



RULES OF ENGAGEMENT

A doctrine revisión as a manner to contribute to the promotion of standards of joint and joint- combined military interoperability.

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PROLOGUE

Roles that were assigned to military forces during the last years led to different discussions, among other political and doctrine aspects, about something that was old and known, such as the use of weapons to impose their own will.

Experience shows that it is necessary to plan a real or simulated operation in a war game, whether of combat or peace operations or even in cases of natural disaster, within or out of national territory, there appear aspects related to writing, training and implementation of “Rules of Engagement”, understood as the authorization, restriction and prohibition of the use of lethal power of weapons, a concept that later included the use of force in operations. The question how to apply force, against whom and to what extent is permanently asked.

War is a political problem rather than a military problem. Because of the so-called globalization, distances have been reduced and armed forces of states have more international participation, whether in operations of war integrating alliances and coalitions, in peace operations under the mandate of the United States or in stability operations under regional organizations protection. This is true also within internal framework for humanitarian aid in cases of natural disasters or man-made disasters. Because of this, politics must exercise control over the use of force carried out by their armed forces because in these rules for the use of force, the intention of the country to contribute out of their territory and their government policies, both domestic and foreign, are clear.

Throughout this work, we provide judgment criteria that show the need to have a catalog of permanent Rules of Engagement approved by political authorities, at least from a Ministry, in order to properly train troops and, therefore, prevent, during military operations, mistakes contrary to international law, diminish the possibility of collateral damage and prevent mistakes that may cause losses in their own force, which is called fratricide.

This research is not only of military interest but it is also interesting for political authorities involved in the state conduction and national defense as the use of force of the armed element of the state in an integral part of the state. All democratic nations have promulgated clear rules that govern the use of lethal and non-lethal force by their armed forces.

First Part

HISTORY, DEFINITION AND PURPOSES

Concepts and Definitions

Main Elements of a Definition

Although Rules of Engagement are not a new phenomenon, it is interesting to highlight that when different authors try to define them, they normally tend to do so from the perspective that coincides with the purpose of their contributions, which may refer to multinational operations by international organizations or a group of a contributing country in particular or an operation conducted by a particular nation. But these definitions tend to be a simplification because when we thoroughly analyze the ROE systems of the North Atlantic Treaty Organization (NATO), the European Union (EU) or the United Nations Organization (UNO), there appear critical differences among them, especially if a particular state has to draft them. In this sense, prior to defining their main elements, we need to determine what they are and what they are not.

Therefore, we will start to mention existing definitions, establish differences and similarities that allow to increase knowledge of them.

Joint Argentine Definition

The PC 00- 2 publication project “Glossary of Terms of Military Use for Joint Military Action”¹, of the year 2010, defines ROE as:

Instructions established by the National Executive Power, which determine in a clear and precise manner criteria regarding the effective use of Military Instrument, in line with international and domestic law rules. These are an interrelation between national politics, law and requirements inherent to military operations.

Publication PC 20- 04 “Planning for Joint Military Action in situations of crisis”², 1988 Edition, established:

*b. Instructions for the development of operations. Rules of Engagement.
Rules of Engagement are restrictions or subordination to the use of the military*

1. Argentine Army, PC 00- 02 *Glossary of Terms of Military Use for Joint Military Action*, 2010 project.

2. Argentine Army, PC 20- 04 *Planning for Joint Military Action in situations of crisis*, 1988 Edition, Chapter II, section 2005 “Planning. Factors to be considered”.

instrument imposed by the Military Strategic Level of decision in order to achieve the military goal set.

The use of the military instrument in a Crisis Maneuver may cover a broad scope of alternatives for which it is necessary to achieve the objective desired by the decision political authority. Moreover, whenever the development of operations requires time, during which evolution of the situation is possible or faces the Commandant in charge with unforeseen events or options, it is necessary to establish Rules of Engagement.

They must allow to standardize behaviors so that tasks carried out by forces may produce the effect expected by National Strategy.

Rules of Engagement shall be coordinated and established by the National Strategic and Military Strategic levels of decision jointly in order to assure some uniform criteria. Rules of Engagement will usually be less restrictive as we move from a situation of mild tension to one in which legal aggression by adversary forces is possible.

Rules of Engagement shall clearly include criteria with respect to self-defense of means engaged. Military authorities may draft rules of behavior for forces deployed which clearly and precisely establish instructions for the use of means and execution of operational maneuvers which, in response to the spirit of Rules of Engagement, may consider the different possible situations in the action scenario.

The “Libro Blanco de la Defensa Nacional” [National Defense White Book]³, 1998 edition, defined them as:

Particular instructions that military commandants must receive in order to limit in a precise and clear manner criteria related to the effective use of force.

Moreover, it is also explained that these guidelines are especially necessary in the current strategic context as well as the context of conflict due to the different situations that may exist, apart from classical war. It is also added that:

This need becomes more important during crisis, in order to prevent an undesired escalation; in situations of tension or, even more, when it is necessary to prevent such situations, which sometimes are caused by wrong mutual perceptions of actions and even attitudes that close military forces adopt, even those that are not intended.

According to the same White Book:

These particular instructions receive the international name of Rules of Engagement or Behavior⁴ and are given by competent authority and describe circumstances and restrictions under which forces will start or continue an armed engagement with other forces.

They represent an interrelation between domestic politics; law and the very requirements of military operations.

3. Libro Blanco de la Defensa Nacional, Part V: “Conduction of Defense”, 3. “System Functioning: Decision and Acting Levels, 1998 edition, p. 104.

4. It is a mistake to consider the concept of Rules of Engagement as the same as Rules of Behavior.

They are particularly useful in diffuse situations of conflict and may come from the highest diplomatic-political level of the Nation and are then moved onto operations commands by military authorities in the proper operational terms.

In sum, they are a practical tool that allows to provide the use of military force with rationality, proportionality and humanity.

Pursuant to recent national executive orders⁵, they are also guidelines that engage National Defense and this is why they are “Secret”.

Definiciones argentinas específicas

The Argentine Army⁶ defines them as:

1. *Rules or guidelines imposed by the military strategic level to commandants of theaters of operations that rule the use of forces.*
2. *See Dictionary for Joint Military Action.*

The Argentine Air Force⁷ expresses that:

Rules of Engagement are clear and complete guidelines that include the highest number of possible options and that have the purpose of preventing, in case of a hostile act, an adverse effect due to the lack of action or improper use of the Military Instrument of National Defense.

In this sense, rules to guide in the proper manner the action of defense and attack means are established, stating allowed and prohibited actions, restrictions and exceptions to be applied during the use of the Military Instrument of National Defense, not only in times of peace, but also within the framework of an emergency situation or of conflict states.

These guidelines are the basic rules for the exercise of National Aerospace Power in compliance with responsibilities and competences given to the Air Force by National Strategic and Military Levels, as a member of the Military Instrument of National Defense in order to contribute to the preservation of Vital Interests of the Nation.

The Argentine Army does not have a precise definition of ROE, although since some years ago, it has a classified publication titled “Instructions to act in international special situations”⁸, which may be considered a sort of ROE Catalog. In spite of this, the word engaged is used in the Argentine Army to indicate:

Any navy, air- sea or marine unit that is in contact with the enemy or in combat referring to weapons, when they have started combat by fire and cannot be taken for any other mission while they are under that situation.

5. Executive Orders of the National Executive Power; 1345/2015, 1134/2009 and 1103/2010.

6. Argentine Army, RFD-99-01 “Rules of military terms used by the Argentine Army”, printed at the Doctrine Department, Direction of the Army Staff, 2001, p. 245.

7. Argentine Air Force, RAC 1 “Rules of Basic Doctrine of the Argentine Air Force”, edited by DGO y Dof the Argentine Air Force, valid for an experimental period of two years, approved on March 3, 2003 through Resolution issued by the Chief of the Air Force Staff, Chapter II, p. 7, 2010 edition.

8. Dictionary of Military Terms for the Navy.

Comparison of Definitions: National, Foreign and International Organizations Definitions

As regards other countries, in the case of the Republic of Brazil, the *Glossário das Forças Armadas*⁹ presents two concepts which, according to their definitions, include the guidelines defined by UNO for the Rules of Engagement:

REGRAS DE COMPORTAMENTO OPERATIVO – Guidelines for operational behavior for situations that may arise when carrying out tasks given to the commandant of a force or isolated unit. They are related to existing political circumstances and legal restrictions, establishing the degree of intensity and modes of authorized use of force with the guarantee of a precise control over its execution.

REGRAS DE ENGAJAMENTO – They are a series of previously defined instructions that guide the use of units that are in an area of operations, accepting or limiting certain types of behaviors, in particular, the use of force, in order to achieve political and military objectives set by the authorities in charge. They respect the preparation and form of tactical conduction of combats and engagements, describing individual and collective actions, included defense and rapid response actions.

In the case of the Republic of Chile¹⁰, Rules of Engagement are:

Guidelines prepared by a military authority which specify circumstances and limitations under which they may or shall confront another armed force.

And it adds a definition of the Profile of Rules of Confrontation:

List of Rules of Confrontation selected for a force or specific military operation which is applicable within a certain period of time and space.

It is worth mentioning that the Chilean *Diccionario Militar Conjunto* [Joint Military Dictionary] (DNC 2, 2009)¹¹ is the translation of the text of NATO AAP- 6, Glossary of terms and definitions of the year 2006.

In the case of the Republic of Colombia¹², Rules of Confrontation are:

The group of norms issued by the competent military authority and of higher rank that precisely state the time, circumstances, powers and restriction under which the Military Forces may use force in order to face external and internal threats against institutional status and the State.

In the glossary of the most commonly used terms in air military operations¹³, it is said that Rules of Confrontation or Access to Combat is an expression of recent origin whose concept has been studied up to date, mainly in military associations, especially in the

9. MD-35-G-01 Glossário das Forças Armadas –Ministério da Defesa– aprovado pela Portaria Normativa No 196/EMD/MD, de 22 de fevereiro 2007. 4a Edição 2007, Brazil, p. 225.

10. NationalDefenseMinistry, "Diccionario Militar Conjunto", 2010 edition, Chile, p. 301.

11. Ibid., p. 4

12. Ministry of National Defense, Military Forces of Colombia, "Disciplinary forensic practice for military forces of Colombia", Disposition No. 012 DE 2007 (05- Mar- 2007) in Volume II, Rules and Case Law, p. 169.

13. Ibid., p. 141

Navy. It is applied to instructions that a Government gives in order to clearly state circumstances and restrictions under which their land, navy and air forces may start or continue actions of combat against enemy forces. These instructions may be general or permanent or may refer to specific actions or certain situations related to a given behavior of the enemy. Particularly, these are rules that restrict the use of force within the limits authorized by domestic law and international law of armed conflicts. Strategic, political and diplomatic factors may also influence their drafting. The concept of rules of access to combat is generally associated to the theory of gradual counter- attack. Except for some cases, these rules need also to take into account requirements of self- defense.

With respect to their degree of reserve, in the Republic of Colombia, it has been considered that safety of operations require these rules to be known not only by members of the armed forces that will implement them. For this reason, each of them is indicated by means of a Greek letter, the specific meaning of which is included in a confidential publication.

For the Republic of Peru, there is a difference: ROE are the ones used in different peace operations carried out under UN sponsorship¹⁴, while the ones prepared by the country for domestic affairs are called Rules of Confrontation¹⁵ and are defined as:

There are command orders that establish how and against whom force is used during a military operation. They refer to instructions given by the State to clearly guide circumstances and restrictions under which their land, navy and air forces may start or continue military operations against hostile groups.

For the United States Armed Forces¹⁶, they are defined as:

Guidelines issued by the competent military authority that set the circumstances and restrictions under which United States forces will start and/or continue a military confrontation against other forces.

In this concept given by the Joint Staff of the Armed Forces, it is necessary to highlight that the authority that issued them is a Military Chief. However, in many cases nowadays, it is acknowledged that the scope of ROE is much broader¹⁷ as they mean the means by which the National Command Authority (NCA) and Operational Commands rule the use of armed forces in any type of military operation.

It is worth mentioning that this definition, different from the previous ones which indicated that the *government could set*, emphasizes the responsibility of the Operational Commandant and, in theory, aim at eliminating the perception that existed in the times of Vietnam when ROE came exclusively from NCA¹⁸.

14. Exposition made by the delegation of the Republic of Peru before the UNASURI War Game.

15. Legislative Power Order 1095, "Rules of use of force by the Armed Forces in national territory", Chapter IV, Rules of Confrontation and Use of Force, section 13, Lima, August 31, 2010.

16. Department of Defense, Dictionary of Military associated Terms. Joint Publication 1-02, April 12, 2001. Updated on November 30, 2004. Available at: www.dtic.mil/doctrine/jel/new_pubs/jpl1_02.pdf

17. Hall, D.B., Rules of Engagement and Non- Lethal Weapons: A Deadly Combination?, Marine Corps University Command and Staff College, 1997. Available at: www.globalsecurity.org/military/library/report/1997, p.5.

18. Parks, Hays W., "Deadly Force is Authorized"; Joint Center for Lessons Learned Bulletin.

In this country, there are also, Rules for the Use of Force issued by the Board of Joint Staff Chiefs of the Armed Forces addressed to all staff of the US Department of Defense in military operations to support security agencies that carry out anti- drugs operations in said country, which implies land, interior waters, the territorial sea and the air space of the 40 states as well as the territories and overseas possessions and associated states.

For Canada¹⁹, Rules of Engagement are:

Orders issued by a military authority which define circumstances, conditions, level, manner and restrictions within which force or actions that may be considered as provocative, may be used to achieve military goals pursuant to national laws and policies.

The word “order” must be understood as the limit of force authorized by the Higher Authority of command and not as an obligation for the use of force

In Spain, we can find the following definitions²⁰:

In the Glossary of Military Terms of the Spanish Army” (“Document DO-005”), it is stated that they are:

Guidelines issued by the military authority in order to specify circumstances and restrictions in which forces will start or continue confrontation against other forces. They define the circumstances, conditions, degree and manner in which force may or may not be applied. They are drafted as prohibitions, limitations and authorizations which rule the controlled application of force.

Also, the one mentioned in “D-CP-07” of the Spanish Navy is similar. This is named “Manual of Maritime Law for Commandants of Vessels and Staffs” (paragraph 041), June, 2005:

Rules of Confrontation are guidelines issued to military forces which define circumstances, conditions, degree and manner under which military forces may use force.

As it could be seen, in general, definitions have contents that are similar among countries that are part of an alliance, such as NATO, but, also, they have their differences, given that while for the United States and Spain, these are guidelines, for Canada, they are orders.

As regards multinational military organizations, NATO, in a document drafted by its Military Board titled “MC-362”²¹ (initial acronyms refer to said Military Board), ROE are defined as:

Guidelines addressed to military forces including troops), in which the circumstances, conditions, degree and procedures for the use of force or actions that may be considered as provocation are defined.

In order to clarify this definition, we can state that:

Rules of Engagement neither are tactical instructions nor aim at summarizing

19. B-G-J-005-501/FP-001 Canadian Forces Joint Publication, CFJP-5.1 “Use of Force for CF Operations, August 2008, pp.2-3

20. Plana, Miguel Alía, “Rules of Confrontation Doctrine Articles: Military Law”, Noticias Jurídicas, July, 2009.

21. MC 362/1, “NATO Rules of Engagement”, June, 30, 2003.

the principles of Armed Conflicts Law, the knowledge of which by military men is always supposed.

When they are stated as prohibitions, they have the status of orders for actions described as prohibited not to be carried out.

When they are stated as authorizations, they have the purpose of defining limits for the use of force and, in general, of any action that may be interpreted as threat to the use of force.

For the UNO²², Rules of Engagement are:

Guidelines for Operational Commandants, which define the standards under which force may be used by military staff appointed by UNO during a peacekeeping operation.

The definition also adds that:

They are based upon resolutions of the Security Council.

When they are issued as prohibitions, they are orders that imply the non-execution of certain specific actions and when they are authorizations, they provide commandants with the authority to start certain actions which, in their opinion, are necessary to achieve the goal of the mission.

They allow for the use of the necessary degree of force in order to guarantee self-defense and they define the circumstances under which, the use of force by military staff of the Mission, may be justified²³.

The International Institute of Humanitarian Law of San Remo has published the “Manual of Rules of Confrontation”²⁴ for countries to take them as reference. It is necessary to clarify that this Manual is not binding to domestic law. Here:

ROE are issued by competent authorities and contribute to the listing of circumstances and restrictions under which military forces may be used, in order to achieve their objectives. ROE appear in different manners in national military doctrines, including the execution of orders, the deployment of orders, operational plans, or guidelines in force. Regardless of which their form is, they provide authorization or restrictions, among other cases for the use of force, the positioning of forces and the use of certain specific skills.

22. United Nations, Guidelines for the development of ROE for UNPKO, UN document MD/FGS/0220.0001, May, 2002, Attachment I.

23. UN master list of numbered rules of engagement Provisional, May, 2002.

24. International Institute of Humanitarian Law, op. Cit., San Remo, p.1

CHART 1: DEFINITIONS OF RULES OF ENGAGEMENT ACCORDING TO EACH COUNTRY AND ENTITY

COUNTRY	ENTITY AND TYPE OF DOCUMENT	EXTRACTFROMDEFINITIONS
Argentina	Ministry of Defense "White Book of National Defense", 1998 edition.	Instructions set by the National Executive Power which precisely and clearly determine criteria regarding the effective use of the Military Instrument.
	Joint Staff of the Armed Forces PC 00- 02 "Glossary of terms of military use for joint military action"	Instructions set by the National Executive Power which set the criteria for the effective use of the Military Instrument.
	Joint Staff of the Armed Forces PC 20- 04 "Planning for joint military action in situations of crisis", 1998 edition	Instructions that set the restrictions or subordination to the use of military means imposed by the Military Strategic Level of decision in order to achieve the military objective set.
	Argentine Army RFD- 99- 01 "Rules of military terms to be used in the Argentine Army", 2001.	Rules or guidelines imposed by the military strategic level to commandants of theaters of operations that rule the use of forces.
	Argentine Air Force RAC 1 "Rules of Basic Doctrine of the Argentine Air Force", 2010 edition	Guidelines that include as many possible options as possible which correctly guide the action of defense and attack means, stating actions that are allowed, prohibited, as well as restrictions and exceptions to be applied during the use of the Military Instrument of National Defense, not only in times of peace, but also within the framework of an emergency situation or conflicts state.
Republic of Brazil	Ministry of Defense <i>Glossário das Forças Armadas</i> – Ministério de Defesa- MD- 35- 6- 01, aprovado pela Portaria Normativa N° 196/ EMD/ MD, 22 de fevereiro 2007. 4a Edic o 2007.	REGRAS DE COMPORTAMENTO OPERATIVO – Guidelines for the operational behaviour for situations that may exist when complying with tasks given to a commandant of a force or an isolated unit. They are related to the existing political circumstances and legal restrictions, establishing the degree of intensity and modes of authorized use of force with the guarantee of the precise control over its execution.
		REGRAS DE ENGAJAMENTO – The feature of this is that they are a series of instructions previously defined which guide the use of units that are in an area of operations, consenting or limiting certain types of behaviour, in particular the use of force, in order to allow to reach political and

COUNTRY	ENTITY AND TYPE OF DOCUMENT	EXTRACTFROMDEFINITIONS
		military objectives established by authorities in charge. They respect the preparation and form of tactical conduction of combats and engagement, describing individual and collective actions, including defensive and rapid response actions.
Republic of Chile	National Ministry of Defense "Joint Military Dictionary", 2010	Guidelines drafted by a military authority which specify the circumstances and restrictions under which they may or need to confront any other armed force.
Colombia	Ministry of Defense Rule No. 12 of March 5, 2007, "Rules of Confrontation for Military Forces"	Group of regulations issued by the competent military authority and of high rank which precisely state the time, circumstance, powers and restrictions under which Military Forces may use force in order to face external and internal threats against institutional status and the State.
United States of America	Department of Defense <i>Dictionary of Military associated Terms.</i> Joint Publication 1-02 of April 12, 2001. Updated on November 30, 2004.	Guidelines issued by the competent military authority that state the circumstances and restrictions under which US forces will start and/ or continue a military confrontation against other forces.
Canada	Joint Staff of Defense B- GJ- 005- 501/ FP- 001 Canadian Forces Joint Publication, CFJP- 5.1 Use of Force for CF Operations August 2008	Orders issued by a military authority which define circumstances, conditions, level, manner and restrictions within which force or actions that may be considered as provocative may be used.
Spain	Army Document "0- 005"	Guidelines issued by a military authority to specify circumstances and restrictions under which forces will start or continue confrontation against other forces. They define the circumstances, conditions, degree and manner in which force may or may not be applied.
	Spanish Navy D- CP- 07 "Manual of Maritime Law for Commandants of Vessels and Joint Staffs", 2005	Guidelines issued to Military Forces that define circumstances, conditions, degree and manner in which military forces may use force.
NATO	Military Board Publication MC- 362	Guidelines issued to Military Forces (including troops) in which circumstances, conditions, degree and procedures for the use of force are defined.
UNO	United Nations, Guidelines for the development of ROE for UNPKO, UN	Guidelines for Operational Commandants which define standards within which force may be used by military

PAÍS	ORGANISMO Y TIPO DE DOCUMENTO	EXTRACTO DE LAS DEFINICIONES
	document MD/FGS/0220.0001, May 2002, Attachment 1	staff appointed by UNO during a peacekeeping operation.
International Institute of Humanitarian Law of San Remo	Manual of Rules of Confrontation	These are issued by competent authorities and contribute to the determination of circumstances and restrictions under which military forces may be used.

Source: prepared by the authors based on sources analyzed

Restrictions and Rules of Behaviour

From what has been observed, we can see that in the definitions from Argentina, the expressions Rules of Engagement and of Behaviour are used indistinctively in several doctrine publications.

For this reason, and in order to avoid confusion, we have found out information about the expression Rules of Behaviour, which is used by the International Committee of the Red Cross in a document addressed to the combatant who needs to adapt their behaviour to the provisions of International Humanitarian Law in unpredictable situations that they may face during the development of an armed conflict.

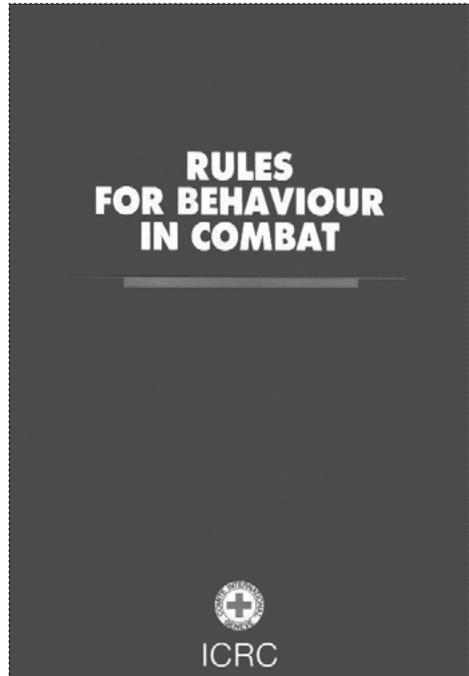
In this document, we summarize the scope of International Humanitarian which includes: the protection of people who do not take part or no longer take part in hostilities and the limitations of war means, especially weapons and of war methods, such as certain military tactics.

The purpose of Rules of Behaviour is to set a balance between legitimate military action and humanitarian purpose of reducing human suffering, especially of civilians, and it is States the ones that have the obligation to make provisions of this law known to armed forces and the public in general.

As regards restrictions, although there is no doctrine definition, it is possible to adopt the second paragraph of the definition of ROE of the “Glossary of Terms of military use for joint military action”, which states:

At military strategic level, ROE are operated by the competent authority and set the concrete circumstances and modes under which forces will engage with other forces²⁵.

Within this definition, we may consider the instructions given by Mao Zedong to Chinese troops during the conflict that his country had in 1962 with India as restrictions at military strategic level. These orders prohibited to open fire except in the case in which Indians would get less than fifty metres closer to their positions and, even if this happened, they could only open fire following orders given by higher authorities²⁶ or the order imposed to General Mac Arthur, during the Korea War through which he was



ordered that to the extent he would get closer to the border between Korea and China, he would only use Korean forces²⁷, or the order not to spill British blood which was given to Argentine troops that took part in the Rosario operation on April 2, 1982, which, as we will see, are different from ROE.

Partial Conclusions

With respect to expressions, there is not a common name in Spanish speaking countries. For Spain²⁸, Chile²⁹, Colombia³⁰, Uruguay³¹ and for the International Institute of Humanitarian Law of San Remo, these are Rules of Confrontation, while for others, they Rules of Engagement (ROE)³².

In spite of this, neither the former nor the latter can be confused with the so-called Rules of Behaviour, as these are related with the procedure taken by troops pursuant

25. PC 00-02, op.cit.

26. Kissinger, Henry, China, Editorial Debate, 2010, p. 205.

27. Brodie, Bernard, War & Politics, Mac Millan Publishing CO., Inc. New York, 1973, p. 71.

28. Plana, Miguel alía, op.cit.

29. Ministry of Defense of the Argentine Republic, Media Information 014/11 dated April 27, 2011.

30. Colombia, Resolution No. 12 dated March 15, 2007, "Rules of Confrontation for Military Forces".

31. Republic of Uruguay, "Frame Law for National Defense", Law 18650, section 16, paragraph d, National Direction of Official Printing and Publications.

32. *In Portuguese, Regras de engajamento; in German, Einsatzregel;n; in Italian, Regale d'impiego and in French, re'gles d'engagement.*

to International Humanitarian Law which, in times of war, by means of a set of rules, protects people that are not taking part or no longer take part in hostilities, trying to limit and avoid human suffering. Rules of Behaviour are simple rules addressed to the soldier that may be summarized in only nine rules³³.

Nor can they be confused with restrictions of military strategic level that may be the ones imposed by national or military strategic level.

The fact is that ROE change depending on each level. Normally, at direction levels (general strategic and military strategic), they are mentioned as restrictions and, at planning and execution levels (operational and tactical), they are called ROE.

Rules of Engagement have a relation with International Law of Armed Conflicts (LOAC) and must abide by it but they are also influenced by other factors. While LOAC is an external regulation to which every country agrees to abide by as it establishes provisions that shall rule the behavior of that country during a conflict, ROE are internal obligations that each country imposes to its Armed Forces.

As in Argentina, Publications PC 20-04 “Planning for Joint Military Action in Situations of Crisis”, 1988 edition, the “White Book of National Defense”, the “Glossary of Terms of Military Use for Joint Military Action” and the National Executive Power orders call them “Rules of Engagement”, in this research work, we will use this expression as the essence does not change, but it is a different translation of the English word “engagement”³⁴.

There is no universally accepted definition and this is due to different historical experiences and the domestic laws of each country.

The different definitions analyzed are a great formula that includes not only what is commonly understood as a tactical ROE, for example, the decision of a soldier to shoot in response to a threat, but also a great variety of rules that range from warning conditions of weapons, geographical restrictions and measures to control support fire.

We could also see that there are different classes of names for what countries in general understand as ROE, such as Brazil.

According to PannoBeirão³⁵, from the comparison between the Brazilian concepts of *Regras de Comportamento Operativo* (RCO) and *Regras de Engajamento* (REC), with the concept that UNO has of ROE, we can see some doctrine differences.

UNO expresses that its ROE are addressed to Operational Commandants and are defined based upon legal standards that lie in the UN Security Council

33. Fight only against adversary combatants. Do not harm enemies who surrender –disarm them and take them to your higher authorities. Do not cause harm nor torture prisoners of war or enemies. Pick up and take care of the injured, whether friends or enemies. Do not attack medical staff, facilities or equipment. Do not destroy more than what the mission requires. Treat civilians in a humanitarian manner. Do not steal and respect private property and possessions. Do everything possible to prevent breach of the law of war and inform of any breach to your higher authorities.

34. Translator’s Note: The author makes this explanation to distinguish the expressions used in the Spanish language though in the English language, the word is “engagement”.

35. PannoBeirão, André. Aspectos político- legais e legal- militares da participação brasileira em Operações de Manutenção da Paz da ONU, pós 1988.

Resolution and/or the Mandate of each Peace Operation. This would allow to see some “supra tactical” orientation to operation decision- makers with which the Brazilian definition of RCO the one that best fits the definition of UNO because of their highest similarity as RCO are also issued to Force Commandants who conduct, at operational level, their contingents concerned about the legal grounds for their decisions.

On the other hand, ROE provide practical orientation, such as authorizations and prohibitions to military troops, with respect to actions to be taken, which makes them go down to individual tactical level and the level of units. They also include numbered and specific rules of actions that must be known by all those who are part of a peace operation, from soldiers through subordinated commandants, as specified in item 9, d) of ROE- MINUSTAH:

9, d) Commandants of all national contingents are responsible to make sure that all their subordinates understand these ROE. For this purpose, ROE must be translated in a clear and precise manner into the language of each contingent. In order to assist this process, a Blue Card ROE must be drafted and translated in a proper manner to each member of the contingent. This must be done before the contingent enters into operations.

Therefore, the tactical option of these rules is clear, and this gets this ROE (the one from UNO) closer to the concept of the Brazilian REC. That is, from these doctrine definitions, we can see that ROE include both RCO and REC, and there is a possibility of different concepts as regards the effectiveness of ROE from Brazil to its contingents. If we followed the Brazilian doctrine, some ROE should be considered RCO and some others, the more tactical ones, they should be considered REC and, thus, the individual charters may not include all ROE issued by the UNO. In practice, it is necessary to make the Cartão de Regras de Engajamento (Blue Card), which is distributed to each member of the Brazilian contingent of MINUSTAH, to reflect the correct translation from the original, which is in English, issued by the UNO. In this manner, at least in relation to peace operations, it is clear that the Brazilian concept of RCO brasileiro is empty.

Therefore, we could say that ROE are essentially authorizations, restrictions and prohibitions to the use of the power of combat.

Moreover, from the analysis of the different definitions, we could see that in some countries, ROE are the status of guides for military forces; in other countries, these are orders pursuant to law³⁶. There are nations that consider them as instructions, guidelines or references and some others, such as Canada or Peru, consider them as “orders” that must be obeyed and respected. For the Argentine Republic, there are rules or guidelines (Argentine Army), Instructions (Joint Staff of the Armed Forces), or Instructions/ Guidelines for the “White Book of Defense”.

36. “Manual of San Remo on Rules of Confrontation”, San Remo, March 2010.

For Canada, the term “order” must be construed as the limitation to force authorized by the high authority of command and not as an obligation for the use of force. For the UNO, these are orders that imply not executing certain specific actions and authorizations providing commandants with certain freedom of action to comply with the mission.

As it can be seen, certain countries refer to ROE as guidelines, some other refer to them as instructions and others as orders. Their meaning in each case is different and this is probably because of the degree of freedom of action to implement them. In strict theory, a guideline provides broad freedom of action, an instruction is for a certain case and an order is merely restrictive. In a guideline, it is necessary to apply much more criteria than in an order.

All these differences need to give some warning with respect to problems that will surely arise, as it has actually happened, when they are harmonized in the context of an alliance of coalition, which has been a permanent concern in this era of peacekeeping and peace enforcement operations.

ROE refer to authorizations, limitations and prohibitions to use military forces, including the lethal power of weapons. By extension, they refer to the extent in which violence is used in order to comply with LOAC aiming at assuring that Armed Forces comply with what has been set at domestic and international law in relation with the conduction of military operations. In this way, they define:

- > When military force may be used.
- > Where military force may be used.
- > Against whom military force must be used in the circumstances previously described.
- > How military force must be used to reach the desired ends.

Neither are they a description or analysis of LOAC, save for the case in which the commandant desires to highlight a specific aspect for the compliance of the mission such as the protection of hospitals, temples, churches, schools, museums or other historical or cultural buildings.

ROE are basically instruments for military operations and not of mere legal nature. In the Operations Plans, they are included in the ROE Annex, which is independent from the legal one. In this Annex, legal, political and military principles that are part of them are stated. However, they are not used to appoint missions or tasks or to give tactical instructions. Missions and tasks are appointed through operations and other command and control instruments that are similar.

Origin and Evolution

Origin

According to Philips, the first ROE of which there are memories are instructions issued on May 23, 1745, by Prince Charles of Prussia to Jagendorf: silence until you see the white part of their eyes. This event is complemented by the instructions given by Frederick the Great when, in Prague, on May 6, 1757, he said to his troops: after drawing bayonets, do not

shoot until you see the white part of their eyes and the one given by the American General Israel Putnam, in the battle of Bunker Hill on June 17, 1775, as regards the way in which their troops had to open fire against the enemy: none of you can shoot until they see the white part of their eyes.

For Professor O'Connell, the expression Rules of Engagement was coined, for the first time, in Malta in 1960 and then, its use became more common as from the Vietnam War.

According to Martins, although nobody referred to them as such, the current ROE appeared in 1950, during the Campaign in North Korea, when General Mac Arthur received the order that American bombardiers could not get into Chinese air space nor destroy side of Yalu River.

For Martineau, on the contrary, they date back to the 50's. As evidence of that, the author states that whilwae vessels of the US Navy had to face the harassment maneuver by the vessels of the Warsaw Agreement, it was necessary to give orders to commandants that allowed them to control escalation risks during the possible collision with vessels of the enemy fleet. The informal document of 1954 was titled Intercept Engagement Instructions for the US Navy. This idea was subsequently used at the beginning of the 60's by elements of the US Air Force.

O'Connell, taking into consideration the danger implied in the risk of collision with an aircraft carrier which made the Soviet Union and the United States signed on May 25, 1972, an "Agreement for the Prevention of Incidents at High Sea", which prohibited the maneuver harassment. We can state that this is so as this Agreement was a ROE catalog for military forces that operated in the maritime environment.

In one part of the film *Apocalypse Now*, it may be seen that, before starting an attack over a tribe, Lieutenant Colonel commanding the operation orders to execute from a helicopter the Ride of the Valkyries of Wagner. This is how the following ROE was fulfilled: Before starting an attack over Vietnamite urban areas, air units must warn inhabitants by using leaflets, speakers or any other proper media and give enough time to evacuate, even in spite of being attacked and being the attack legally authorized.

In spite of this, one of the first analysts of ROE, Colonel of the US Navy, Hays Park, stated that in 1979, ROE (in the United States), were as disorganized as in an anarchy.

In general and regardless of prior events, studies state that the first ROE, in a modern sense, were promulgated, in 1979, by the US Navy, when the Head of Navy Operations, Admiral Thomas Hayward, ordered its coding as proposed by Admiral William Crow, in order to make a standard (coding that received the name of Worldwide Peacetime Maritime Rules of Engagement - PMRDE) that allowed them to be rapidly mentioned in operation orders.

These ROE were a clear sign of the American vision with respect to the concept of defense in times of peace, but they could also be positive to mitigate transition of hostilities and, if that is the case, they could be used in many stages of the conflict. In order to comply with these purposes, the ROE compiled all these necessary legal references and included a list of additional measures that the Commander could select when they believed it was necessary to make their authority clear to use force beyond own defense.

With the experience gained after several events, encounters and combats during the Cold War, in land, navy and air areas, ROE must be updated. In 1981, the Board of Chief of Staff established them in times of peace for overseas forces in light of a possible preventive attack from the Soviet Union.

However, an unfortunate event made US authorities revise them. In 1982, marines in Beirut implemented three cards (white, blue and red) which implied different degrees of isolation of weapons and authorizations to open fire depending on the fact that they covered services at the airport, shacks or the Embassy. Soldiers went through these three positions, which meant different ROE in nearby geographical locations. For safety in the shacks, sentinels could not load their weapons without the authorization of an officer who was in the place. This rule was in force when a truck full of explosives driven by a suicide terrorist crashed into the headquarters of the US marines destroying the shack and causing the death of 241 marines. A similar attack, carried out at the same time, over the shacks of the French parachutes caused 58 deaths.

As a consequence of these events, the international peace force withdrew and, in June 1986, ROE in force were replaced by PRDE given the need to spread them for times of peace to all armed forces.

Incidents of vessels USS “Stark” (attacked on May 17, 1987 by an Iraqi F-1 “Mirage” with two missiles during the Iraq- Iran War³⁷ and the USS “Vincennes” (which on July 3, 1988 attacked and brought down the aircraft “Airbus A300B2”, flight 655, of Iraqi line by mistake³⁸) and the bringing down of two MIG-23 in the Gulf of Sirte (1989) showing that PRDE were written in an ambiguous manner and after an exhaustive revision, the Board of Chiefs of Staff passed, in October 1988, new rules to replace the existing ones.

This new set of rules stated the right of self- defense anytime US troops were victims of a hostile act or when there is clear evidence of an attempt of hostilities.

Experiences in operations “Just Cause” (Panama, 1989- 90), “Desert Shield” and “Desert Storm” (Saudi Arabia, Iraq and Kuwait, 1990- 91), clearly showed that ROE for land forces needed some improvement, in particular with relation to assistance to heads of small units and soldiers in an individual manner for the determination of when the use of lethal force was authorized. After a series of meetings, some recommendations were prepared with respect to the setting of ROE related to self- defense for each soldier.

These recommendations were accepted by the US Army and the Marine Infantry but the resistance of the Navy to acknowledge the individual principle of self- defense (as they consider that the Navy operates with units rather than individually), made them to be included in the glossary instead of the amendments to the new version of Rules of Confrontation in force of the Board of Chiefs of Staff (JCS Standing Rules of Engagement JCS SRDE) promulgated on October 1, 1994³⁹.

37. Parks, Hays W. “Righting the Rules of Engagement”, op.cit.

38. Parks, Hays W. “Righting the Rules of Engagement”, op.cit.

39. Park Hays, colonel W. U.S Marine Corps Reserve (Retired) “Deadly Force is Authorized”, Joint Center for Lessons Learned Quarterly, Bulletin March 2001, Volume III, Issue 2, p. 15.

In a new revision promulgated, on January 15, 2000, more relevance was given to the issue of self- defense, with the admonishment that commandants had the obligation to assure that their subordinates understood and had been trained with respect to when and how to use lethal force for self- defense⁴⁰.

Said version was replaced again in 2005 and is currently in force⁴¹. In this, the concept of individual right of self- defense stopped being a separate part to become a subgroup within the concept of self- defense of the unit and, for the first time, it was expressly authorized for commandants not to restrict the right to self- defense to an individual scope but to extend it to members of the unit as a whole. 2000 version separated definitions of national defense, collective defense, defense of the unit and individual defense⁴².

ROE were not and are not for the exclusive use of the United States. For the Captain of the British Navy, G. Wilson, the United Kingdom was the first European country that used ROE pursuant to the records of the operation “Beira Patrol” (blocking of the mentioned port in Mozambique in order to prevent the supply of oil to former Rhodesia) carried out by British navy units in compliance with Resolution of the UN Security Council on April 9, 1966⁴³.

During the South Atlantic Conflict, 1982, the British Navy used them as stated by Admiral sir Sandy Woodward⁴⁴:

On Wednesday April 21 (1982), 1500 miles from Ascension, our understanding of the ROE was tested... if we had brought down the airline aircraft, we would probably have not left Americans other option than to repeat their support, the Task Force would have been called back, Falklands would be Malvinas and I would have been brought to a military court.

For the case of Canada, the Commission that in 1993 investigated the performance of their military men in Somalia⁴⁵, recommended that the Chief of the Defense Staff:

- > *Created a general framework for the development of ROE based upon international and domestic law, including laws of armed conflicts, Canadian foreign policy and the corresponding operational considerations.*
- > *Established and implemented policies for the drafting of ROE corresponding to each mission in particular and assured that a procedure for verification and testing be included in the process of certification that a unit is fit to be deployed.*
- > *Assured that Canadian forces keep a database of ROE from other countries, both before deployment and once they arrive to the theater of operations, with the provisions corresponding to an additional training in case of confusion or misunderstanding.*

40. Ibid, p. 15.

41. Operational Law Handbook, "International and Operational Law Department", The Judge Advocate General's Legal Center and School (TJAGLCS), 2010, p.74.

42. Henseler, Sean P. Commander, JAGC USN "Self- defense in the maritime environment under the new standing Rules of Engagement/ Standing Rules for the use of Force, SRDE/SRUF 53 Naval L. REV, 2006, p. 212.

43. Wilson, GASC, Captain RN, "Maritime Rules of Engagement- A Post War History of the British Experience", The Naval Review, volumen 86, No. 1, January 1998, p.4.

44. Woodward, Sandy, One hundred days: The memoirs of the Falklands Battle Group Commander, Naval Institute Press, 1992, pp.101- 103.

45. National Defense University National War College, "The Chechen War: Another Russian humiliation", p.15.

- > *Developed and implemented a system for the broadcasting monitoring, interpretation and application of ROE, with the purpose of assuring that all hierarchies could understand them, develop them and also adjust a procedure that allows for rapid changes in order to assure that the intention of the Chief of Defense Staff was complied with.*
- > *Assured that any change in ROE, once distributed, gave place to the corresponding training.*

As it may be observed, ROE do not belong to the United States or NATO. The chair of the course “Principles of Military Thinking and Strategy” of the National Defense University- National War College titles “The Chechen War. Another Russian Humiliation”⁴⁶, when analyzing the physical elements that affect confrontation, that is, the scope of forces, composition and their weapons, stated in 1994, that during the first Russian war against Chechnya:

Strictly looking at the number of combatants (Russian soldiers exceeded 4:1 Chechen rebels) and weapons they had, Russians seemed to have some advantage. Motorized infantry, airtransported forces, Marine infantry battalions and Spetnaz troops made up the invader force. But Russian planners did not see the level of resistance they were going to have by thousands of civilians. The Russian High Command even put forces at a disadvantage by limiting their options. For example, during the first days of war, Russian rules of engagement prohibited troops, in an explicit manner, to open fire except in cases in which fire was opened against them.

