEP'T OF DEF., REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR app. (1992), as reprinted in 31 I.L.M. 612, 643-44 (1992).

266. See *Garner*, 471 U.S. at 11.

267. See ROGERS, *supra* note 24, at 3-7.

268. See *id.* at 19.

teach soldiers how to think and evaluate combat situations and scenarios. It must provide individual feedback so soldiers learn from their mistakes. Although increased training may not be feasible or necessary for all troops given budget and time constraints, the military can focus this training on troops who most need the resource.²⁶⁹ Training is crucial to the proper execution of the law of war.

a. The Law Enforcement Model Emphasizes Judgment-Based Training

The training of federal law enforcement officers is tailored to the use of deadly force. Law enforcement training was formerly “conducted in the static, nonthreatening, low-stress environment of the gun range, gymnasium, or classroom,” which effectively constituted “motor skill training.”²⁷⁰ However, because this type of training “does not adequately prepare . . . officers to make effective deadly force decisions,” the law enforcement model now uses dynamic training in use of force that requires officers to apply their judgment skills in real-life situations.²⁷¹

FBI use of force training focuses on threat assessment: determining the suspect’s “hostile intent and indicators of capability.”²⁷² Since the intent of a suspect is often difficult to determine, officers must look to situational factors.²⁷³ Such factors include the suspect’s communication or lack thereof and the suspect’s compliance or noncompliance with directions.²⁷⁴ In determining capability, the officer must also assess the suspect’s physical abilities, size, and access to weapons.²⁷⁵

The FBI uses a “multistage approach” to train its officers in threat assessment.²⁷⁶ This approach begins with classroom instruction on the Justice Department’s use-of-force policy and subsequently uses written scenarios that show how the law

269. While I advocate for a different ROE and training model for these troops, the details of how such a training model would be implemented in this time of war is highly operational and beyond the scope of this Note.

270. Olson, *supra* note 230, at 3.

271. See *id.* at 5 (noting that *Zuchel v. City of Denver*, 997 F.2d 730 (10th Cir. 1993), found that the death of a bystander was in part caused by a lack of adequate use-of-force training).

272. See Petrowski, *supra* note 232, at 25.

273. See *id.*

274. *Id.*

275. *Id.*

276. See Hall, *supra* note 219, at 27.

should be applied in varying situations.²⁷⁷ These scenarios include instances in which deadly force both is and is not permitted.²⁷⁸ Then officers test their knowledge with both “interactive video simulation” and role-playing exercises.²⁷⁹ Video-based simulation provides “fast-paced” scenarios that are “in varying degrees of illumination, often innocuous, and always subject to change.”²⁸⁰ FBI video training is especially helpful because the program responds to the officer’s actions and allows training staff to critique the officer’s use of force, giving the officer an individual needs assessment.²⁸¹ This deadly force training is repeated every year.²⁸²

Other law enforcement models use visualization techniques in which officers imagine possible deadly force scenarios and “mentally discard[] ineffective responses,” reducing the officer’s reaction time.²⁸³ Additionally, teaching “tactical breathing” allows officers to control their heart rate so they are less affected by “survival stress symptoms.”²⁸⁴ Some training models require officers to explain how their body will react to the stress of a use of deadly force incident and how they can overcome those limitations.²⁸⁵

b. The Military Should Invest in Increased Training Based on the Law Enforcement Model

If the new ROE are employed, they must be coupled with robust training. Using force is first and foremost making a judgment, not merely applying a rule in rote fashion or engaging in the skillful use of firearms. This is particularly true when the number of threats on the street quickly outstrips the limited number of rules a person can be trained to follow.

277. *See id.*

278. *See id.* at 29–32.

279. *See id.* at 27.

280. Bolgiano, *supra* note 127, at 81.

281. *Cf.* Olson, *supra* note 230, at 6 (discussing the use of needs assessment in live role-playing scenarios). Such individual evaluations about the execution of the law of war are not required in the military. *See* Perry, *supra* note 119 (describing training as a lecture and pocket cards).

282. *See* Hall, *supra* note 219, at 3.

283. *See* Olson, *supra* note 230, at 7.

284. *See id.* at 8.

285. *See* MINN. BD. OF PEACE OFFICER STANDARDS & TRAINING, LEARNING OBJECTIVES: IN-SERVICE USE OF FORCE 3 (2001), available at http://www.dps.state.mn.us/newpost/continuing_ed.asp (follow “In-Service Use of Force” hyperlink).