In spite of this, for colonel Andrei Demurenko and professor Alexander Nikitin⁴⁷, in an article written in March 1994, a group of Russian officers that had gone to Fort Leavenworth to work in techniques, tactics and procedures to carry out a combined exercise on peacekeeping operations, could not immediately coincide over the meaning that the term Rules of Engagement could have in Russia although it was clearly defined for US troops. According to the authors, at the time of publishing the article in 1997, after several exercises and real operations, “the whole world” had already perfectly understood the concept.

Origin of the Rules of Engagement in the United Nations Organization

As regards the use of ROE by the UN, Fernández Tresguerres⁴⁸ states that the first representations date back from the Korea War:

When the first American soldiers arrived, they had instruction that their mission was almost like a police mission, and did not initially adopt precaution or were they prepared to confront an enemy that attacked them with all the means at their disposal and, therefore, suffered lots of casualties before said instructions changed.

46. National Defense University National War College, “The Chechen War: Another Russian humiliation”, p.15.

47. Demurenko, Andrei, colonel and Nikitin Alexander, profesor, “Basic Terminology and Concepts in International Peacekeeping Operations: An Analytical Review”, translated by Mr. Robert R. Love Foreign Military Studies Office, Fort Leavenworth, KS. This article originally appeared in *Low Intensity Conflict & Law Enforcement*, Volume 6, Summer 1997, Frank Cass, London.

48. Fernández Tresguerres, José Antonio Toledo 21-IX- 2007.

Findlay⁴⁹, states the different names with which the UN instructed members of peacekeeping operations as regards the use of force.

Between August 17, 1960 and March 30, 1961, the Organization gave six “Operational Guidelines” for the Mission in Congo (ONUC) in which they set the “Policies Related” to detention, conflicts among tribes, law and order enforcement, protection against prowlers and armed bands, with respect to quitting by public order agents, with relation to the use of force in peace operations, the protection of facilities and properties of the UN and other certain aspects.

In general, said policies explained that the UN Force was a peace force which carried weapons to make its authority be felt but in a dissuasive manner and that its use was only allowed in cases of self- defense. At that time, it was understood that the presence of armed forces which were trained and deployed in a smart way would be a powerful dissuasion to stop disorder and violence and that the use of force had to occur for self- defense.

The same happened during the Second Emergency Force (UNEF II) established to control cease fire between Egyptian and Israeli forces, control the re- deployment of both of them and to control separation areas established under the agreements of January 1974 and September 1975. In the “Instructions for the use of force that specified circumstances for its use, the term “force” was defined, as well as the principles for its use, the manner to protect oneself against individuals or armed attacks, principles of self- defense and actions to be carried out after having used force.

In the UNIFIL mission (United Nations Interim Force in Lebanon), in the years 1984 and 1985, indications with respect to the fact that their members could use weapons in self- defense were stated although nationalities did not have the same concept of this phrase.

In March 1992, the UN experience in peacekeeping was collected, for the first time, at the Department for Peacekeeping Operations –initially called Office of the General Deputy Secretary for Peacekeeping Operations –as an attempt to give some professional features to what has clearly become a waste of time and money for the UN.

In line with this event, for the first time, the term Rules of Engagement appeared in a document signed on March 24, 1992, by General Jean Cot, Commandant of the UN Protection Force for the old Yugoslavia (UNPROFOR). In this document, ROE were written as a list or catalog so as to have numbered options in which the following were defined: self- defense, hostile attempt, hostile act, minimum force, collateral damage, positive identification, armed force, disarmed force, warning shootings and procedure to open fire.

For Findlay⁵⁰, although the UNOSOM II (may 1993), was the first mission of the UN, the mandate of which had, from the beginning, the use of force beyond self- defense, neither the Security Council not the Secretary General gave guidelines for the use of

49. Findlay Trevor, Dr., “The Use of Force in UN Peace Operations”, Stockholm International Peace Research Institute, 2002, appendix 2, p. 411.

50. Findlay Trevor, Dr., *op.cit.*, p.191.

force. ROE for UNOSOM II (United Nations Operation in Somalia) were designed by the commandant of the force without the assistance of the Security Council, the Secretary General or the Secretariat. In what it seems to be the first time a reference was made in a UN document to the term Rules of Engagement (undoubtedly influenced by the participation of the United States in the planning of the operation), the Secretary General simply noted that ROE would authorize commandants to carry out certain specific actions that they considered necessary to comply with the mandate.

There were no prior questions or agreements with the countries that contributed troops as regards ROE or command and control. ROE of UNOSOM II were, under those circumstances, shaped in a very close manner to UNITAF, that is, they were based upon the concept of “threat perception” and “proportional response”. For others, the fact that responsibility of ROE of UNOSOM II had lied in a Belgian colonel of the Operations Section, who did not have prior experience in ROE, was more worrying⁵¹.

Tragic events that took place in Bosnia, during July 1995, in “safe areas” of Srebrenica and Zepa were a turning point not only in the actions of UN in Yugoslavia, but also in the general ideas for the Organization peacekeeping operations.

In 1998, a workgroup was formed with the purpose of drafting ROE for future missions and, also, for training. Partly because of concerns of developed countries when mentioning countries (at least some), the first draft only considered the use of force in self- defense and in defense of the mission⁵².

After some consultation, in 2001, and after the reports about Rwanda and Srebrenica, and after the Brahimi report was published, it was possible to see an evolution in thinking with little agreement. In December of that year, the Secretary General announced that the document, now known as Guidelines for the Development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations would still be under a process of work but since then, this was used by military men who planned different operations to write specific ROE for each mission. Said document has instructions that define what should be included in the drafting of ROE for UN peacekeeping operations (in particular, in Annex 1, there is the UN master list of numbered rules of engagement⁵³).

Origin of Rules of Engagement in the Argentine Republic

ROE were used in our country for the first time with that meaning when the President of the Argentine Republic, in his capacity as Commander in Chief of the Armed Forces, ordered on September 18, 1990, the enlistment of navy means to support the operation Desert Shield. The operation was called “Alfil” by the Argentine Navy. Until January 15, 1991, the mission was for control of maritime transit and application material, goods and load sequestration from or to Iraq or Kuwait. Since that date, the mission was extended to keeping of maritime communication lines for coalition forces, air patrol to support

51. Lorenz, F. M. colonel, “Law and anarchy in Somalia”, *Parameters*. US Army War College Quarterly, vol. 23, No. 4 (winter 1993/94), p. 38.

52. Findlay, *op.cit.*, p. 347.

53. United Nations, “Guidelines for the development of ROE for UNPKO”, UN document MD/FGS/, May 2002, Attachment 1.

said forces and escort of the logistic train from Oman to the Kuwaiti coast, where capital vessels were in permanent station (aircraft carriers, cruises, helicopter carriers) of the coalition⁵⁴. This extension of the original mission was allowed under Law 23904⁵⁵ of the National Congress that authorized the Executive Power for forces deployed to give proper support to actions that may be carried out in the application of Resolution 678/90 of the UN Security Council, without being authorized to make direct war as stated in paragraph 2 of said resolution.

This was confirmed, some years later, in the “White Book of the National Defense”⁵⁶, 1998 edition, in which some examples were given for the actual application of this instrument by Argentina:

- > *Orders given as permanent to own Armed Forces in relation with British military forces established or going to Malvinas Islands, from 1982 to the restoring of diplomatic relations with the United Kingdom in 1990.*
- > *Those included in the Madrid II agreements, which made formal said restoring of relations through which it is possible to prevent undesired misunderstandings in the military field that may affect the diplomatic- political process of normalization of relations.*
- > *Those included –as from instructions given by the Ministry of Foreign Affairs- to orders of operations of Argentine Navy forces which, giving logistical support, made up the international coalition which, under the mandate of the UN, acted in the Persian Gulf War in 1991.*

The Argentine Army used them, for the first time, in the old Yugoslavia conflict at the beginning of 1983, being part of UNPROFOR –Argentine Army Battalion I (BEA I, in its Spanish acronym)- and since then, their use and name have spread. At that time, BEA I received and translated from this new expression: Rules of Engagement as “*Reglas de Compromiso/ entrada en combate*”, in Spanish.

In spite of the existing ones for peace missions in Cyprus and Haiti, during the last years, the National government also used them with that name for operations within the country, as shown in Executive Orders 1345/2005, 1134/2009 and 1103/2010 for which ROE were approved to operate in different sectors of defense as established for different situations (presidential summit meetings in Mar del Plata, Bariloche and San Juan, respectively) and declare them with the security classification of “Military Secret” in the terms of Executive Order No. 9390/63 as they are guidelines that engage National Defense.

Rules of Engagement: Conclusions about their origins

ROE have their origin in Malta in the 60’s and although both British in 1966 and Americans

54. Neves, Juan Carlos, Captain of the Argentine Navy, “Interoperability in Multinational Coalitions- Lessons from the Persian Gulf War”, *Naval War College Review*, Winter 1995, Vol. XLVIII, No. 1, pp. – 62.

55. Law No. 23904/91: enacted on January 24, 1991.

56. White Book of the National Defense, Part V: The conduction of defense; 3. The functioning of the system: decision and action levels, 1998 edition, p. 104.

in Vietnam used them since then, their use and name, both for peacekeeping operations for armed conflicts, they have extended since the beginning of the 90's. Nowadays, military operations of any nature cannot be thought of without their pertinent ROE.

While UN operations have always used ROE to regulate the use of force by their troops, they did not always receive such name. Since the end of the Cold War, mainly due to the US and British participation in Somalia and Bosnia, respectively, ROE have been of interest and observation by the media, politicians and lawmakers as well as the public in general⁵⁷.

Prior to the appearance of the UN Master List, ROE in peace missions under UN mandate, were a copy or adaptation of Anglo-Saxon models or other national models and, therefore, ROE were wrongly written in a wrong English language or they were not proper for the mission⁵⁸.

Argentina used them in 1991⁵⁹, in the Persian Gulf and UNPROFOR in 1993. Spain used them for the first time in the conflict of the old Yugoslavia, being part of UNPROFOR; Canada used them in Somalia in 1993 and, as we have seen, in 1997 it was a consolidated expression, even in Russia.

Objectives of Rules of Engagement

Traditionally, the Armed Forces had the main mission to achieve the military strategic purposes to “win the war”, which were obtained by means of the destruction or neutralization of enemy Armed Forces fighting in the different battles of a military campaign, until the enemy state surrendered or there was armistice.

As weapons were enhanced and destructions were greater, even reaching non-combatant civil population, States tried to restrict the use of force by means of several agreements that were initially called International Law of War (ILW). Subsequently, the UN charter, of 1947, restricted for all signatory States the use of force to the cases indicated in Chapter VII, as in the case of threat to peace and international security (article 42) and self-defense (article 51), and therefore excluded the use of force or threat in international relations.

In 1949, the new Geneva agreements were signed and they included, not only the concept of war, but also a broader one, which is the concept of armed conflict, they refer to non-combatant civil population and the Additional Protocols of 1977 explain the concepts of international armed conflict and domestic conflict, the old name of Law of War was replaced by the name of International Law of Armed Conflicts (LOAC) or International Humanitarian Law (IHL). In more recent times, in the New York Agreement of 1994 and the Statute of the International Criminal Court, protection mentioned in the Agreements is extended not only to combatant staff, but also to those who take part in UN peacekeeping operations.

57. Findlay, Trevor, Dr., *op.cit.*, p.368.

58. Findlay, Trevor, Dr., *op.cit.*, p.369.

59. Tejo, José L., “Command, Control and Rules of Engagement in Combined Operations”, *Journal of the Navy College*, No. 35, June 1991, pp.34-38.

As a result of this, the manner to use force nowadays is not the same as it was in prior conflicts. The general mission of the Armed Forces is not necessarily as it used to be before: destroy or defeat enemy forces to achieve the strategic objective that leads to the political objective.

Nowadays, the mission is to achieve objectives set by the political authority and these objectives may normally be obtained by means of the use of Armed Forces or the combination of different means of a State, that is, diplomatic and economic means, among others, without need to destroy the enemy army.

As stated by Plana⁶⁰, ROE have three basic columns: operational, political and judicial requirements.

Operational objectives

Operational objectives set concrete limits to the exercise of command, as they determine how, where, how much, when and against whom force must be used. This means that they state a series of actions that go beyond mere use of force and which are grouped based on activities, combining permissive and prohibitive measures, more or less violent, in relation to an increase escalation of force from mere threats to combat actions⁶¹.

An example of this may be: to establish a restriction in the type of weapons to be used during a low intensity conflict in order to reduce the number of casualties or the limitation of military targets with the purpose to create irreconcilable tension at the end of it.

Political objectives

From the political point of view, they are an instrument used to restrict war, isolate a conflict or prevent violence escalation in a concrete scenario that should be based upon international and national legality of the flag state. These are one of the most important tools of civil control over military power. In a democracy, they get their greatest sense in the framework of a State of Law, in which military power is subject to civil power by means of abiding by the law, in such a way that only military men deployed in campaign must fulfill the orders given by their government with respect to the concrete situation, but they cannot make political decisions on their own. Therefore, the knowledge of ROE must be required not only from military men implied in an area of operations but also from any person responsible, even politicians, for the development and success of a mission⁶².

The definition of the limits of the Theater of Operations where force may be used or the exclusion of certain areas or countries or other targets is a habitual way of restricting the use of force to the Operational Commandant. During the Korea War, efforts were made to prevent the Soviets and the Chinese to enter war, and this is why, land military

60. Plana, Miguel Alía, op.cit.

61. Plana, Miguel Alía, op.cit.

62. Plana, Miguel Alía, op.cit.

operations were limited to the territory of South Korea. Air operations could not get closer than 5 miles from the border between North Korea and China⁶³.

However, an opposite example may be seen in the operation “Iraqi Freedom”. The newspaper *The New York Times*, in an article published on February 4, 2008⁶⁴, stated that *American forces were authorized to respond to a hostile force that used the territories of Iran or Syria to attack them when they were in Iraq or that represents an “imminent threat” for operations to be carried out in that country*⁶⁵.

ROE may also be used to improve relations with a country or seek diplomatic agreements, as it may be seen in this example: originally, militia from the Moktada al-Sadr clergyman had to be considered as hostile as the highest occupation authority of the United States in Iraq. L. Paul Bremer III, declared him as a person outside law and even an Iraqi judge ordered their arrest.

After having executed a truce with Sadr, Iraqi politicians tried to include him in the political process, ROE were modified and stated that the hostile status of Sadr and the Mahdi army was suspended and that such individuals must not be confronted, except in the case of self-defense⁶⁶.

Legal objectives

The third part is the legal point of view as ROE must guarantee legality of the operation in accordance with LOAC and domestic laws; therefore, military operations become legitimate. Under certain circumstances, there may be greater limitations than those required by law⁶⁷.

An example of this is the ROE imposed to Commandants of the Defense Force from Israel (IDF) which requires commandants that prior to entering areas of combat that could be authorized by civilians, they had to distribute warning leaflets from planes, send messages over mobile phones, publish the news by Palestine media and to launch warning flares. This new ROE was promulgated as a consequence of having been warned that after the attacks to Gaza, civilians had few places where to escape due to the narrow dimensions of the Strip⁶⁸.

ROE should not necessarily be seen as an impediment but rather as an efficient tool for planning and execution of an assigned mission, as they only aim at helping those who must face a potential threat to decide when an armed response is necessary. The purpose of ROE is no more than to dispose of an instrument to control the use of force

63. Burton, Michael A., major, “Rules of Engagement: What is the Relationship between Rules of Engagement and the Design of Operations?” School of Advanced Military Studies U.S. Army War College and General Staff College, May 4, 1987.

64. Schmitt, Eric and GORDON, Michael R., “Leak on Cross-Border: Chases From Iraq”, *The New York Times*, Feb 4, 2008.

65. Schmitt, Eric and GORDON, Michael R., op.cit.

66. Schmitt, Eric and GORDON, Michael R., op.cit.

67. Operational Law Handbook, International and Operational Law Department, The Judge Advocate General’s Legal Center and School (TJAGLCS), 2011, p. 73.

68. Pfeffer, Anshel, “IDF outlines rules of engagement in populated areas” <http://www.haaretz.com/print-edition/news/idf-outlines-rules-of-engagement-in-populated-areas-1.292674>.

so that this does not exceed the restrictions imposed by political orders to military operations being carried out.

In some circumstances, certain legitimate military actions in light of the IHL may be considered as detrimental for the achievement of long term strategic objectives. Consequently, ROE give a mechanism to limit military action without necessarily affecting the achievement of military objectives.

With ROE, it is expected to keep violence escalation under control with relation to circumstances in which the military operation is carried out without being outside the limits set by the authority that has adopted the initiative.

ROE have a double nature. On the one hand, they are political guidelines and allow authorities, who have agreed as to the need to carry out a military operation, to keep control of the use of force at any time during its development. On the other hand, they are provisions of legal relevance directly applicable over the land provided they are expressed as orders addressed to all levels of the military command chain, including the soldier level as such.

As orders aimed at regulating the use of force, including lethal force, they acquire relevance from the legal point of view, especially when most operations protected by the UN fall within the category called “peacekeeping or peace building operations” in which the use of force is reserved for cases of self- defense and compliance with the mission, although this concept is understood in a broad sense by the UN Security Council depending on the circumstances.

By means of the determination of the conditions under which force may be used, ROE allow Commandants of forces deployed to conduct crisis situations in times of peace and control the level of hostilities in times of war. Philosophy of ROE is no other than limiting violence escalation and also preventing events that LOAC and positive law of each country prohibit.

Other objectives

According to Martineau⁶⁹, ROE also have a hidden, but also relevant, purpose: to prevent what today is known as fratricide through the determination of criteria of identification of the enemy. The classical example of this is the called Tarnak Farm incident, in which two F- 16 of the US National guard that were coming back from a mission believing that they were facing a hostile attempt (surface- air attack) launched a 500- pound bomb by laser over a group that was training in a camp situated 14 kilometers away from Kandahar, Afghanistan, causing the death of four Canadian soldiers and injuries to eight other soldiers.

According to Dungan⁷⁰, the manner in which they were drafted in April 2002, ROE in force in Afghanistan, contributed to the creation of the conditions that caused such

69. Martineau, F., *op.cit.*

70. Rules of Engagement and Fratricide Prevention: Lessons from the tarnak farms incident – UCLA Journal of International Law and Foreign Affairs, Vol. 9, Fall/Winter 2004.

fratricide. However, in order to prevent it, it is not enough with correctly writing them, but it is necessary to have the technical elements that allow for their compliance. This was the case in the Operation “Desert Storm” when the US Air Force (USAF), in charge of the drafting of ROW for air context established that:

In order to prevent fratricide, aircrafts that desire to open fire over another one that is not carrying out a hostile act must determine through two independent verification means that the aircraft that will be attacked is hostile and that there are no enemy aircrafts in the fireline⁷¹.

For this reason, aircrafts of the US Navy that desired to open fire over an aircraft that could not be visually identified, must be authorized to do that by aircrafts AWACS (acronym for Airbone Warning and Control System) of the Air Force.

A summary of the objectives of ROE may be found in the provision of the Ministry of Defense of the Republic of Colombia⁷², article 2 of which states the following:

- > *To guarantee that planning, conduction and execution of operation may be framed within standards established in the National Constitution, the Law and international agreements and treaties ratified by Colombia regarding Human Rights and International Law of Armed Conflicts.*
- > *To guarantee respect for Human Rights and the application of the International Law of Armed Conflicts provisions in the development of military operations.*
- > *To regulate the use of force in the conduction and execution of operations by Military Forces.*
- > *To clearly define what Forces and Units at different command levels are allowed to do as regards conduction and execution of military operations.*

Importance of juggling objectives of the Rules of Engagement

To impose certain ROE to the operational commandant without a clear understanding of their effects may influence in a wrong manner in the selection of military targets causing that vital objectives of the opponent may be out of the theater of operations or that own forces take an unfavorable relative position with which political objectives may not be achieved.

If in the aim to achieve political and diplomatic objectives, leaders impose extremely restrictive ROE, certainly the Commandant will find the manner to comply with their mission limited but they will not be able to use their forces in the most efficient manner. Rwanda genocide in 1994 and the genocide of Srebrenica are examples of ROE that are very restrictive or that have been designed for other purposes.

Restrictions as to the use of force or methods to use force may also be a threat to morale of one’s own troops as generally the enemy does not have to accept the conditions of a limited war. Since some decades ago, we have been witnesses that in different conflicts

71. Gordon, Michael R. and Trainor, Bernard E., general, *The General's War: The Inside Story of the Conflict in the Gulf*, Little, Brown & Company, New York, 1st, 1994, p. 218.

72. Department of Defense, *Dictionary of Military associated Terms*, op.cit.

that took place worldwide, whenever there has been a great difference of military, technological or diplomatic power, the weakest one used, in many cases, any kind of fight without considering any ethical objection.

In general, the weakest opponent has adapted to tactics of peace forces in order to limit them taking advantages of ROE whether by using women and children as human shields to be able to escape from certain areas, taking children with them in a motorbike in order to dissuade troops not to open fire or after shooting them, they threw their weapons and mixed with people.

Civil areas and population started to be used as attack and defense weapons building facilities in cities and populated areas, using civil houses to store weapons and start attacks from them or hide defense systems near schools and hospitals. This may lead to another type of mistake that takes place when ROE are too permissive, which may give place to conflict escalation or the death of non combatants believing that they are hostile elements.

It is possible to expect, in light of recent conflicts in Afghanistan, Iraq or Libya, that in the future, it will be very difficult to distinguish the opponent among innocent civilians as they will be so mixed with population that there will be no other way to distinguish them in cases of air or land attack.

It is, thus, clear that there is dilemma to be solved by those who draft and approve ROE.

To what extent must the use of force be restricted in order to have a proper control of it? Making them too restrictive or denying the possibility to use certain weapons or sophisticated equipment may lead a Commandant to be forced to reject, during their planning, some of the principles of war with the consequences thereof.

A ROE that limits the space to act to intelligence media that may contribute knowledge as to units, equipment and capacities or operational standards of the opponent may make a commandant restrict operations and not being able to address them against a clearly defined, decisive and reachable objective.

Partial conclusions

The main objective of ROE is the use of military force only in a justified manner (either by a country individually or by a multinational force). They are key in order to have legal grounds and political legitimacy and, therefore, they contribute to success of operations.

The political objective of ROE is to prevent military operations to spread beyond political objectives. Therefore, nations use ROE to discourage war, to isolate a conflict and to prevent escalation that results in total war. This is the reason why States use them in times of peace.

Their military purpose is the compliance of the mission. A commandant applies ROE to guide subordinates in the use of force in order to achieve military objectives. This is done by means of a strategic decision which allows them to adopt an aggressive maneuver and to ensure the right of self-defense and that said maneuver does not cause the loss of popular support or gives rise to a more powerful enemy or obliges them to fight in unfavorable times and spaces.

The legal purpose of ROE is to prevent breach of domestic and international laws. Therefore, they must consider, for example, the concept of proportionality and set criteria for the selection of targets to reach.

Last, ROE must prevent fratricide, be a permanent guide during peace times, allow to control transition between peace and conflict, control operations during conflict and, lastly, transition from this to peace.

In light of these four objectives, there is the need to juggle the political- diplomatic, legal and military components of the strategy so as the Operational Commandant may understand, foresee and design military actions as well as possible.

ROE given by the commandant of the theater must provide subordinate commandants, in case they cannot communicate, the answer to the question “how would the Commandant act in these circumstances?”

Criteria for the classification of Rules of Engagement

There are several criteria to classify ROE. Although these may be written based on a single format, they may be classified upon different situations they must face or situations that military forces may face in certain circumstances.

According to their nature

The first criteria to classify them according to their nature of the situation in which they are used: peace times, crisis situations and war time.

In armed conflicts, the use of force is less limited. Troops and enemy units will always be a military objective that may be attacked even within inhabited areas and not only when they are attacking or getting ready to attack. The Operational Commandant acts in accordance with principles of war, LOAC and the mission assigned. The same applies to the objectives that may have military interest or when there is military application, roads, bridges, railways, ports, airports, among others.

Therefore, ROE of “war time” decrease restrictions for the use of force, but maintain respect for the right of armed conflicts and international principles on protection of persons, monuments, facilities that have dangerous sources of energy, hospitals and religious facilities. *The use of force needs less justification to attack the enemy. The use of covert actions in Iraq is authorized to the extent they are necessary to fulfill the mission*⁷³. However, prohibitions to resort to perfidy, prohibited weapons (QBN), anti-personnel mine, unlawful use of emblems or uniforms and other restrictions of LOAC are unchanged.

The main difference between operations in times of peace and war lies in the fact that in the last, diplomatic efforts have failed and there is an attempt to reach a solution by means of the use of the whole combat power. ROE of war time allow military forces to open fire against any enemy target identified without considering that they represent actual or immediate threats.

73. Best, Richard A. Jr., “Covert Action: Legislative Background and Possible Policy Questions”, December 27, 2011

In general, for war time, national leaders aim at making ROE no more restrictive than required by international law, although there will always be restrictions or limits to the use of force. To the contrary, ROE of peace times only allow for individual combat, whether by unit or national, in self-defense or to assure fulfillment of the mission. The main law ground that allows for the use of force during peace times is the right of self-defense.

ROE should cover all situations in which force is used. In many occasions, experience has showed that transition from a series of strong ROE that authorize hostilities to less permissive ones may easily be carried out. For the Canadian Armed Forces, *Different Circumstances only need different rules rather than different systems of rules*⁷⁴.

In the first Persian Gulf War, US forces used ROE of peace times and of war times. During the Operation "Desert Shield", the Commandant of the Central Command promulgated ROE for peace time based upon the model issued by the Board of Chiefs of Staff and the Staff of general Schwarzkopf proposed a series of additional measures that were passed by Washington.

In general, these rules gave typical guidelines for peace time and, for this reason, they were basically defensive and written in order to prevent conflict from starting because of carelessness. In the operation "Desert Shield", ROE limited military actions to respond only to hostile acts or demonstrations of hostile attempts.

During the updating session of the afternoon, the Commander in Chief, General H. Norman Schwarzkopf was informed about an event in which an Iraqi MIG-25 was involved. It had gone through the Saudi border and went between six and ten miles over foreign territory. Aircrafts, ready to respond, were looking at it and were ready to shoot when the MIG-25 would go over the border again as they returned. The Commandant of the Theater reminded the operations officer that they could not start a war because of a mere incident with an aircraft and that they had to carefully review ROE.

When hostilities started, January 17, 1991, ROE for war time written by the Commandant of the Central Command and by the Commandant of the Air Component and approved by the Board of Chiefs of Staff were the ones that guided air combat operations. These rules acknowledged hostilities with Iraq and authorized to seek and destroy targets related to the Iraqi war effort within the area of operations.

Transition from ROE of peace time to ROE of war time require a mechanism that may be carried out whether by strengthening ROE of peace time in a gradual manner or activating ROE of war time in case hostilities start in an unexpected way. Some years ago, the Operational Law Handbook of the US Army suggested the following:

"GREEN" when there is no likely threat, that is when self-defense and defense of facilities is only authorized.

"AMBER" when there is a credible threat of attack and in spite of an increased enlistment condition, a greater authorization is not necessary for engagement.

74. Use of force in cf operations, Chap I, section I, part III, I.

“RED” when an attack has occurred or the Commandant has authorized an attack.

According to the research work by Harper about the submarine operation during the Conflict of Malvinas, British ROE changed as conflict escalated:

- > *April 12: There is no authorization to attack any vessel until they get into the Exclusive Maritime Zone (200 nautical miles) except for the case they attacked, in which case self-defense is authorized by using the minimum force.*
- > *April 23: The use of weapons is authorized against any force that may represent a threat.*
- > *April 26: A 25-mile area of defense around all Task Force units is set.*
- > *April 29: Attack is authorized against any vessel that tracks the Task Force.*
- > *April 30: The Total Exclusion Zone is set and air lines are added as authorized targets.*
- > *May 2: Submarines are authorized to attack any Argentine war vessel.*
- > *May 7: A Total Exclusion Zone is set (in any place save for within 12 miles from Argentina).*
- > *May 12: Attack to merchant shipping and fishing vessels is authorized in any place if they are found in operations to supply the islands.*

With time, and as conflicts changed, the process of transition from ROE of peace time to war time, started to get more difficult. Up to the experiences in Afghanistan and Iraq, US ROE state two possible scenarios: a state of peace (in which the principle of self-defense could be applied) and a state of war in which force against a concrete force that had been declared as hostile could be applied).

After said experiences, the term “Evolution in the escalation of force” (EOF) started to be used and a Threat Assessment Process was developed for the purposes of being able to clearly distinguish enemies from innocent civilians.

Also, with the evolution of weapons and information systems it was necessary to have ROE that were flexible enough as to solve any situation during this thin line that exists between peace and conflict. This line becomes even thinner when, for example, it is necessary to prepare the battlefield prior to the conflict, which may imply the need to deploy intelligence elements with the aim to know the enemy’s capacities, to access their calculation systems or install non-lethal devices that may destroy their information systems as they are activated at certain time.

Last, once hostilities have come to an end or there has been armistice, ROE must be reviewed and although they may not be the ones for peace times, they must reflect, in some way, the conditions for ceasefire.

According to geography

Other criteria to organize ROE is to consider the context in which they will be developed: land, maritime and/or air. The San Remo Handbook on Rules of Engagement, for example, classifies them for:

- > *Land Operations*
- > *Maritime Operations*
- > *Air Operations*

- > *Foreign Space Operations*
- > *Cyberspace Operations*

Each confrontation is different from others and needs a set of ROE that is proper for the context, class and objectives in which they will be developed. Therefore, we can find as many sets or groups of ROE as types of operations.

From the ROE normally used for combined exercises, we can see that the first three of them are subdivided into:

a) Land Context:

- > Target lighting
- > Ammunition and explosives
- > Warning and protection
- > Weapons systems
- > Intervention
- > Arrest and detention
- > Riot control

b) Maritime context:

- > Equipment
- > Ammunition and explosives
- > Warning and protection
- > Weapons systems
- > Intervention
- > Visit, register and capture

c) Air context:

- > Target lighting
- > Equipment
- > Ammunition and explosives
- > Warning and protection
- > Weapons systems
- > Interception

d) Common to the three contexts within one theater of operations:

- > Maneuver and geographical positioning
- > Maneuver restrictions
- > Electromagnetic spectrum
- > Warning and protection
- > Maneuver harassment
- > Defense of third parties
- > Improvement of own survival
- > Attack actions

According to the planning context

Moreover, the San Remo Handbook on Rules of Engagement classifies them according to the specific action to be carried out, as it considers that all of them have their own characteristics that distinguish them:

- > *Peace operations*
- > *Non-combatant evacuation operations*
- > *Humanitarian aid/Aid in case of disaster*
- > *Aid to civil authorities*
- > *Maritime interdiction operations*

NATO initially used these categories in the publication MC 362/1 -Military Community- (prior to the one in force nowadays) that has five main parts:

- 1) **Part I and Introduction:** here is a definition of ROE and of domestic and international laws that may be applicable, explaining that different units must follow their own domestic laws and that Commandants are not obliged to breach their respective laws during operations. Also, in this part of the document, it is stated that limitations and instructions of each country may not be more permissive than those authorized by NATO ROE.
- 2) **Part II:** there is a definition of the concept of self- defense stating that it cannot be limited by ROE.
- 3) **Part III:** the content of this part explains the principles related to the use of force.
- 4) **Part IV:** there is an explanation of the role of political conduction over military authorities.
- 5) **Part V:** This is probably the most important section as it sets forth the structure of ROE and procedures.

ROE themselves are expressed as permits or prohibitions in different series developed in an annex, in the exhibits of which there is a definition of hostile act and hostile attempt as well as information operations. Other exhibits deal with the different types of operations (air, land and sea) and procedures to require other ROE to authorize them and implement them. The structure of the document is hierarchical and the list is not limited to them.

An interesting aspect of NATO ROE is that it includes an exhibit that indicates those that may be given to the public in general as they do not have confidential information.

Currently, NATO has publication MC 362/1 -NATO Rules of Engagement that gives a series of guidelines and instructions for the organization both for joint and combined missions. This is the only ROE multinational permanent system. The current version is an updating of NATO MC 362, which started to be prepared in 1999 and finished in July, 2003. Rules stated there have been designed for all aspects of operations, that is, from peace, crisis and even a conflict.

According to the level of authority

Other criteria for classification relate to the level of authority to order their application. In this case, all ROE, in general, have two ways:

- > **Measures that require authorization by the Higher National Authority as they may have undesired political effects or escalation risk.**

An example of this is the measure for the entrance of US land forces or for flights over the territories of Iran or Syria which need authorization of the Secretary of Defense.

Space or civil systems such as image communication satellites may be used to support hostile actions. Attacking systems of civil space or of third parties may have significant political and economic consequences. Therefore, except it is especially authorized by the National Command Authority (NCA), commandants may not conduct operations against systems installed in the space of land that may connect space systems.

After the attack to the AlFirdos bunker by two F-117s in which, due to an intelligence assessment mistake, almost 400 Iraqi civilians died (mainly women and children) and other civilians were seriously injured general Colin Powell imposed the following ROE:

No target in the Iraqi capital may be attacked without the specific authorization of the Board of Chiefs of Staff (ROE in the operation “Desert Storm”).

> Measures that the Operational Commandant may implement without the authorization of the National Command Authority (NCA).

In order to carry out an uninterrupted persecution (hot pursuit) and to engage through international borders with military aircrafts with terrorists and with former civil and military authorities of the Iraqi regime that may have been identified, it is not necessary to have authorization of the Secretary of Defense.

According to the context in which they are used

Within the national territory

Military staff have the inherent right to use force to protect themselves in the exercise of individual or collective defense. As they exercise this right, national laws require that only reasonable force be used for self-defense. Lethal force is justified only when human life is at risk or may be at risk and there is no other way to prevent it. Justification for the use of force may be in line with the provisions of proportionality and discrimination of the Criminal Code.

There are many nations whose constitutions or domestic laws state the use of their armed forces in national jurisdiction, that is, within the territory, water and/or air space where each country exercises their domestic law (for example: United States, Spain and Peru). Among them, we can consider:

- > Support to national or provincial authorities in cases of natural disasters
- > Support to civil or security authorities
- > Support to operations of air space control
- > Restoring a normal situation of domestic security after a declaration of state of siege
- > Control of fishing in national jurisdiction waters
- > Support to security during elections
- > Support to security of navy units and own military air units in foreign airports or ports.

In the United States, ROE are the ones used against an opponent outside its territory and Rules for the Use of Force for Armed Forces in operations within one’s own territory. Since 2010, the same classification has been used by Peruvian Armed Forces which call them Rules of Engagement and of Confrontation, respectively.

With respect to this, the United States in the instruction of the Board of Chiefs of Staff of the Armed Forces, 3121.01a Standing Rules of Engagement/ Standing Rules for the Use of Force for US Forces, dated January 15, 2000, later amended by instruction 3121.01b, dated June 13, 2005⁷⁵, have seventeen annexes, the first eleven of which describe ROE and the rest of them describe RUF:

- A) Permanent Rules of Engagement for the US Forces
 - Appendix A- Policies and Procedures for self- defense
- B) Maritime Operations
 - Appendix A- Defense of co- nationals and their property at sea
 - Appendix B- Recovery of US government property at sea
 - Appendix C- Protection and disposal of allies
- C) Air operations
- D) Land operations
- E) Space operations
 - Appendix A- Indicators of hostile acts and hostile attempts in Space Operations
- F) Information Operations
- G) Non- combatant evacuation operations
- H) **Support to anti- drug operations outside the territory of the US**
- I) Additional measures
 - Appendix A- General additional measures
 - Appendix B- Additional measures for maritime operations
 - Appendix C- Additional measures for air operations
 - Appendix D- Additional measures for land operations
 - Appendix E- Additional measures for space operations
 - Appendix F- Messages formats and examples
- J) Process of Rules of Engagement

In the other six, RUF:

- K) References for ROE
- L) Permanent Rules for the use of force by the US Armed Forces
- M) **Maritime operations within the territory of the US**
- N) **Land contingencies and operations related to security within the territory of the US**
- O) Support to anti- drug operations related to security within the territory of the US
- P) Process for the Rules for the Use of Force
- Q) References for RUF

According to Daniel Sennott, the concept of ROE and RUF is different⁷⁶. The Department

75. Operational Law Handbook, The Judge Advocate General's Legal Center and School, 2011, p.86.

76. Sennott, Daniel, J., major, "Interpreting Recent Changes to the Standing Rules for the Use of Force", The Army Lawyer, November 2007, p.52.

of Defense of the United States defines “Rules for the Use of Force (RUF) as guidelines issued to guide United States forces in the use of force in several operations⁷⁷.

This general definition is deepened in the current SRUF Standing Rules for the Use of Force, in which it is stated that main policies and procedures for actions to be carried out by US commandants and their forces in all civil support operations that are taken in the territory of the United States or in its territorial waters are set forth⁷⁸.

Due to the research because of the death in 1997 of the 19- year boy, Ezequiel Hernández Jr. caused by a marines patrol that was in charge of surveillance against illegal drug trafficking in the border between the United States and Mexico and due to the recent experiences in the operations “Enduring Freedom” and “Iraqi Freedom”, the United States acknowledged the need to call ROE those rules for overseas operations and “Rules for the Use of Force” all those operations to support civil authorities given that, although both of them have the same purpose, the mix of political, economic and operational interests is different for ones or the others⁷⁹.

According to Sennott, the best manner to define RUF may be taking the negative meaning. SRUF (Standing Rules for the Use of Force) are not ROE as the latter apply outside the US territory. In spite of sharing the same principles, SRUF are based upon national laws while ROE, as we have seen, are mainly based upon international law. Therefore, any definition and concept that contain RUF must be based on the National Constitution and national laws⁸⁰.

When the US Northern Command (USNORTHCOM) was established, after the September 11, 2001 attacks with the mission of *conducting operations to dissuade, prevent and defeat threats and aggression to the United States, its territories and interests within the area of assigned responsibility and upon the order of the President or the Secretary of Defense, to give support to civil authorities including the conduction of operations*⁸¹, several RUF were included in only one document. They stated three types of actions: anti- drug operations, civil riots and law enforcement and security tasks. Unlike prior versions that were designed according to the type of attack (chemical, conventional, natural disaster), the current version is promoted by different responses to this type of attacks and level of force required for its response⁸².

As regards the Republic of Peru, there is something similar. On September 9, 2009, the Constitutional Court issued its decision 0002- 2008- PI⁸³, clarifying the need to issue a regulation as to the use of force by the Armed Forces, according to certain principles

77. Joint Chiefs of Staff, Joint Pub. 1-02, “DOD Dictionary of Military and Associated Terms”, Aug 8, 2006, available at <http://www.dtic.mil/doctrine/jel/dodict/>

78. CJCSI3121.01b, supra note.

79. The Center for Law and Military Operations (CLAMO) and Headquarters Marine Corps, Judge Advocate Division, International and Operational Law Branch, HQMC JA (JAO), “Rules of Engagement: What Are They and Where Do They Come From”, MCG, Apr 02, p. 59.

80. Sennot, Daniel J., major, op.cit.

81. United States, NORTHCOM, http://www.northcom.mil/about_us/about_us.htm

82. Sennot, Daniel J., Major, op.cit.

83. Available at <http://blog.pucp.edu.pe/item/109558/ejecutivo-promulga-decretos-legislativos-sobre-las-fuerzas-armadas-y-la-policia-nacional>.

stated by this high court. In said ruling, this high court urged the Congress of the Republic to adopt laws that develop the situations under which the Armed Forces may act to maintain internal order in undeclared situations under a situation of emergency within the framework of fight against drug trafficking, terrorism and protection of facilities that are strategic for the operation of the country and others referred to the use of force in situations of domestic armed conflicts and domestic unrest.

In both cases, it set guidelines to do so, but, as it is in the interest of this work, only the one referring to the use of force in situations of domestic armed conflicts and domestic unrest will be mentioned.

For this case in particular, the Constitutional Court of Peru ordered to adopt a law that rules the use of force by the Armed Forces, divided in two parts: one that refers to the use of force in situations of armed conflict called ROE and one that rules the use of force in situations of emergency, unrest and domestic riot taking into consideration Human Rights Treaties and Humanitarian Law, as the case may be, which are called Rules of Confrontation.

Pursuant to Law No. 29548, passed in July, 2010, the Congress of the Republic gave powers to the Executive Power to issue legislative orders about different topics related to the Armed Forces and the National Police of Peru. Upon these powers, the Executive Power promulgated four legislative orders, among which we can find 1095, by which rules for the use of force by the Armed Forces in the national territory were established and Law No. 29166 which regulated said topic was abrogated.

Thus, we can deduct the difference that exists in Peru between Rules of Engagement and Rules of Confrontation which, in other parts of the world, are known as ROE and RUF, respectively.

Below, we present some examples of RUF⁸⁴:

No member of the joint Task Force JTK Katrina, within the area of operations, shall carry out actions or help to evacuate in a forced manner any citizen.

They shall not be authorized to get involved in any issue of civil law enforcement, except for specific circumstances as authorized by the commandant and only when certain exceptions may be applicable.

It shall not be possible to capture or detain civilians except in the case you face imminent danger of death or risk to be seriously injured. Any person detained may be surrendered to civil authorities as soon as possible.

The mere fact of carrying white weapons shall not give rise to engagement with fire weapons by the group. In case the opponent insists in an aggressive manner with the white weapon against the member of the Peace Force, they shall dissuade the opponent with the fixed bayonet⁸⁵.

Compliance with judicial orders of judicial police competence or for which it is necessary to have the support of the police in the area of the Peace Force

84. Ibid.

85. "Regras de Engajamento para o Operaç~ao da Força de Pacificaç~ao no Rio de Janeiro", Dieretrix Ministerial No. 15/2010, de 04 DEZ 10, p.7.

*responsibility shall be executed by the delegation of the Civil Police of the Peace Force with the support of military men and military police of the Peace Force. Other judicial orders that do not require police action shall be complied with by justice officers appointed by the Judicial Power in coordination with the representatives of the Peace Force*⁸⁶.

Only the United States and Peru state a difference between ROE and RUF in an explicit manner, while the rest of them state its use for different types of military operations, whether in times of peace, crisis or war.

In Argentina, although the Domestic Security Law No. 24059, enacted in January, 1992, in Titles V and VI deals with different cases in which the armed forces may give support to domestic security operations, it does not authorize them to develop doctrine nor to organize, get equipment or training for such circumstances as they are considered an exceptional way of use that will be only developed in extremely serious situations. For this reason, the classification between ROE and RUF shall not be applicable.

However, other countries that have the same restrictions as Argentina establish the difference based upon pertinent laws. This is the case of the *Posse Commitatus* Act of the United States of America. This federal law, of the year 1878, prohibits military men, including National Guards of each state⁸⁷, to exercise police tasks in non federal property within their territory, except for those cases that the Constitution or the Congress may authorize.

In this sense, the Fourth Amendment to the Constitution prohibits government officers to carry out “unreasonable search and arrests”. Said amendment is applicable to US military men during the fulfillment of missions in the national territory and in the exercise of protection to national forces. However, and especially after the IIS, both provisions do not prevent military forces from giving support to Law Enforcement Forces if it becomes necessary and while there is a law that supports this. This is why, as we could see at the beginning, the Board of Chiefs of Staff of the United States enacted, in 2005, instruction 3121.01b, which includes Rules for the Use of Force in the US territory in one of its exhibits.

In countries where their forces may act in domestic security operations with the same, greater or less restrictions than in Argentina, the solution has been different. In the case of Peru, the decision of the Constitutional Court which gave rise to the difference between ROE and RUF was caused by a claim for its unconstitutional nature presented by thirty one Congressmen against the second part of the first paragraph of section 7 of Law No. 29166 which established the rules for the use of force by personnel of the Armed Forces in the national territory of said country.

In the case of Spain, although article 8 of its Constitution sets forth the defense condition, its Armed Forces, in additional Regulation 3a of Law 39/2007, dated November 19, establishes that: *Members of the Armed Forces that render services as military, navy or*

86. "Regras de Engajamento para o Operaç~ao da Força de Pacificaç~ao no Rio de Janeiro", op.cit.

87. The Coast Guard is outside the scope of the *Posse Commitatus* Act.

air police, which get involved in the operations described in section 16.e) of Organic Law 5/2005 dated November 17, of National Defense, shall have the condition of authority agents in the exercise of their responsibilities, in the circumstances and conditions that shall be ruled. Section 16.e) of Organic Law 5/2005, dated November 17, of National Defense states the following: collaboration with different public administrations in the cases of serious risk, catastrophe, disaster or other public needs, pursuant to the laws in force.

Spain has created, also, by agreement of the Board of Ministers on October 7, 2005, the “Emergency Military Unit”. Subsequently, through Royal Decree 416/2006 dated April 11, its organization and deployment were established and it was stated as a joint force of permanent status within the Armed Forces. Its main mission is to get involved in any place of the national territory to contribute to security and welfare of citizens, together with the rest of the State institutions and public administrations, in the cases of serious risk, catastrophe, disaster and other situations, as established by Organic Law 5/2005, dated November 17, of National Defense and the rest of the laws in force⁸⁸. Intervention may be ordered when any of the following situations of emergency occurs in a serious manner:

- > Those which are caused by natural risks, among them we can mention floods, earthquakes, landslide, heavy snow and other adverse meteorological phenomena of great magnitude.
- > Forestry fire.
- > Those caused by technological risks, among them we can mention chemical, nuclear, radiological and biological risk.
- > Those that are the consequence of terrorist attacks or illegal and violent acts, including those against critical infrastructure, dangerous facilities or with nuclear, biological, radiological or chemical agents.
- > Environment pollution.
- > Any other that may be decided by the President.

A similar situation occurs in the Federal Constitution of 1988 of the Republic of Brazil, which expresses in section 142⁸⁹ referring to the mission of the Armed Forces which states the use of them in missions of Law and Order Enforcement. In line with this, this involvement is ruled by Additional Law 97, of the year 1999, as amended by Additional Law 117 of the year 2004 and by Additional Law 136 of the year 2010⁹⁰.

When the Armed Forces of Brazil are used in Law and Order Enforcement Operations (OpGLO), they shall be subject to the same laws stated for the Security Forces (state, civil and military police), individual rights and guarantees stated in the Constitution are preserved, contrary to the exceptions stated for the state of defense and for the state of siege. Military law in force states that guidelines for the preparation and the use of the

88. <http://www.ume.mde.es/>

89. http://www.planalto.gov.br/ccivil_03/constitucao/constitui%C3%A7ao.htm

90. http://www.planalto.gov.br/ccivil_03/leis/LCP/Lcp97.htm

Brazilian Army in Law and Order Enforcement Operations are included in the Diretriz de Planejamento Operacional Militar (DPOM) No. 01/2005 –GLO- Reserved, of June 2, 2005, of the Land Commandant⁹¹.

In this law, rules and authorizations for planning the use and execution of actions for law and order enforcement are stated when the State defense measure are stated, as included in the National Constitution. Also, it defines as Forças Adversas, the parts of organized crime, drug trafficking groups, weapons and ammunition smugglers, armed groups and groups of waylayers, acting or existing in the areas under the responsibility of the Area Military Commands. In all of this context, the basis is given by the principle that the Brazilian Army shall only use for OpGLO operations troops that have been actually trained for missions of this nature. One of them is the 11^o Brigade of Light Infantry (11^o Bda. Inf. L) GLO that, with headquarters in Campiñas, San Pablo, has an area of influence that includes the whole country.

Said brigade for Law and Order Enforcement is specialized in interventions in urban conflicts with non lethal ammunition and functions to act as an elite riot police, with the possibility to also operation in specific actions against organized crime.

Outside the national territory

In general, Article 2, paragraph 4 of the UN Charter prohibits the use of force by the States for the settlement of international disputes. However, it is generally accepted that international law allows for the use of force in the following circumstances:

- > When authorized by a Resolution of the UN Security Council, acting under Chapter VII of the Charter.
- > When justified under Article 51 of the Charter, based upon individual or collective defense.
- > When it is necessary to protect other nationals or persons who are abroad from imminent attacks or damage (R2P).
- > Exceptionally, when it is necessary to prevent or stop a humanitarian disaster (R2P).

In general, Peacekeeping Operations are carried out within the framework of the UN Charter, although they are not directly stated therein. In fact, the expression “Peacekeeping Operations” is not mentioned in that Charter. However, there is the intention of the UN to protect future generations from the problem of war, for which the pacific settlement of controversies is stated (Chapter VI), the use of other means to maintain international peace and security, which includes the use of force (Chapter VII), and the actions of regional organizations to deal with issues related to peacekeeping and international security (Chapter VIII). The former Secretary General, Dag Hammarskjöld, stated that

91. Souza Pinheiro Alvaro de, “A Segurança Pública, o Exército Brasileiro e as Operações de Garantia de Lei e da Ordem”, Estudos e Pesquisas No. 322, Fórum Especial 2009 – Na Crise- Esperança e Oportunidade, Desenvolvimento como “Sonho Brasileiro”, Oportunidade para as Favelas 17 e 18 de setembro de 2009.

peacekeeping operations were included in “Chapter Six and a half” of the Charter⁹², that is, they were stated with the traditional methods for the peaceful settlement of controversies of Chapter VI and coercive measures for peacekeeping of Chapter VII.

Although peacekeeping operations under Chapter VI of the UN Charter is no longer in force since the Ethiopia- Eritrea mission (UNMEE, 2001), it is necessary to understand them in order to see how they evolved to Chapter VII.

In peace operations, the use of force is limited as the search for a diplomatic solution is always present through negotiations or mediation; therefore, ROE are more restrictive. Currently, said operations are carried out by coalitions that operate pursuant to International Law and under the mandate of the UN which normally imposes certain restrictions, as in the case of Resolution 1973 (2011) passed by the Security Council in its 6498a meeting, held on March 17, 2011⁹³, as it is considered that the use of an overwhelming force may put diplomatic efforts to reach a peaceful agreement at risk.

However, history shows that they should not be the same. In this sense, a case that may be relevant is the UNPROFOR mission, which acted at all times as a peacekeeping force of Chapter VI and, as such, it had a restrictive policy for the use of force, pursuant to the nature of the operation. In this manner, the commandant of the force expressed this purpose in very restrictive ROE, approved in March 1992. Given that the interpretation of what could mean self- defense offered a broad scope of possibilities of confusion, nations that participated with forces expressed their reserves and this made it necessary to approve a new set of ROE in June, 1994, to include within the concept of self- defense the reaction against a direct attack to civilians under the protection of UN forces⁹⁴.

Normally, in these operations, the resort to the use of force is not limited exclusively to self- defense, but it is authorized for the fulfillment of the purposes of the mission and/or the resort to force measures to exercise or enforce the right to free movement, control of or stop demonstrations as well as the arrest, keeping and/or registration of people, vehicles and houses.

ROE are most commonly known in the context of UN operations and combined exercises. It is likely that the greatest relevance and need to implement ROE has come from peace operations, as contributing countries were reluctant to contribute to a mission

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92. United Nations Organization (UNO), Press Release GA/SM/66PKO/76, October 6, 1998: In a first stage, the fulfillment (of peace missions) at the request of states involved, of military units and of civil observers under the command of the Organization with the purpose of stopping or limiting war actions, verifying compliance with fire cease agreements and contributing as neutral part in eventual negotiations was admitted as a legitimate application of the text and the spirit of Chapter VI of the Charter, even when the use of military forces equipped with light weapons introduced a manner that was not far from the action modes expressed in Chapter VII, a situation that led Dag Hammarskjöld to express that peacekeeping operations were included in a “Chapter 6 ½” of the Charter.
93. It authorizes Member States that have previously notified the Secretary General, acting in the national interest or by instruction of organizations or regional agreements and in cooperation with the Secretary General, to adopt any necessary action, in spite of the provisions of paragraph 9 of Resolution 1970 (2011), to protect civilians and areas inhabited by civilians under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, although excluding the use of a foreign occupation force of any nature in any part of the Libyan territory and requests interested Member States to immediately report to the Secretary General about the measures adopted pursuant to the authorization given under this paragraph to be immediately transmitted to the Security Council.
94. Hernández, Rubén Martín, “Consequences of the UN actions in Srebrenica”, Information Gazette No. 306, Instituto Universitario General Gutiérrez Mellado, p. 27.

if this implied an open war. The general rule was self- defense and this was considered as operations under Chapter VI of the UN Charter although it was only a forced ideal that reality would show. It was clear that under the rule of self- defense, weapons could not be used to impose will. The first problems appeared when nationalities were different in meaning and there were doubts as to allowing the compliance with the mission and defending third persons and/or UN property.

As regards the concept of self- defense, most countries understand it as the possibility to be able to use weapons in cases of threat of death or serious injuries, although not in all cases. The United Kingdom particularly states that use of weapons may only occur if life is at risk. Although both definitions may seem to be similar, in practice, United Kingdom ROE are much more restrictive.

Throughout the years, the concept of self- defense was extended to defense of life, members of the unit, members of the alliance or coalition, civilians to be protected and protected areas.

As regards defense of property, this defense of one's life is confused when there is the need to distinguish the type of property or military equipment, when there is an evident imbalance of forces or when there is no possibility to keep the action as there is no logistic support.

In peace operations, it is necessary to distinguish those that are within the framework of peacekeeping from those that mean will enforcement. Operations included in Chapter VI of Peacekeeping mean potential capacity to impose one's will if the situation requires so as prior agreements have not been complied with, while operations included in Chapter VII for will enforcement mean war with UN authorization. In both cases, weapons are used not only for self- defense, but also when there are obstacles for the fulfillment of the mission. However, when in an operation under Chapter VI, troops are ordered to "ensure free movement", "disarm groups", "ensure areas", or missions of this nature, the limit of Chapter VII is being crossed; there lies the reason of the name Chapter VI and a half.

The UN document, promulgated in 2002, establishes that Annex of ROE for a certain peace mission must be divided as follows:

- a. **Main body:** *it explains ROE requirements, the planning process and instructions to implement changes. The most important part of it is that it sets the mandate that states ROE to be used;*
- b. **Numbered list of ROE (Annex A):** *it includes ROE, taken from the UN Master List of Numbered ROE, which are applicable to a certain peace mission pursuant to the mandate issued by the Security Council in its resolutions; the list numbers ROE related to the use of weapons, the use of certain systems of weapons, carrying weapons, arrest, search and disarmament of people or groups of people, rules to be followed in case of demonstrations, protests, etc.*
- c. **Definitions (Annex B):** *a series of definitions is expressed for the purposes of ensuring the command unit during the operation; said definitions may include: hostile attempt, which means that a weapon is loaded or unloaded, positive identification, proportionality, when it may be concluded that there is threat, self- defense, warning shooting, etc.*

- d. **Support guidelines and procedures (Annex C):** *it gives a series of guidelines and procedures that must be followed by military armed staff in the fulfillment of certain tasks; this annex may describe procedures to be followed in order to do some warning actions, to open fire, to search and apprehend people, etc.*
- e. **State of weapons (Annex D):** *it identifies the different states of weapons that may be authorized by the Force Commandant without need to resort to the UN Headquarters.*

National and International Rules of Engagement

When the Armed Forces started to be sent out of their territories to be part of multinational units formed under the UN mandate, there was another problem in light of the fact that for most States, their Armed Forces, during a conflict were subject to LOAC international regulations and to whatever is set forth in their national laws.

Then, it became more necessary to establish rules both for commands and the combatants as to under which circumstances, against whom and with how much intensity they should apply their force and, in particular, who could order this.

When a country engages its troops in operations outside the national territory, it establishes restrictions provided there is a political intention to engage them. In light of this, any participating state that puts a unit of its Armed Forces at the disposal of an international organization, such as the UN, or a multinational organization, or a coalition, they do not do it in an unconditional manner but under certain conditions and keeping some powers⁹⁵.

This has been the case, for example, of the Agrupación Española (SPABAT) in the UN Protection Force in Bosnia (UNPROFOR). According to Ortega⁹⁶: The Spanish government, through the Defense Chief of Staff of Spain, has transferred the operational control to the commandant of UNPROFOR for the escort of convoys for humanitarian aid between Mitkovic and Srajevo through the Neretva valley and, therefore, they could not fulfill orders given in order to stop in Mostar or, even less, in Igman mount, near Sarajevo. This situation led to permanent problems between the UNPROFOR Command and SPABAT, as the Defense Chief of Staff did not authorize the change of mission.

Also, every state establishes limits with respect to the application of ROW approved for said mission (for example, not using anti- personnel mines) or the participation of their forces in certain actions (for example, not carrying out anti- riot actions previously planned, or not protecting detainees). This is known as caveats (warnings) or legal and political limitations to ROE.

In any multinational mission, states try, on the one hand, to restrict the level of authority, that is, the type of “command and control” transferred for the purposes of the authority receiving the transfer not to any type of operational mission or organize

95. Ortega, Luis Felú, “Las limitaciones al uso de la fuerza: la transferencia de autoridad (TOA) y las reglas de enfrentamiento (ROW)”, Real Instituto Elcano ARI 30/2009, February 19, 2009.

96. Ortega, Luis Felú, *op.cit.*

the unit in different manners and, on the other hand, to establish restrictions for the application of ROE.

The most frequent differences in the application of ROE are normally found in the authorization for the use of force and the interpretation and scope of the right to self-defense. This is why the coordination of different armies and the combination of efforts that may include air, sea and land forces is quite complex, as alliances, coalitions or US missions are made up of troops subject to their own domestic laws and, as it is already known, there cannot be international laws that breach domestic laws.

No member of the UN mission is forced to breach their domestic laws. In general, the government of each contributing country is willing to assign their troops under a non-national command in certain conditions and up to certain extent. The Armed Forces of a nation are not forced to comply with ROE that are against their domestic laws. This is seen in national ROE.

The following example shows the differences there may be in a coalition: certain countries accept resorting to the use of lethal force to defend property, others prohibit it and third countries limit their use exclusively to property that is essential for the fulfillment of the mission.

Out of the 41 members of NATO that have deployed forces in Afghanistan, each of them has the right to set restrictions to ROE of the organization, as expressed by Mayer:

All forces operating under the authority of the International Security Assistance Force (ISAF) in Afghanistan are subject to the Rules of Engagement (ROE) issued by the Allied Brunssum Headquarters. ROE are coherent with the publication MC 362/1 NATO Rules of Engagement. US forces that do not belong to ISAF operate under similar ROE issued by the Chief of Staff of the Armed Forces of that country. US ROE are based on the document CJCSI 3121.01A. All US units, ISAF and non-ISAF units keep the inherent right of self-defense. ROE are classified and their content cannot be revealed or discussed with outside members⁹⁷.

These caveats are precisely the ones that set the differences between acting capacities of some armies or others in Afghan territory. Spanish troops, for example, have a good number of restrictions to ROE from the International Security Assistance Force (ISAF): They cannot act during the night; they cannot attack or be deployed outside their deployment area... A series of restrictions with the purpose of exposing as little as possible Spanish troops to possible danger, but this is a two-edged sword because, at the same time, they allow enemy forces to advance and establish in new areas, thus increasing danger to which Spanish troops are exposed⁹⁸.

In spite of this, what has been expressed up to here means that said caveats must remain unchanged during the whole mission. An example that shows the possibility

97. Mayer, William, "Current US Rules of Engagement in Afghanistan Problematic", December 17, 2009, <http://www.militantislammonitor.org/article/id/4190>.

98. <http://www.libertaddigital.com/nacional/chacon-dice-que-los-rg31-estaran-a-fin-de-ano-en-afghanistan-1276371094/>

of change may be seen in an article written in the digital page of the Deutsche Welle⁹⁹:

For many years, the German government has established national caveats or formal restrictions for the Bundeswehr in the ISAF operation. Lethal force, for example, may only be used if soldiers were being attacked or about to be attacked.

However, since this summer (2009), this self-restriction is over. Given that the Bundeswehr was more frequently attacked by insurgents since the beginning of the year, the Ministry of Defense has given soldiers more freedom to decide on the type of force they may use.

This is why the individual charter each soldier carries for each mission reminds them that “attacks may be prevented, for example, by taking measures against those who are planning, preparing or supporting attacks or show any other hostile behavior”.

ROE are subject to a national legality control, in such a way that in multinational operations, national authorities may consider it convenient to retain the right to make certain decisions during the operation or not to apply certain ROE. In this way, in those situations in which are essential for a country, certain political or legal restrictions may be imposed to operational decisions reporting specific ROE that, in spite of being included in the planning of a mission, are not applied by forces of a certain nation.

An example of this is the case of the Spanish brigade Plus Ultra in Iraq which could not accept the order to act against the militia of the clergyman Muhtada el Sadr and proceed to detain his brother as Spanish units did not have an authorization to act against insurgents except in self-defense¹⁰⁰.

A question to be considered is that operations change nature rapidly and initial ROE may be harder is there is an escalation of conflict. Then, there may be new ROE according to the circumstances and there may be an undesired situation in which certain contributing countries find the dilemma whether to engage their troops in actions for which national forces do not have a political authorization, are not organized, equipped or trained and do not have the logistic support for such purpose. This is called mission creep.

ROE for humanitarian aid under UN sponsorship do not usually include the right to legitimate self-defense, although their strength may be determined by peligrosidad and scope of authorization of the authorities of the country to be helped. Besides this, ROE will be influenced by the agreement on the status of troops executed with the host country.

Specific Rules of Engagement for each Theater of Operations

Up to here, we have studied the different types of classifications that may be found in catalogs, lists or even other documents prepared by Chiefs of Staff and Joint Chiefs of Staff as it happens in those countries that do not have the former.

In some type of classification, we will find ROE received by the Operational Commandant and regardless of the need to challenge them or not, they shall

99. How the rules of Afghanistan have changed for the Bundeswehr available at <http://www.dw.de/dw/article/0,,5019739,00.html>

100. Ortega, Luis Feliú, op.cit.

communicate them to commandants of all components of the Force together with any other additional information required.

Moreover, although they are not allowed to go beyond authorized ROE, they may retain certain measures with respect to their subordinates, if the operational situation so requires or issue additional or summarized instructions for forces or specific operational situations. There is the obligation to keep higher authorities informed, for example, about rules that govern weapons exercises in the presence of navy or land units that are potentially hostile, the use of explosives with the purpose of destroying weapons or ammunition, mines or unexploded ammunition during an exercise, etc.

Another example of this is the public part of the tactical directive dated July 2, 2009, signed by the NATO Commandant, International Security Assistance Force (ISAF), in Afghanistan, general Stanley McChrystal¹⁰¹:

We will not isolate population from our forces through our daily behavior or the execution of operations. Therefore:

- > Any entrance into an Afghan household must always be made by Afghan Security National Forces with the support of local authorities and considering cultural sensitiveness towards local women.*
- > No force from ISAF may enter or open fire against or within a mezquita or any religious or cultural site, except in the cases of self-defense. All records and entrance for any other reason must be conducted by Afghan Security National Forces.*

Based upon this and as a result of the research, we may say that although this classification, presented hereinbelow, is not from doctrine, but represents all those that other American commandants may have used in prior contingencies¹⁰². These specific rules are divided into ten types, so that subordinate commandants may know:

- I. *Criteria of hostilities and, in this way, those who must make decisions as to the use of weapons have a series of factors that allow them to distinguish whether a potential attacker shows hostile attempts and, therefore, they may open fire against them before receiving it.*

The contrary may also happen, as shown in the following examples:

During the Vietnam War, one of the ROE ordered: all US military aircraft may attack surface- air missile locations only after said missiles have been launched against said aircraft.

Another ROE ordered: if a Turkish war vessel finds an Israeli war vessel outside territorial waters of said country, it shall get 100 metres close to it and render its weapons system useless¹⁰³.

101. http://www.pipelinenews.org/images/Tactical_Directive_090706.pdf

102. http://www.globalsecurity.org/military/library/report/call/call_96-6_RDEsec2a.htm

103. Humphries, op.cit., p.29.

II. How to grade the use of force in ambiguous situations before resorting to the use of lethal force (warning shootings, use of anti-riot elements, limiting persecution acts of an attacker, etc.)

It is allowed to shoot or launch ammunition (appointed), aimed at not impacting, with the intention to warn, against vessels (appointed).

III. What and who may be defined through the use of force apart from co-nationals and what measures must be adopted to prevent massacre or the escape of war criminals.

The use of force is authorized and its increase is authorized up to the inclusion of lethal force for the protection of civil staff, including humanitarian workers who are under imminent physical violence threat, when local authorities are not able to provide immediate assistance. When the situation allows so, authorization to use force must be issued by the immediate Higher Commandant¹⁰⁴.

An infantry squad is authorized to defend a member of the coalition from a Kurdish or Iraqi attack, but it is not authorized to defend another squad of the coalition¹⁰⁵ (French ROE in the operation "Provide Comfort").

IV. The status of weapons and warning conditions for air defense, in order to solve doubts with respect to when they may be engaged.

Surface-air missiles may be engaged against a hostile aircraft south of parallel 36° N only when a hostile attempt has been demonstrated or a hostile act has taken place. Except for the cases of self-defense, authorization for such engagement must be given by the air defense commandant. Warning shooting may be given in the prow of said aircraft in order to dissuade them from committing hostile acts¹⁰⁶ (ROE of ISAF in the operation "Provide Comfort", 1991).

V. Who may be armed without/with clips without/with ammunition in the bedroom and with/without lock in their weapons.

Transport and carrying of weapons, such as machine guns, light mortars and anti-attack rockets¹⁰⁷, for individual support are authorized.

VI. The level of command that must approve the use of the different systems of weapons. If there are civilians in the area, not to use M-551 tanks, artillery, mortars or rockets against known or suspected targets without the authorization of an officer in the rank of Lieutenant Colonel or higher¹⁰⁸ (ROE of ISAF during the invasion to Granada in 1983).

Before using weapons against a target, this must be visually identified both by the crew of the aircraft and the tactical air controller and authorized by the Combined Center of Air Operations (which was located in Vincenza, Italy) through

104. RDE MINUSTAH.

105. Poe, Stacy A., Lcdr. Judge Advocate General's Corps USN, "Rules of Engagement: Complexities of coalition interaction in Military Operations Other than War", Naval War College, Feb, 1995, p. 9.

106. http://www.globalsecurity.org/military/library/policy/army/fm/100-23/fm100_10.htm

107. ROE MINUSTAH.

108. Reisman, Michael W. and Antoniou, Chris T., *The Laws of War: A comprehensive collection of primary documents on international laws governing armed conflict*, Vintage Books, 1994, p. 128.

an aircraft AWACS¹⁰⁹ (NATO Operation “Denny Fly”).

- VII. *Identification requirements by one or more human or electronic means necessary to open fire in combat operations of low or medium intensity, which includes naval shooting and indirect shooting and efforts necessary to observe shooting without regarding the target location.*

When aircraft crews cannot find or positively identify their primary or secondary targets, they must return to the base with all their weapons¹¹⁰ (ROE of the United States in the Operation “Desert Storm”).

Pilots of all military aircraft must be informed before each mission with respect to the location of civilians and friendly forces¹¹¹.

When a pilot gets close to a target and considers that disproportionate collateral damage may be caused, they must stop the attack or- whenever possible- divert the missile that may have already been launched¹¹² (ROE of Israeli defense forces during the Operation in Gaza).

- VIII. *Geographical areas in which forces cannot open fire or enter, which may include territorial limits (or even political ones) beyond which forces cannot enter or open fire.*

Deployment of artillery battalions in the north of Iraq to support coalition forces or British forces (English ROE in the operation “Provide Comfort”) is not authorized.

Surface units are not authorized to enter the country’s territorial sea (of the country appointed). Land Operations will be limited to the territory of South Vietnam¹¹³ (ROE of the United States in the Vietnam War).

- IX. *Military power (number and type) that is going to be involved in a theater of operations. Armed UH- 1 helicopters of the US army when they are used for combat support missions must carry the US emblem and be operated by a US-Vietnamese crew¹¹⁴.*

- X. *Restrictions with regard to targets.*

In attacks to airdromes, bombing buildings or hangars is not authorized. The act of bombing paths, road surface and anti- air defenses¹¹⁵ is not authorized (Attack by NATO forces to the airport of Udbina during the Operation “Denny Fly” in November, 1994).

Last, in this instruction 3121.01b, dated June 13, 2005, there are Additional Measures, which allow commandants to prepare ROE for each mission in particular. They are

109. Perry, Richard M., “Striking the Balance: Airpower Rules of Engagement in Peace Operations”, School of Advanced Airpower Studies Air University Maxwell, p. 65.

110. Humphries, op.cit., p. 37.

111. Reisman, Michael W. and Antoniou, Chris T., op.cit., p. 129.

112. State of Israel, The Operation in Gaza: Factual and Legal Aspects”, Jul 2009, p. 96.

113. Burton, Michael A., Major, USA, “Rules of Engagement: What is the Relationship Between Rules of Engagement and the Design of Operations”, Army Command and General Staff College for Fort Leavenworth Ks School of Advanced Military Studies, 4 May 1987, p. 14

114. Mark, S., major, “Rules of Engagement for Land Forces: A Manner of Training, Not lawyering, Military Law Review, Volume 143, Winter 1994, p. 116.

115. Perry, Ricahrd M., op.cit., p. 64.

mainly issued to define limits or give authority for the use of force in the fulfillment of a mission.

We will now study some examples of additional measures:

- > *To prevent any type of provocation or attack maneuver that may lead to an attack to navy units¹¹⁶ (Argentine ROE in the Gulf of Fonseca).*
- > *Navy units that are surprised carrying out mining operations, even if they are merchant, may be attacked with tubular weapons (ROE of the United States during the Iran- Iraq war when Iran started to attack Iraqi oil tankers).*
- > *For the purposes of reducing as much as possible the possibility for pilots of downed aircraft may be prisoners, going only once over appointed¹¹⁷ targets is authorized (ROE of the United States in the attack to Libya in 1986).*
- > *Buildings suspected of hiding hostile forces cannot be attacked except there is the certainty that there are not civilians inside them¹¹⁸ (ROE of NATO forces in Afghanistan).*
- > *Buildings normally occupied only during day hours and military targets located in the areas near said buildings may be attacked during the night¹¹⁹.*
- > *Vehicles in movement may be attacked when they are travelling as far as possible from civilians¹²⁰.*
- > *Booby traps may be used to protect own positions or to prevent the enemy from advancing. They may not be used in private civil property. They must be recovered and destroyed when they military need to use it is no longer valid¹²¹ (ROE in the Operation "Desert Storm").*

Partial Conclusions

ROE are specific for each theater of operations. They are not the same for Afghanistan, Iraq or Libya, although countries that are involved are the same. However, in all cases, national ROE have pre- eminence over those of an alliance or coalition.

If ROE Alliance/ Coalition are more permissive than national ones, the Head of the Contingent must inform the Commandant of the Alliance/ Coalition about these restrictions. If national ROE are more permissive than those of an Alliance/ Coalition, the Head of the Contingent (who must be the Commandant of the Troops) must only apply violence by the Alliance/ Coalition.

Although, as we have seen, almost all models analyzed have similarities, there is not one that allows to develop a universal ROE catalog. Therefore, ROE catalogs are necessarily national.

116. Pugh, Michael, ed., *Maritime Security and Peacekeeping: A Framework for United Nations Operations*, Manchester University Press, UK, 1994, p. 44.

117. Parks, Hays W., "Righting the Rules of Engagement", *op.cit.*, p. 90.

118. <http://www.captainsjournal.com/category/marjah/>.

119. State of Israel, *op.cit.*, p. 97.

120. State of Israel, *op.cit.*

121. *Operational Law Handbook*, *op.cit.*, p. 100.

Drafting of Rules of Engagement

Throughout our research studies, we have seen that there are different instruments or publications that are of help for those who need to draft ROE to substitute catalogs such as MC 362/1 NATO Rules of Engagement, dated June 30, 2003 or the instruction 3121.01b, Standing Rules of Engagement/ Standing Rules for the Use of Force for US Forces, promulgated on June 13, 2005, by the Board of Chiefs of Staff of the Armed Forces of the United States.

One of them is the UN Master List of Numbered Rules of Engagement, temporary edition of May, 2002¹²², or the “Manual of Rules of Confrontation” of San Remo, drafted so that it could be used in any country or group of countries without reference to warnings or security restrictions¹²³. However, its drafting is not simply taking certain rules of a certain catalog. From historical experiences, we can infer that it is something much more complex as when establishing and implementing them, there are legal, military and political problems.

ROE are the main resource the military authority has, through the Staff, in order to establish guidelines for the deployment of forces in times of peace for the conduction of a crisis and in times of war in order to control combat level¹²⁴.

In this definition, we can see the contradiction between the need to use force in order to get the desired objective and the need to moderate it and set a series of criteria to prevent consequences that may affect the achievement of the objective. In this way, ROE are the result of the need to give response to this tension which has three elements or factors: a) political, b) legal and c) military. Tension exists because each factor has a need that collides with the need of the other factors as, at the same time, the contradiction does not only operate between factors, but also within them.

It is then clear that as a consequence of this tension and changes in the context of conflicts and, therefore, the variable condition of military operations, whether of peace, during a crisis or of war, it is necessary to adjust or to be careful in the drafting of ROE as the way in which they are defined and implemented will be a key factor for the success of the mission.

Also, there is a second aspect that makes the drafting of ROE be more complex. This is the lack of a solution that considers the needs of each factor. Political conduction, pursuant to their values and interests, must decide which one will become a priority with respect to the others and bear the consequences of that.

A third aspect to be considered is that each mission is different and requires ROE to be flexible enough to adapt to the requirements of each one. This idea is supported by the permanent mutability of armed conflicts that forces the military instrument to be permanently trained in order to face similar and different scenarios with different ROE. This is why the drafting of ROE must be in line with the objectives set by the political

122. Findlay, Trevor, Dr., *op.cit.*, p. 425.

123. International Institute of Humanitarian Law, *Manual of Rules of Confrontation*, San Remo, November, 2009, p. ii.

124. Roach, J. Ashley, captain JAGC, US Navy, “Rules of Engagement”, *Naval War College Review*, January- February, 1993, p. 47.

conduction and the legal framework adopted by it. Therefore, the political component acts as a decision maker as regards the drafting of ROE and, thus, they must approve them.

The political component, as regards decision-making, is the government that is the Executive Power¹²⁵. Government actions are subject to institutional level because of the makeup of political forces that are part of the Legislative Power and judges of the Judicial Power.

In a democratic system, the government depends, to a great extent, upon the will of the people and public opinion, in the process of which the media have great influence. Moreover, government actions are also influenced by those of foreign states and the position of the country in the international system.

Consequently, drafting of ROE is not only influenced by tension among factors (political, legal and military), but it is also influenced, within the political component, by the tension among:

- a) Interests and ideology of government officials
- b) Influence of domestic political actors who have an influence over the foreign policy and defense policy of a certain country.
- c) Influence of other states.
- d) Position of the country in the international system.

From a mere military perspective, ROE are the menu of options for the use of force allowed by the political power to the operational commandant to carry out the mission assigned. ROE have the purpose, in times of war or in times of crisis, of assuring the control of political conduction over the Military Instrument in order to regulate the use of force according to the political objectives set¹²⁶. In order to do so, it is necessary for the commandant to deeply know the political implications that their actions may have and to be able to correctly communicate their intention to all levels of the chain of command.

As a counterpart, political conduction must be fully aware of the consequences of the restriction to use force for security of Armed Forces deployed and, also, of the tasks they may successfully carry out given ROE restrictions.

This implies that ROE cannot interfere with the right of the commandant to protect their forces in the battlefield, which puts their physical integrity¹²⁷ in danger nor with the freedom of action, a principle without which their military options are seriously restricted.

We can therefore infer that ROE do not only require the military and political components to understand their mutual needs and achieve a proper balance as to the use of ROE at all decision making levels, but it is also necessary to train all decision making level, including the political one, in the use of ROE. Although the command structure of decision making levels is pyramidal, its nature is horizontal. This means that, for

125. For the purposes of this work, we will analyze the political component based upon the Argentinian democratic, republican and federal system.

126. Roach, J. Ashley, *op.cit.*

127. Roach, J. Ashley, *op.cit.*, p. 48.

example, a tactical fact may directly affect the national strategic level and vice versa. In order to prevent this type of incidents, it is necessary to have a mechanism in which political conduction interacts with military conduction and that the military conduction understands the objectives and needs of political conduction that restrict freedom of action of the commandant.

Basic Principles

In order to draft them, it is convenient to take a series of basic principles. A first principle is not to deny or restrict the right to self- defense, whether in times of peace or war.

ROE are based upon the idea of gradual use of force implementing the principle of necessity and proportionality set forth by LOAC, establishing that only the minimum force necessary to reach the objective set must be used. This is reflected as follows:

Whenever possible, before using air bombing, military targets must be distributed by mechanical equipment¹²⁸.

Whenever possible, and even when this is not required by LOAC, Israeli defense forces will conduct air attacks with precision using guided ammunition¹²⁹.

Based upon a wide variety of possible situations, in different contexts of peace, crisis or war, which have been analyzed in this research study, we suggest the following for the drafting of ROE:

- > Not to limit the commandant's discretion in the use of force beyond what is absolutely necessary for the fulfillment of the mission.
- > To allow subordinates to establish more restrictions than those imposed by the higher authority, but not to increase them at their own discretion.
- > To allow ROE to evolve in time based on changes in the situation or in the command given to the force.
- > To avoid drafting them as tactical instructions, as orders to establish procedures for the use of weapons or as a re- edition of LOAC.
- > To carefully distinguish purposes from means, so as to prevent actions that may be against national policies. An example of this may be the "non flight area", which is a means or a task to get a higher purpose, for example: the delivery of humanitarian aid or keeping fighters away from each other.
- > To consider all incidents that may occur in the context of a particular operation, such as the ones that may be more difficult to be analyzed, for example making an instantaneous decision during an air operation.
- > Although a ROE catalog does not necessarily need to be classified, it considers, as from the time within an operation, certain ROE are authorized, these become classified with the same condition as the operation in itself. However, and as mentioned before, to consider a certain group of ROE to be published through the media.

128. State of Israel, op.cit., p.97.

129. State of Israel, op.cit., p.97.

- > To use, in its drafting, expressions as simple and clear as possible to authorize or prevent certain actions, preventing them to be construed through complex decision diagrams.

An example of ROE drafting may be:

- 40 A** Use of force is prohibited to protect property that belongs to the Force.
- 40 B** Use of non-lethal force is allowed to protect property that belongs to the Force.
- 40 C** Use of force is allowed up to lethal force in order to protect property that belongs to the Force¹³⁰.

Probably the shortest ROE that were drafted correspond to the invasion of Granada in 1983. They were written by the Board of Chiefs of Staff and, although they were initially an only rule, the following four rules were finally drafted:

- > *Use force and weapons to the extent this is essential for the fulfillment of the mission.*
- > *Minimize damage that military operations may cause to domestic economy.*
- > *Carry out essential tasks in a rapid manner with the least number of injured persons and damage.*
- > *Treat Cuban/Soviet civilians no belligerentes with the same respect as other civilians are treated¹³¹.*
- > *Avoid vague or ambiguous terms. The use of ROE catalogs allows for the standard use of words that reduce the risk of ambiguity, which is important in the case of coalitions¹³². Also, it prevents the use of a very detailed language, sometimes impossible to be understood by the subordinate and, last, it restricts the extension of the document itself. During the Operation "Desert Storm", from an initial document of eighteen pages, another document of only four pages with all coalition actions was drafted¹³³.*

ROE, with which US Marines were sent to the Lebanon in September 1982, as part of a multinational force, in response to a situation of civil war which got worse every day, were drafted in an ambiguous manner, which caused the death of 241 of them¹³⁴.

Nowadays, it seems that UN peace forces will be called more often to protect civilians under imminent threat of physical violence, in a context in which it will be more difficult to distinguish combatants from those who are not, sometimes with little attention from the UN to the way in which the objective will be achieved or even without knowing if that is possible. Therefore, it is necessary to acknowledge that not all ROE, but some of them, will require specific military capacities, such as, means capable of determining the percentage of collateral damage, important budget and trained personnel.

- > To prevent ROE from putting the Armed Forces in situations of danger or desventaja or indefensión. An example that may put one's forces in a disproportionate

130. International Institute of Humanitarian Law, San Remo, op.cit., p. 40.

131. Hayes, Bradd C., "Naval Rules of Engagement: Management tool for crisis", RAND. N-2963-CC, July 1989. Prepared for "The Carnegie Corporation", p. 7.

132. Martineau, F., op.cit.

133. Humphries, op.cit., p. 29.

134. Skelton, Ike, "military Lessons from Desert from Desert One to the Balkans", Strategic Forum No. 174, October 2000, p.1.

situation and even in a situation in which the mission cannot be fulfilled is one of the ROE of the operation UNITAF in Somalia, which prohibited the inspection of private houses in search for stolen weapons or supplies. Knowing the rebels, each house became a possible sanctuary of weapons. Given that the UN forces could not enter even knowing that there was material there, the restriction imposed by this ROE did not only make peace forces feel frustration, but also made those who provided intelligence services to start to question the prestige and purpose of the UN mission¹³⁵.

- > In other occasions, ROE are drafted in such a restrictive manner to minimize the risk of one's personnel to be captured or taken as rehén.
- > To prevent putting Armed Forces in situations in which the legal context where ROE are applied is not certain or it is unclear. After the attacks to the Gaza Strip and the results of the Goldstone Report, Israeli defense forces, requested some clarification as to ROE related to combats in populated areas, as the existing ones led commandants to confusing situations. Discussion and said report made studies about LOAC and ROE to be extended to conduction level courses for officers. The Chief of the Israeli Defense Forces decided to include legal advisors at all combat divisions¹³⁶.

We may consider an apparently vague resolution of the Security Council in which it was ordered to establish a non-flight area for any military aircraft. In this case, avoid putting pilots in embarrassing situations, clearly defining: the exact meaning of the term "military aircraft".

- > Is it just an armed aircraft?
- > Does it include helicopters?
- > What happens with transport aircraft?
- > How is it necessary to act with respect to aircraft hired that carries supplies and military personnel or with civil aircraft that carries out recognition operations with military purposes?
- > How is it necessary to act with respect to military aircraft that carries civilians due to the collapse of the civil transport system or those that carry officers involved in peace negotiations?
- > Should those military aircrafts that deliver humanitarian aid be included in the prohibition?
- > Are military aircraft that deliver sanitary transport an exception?
- > To avoid ordering Armed Forces to fulfill missions without ROE issued and implemented beforehand. Almost all manuals of any country state the need to prepare individuals and units for each specific mission, including, of course, ROE of said mission. However, it is necessary to consider that in current conflicts, military men must face a threat that changes from one day to another, from one

135. Fimple, Stephen M., lieutenant commander, USN, "Rules-in-a knife fight? A study of Rules of Engagement", Naval War College, p. 10.

136. Pfeffer, Anshel, op.cit.

hour to the next one. During the Iraq War in 2003, a Marines unit that fought to recover the city of Fallujah was authorized to open “fire at their discretion”, but one hour before, the same unit patrolling a few blocks to the west had other ROE that only authorized to open fire after having been attacked with fire weapons and allowed them to deliver humanitarian aid to civilians whenever possible¹³⁷. Therefore, training in the execution of ROE is essential, a fact that will be dealt with in the second part of this research.

Considering language differences in missions with forces from countries that speak different languages. For example, load means, for some nationalities, to “put the cargador and place a cartucho in the recámara” and for others, just to “put the cargador”. Also, there are different criteria among nations with respect to warning shootings. For some of them, these shootings may be understood as a consummated use of force, while for others this is just a provocation act and the right to self- defense is not clear. In some states, for this to be considered a warning shooting, it must be made upwards, while for others it must be non- targeted fire.

NATO considers warning shootings as a way of advice rather than use of force, as considered by the United Nations catalog. In the European Union ROE, this must be defined in each operation: what warning shootings mean and it is necessary to establish whether they are considered as use of force or not¹³⁸.