The law enforcement training model would teach execution of the law of war. Unlike much of current military training described above, it would provide individual feedback and assessment.²⁸⁶ Additionally, it would require additional training cycles that would ensure that soldiers continue to improve upon their understanding and application of the law.²⁸⁷ While some of the current military training is on point, the best solution would be for the Joint Chiefs to require a judgment-based training course as opposed to allowing commanders to determine implementation.

While the law enforcement training model may result in better application of the law of war, it also requires investment of capital and time by the military. Live simulations are expensive, as the military must transport units to training grounds and hire actors to run the simulations.²⁸⁸ Additionally, virtual training requires investment in the necessary hardware and software.²⁸⁹ With limited resources, the military should focus additional training on the troops that need it the most.

Several methods of training would benefit soldiers. At the very least, JAGs and commanders could work together to develop classroom training, like that used by the FBI.²⁹⁰ Soldiers should individually answer and then discuss hypothetical use-of-force situations, receiving personalized feedback on how they responded. These scenarios should be based on situations most frequently experienced by soldiers policing in Iraq: IEDs, sniper fire, and ruses of war, where combatants pretend to be civilians.²⁹¹ Additionally, commanders can plan law of war role-playing exercises within their units, at minimal cost. Where cost permits, training should also include virtual simulation software similar to the Firearms Training System of the FBI.²⁹² Such a system should be tailored to use-of-force situations that occur in Iraq, and JAGs and commanders should evaluate the soldier's individual responses. Finally, where time and cost

286. See, e.g., Bolgiano, *supra* note 127, at 81; Olson, *supra* note 230, at 8.

287. Cf. Hall, *supra* note 219, at 27 (noting that FBI agents receive situational training on a yearly basis).

288. See Martins, *supra* note 126, at 4 (stating the cost of simulated training at the Army's Joint Readiness Training Center).

289. See Bolgiano, *supra* note 127, at 81 (describing the tools needed for such training).

290. See Hall, *supra* note 219, at 27 (describing classroom training).

291. See ROGERS, *supra* note 24, at 39; Iraq Coalition Casualty Count, *supra* note 142 (detailing the causes of death for U.S. soldiers in Iraq).

292. See Bolgiano, *supra* note 127, at 81.

permit, units should undergo live training exercises that are focused wholly on policing and law of war application.²⁹³ Without training to back up the new ROE, they will be just as ineffective in imparting the law of war as the current model.

C. CREATING NEW ROE BASED ON THE LAW ENFORCEMENT MODEL FOR SOLDIERS ENGAGED IN POLICE OPERATIONS WILL RESULT IN BETTER EXECUTION OF THE LAW OF WAR IN IRAQ

Some have argued that the current ROE are an appropriate interpretation of the law of war, because insurgents mix with civilians and “success in Iraq depends on our ability to treat the civilian population with humanity.”²⁹⁴ However, the rules must be a bit tighter in order to successfully achieve the political goal of the mission²⁹⁵: winning the hearts and minds of the Iraqi people.²⁹⁶ This is an important goal and a necessary objective for success in Iraq; however, it is far from clear that the current ROE adequately achieve this goal.

The multiple reports of soldiers using excessive force against civilians would tend to show that the current ROE are not adequate at reining in soldiers’ use of force. In Haditha in 2005, marines killed twenty-four Iraqi civilians after their colleague was killed by a roadside bomb.²⁹⁷ Marines testified that they were issued a 4 S’s ROE card and were required to positively identify their target and shoot only when hostile intent and hostile action were shown.²⁹⁸ At trial, the defense asserted that the marines followed the ROE while the prosecution argued that the marines violated the rules.²⁹⁹ The marines and their superiors testified that the meanings of positive identifi-

293. See, e.g., Hall, *supra* note 219, at 3 (discussing FBI role-playing exercises).

294. See Caldwell, *supra* note 111.

295. See W. Hays Parks, *Teaching the Law of War*, ARMY LAW., June 1987, at 4, 5 (“[V]iolations of the law of war frequently lead to a loss of public support (domestic and international) for the war effort; and violations of the law of war may arouse an enemy to greater resistance, leading to increased friendly casualties.”).