As regards Rules for the Use of Force for operations in the national context, avoid supporting them with international laws that do not have constitutional national status.

The Operational Law Handbook of the United States Army summarizes the purposes of the ROE drafting in five rules:

- > Draft ROE in a clear and concise manner.
- > Avoid language subject to conditions.
- > Adapt language to the audience that will receive them.
- > Classify ROE according to the description of tasks.
- > Guarantee they are easy to be understood, remembered and implemented¹³⁹.

Considering that ROE require understanding by all persons involved, it is important to express them in a clear language so as to be included in a catalog to be taken on the knees of a pilot, the pocket of a soldier, in order to be easily read. When carrying out such aid, it is necessary to consider that ROE need to be understood by those of lower hierarchy, but they do not change the specific policies included in the ROE approved by national authorities. In other words, prevent this clear language from replacing the message by which ROE are implemented and making it be a complement to them.

137. Barrett- Mignon, Sherry, “A Brush With The New Reality The Law of Armed Conflict and Rules of Engagement in the Theater of the New War”, Loyola University, Chicago Critique: A worldwide journal of politics.

138. Sánchez Sánchez, Verónica, “ROEs, Rules of Confrontation, lieutenant auditor, Escuela Militar de Estudios Jurídicos, Cuaderno Práctico, 5 Nov, 2010- Apr 2011, p. 101.

139. OperationalLawHandbook, 2011.

We should not forget that even if the number of ROE is great, nothing may replace the professional criteria of a commandant and ROE do not aim at doing so.

Main documents and sources

We now present a list of sources which we consider essential for the drafting of ROE.

- > Documents from the United Nations Organization:
 - > Resolutions of the Security Council
 - > Reference terms for each specific mission issued by the Secretary General of the United Nations.
 - > Regulations of the Force Commander.
 - > Agreement on the mission status (SOMA)/ UN Model.
 - > Guidelines for the development of Rules of Engagement for UN Peace Operations (UN Document. MD/FGS/0220.001, May, 2002).
- > Other sources:
 - > Status of Forces Agreement (SOFA), agreements on facilities and infrastructure, agreements for mutual cooperation.
 - > Positive law of the host nation and treaties executed by the country providing troops (Ottawa Convention).
 - > Argentine positive law and international treaties executed by the country

Primary responsibilities

During the year 1993, records show that members of the Canadian forces, rendering services in Somalia, shot their weapons and caused the death of several Somali people in three different events. In their report, the Commission of Inquiry appointed for such purpose stated that members of the Canadian Defense Department had acknowledged that, during the prior year, they did not have some essential elements that may have been useful for those who had to draft ROE.

Moreover, the legal grounds of the mission imposed by Resolution of the Security Council No. 794, dated December 3, 1992, were ambiguous, there was no doctrine that set forth the way in which ROE had to be drafted for joint operations, nor those drafting them had a detailed definition of missions which included the mandate, nor a written document in which political objectives of the country were expressed or the concept of operations desired by the Force Commander. In sum, the Headquarters of the Canadian Armed Forces was not prepared to draft ROE of the "Deliverance Operation"¹⁴⁰.

Another example may be seen in the Gulf War: The most significant discussion with respect to ROE came to light when it was necessary to decide who had to draft them. In the Central Command, ROE were originally drafted by legal advisors and then revised by those who had to participate in operations¹⁴¹.

140. Report of the Somalia Commission of Inquiry Canadian Forces.

141. Myrow, Stephen A., "Waging War on the Advice of Counsel: The Role of Operational Law in the Gulf War", *Journal of Legal Studies*, 1996/1997.

Some state that, first, they have to be drafted by the latter as they are better trained in the art of war and, therefore, they have more practical knowledge of the operations. Also, if they are required to revise them, a problem that may arise may be that they become too dependent on the work of lawyers and relied on it to the extent of revising them in an integral manner. Others, on the contrary, claim that lawyers are trained at schools of law and in such a way they turn ideas into written documents in a clear and concise manner.

Who should draft ROE, lawyers or those who are going to implement them? This will surely be an issue that will never be finally decided but the truth is that both have to be present in the drafting of ROE.

Pursuant to the United States Operational Law Handbook, 2011, in order to assure that ROE are versatile, understandable, easy to be executed and legal and tactically appropriate, both operators and legal advisors must understand the broad scope of legal, political and operational aspects implied by ROE and work in a coordinated manner for its development, training and implementation¹⁴².

Legal advisors must be familiar with the mission and operational concepts, with capacities and restrictions of forces and weapons systems and with combat functions, military decision processes and the joint military planning system¹⁴³.

Confrontation needs to be familiar with the restrictions imposed by international and domestic law for the use of force and with the armed conflict laws. In particular, they must speak the same language so as to provide forces with the most effective ROE.

Drafting of ROE is a primary responsibility of the commandant and they are responsible for assuring that national objectives are translated into military objectives. However, he is responsible for having knowledge of the current and future operational context, including habits and cultures of the people rather than a simple description of geography or enemy forces. If there is no connection between all of this and ROE, the commandant will need to change them and inform their higher authorities about differences found. They are also responsible for knowing the political circumstances that may occur and lead them not to have enough time to draft them again, distribute them and assure their understanding. The commandant needs to know that, in spite legal advisors have a key role in the drafting of ROE, these rules will be the ones that will be finally implemented by military men fulfilling the mission.

Rules of Engagement have been drafted by our staff in the Central Command, and approved by General Franks and by me (Second Commandant). Once approved, they became final. If we had had to extend them, we would have needed approval by Rumsfeld and he would have needed the approval of the President given the relevance of the situation¹⁴⁴.

142. OperationalLawHandbook, 2001, p. 73.

143. Movement and maneuver, fire, intelligence, support, command and control and protection.

144. Delong, Michael and Lukeman, Noah, "A General Speaks Out: The <http://www.lukeman.com/ageneralspeaksout/excerpt.htm>

A similar process on how ROE were established for Spanish forces deployed in Iraq may be deducted from the speech made before the House of Representatives in July 2003 by the then Ministry of Defense, Federico Trillo- Figueroa:

Representatives, Mr. President, one of the most important aspects in operations of this type is what we call Rules of Confrontation in military technique, frequently known as ROE. In spite of the fact that this mission does not have the purpose of confrontation, military planning and prudence suggest to define in a more precise manner rules that establish the conditions in which force may be used. Their content, of course, will be in line with international commitments and Spanish laws. These rules will be set forth by the Chief of Staff and authorized by the Ministry of Defense and will rule the performance of Spanish units in the area, during the operation¹⁴⁵.

Having checked this assumption, in Spain, the draft made for each operation under the direction of the Chief of Staff, in his capacity as operational command, is subject to approval by the Government. At NATO, the Military Commandant presents it to be approved by the Committee of Defense Plans of the North Atlantic Council made up of 19 ambassadors¹⁴⁶.

In the case of operations under the command of the UN, this organization has prepared a draft of ROE which are adapted for each mission based upon the authorizations of each resolution. ROE for each operation are prepared by the office of the military advisor of the Peace Operations Department and the Legal Affairs Office, approved by the General Deputy Secretary for Peace Operations delivered to the Force Commandant, who may require changes that they may consider necessary. For each mission, ROE include one or more general permits for the use of force, chosen from among the ten options given by the UN Master List.

Each contributing country has the right to present exceptions to ROE by means of remarks called caveats as it happens with ROE of a coalition.

From the cases analyzed for Argentina, we can see that for domestic situations, Staffs of each force have drafted them and prepared them as a proposal to the Joint Staff of the Armed Forces, a body that presented them to the Ministry of Defense to be approved by the Executive Power, as Head of the Nation and Commander in Chief of the Armed Forces.

From the extract of the Executive Order passed by the President of the Republic of Brazil which we present below, we can see that in that country, the equivalent body to the Staffs is responsible for drafting them:

*DIRETRIZ MINISTERIAL Nº 15/2010
O EXCELENTÍSSIMO SENHOR PRESIDENTE DA REPÚBLICA, atendendo*

145. Plana, Miguel Alía, op.cit.

146. De las Rivas Aramburu, I, "ROE out of the wardrobe", Revista Ejército N° 794, 2007, p. 89.

à *EXPOSIÇÃO DE MOTIVOS INTERMINISTERIAL* n° 00460/MD/GSI, de 02.12.2010, decorrente da solicitação do GOVERNADOR DO ESTADO DO RIO DE JANEIRO, datada de 01.12.2010, para dar “continuidade ao processo integrado de pacificação do Estado do Rio de Janeiro, entre a União e o Estado ... nos termos dos §§ 2º, 3º e 4º da Lei Complementar n° 97/1999 e dos artigos 2º, 3º e 5º do decreto 3.897/2001”, AUTORIZOU o prosseguimento do “emprego temporário de militares das Forças Armadas ... para a preservação da ordem pública nas comunidades do Complexo da Penha e do Complexo do Alemão.

DETERMINO

1. Ao **COMANDANTE DO EXÉRCITO** que:

1.1. **ORGANIZE** uma **FORÇA DE PACIFICAÇÃO (FPaz)**, subordinada ao Comando Militar do Leste, para dar prosseguimento ao contido na **DIRETRIZ MINISTERIAL** n° 014/2010, com a missão de “preservação da ordem pública nas comunidades do Complexo da Penha e do Complexo do Alemão”, integrada por:

a)

b)

1.2. **DESIGNE** o Comandante da FPaz, que, de imediato, definirá com as autoridades estaduais, o início das operações;

1.3. **REMETA** ao **ESTADO-MAIOR CONJUNTO DAS FORÇAS ARMADAS**:

a) o “Plano de Operações”, para conhecimento e registro;

b) as “Regras de Engajamento”, para análise deste Ministério e subseqüente aprovação do **MINISTRO DA DEFESA** e do **GOVERNADOR DO ESTADO DO RIO DE JANEIRO**; e...

The same happens with the Republic of Colombia¹⁴⁷, where through Order No. 012 of the year 2007, the General Commandant of the Military Forces issued “Rules of Confrontation” for Military Forces pursuant to the legal powers stated in items d and e in section 21 of the Law 21335 of the year 1971, as amended by section 1 of Executive Order 2218 of the year 1984 and item h, paragraph 4, Chapter II of Executive Order 1605 of the year 1968.

As a conclusion, we may state that that the operations officer will form a work group responsible for their drafting, in which intelligence and plans staff will participate together with legal advisors in order to prepare clear ROE that are proper and precise without vague or ambiguous ideas. Taking into consideration that ROE for each operation are not permanent, this work group will also be responsible for their follow-up and for making any modification that the change of the mission or the threat render necessary.

*Rules of engagement are drafted in the following days*¹⁴⁸, this is what a NATO spokesperson stated before the Operation Unified Protector started in Libya at the

147. General Command of the Military Forces of Colombia, “Disciplinary Forensic Practice for Military Forces of Colombia, laws and case law”, volume II, p. 169.

148. <http://homepost.kpbs.org/category/libya/operation-odyssey-dawn/>

beginning of 2012. For professionals, this has been a diplomatic response to the media, as if there was a prior catalog, what may have been necessary would have been the selection of proper ROE for that operation according to the circumstances.

This clearly shows that ROE are established before the preparation of an operation through the prior drafting of a general catalog called ROE in force from which the most proper ones will later be selected or, rather, through the drafting of them for a specific mission.

In any case, whether they are selected from a prior catalog or they are created ad hoc, their drafting will be the responsibility of the operational command and they are prepared or chosen at the planning stage with the advice of the Legal Advisor, once the concept of the mission has been set and after the legal framework has been established upon the definition of political- strategic objectives to be achieved¹⁴⁹.

As we already know, among the main elements for the analysis of the mission, apart from studying the initial situation, its nature, guidelines or orders by the higher rank, the intention of the commandant, restrictions without his freedom of action, the commandant and Staff need to consider the impact of ROE imposed by the higher authority or by the Commandant of the Theater of Operations upon the capacity to fulfill the mission. This is the first opportunity for the commandant to require more restrictive or permissive ROE¹⁵⁰.

It is necessary for the development of ROE to start at the beginning of the planning process, generally before or during the preparation of modes of action, so that during the confrontation, acting in the same manner the opponent would act, it would be possible to predict their likely impact on planning, discuss political and military aspects and foresee likely restrictions and authorizations for the use of force and, therefore, be subject to the necessary changes so that they efficiently contribute to the achievement of the mission objectives.

After the period for drafting ROE is over and at the time of applying them, it may happen that the ones initially approved are not enough or, even if they are enough, they are not the most proper ones due to the different stages of the operation, changes in the situation (threats, political changes, among others).

These two issues are to be dealt with by the commandant who, if allowed to do so, will complement the relation of rules that they may consider necessary for his involvement in the operation. If they have no competence to do that, they will require, upon explanation of reasons, and through the chain of command, the Requirement of ROE (ROEREQ, in international language) while waiting for approval or denial (ROEAUTH, in international language).

This is what happened in Bosnia with the Stabilization Force (SFOR). During a meeting of ambassadors held on September 5, 1999 by the Atlantic Council, the Supreme

149. Plana, Miguel Alía, July, 2009, Noticias Jurídicas, <http://noticias.juridicas.com/articulos/70-Derecho%20Militar/200907-78965324897521.htm>

150. Vego Milan, Dr., "Joint Operational Warfare: Theory and practice", 20 September, 2007, Reprint of 1st ed, 2009, pp. IX-35.

Allied Commander Europe (SACEUR), it stated the importance of the SFOR to carry out an action that allowed to assure the existence of free media and freedom of expression of media in favor of the implementation of Dayton peace agreements, which, in many cases, were silent because of the action of radical groups. For this reason, the Council adopted an amendment of the rules with the purpose of allowing components of the SFOR to use force against local media that promoted violence¹⁵¹.

It is worth mentioning that this vocabulary is used almost everywhere, to the extent that the “Manual of Rules of Confrontation”¹⁵² of San Remo has a complete annex to describe ROE request messages (ROEREQ, in international language), authorization or denial of ROE (ROEAUTH, in international language) and ROE Implementation (ROEIMP, in international language) given that they must be continuously revised to assure they are clear and legal, they are enough to face the requirements of the mission and that provide the commandant with the powers necessary to effectively deal with the threat.

According to NATO¹⁵³, the process for drafting ROE is closely related to the process of planning the operation. This is a procedure that has three stages, the main line of which may be summarized as follows: after analyzing the concept of the operation, it is necessary to consider its legal framework and the political objectives, the operational commandant, after consulting with their subordinate commandants (land, sea and air), drafts the ROE projects which will be subject to approval at political level through a message called ROE requirement. Political authorities in charge of approving them will approve them through the pertinent message called ROE Authorization.

The strategic commandant (for example, SACEUR) will implement ROE sending the authorization to their subordinated commandants apart from adding their comments through a message called ROE Implementation Message. This procedure is delivered to minor units through the whole hierarchy chain.

As a general rule, the ROE project for each operation must be drafted as soon as possible, in order to make troops become familiar with them before they are deployed in the theater of operations and if a ROE that was not approved and included in the catalog appears, to allow troops to be trained.

Partial Conclusions

Up to here and as a conclusion about the issues implied in the drafting of ROE, we can state the following:

- > A wrong drafting of ROE may mean failure of a mission although it may be correctly prepared. The manner in which ROE are drafted will allow parties involved to identify the nature of the conflict of which they are part, and this is applicable to peace operations as well as any other operation.

151. Sánchez Sánchez, Verónica, *op.cit.*, p. 104.

152. International Institute of Humanitarian Law, San Remo, *op.cit.*, p. 66.

153. Martineau, F., *op.cit.*

- > As ROE organize, among other things, when and how commandants or independent units may use force, their open publication may reveal capacities or doctrines and one's own operational tactics or procedures.
- > If the opponent knows the rules that govern the specific circumstances in which force may be used or not, they will surely adjust their tactics for that. For this reason, ROE have the security classification of "secret". However, a part of them must be public so as to be released to the media.
- > As it may be easily concluded, one of the most difficult questions for a Commandant of a Multinational Force is to conduct troops from different countries with different national ROE. Therefore, it is necessary to make all necessary efforts to previously agree on ROE of an alliance or coalition as there have been cases such as in peace missions in Cambodia and Sierra Leone in which the Force Commander tried to harmonize them on the field and found resistance and insubordination¹⁵⁴. <

General Conclusions of the First Part

This research study was started dealing with several aspects related to the definition of Rules of Engagement. For this purpose, we have revised the Argentine definition in the joint context, specific definitions of each Force and compared these national definitions with other countries and international organizations.

Before presenting our conclusions, we suggest adopting the expression Rules of Engagement (ROE).

Regardless of its manner, ROE give authorizations, limits or prohibitions, among other things, with respect to the use of force, positioning and opinion of the forces and the use of certain specific capacities. In some countries, ROE have the status of guidelines for military forces; in other countries, ROE are orders pursuant to law¹⁵⁵.

These ROE are clearly different from Rules of Behavior and from Rules for the Use of Force (RUF). Rules of Behavior refer to the behavior of troops pursuant to International Humanitarian Law or the International Law of Armed Conflicts. RUF refer to the use of force in all land, navy and air operations carried out in times of peace within the territory, air space and national waters.

The latter are not a category exclusively used by the United States; we have seen that Peru, in the Legislative Order 1095 refers to Rules for the use of force by the Armed Forces in national territory" and calls them "Rules of Confrontation". Therefore, although RUF also mean authorizations, limits and prohibitions for the use of combat power, they have political, legal and military objectives that are totally different from ROE. While political objectives of ROE are focused on the relation with foreign actors, RUF objectives are focused on political objectives and national public opinion.

154. Findlay, *op.cit.*, p.370.

155. International Institute of Humanitarian Law, San Remo, *op.cit.*, p.1.

The difference made between ROE (international context) and RUF (national context) is based upon two reasons. The first of them is that operations within the territory authorized by the national government are different in their nature; a RUF to support the community is very different from a RUF to prevent looting in areas that have been devastated by natural disasters, or a RUF to prevent illegal fishing in territorial seas or a RUF for the bringing down of unidentified aircrafts outside their path without flight plan. RUF are, in general, much more restrictive than ROE.

The second difference is that national laws may be different from international laws in certain specific aspects and within each country, it is the government the one that has to enforce them through constitutional means made available to it¹⁵⁶. Therefore, words used are different. While ROE are drafted based on international commitments, as the UN Charter, international treaties or international law, RUF are drafted based on the positive law of the nation and of each province or states¹⁵⁷. Using the expression Rules for the Use of Force when referring to operations in the national territory will allow not to confuse said operations with combat operations, not to train military personnel using improper vocabulary and, also, to train them in relation with national positive law, in line with human rights law rather than International Law of Armed Conflicts.

As regards its origin, we have presented in a summarized manner the use that other countries, the United Nations Organization and the Argentine Republic have made. We may state that although other countries have used them since the '60s, in the '90s, the use of ROE became more general in military operations, whether multinational or not, as a manner to regulate and unify the behavior of military forces that were involved in said missions, such as combat missions, crisis management, peace restoration and/or humanitarian assistance.

At the beginning, ROE came directly from the highest political level, but nowadays, in general, they are chosen from a catalog approved by the political power in advance so as to allow equipment and training of troops.

ROE achieve political, legal and operational objectives as they are the instrument with which national authorities train forces deployed with respect to the use of force, they act as a control mechanism for the transition from peace times to war times and are an element for planning. ROE are a framework that includes national political objectives, mission requirements and laws. Moreover, these Rules are useful to prevent fratricide.

As regards political objectives, ROE assure that national policies and objectives are reflected in actions carried out by commandants in a Theater of Operations, in particular when communication with national authorities is not possible. An example of how ROE may reflect political and diplomatic purposes is the establishment of the restriction to attack certain targets so as not to affect laws of the host nation or the Status of Forces Agreement (SOFA).

156. Sennott, Daniel, "Interpreting Recent Changes to the Standing Rules for the Use of Force Major", November, 2007, The Army Lawyer, DA PAM 27-50-414.

157. The Center for Law and Military Operations (CLAMO) and Headquarters Marine Corps Judge Advocate Division, International and Operational Law Branch (HQMC JA (JAO)) ROE v. RUF.

As regards legal objectives, ROE set restrictions to commandants in line with national and international laws and may, under certain circumstances, impose greater restrictions than those imposed by law. This is why it is essential for commandants to be familiar, as soon as possible, with legal principles for the mission. Moreover, the commandant may strengthen certain principles of laws for the armed conflict, preventing harmful consequences. A practical axiom to be followed is that before using lethal power of weapons, it is necessary to think about the following day.

As regards operational objectives, ROE should set standards within which a commandant has to operate in order to fulfill the mission appointed, be a maximum limit for operations and assure that actions of this commandant do not start an unnecessary escalation and, also, regulate the capacity of this commandant to influence on a military action by providing him with or keeping the authority to use certain systems of weapons or tactics.

In line with the objectives mentioned, there are other standards to be considered. Use of force may be necessary, as it has been, to solve certain situations. This does not imply that it may be done without proper control or coordination with other means and, therefore, in particular, both at international and national levels, it is unavoidable to determine objectives and limits to the use of force.

On the one hand, ROE are the best engagement solution among military, political and legal requirements to make use of force in a manner that the military commandant at each level, whether operational or tactical, receives clear and correct instructions as to the objective to be reached, the behavior to be followed in each situation, the level of force to be used and restrictions in each case.

On the other hand, the military commandant of an operation should always request through the chain of command, prior approval of the operations plan with the necessary options or instructions. In this manner, difficult situations will be reduced both for military men and political authorities. In the new decision-making processes shared by governments and parliaments to analyze participation in international missions, the proper definition of ROE is conclusive as criteria when authorizing a mission for armed forces or not.

ROE are not an impediment for the proper execution of military operations, but when they are developed in line with consistent policies and with clearly set military objectives, they are a facilitating element.

For a certain operation, ROE is a tool for the commandant, as an individual action, to the extent it is carried out based upon a specific one, gives legitimacy for the tactical level¹⁵⁸.

These rules are a key document for the conduction of operations by the armed forces. They have an essential and necessary role in the regulation of the use of force in times of crisis and war.

Said regulation, in democracy, should be under civil control, but ROE are also tools for operational commandants. The correct coordination between them, through

158. Hittinger, William R., *op.cit.*

proper ROE, will allow operations to be successful and, therefore, to protect national interests.

As long as civil control over the use of armed force is kept, democratic governments do not have the obligation to draft ROE that put their Armed Forces in situations of danger or disadvantage and no ROE may restrict the responsibility of any commandant to provide the necessary security for elements under their command and responsibility, to allow for the fulfillment of the mission and to assure the protection of forces that are going to carry this out.

There are different categories to classify ROE: according to the nature of the occasion in which they are used; according to the geographical context in which confrontation takes place, according to the planning context, according to the level of authority that authorizes their execution, depending on whether they are used within or without the national territory.

It is convenient for each commandant to draft their own ROE of, if they exist, to select from the catalog the necessary ones to fulfill their mission and if new ROE are necessary, to request authorization to the pertinent political authorities. ROE are a responsibility of the command rather than of lawyers.

Military lawyers advise so that ROE are within the legal framework but they are not responsible for their correct application, and this is what they account for.

One of the main responsibilities of the command is that ROE do not pose a risk to the security of the force.

Moreover, it is convenient to take advantage of the auditor's ability to properly use accurate vocabulary when making changes or requests of modification of ROE drafted by commandants.

Some examples taken from the book *One Hundred Days* by Admiral Woodward allow to see three of the many responsibilities that any operational commandant has: not to start war before it is time to do so; to know their subordinate commandants and to assure they have understood their intentions.

First, I wanted to exactly control when and how "war" started. Then, I planned a local procedure called "Confiscate"... Up to that moment, I did not authorize, [giving the signal to start war], for us, war had not started yet. Actually, I had deprived my commandants of the right to self-defense and I had also imposed some restrictions to rules issued by our country that allowed them to respond to the attack. But I did not want this war to start immediately given that this would probably cause great confusion and loss of control¹⁵⁹.

As regards knowledge of their subordinates, in his journal, Admiral Woodward wrote the following as regards the commandant of one of his destructors:

Coward is studying the rules of engagement more than necessary and dreams with the idea of starting war on his behalf... Meanwhile, I will have the

159. Woodward, Sandy Admiral, *One Hundred Days*, Naval Institute Press, pp. 107-108.

need to extend ROE in such a way that all commandants know my plans rather than making their own interpretation which could be an attack with conventional weapons or destruction with nuclear weapons¹⁶⁰.

Admiral Woodward also wrote the following:

I was aware of the fact that a huge extension of ROE at local level would be essential. I had certainty as to the fact they were perfectly reasonable for Whitehall although sometimes they were not very clear in the first line, where there was no time to discuss implicit but undeclared details. In any way, two superior commandants under my command, Barrow and Conrad, were basically making a different interpretation of ROE, therefore, I thought it was convenient for them and other officers to get advice as to how we were expected to conduct ourselves during these first decisive exchange situations¹⁶¹.

In the case of Peace Operations, national governments need to develop separate ROE for each UN mission in particular, that is, each case is analyzed at national level.

Accepting from the beginning the ROE of a peace mission as established by the UN means to delegate the national commitment to contribute to third entities without any national responsibility. Each country may introduce national restrictions or reserves that they may consider appropriate to adapt ROE and even missions and commitments of their forces not only to their legal framework, but also to their foreign and domestic policy, introducing legal, political and military reserves as they may consider convenient.

This poses a series of challenges, but states keep the right to adopt their own ROE to the extent they fall within the scope of those adopted by the alliance. Once agreed or once the corresponding caveats have been made, ROE that have supremacy are, in all cases, the national ones as they are subject to this legal jurisdiction in case they are not complied with. However, it is convenient to consider that contributing countries at any time may extend or restrict initial ROE.

The same happens in those cases in which an alliance or coalition needs to be created, as it may occur with UNASUR, in which we generally find forces of countries with different doctrines and strategies.

For this case in particular, ROE are tools to coordinate the use of force, prepare the campaign, gather common efforts but, above all, they assure a common engagement towards the achievement of objectives as there is nothing more difficult than conducting troops with different ROE.

Agreement in the acceptance and implementation of Rules of Engagement will allow for the achievement of interoperability sought in any alliance or coalition. However, ROE do not condition sovereign nations in an agreement, but they simplify differences

160. Woodward, Sandy Admiral, op.cit., p. 100.

161. Woodward, Sandy Admiral, op.cit., p. 107.

by giving flexibility and the necessary space for all countries to feel in an equal position regardless of the size of their forces or their political influence.

If in one coalition a contingent uses more aggressive ROE than others, the life of other contingents may be at risk due to the possibility of crossed fire or particular events may be worsened or there may be an impression of escalation of the operation.

There is no magic formula to prepare or draft ROE given that there is a huge variety of factors that have a simultaneous influence. The key to their success is the same as for any military operation in general: preparation, coordination at all levels and approval.

ROE are difficult to be drafted due to legal and non- legal factors that affect the level in which force may be used in times of peace, crisis and war. Legal factors that are application to ROE (that is, the right to self- defense in the context of international laws, laws of armed conflict and, for national operations, domestic laws related to the use of force and support of civil authorities are complex issues.

Non- legal issues have a military and political rational that also requires understanding and experience, that is why, personnel in operations and legal advisors are obliged to be part of the process of drafting ROE in such a way that, as a whole, they may be useful not only for personnel in combat, but also for national interests.

ROE in a military force in operations are an essential tool for the political control of Armed Forces. They take to the field the political intention of the state in each circumstance. It is necessary to establish them in advance by means of a permanent committee and discussion among government, national and international entities involved. Legal advice at all stages is a key requirement. As ROE are authorizations, restrictions or prohibitions for the use of the military component of national power, they require approval by the Executive Power or at least by a Ministry.

Carrying out operations with ROE require trained troops that have equipment for that. In order to do so, during peace times, the Joint Staff should have a permanent catalog of ROE already drafted pursuant to national and international laws that include any possible circumstance and which has been approved by political power (President or Ministry of Defense) in advance so that troops may be equipped and trained.

For Argentina in particular, we propose the following:

- > To adopt the translation *Reglas de Enfrentamiento* for the expression Rules of Engagement as it is the one used by the Glossary of Terms of Military Use for Joint Military Action and the Executive Orders of the National Executive Power.
- > Given that the definitions of the Joint Staff and of each of the Armed Forces are similar but not the same, we recommend to have a uniform concept, with a broader definition, such as this one: ROE are authorizations, restrictions and prohibitions for the use of combat power, issued to assure political control of military forces in the fulfillment of missions appointed. They exercise political control over the military one, allow to fulfill the political intention and assure that International Humanitarian Law principles are followed.
- > To consider that ROE are different from Rules of Behavior.
- > Political authorization of ROE may be obtained by means of the issuance in times

of peace of a ROE catalog which includes all cases in which military forces may make use of force. Approval of this catalog should be given by political authorities of the Ministry of Defense and they should be informed to the troops to allow for their equipment and training. Currently, Argentina does not have this catalog approved by political authorities.

- > If during planning and development of an operation, there is the military need for other ROE not included in the Catalog, this should be under the responsibility of the military commandant who will have to draft them with the support of the Staff and request political authorization before implementing them. If this request is complied with, the military commandant may deliver this new ROE to the troops in order to allow for their training before applying them. It is essential to previously train troops as to the implementation of ROE on the field.
- > To favor the supremacy of national ROE over those of an alliance or coalition. This is also applicable to UN operations. Accepting ROE from UN missions without analyzing them may lead troops to engage well beyond the intention of the political authority at the time of contributing through the involvement of the troops. In an international mission, ROE may change easily and quickly. In that case, it will be the obligation of the Commandant of the Argentine Contingent to ask the national political authority before carrying this out. Therefore, it would be necessary to have members in the Defense Committees that can approve/ reject new ROE. This system is used in European countries that contribute to UN missions.
- > Distinguish ROE from Rules for the Use of Force (RUF), being the latter the ones that will be used in operations within national jurisdiction. Given that RUF are only based on domestic laws, they are much more restrictive than the first ones and they may require different equipment.

In this sense, and from a theoretical point of view, we can see a contradiction in section 31 of the Domestic Security Law No. 24059 enacted on June 6, 1992, which states that:

Section 31: Notwithstanding the support established in section 27, the Armed Forces will be necessary for the restoration of domestic security within the national territory, in those exceptional cases in which the system of domestic security described in this law is not enough, at the President's discretion, for the achievement of objectives established in section 2.

Paragraph c, section 32, states:

As the one established in this section is an exceptional way of use, which will be developed only in situations of extreme seriousness, this will not affect doctrine, organization, equipment and training of the Armed Forces, which will keep the characteristics set upon the application of Law No. 23554.

If use is established and this requires RUF, it is necessary for troops to have equipment and to receive training in advance. Failure to do this would imply an improvisation that may cause effects undesired by the political authority.

This contribution shows not only the importance of ROE, but it also highlights the difficulty faced by those who draft them and those who use, design, implement and use ROE given that in these ones, if their drafting is appropriate, they will reflect all specific standards for each operation.

ROE and RUF are an issue that is worth paying attention to, that need research and discussion both at War Colleges and Staffs and at any national entity which, for any reason, may be involved in the decision- making processes related to the use of national military forces. <

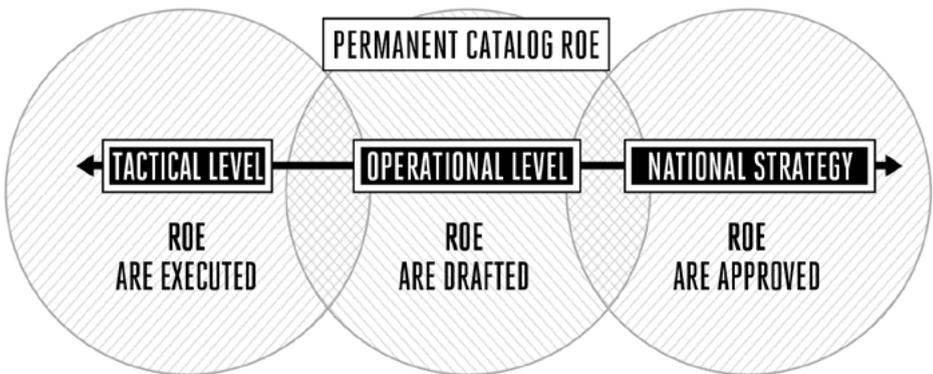
Second Part

INFLUENCE OF RULES OF ENGAGEMENT IN PLANNING AND CONDUCTION OF NATIONAL AND MULTINATIONAL OPERATIONS

As we could observe in Manual MC 20- 01, the first two steps of the planning method correspond to stages of operational design and the rest to operational art which is understood as the creative manner in which elements of the operational design are combined¹⁶².

Based upon this, operational design gives grounds to operational art, which will finally translate into tactical confrontation. Therefore, ROE must be seen as the conductor between national politics and tactical execution, and they, thus, need to be integrated to planning since the beginning to the end. This figure shows that.

Rules of Engagement as a connection between strategy and tactics¹⁶³



Source: Author

162. Joint Forces Staff College; MC 20- 01; op.cit.; p.32.

163. Thompson, Brian A.: Rules of Engagement in Hybrid Warfare Integrated into Operational Design"; Air Command and Staff College Air University, April 2010.

Rules of Engagement and Operational Design

Elements of operational design are tools that help a commandant of the Theater of Operations to foresee a campaign and shape their **intention**.

The first step of planning implies identifying the nature of the conflict in which forces will be involved, the mission to be fulfilled, the target/s to be neutralized, one's own forces willing and trained to be conducted, weapons assigned, terms required to be met and operational final state to be achieved.

Although all these points are closely related among them, the first three of them: mission, objective and forces are the essential ground to analyze military needs, which will be the essential factor to be considered so that the attack may be considered as legitimate from the point of view of International Law of Armed Conflicts (LOAC).

The last three of them, weapons assigned, terms required and operational final state to be achieved are the basic ground in the decision- making process because, based on them, the commandant must assess whether ROE imposed are proper for the requirements of the mission.

The purpose of this stage of planning is to assure that the commandant of the Theater of Operations and their Staff have clearly understood the tasks and the purpose of the operation to be carried out, for which purpose, both the Commandant and their collaborators will analyze all aspects of the order received.

The final product of said analysis is the initial orientation of the commandant for their subordinate commandants expressed in a Preparation Order, which among other things, includes their initial intention and guidelines to prepare modes of action and indications as to enlistment and other measures or initial restrictions that will be part of the campaign.

The initial intention of the commandant is their personal expression with respect to the final state to be achieved at the end of military operations. In order to do so, the initial analysis includes the nature of the conflict in which they will get involved, final conditions required, time available to achieve this final state, resources to be assigned to the Theater of Operations specifying possible means of coalitions and their likely restrictions, effort of war that the Military Strategy may have and restrictions imposed.

Restrictions

Restrictions to a commandant of the Theater may be of different categories. They refer, among other things, to geographical spaces in which military operations may be developed or not, interests of other countries which they do not want to affect, the prohibition or restriction in the use of certain weapons or deception aspects.

Restrictions imposed and other restrictions deducted after the analysis, must be informed to the Staff and the Commands of the Component of the Theater of Operations. This is so in light of the fact that planning is usually simultaneous and concurrent and that subordinate commands may start to carry out activities on the field, such as recognition flights or information meetings, once the Preparation Order has been received.

Another way to call them is the one suggested by Burton¹⁶⁴, for whom although there are some restrictions in any operation, such as materials or staff, in general, a

commandant may find three types of restrictions imposed by higher authorities related to ROE: geographical; types of weapons and methods to use combat power.

The geographical limits of the Theater of Operations is one of the most possible and common manners to restrict the use of force to a commandant of the Theater of Operations.

During the Korea War, air operations could not get closer than five miles from the border between China and North Korea to prevent China from getting involved in the conflict.

This type of restriction generally aims at reducing the risk that allies of the opponent get involved in the conflict as they feel threatened but this restriction is also used to send a message to the international community and the people in the sense that conflict will not escalate on its own.

Of course, the political need cannot lead vital targets to be out of the limits of the Theater of Operations.

As regards the restriction of the type of weapons, we can see facts in which the use of artillery or air attacks were not allowed in order to reduce to a minimum collateral damage. An example of this is shown by Gregory S. Mc Neal¹⁶⁵ when he explains that the President of the United States, Barak Obama, decided to choose Seals instead of using unmanned vehicles to attack the leader of Al- Qaeda, Osama bin Laden, although this could mean the loss of American soldiers due to possible collateral damage that could occur in the City of Abbottabad and the need to positively identify the target as a legitimate military target¹⁶⁶.

As regards the restriction to use combat power, we can highlight the prohibition to attack certain targets which, in many cases, is applied to show the world the unlimited proximity to LOAC and, therefore, the legitimacy of armed actions.

In the Operation Enduring Freedom (Afghanistan, 2001), ROE were directly issued by the President of the United States who decided to prevent any accident or action during attacks that may suggest that the campaign was an indiscriminate war against Afghan people or Islam.

This determination led to the requirement of the President that the campaign should destroy the least possible. To do so, they would use tactics that would outrage Afghans, that would not destroy even more what was already destroyed and weaken infrastructure of the country or that would promote Anti American sentiment in the Arab world¹⁶⁷.

In another occasion, during the planning stage of the Iraq war, both the government of the United States and military commandants considered that certain operations addressed against Saddam Hussein's regime may exceed the LOAC limits if, for any reason, civilians were attacked or disproportionate damage was caused to civil infrastructure.

164. Burton, Michael A.; "Rules of Engagement: What is the Relationship between Rules of Engagement and the Design of Operations?"; *School of Advanced Military Studies, U.S. Army Command and General Staff College*, 1987.

165. Mc Neal, Gregory S.; "The bin Laden aftermath: Why Obama chose SEALs, not drones"; disponible en: http://afpak.foreignpolicy.com/posts/2011/05/05/the_bin_laden_aftermath_why_obama_chose_seals_not_drones

166. Additional Protocol to Geneva Conventions, dated August 12, 1949, in relation with Protection of Victims of International Armed Conflicts (Protocol I), art. 52.

167. Lambeth, Benjamin S.; "Air power against terror: America's conduct of Operation Enduring Freedom"; *RAND*, p. XXVII.

This is why, from the beginning, the Pentagon issued no- strike lists (targets not to be attacked) which included hospitals, water treatment plants, water plants and other elements of civil infrastructure.

At the end of 2002, through a telephone number and a website, different UN agencies and non- governmental organizations were invited to provide data about those places they considered pertinent to be included in the list and this went up to thousands of them¹⁶⁸.

After analyzing all restrictions given, including ROE, which were imposed, the commandant of the Theater of Operations will be able to issue their guidelines as regards this aspect¹⁶⁹.

Rules of Engagement in the Initial Orientation of the Commandant

Pursuant to MC 20- 01¹⁷⁰, the initial orientation that the commandant will give to their Staff may include a series of data according to the level of knowledge of the operational context, within which there is, their **intention**, that is, their interpretation of the operational end state.

The more the commandant knows the environment, the more concrete their guidelines will be. As an example, we can mention a part of the tactical Directive¹⁷¹ issued by the Force Commander of the International Security Assistance (ISAF), in Afghanistan, general David Petraeus both for the ISAF force and the US Forces units-Afghanistan (USFOR- A) operating in this country in which their intention with respect to ROE is shown.

TAll Commandants must strengthen the right and obligation of coalition forces, our Afghan partners and other people to self- defense as authorized by the rules of engagement.

We must train our forces so that they know and understand rules of engagement and the intention of the tactical directive. We must give our troops confidence so that they can carry out all necessary actions.

At the same time, they need to understand strategic consequences implied by the loss of civilians. I truly hope that our troops use their best criteria according to the situation on the field. Beyond this, each soldier, marine, aviator or marine infantry will have my total support when we have to face the enemy.

Rules of Engagement and the drafting of modes of action

In this part of planning, the commandant must consider the manner in which ROE and the restrictions imposed by their higher authorities will be used in the fulfillment of

168. Woodward, Bob; *Plan of Attack*; Simon & Shuster; New York; 2004, p. 277.

169. It is worth mentioning that there are other types of restrictions, such as staff and materials, they will not be explained as they are not related to the topic under analysis and, also, their analysis would exceed the purposes of this research work.

170. Joint Forces Staff College, MC 20- 01; op.cit., p. 82.

171. "International Security Assistance Force – Afghanistan". Disponible en: <http://www.isaf.nato.int/article/isaf-releases/general-petraeus-issues-updated-tactical-directive-emphasizes-disciplined-use-of-force.html>.

their mission (for example, access or going through the territory, sea or air space of a sovereign state), because any requirement to change ROE, whether to soften them or make them more restrictive, will have to be taken into account and be solved during the development of the modes of action¹⁷².

This is due to the fact that restrictions that a commandant of a Theater of Operations may have received may collide with certain war principles, for example: the principle of the attack or the target.

A commandant cannot forget that before preparing these guidelines, they need to consider that the legitimacy of actions of the armed forces come from three important factors:

1. That the armed forces must carry out the campaign or the operation pursuant to international laws.
2. That they must be conducted pursuant to international laws and treaties recognized by the national government.
3. That the campaign or operation must be accepted by the people of the country or the international community. Although legitimacy will mainly be based upon the level of support by national public, other opinions are also important, such as those of third nations, civil populations near the area of operations and of other multinational forces and non-governmental organizations.

Therefore, the commandant of the Theater of Operations and their subordinate commandants will always balance military actions and legitimacy. An excessive use of force damages legitimacy of the organization and, at the same time, legitimates the opponent.

Therefore, commandants will take care of ROE to be in line with the desired end state and the situation. This is achieved when ROE that were imposed from the beginning of the campaign or operation consider all situations possible that may eventually occur.

Examples of the instructions that a commandant may give to draft modes of action are: prevent damage to civil buildings adjacent to military useful targets or only use precision ammunition guided to destroy key targets within a populated center.

After considering restrictions imposed and ROE that may have been ordered to the commandant, they will get to the second stage of the planning in which, after identifying tasks (explicit, implicit and essential); the operational end state; possible centers of gravity, assumptions, limitations and stating the mission, factors that allow to know the operational environment will be analyzed.

Rules of Engagement and Limitations

At this stage of planning we reach the analysis of limitations imposed by ROE, both strategic and tactical that will restrict the use of force due to:

- > National laws and policies

172. Joint Operation Planning Process (JOPP); "Instructional Workbook for In-Class Work/Wargaming" (Workbook NWC 4111H); JMO Department, *Naval War College*; 21 January 2008; pp. 1-33.

- > Military strategy in documents and orders issued
- > International laws included in the UN Charter
- > International treaties and conventions
- > Laws of the host nation and agreements on the use of forces that may have been executed (Status of Forces Agreement- SOFA), in case of Peace Operations (OMP)

At this stage, the commandant and Staff must consider the impact the ROE imposed by authority or higher levels will have over the fulfillment of the mission appointed. It is time to require them to be less limiting or more restrictive than those of other coalition forces as it may happen in multinational operations.

Under the principles of *jus in bello* of LOAC, the application of force has legal status and, except for those stated as crimes against humanity in the Statute of Rome, enacted on July 1, 2002, the rest of breach of *jus in bello* lie within national legal jurisdiction.

Jus in bello requires two basic conditions: necessity and proportionality.

The principle of military necessity establishes a sensitive balance between needs of war and humanitarian conditions, so as not to cause disproportionate damage to the opponent with relation to the purpose of the armed conflict, which is to defeat the enemy. It implies choosing the least damage so as not to cause to the enemy more violence than the one required for the development of hostilities.

The principle of proportionality prohibits weapons and methods that cause people and their property excessive damage with respect to a concrete and direct military advantage. Therefore, it is prohibited to launch attacks when it is foreseeable to cause civil deaths and injuries or damage to property of civil status or both things.

However, not all restrictions to the use of force are legal. It may happen that the commandant, based on logistical estimations and as a way to limit the consumption of ammunition, prepares ROE as the following one: Identification and determination of targets must be approved by intelligence sources before being included in the list of target to assure that the aerospace means are not used against fictitious targets.

Also, it may happen that other restrictions come from intentions to preserve critical infrastructure, prevent civil victims or reduce the risk of collateral damage, for example¹⁷³:

Infrastructure and economic items may only be attacked provided said facilities are used to support operations of the enemy; attacks must aim, to the extent possible, at damaging them rather than destroying them. If the target is close to a highly populated area, they must request authorization to attack them which must be given by the Joint Staff of the Armed Forces.

Having this authorization been received and before entering combat areas that may be inhabited by civilians, warning pamphlets must be thrown from airplanes, messages must be sent to mobile phones, the news must be released on the media and warning flares must be launched.

173. Note of the author: These examples of restrictions were presented in Trama Gustavo, Rules of Engagement. History, definition and objectives: Volume I, Joint Forces Staff College; Buenos Aires, 2012.

As regards attacks to communication lines, the Commandant of the Theater of Operations has authorization to attack them provided they are used to support operations of the opponent; attacks must aim, to the extent possible, at damaging them rather than destroying them; this authorization may be given by subordinate Commandants after having analyzed each case and provided they do not exceed the authorized level of collateral damage.

These restrictions will be translated into ROE after confrontation between the one's own operational designs and those of the enemy.

Collateral damage

As it could be seen in the last example, a limitation that the commandant may receive will be the level of collateral damage higher authorities will be willing to allow. With respect to this, it is necessary to make some comments, as nowadays, this is a key factor to be taken into account. As stated by Anthony Cordesman¹⁷⁴: War in Kosovo showed that minimizing collateral damage has become a new critical aspect of modern war.

Although there are much more complex definitions, collateral damage is understood as non- intended, which took place as a result of the use of weapons. This is directly related to the system of targeting, ROE and International Law of Armed Conflicts.

As it could be seen in the last conflicts which took place in Africa, Iraq and Afghanistan, as well as in Haiti, due to the increase in military operations in urban areas, armies of several countries had to face serious difficulties, in areas in which concentration of civilians and non- combatants is higher.

Rules of Engagement of the United States and Iraq clearly show this situation. Therefore, attacks to targets in populated areas which probably resulted in the death of civilians required the approval of the Secretary of Defense and were defined as Targets of High Collateral Damage:

Those that once attacked, have a ten per cent possibility to cause collateral damage due to the expansion wave and fragmentation, resulting in significant collateral effects on non- combatants and infrastructure, including:

- a) Thirty or more injured among non combatants.
- b) Important damage over protected sites.
- c) Consequences that significantly impact on non combatant population, including damage to the environment, buildings and infrastructure not related to the war potential of the opponent.
- d) Targets in the surroundings of "human shelters".

Therefore, in Iraq one of the limitations imposed to the armed forces was the requirement to request authorization from the Secretary of Defense to carry out attacks that had a reasonable possibility to injure more than a certain number of civilians¹⁷⁵.

174. Cordesman, Anthony H. and Burke, Arleigh A.; Chair in Strategy; "The Lessons and Non-Lessons of the Air and Missile Campaign in Kosovo"; p. 123.

In light of the need to identify the target and face it in a controlled manner, preventing crossed fire in an urban area (collateral damage), the development of special systems was promoted in order to increase accuracy and fire power of armored vehicles and which, at the same time, guarantee the protection of their operations and reduce collateral effects that result from these operations.

Moreover, NATO in Libya launched GPS or laser- guided bombs which have the possibility to be visually tracked by the pilot, which is authorized to change its path, if necessary¹⁷⁶.

Those who do not have such weapons will necessarily be obliged to use other alternatives to reduce collateral damage. This situation must especially be taken into consideration to be translated into ROE that allow to reduce it and, also, not to put the fulfillment of the mission and people at risk.

Among alternatives for the reduction of collateral damage, there are the following:

- > Use accuracy or light anti- attack weapons rather than mortars or campaign artillery in situations in which civilians are near combatants or as a manner to reduce damage to existing structures.
- > Reduce the use of certain ammunition that may penetrate in urban areas to reduce the possibilities to attack or enter second buildings that are not targets of military use.
- > Set areas in which weapons of great calibre cannot be used.
- > Use fire of demonstration to persuade the enemy to leave their defensive positions and surrender in order to prevent exchange of fire.
- > Practice techniques to control fire during training with the purpose of reducing collateral damage.
- > Use special snipers to eliminate snipers and positions in highly populated areas within the area of operations and, also, as an effective manner to reduce forces.

As it could be seen, the level of collateral damage that may be caused during a campaign is a key aspect of planning and this is why today it is not unusual that commandants select means or methods to attack that reduce said level.

However, said decision must be balanced with other considerations, such as, assigning more precise and economical means.

An attack with unmanned means may be much more precise and cause less collateral damage than other, but is it possible to use them under adverse meteorological conditions or against an opponent that has very sophisticated air defense systems?

In such situations, even when the commandant may use unmanned airplanes, their decision will surely be influenced by the most efficient means.

Last, in light of the fact that collateral damage authorized is a political restriction, it is necessary to consider that in a coalition, it may happen that contributing countries have

175. Available at <http://dissidentvoice.org/2008/02/us-iraq-rules-of-engagement-leaked-raises-question-about-rumsfeld-authorizing-war-crimes/>

176. "Report of the International Commission of Inquiry on Libya"; *Human Rights Council Nineteenth session*.

different percentage of accepted collateral damage. If means for the acquisition of targets and fire are not met under the authority of only one country, the existence of different levels of collateral damage may affect the efficiency of operations.

Rules of Engagement in the analysis of operational environment

This is the last part of operational design, a moment in which those who have to draft ROE will analyze the situation or, in other words, will know the operational environment in which the conflict will take place and how this will influence their drafting and execution as well as the military position of forces that will use them and contingencies to be faced.

In a work titled *Rules of Engagement in Hybrid Warfare Integrated into Operational Design*¹⁷⁷, Major Brian A. Thompson, of the US Air Force, describes considerations to be taken into account during the analysis of the operational environment.

According to the author, ROE should be the result of an adaptation process prepared for each situation. Its integration within the operational design must start with the description and evaluation of the operational environment according to certain factors: political, military, economic, social, infrastructure and information with the addition of the analysis of the physical and time environment.

Political reality must be analyzed, in particular, in those conflicts with limited objectives. If the survival of a nation is at stake, ROE will have fewer restrictions than in other conflicts. However, in the latter, it is necessary to respect international treaties not necessarily related to International Law of Armed Conflicts. Examples of these are: border treaties among some intervening parties; sovereignty of third countries; freedom of seas or others, such as the Antarctic Treaty which prohibits the establishment of bases and military fortifications; maneuvers and trial of weapons in their authority area.

As regards the military factor, the analysis of experience of one's own forces such as allies will give an idea of the level of restriction of ROE. Experienced forces are more prone to make correct decisions in difficult situations while, on the contrary, forces with little experience will require more prohibitions or restrictions.

As regards the analysis of the opponent, those who work in the drafting of ROE must analyze, as a first aspect, the fact that they have ratified or not the Geneva Conventions, their additional protocols and any other treaty that are part of the Hague Convention. Also, it will be essential when taking part of a peace operation in which some of the actors are non- state armed organizations which, of course, will not have signed those conventions and, therefore, are not bound by them. It is clear that breach of Geneva Conventions and Hague Convention by the opponent does not authorize a state to breach them.

For this reason, at this moment of planning, it is necessary to make some questions related to the fulfillment of International Law of Armed Conflicts by the opponent:

177. Thompson, Brian; *op. cit.*

- > Will they use human shelters?
- > Will they use civil property, cultural property, worship places and/or essential items for the survival of civil population to hide arsenal, command and control centers in order to perform attacks from them?

Responses to these questions must be given by intelligence entities and based on that information, they must change or include new ROE or additional measures.

Events like these ones occurred in April 2002, when troops of Israeli defense forces discovered that Palestinians used voluntary human shelters. In light of this, they imposed a ROE that gave priority to land attacks over air attacks due to the risk that the latter implied for civilians. This allowed for a tidy evacuation and to reduce the damage to neighbor facilities to a minimum, in spite of the fact that it clearly exposed Israeli forces to a greater risk¹⁷⁸.

Having legal aspects been analyzed, it is now necessary to identify possible targets to be attacked due to their military importance. It is here where the list of high value targets is prepared, that is, those whose destruction will make the fulfillment of the mission of the opponent difficult or impossible. This list will be useful at the time of preparing modes of action.

Another aspect to be taken into account when analyzing the opponent is the type of weapons they have. Currently, proliferation of weapons of similar characteristics to one's own weapons due to the acquisition of technology, whether open or hidden, must warn the commandant of the Theater of Operations with respect to the risks of producing victims among their own troops and allies (fratricide), as many military means of both opponents may see each other as the same.

Also, it is very important to have electronic means of Identification Friend or Foe (IFF) during the analysis of the military factor and during the development of the campaign, it is also necessary to know the location of friendly forces and land-based air defense systems.

During the operation Desert Shield, those responsible for the drafting of ROE for air defense operations had to know how surveillance and recognition aircraft would be used, what one's own tempo and the design of the Iraqi air activity were and what business air traffic that would go through the Theater of Operations was¹⁷⁹. After that, they had to consider who the users of ROE would be.

A proper ROE to solve this problem could be the following: Before the deployment of any military air unit, the crew must be informed as to the positions of coalition forces to prevent fratricide”.

In the analysis of the economic factor, ROE also have a key role as they have to restrict the attack to elements whose destruction or damage does not cause great inconvenience to non-combatants or require, after the conflict has finished, huge logistical tasks of the force.

178. The State of Israel; "The Operation in Gaza: Factual and Legal Aspects"; p. 97, inc. 257.

179. Heintzelman, Harry L. IV; Lieutenant Colonel; USAF, and Bloom, Edmund S.; Lieutenant Colonel; USAF; "A Planning Primer: How To Provide Effective Legal Input Into The War Planning And Combat Execution Process"; *The Air Force Law Review*, 1994.

The theory of Colonel Warden¹⁸⁰ is very famous. He thinks that attacking essential systems of a state such as power plants, distilleries and financial systems, is a way to reduce the capacity to keep the war effort of the opponent. However, such destruction many times may threaten the capacity to survive of the civil population, with which it may be possible to cause an ethics and even legal problem.

The analysis of the social factor is complex as any mistake may affect both morale of one's own troops and the population which is attempted to be defended.

Nowadays, the more civilian victims there are in a conflict, the more negative the reaction of local population and of international public opinion will be which may range from non-cooperative to exultant.

Moreover, if the opponent is skillful, they will exploit the injured and collateral damage with some impunity for their own benefit.

In asymmetrical wars, the main strategy of the weakest forces is to erase the distinction between combatants and non-combatants.

The analysis of the infrastructure factor must be carried out with relation to military, economic and social factors as the destruction of facilities that are vital for the population or for the future, both for one's own forces and the enemy's forces may create difficulties for the continuation of their own operations or dislikes in the community or a very important economic impact that makes it necessary to carry out important tasks in the area of Civic-Military Cooperation.

The physical environment is related to ROE as open fields minimize the possibilities to cause collateral damage, which will allow to have less restrictive ROE. On the contrary, operations in urban areas will require stricter Rules for the purposes of reducing possibilities to cause injuries to non-combatant civilians or damage facilities of non-military use.

Last, the analysis of the tempo factor must be carried out with respect to risk. The less available time to react, maneuver, deploy or relocate forces, the greater the risk that will be taken and ROE may be less restrictive. Time available will give the options of force to be used.

From the factors analyzed, political and military factors will be essential for the drafting of ROE. The political situation will give an idea of how restrictive they will be. The composition of one's own forces will give an idea of the capacities and, therefore, the weapons to be used and the characteristics of the enemy will give us an idea of their position with respect to International Law of Armed Conflicts even when this is only a hypothesis in planning.

Rules of Engagement and Operational Art

Once the analysis of the operational environment has been carried out, it will be necessary to determine the means with which the main effort and support will be made, the effect

180. Warden, John A. III; Colonel; "Air Theory for the Twenty-First Century" in *Challenge and Response: Anticipating U.S. Military Security Concerns*, ed. Karl P. Magyar; Maxwell AFB, Ala.: Air University Press, August 1994.

or result desired as to decisive points, when this will start and it will include the campaign and where main and secondary efforts will be applied¹⁸¹.

The Staff, based on knowledge that has been acquired after the analysis of explicit and implicit tasks and of the operational end state, will try to identify centers of gravity of their own and of the opponent and to determine which one's own and the opponent's weaknesses may be critical vulnerabilities.

The influence of ROE starts to play the most important role in the identification of capacities, requirements and critical vulnerabilities.

Destroying critical vulnerabilities of the opponent may cause a great impact over their center of gravity but what would happen if in that operation civilians died? This alleged advantage reached will surely be an impediment at political level.

An issue to be taken into consideration for the drafting of ROE may be the case of having identified the center of gravity of the opponent but restrictions or ROE imposed by higher authorities restrict operations to attack them. This would be the case of a ROE that restricts the acquisition of electronic information or the operational intelligence process up to certain latitude or length or the limits of the Theater of Operations do not allow it to be attacked.

Moreover, it may happen that a commandant, as General Mc Chrystal did, identifies a population (Afghan) as a center of gravity as without this support, the effort would not be useful and, for this reason, at this stage of planning, they draft a ROE to protect them ordering that the use of air- land and indirect fire weapons over residential neighborhoods is only authorized under very limited and restrictive conditions¹⁸².

Rules of Engagement in the design of modes of action

At this stage, it will be necessary to analyze whether the permanent ROE are sufficient to fulfill the mission and, if not, what additional measures would be necessary.

It may happen that the ROE drafting team or the legal advisor consider that certain Rules or additional measures will be difficult to be approved by the higher authority and, if so, they will have to immediately communicate this to those who prepare modes of action so that they modify or disregard them.

During the analysis of modes of action (subject to consideration) there will be support appreciation with the purpose of determining, among other things, their feasibility from the point of view of resources availability in order to fulfill certain missions.

If there had been a navy block as part of the campaign and if there is an imposed ROE by means of which it is established that two or more vessels are necessary for record, visit and capture tasks, the work group of ROE, in its support assessment, should advise those who prepare modes of action so that they decide whether navy resources are sufficient. If not, the Rule should be modified as those tasks could not be carried out or an intermediate option should be selected.

181. Joint Forces Staff College, MC 20-01; op.cit., p. 99.

182. Available at: http://www.ieee.es/Galerias/fichero/docs_opinion/2011/DIEEE025_2011ContribucionEspanolaISAF.pdf (retrieved on April 24, 2012).

This is why the work group of ROE must analyze each mode of action prepared from the point of view of ROE so that tentative modes of action are the least affected by restrictions imposed. This must be included when advantages and disadvantages of each of them are expressed.

Rules of Engagement in confrontation

During confrontation, the work group of ROE must advise the Commandant as to any aspect related to International Law of Armed Conflicts (LOAC), ROE, agreements and international treaties, treatment of non-combatants and legal aspects related to lethal or non-lethal nature of targets that are selected.

Whether at strategic, operational or tactical level of war, the purpose of any commandant is to use all their military capacities available in a synchronized manner in order to successfully and efficiently reach the main operational objective and the desired end state.

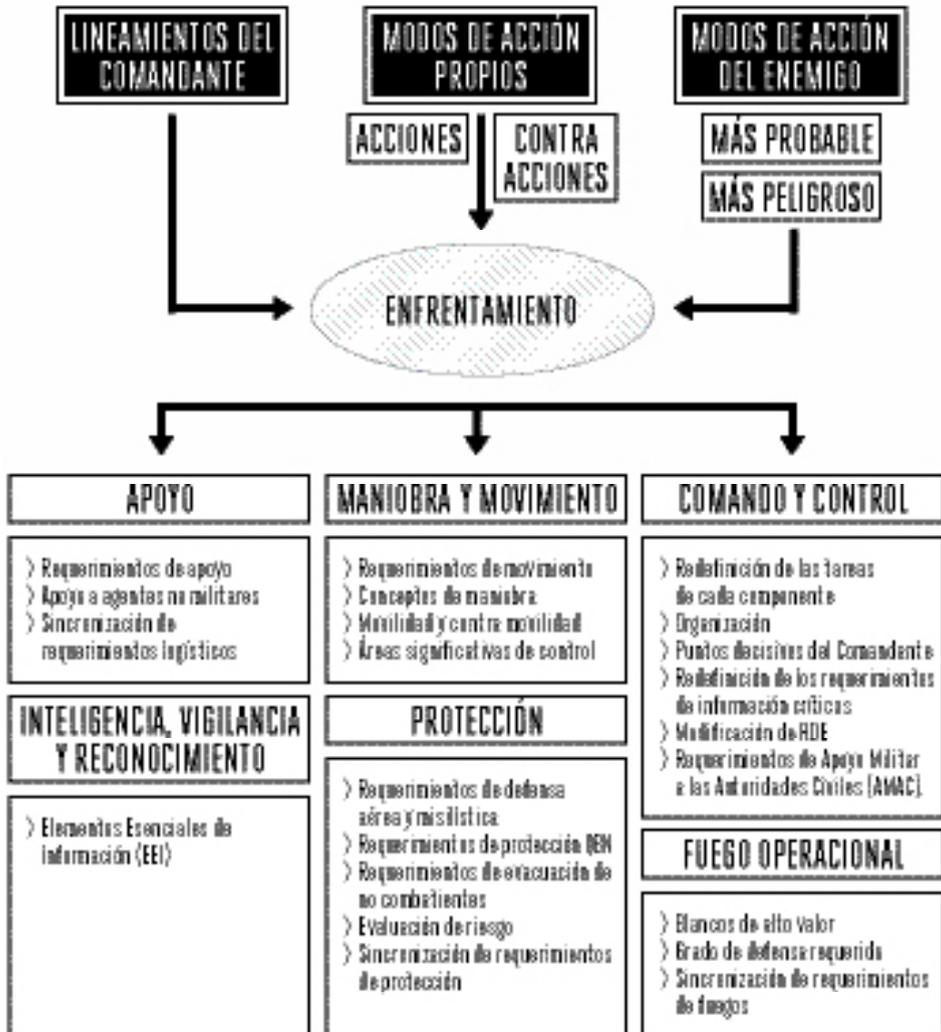
During confrontation of modes of action, called confrontation stage which is normally carried out by means of a war game¹⁸³, the Staff identifies a series of requirements which, in some countries, are the operational functions necessary to support the maneuver scheme, as it may be observed in the graphic "Confrontation Process".

183. During the planning of the invasion to Iraq, the war game for confrontation was called: Internal Look, and among the conclusions made, we can mention:

- > The need to take Special Forces to Western Iraq to prevent the Iraqi to launch their "Scud" missiles.
- > The impossibility to carry out an airborne operation over the Baghdad airport due to the Iraqi defenses in that place.
- > Warning to Marines with respect to the fact that they should forecast a rapid attack over Kirkuk at the end of the campaign with the purpose of controlling oil wells in that place.
- > The need to enough logistical equipment at the "Bushmaster" advances logistics base to keep operations during 20 days in order to advance over Baghdad.

This means that upon an action or mode proposed, there is a reaction and, therefore, a counter reaction as it may be observed in the graphic "The Confrontation Process"; Gordon, Michael R. and Trainor, Bernard E.; General, Cobra II: The Inside Story of the Invasion and Occupation of Iraq, Pantheon Books, New York, 1st. Edition, 2006, p. 92.

The Confrontation Process



Source: Author

Said operational functions help to assist the commandant in the integration, synchronization and conduction of operations and are grouped in six functional areas of joint capacities: command and control; intelligence, fire, maneuver and movement, protection and support¹⁸⁴.

According to Captain Narvajás Santini¹⁸⁵, the Operational Commandant applies operational art to plan major operations or campaigns, in which they must coordinate

and synchronize joint forces and many other activities of operational level. These activities are Operational Functions as to which there is no agreement as regards the list and meaning of each concept.

While the relative weight of each of these functions may vary according to the characteristics of each mission, the function “operational fire” is generally subject to criticism for the concept of the commandant operation, whether for attack or defense, because as part of the campaign plan, operational fire may be used for a variety of purposes. For example: to support land, navy or air operations; to control territories; destroy the potential of the adversary before they can use it; attack centers of gravity or for other purposes.

According to Professor Vego¹⁸⁶, fire is classified into: strategic, operational and tactical, according to the effect they are aimed to achieve.

- > **Strategic fire:** they aim at getting a greater effect in the result of the campaign or, in some cases, even the conflict. Those called strategic which occur outside the Theater of Operations must be required at political level.
- > **Operational fire:** these are aimed at achieving an operational purpose. Sometimes, they aim at forcing the enemy commandant to react earlier, for example in these cases: use reserve before what has been planned and some other times, they aim at deceiving them with respect to the place of the main attack.

According to this author, operational fire may be described as the application of power of lethal and non-lethal fire. The first are aimed at delaying, interrupting or harming the enemy’s forces or functions by means of conventional or non-conventional weapons, including missiles, bombs, cannons and even torpedoes and mines.

Non-lethal are aimed at interrupting or delaying the performance of forces, functions or enemy facilities through electronic war and psychological war.

An example of operational fire is mass air attacks carried out in 2003 during the war against Iraq (Operation Iraqi Freedom), which aimed at delaying or preventing the maneuver of three divisions of the Republican Guard from the North of Iraq to Baghdad¹⁸⁷.

Once the purpose of operational fire, such as easing the operational maneuver of friendly forces; prevent the operational maneuver of the enemy; retain enemy forces that have not been committed; destroy or neutralize critical facilities; interrupt their logistical support; diminish their morale or prevent their withdrawal; it will be necessary to integrate and synchronize them in an effective manner in operation plans.

Currently, this is done through a process of selection and execution of targets in such manner that the process allows to create specific effects to achieve objectives.

184. Joint Chiefs of Staff; Joint Publication 3-0: *Joint Operations* III-1; 2011.

185. NavajasSantini, Ramiro; Captain, Chilean Navy; “Operational Art and Joint Strategy”; REVISMAR 3/2006; Chile; p. 220.

186. Vego, Milan; “Joint Operational Warfare: Theory and Practice”; Reprint of 1st ed., 2009, Chapter VIII, pp. 59 and 60.

187. Vego, Milan; op. cit.; Chapter VIII, p. 59.

Tactical fire aims at obtaining tactical effects as they are executed to support forces during their movement. They have the purpose of destroying direct and indirect fire systems of the enemy as well as their air defense systems.

In the Handbook on Rules of Engagement¹⁸⁸ of the International Institute of Humanitarian Law, selection of targets, which is called “determination of targets”, is defined as:

This is the process of selecting and prioritizing targets and matching the appropriate response to them, taking into account operational requirements and capabilities, applicable ROE and International Law of Armed Conflicts (LOAC).

In said Handbook, it is stated that the relation between ROE and selection of targets is summarized as follows:

- a.** Forces may determine only those military objectives allowed to be determined in the relevant ROE.
- b.** ROE may impose political restrictions as to the determination of targets that go beyond LOAC requirements.
- c.** ROE can never allow the determination of targets that do not comply with LOAC.

Targeting

In the process of selection and execution of targets called targeting, targets are found and it is then decided whether they will be defeated assuring that force to be used, combat methods and targets are not contrary to LOAC.

This is why during operations, it may happen that the commandant of the Theater of Operations decides to restrict, limit or prohibit attacks over certain targets based on political consideration of the risk they imply, possibilities of collateral damage or laws of armed conflict.

A simple way to make an assessment with respect to possible collateral damage is to answer the following five questions¹⁸⁹:

- a.** Can I positively identify the object or person I want to attack as a legitimate military target authorized for attack by the current rules of engagement?
- b.** Is there a protected facility (i.e. NoStrike), civilian object or people, or significant environmental concern within the effects range of the weapon I would like to use to attack the target?
- c.** Can I avoid damage to that concern by attacking the target with a different weapon or with a different method of approach?
- d.** If not, how many people do I think will be injured/killed by my attack?
- e.** Do I need to call my higher commander for permission to attack this target?

188. International Institute of Humanitarian Law; “Handbook on Rules of Engagement”; San Remo; November 2009; p. 26.

189. Center for Law and Military Operations (CLAMO); “Legal Lessons Learned from Afghanistan and Iraq”; Vol. 1: Major Combat Operations; The Judge Advocate General’s Legal Center & School; United States Army; Charlottesville; Virginia; p.103.

In his final assignment, Captain Braghetta, graduate from the Joint Forces Staff College, proposed to apply the method of risk analysis to decide what Rules to use in the Theater of Operations under the obvious condition of anxiety caused during operations. This work shows a matrix to assess the level of risk implied by certain levels of collateral damage in the fulfillment of the mission.

Once targets are validated or approved, there is a detailed analysis of the capacities available with relation to desired effects, a process that is guided by the principle of proportionality. It is at this moment that the commandant of the Theater of Operations will try to mitigate the risk of collateral damage selecting weapons and tactics which, to the extent possible, will produce the desired effect and minimum collateral damage. At this stage of planning the restrictions mentioned before become ROE.

The process of targeting will be based on end knowledge of the end state and tasks to be carried out. In contemporary military operations, ROE tend to be more restrictive in order to satisfy political considerations related to the application of combat power, especially when it comes to using indirect fire¹⁹⁰.

For example, a typical ROE may restrict the use of indirect fire in urban areas when there are no advanced observers. As it may be seen, this rule is not included in LOAC but its implementation will allow the commandant to be sure that the target will be useful in military terms, collateral damage will be within limits set and fire will be open over the target established¹⁹¹.

For those targets that are approved or validated as such, ROE must establish how, when and under what circumstances a target may be attacked according to the following classification:

1. Against troops that are in contact
2. Against pre- planned targets
3. Against targets in transit or transitory
4. Against time- sensitive targets

An example of how ROE may be seen in the Annex to the Campaign Plan would be the following:

- > **Troops in contact:** when one's own forces are in contact with those of the opponent, whether in response to a hostile act or attempt or in reaction against a positively identified force and declared as enemy force, commandants that are in that place have received approval to use all necessary organic and non-organic weapons and are responsible to minimize collateral damage in a proportional manner.
- > **Pre- planned attacks:** their approval, whether they are persons or targets, is

190. Corn Geoffrey S. and Corn, Gary P.; Lieutenant Colonel; "The Law of Operational Targeting: Viewing the LOAC through an Operational Lens"; *Texas International Law Journal*; Volume 47, Issue 2; p. 357.

191. Corn Geoffrey S. and Corn, Gary P; op. cit.

determined upon the type of target: arsenal and ammunition storage, infrastructure and economic items and communication lines.

As a general rule, subordinate commandants may defeat them after the commandant of the Theater has analyzed them on a case by case basis.

An example of ROE for this type of targets may be: buildings taken during daily hours and military targets located in the surroundings of said buildings that may only be attacked during the night.

- > **Instant, transitory or in transit targets:** these are those targets that stay within observation distance or within the scope of weapons for short periods of time which require little time so as to adjust weapons to open fire against them, for example with aircraft, vehicles; troops in transit, etc.

Based on this situation, there will be an analysis, before attacking in transit or transitory targets, whether for items or persons, in order to determine whether the target has a significant value, if their nature is temporary, if it is a hostile force and, also, collateral damage that the attack may cause.

Under these circumstances, commandants of the component must assess possible collateral damage and if, from this assessment, we can state that it is very likely that said damage may take place, the attack will be authorized by national authorities.

If, from the assessment, we can state that there will be no collateral damage or that it is not likely, different levels of command may normally approve the use of different resources:

- > **If there is no collateral damage:** the commandant at brigade level is authorized to use any weapons system available, when the attack is approved, he will be responsible for determining the positive identification of the target and to respond in a proportional manner.
- > **If there is little collateral damage:** the commandant at brigade level is authorized to use any direct fire means, except for air resources, when the attack is approved, he will be responsible for determining the positive identification of the target and to respond in a proportional manner.

However, the commandant may also draft a ROE ordering that vehicles in transit are attacked when they are as far away as possible from civil populations.

During the war in Iraq, US land forces considered, in order to carry out attacks, a safety distance of between 300 and 500 meters, in presence of civilians or civil items and required visual confirmation before opening fire except in the case they are being attacked¹⁹².

An example of negative consequences that the attack to this type of targets is the one launched by ISAF on September 4, 2009 in the northern Afghan province of Kunduz by NATO forces. The action against two tanker trucks stolen by the Taliban was ordered

192. Kahl, Colin H.; "Rules of Engagement: Norms, Civilian Casualties, and U.S. Conduct in Iraq"; *Council on Foreign Relations International Affairs; The Lone Star National Security Forum, Austin, TX, Mar. 30-1 Apr. 2007.*

by the German Colonel Georg Klein, without considering that dozens of civilians were taking fuel from them.

On September 4, 2009, the Colonel responsible for the German headquarters in Kunduz received an urgent call. Two tanker trucks full of petrol have been taken by the Taliban. The reporter told Klein that the trucks could be used to attack the German military base in a suicide action. When the reporter finished the call, Klein, using the satellite telephone, dialed a secret number to communicate with NATO air base and requested immediate action of combat airplanes that had to destroy the two tanker trucks.

US forces complied with the order of the German Colonel and sent a combat airplane F-15 that threw two 500-pound bombs over those two trucks full of petrol that were located by the river bed. 142 people died¹⁹³.

In June, 2010, it was known that the victims included many civilians, who were trying to siphon off fuel from the tankers that were located by the river bed while the Taliban had left fearing an attack by the fighter jets that were circling the area¹⁹⁴.

The event in Kunduz led to six official reports in Germany, but none of them led to punish the action of the Colonel who, in August 2012, was proposed to be promoted to General. The Chief of Defense Staff, General Wolfgang Schneiderhan, the Defense State Secretary (Deputy Secretary), Peter Wichert and the Ministry of Labour and Social Affairs, Franz- Josef Jung, Head of Defense at the time the events took place¹⁹⁵.

After some months of negotiation, the German Army announced that they would pay US\$5000 (3800 Euros) to each relative of the more than one hundred victims but they did not take any blame for the events.

- > **Time- sensitive targets:** these are the targets that require an immediate response as they represent or may represent danger for one's own forces or they are highly profitable or transient. They do not necessarily have to be mobile targets. Some examples of time- sensitive targets may be: a building temporarily taken by the opponent's forces or civil or military devices planting mines or combatants installing improvised explosive devices.

After confrontation, the pertinent authorizations to component commandants that acquire certain time targets so they can be defeated immediately are normally stated through a ROE.

In the Anaconda operation, from the perspective of the Mountain Joint Tasks Force, the whole Shah-i-Kot valley and their access routes are within the scope of enemy mortars,

193. El País newspaper, World section, available at: http://internacional.elpais.com/internacional/2012/08/22/actualidad/1345629530_311950.html

194. Gebauer, Matthias, "Aftermath of an Afghanistan Tragedy: Germany to Pay \$500,000 for Civilian Bombing Victims"; *Spiegel Online International*, disponible en: <http://www.spiegel.de/international/germany/aftermath-of-an-afghanistan-tragedy-germany-to-pay-500-000-for-civilian-bombing-victims-a-710439.html>.

195. La Nación newspaper, World section, November 27, 2009, available at: <http://www.lanacion.com.ar/1204887-alemaniarenuncio-un-ministro-por-ocultar-informacion-de-un-bombardeo-en-afghanistan>

which would turn their position into legitimate targets to be defeated by means of close air support. However, as many of these targets reduced in that little battle space, they were included in the categories called “in transit” or “time sensitive”, the ROE in force prevented them from being attacked by aircraft in close air support due to its possible proximity to non-combatants.

This situation made it necessary to have prior authorization from an authority higher than the Commandant of the Theater of Operations (in this case, the Central Command –CENTCOM- that was in Tampa, Florida) in order to attack them as the members of Al Qaeda were often mixed with Afghan civilians and some reports stated that they offered money to local residents in order to use their houses¹⁹⁶.

For Australian defense forces¹⁹⁷, from the result of confrontation, new ROE and Fire Guidelines must arise. The latter, usually permanent (although they may be issued for an exercise or operation in particular) must, among other things, specify:

- > Targets that are approved, restricted or not authorized
- > Methodology to be used to estimate collateral damage
- > Levels of risk authorized for each Commandant
- > Coordination for the exercise of command and control
- > National policies and legal aspects related to targeting

These examples, in spite of being illustrative, are not enough to show the different alternatives that may exist in a conflict. This is why, during confrontation, the following questions must be asked:

- > If a target is near a sensitive place, such as a school, can this target be defeated by restricting the type of weapons to be used or can it not be defeated?
- > If a target has been authorized to be defeated, what type of ammunition may be used?

With respect to the operational function protection and in relation with the level of air superiority desired to be achieved, the following examples will allow to see the type of ROE to be required during an operation or campaign.

Air superiority may vary from total control over the whole Theater of Operations to local control over a certain area of operations. Also, control may be temporary or permanent.

Depending on the force of air defense enemy elements located on the field, air superiority may be limited up to certain flight altitude for one's own aircrafts and such limitation may be imposed through a ROE such as the one in force in the War in Afghanistan in October 2001. This forced American aircraft to fly 13000 feet high due to the threat posed by missiles SA-7/13 manufactured by the Soviets such as Stinger from the United States which the Taliban had.

196. Lambeth, Benjamin S.; op. cit.; p. 210.

197. *Australian Defence Doctrine Publication* 3.14; pp. 2-3.

Another example may be a ROE or additional measure that states the prohibition to operate less than 100 miles from a certain coast in order to be out of reach of certain type of weapons.

In 2006, the Israeli Navy imposed said ROE to its surface units after the Class Saar 5 Hanit Corvette was attacked by Hezbollah with missiles C- 802 coming from the field¹⁹⁸.

Rules of Engagement in drafting a Campaign Plan

In the context of current conflicts, any armed force in operations requires that missions ordered are in line with ROE and restrictions related to different types of fire so that proper control may be exercised. It is also required that commandants are given authority and freedom of action to exercise missions.

The Campaign Plan and Operations Plans must clarify the objectives to be achieved and tasks to be carried out and to assure certain balance between centralized direction and decentralized execution. Before combats started and, to the extent possible, guidelines for fires and operations must be stated.

Therefore, ROE must have a common interpretation so that proper control is possible and delay to get authorization from higher authorities to defeat critical targets is reduced.

Taking into consideration that ROE are not basically a legal document but an instrument for military operations, they are included in an Annex to the Campaign Plan and/or Operations Plans.

In the first part of the work, considerations for drafting ROE have been explained. As from the analysis of different international publications¹⁹⁹, the following aspects must be included in the preparation of the Annex to of ROE to the Campaign Plan, both for a national or multinational operation:

- > **Mandate of the mission:** it summarizes the political, legal and diplomatic framework upon which the mission is based.
- > **International Law and International Law of Armed Conflict:** short description of the relation between the mission and international law. Depending on its nature, it may include a description of the applicability of certain rules of International Law of Human Rights and other regulations and everything related to OLAC, for example:

Respect for International Law of Armed Conflict and usages and customs of war generally accepted in the planning process of operations mainly implies fulfillment of rules set in the Geneva conventions and additional Protocols, as well as in international treaties for prohibition of weapons and similar items. In case one of the countries contributing troops has not ratified said instruments and

198. Lambeth, Benjamin S.; "Airpower and Strategy in Israel's 2006 War against Hezbollah", *Naval War College Review*, Summer 2012; Volume 65; Number 3; p. 88.

199. "Nato Legal Deskbook", Second Edition 2010; "Rules of Engagement Handbook"; International Institute of Humanitarian Law; San Remo; November 2009. "Operational Law Handbook 2011"; International and Operational Law Department, The Judge Advocate General's Legal Center and School (TJAGLCS).

other participants have, for the only purpose of this operation, this will be observed without implying acceptance by the non- signatory country at general level or of other situations.

- > **Domestic laws related to the mission:** when the national authority has stated certain caveats to ROE of the coalition, it is necessary to summarize them and identify the impact they will have in the fulfillment of the mission. Armed forces of participating nations will adjust themselves to their domestic laws and are not bound to fulfill any mission or task that may be a breach of them. Therefore, in the Annex of ROE, instructions must be included to assure compliance with said caveats, which need to be coordinated in advance with the commandant of the Theater or subordinate forces, for example:

Armed forces of nations that participate in the Alliance/ Coalition must also comply with their own domestic laws. They are not forced to carry out missions, operations or tasks that may represent breach of their domestic laws. Therefore, it is necessary to acknowledge that nations will issue extension or restriction measures to these ROE to assure that they comply with domestic laws. None of these extended instructions must be more permissive than ROE of the Alliance/ Coalition. When national rules are not in line with ROE of the Alliance/ Coalition or they are more restrictive, this must be informed to the Commandant of the Theater as before.

- > **Self- defense:** the Annex must clarify the relation between self- defense and ROE.

All individuals and units have the right to defend themselves against the attack or imminent attack and ROE cannot limit it. Due to the fact that domestic laws of countries participating in a coalition are different among them, the action of a multinational force will not always be coherent with respect to the extent to which the right to use force is allowed and where the right to use force starts in order to assure fulfillment of the mission.

This has to be discussed in the planning stage and if there is disagreement among ROE for the mission, they do not need to be construed as restrictions to the right of self- defense.

- > **Defense and protection of friendly forces:** the authorization from national authorities for their forces to defend friendly forces that may be attacked or that are being attacked must be expressed in the Annex.

ROE may also be used to define the word “forces” if applicable to those civilians that operate as part of the group of troops.

- > **Protection of persons and property with a special status:** the Annex must explain policies related to the protection of members and property of international, regional or local organizations.

- > **Obligations of forces:** as long as the contrary is not stated in LOAC, ROE may be used to give special instructions or general rules with respect to the application of certain principles of LOAC in the context of a specific operation.

An example of this may be what is understood as: military necessity, degree of collateral damage allowed, the obligation to inform about certain events that may

be breach of ROE or OLAC or inconsistencies of ROE. This is not an exhaustive list, but a list of examples. The important fact is that information included in ROE must be clear, concrete and related to the mission to be fulfilled, as it is expressed in the following paragraphs:

Respect to the principle of proportionality: this implies that the determination and use of means to carry out a certain mission must have a proper relation of means with respect to ends aimed to be achieved. The use of force must be restricted to the achievement of the desired result. Operations must be planned in such a way that the advantage to be obtained justifies the negative effects that may exist with respect to non-combatants or civil facilities. Moreover, planning of operations must reduce to a minimum the possibility of accidental or collateral damage to non-combatants or civil facilities. The use of weapons that cause unnecessary damage or suffering is prohibited. Operations that cause serious and permanent degradation of the environment cannot be carried out.

It is necessary to make any reasonable effort to reduce confrontation starting warning procedures. Provided the operational situation allows it, the initial step to solve a potential confrontation, apart from the use of force, is to carry out warning procedures. Alert or warning shootings, if authorized, must be included in the warning procedures, but they must be clearly perceived as such and, therefore, it is necessary to be careful when applying them when it is reasonable and safe to do so. There must be procedures to make warnings that include warning shootings.

- > **Key definitions:** if necessary, definitions of terms related to the mission that are approved in the catalog of permanent ROE or in a combined publication, such as the AAP 6354²⁰⁰, must be repeated and extended in the Annex.

The following is an example of this:

Air Support to Land forces: this is air attacks with two purposes: to defend land forces from hostile acts of maritime or land forces, and air attacks carried out as part of prevention missions, which require a detailed integration of each air mission with fire and movement of these forces. This definition includes Air Support close to the fixed wing, rotary wing (including attack helicopters), AC-130 in missions of Close Air Support related to operations of Enemy Air Defense and tactical air attacks to surface maritime units.

Fire weapon: any weapon mainly designed to open fire to items or cause injuries to people through fire action, flames, heat or a combination thereof produced by a chemical reaction or a substance that is spilled on the target.