296. *Showdown: Iraq—Voices of Dissent—Part 3* (CNN News television broadcast Feb. 15, 2003) (confirming with Brigadier General David Grange that, even before the war was declared, the goal was “to win the hearts and minds” of the Iraqis); cf. Caldwell, *supra* note 111 (stating that self-defense in terms of necessity and proportionality is crucial in a counterinsurgent environment).

297. Perry, *supra* note 119.

298. *Id.*

299. *Id.*

cation, hostile intent, and hostile action “change from one area to the next” and that there was a “continuing conflict” between the marines on the ground and upper-level officers as to the proper definitions.³⁰⁰ This confusion could have contributed to the excessive use of force.

Additionally, the law of war, as interpreted through the ROE, may not make sense to many soldiers. Whenever an American soldier discharges his weapon, there is an investigation as to why escalation of force was necessary, which keeps American soldiers faithful to the ROE.³⁰¹ However, soldiers have stated that they prefer to patrol with the Iraqis because the Iraqi ROE are less restrictive.³⁰² Furthermore, a JAG testified during the trial of marines for the killings at Haditha that the current ROE allow soldiers to fire upon individuals, even those unarmed, fleeing the site of a roadside bomb attack.³⁰³ But, she added, the same ROE do not necessarily permit a soldier to shoot an individual pointing a gun at him.³⁰⁴ The current ROE are more restrictive than the common law³⁰⁵ and in execution may seem absurd to soldiers.

The mounting frustration with the current ROE may actually create an incentive not to follow the law and prompt soldiers to take matters into their own hands.³⁰⁶ In Hamandiya in 2006, marines carried out a plot to kidnap and kill a suspected insurgent leader and planted evidence on the body to make it look like the man had a bomb, in order to set an example for the community.³⁰⁷ The platoon leader testified that the marines were frustrated by the ROE and looked to a movie plot that advocated morally justified killing for a “tactical solution,” even though they knew it was illegal.³⁰⁸ The defense team argued that the ROE bound the hands of the marines, who felt that people were laughing at them.³⁰⁹ Marines and soldiers wonder why they have to follow the rules when the enemy does not,

300. *See id.*

301. *See* Bolgiano & Patterson, *supra* note 250; The Captain’s Journal, *supra* note 186.

302. *Id.*

303. *See* Perry, *supra* note 119 (citing Captain Kathryn Navin).

304. *See id.*

305. *See id.*

306. *See generally id.*

307. *See id.*

308. *See id.*

309. *See id.*

particularly when following the rules rewards the enemy and harms themselves.³¹⁰

Although the new ROE may increase the soldier's ability to protect his life and the lives of others, some may argue that they will increase the possibility that force will be used incorrectly. If soldiers are not "ramping up" their use of force and rather are responding as they see fit, there are more likely going to be errors in judgment. However, errors in judgment already occur under the current ROE. The solution proposed is not intended to allow indiscriminate firing, but rather to promote increased training so that the first response of a soldier is correct and legally compliant. A soldier's ability to use deadly force under the law should be the same whether he is policing the streets of New York City or Baghdad. The answer to these issues is not loosening the rules, but interpreting the law correctly so that the use of force better complies with the law of war. Despite some concerns, reforming current ROE remains necessary and, in fact, will improve the application of the law of war on the streets of Iraq.

CONCLUSION

The law of war never intended for war to be harmless; it only strives to mitigate unnecessary cruelty. The law has never diminished the right to self-defense. The current ROE, in interpreting the principles of the law of war, overemphasize proportionality while largely ignoring and thereby inhibiting the soldier's right to self-defense. They encourage insurgents to continue to ignore the law and frustrate the soldiers who are trained to follow the law. These ROE are dangerous for soldiers policing the streets of Iraq.

New ROE, mirroring U.S. law enforcement's use-of-force model, will better communicate to soldiers when force is allowed while policing Iraq. If written correctly, they will still comport with the requirements of the law of war. But the new ROE cannot exist in a vacuum. They must be accompanied by adequate training for soldiers so their judgments as to when force is authorized under the law are worthy of deference. The military should only adopt new ROE based on this model if it is prepared to make the investment in training as well. Only then can the law of war be properly applied in policing Iraq.

310. Cf. Rotunda, *supra* note 177 (describing a failure to fire on a terrorist leader due to a lack of positive identification).