Due to the fact that there are sometimes situations in which there is not an only definition for a word, a sentence must be included in relation with the circumstances

200. AAP-6(2009); is a combined publication of NATO, agreed by nations that are part of the Alliance and is titled Nato Glossary of Terms and Definitions (English and French).

surrounding the mission which assures the same definition for all forces in operations, as stated in the following example:

For the purpose of ROE XXX, “to give active support” means any action which directly or indirectly contributes to the hostile act or war or hostile forces against friendly forces, for example, an advanced observer of artillery or air controller directing land and air fire.

The Annex will include a series of appendices, the first of which will normally explain, in a detailed manner, what a hostile and hostile attempt are and the purpose of ROE for each mission and who and when they must comply with them, promulgate, update or amend them, for example:

ROE of this Annex are effective during the time operations are effective in (place to be determined), as established by the Ministry of Defense or the Commandant of the Theater of Operations or until they are derogated or modified by the competent authority.

In the appendices, there are normally particular rules as to land, navy or air- space operations, to which ROE taken from the catalog are usually added. Also, additional measures for the fulfillment of the mission and, in the latter, ROE that will be published are stated.

An example of this is:

Military aircraft of the coalition must carry an exterior sign that states their nationality and military condition in the manner established in their respective domestic laws. Its crew will be exclusively military.

Navy forces will not make maneuvers in high maritime traffic where internationally recognized separation schemes are in force.

ROE must also state all types of operations including medical support to non-combatant civilians that may be injured as, on the contrary, forces will evacuate them in the closest sanitary place without considering the patient’s condition, without asking how injuries were caused or the availability of medical resources in the nearby²⁰¹.

For example, in Haiti, United States ROE stated, on the one hand, that each soldier had to be trained with respect to how to proceed if there is an injured and where to take them if they are civilians or military²⁰². This rule based its principle in the fact that the main mission of the military hospital was to serve as support for the force, and also, apart from being small, it had limited capacity and resources for the assistance of patients.

On the other hand, and upon the same grounds, ROE stated that, if a civilian was found injured, the soldier had to provide them with first aid and then take them to a civilian hospital, except in the case the injury is a consequence of a military action²⁰³.

201. Martinez-Lopez, Lester; Colonel, USA; “Medical Support for Urban Operations”. Available at: http://www.rand.org/pubs/conf_proceedings/CF148/CF148.appk.pdf (Retrieved on June 1, 2012).

202. Martinez-Lopez, Lester; op. cit.

203. In places of ethnic or religious conflicts, it is necessary to take into consideration that the injured of a part must be taken to hospitals or healthcare centers of their own ethnicity or religion in order to prevent revenge possibilities, as it happened in Cyprus in 1973.

In the drafting of the Annex to Rules of Engagement of a Campaign Plan, the following must be prevented:

- > Transcribe or reveal the strategy, doctrine of use or tactics: the Annex of Rules cannot be used as a mechanism to describe strategies or transcribe doctrines or reveal tactics or capacities of weapons or detection systems. The commandant must express their strategic thinking in the Campaign Plan and corresponding annexes.
- > Repeat OLAC: it is not advisable to include an extensive explanation of OLAC. Commandants must emphasize in the Rules some aspects of OLAC which are relevant for their Campaign Plan.
- > State restrictions related to security: although the use of certain weapons requires specific security measures, these must not be detailed in the Annex to ROE, but they must be included in the normal operational procedures.

The drafting of ROE is a responsibility of the operations officer. Military auditors will advise the Staff so that the Annex is consistent: with international law (including OLAC); the political mandate of the mission; domestic laws and coalition policies.

Last, ROE must be presented to higher authorities for approval as part of the Campaign Plan although, in some cases, both documents are approved separately and will become classified.

Rules of Engagement: Influence on the Conduction of Operations

The German Field Marshal Helmut von Moltke is said to be the one who said that no battle plan survives the first contact with the enemy. This is, in part, the reason why commandants must see and permanently review ROE with the purpose of assuring that life and integrity of their soldiers are not unnecessarily put at risk.

But the announcement made by von Moltke is not the only reason to modify certain ROE. The things that Clausewitz called “war frictions” will surely be another cause to have to adapt them as it may happen when going from one phase of the campaign to another.

There is no doubt that Rules for an attack stage will be different from those to be used in a stabilization phase or even within the same stage if the strategy is modified as it happened when General Stanley McChrystal took the command of ISAF.

Another reason to modify them may be found when analyzing lessons learned from the Operation Anaconda in Afghanistan in which during the first three days, ROE were so strict and caused so many misunderstandings that they sometimes required an excessive amount of time to get permission from the Central Command (CENTCOM) to attack certain targets. The problem was solved by re-drafting the procedures for command and control and the manner in which ROE were applied²⁰⁴.

204. Kugler, Richard L.; Baranick, Michael and Binnendijk, Hans, „Operation Anaconda: Lessons for Joint Operations”; *Center for Technology and National Security Policy, National Defense University*, March 2009, p. VII.

It may happen that during the campaign, the commandant desires to increase tempo of operations²⁰⁵. A possibility that ROE gives is to publish the list of targets or, during a negotiation phase, to announce that they are stricter showing their decision to cause a high number of victims to the enemy or the intention to escalate the conflict or permit attack operations in certain areas where ROE prohibited or limited that before.

An example of this is what happened in the Operation Deny Flight²⁰⁶, in former Yugoslavia, in which the Operations Plan stated the expansion of the use of air power according to three options regulated by ROE.

The first of them authorized attack to targets such as armored vehicles; mortars; campaign artillery, etc. which prevented the fulfillment of the UNO Security Council mandate.

The second one included attacks to operational level targets as it happened with integrated systems of air defense, of command and control and huge weapons and ammunition storage.

The last option included targets that were not necessarily within the area of operations²⁰⁷.

According to Lieutenant Colonel Humphries²⁰⁸, after thirty days of campaign in the Persian Gulf conflict, a series of events led ROE to be reviewed in order to determine whether certain considerations of OLAC would need changes.

Iraq had started to store war material near schools, assistance facilities and workplaces, settled command and control posts at schools and public buildings, installed anti-air weapons in residential areas and roofs of public buildings, tanks and artillery pieces were located among houses in small villages, MIG planes were located near important archeological sites.

According to Humphries, Iraq acted that way for one these two reasons: to protect legitimate targets from being attacked or for coalition forces to damage civil property and cultural items.

Moreover, there may be a situation in which during one phase of the campaign, certain targets cannot be attacked as, simultaneously, there is another operation being carried out.

This is what happened in Iraq, where before the ground attack, coalition forces could not attack some communication nodes as they were included in the Southern Watch

205. The Manual MC 20-01 defines "Tempo" as: "Keeping constant pressure so as not to give a break to the enemy, creating new problems before they can solve prior problems, which allows to keep the initiative and prevents the enemy from reorganizing and, therefore, fall more rapidly. Some call this tempo or pace.

206. Author's note: This was a campaign organized by NATO aimed at assuring air blocking as ordered by UNO in April 1993 over Bosnia- Herzegovina. The operation was extended to air support tasks for UNPROFOR troops by exercising air attacks against targets in that territory. Twelve NATO member countries took part in the operation.

207. Perry, Richard M.; "Striking the Balance: Airpower Rules of Engagement in Peace Operations"; *School of Advanced Airpower; Studies Air University Maxwell AFB*; p. 66.

208. Humphries, John G.; Lieutenant Colonel, USAF; "Operations Law and the Rules of Engagement in Operations Desert Shield and Desert Storm"; *Airpower Journal* – Fall; 1992.

Operation which was the name of the mission to monitor and control Iraqi air space, in the south of the 33° N parallel, after the First Gulf War²⁰⁹.

If during the campaign as it happens when planning, the commandant of the Theater of Operations required Rules that are not included in the Catalog and are not authorized; they shall require approval from higher authorities. In NATO terms, requirement for new ROE is called Rules of Engagement Request (ROEREQ) which, if authorized, is called Rules of Engagement Authorization (ROEAUTH).

In sum, ROE will be promulgated as an Annex to the Campaign Plan and will be amended by other ROE that are more permissive or restrictive, depending on the dynamics of the situation in the area of operations.

Rules of Engagement in Planning and Conduction of Multinational Operations

A multinational force that may be created with armed forces from countries with common objectives may succeed or fail in the fulfillment of the mission depending on the degree of interoperability of their forces. ROE are a great part of this interoperability as they are one of the most critical aspects of any military coalition, as it has been shown in recent operations of this type.

This is the reason why governments that are a coalition try to arrive to an agreement on them before forces are deployed understanding that common Rules prevent disagreements or misunderstandings.

Multinational operations are more difficult to be organized and executed than national ones. The reasons for this are the differences: in the way to combat among nations; among each force; in doctrine; in training; in logistical support and maintenance; in ROE; in difficulties to communicate due to differences in language or the lack of a common dictionary of military terminology. Even more, operations with non- traditional allies may risk one's own forces.

As an example, we can say that in May 2012, the commandant of ISAF, General John Allen, during a videoconference stated that half of attacks between ISAF and Afghan security forces had been carried out by spy Taliban.

In August of that same year, the same officer said that around 25% of attacks (green against blue)²¹⁰ were due to spy Taliban or Afghan policemen or soldiers threatened by the Taliban in a direct manner by threatening their relatives²¹¹.

Some other times, members of a coalition have opposite perspectives with respect to the value of human life and, therefore, concepts related to collateral damage will differ. Moreover, the fact that other nations are involved strongly reinforces the diplomatic political level of the operation as well as its legitimacy given by public opinion²¹².

209. Center for Law and Military Operations; "Forged in the Fire: Lessons Learned during Military Operations (1994-2006)"; September 2006, p. 75.

210. Expression used by NATO.

211. Shanker, Thom; "General Notes Taliban Coercion in Some Attacks on Troops"; *The New York Time Asia Pacific Section*, August 23, 2012; disponible en: http://www.nytimes.com/2012/08/24/world/asia/general-notes-taliban-coercion-in-some-attacks-on-troops-in-afghanistan.html?_r=3&ref=world&.

212. Vego, Milan; op. cit.; capítulo V; p. 100.

Before dealing with the issue, it is necessary to take into account that not every country acts in the same manner as regards drafting ROE. In some countries, this is dealt with by bodies such as the legislature, an inter- ministry commission, or a commission of armed inter- forces. In other countries, this responsibility is given to an only one person: Ministry of Defense, Chief of Staff or Force commandant.

If the decision is made by a body, there may be more restrictions due to the different positions of each person in the discussion. These restrictions will also give rise to a greater number of warnings (caveats) to the original project.

For the treatment of multinational operations and based upon different experiences, some of the inconvenience that may exist as regards ROE may be clear.

As part of a multinational force

A nation may introduce caveats to ROE for different reasons:

- > Because positive law of the country does not allow to fulfill some of them.
- > Because their interpretation of international law is different from that of other nations.
- > Due to its particular interpretation of the UN mandate.
- > Due to certain political limitations or restrictions: invoke geographical restrictions to reject sending troops to a specific area within a Theater of Operations, to reject using certain means to fulfill the mission, for example ammunition with rubber pellets or tear gas.

These caveats may be official and in writing, or non- official and unwritten. The normal procedure used by countries is to notify their restrictions in an official manner to the multilateral organization under which they are operating and the rest of the contingents.

However, there are countries that contribute troops that are reluctant to give some type of information causing said caveats to be perceived only when circumstances are given for that.

Anticipating such national restrictions, NATO prepared a plan for Afghanistan that was written in a broad manner with the purpose of allowing nations for the option of adopting ROE or not or the missions in which they did not want or could not legally permit the participation of their troops.

During the time General Rick Hillier served as Chief of Staff of Defense in Canada, he said many times that the most significant caveat was whether Canadian troops could operate in the south of Hindu- Kush²¹³ or not.

Within a multinational force, there may be national ROE that are perfectly clear, for example, not to operate in a specific town, not to open fire unless one is being attacked with fire weapons, not to participate in certain type of operations, not to have detainees for more than a certain number of hours.

In other cases, the decision for the contingent to participate may be made by a senior officer who, in certain situations, must communicate with higher authorities to

213. Auerswald, David P.; op. cit. p.8.

request authorization, although this usually takes time and creates controversies both in the Theater of Operations and the country.

In other circumstances, ROE will be less obvious, for example, the ROE that prohibited German troops that took part in ISAF to get involved in the Operation Enduring Freedom. For this reason, pictures taken from German recognition aircraft could not be distributed if there is a risk for them to be used as part of an anti-terrorist effort. In practice, this meant that German intelligence information would only be shared with part of ISAF and no one else, given that there were few countries participating in both operations. When NATO changed ROE of ISAF to allow for more offensive operations, Germany did not breach the agreement but made some exceptions (caveats) indicating that they would not take part in attack operations, an ambiguous phrase that led to different interpretations²¹⁴.

Moreover, in a multinational operation, there may be contingents with national ROE that prevent them from deploying troops during the night or taking part in missions with old enemies. In Afghanistan, a member of the coalition could apparently not allow Afghan people on board of helicopters, whether they were members of the Afghan national Army or not even when they were injured²¹⁵.

However, there are two aspects in which nations have disagreed recently. The first of them is related to the adhesion to the Ottawa Treaty which prohibits the use of antipersonnel mines. To give an example of what the consequences of such differences could be, Australian forces in Iraq were not allowed to refuel US aircraft that had the capacity to launch antipersonnel mines from the air²¹⁶.

The other common aspect, on which there is no agreement among countries, refers to authorization to use lethal force to defend physical property. Among countries that are members of the International Force East Timor (INTERFET) conducted by Australia, both said country and the United States accepted such possibility while Great Britain, New Zealand and Canada rejected this because of their domestic laws with which troops of said countries could not be assigned to the defense of an airdrome or airport.

Examples mentioned highlight the practical importance of national legal factors in multinational military operations and the need to work with other countries to know their ideology and respective legal restrictions to operate. It is necessary to consider that national restrictions of one country may differ with different administrations of different ideology.

If this happens among nations that got training and operated for many years, we can expect this to happen in regional organizations or recently created coalitions.

Command of a Multinational Force

When there is a joint- combined force, the Commandant of the Theater assigns the mission and determines the area of operation in time and geographical terms for their

214. Auerswald, David P.; op. cit.

215. Auerswald, David P.; op. cit.; p. 9.

216. Kelly, Michael; Colonel; "Legal Factors in military planning for Coalition Warfare And Military Interoperability Some Implications For The Australian Defence Force"; *Australian Army Journal*; Volume II, Number 2, p. 165.

activation getting involved in the drafting and approval of ROE. Given that different national concepts may give rise to different ROE in a multinational force, commandants must be aware of the restrictions imposed to other forces that are part of the coalition. Understanding operational restrictions of each contingent is essential if we want to understand limits and effects of international cooperation. As a starting point for planning, a commandant of a contingent in an alliance or coalition must apply their own ROE. If they are less restrictive than those of the alliance or coalition, they must apply more restrictive ROE. If national ones are more restrictive than those of the alliance or coalition, the commandant of the contingent is not bound to comply with ROE of the alliance or coalition and if this happens, they must inform the multinational commandant of such circumstance.

Being aware of differences among contributing countries is essential when tasks or missions to be assigned to forces of these nations arise from planning.

It is interesting to analyze what the 4th edition of the Coalition Operations Handbook drafted by Armed Forces from the United States, Great Britain, Canada, Australia and New Zealand states as regards ROE.

This manual presents a series of general, specific and particular questions for the drafting of ROE so that commandants that operate in a coalition can get guidelines for their drafting:

General

- a. Does the coalition have a common definition of self defense?
- b. Are the terms necessity, proportionality and imminence defined?
- c. Have ROE been established as regards permission to attack based on a hostile attempt and hostile act?
- d. Have ROE been established for air operations?
- e. Have ROE been established for air defense operations?
- f. Have ROE been established for navy operations?
- g. Does the coalition have a common definition of ROE?
- h. What is the effect of national ROE on the formation and mission of the force?

Specific

- i. Have ROE been agreed upon among national authorities or among Commandants of contingents?
- j. How will national ROE affect operations and the organization of other coalition forces?
- k. What are the procedures for the Commandants to require a change in ROE?
- l. Are there general ROE with which all nations agree?
- m. How does each national inform ROE to their soldiers?
- n. Have ROE been given to soldiers and have they been trained as to their use before deployment?
- o. What are the great differences that exist with respect to ROE among coalition nations?

- p. Are there ROE for indirect fire?
- q. What will ROE of the coalition be before hostilities start and what will they be after the first hostile act has occurred?
- r. Is the policy for prevention air attack stated in ROE?
- s. Who will define the status of weapon control? For example, weapons free which means to shoot any target that has not been positively identified as one's own target; weapons tight which, in air defense, means to shoot only targets that are confirmed as hostile or weapons hold that means not to shoot except in cases of self defense or only with a formal order of fire opening²¹⁷.
- t. What mechanisms are there to update ROE during the operation?
- u. Do national ROE include e-attacks, interference, and e-deception?
- v. Are forces authorized to use e- counter measures? What level of counter measure may be applied and to what systems?
- w. What are the guidelines to use indirect fire as a way to show intentions?
- x. Are these guidelines different among nations of the coalition?
- y. What is it understood by use of lethal force in self- defense, for the defense of property and for the fulfillment of the mission of the countries that contribute troops? Is there any country contributing troops that accepts the concept of early preventive self defense?
- z. What ROE are there for intelligence aspects such as telephone listening or Humint?

Particular for the mission

- a. Are forces authorized to take part in non- military activities? If so, what activities? What level and type of force can they apply?
- b. What actions are authorized to prevent the approach, detention or capture of certain aircraft, vehicles, personnel or property? What levels of use of force are authorized to be applied in each case?
- c. Are approach operations authorized? What level and type of force may be applied?
- d. Are detention and capture operations authorized? How are these operations defined? What level and type of force may be applied?
- e. Is the use of infrared means or lightning systems authorized? How will they be controlled?
- f. Have the criteria to identify possible targets been defined? What requirements must be met before being engaged as a potential target?
- g. Are forces authorized to make exercises in the presence of a potential enemy?
- h. Are forces authorized to make simulated attacks? What are the restrictions?
- i. Are forces authorized to appoint targets?

217. Terms used in abbreviated codes of NATO.

- j. Are forces authorized to respond to harassment operations? What level and type of force may be used in harassment and counter harassment operations?
- k. Is the use of anti disturbance elements authorized? What are the restrictions for the use of these elements and under what circumstances may they be used?
- l. Are certain types of weapons prohibited or restricted in certain circumstances?
- m. Are forces authorized to conduct information operations? What type of information operations may be carried out? What level of response may be applied? What non lethal technology is available? How has the force been trained for its use? Do ROE authorize their use?
- n. Are forces authorized to use navy or land mines? What are the restrictions for the use of land or maritime mines?
- o. Are forces authorized to carry out attacks that are not related to self defense? What type of attacks are authorized and under what circumstances? What levels of force may be used?

In a multinational coalition, identification problems are amplified, as it happened in the First Gulf War (1991), in which Argentine units took part. In this opportunity, French mirage aircraft, tanks, air defense systems and MIG aircraft were used both by Iraq and other countries of the coalition²¹⁸.

The commandant of any coalition must clearly understand what coalition forces can do and the reasons for that. Moreover, they must know when they may expect differences to be solved with an authorization request for new ROE or in what moment forces of a participating country are in the limit of what their domestic laws permit.

Making this concept clear, it may happen that a contingent is not authorized by its government to use lethal force to defend items or property. In this case, the commandant of the force may require a change in the ROE of that contingent or, if they know that this is not possible, they may assign other tasks that are compatible with ROE of that country.

Moreover, they need to know when said positions are political and may be modified, or legal, which will be difficult to change²¹⁹.

Rules of Engagement and Training

Some people may think that training for the use of ROE would only be possible for land forces or those that operate in said context: tactical divers, amphibious or air force commands. If someone thought this, they would not be wrong. In general, bibliography about ROE and training take this perspective focusing on the fact that ROE for land context require an exhaustive training.

However, there are cases in other contexts that require training as there will always be situations in which, in a very short period of time, someone will have to decide

218. Ziegler, Paul M.; Lieutenant Commander; U. S. Navy; "Considerations for the Development of Theater Hostilities Rules of Engagement: Blue-On-Blue versus Capability Sacrifice"; *Newport, RI*.

219. Brown, Neil; "Issues Arising from Coalition Operations: An Operational Lawyer's Perspective"; *International Law Studies*, Volume 84, *International Law and Military Operations*, Michael D. Carsten Editor; *Naval War College*, Newport; Rhode Island; 2008; p. 231.

what facts are hostile attempts, a hostile act or determine that it is not a threat. In this sense, the concern that commandants obviously have is how their forces may find an intermediate position among incidents that involved the USS Stark (FFG- 31) and the USS Vincennes (CG-49). Not shooting for self- defense and, therefore, have casualties, is not satisfactory as shooting too soon and causing a potential escalation of the crisis or shooting against an innocent target²²⁰.

Navy units are generally trained in the use of ROE in exercises with other Navy forces but, in times of crisis, due to the nature of high seas, the navy has had to operate with their potential enemies in their backs, next to them and, sometimes, even among them. Vessels of the other force frequently get into a formation or affect veil operations. Although a great part of the problem derives from the maneuver of vessels and is stated in the International Regulations to prevent approach of the year 1972 (Rules of International Transit or COLREGS), this treaty is not enough to prevent incidents.

This is why training in harassment²²¹ operations and counter harassment maneuver as well as interposición entre buques of their own and of the enemy becomes increasingly necessary for navy units. This type of maneuver took place in the so- called Cod War during which the units of the Royal Navy had to avoid arrest or harassment of British fishing boats in waters under dispute by Icelandic patrol boats²²².

Like navy ROE, Air Force ROE tend to be technical as signs of hostile acts or hostile attempts mainly come from electronic indicators and warnings. Tactical maneuver of an adversary may also be evidence of a hostile intention.

On the field, training of troops must start at the beginning of the campaign. ROE must be part of the training during the stage prior to deployment as the worst mistake that a commandant may make is to think that ROE are only to be memorized.

Awareness of ROE in a familiar environment will improve efficiency of units to be deployed and will reduce the possibility to be forced to make delicate decisions once they arrive to the Theater of Operations.

ROE have a minimum content and its determination has to do with the application of the DAMP formula, an acronym that means:

1. Fire back. You always have the right to repel hostile acts with the necessary force.
2. Foresee the attack. Be the first to use force but only if you perceive clear signs of hostile attempts.
3. Measure the amount of force to be used if circumstances allow to do so.
4. Protect with the use of lethal force only human life and property specified by your commandant.

220. Phillips, Guy R.; Lieutenant Commander; "Rules of Engagement: A Primer"; *The Army Lawyer*, July 1993; p. 4.

221. Harassment operations are generally understood as any deliberate action that proposes to interrupt, prevent or stop actions of a ship or military, commercial or private aircraft.

222. O'Connell, D.P.; "The Influence of law on sea power"; *Manchester University Press*, Edit. 1975, p. 173

Although ROE are a guide for commandants, they must be distributed among subordinates as completely as possible taking into consideration the classification of security and the need to know of the receivers. If this is not possible, the commandant must distribute a version of rules, summarized or public, up to the lowest level that may need them.

In the Army, for example, the staff of other forces devoted to security within a perimeter or a base are exposed to fire from portable weapons, they must receive a clear and simple instruction as to the circumstances in which they can shoot in self-defense or to protect third parties.

One usual manner is to print ROE in small cards²²³. If there are different ROE in one mission, soldiers must not exchange positions with different ROE to avoid confusion as it happened in 1983 to marines in Beirut²²⁴.

In this case, marines received and were instructed as to the application of ROE for peace, which was thought to be the most proper one in this opportunity. In these ones, the possibility to use force was limited and subject to several controls so its use was very complicated. The United States were not in war against the Lebanon, but they supported their government in their own tasks for peace maintenance and their ROE did not state their forces to be in combat. Moreover, they were not interpreted in the same manner by military commands involved nor by the different units of marines that rotated in Beirut while the mission was active (the Marine Amphibious Unit, MAU and the Battalion Landing Team, BLT). The time during which this system failed was immediately after the attack suffered on April 18, 1983 by the US embassy. The US units left what had remained of the building and they stayed with the British at the Duraffourd Building, at the time one unit of BLT was assigned for security.

ROE of units were included in a blue card (with more possibilities of use of force in case of a hostile act for security staff at the Duraffourd Building) and in a white card for other units, in particular those that provided security at the Beirut airport (with more restrictive ROE that allowed to place the chamber and load the weapon, for example, at the beginning of service and to open fire in case of threat).

The distinction between both ROE and corresponding situations were complicated and, in fact, the command and lower tactical levels (corporals and riflemen) did not understand it clearly and this caused confusion and insecurity which increased when marines rotated in security posts in both detachments.

The Air Force gives ROE to pilots and weapons air controllers, that is, the staff that is most exposed to face the enemy. According to Phillips²²⁵ experience in the Gulf War, the complete set of ROE was too long to be known by each pilot of hunt aircraft, and this is why the auditor officer summarized them in two pages of their booth reference notebooks.

223. Phillips, Guy R.; op. cit.; p. 26.

224. Red more: <http://www.monografias.com/trabajos71/reglas-enfrentamiento-roe/reglas-enfrentamiento-roe2.shtml#ixzz2Lfd348tE>

225. Phillips, Guy R.; op. cit.; p. 26.

ROE applicable to war vessels must only be distributed to staff assigned to the combat information centre as few officers are responsible for controlling fire coming from the vessel. In special circumstances, such as visits, approach and search, rules that are similar to ROE implemented by the Army must be prepared.

This is why, from times of peace, there must be a ROE catalog approved by the political power that includes all possibilities that may exist for armed forces to exercise and, therefore, reduce mistakes. When it is time for a military operation, the command chain will indicate what ROE of this catalog may be applied and which ones may not.

If during planning, the commandant of the Theater of Operations requires ROE that are not included in the catalog and/or have not been previously authorized and on which forces have not been trained, they must obtain their approval as soon as possible for the purposes of starting training soon.

The Commandant, the work group for the drafting of Rules of Engagement and the role of military lawyers

Commandant

Commandants and those who advise them in the planning of a campaign or operation have the obligation to give clear orders to those who must implement the plan. Rules of Engagement properly drafted are essential for this and the success of any operation apart from being, for the commandant, an integral manner to exercise command and control of forces that were placed under their command.

For Duncan²²⁶, commandants, who are responsible for all what their forces do or not do, must assure that guidelines corresponding to the use of force are included in ROE because, as it happened in the past, future commandants must face intense pressure to produce “correct” Rules for each specific operation. In order to overcome such challenge, they must operate in a proactive manner in the organization of their Staff.

Commandants must assure that national strategic objectives are properly translated into operational objectives and that may be reached with means available. To do this, they must have knowledge of the operational context that includes not only geographical aspects and the battle order of the enemy, but also culture and habits of local population. If there are differences between ROE and objectives, they will be responsible for modifying them or inform higher officers about those differences.

Work group for the drafting of Rules of Engagement

Even when there is a catalog of permanent ROE, this has been thought as basis for the commandant to prepare ROE for missions assigned, but as said list is not exhaustive, it cannot cover all possible circumstances in a military operation and, for this,

226. Duncan, James C.; Lieutenant Colonel USMC; “The Commander’s Role in Developing Rules of Engagement”; *Naval War College Review*, Summer 1999, Vol. LII, No 3 p. 76.

commandants must draft their own additional measures according to the guidelines of the higher authority and laws in force.

Although the responsibility of drafting ROE lies in the commandant, restrictions of time and multiple tasks that require their personal assistance, reduce the possibilities to get personally involved in their drafting. For this reason, during planning, the responsible for doing it is generally the operations officer. However, given that the process for drafting ROE requires timely and extensive coordination among members of the Staff, a work group is organized to allow to prepare an organic structure through which said officer can comply with their task in an effective manner.

The group is generally composed of the intelligence officer, operations officer, plans officer and legal advisor and, according to the characteristics of the mission, of officers specialized in peace operations, civil affairs and any other area involved.

In some situations, it will also be necessary to have the presence of other specialists such as a Military Engineer officer able to provide the work group with technical information related to structural weaknesses of a target, the best weapon or the most proper explosive to be used and possible environmental impact that would cause its destruction.

In this group, legal advisors must play a key role, but they do not have decision power. They must get involved from the very beginning in the planning process as, on the contrary, they cannot act as a link between the commandant and those who prepare the plan. If their participation was only at the end of planning, it may happen that modes of action prepared were not acceptable from the point of view of OLAC with which valuable time would have been lost.

In multinational operations, it will be essential to include in the group representatives of all countries that will be part of the multinational force because, in this manner, it is possible to consider the possible reserves or objections that each nation that contributes troops may have before drafting ROE that may be applicable to all members of said force.

Taking into account that the process of drafting is not static and ends with the promulgation of the Campaign Plan or the Operations Order, the work group must assess and constantly review ROE so that they can suggest changes according to the changes that take place both in the mission and the threat.

This work group will be responsible for the training of those aspects that are essential for ROE.

The most important aspects that must be considered by the members of the group for the drafting of ROE are the following:

- > Initial effort must be support to the planning process
- > ROE have a key role in the drafting of Modes of Action, this is why they must act like the opponent and, thus, predict the impact that ROE may have during the operation, discussing political and military aspects of the mission and foreseeing likely prohibitions, restrictions or authorizations for the use of force.
- > Deduct those threats or relevant aspects that may arise during the development of Modes of Action and that will become the basis for the drafting of ROE or to require other additional ROE.

- > Prepare the Annex ROE for the Campaign Plan or Operations Plan.
- > Develop or revise in a coherent manner aspects that have to do with training, follow- up and interpretation of ROE.
- > Supervise the distribution and training process of ROE.
- > Analyze requirements of additional ROE by air, navy and land components. Prepare requirements for additional ROE based on changes in the threat or mission.

It will always be necessary to take into account that ROE must contribute to the fulfillment of political, legal and military objectives and also, of an equally important objective: prevent victims among one's own and allied troops by means of the definition of criteria to identify the enemy.

From the political point of view, ROE will reflect policies of the national government and of those countries that are part of the mission. As regards legal aspects, they will adjust to international and domestic law and they shall express multilateral or bilateral agreements.

As regards the military purpose of ROE, the group must bear in mind that if they are correctly prepared, they will help for the fulfillment of the mission assuring that the use of force is consistent with the military objective.

Moreover, they shall state the inherent right and obligation to act in self- defense and to support the fulfillment of the mission; assure the commandant to prevent the beginning of hostilities before forces are able to start confrontation; establish circumstances that allow to comply with the principle of economy of force during hostilities or protect the infrastructure of the enemy that may be useful in the future.

ROE that are properly drafted with the guidelines and intention of the commandant will assure that intervening forces prevent unnecessary risks when doubting whether to use force in self- defense when necessary.

As an example of the diversity of aspects to be analyzed, ROE may play a key role when determining if the destruction of the information system of the enemy is a feasible option during a specific stage of the operation or if in case of high risk of collateral damage, it will be necessary to make land attacks rather than air attacks.

In order to do so, it is necessary, first, for those responsible for drafting ROE to know the intention of the commandant. The more they know about it and strategic objectives of national authorities, the better they will be prepared to draft them for a military operation or campaign.

Second, all those taking part in the drafting of ROE must be involved from the beginning of planning and not become mere reviewers at the end.

Last, each member of this work group, without exception, must bear in mind that their main task when drafting ROE for a Theater of Operations will be to try to anticipate to any type of needs that units will find on the battlefield.

Role of military lawyers

In 2001, the Revista de Marina of the Chilean Navy published an article written by Captain

Federico Niemann Figari²²⁷ titled “The military lawyer: an operational perspective” in which the author stated:

As regards the military lawyer, they shall be not only an authority as regards laws and principles of the Law of War and Law of Peace with all its issues and concepts, but they must also act properly in the military context. As it happens with a lawyer that specializes in economy, criminal, international, maritime or borders law, a military lawyer devoted to operational law necessarily requires deep knowledge of military operations.

As regards the attitude of the Operational Commandant, this cannot be the attitude of the person who sees or feels the military lawyer as someone who does not permit freedom of action. On the contrary, in the area of non-war operations, it shall be this person the one who provides with a legal context in which to devote 100% to the fulfillment of the mission.

In February 2002, journalist Esther Schrader²²⁸ in an article titled “War, on Advice of Counsel”, published in Los Angeles Times, made it known that any attack or raid of the United States in Afghanistan was vetoed by lawyers specialized in combat international rules and asked whether said decisions helped the Taliban to prevent missile attacks or not.

In May 2007, Captain Hollingshead²²⁹ from the US Coast Guard service, in a work presented at the Navy Staff College, questioned that lawyers were affecting the work of planning groups in the conception of the possible scope of modes of action.

The role of US military lawyers was limited until in the 80’s, the Board of Chiefs of Staff decided to rule for a broader function focused on the importance of advice in each stage of the operation. The memorandum they promulgated required all operations and contingency plans as well as rules of engagement to be reviewed by lawyers in order to assure compliance with OLAC²³⁰.

Apparently said decision turned the military auditor into a person capable of making decisions which, in other occasions, would only have been made by a commandant.

In fact, this is not completely true, although in some circumstances, many military men forced to make important decisions during a conflict or at any time in their careers, have decided to delegate responsibility to their lawyers as a manner to act in a “politically correct” manner. But it is not acceptable to lose a war and blame the lawyer for that.

When a Taliban convoy was directed to support positions against the North Alliance, target designators of the US Air Force, based on intelligence reports, advised their commandant that was not a target to attack. However, the higher rank legal advisor of the

227. Available at: <http://www.revistamarina.cl/revistas/2001/5/Niemann.pdf>. “Rules of confrontation and the role of a military lawyer”.

228. Schrader, Esther; “War, on Advice of Counsel”; *Los Angeles Times*, disponible en: <http://articles.latimes.com/2002/feb/15/news/mn-28151>

229. Hollingshead, Christopher, Lieutenant Commander; USGS; “The impact of Law and Lawyers on Operations and Planning”; *Naval War College*; disponible en: <http://www.dtic.mil/cgiibin/GetTRDoc?Location=U2&GetTRDoc.pdf&ADA470761>

230. Humphries, John G.; op. cit.

Central Command said that it was not convenient to attack as he was concerned that there could be women and children. Later, it could be seen that this was wrong and the enemy convoy achieved their goal.

As the legal advisor was blamed for his bad performance, the spokesman of the Central Command expressed that it was common that these advisors state pertinent legal aspects in target selection, but he or any other auditor cannot prevent an attack. This is a prerogative of General Franks or any other operational Commandant²³¹.

In order to have an idea of magnitudes, during the Gulf War, coalition forces, made up of 30 countries, deployed around 800,000 men and women. In order to support these forces, almost 350 lawyers were sent to the Theater of Operations²³².

According to Schrader²³³:

Military lawyers jumped with parachutes together with special forces in Panama in 1989, travelled with the Army to Haiti in 1994 and were deployed by hundreds in Kuwait and Saudi Arabia during the Gulf War, sleeping on the sand with troops on the field. They checked air attacks over Kosovo from a center of operations in Germany and movements of special forces in Somalia or Rwanda. They are permanently posted in Sinai, South Korea and Kuwait.

After the attack to the Twin Towers, US military men stated that the operational context in Afghanistan and Iraq became more complex and this is why they started to include legal advice in planning, training and operations.

This requirement, in Marines, was first met with auditors who were working and some from the reserve that were posted in the command of said force, but to the extent that demand increased, other lawyers were sent to operational units from what, in our country, would be the Legal Advisory Body of a Staff. This process concluded with the decision to appoint a legal advisor to each battalion or regiment to be deployed.

As lawyers were mainly young people and had no experience in military operations, they received courses of Operational Law and were trained at the same units, which turned to be successful. This is how in 2002, in relation to the conflict in Afghanistan, Schrader²³⁴ expressed the following:

There are lawyers in secret operations center, in The Pentagon, called The Tank, 24 hours a day, verifying legality of raids and of attacks. There are lawyers in the Combined Air Operations Center in the air base Sultan Prince in Saudi Arabia, thoroughly studying lists of potential targets to be bombarded. Groups of lawyers in aircraft carriers explain pilots about what things they can attack before being launched over Afghan sky. Military lawyers on the field, in Kandahar and Bagram,

231. Schrader, Esther; op. cit.

232. Myrow, Stephen A.; "Waging War on the Advice of Counsel: The Role of Operational Law in the Gulf War"; 1996/1997; *Journal of Legal Studies*.

233. Schrader, Esther; op. cit.

234. Schrader, Esther; op. cit.

work together with US commands and when special forces comply with their secret missions, a lawyer is usually with them.

As it may be seen, the rule issued by the Board of Chiefs of Staff meant that lawyers specialized in different areas of law could acquire different training compared to civilians or the one they had in prior posts.

During a conference given at the School of Law at Harvard University, a graduate, Brigadier General of the United States Army, Mark Martins, stated²³⁵:

We have deployed lawyers. They must be soldiers, physically prepared to resist difficulties and stress caused by combat while keeping a clear mind and they must be able to go through the whole area of operations, communicate using radio and systems available on the field and, if necessary, use weapons.

As a conclusion and considering that article 82 of the Additional Protocol I to the Geneva Convention states²³⁶:

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

We can state, as Brigadier General Kenneth W. Watkin²³⁷ and Captain Debrot expressed, that legal advice that may be given by the auditor to the commandant includes, among other things: Rules of Engagement, selection of targets, intelligence, revision of campaign plans assuring that national, international and sea laws are complied with, legality of weapons to be used, instruction about OLAC, negotiation as to agreements with respect to the status of forces and memorandum of understanding with the host nation.

General Conclusions of the Second Part

In this part of the work, we have analyzed the relation between ROE and operational planning process. This will be coordinated and developed simultaneously as from the first part of the planning process as ROE are an instrument that must directly support the concept of operation.

It has also been stated that drafting ROE coherent with certain principles of war, such as the target or attack is a process that is difficult to be carried out, especially in current conflicts in which there is constant use of not only “human shelters”, but also of

235. Martins, Mark; Brigadier General; U.S. Army; “Rule of Law in Iraq and Afghanistan”, Commander, Rule of Law Field Force, Afghanistan. J.D., *The Army Lawyer*, November 2011; p. 21.

236. Protocol I, additional to the 1949 Geneva Conventions; related to protection of victims of international armed conflicts, 1977.

237. Watkin, Kenneth W., Brigadier General and Debrot, Zenon, Captain; “The Operational Lawyer: An Essential Resource for the Modern Commander”; www.forces.gc.ca/.../oplaw-loiop-watkin-eng.pdf

civil, cultural, worship and essential property for the subsistence of civil population to hide arsenal, command and control centers or to attack from them.

But this is also difficult because, as stated by Major D.B. Hall²³⁸: the same moral obligation that leads world leaders to require military force to solve certain conflicts requires military men to find other means, which are less lethal to carry out their missions.

In other words, if, as a result of improper ROE, there is great collateral damage, world media and enemy information operations will take advantage of said damage for their own interests.

Because of this, two reasons have become essential when drafting ROE during the planning of any operation. First, OLAC laws related to the selection of targets and, second, those corresponding to weapons allowed.

The use of force against a certain target may be legal, but the weapon may not be legal in itself, or the weapons may be legal but the way to use it may be illegal due to the possibility that incidental or indirect damage or injuries may be caused.

Laws ruling armed conflicts require the application of force to be in line with military necessity, proportionality and humanity. For this purpose, in all countries, there is a common practice to make reference to the most important legal aspects of an operation in the ROE annex or appendices.

An important case as regards strictness with which OLAC is required to be complied with is shown in the report presented by the Research International Committee in Libya²³⁹.

This report considers that although, in many occasions, NATO attacks prevented damage to civilians, there were also situations in which there was not “military utility” and the death of civilians in these cases need to be investigated, especially because information given by NATO was not enough to conclude as to legality of these events.

Although this may not be questioned, at all conduction levels there are people who are against said control as, in many occasions, excessive care in compliance with OLAC caused “military utility” targets not to be defeated or, even worse, loss of human lives within their own troops.

These points of view that seem to be contrary to each other are shown during planning through certain restrictions and/or limitations imposed to the commandant reflected on: the type of targets they are authorized to defeat, the number of forces assigned to them, the type of weapons authorized to be used, the manner in which they can use it and the limits of the Theater of Operations.

Said limitations and/or prohibitions are included in a group of ROE which will specify, by means of authorization or prohibition, the degree and manner in which force may be used. Moreover, they will appear as restrictions in the Strategic Guideline that a higher authority gives to a commandant.

238. Hall D. B.; Major, USMC; “Rules of Engagement and Non-Lethal Weapons: A Deadly Combination?”

239. United Nations; Human Rights, Office of the High Commissioner for Human Rights, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/LibyaReport.aspx>

As a consequence of said limitations and/or restrictions, during the planning process, the Commandant of the Theater must consider that although the attack to certain targets must be carried out with as much military efficiency as possible, its selection must be strictly restricted to compliance with OLAC, be based on the principles of distinction, military necessity, proportionality and protection of cultural items and, above all, have the objective of minimizing collateral damage.

With this purpose, they must carry out a detailed analysis of targets to determine potential effects on the center of gravity of the enemy.

From the result of said analysis, the pertinent ROE and Fire Guidelines must be prepared bearing in mind that this is a complement of ROE.

A commandant may never adopt ROE that risk security of troops. This is the first consideration above any other one. But this does not mean that he does not consider that the level of force to be used will be influenced by what is acceptable by the public or international opinion, something that may determine the strategy to be adopted.

Terms such as collateral damage and selection of targets are common, not only in military and political contexts, but also in non- governmental organizations, in the media and all other institutions related to humanitarian objectives.

Accordingly, the second aspect that arises from this research refers to the manner to prevent mistakes in the use of weapons by one's own forces. Some of these mistakes may involuntarily breach OLAC.

The way to prevent mistakes is to predict, during planning, all possible situations that may exist to act and react correctly during operations²⁴⁰.

In order to prevent "frictions of war" from affecting the decision capacity of a commandant or someone who must decide as regards authorizing or not a certain ROE, organizations such as UNO or NATO, or countries such as the United States have designed a catalog of permanent ROE drafted in advance so that troops can be trained in them and practice.

Said ROE are established before designing an operation by previously drafting a general catalog (called Standing ROE) from which the most proper ones will be selected or rather by preparing them for a specific operation.

Moreover, it has been shown that from planning, there may be a need to draft ROE and/or additional measures that require approval of the President or the military strategic level or to modify or suppress others which does not invalidate the need to have permanent ROE.

Governments must assure that due to political omission, the following circumstances do not take place (these are known as the four No policies):

1. Not to order armed forces to take ROE for which they are not prepared, trained or equipped.

240. Plana, Miguel Alía: "Las reglas de enfrentamiento"; <http://noticias.juridicas.com/articulos/70-Derecho%20Militar/200907-78965324897521.html#sdendnote25sym#sdendnote25sym>

2. Not to restrict ROE to a situation in which the armed forces are put in situations in which lives may be unnecessarily lost.
3. Not to put armed forces in situations in which the legal context in which ROE are applied is uncertain or unclear.
4. Not to order armed forces to take missions in which ROE are not issued.

It has also been shown that due to the fact that each operation is unique –in geography, population, culture, mission and forces available- each ROE that has to be drafted has to reflect the essence of operational context and be frequently reviewed even for small changes.

Once operations have started, the ROE control process needs to be able to anticipate changes in operational context to allow for modification and additional measures that allow for the fulfillment of the mission.

Commandants and staff must permanently analyze ROE and recommend changes that allow to comply with operational standards.

Inflexible Rules of Engagement may lead to inaction in certain key moments. Moreover, they may make actions of armed forces to be predictable and to increase risk.

Fear to cause victims among one's own troops and allied troops must not lead the commandant to impose ROE that increase the risk of their forces. Therefore, the commandant and their Staff must consider the risk of limitations imposed by ROE, given that they may affect capacities to protect troops and fulfillment of the mission.

In multinational operations, commandants and their Staff must consider, for each country contributing troops, differences as regards legal obligations, differences in the interpretation of the command of the operation and different political positions that exist among the members of the coalition.

As regards the position of the commandant, during planning of a campaign or national or multinational operation must understand that although different information systems may help them and allow for a better command and control, technology does not replace the exercise of command. In the same manner, planning methods may help him and his Staff as they provide with common terms and procedures but they have to be seen as means rather than as a purpose. Planning a campaign requires, above all, application of good professional judgment and a thorough analysis within the operational context.

Responsibility to determine ROE lies with the Commandant of the Theater. However, execution is decentralized and each weapon operator and weapons system must include this responsibility. In troops trained in this, especially when it has not been possible to analyze the incidents that may have occurred, commandants must thoroughly promote initiatives but also make all responsibilities effective.

Every commandant must be responsible for being the author of ROE and assuring that members of their Staff, without any exception, understand them and are warned about authorizations, limitations and prohibitions that were imposed.

Last, the presence of military lawyers during planning and execution of a military operation or campaign has increased.

This is why these professionals have to be trained to deal with issues that arise from the interpretation and application of rules for the use of force, as the most sensitive

problems will be related to this and they have to be solved in times of peace, crisis or an armed conflict. These may be:

- > Can we open fire against someone who is attacking from inside a school?
- > What rule of engagement can be ordered to control post staff when some meters away from him a bomb has exploded in a building?
- > Can an enemy's command post be bombarded if it is on the ground floor of a school that is working?
- > Can we bombard an Observation post of United Nations from which observers openly broadcast movement of troops and although they have been warned not to do it as they risk the life of troops because information may be taken by the enemy, they keep doing it?

Military lawyers are not responsible for predicting or advising with respect to what may be politically correct or what the reactions of the public in general may be.

According to Martins²⁴¹, a military lawyer has to adopt three different positions depending on the case.

When asked to give an opinion about the application of a law, or something more precise such as rights or obligations given by OLAC to a commandant, a military lawyer has to play the role of "judge" and, in this sense, he is someone who does not decide based on political preferences, but based on objective reasons pursuant to law.

When they have to face a commandant who rejects or fails to find just balance between military need and prevention of unnecessary damage, they must become "awareness of military unit", someone who must try to introduce humanitarian considerations in military decisions.

Last, when they have to assist a commandant in the fulfillment of the mission assigned, the military lawyer has to play the role of "advisor", that is, someone who presents ideas before so that the commandant may find the solution to their problems and comply with the mission pursuant to law.

For military lawyers to work efficiently, we propose to include them when carry out planning exercises at different levels of conduction and deploy them on the field in any case that military force is used.

Pursuant to what has been investigated, we could say that there has to be a catalog of ROE approved by national authorities. Said catalog, which has to be "SECRET" needs to include, in most of its content, the manner in which Argentine Armed Forces need to act in light of the different possibilities there may be in times of peace.

This will allow our troops to train and, thus, reduce chances of mistake.

To conclude, we can state that as armed forces are used as a support element to foreign policy rather than to fulfill missions that have to do with national defense, ROE

241. Martins, Mark S.; Major, "Rules of Engagement for Land Forces: A Matter of Training, not Lawyering"; *Military Law Review*, Volume 143; Winter 1994, p. 108.

will be more restrictive. They will never be able to limit the use of force, including lethal force for self-defense.

Although there are catalogs of permanent rules prior to any operation, we should not copy ROE that are already part of a catalog. Each operation is unique and during the planning stage, the use of force must be adapted to the reality we expect to find so as to be able to draft proper ROE and train forces that will use them.

During the operation, efficiency of ROE must be measured in order to be able to modify them if necessary and whatever has been planned can be supervised.

Last, after having fulfilled the mission of ROE, they have to be analyzed to take lessons for future operations.

With this last summary, we conclude the second stage of the research which we understand will be useful for those who have to take part in the planning process of a military mission, whether in times of war or peace, within or without the national territory. <

 Third Part

RULES OF ENGAGEMENT, USE OF WEAPONS AND SELF- DEFENSE

As it has been discussed, ROE are guidelines for military forces that define circumstances, conditions, degree and manner in which force may be used, threat for its use and actions that may be understood as provocation.

ROE do not restrict one's own or self- defense but they must be based upon them. Right to self- defense of persons or units, understood as the use of proportional and necessary force in case of an attack or imminent attack is universally approved in any situation as a right or exemption.

The most commonly approved definition is that self- defense is a universally known right for military individuals, units, military personnel and units in the surroundings as well as civilians with the status of "protected persons", such as diplomatics, politicians, sanitary staff, refugees and members of the United Nations Organization (UNO). Thus, self- defense may be collective or individual. Moreover, self- defense also has to do with armed aggression against a nation that is known as national self- defense.

The Sanremo Handbook on Rules of Confrontation²⁴² states that self- defense is available for any situation including armed conflict and the most generally accepted principle considers four levels of self- defense: self- defense of an individual, self- defense of a unit, protection of persons and national self- defense.

Self- defense

Basic principles of the use of weapons, included in the so- called *jus in bello*, are two: proportionality and discrimination, considered within the general framework of the principle of necessity.

The principle of proportionality prohibits any military action that causes damage that exceed military advantage arising from them. In other words, proportionality means that there has to be some harmony among weapons used to attack and weapons used for defense. The inexperienced frequently understand that contenders must carry

242. International Institute of Humanitarian Law, "Handbook on Rules of Engagement", San Remo, November 2009, p. 3.

equal weapons: a knife for a knife, a gun for a gun. In this manner, there would not be proportionality if one of the contenders uses a stick and the one defending oneself uses a weapon. In case of an attack of a group to an individual, if we adjust to this interpretation, the one defending oneself could not use a fire weapon.

With these criteria we have to analyze the case in which the attacker aims a weapon to the opponent, even without opening fire. Everything shows that the possibility to defend oneself would be destroyed if the attacker is the first to open fire. The only intention to attack shown by the act of aiming a weapon may not be enough reason to exercise the right to self-defense.

In this sense, an armed attacker with a bottle may cause someone's death, as it may happen with someone who has a stick, a pen knife, a sheet deployed or rather as an expert in martial arts can do. Therefore, under these circumstances, defending one's own life using a fire weapon seems not to affect the proportionality of the response. However, during planning and foreseeing that there may be situations like this or other situations in which attackers do not use fire weapons, there may be Rules of Engagement or Rules for the Use of Force, such as the ones issued to the Brazilian Pacifying Unit²⁴³, as stated below:

The mere fact of carrying bladed weapons will not be an argument for engagement with fire weapons by fraction. In case the opponent aggressively with a white handgun against a Peace Force, they shall dissuade them with a bayonet.

If a disarmed opponent attacks the Peace Force, they use a minimum force to immobilize them.

Discrimination means distinction. If defense is individual and addressed to an attacker with the intention to injure or kill, defense must be aimed at the one who has that intention rather than other persons involved in the fact or observers. This is why, for self-defense, fire for response as "automatic" shooting is not allowed, but as "repetition", that is shot by shot is.

Last, in the exclusive case of self-defense, there must be a prior condition of necessity: weapons can be used only when all other persuasive resources have been used for the attacker to change their attitude. It is a very clear principle: there is no self-defense if there is nobody who attacks with the intention to injure or kill their opponent. However, as it will be explained later, this principle of necessity has some issues.

Self- defense of the individual and of the unit

One of the most important responsibilities of any Commandant is the protection of the staff under their Command. Military men know that one of their rights (which is also considered an obligation in the United States) is to use force to defend themselves and their units against a real or imminent attack. This right, sometimes called self-defense,

243. Brasil, Ministério da Defesa; *Regras de Engajamento para a Operação da Força de Pacificação no Rio de Janeiro*; (Diretriz Ministerial nº 15/2010, de 04 DEZ 10); p. 7.

defense of the unit or right inherent to self- defense, is one of the key concepts of ROE.

Order 3121.01b given on June 13, 2005 by the Head of the Council of Staff of the United States in the Standing Rules of Engagement/ Standing Rules for the Use of Force for US Forces²⁴⁴ (SRDE/ SRUF 2005) combines definitions of self- defense of an individual and self- defense of a unit in a more general definition of the expression “inherent right to self- defense” to state that self- defense is not absolute.

When individuals are assigned and act as part of a unit, individual self- defense must be considered as a subgroup of self- defense of the unit. As such, commandants of units can limit individual self- defense of the members of the unit. Both self- defense of the unit and of individuals include defense of other forces of the US in the surroundings.

This means that self- defense of an individual is part of self- defense of the unit. Therefore, commandants may limit that of individuals so that they do not make the whole unit react due to an excess of self- defense of an individual. However, attack to any of their members implies an attack to the unit as a whole. Rule 10A of the Handbook on Rules of Engagement of the International Institute of Humanitarian Law also states this when it indicates in Annex B that: the use of force is allowed until lethal force is reached for individual self- defense except in the following case: (Specify) an example of said exception may be to add: except that time or circumstances allow for it, in which case it will be necessary to warn and give the opportunity to withdraw or cease threatening actions.

Another example of this restriction is shown by Admiral Woodward, Commandant of the British Task Force during the South Atlantic conflict who, in his memories, stated that:

I had, in fact, taken away some of the self- defense rights of my commandants, restricting more and more those rules that allowed to give fire back. But I did not want anybody to act in a premature manner because that would probably cause great confusion and loss of control²⁴⁵.

There are also those who consider that self- defense is not only respect for individuals and the unit they belong to but also this may involve other forces in the surroundings. That is, if a neighbor unit is attacked, another unit near it may react and this, in the same manner, is considered an act of self- defense.

However, national policies of countries (such as France) may restrict the capacity of forces to use force, especially lethal force, to protect other military men of the same coalition.

As it has been seen in the first part of this research, a French ROE in the Provide Comfort Operation established that an infantry squad is authorized to defend a member of the coalition from a Kurdish or Iraqi attack but it is not authorized to defend another squad of the coalition²⁴⁶.

244. The Judge Advocate General's Legal Center and School; *Operational Law Handbook*; 2011; p. 86.

245. Woodward, Sandy; *One hundred days: The memoirs of the Falklands Battle Group Commander*; Naval Institute Press; 1992; pp. 107-108

246. Poe, Stacy A. Lcdr. JAGC. "USN. "RULES OF ENGAGEMENT: Complexities of coalition interaction in Military Operations Other than War"; febrero 1995, p. 9. Recuperado de <http://www.dtic.mil/dtic/tr/fulltext/u2/a293881.pdf>

If we analyze the “Guide for the development of Rules of Engagement for United Nations peacekeeping operations²⁴⁷”, from which the United Nations Master List of Numbered ROE is derived, we can see that the latter has five groups of ROE and the first of them refers to the use of force. Also, this first group has ten ROE, two of which are stated below, related to defense of individuals and the unit implicitly referred to when mentioning, in a general manner, “other staff of the UN”.

Rule No. 1.1

Use of force, up to a certain limit, including lethal force to defend oneself and other staff of the United Nations from a hostile act or hostile attempt is authorized.

Rule No. 1.3

Use of force, up to a certain limit, including lethal force to resist kidnapping or detention attempts of oneself or other staff of the United Nations is authorized.

The concept of self- defense of the unit is better explained by Captain Dale Stephens from the Royal Australian Navy²⁴⁸, for whom said right has three main characteristics according to current practices. The first is that it is only applicable to military units, as they are unquestionable tools of the State and are necessarily exposed to hostile environments. The second is that said right is part of custom law applied to the military unit in its whole understanding this as a war vessel, military aircraft or a group of soldiers fulfilling a military mission. The third feature is that the use of force to defend the unit is justified only when an attack is clearly imminent and danger is such that defense actions are absolutely necessary.

Extended Self- Defense²⁴⁹

However, the use of weapons in one’s own self- defense in military context may also be extended beyond the fact that an individual as military man or his unit are attacked.

The first case is when civilians have to be defended in an operational area. Unless it has been prohibited, troops must assure life and property of those affected. This started, for the first time, in 1999. Before that date, mandates of the Security Council generally authorized peacekeepers to promote “a secure and stable environment” or to protect civilians associated to the mission, such as those who provided humanitarian aid or UN civil staff.

Resolutions sometimes called for the establishment of “humanitarian areas” or “secure areas” but established that those defending said areas could only use force in response to an attack.

Another case is the one stated by Victoria K. Holt and Tobias C. Berkman²⁵⁰ for whom peace operations, the mandate of which include protection of civilians have serious

247. Guidelines for the development of RDE for UNPKO” UN document, MD/FGS/0220.0001, May 2002.

248. Stephens, Dale Lt. Cdr. Royal Australian Navy; “Rules of Engagement and the Concept of Self Defense”; *Naval Law Review*; XLV; 1998; p. 135.

249. In some countries, such as Spain, the expression “extended defense” is used.

limitations that restrict what is expected from the mission. First, the Security Council often recognizes that protection of civilians is a primary responsibility of the government of the host nation where the mission is operating, but it does not take into account if the nation is in a perfectly formed State or about to fall down. Mandate of the mission in Burundi (ONUB), for example, ordered members of the mission to protect civilians “regardless of the responsibilities of the Government of National Reconciliation”. There are some exceptions such as mandates for MONUC in the Democratic Republic of the Congo²⁵¹ and in the Licorne Operation²⁵² commanded by the French in Ivory Coast.

Second, the Council usually limits the scope of responsibility of the mission for almost all operations for the protection of civilians “within the area of deployment” or “within their capacity”. Mandate for forces from the Summit of the Economic Community of West African Countries authorized Member States that took part in Ivory Coast and French forces that supported them to “by means of resources at their disposal, take any necessary measure to guarantee security and freedom of movement of their staff and to assure, regardless of the obligations of the National Reconciliation Government, the protection of civilians at imminent risk of suffering physical violence in their areas of operations”. For the authors, this happens with Mission ROE of the United Nations for Stabilization in Haiti (MINUSTAH)²⁵³.

It is frequent to find these situations of civilian protection also in natural disasters in which there is looting and robbing. In these cases, troops may be instructed to open fire in defense of civilians to restore order.

An example of this is the case of the earthquake in Chile in the year 2010 during which in cities that were isolated by the earthquake, there was looting and robbery. In this opportunity, president Michelle Bachelet authorized the joint military component in the areas of catastrophe in the Regions of Maule and Bio Bio, to exercise two rules that allowed for the use of force, including lethal force. These rules were the ones referring to legitimate defense, defense of third parties and of international humanitarian workers in the region. In this case, self-defense was extended to defense of civilians and of property²⁵⁴.

The following seems to be easy to be said but it is sometimes difficult to comply with if there is a lower military level, for example, for peacekeepers in a peacekeeping operation. This was seen in the Mission of the United Nations in Sierra Leona (UNAMSIL), which

250. Holt, Victoria K. and Berkman, Tobias C.; *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*; The Henry L. Stimson Center; September 2006; p. 86.

251. Acting pursuant to Chapter VII of the UN Charter, they decided that MONUC may adopt necessary measures in the area where infantry battalions are deployed and within their possibilities, to protect UN staff and staff located from the Mixed Military Commission (CMM), as well as facilities and equipment, guarantee security and freedom to move to their staff and protect civilians threatened of imminent physical violence;

252. As requested by the Economic Community of West African Countries and with the support of France, the UN Security Council, through Resolution 1528 dated February 27, 2004, decided to establish the United Nations Operation in Ivory Coast. French and African troops were deployed to bring peace to the country. After the murder of 9 French people, the French who work jointly with African forces, withdrew from the territory of Ivory Coast to Abidjan but remain there as part of the Licorne Operation.

253. Holt, Victoria K. and Berkman, Tobias C.; op.cit; p. 90.

254. Marchant Roa, Gastón, Captain, “Chile in International Cooperation Operations: Rules of Engagement in Peace Operations”; available at <http://cecopac.cl/wp-content/uploads/2013/07/art-RDE-cecopac.pdf>

was the first UN operation whose mandate ordered for “the protection of civilians under imminent attack”. In May 2000, the mission was about to fail when the United Revolutionary Front secuestró hundreds of members of the mission and rejected the cease fire in a gesture that risked credibility of UN peacekeeping operations²⁵⁵.

Another case occurs when it is necessary to defend property, whether military or any other that may have been ordered to be protected. In these cases, if someone enters to steal within the perimeter in which troops are staying in barracas or acantonamientos, such robbery may occur during day or night. If it happens at night, it may be understood as an attack or a prior exploration. However, this case falls within the scope of self- defense and it is understood that whoever goes beyond the border of a barraca or headquarters is doing that with the purpose of stealing. Only by means of a post facto research, the real intention will be showed. In this manner, the person that went beyond the limits of the military facilities is breaching law but, reasonably, the person who enters to steal food or a chair, cannot be treated as someone who is putting life in danger. Of course, the situation is more difficult is the person aims at robbing weapons or military equipment. In such cases, military staff cannot permit robbery of military equipment or that the person takes a tank or armored vehicle. This is why, in order to provide for these situations, we can add defense of military equipment to rules of self- defense. It is then worth asking: can anyone say that they could enter military facilities using over their clothes the same uniform that those who defend wear (which is called perfidia) that their only intention is to steal food to survive and that they did not want to cause damage to anybody?

In the United Nations Master List of Numbered ROE, as regards extended self- defense, that is the use of lethal force to protect other individuals and property, we can see that three out of ten ROE that authorize use of force make reference to defense of international staff and civilians and other three rules refer to defense of property. Below we mention these rules:

Rule No. 1.2:

The use of force, up to a certain limit, including lethal force, to defend other international staff against a hostile act or hostile attempt is authorized. (It is worth mentioning that this rule may only be included as an annex to rule 1.1 provided it is in line with the mandate of the Security Council).

Rule No. 1.4:

The use of force, up to a certain limit, including lethal force, to resist arrest or detention attempts of international staff is authorized (this rule can only be included as an annex to rule 1.3 provided it is in line with the mandate of the Security Council).

Rule No. 1.8:

The use of force, up to a certain limit, including lethal force, to defend any civil staff

255. UNAMSIL: example of the peacekeeping mission

that needs protection against a hostile act or hostile attempt when local authorities are not able to give immediate assistance is authorized. Whenever and wherever possible, authorization must be required for the use of force from the immediately higher commandant.

As regards defense of facilities, the United Nations Master List of Numbered ROE divides them into United Nations facilities and key facilities, as it may be seen below.

Rule No. 1.5:

The use of force, up to a certain limit, including lethal force to protect United Nations facilities, areas and items appointed by the Head of the Mission when consulting the Force Commander against hostile acts is authorized.

Rule No. 1.6:

The use of force, up to a certain limit, including lethal force to protect key facilities, areas and items appointed by the Head of the Mission when consulting with the Force Commander against hostile acts, is authorized (this rule may only be included as an annex to rule 1.5 provided it is in line with the mandate of the Security Council).

Rule No. 1.7:

The use of force, excluding lethal force, to protect key facilities, areas and items, appointed by the Head of the Mission, when consulting with the Force Commander against a hostile act is authorized.

However, this is not absolute and, as it has been said in several occasions during this research, different national concepts of legitimate defense (for example, the German law does not accept legitimate defense of property unlike French and Spanish law that allow for it in some cases) require to allow each country to introduce those restrictions (caveats) that they may consider appropriate to adapt this concept to domestic law.

National Self- defense

Ius ad Bellum is the expression used to refer to the branch of law that defines legitimate reasons that a State has to start war. In general, there is no disagreement as to the fact that States keep the right to self- defense in case of aggression from another State, as it may be seen in some chapters of the UN Charter and the National Defense Law as detailed below.

Article 2 paragraph 4) of the UN Charter states:

The Members of the Organization, in their international relations, shall not resort to threat or the use of force against territorial integrity or political independence of any State or in any other manner that is not in line with the purposes of the United Nations.

Article 51 states:

No provision in this Charter shall affect the immanent right to legitimate

defense, whether individual or collective, in case of armed attack against a member of United Nations until the Security Council has taken all necessary measures to keep international peace and security. Measures taken by the members in exercise of the right to legitimate defense shall be immediately communicated to the Security Council and shall not affect authority and responsibility of the Council pursuant to this Charter in order to exercise, at any time, the action that may be considered necessary with the purpose of keeping or restoring international peace and security.

National Defense Law No. 23554 in its article 6 sets forth that “national defense is a right and an obligation for all Argentines, in the manner and terms established by laws”.

Differences appear when a State defends itself from non- state actors, when we try to define what an armed attack is if there are issues such as “preventive defense” or discussion regarding how far a state may get as regards its armed response. In general, study of these issues restarted as from the attacks to the Twin Towers in 2001 and the invasion of the United States to Afghanistan and Iraq with the purpose of determining when and how States can use force against another State or within the territory of another State for self- defense. Many analysts are still discussing if *jus ad bellum* is something static or if it continues evolving in response to changing circumstances and different scenarios that may exist.

This is so because new wars involve actors that are not States and that use tactics that are different from those of them. They do not use mass exercise and, in most cases, they do not use sophisticated weapons either. Within this type of actors, we do not only have to considered organized armed groups, religious groups or organized crime organizations, but also Military Companies and Private Security Companies. For this reason, the question that appears is: up to what extent claims for self- defense against non- state actors may be considered legal under international law?

The problem gets worse when certain States allow that from their territories attacks are launched by non- state organizations against other States. During the last years, cases that may be considered as use of force by a State with the excuse of self- defense against a non- state actor, would be invasion to Afghanistan in 2001, led by United States, the military operation in Lebanon during the Second War in Lebanon in 2006 and the conflict in the Gaza Strip between 2008 and 2009.

According to Juan Gabriel Tokatlian²⁵⁶, there are certain links between domestic war and international war, such as the ones called proxy wars: “a country supports (for different reasons) insurgent people in a nation that is under an armed conflict with the purpose of weakening the neighbor country and get more influence and power”. On the contrary, as the author explains, “a country may attack their neighbour country as reprisal and pressure so that this one stops helping the insurgent. As a result of this, a domestic conflict becomes international: a country that is under a domestic dispute makes it external. We could add the case of countries that, trying to get more influence

256. Tokatlian, Juan Gabriel, “War in the Andes?” Tension between Colombia and Venezuela”; La Nación newspaper, Tuesday November 24, 2009.

and power in the region and/or internationally, provide irregular forces with high technology weapons to attack in different countries.

With respect to this situation, there are different prior events. The first of them is the so-called “Nicaragua case”. In this case, the Republic of Nicaragua brought before the International Court of Justice a claim against the United States as they have supported armed opposition (the opponent) in their war against said government and because of having mined the ports of the country.

According to Onderco²⁵⁷, taking into consideration, what Heinze²⁵⁸ had stated, in 1986, the International Court of Justice did not believe that the only supply of weapons and other type of support may be equivalent to an armed attack. In this case, the concept of “effective control” appeared, that is, the requirement for effective control over a non-state actor in order to attribute an attack to a State. However, this International Court expressed that if there were enough evidence of a persistent behavior of support for an indirect aggression, this fact would be enough ground for the victim to resort to the use of force under the terms of article 51 of the UN Charter.

This author, now quoting Duffy²⁵⁹, expresses that the International Criminal Tribunal for the former Yugoslavia in the case Tadic decided that the level required is “total control” which goes beyond arming and financing, but includes participating in decision making and planning operations.

Having analyzed everything related to national self-defense and understanding that all requirements to justify an attack against a non-state actor that uses the territory of another State as operation base, under article 51 of the UN Charter, have been met, the following question is: “what part of said State may be attacked? The whole territory or only the part used by the non-state actor? In light of this dilemma, Onderco said that the International Court of Justice, in the case “Armed Activities”, considered that the Democratic Republic of Uganda did not have the right to launch an armed attack against the Democratic Republic of Congo, that such attack against a non-state actor in a foreign territory could not have occurred in a limited and precise manner using force only against real sources of attack. Onderco concludes his work by expressing that the use of force against non-state actors has become more acceptable not only in the Middle East, but also in other parts of the world.

In South America, an example may be the case of military attack from Colombia to a camp of the Revolutionary Armed Forces of Colombia in the territory of Ecuador, in March 2008.

Partial conclusions on self-defense

Up to this moment, we have identified defense of one’s own life and defense of members of

257. Onderco, Michal; “Armed Force and non-state actors: a curious case of Middle East” Centre for European and North Atlantic Affairs. Available at <http://cena.org/analysis/armed-force-and-non-state-actors-a-curious-case-of-middle-east/>

258. Heinze, Eric A.; “Nonstate Actors in the International Legal Order: The Israeli-HEzbollah Conflict and the Law of Self-Defense”, in *Global Governance*; Vol. 15; No. 1; 2009; pp. 87-107.

259. Duffy, Helen; “The War on Terror” and the Framework of International Law”, Cambridge, UK, Cambridge University Press; 2007.

the unit. Of course, no military staff can remain impassible if the life of a member of their unit is in danger. However, some countries allow commandants to limit self- defense of an individual based on defense of a unit.

Moreover, we have stated that what has been called extended self- defense: that one aimed at protecting military or civil staff as protected, or property which has been assigned the same status, whether civil or military.

It has been showed that these four cases of self- defense are included in ROE of the United Nations Master List of Numbered ROE and that are applicable against hostile acts without considering the source of the threat. Said ROE do not differentiate between hostile acts or attempts by armed forces, non- state actors or individuals. The only difference lies in protection of facilities, whether of the United Nations or key facilities; in this case, the use of lethal force is only authorized against hostile acts rather than hostile attempts.

As from the analysis of other situations, we could understand that neither the mandate nor ROE that authorize the use of force to protect civilians or property guarantee on their own their compliance. The manner in which ROE are interpreted and the real capacity of forces to protect civilians will be, in many cases, more important for their implementation than the language or formality used to draft them.

As regards national self- defense, it is clear that article 51 of the UN Charter is the source that states the right of States to respond by means of the use of force against an armed aggression by another State.

This is not the case with respect to the right of a country to defend itself from non-state actors, that is, against those organized armed groups that have not been declared at war by this or other States and that carry out attacks against it during long periods of time, whether from their territory or from other places.

Legal confusion

Pursuant to what we have developed in the prior section, it is possible to understand that the use of weapons in self- defense creates some legal confusion. With respect to this, the first aspect that will be discussed is the one that seems to be evident: when is it necessary to exercise defense?

Interpretation of the need for self- defense is not uniform: for some people, we can understand that the one defending oneself may use weapons in case of threat of death or serious injury. In other cases –the United Kingdom, for example- the one who defends oneself may only use a weapon when life is in danger²⁶⁰.

For someone who is not an expert in these issues, it is difficult to find the difference. However, there is a difference and it exists in fact. If we consider the first rule –in case of threat of danger of death or serious injury- there has to be danger as a condition to use

260. British law establishes that only reasonable force may be used to defend oneself or other from an imminent threat of personal injury. The use of lethal force is only justified when human life is or may be at risk and there is no other way to prevent it. Commandants need to understand that people may have a legal reason for the use of force at first. Also, they may be responsible for any excess in the use of force.

weapon in self- defense. With the second rule, the one who defends oneself, they first have to exercise the option to get out of danger before using weapons. In a specific case, for example, if a control post in which a vehicle has been stopped, a soldier stands in front of it and the driver accelerates the vehicle with the intention to evade control, this soldier may be crashed into and, therefore, they could open fire in self- defense. With the second rule of self- defense –when their life is in danger- before opening fire, the soldier must exercise the option to jump out of the road to get out of the vehicle.

Following this line of thought, we can observe that the right to self- defense is exercised, in some countries, in case an attack is imminent and, in other countries, it needs to be exercised when there is an instantaneous and key necessity (that is, when the other person is committing or about to commit an act that may endanger human life and there is no other way to prevent that danger). Although it may seem a game of words, the difference between imminent and instantaneous is really significant.

Common sense indicates that there should be no doubt as to the need to exercise self- defense if the one who attacks shows a fire weapon. There would be no place for doubt if the attacker does not show fire weapons, but has sticks, bottles or any other item that may cause serious injuries or cause death. There would be no doubt either if the one who attacks is an expert in martial arts. However, let's mention the case of an individual who has a button that may make an explosive detonate or if a bomb activated through a mobile phone has been discovered when a person who in the nearby takes a mobile phone, or if someone sees the red point of a laser pointer is seen on one's own body.

In these cases, we could ask: do they give enough reason to use a weapon in self- defense? If we see the red point of a laser pointer on one's own body, is the use of weapons justified for self- defense? As from what has been investigated up to now, we could say that the answer may be found in the domestic law of each country.

To respond to this question, taking into consideration that rules for self- defense of many national States are classified, we could say that the scope of answers that may be considered as self- defense may be explained, in general, through the following example²⁶¹:

A person gets close to a control post and makes a shooting against it. Before someone repels fire, the person puts the weapon down, puts it on the floor or throws it away and runs away. The man is not part of a declared hostile force and members of the coalition have to act according to the principle of self- defense in response to this situation.

There may be three different responses in this case:

- > Immediately shoot the person as they continue to be a threat for the life of soldiers.
- > Wait a moment before shooting against them as although they continue to be a threat, given that force has to be used gradually to remove threat, before making a decision to shoot against them, they could be verbally forced to stop and/or make warning shootings.

261. Legal Lessons Learned from Afghanistan and Iraq: Volume I, Major Combat Operations (11 September 2001 to May 2003); p. 119. Available at <http://www.fas.org/irp.doddir/army/clamo-vl.pdf>

- > It is not possible to shoot against the person as, given that there is no weapon pointing, they are no longer a threat for human life and, therefore, they cannot be shot under the concept of self- defense.

While the Armed Forces of the United States would adopt the first response, other countries would adopt one of the other two. According to Merriam “while ROE had always authorized for self- defense in response to an imminent attack, SROE/SRUF 2005 established for the first time that the word imminent “does not necessarily mean immediate or instantaneous”. As a result of this, the author adds: the United States have opened the door for the use of force in self- defense against non- immediate threats²⁶².

According to Sennott²⁶³, “a person may be an imminent danger even when at that moment they are not pointing a weapon”. To prove this statement, he takes two examples included in RUF in operations against drug trafficking by staff from the Department of Defense of the United States. These examples of imminent danger are:

An individual who has a weapon or who tries to have a weapon under circumstances that show their intention to use it against staff of the Department of Defense or against someone who is near staff of the Department of Defense.

An individual who does not have a lethal weapon but who has the capacity to cause death or serious injury and who shows their intention to do that, for example, trying to run over staff of the Department of Defense or someone who is near staff of the Department of Defense.

Merriam²⁶⁴, while assigned to the 10th Special Forces Group (air- transported), wrote:

A problem normally faced by civil authorities who interact with military staff from the United States is that they are not prepared to understand where the line that differentiates a threat from something that it is not a threat is. While military men and civilians agree on the fact that a weapon pointing to a soldier may lead to an individual self- defense act, the same does not necessarily occur with respect to driving a car against a traffic control post or taking on a mobile phone near a US patrol or other types of behavior as none of them represents, in an obvious manner, an imminent threat. For example, if there is a man digging on the floor at night, is he placing an improvised explosive device or is he working the land because temperature during the day sometimes gets to 130° F? Is he talking on a mobile phone because he is guiding mortar fire or because Afghanistan is a mountain field and height helps for mobile phone signal? Whatever may be seen as a threat for the US forces may be

262. Merriam, John J, Major; “Natural Law and Self-Defense”; *Military Law Review*; Vol. 206; p. 44.

263. Sennott, Daniel J. Major; “Interpreting Recent Changes to the Standing Rules for the Use of Force”; *The Army Lawyer*; November 2007; p. 55.

264. Merriam, John J.; op. cit.; p. 82.

interpreted as an innocent behavior for civilians. The serious fact is that if the threat is not understood as such, it may result in an increase of one's victims.

According to Merriam²⁶⁵, the definition of self- defense of SROE/SRUF 2005 reopens the debate with respect to the validity of prior self- defense –an action that is carried out before the attacker attacks –a concept that, although criticized, even those who support their validity, do not agree with the exact temporary limits for its use.

The second aspect discussed is discrimination. In self- defense, shooting must be on a shot basis to prevent damage to those that are not involved in the event. Inexperienced state that “it is necessary to point fire, trying not to injure or kill”, but this is a theoretical disquisition as all men who defend themselves are treated as expert shooters (as if they were Olympic champions in shooting) and as if they would always make a precise shooting.

Those who state that do not know that, if we talk about a rifle, the target pointed and the point of impact are different depending on the distance where the target is. For this, the shooter has to adjust the weapon aim system. This is called “efficient reach”, that is, the point in which the target coincides with the impact point. This “efficient reach” is different according to the weapon and, within the same type of weapon, it is different according to the weapon. In many cases, light or climate conditions also have an influence. Moreover, the fact that target systems are orthoptic or not has an influence as well²⁶⁶. Therefore, the statement “open fire trying to injure but not to kill” is an almost impracticable abstraction in fact.

However, Regras de Engajamento para a Operação da Força de Pacificação no Rio de Janeiro stated that, in case they had to use fire weapons against persons, shooting had to be made to lower rank members of the enemies with the purpose of incapacitating them²⁶⁷.

In sum, we can state that although there is a principle of self- defense, the use of force, even lethal force must be based on necessity and proportionality criteria.

As regards national self- defense, although both International Law and domestic laws are clear to state that said right arises from the power given by section 51 of the UN Charter, there may be some legal confusion.

On the one hand, there is disagreement as to the fact whether section 51 allows for the use of force by a state before an actual aggression which, if it occurs, it may have serious consequences for such State as an attack with mass destruction weapons.

On the other hand, there is the expression “external aggression”, which is defined in the Glossary of Terms of Joint Military Action as “the use of an Armed Force by one or more States against vital interests of the Nation or any form of action that is not compatible with the UN Charter²⁶⁸.”

265. Merriam, John J., *op. cit.*, p. 82.

266. Orthoptist target systems: these are the ones that have a circle in the rear sight. Targeting in these systems is different depending on the eye curvature. These weapons with this targeting system are to be used by only one man as the eye curvature is different among human beings.

267. República Federativa do Brasil, Ministério da Defesa, Gabinete do Ministro, Diretriz Ministerial Nº 15/2010, De 04 Dez 10, *op. cit.*; p. 7.

268. “Glossary of Terms of Joint Military Action”; PC 00 – 02; 2010; p. A -33-35.

In this case, it is useful to take into consideration the list of acts that are an aggression as stated in section 3 of Resolution 3314 (XXIX) of the year 1974²⁶⁹ on the definition²⁷⁰ regardless of the fact that there is a statement of war or not and also the Nicaragua case mentioned before.

As it may be seen, the resolution considers that an armed attack is the act of sending non regular armed groups from one country to another to exercise violence provided that its action is serious enough. However, it could not be said that other forms of assistance to a faction engaged in a civil fight against the government of another State are not an armed attack according to the International Court of Justice in the case on Nicaragua v. United States. Nevertheless, section 4 opens the door to other type of aggressions that will be determined by the Security Council.

In this case, the Court has decided that the supply of weapons, financing, opportunities for training and general support to the “Enemies” to fight against the government of Nicaragua were an illegal use of force, but were not equal to an armed attack that authorizes Nicaragua to respond with force against the United States, except, naturally, within its territory and against the armed groups in question. It could only take proportional counter measures that the Court²⁷¹ does not define against the State that has organized support to insurgent people.

Although definitions seem not to express doubts as to what acts may be considered an armed attack or external aggression and from whom an armed attack may come, these do not answer this question: when can an armed attack may have been considered to have occurred? This last question is valid as, throughout time, the manners in which attacks took place have evolved. As Clausewitz states: War is no more than a chameleon which softly adapts its characteristics to each concrete case²⁷².

269. Available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/743/93/IMG/NR074393>

270. Acts of aggression are the following:

- a) Invasion or attack by armed forces of a State to the territory of another State, or any military occupation, even temporary, which results from said invasion or attack, or any attachment by means of the use of force of the territory of another State or part of it;
- b) Bombing by armed forces of one State to the territory of another State or the use of any weapon by a State against the territory of another State;
- c) Blocking ports or coast of one State by the Armed Forces of another State;
- d) Attack by the armed forces of one State to the land, navy or air armed forces of another State or its merchant or air fleet;
- e) The use of armed forces of one State which is in the territory of another State with the agreement of the receiving State in breach of the conditions set in the agreement or any extension of its presence in said territory after the agreement has expired;
- f) The action of one State that allows for its territory, which has been made available to another State, to be used by that State to carry out an act of aggression against a third State;
- g) The fact that one State, or someone in its name, sends armed groups, irregular or mercenary groups that carry out acts of armed forces against another State which are so serious that they may be compared to acts as listed before or its essential participation in said acts.

Section 4: The list of acts mentioned before is not final and the Security Council may determine which other acts represent an aggression pursuant to the provisions of the Charter.

271. Guerisoli, Emmanuel; “Evolución del concepto de Legítima Defensa”; Centro Argentino de Estudios Internacionales. Recuperado de http://www.caei.com.ar/sites/default/files/19_6.pdf

272. Clausewitz, Carl von, “On War”; Edited and Translated By Michael Howard and Peter Paret, Princeton University Press; Princeton; New Jersey; 1989; p. 89.

Nowadays, what we can call computer network attack (CAN) may be defined as any operation with the purpose of disrupting, denying, destroying or deteriorating information contained in computers or information networks. A cyberattack against the military command of a nation and its control system may replace an attack with missiles, as in the Stuxnet case²⁷³.

In an interview carried out by Jerusalem Post to Ralph Langner, a German expert in security, he said that Stuxnet had two “digital ogives”, each of which had one purpose.

Langner explained that the first digital ogive was addressed to Irani uranium enriching facilities. This digital ogive could manipulate the speed of mechanical parts of the enriching process, which would result in a “rotor stirring and the spin cycle would be destroyed”. The second digital ogive was clearly different and intended to attack the Buserher power station in Iran. This is the first power station in the Middle East and is planned to be finished soon. This part of the code aimed at attacking external turbines and could “destroy the turbine as an air attack could do”. To conclude, Langner added: “smart attacks may affect an industrial plant and a military base in the same manner”.

Is a computer network attack equivalent to an armed attack to such computing networks? If so, is it subject to International Humanitarian Law as part of the operations of a classical conflict or as a cyber war that produces damage or destruction of an attack?

The problem that this type of attacks presents is that, in general, it is difficult to determine whether they actually are an attack, where they come from and who executes them. This threat has a global scope and the actor may operate from anywhere in the world, including one’s own national territory, with the only requirement of having access to cyber space.

Moreover, the necessary analysis to identify an attacker may take months, if identification is finally made. Cyber attacks are often caused in servers located in neutral countries and response may have consequences that are not in line with their interests. For this reason, the use of this type of reactions must lie under a strategic command that has an integral and global vision of the situation²⁷⁴.

These cyber attacks may be carried out from computers located in a country to attack networks of another country without anyone knowing about this, not even the government hiding its origin through servers and computers. These attacks are difficult to analyze from the principle of neutrality of International Law of Armed Conflicts and the country from which the attack is launched may not know that their computers are being put at risk.

Some questions related to the International Law of Armed Conflicts arise: who could be legally attacked by means of a cyber attack and who could legally carry out said type of attack? Is it possible to respond to a cyber attack by means of fire weapons?

273. “Stuxnet specifically targeted Iranian nuclear program”. Recuperado de <http://www.jpost.com/Iranian-Threat/News/Stuxnet-specifically-targeted-Iranian-nuclear-program>

274. Spain; Ministry of Defense; Instituto Español de Estudios Estratégicos; Instituto Universitario “General Gutiérrez Mellado”; “Ciberseguridad Retos y Amenazas a la Seguridad Nacional en el Ciberespacio”; Grupo de Trabajo volume 03/10; Cuaderno de Estrategia; 149, p. 225

A report ordered by the House of Commons of the British Parliament²⁷⁵, on December 18, 2012, referring to the conceptual framework of military activity in cyberspace wondered:

Is an attack to a defense contractor enough, for example, to justify participation of military men based on the fact that it is possible for the commitment to have an impact on sensitive information of military interest? What would the rules of engagement be which would involve military men? Would military participation be related to a specific political context, for example, tension that escalates with a country in particular and the possibility of military confrontation when cyber attacks are attributed to that country? Or, would military involvement be related to the defense of a specific target of military interest, such as the control of a weapon system? Would this also be extended to systems that are essential for the development of military operations but do not belong to the center of military functions, for example, parts of the telecommunication national network? Or would military aspects be involved in the case of a cyber attack that does not focus on defense items but would be of such catastrophic proportion and effect for the nation that could be the equivalent of an armed attack? An example could be the use of a cyber attack to carry out a sabotage to a nuclear energy plant.

Legal background of the right to self- defense and defense of the unit

Essentially, the right to self- defense of the unit allows the Commander or a military man who acts individually to defend their unit or oneself in certain well defined circumstances. However, and although the expression is internationally recognized, not everybody agrees as to its legal background.

In this part of the research, we will show that according to international law and national laws and rules, an Argentine military man may use force to defend himself and his unit against a real attack or the threat of an attack.

In order to do so, we will analyze two theories that show that said right exists. The first one states that the right to one's self- defense or defense of the unit is a derivation of the national right to self- defense. The second one states that custom law gives background to one's self defense and defense of the unit.

Legal basis for the right to self- defense and defense of the unit

According to Findlay²⁷⁶, military staff, as any other person, have the inherent right to individual and collective self- defense. For this author, the origin of the concept may be sought in the writings of the Dutch Hugo Grocio, who considered the right to self- preservation as a natural right of individuals that cannot be restricted by law. Grocio

275. Parliament UK. Defence Committee - Sixth Report Defence and Cyber-Security. Recuperado de <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmdfence/106/10602.htm>

276. Findlay, T., "The use of force in UN Peace Operations", SIPRI; Oxford; 2002; p. 15.

also made this extensive to States, which had been recognized as such by section 51 of the UN Charter. For these reasons and in light of the fact that Armed Forces are the main defense of a State, we can state that its collective right to self- defense is derived from the right of said State to defend itself.

Findlay also states that military men have the same right acting under UN mandate, even when, for some analysts, said right corresponds to the individual right of a person to self- defense rather than the broader concept of self- defense of a State.

Yoram Dinstein²⁷⁷ expresses that there is a quantitative but not qualitative difference between a simple unit responding to an armed attack and a whole military structure doing the same. Self- defense is always exercised by the State; actions of any soldier and the highest rank soldiers may be attributed to the State that gave them functions.

However, according to Trumbull²⁷⁸, the right to self- defense and defense of a unit cannot be included in the framework of the concept of national self- defense. The right to self- defense of the unit, for this author, is derived from custom law and, therefore, must be distinguished from the right to national self- defense. According to this point of view, there are four different reasons to be opposed to the theory that self- defense of the unit is a representation of the right to national self- defense.

The first one is that the decisions to exercise individual and national self- defense are made at different levels of conduction. We could say that the first one is at tactical level while the other one is at national strategic level. A military man or the Commander of a unit cannot take some time to respond to an attack or the imminence of an attack, while a State does not necessarily need to do this in an immediate manner. After suffering an attack, a State has the option but not the obligation to respond to it for many reasons, among which we can mention the risk of escalation or little combat capacity.

The second reason to establish that self- defense of the unit is not a representation of the right to national self- defense is that it does not refer to military men that participate in operations under UN mandate as this is a supra national organization rather than a State against which an attack is being carried out.

The third one is that it does not refer to attacks of non- state actors. Under this theory, a unit that exercises the right to self- defense against the attack of a non- state actor that is not associated or protected by a country could not raise section 51 of the UN Charter as justification for the use of force. This is due to the fact the rulings of the International Court of Justice and the International Criminal Court for former Yugoslavia have considered that an attack by an armed group may only be considered an “armed attack” under section 51 of the UN Charter if the State that gives asylum to said group exercises “total control of said group”.

Last, Trumbull expresses that the right to self- defense of the unit does not allow military men to prevent an attack some days after the hostile act has occurred, or a

277. Trumbull, Charles P. IV; “The Basis of Unit Self-Defense and Implications for the Use of Force” *Duke Journal of Comparative & International Law* Vol. 23:121 2012; p. 122. Recuperado de <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1384&context=djCIL&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3DThe%2BBasis%2Bof%2BUnit%2BSelf->

278. Trumbull, Charles P. IV.; op. cit.; p. 126.

group different from the one that carried out the attack or threatened to do it or to take measures to prevent future attacks. Although national self-defense must proceed under the principles of necessity, proportionality and imminence, this last requirement is less demanding for a State than for an isolated unit or military man. Usually, the government of a State that has suffered an attack discusses, analyzes different alternatives and, normally, acts weeks or months later.

It is worth mentioning that in the ruling of the International Criminal Court for former Yugoslavia that sentenced Darío Kordic and Mario Cerkez²⁷⁹, the concept of self-defense in international law was analyzed and it was stated that:

The notion of self-defense may be defined in a broad manner as the act of considering the defense of a person that acts to defend himself or protect himself or his property (or another person and his property) from an attack, considering that this act is a reasonable, necessary and proportional reaction to such attack.

The International Criminal Court also stated that “the principle of self-defense shows the provisions of most Criminal Codes of different nations and that may be considered as part of custom international law”.

If Trumbull’s theory is correct, we could ask what the legal background is, both in domestic and international law upon which the right to self-defense is based in all types already described. Moreover, we could ask what the legal basis is for such law in other countries in UNASUR.

Self- defense of the individual and of the unit in national law

Between the years 1989 and 1992, the Argentine Republic was part of the peacekeeping mission called United Nations Observer Group in Central America (ONUCA).

For this mission, the mandate of the Security Council of the United Nations ordered the withdrawal of all weapons of Dabur class patrol ships that the Argentine Republic had sent. Although our country proposed to keep 20mm and 12.7mm machine guns inside the ships that were dismantled, the UN opposed to this and all weapons had to be unloaded²⁸⁰.

The fact that patrol ships should operate disarmed made it necessary for an agreement between Argentina and the UN with respect to ROE in which it was established that, if during patrol, ships were attacked, the crew had to adopt an evasive path and be out of the scene, report the incident to the ONUCA headquarters and request immediate assistance of navy authorities of the riverside State that has jurisdiction over the seas in which ships were operating.

However, in 1996, by Law 24649²⁸¹, the Argentine Republic passed the Convention on the Safety of United Nations and Associated Personnel, establishing in section 21 that “nothing contained in this Convention will be interpreted as if it affected the right

279. Available at http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf

280. Neves, Juan Carlos; Capitán de Fragata; “United Nations Peacekeeping Operations in the Gulf of Fonseca by Argentine Navy Units”, *Center for Naval Warfare Studies, Naval War College, Newport, R.I.*

281. Law 24649 “Approval of the Convention on the Safety of United Nations and Associated Personnel; Buenos Aires, May 29, 1996, Official Gazette, July 1, 1996-

to act in self- defense”. The Convention had been passed in December 1994 in a context featured by a significant increase in the number and relevance of peacekeeping and peace imposition operations.

Four years later, our country adhered through Law 25390 to the Rome Statute of the International Criminal Court²⁸², section 31, paragraph 1- c of which states the following:

1. Notwithstanding other circumstances that exclude criminal liability set forth in this Statute, no person shall be criminally liable if at the time of acting (...):
- c) Reasonably acts in self- defense or defense of a third party or, in the case of war crimes, of property that is essential for survival of his own or of another person or property that is essential for a military mission against an imminent and illegal use of force, in proportion to the danger it may pose to himself, third parties or protected property. Participation in a force that carries out a defense operation shall not be enough to be a circumstance that excludes criminal liability pursuant to this paragraph (...).

Last, law 26394²⁸³ enacted on August 6, 2008, which derogated the Military Justice Code and all internal regulations, resolutions and provisions which ruled and modified the Criminal Code and Criminal Procedure Code set forth in Chapter V “Disciplinary liability defenses” and in section 28- General defenses considers in paragraph 4 a disciplinary liability defense and states that it is not possible to punish a military man who has been accused if he has defended himself in this circumstance:

Incurring in offense acting in legitimate defense or state of necessity provided there is proportion as to damage caused and property defended.

While our country, when it passed Law 24649, seemed to show that the right to self- defense is an inherent right of people as it adhered to the Statute of Rome and modified the Criminal Code, it may be understood that nowadays the Argentine Republic understands legitimate defense as a defense as set forth in Section 34, paragraphs 4, 5 and 6 of the Argentine Criminal Code. This considers that it is not possible to punish “those who act in compliance with an obligation or during the legitimate exercise of their rights, authority or position”, “those who act in exercise of due obedience” and “those who act in self- defense or defense or their rights provided the following circumstances exist: legitimate aggression, rational necessity of means used to prevent or repel it, lack of enough provocation by the one who defends himself”.

As it may be observed in section 34, this defense does not expressly establish the case of professional exercise. However, Natalia C. Birreci²⁸⁴ understands that, provided that a right, power or duty derives from it by law for the person who exercises them, the legitimacy of its exercise shall be ruled by principles related to three specific assumptions: exercise of a duty, authority or position.

282. Law 25390 “Be the Statute of Rome, adopted don July 17, 1998, approved” Enacted: November 30, 2000. Promulgated: January 8, 2001.

283. Available at <http://infoleg.mecon.gov.ar>

284. Birreci, Natalia C.; en: D’Alessio, Andrés José (director); Divito, Mauro A. (coordinator); Criminal Code, as commented and revised, general part (sections 1 through 78 bis); First Edition; Buenos Aires; La Ley; 2005 p. 387.

Moreover, by saying “preventing” or “repelling”, the term of effectiveness of the authorization to act in self- defense is expressed.

The Argentine Criminal Code, in its section 253 establishes that:

Any military man who, because of recklessness or negligence, lack of expertise or breach of regulations or duties during the course of an armed conflict or assistance or aid in situations of catastrophes, causes or does not prevent the death of one or more persons or military loss shall be sentenced to prison between two (2) and eight (8) years if it is not a crime with a greater sentence.

Last, the Glossary of Military Terms for Joint Military Action²⁸⁵ defines self- defense as the action to protect one’s own life from a brief and urgent need against an aggression. This action must be subject to the principles of proportionality and gradualness in their response.

Therefore, in the Argentine Republic, self- defense of an individual or a unit is not a right, but a defense that does not have any limit other than those established in the Criminal Code although the Convention on the Safety of United Nations and associated personnel has been approved. This recognizes self- defense as a right.

However, in Resolution 1020/2009 of the Ministry of Defense through which principles were approved to be applied in case of serious crimes against military jurisdiction, which is understood as the territorial context in which military authority exercises its own competence as derived from Laws No. 23554 and 24948, the following is set forth:

It is mandatory for Armed Forces personnel to use the necessary, proportional and reasonable force to prevent any serious violent crime against military jurisdiction, immediately communicating this event to the competent judicial authority and requiring the presence of Security Forces or the Police, for which a coordination mechanism shall be applied pursuant to criteria established by the Joint Staff of the Armed Forces in the Common Security Criteria Guidelines (author’s own highlighting).

Natalia C. Birreci²⁸⁷ states that Zaffaroni, Alagia and Slokar claim that legitimate defense is possible from the moment the attacker shows his willingness to attack and has means available to do it, that is, he may do this at any moment, thus causing immediate danger”.

A possible ROE of RUF that may be promulgated in order to make the Resolution of the Ministry of Defense previously mentioned operative would be: prior to the use of lethal force to defend property, it is necessary to assure that those who come closer are willing to attack. This will require prior training.

285. Publicación PC 00-02; Glossary of Military Terms for Joint Military Action; p. A 33-35

286. Available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/155000-159999/158547/norma.htm>

287. Birreci Natalia C.; in D’Alessio, Andrés José (director); Divito, Mauro A. (coordinator); Criminal Code (commented and revised), general part (sections 1 to 78 bis); First Edition; Buenos Aires; La Ley; 2005 p.387.

Self- defense of an individual and of the unit at international level

Similarly to what happens in Argentina, in Peru, section 30. Exemption from criminal liability of the Legislative executive order which establishes Rules for the Use of Force by Armed Forces in national territory²⁸⁸ establishes:

Cases of criminal liability exemptions derived from the use of force in application of this Legislative Executive Order are ruled pursuant to the provisions stated in paragraphs 3, 8 and 11 of section 20 of the Criminal Code and Law No. 27936 as regards legitimate defense and fulfillment of obligations

The same occurs in Spain, where the Royal Decree 96/2009 dated February 6, 2009 which approves Royal Orders for the Armed Forces sets forth:

Section 84. Legitimate use of force.

In the legitimate use of force, military men will make proportional and gradual use of force pursuant to the rules of engagement established for operations in which they take part.

Section 96. Preparation and participation in peace or humanitarian operations.

Interest in the knowledge and understanding of habits and culture identifying elements of the deployment area shall be raised. These elements shall be respected unless they engage the mission required or one's own or subordinates security.

According to Verónica Sánchez Sánchez²⁸⁹:

Self- defense: This is the use of a proportional and necessary force to defend oneself and forces, persons and property with a special status from an imminent attack. Self- defense may be of oneself or of the mission. In the first case, it will be legitimate defense, which in Spain is not regulated as a right but as a criminal liability defense. Defense of the mission may be limited due to political, military or legal reasons.

Sánchez Sánchez adds:

Requirements that ROE catalogs establishes for self- defense:

- > Attack or imminent attack (illegitimate aggression pursuant to section 20.4 of the Spanish Criminal Code).
- > Need to defend must be clear, immediate and urgent (rational use of means to prevent or repel aggression pursuant to section 20.4 of the Spanish Criminal Code).

²⁸⁸. Available at <http://derechoperu.wordpress.com/2010/09/01/decreto-legislativo-1095-establece-reglas-de-empleo-y-uso-de-la-fuerza-por-parte-de-las-fuerzas-armadas-en-el-territorio-nacional/>

²⁸⁹. Sánchez Sánchez; Verónica Teniente Auditor; "ROEs, Reglas de Enfrentamiento"; Escuela Militar de Estudios Jurídicos, Cuaderno práctico 5, Nov. 2010-Abr. 2011; p. 100.

- > Necessary use of force.
- > Proportional response, that is, coherent with the threat it poses.

At the same time, she states that Spanish laws “also require lack of sufficient provocation by the one who defends himself”.

According to Miguel González²⁹⁰, in an article published in El País newspaper from Spain, Spanish troops (Brigada Plus Ultra) deployed in Iraq between August 2003 and May 2004, had their capacity to use weapons limited: The main idea is to give priority to the protection of the force as to the fulfillment of the mission. However, the author states that rules of confrontation of Spanish troops were divided into four classes: intervention, minimum use of force without including lethal force, minimum use of force including lethal force and prohibitions. The ones that authorized the use of lethal force “were ten in total and were preceded by the warning that they could only be activated as a last resource after force had tried to prevent escalation”. In sum:

The use of lethal force was permitted, even in cases of self- defense to protect personnel under the protection of the brigade; to prevent intrusion in military facilities or approaching vehicles to prevent prisoners from escaping or releasing one’s own prisoners. Also, lethal shooting was authorized to defend property of the brigade when its loss or damage could be a threat against human life as power generator or key health structures.

As a conclusion, the author states that:

Many of these rules were kept by the General commanding the brigade. That is, it could only be applied with express authorization. And, at least one of them, L 45, required permission of the Joint Operational Command Commander, that is, the Chief of Defense Staff in Madrid.

It is the rule that allowed for the use of lethal force “to support coalition forces when they carry out operations in AOR (Area of Responsibility) of the MNB Plus Ultra to seize elements that pose a certain threat for the coalition”.

The San Remo Manual on International Law applicable to Armed Conflicts at Sea, which is considered in some countries as a doctrine reference²⁹¹, provides help as regards definitions related to self- defense. For said Manual²⁹²:

290. González, Miguel, “Las tropas españolas en Irak tenían orden de “evitar o minimizar daños colaterales”; El País, 24 de octubre de 2006. Recuperado de http://elpais.com/diario/2006/01/24/espana/1138057214_850215.html

291. It is worth mentioning that said Manual was considered as a doctrine reference as shown in the report of the Turkel Commission: Report of the Commission for Examining the Maritime Incident of May 31, 2010 to determine whether actions carried out by the state of Israel to enforce the navy blocking on May 31, 2010 were in line with international law, p. 245.

292. San Remo Manual on International Law applicable to Armed Conflicts at Sea; June 12, 1994; Section II; Armed conflicts and the right to self- defense; p.TC-3.

- a. Self- defense of an individual refers to the right of an individual to defend oneself (and, in some other cases, other individuals) from an attack or imminent attack. Some countries allow for commandants to limit self- defense of an individual in the same manner as for self- defense of a unit.
- b. Self- defense of a unit: Commandants of a unit have the right to defend their unit and other units of their country against an attack or imminent attack. For certain countries, the concept of self- defense of a unit is both a right and an obligation; while for others, the concept is only a right. Some countries allow for the right to self- defense to be limited by orders from higher authorities. Self- defense of a unit may be extended to units and individuals of other countries when they are authorized by applicable ROE.

For the United Nations, the principle of non- use of force, except in cases of self- defense, dates back to the first deployment of a UN armed contingent in 1956. The idea of self- defense evolved until it included the authorization for the use of force, including lethal force, to fulfill the mission²⁹³.

In Resolution 1031²⁹⁴ of the Security Council of the United Nations of the year 1995, NATO is given the mandate to implement military aspects of Peace Agreements in Bosnia- Herzegovina (Daytona Agreement). Paragraph 17 expresses:

Member states are authorized to take all necessary measures as required by the Implementation Force (IFOR), whether to defend IFOR or to help the force to carry out their mission and the right of the force to take all necessary measures to defend itself from an attack or threat of attack.

The fact that the Security Council has recognized the right to self- defense indicates that said right exists regardless of the authority that may have given it, that is, the Council, acting under Chapter VII of the UN Charter.

Another piece of evidence is Resolution 1368 approved by the Security Council in its 4370 session held on September 12, 2001 which condemns terrorist attacks that took place on September 11 in New York, Washington DC and Pennsylvania. In said resolution, the Security Council recognizes, among other things, the immanent right to individual or collective self- defense pursuant to the UN Charter.

However, according to Miguel González from the newspaper El País from Spain, the UN has gone one step further and, in 2006, it authorized “preventive self- defense” to blue helmets in Lebanon.

Rules of Confrontation of blue helmets in Lebanon, among others, up to 1100 Spanish soldiers authorize, for the first time in a UN operation, the so- called “preventive

293. United Nations; “United Nations Peacekeeping Operations Principles and Guidelines”; *Peacekeeping Best Practices Section, Division of Policy, Evaluation and Training, Department of Peacekeeping Operations*; United Nations Secretariat; 2008; p. 24.

294. Available at <http://www.nato.int/ifor/un/u951215a.htm>

self- defense”, that is, the possibility that their soldiers could be the first ones to open fire if they are going to be attacked. “Preventive self- defense against an anticipated attack must be based on reliable information as to the fact that hostile persons or groups are involved in an imminent attack”, as stated in the document with rules and procedures of blue helmets, which newspaper El País has had access to.

Nothing in these Rules of Engagement contradicts the right and obligation of commandants to take all necessary, reasonable and proper measures for self- defense. All personnel may exercise their inherent right to self- defense.

“Self- defense against a hostile force, states the document, which has classified status, may be exercised by individuals or units under attack or in danger to be attacked as well as by other UN forces capable to help these individuals or units”.

UN authorization extends beyond self- defense and defense of others to the fulfillment of the mission. Blue helmets may resort to force to prevent their freedom of movement from being limited or a Un checkpoint. All these rules derive from bad experiences in former Yugoslavia, where UN troops were kept or kidnapped and could do nothing as to the killing of civilians²⁹⁵.

When checking Resolution 1701/2006 of the Security Council, we can see that the expressions of the Spanish journalist are in line with item 12 of the mandate, which states:

Acting in support of a request made by the Government of Lebanon to deploy an international force to help them exercise their authority in all the territory, it authorizes the United Nations Interim Force in Lebanon to take all necessary measures and to estimate they are within their capacities in the deployment areas of their forces to assure that their area of operations shall not be used to carry out hostile activities of any type to resist attempts to prevent with force to fulfill the missions pursuant to the mandate of the Security Council and not to protect personnel, services, facilities and UN personnel, to care for security and freedom of movement of UN personnel and humanitarian workers, and that, regardless of the responsibility of the Government of Lebanon, to protect civilians under imminent threat of suffering physical violence.

As a conclusion for this paragraph, we can quote Sánchez Sánchez²⁹⁶ again:

It is important to mention that self- defense does not have the same treatment in all domestic laws and this is because there are significant differences as to their origin among them.

Anglo- Saxon countries give a broader treatment to this right. In some of them, the only suspicion of an act or attempt of hostile act against them authorizes them to resort to force, even lethal force. This interpretation does not coincide with the one of other countries in Southern or Middle Europe which are more demanding when analyzing the existence or lack of a situation that justifies self- defense.

295. González, Miguel, “La ONU autoriza la “autodefensa preventiva” a los “cascos azules” españoles en Líbano”; El País, October 13, 2006. Available at http://elpais.com/diario/2006/10/13/espana/1160690411_850215.html.

296. Sánchez Sánchez, Verónica; op. cit.; p. 101

The right to self- defense of the individual or the unit in the countries of the South American Union (UNASUR)

The Livro Branco de Defesa Nacional, 2012 edition²⁹⁷, when it refers to the International System and its cooperation with the UN, it indicates that “the three pillars of peacekeeping operations are: the use of force for self- defense, or for the defense of the mandate given by the UN Security Council, impartiality and consent of States in which operations occur”.

The Glossário das Forças Armadas²⁹⁸ (2007) of the Ministry of Defense of the Republic of Brazil defines self- defense as:

1. Legitimate defense with the use of one’s own means to respond to a direct attack.
2. Reaction of an armed force or group against any form of real or imminent attack taken without considering other armed forces and in legitimate defense.

In line with this, the Ministry Resolution 15/2010 dated December 4, 2010²⁹⁹ defines legitimate defense as the moderate use of necessary means to repel an unfair aggression, whether actual or imminent, against one of them or of others in proportion to violence suffered and which must stop as soon as aggression ends. However, the word “moderate” is ambiguous.

In Brazil, the concept of defense that federal authorities have indicates that laws understand that self- defense is the legitimate use of force by military men or the Army against the opponent who carries out a hostile act with the purpose of guaranteeing and protecting personnel, materials and facilities. They also express that, in any case, legitimate defense is the moderation in the use of the necessary means to protect oneself against unfair aggression, whether imminent or current, protecting the right of oneself or of another person in proportion to violence suffered and only to stop aggression.

The Republic of Chile, in the National Defense Book³⁰⁰, 2010 edition, when referring to peace missions, it states:

In general, these are missions, the main purpose of which is to stop or reduce a conflict between two or more states keeping parties at war separate and stabilizing the situation. The mission of military observers is composed of disarmed officers and peacekeeping forces carry weapons only for self- defense. Coercive use of force by troops deployed is authorized only in that case: self- defense.

Captain Gastón Marchant Roa³⁰¹, of the Chilean Army expresses that his country considers four types of self- defense pursuant to ROE Charter of Armed Forces, 2006 edition:

297. Brasil; Ministério da Defesa; Livro Branco de Defesa Nacional de Brasil; edição 2012; p. 32.

298. Brasil; Ministério da Defesa; “Glossário das Forças Armadas”; MD35-G-01; 2007; p. 38/274.

299. República Federativa do Brasil; Ministério da Defesa; Gabinete do Ministro; Diretriz Ministerial Nº 15/2010, De 04 Dez 10; “Regras de Engajamento para a Operação da Força de Pacificação no Rio de Janeiro; p. 2.

300. Chile National Defense Book, 2010, P.192

301. Marchant Roa, Gastón; Capitán; “Chile en Operaciones de Cooperación Internacional: Reglas de Enfrentamiento en Operaciones de Paz”; Joint Center for Peace Operations in Chile; Available at <http://cecopac.cl/?p=330>

- > National legitimate defense: for the defense of Chile, nationals and their property and/or commercial items.
- > Collective legitimate defense: act to defend foreigners residing in Chile and their property against the attack of hostile forces.
- > Legitimate defense of the unit: act to defend any force belonging to the Armed Forces and/or Security and/or order Armed Forces that are close to one's own unit against an attack launched by hostile forces.
- > Individual legitimate defense: inherent right to use the necessary means available and actions to defend oneself and Chilean Forces against an act or hostile act.

As an example, we could say that the Republic of Chile, for the case of the United Nations Mission in Haiti³⁰², established that weapons on board of helicopters will be used in self-defense for the fulfillment of a mission that does not have an attack planning to protect integrity of personnel of the Mission, key items or designated areas against an act or hostile attempt of opposing forces, provided attackers are identified and this is under an attack with fire weapons.

In the Republic of Peru, Legislative Executive Order No. 1095 dated September 1, 2010, which establishes "Rules for the Use of Force by Armed Forces in the national territory", in its section 19.1, it establishes:

As an exception, members of the Armed Forces in the fulfillment of the mission assigned may use fire weapons in self- defense or defense of others, in case of immediate danger of death or serious injuries with the purpose of preventing the commission of a crime which is particularly serious and implies serious threat for life or with the purpose of stopping a person who represents said danger and resists authority or to prevent them from escaping and only in case less extreme measures to achieve those goals are not sufficient.

Legitimacy of the use of force in self- defense

As regards legitimacy, it is known that a soldier does not have capacity to influence on legitimacy of a war or strategic legitimacy and cannot be held liable for the decision of going to war. This is why in any military operation, the use of force must be proportional only for military purpose and to prevent unnecessary collateral damage. For this reason, there are two principles of military operations that have to do with one's own attitude towards the opponent: restriction and legitimacy.

The purpose of the principle of restriction is to limit collateral damage and to prevent unnecessary use of force. Commandants must make sure, at all levels, that their personnel is properly trained as to knowledge and understanding of ROE and must be rapidly informed of any change to them. A mistake in understanding or fulfillment of ROE established may cause fratricide, impossibility to carry out the mission and/or damage to the country. The best manner to fulfill this principle is to make sure that

302. Marchant Roa, Gastón; op. cit. p. 12.

ROE, from the beginning of an operation, consider and estimate the greatest number of situations that may appear.

The purpose of the principle of legitimacy is to keep moral and legal authorization in the conduction of operations. Capacity to apply force does not give legitimacy. Indiscriminate use of force may damage even the most legitimate interventions. Actions that take place on the field must show consideration of *jus in bello* in terms of proportionality and to clearly distinguish between combatants and non-combatants. Any use of force must be proportional for military purpose and to prevent unnecessary collateral damage.

Partial conclusions as to legality and legitimacy of the use of force for self-defense

The right to self-defense and defense of the unit is based on concepts different to the right to self-defense. Isolated attacks on military vessels or aircraft do not necessarily allow, under section 51 of the UN Charter, for the beginning of an armed conflict among states.

As it has been shown in this research, laws from different countries differ as to the definitions of basic concepts of ROE and this is not an exception. For this reason, individuals and units must act pursuant to their respective domestic law.

The Convention on the Safety of United Nations and Associated Personnel passed by Law 24649, the Statute of Rome of the International Criminal Court passed by Law 25390 and Law 26394 which establishes the discipline code for the Argentine Armed Forces give the legal grounds both in international and national law on which the right of Argentine military men to self-defense, both individual and of others. Pursuant to Birreci³⁰³:

“When addressing the right to legitimate defense, we observe that it is one of the topics of the General Part (of the Criminal Code) that has been subject to more analysis and, however, its structure is still difficult to be precise. In fact, the various problems that the reader will find with respect to the features of assumptions that are part of it or the extension given, are directly related to structural questions of Criminal Law, especially with the political-criminal axioms from which each author beings and the function given to penalty.

Analyzing the general idea of the formula of legitimate defense obeys to the concept of State, of law and punitive power and which will be reflected –from its grounds– in legal items that may be defended, in the question of necessity and rationality of the means used in the delimitation of an eventual subjective aspect of justification and in the organization of each of the requirements specific to them.

Pursuant to Jiménez de Asúa³⁰⁴ and according to what has been established in the

303. Birreci Natalia C.; *op. cit.* p. 379.

304. Jiménez de Asúa; *Tratado de Derecho Penal*, tomo VI; Editorial Losada; Buenos Aires; 1962; p. 26.

Criminal Code, we can define legitimate defense as the “condemnation or prevention of illegitimate aggression, whether current or imminent, by the attacked person or a third person against the attacker without going beyond the need of defense and within the rational proportion of means used to prevent or repel it”.

National law requires lack of enough provocation by the one defending himself but, as it happens with international law, there is no difference between hostile acts or attempts by armed forces, non state actors or individuals.

In Argentina, protection of the unit is not mentioned with the meaning given by San Remo Manual or the United Nations but Law 26394, in the amendment of section 253 of the Criminal Code, refers to a military man who “causes or does not prevent death of one or more persons or military loss”. The same amended section only talks about cases of “armed conflict or aid or salvation in case of catastrophe”, although it does not mention military men that take part in missions under UN mandate.

When acting in a coalition, it must be clear that for certain countries, such as the United States, the concept of self- defense of a unit is both a right and an obligation. For other countries, the concept is only a right and for some others, such as the Argentine Republic and Spain, it is a defense. However, Argentina has passed international legal documents that consider self- defense as a right.

Moreover, it may happen that the right to self- defense of a unit may or may not extend to units or individuals of other countries pursuant to ROE in force. In other words, the strongest argument in favour of the right to self- defense of the unit is that it is a right recognized by custom law, by ROE of the UN and of several countries, treaties and international courts.

The Argentine glossary only refers to national self- defense and, in a very general manner, to self- defense of an individual. However, it does not consider self- defense of a unit, protection of civilians, protection of property regarded as protected for cases of armed conflicts or the use of weapons for the fulfillment of the mission. However, these last three cases are usual in the participation in missions under mandate of the UN, in which Argentina takes part. The same publication relates the expression self- defense with protection of one’s own life and with acts of aggression and these with actions against one’s own territory: it makes reference to instant and necessary events.

Unlike the Argentine glossary, the Brazilian glossary relates self- defense with reaction and legitimate defense and the latter with aggression to oneself or others. In this case, it talks about imminent events, as the San Remo Manual.

The different national concepts of legitimate defense as a cause of justification that excludes criminal liability require to allow for each country to include those restrictions that they may consider proper to adapt this concept to their domestic law, a possibility that is extended in general to all those cases in which there may be differences as to the formula for the use of force included in the catalog of Rules of Engagement.

Considering what has been analyzed so far and comparing the different definitions of individual self- defense, self- defense of the unit and extended self- defense with the ones of the national glossary, when drafting the catalog of ROE and RUF, it is necessary to be precise, based on national law, these and other questions that may arise: what is an

instant and urgent need? Considering that imminence is what gives ground to a situation of necessity, when does imminence occur? What is a proportional and gradual response? In other words, when and how can force, including lethal force, may be used?

Lack of definition of these aspects makes problems be worse if the one who has to exercise their right to self- defense is an isolated soldier with fear, anger and uncertainty.

Fulfillment of the mission v. self- defense

We have seen that in one manner or another, military men, when fulfilling a mission ordered by a higher authority, may use force, including lethal force, in case of self- defense or defense of the unit, of protected third parties and of property especially considered as such. In the following paragraphs, we will explain the grounds that allow for their use in order to fulfill a specific mission.

Other cases of self- defense: escalation of the mission

Although self- defense and fulfillment of the mission are two different ideas of authorized use of force, escalation of the mission occurs when orders or the mandate of the Security Council include within ROE drafted for self- defense imposition of will, called when fulfillment of the mission finds obstacles”.

Imposition of will has nothing to do with self- defense. However, we have resorted to the euphemism of identifying self- defense with imposition of will, although this is contradictory. If from an initial mission for defense of one’s own life, of people, or property considered as protected, there are orders for the imposition of will, there is an escalation of the mission.

An example of this is when in Operations, Chapter VII of the UN Charter, it is ordered that “groups at conflict must be disarmed” but this is not done applying Section 42 of the UN Charter, in which case force may be used for the imposition of will. In which manner can this order be implemented within the concept of self- defense? If an individual or group of individuals are ordered to leave weapons and they do not do it, does this mean that they can be attacked opening fire under the concept of self- defense? In our opinion, force may be used to impose will and/or legitimate defense. Notwithstanding this, the use of force will take place in usual conditions –last resource, proportionality, warning, etc.).

If in the collective order, in Section 51 of the UN Charter, preventive attack is understood as a form of defense, can this concept be extended to individual order? (in some cases, such as the MINUSTAH, it may be extended). If the attack is a form of self- defense, are military operations of exploitation of a success and persecution to exploit tempo obtained and prevent the enemy from reorganizing or reacting also self- defense? In these cases, may weapons be used as “bursts” or must the restriction of weapon “shot to shot”, which is inherent to individual self- defense, be kept when burst shows greater force and the intention is that armed groups change their attitude? And if in all cases, the use of weapons is illegal as automatic fire, why are there not international conventions that prohibit manufacturing of automatic weapons?

In countries such as the United States, it is allowed to use weapons for self- defense both for the police and military forces in case of threat of death or serious injury” or in

circumstances in which life is in danger taking as an assumption that the person who carries a weapon in a challenging attitude is decided to use it. However, this concept is not universally valid and, in other countries, it is included in the judicial interpretation of the judge appointed.

For this reason, legal interpretations, especially those of courts as to acts of political power are inherent to the constitutional state of law and exist in all countries; the problem is not that they exist, but that the interpretation is proper and based on a known cause.

Even more, the issue seems to be relatively simple if it has to do with disarming individual or groups with portable weapons but if disarmament includes military organizations with weapons and war equipment, this is not so simple as it requires military superiority, whether local or transitory.

When the first order to impose will by force has been issued, there will be other more complicated situations. An important case is “assuring freedom of movement”, especially when it refers to the fact that vehicle columns with humanitarian aid are not stopped by one of the groups at conflict.

In the United Nations Master List of Numbered ROE, there is the following rule that refers to freedom of movement with relation to the use of force:

Rule No. 1.10

Use of force, up to its limit, including lethal force, against any person or group that restricts or tries to restrict freedom of movement is authorized.

Whenever and wherever possible, authorization for the use of force must be required from the higher commandant.

However, assuring freedom of movement exceeds self- defense because life is not in danger, although it may be said that survival of the receivers of aid may be in danger. Applying this concept of “assuring freedom of movement” within the general concept of self- defense also requires military superiority, not only in the place of the event, but in the general relation of forces. If the latter is not favorable, there is the risk of general conflict escalation.

Last, there is escalation of the initial mission of self- defense when there are “secure areas” or “non- flight areas” as enforcing them requires total use of military force superiority. However, it may happen that with these measures, it may be attempted to protect life of people and, therefore, it could be considered extended self- defense.

In an unseen manner and under the initial legal framework of self- defense, we have moved to the original concept: weapons are used to impose one’s own will. This is why ROE must be modified to be in line with the new mission, in which the level of threat changes. This is also necessary in case other situations appear, such as moving from a peacekeeping mission (controlling cease fire) to a peace enforcement mission (imposing cease fire).

The use of force in the fulfillment of a mission outside national territory

According to Rivas Aramburu³⁰⁵, in the initial peacekeeping operations (PKO), the UN

limited the use of force by blue helmets to cases of self- defense. However, events have made the Security Council extend limits of legitimate defense to give a little credibility to their acts. Thus, first with the creation in 1973 of the Second United Nations Emergency Force (UNEF II) in the Middle East and, then, in 1978 with the United Nations Interim Force in Lebanon (UNIFIL), the Secretary General of the United Nations included within the concept of “legitimate defense” actions to “resist any attempt to prevent, by means of the use of force, fulfillment of responsibilities assigned (to blue helmets) by the Mandate of the Security Council”.

One of these situations occurs when the mission includes protection of people or property in a given moment in which the principles of self- defense do not strictly apply, as in the case of preventing “ethnic cleansing”, protecting refugees, or evacuation of non- combatants or even protection of warehouses, communication channels or critical transport for humanitarian aid. In these cases, this is not strictly self- defense and although humanitarian international law recognizes the right to use the necessary and proportional force in order to fulfill the mission, certain administrations may not authorize this to their groups. For example, laws of the United Kingdom of Great Britain do not allow for the use of lethal force to defend property except in situations in which life is also threatened³⁰⁶.

As it has been explained, ROE of United Nations consider this situation. However, it often occurs that national groups that take part in a multinational peace force have more restrictive ROE than those of the UN.

The use of force in the fulfillment of the mission within the national territory

The journalist Horacio Verbitsky³⁰⁷ expressed: In the Fortín Norte Operation³⁰⁸ the Army did not receive from the Ministry of Defense rules of engagement, but just guidelines for behavior that exclude going into combat.

Although the expression “guidelines for behavior” does not coincide with the definitions used in this work, the author explains the existence of a clear difference between the operations carried out outside and within national territory when mentioning two types of rules: rules of engagement and guidelines for behavior. This is how it shows the difference between ROE and RUF.

However, when referring to events of occupation of land by the Argentine Navy in the province of Santa Cruz, he expressed: In Río Gallegos, the Ministry of Defense, Agustín Rossi, ordered that they should only occupy that part of land that is property of the Navy

305. Rivas Aramburu, Ignacio; “Las RDE salen del armario”; Revista Ejército; Nro. 794; mayo 2007; p. 87.

306. “Legal Lessons Learned from Afghanistan and Iraq: Volume I, Major Combat Operations (11 September 2001 to 1may 2003); p. 108. Recuperado de en <http://www.fas.org/irp/doddir/army/clamo-v1.pdf>

307. Verbitsky, Horacio. “Pena de muerte sin juicio” Página 12; 13 de octubre de 2013. Recuperado de <http://www.pagina12.com.ar/diario/elpais/1-231163-2013-10-13.html>

308. In July 2011, by Executive Order 1091, the Escudo Norte operation was set with the purpose of increasing surveillance and control of land, Riverside and air space in national jurisdiction in the North East and North West borders of the country. In said Order, the Ministry of Defense was instructed to adopt all administrative, operational and logistic measures, within their jurisdiction, to increase surveillance and control activities of national jurisdiction spaces by Armed Forces. This is how Fortín II Operation was created.

that had not been interfered with without even carrying fire weapons. With this, we can understand that as personnel is denied to carry fire weapons in an explicit manner, we would be denying the right to self- defense and defense of the unit but this is due to the fact it is a case of defense of possession –section 2470 of the Civil Code- which would not consider an attack in a military sense; in case of interference which has already occurred, the action of eviction removal or concession, depending on the case).

On the other hand, it is common to see military personnel carrying weapons when controlling elections. In this case, persons and items to be protected could be the members of the Armed Forces, security forces and the police responsible for the control and security of elections, elections authorities (electoral judges, members of election boards, election officers), people intervening in the development of elections (watchers, post office employees and data centers, etc) as well as voting citizens.

Based on this, we can say that operations carried out by Armed Forces in times of peace within national territory are governed by RUF which may be included in certain guidelines drafted beforehand or on a case by case basis depending on the type of mission to be developed.

These guidelines, which are prepared beforehand, may be a catalog of permanent RUF or, such as in Mexico, a “Secretary agreement by which the legitimate use of force by Navy personnel in the fulfillment of their responsibilities for maintenance of the state of law³⁰⁹ or a “Guideline that regulates the legitimate use of force by Mexican Army personnel and Air Force for the fulfillment of their obligations, to support civil authorities and for the application of the Federal Law on Fire Weapons and Explosives³¹⁰.

In both protocols, it is said that said documents had to be issued because:

- > According to international documents on the use of force, Mexican Army and Air Force personnel, as officers in charge of enforcing law may use force in legitimate defense to protect judicial property or to fulfill an obligation or to exercise a right provided there is rational need in the means used and within the principle of proportionality.
- > In case there is not legal provision that regulates the legitimate use of force by Mexican Arm and Air Force personnel, it is necessary to confirm provisions on this subject to military personnel so that when fulfilling their obligations, they can act in full respect of Human Rights.

In section 6 of the second document, it is expressed that the use of the levels of use of force by members of the Army is only admitted when it is strictly unavoidable or necessary for the fulfillment of the mission assigned to support civil authorities or in application of the Federal Law of Fire Weapons and Explosives and in section eight, it is established that members of the Army may use force to:

309. Published in the Official Gazette of the Federation on April 23, 2012;

310. SEGOB; Secretaría de Gobernación; Diario Oficial de la Federación; DOF 23/04/2012; Recuperado de http://dof.gob.mx/nota_detalle.php?codigo=5244755&fecha=23/04/2012

- I) Fulfill an obligation acting in support of civil authorities or in application of the Federal Law of Fire Weapons and Explosives,
- II) Reduce non- aggressive, aggressive or seriously aggressive resistance,
- III) Prevent imminent or actual crime occurrence,
- IV) Protect against aggression, protected legal items or
- V) Legitimate defense

It can also be seen that the government of the Republic of Guatemala, through Government agreement 40-2000, authorizes and orders military units to take part in citizen security missions and preservation of public order at the request and in support of the National Police, Prosecutor and Judicial Bodies. In 2011, the Guatemala Army issued some charters with rules of engagement authorized and in force for all the Guatemala Army in all the territory which rule the legitimate use of force by military personnel in support of civil security forces³¹¹.

In the case of the Republic of Brazil, we can observe that *Directriz Ministerial nº 15/2010, Dez 10. Regras de engajamento para a operação da Força da Pacificação no Rio de Janeiro*³¹², in paragraph 7, it establishes rules for the use of force in the following manner:

- a) Groups engaged, in the fulfillment of the explicit determination of the Group Commandant and taking into consideration legal provisions in force, may use force in proportion to aggression to:
 1. Self- defense against direct attacks or concrete threats to their physical integrity or innocent people;
 2. Avoid being disarmed;
 3. Avoid capture of any member;
 4. Prevent stealing military or public materials;
 5. Keep important positions for the fulfillment of the mission; and
 6. Avoid hostile acts that prevent the fulfillment of the mission

In the case of Brazil, it is clear who the authority with the capacity to order the use of weapons is.

Partial conclusions with respect to the use of force for the fulfillment of the mission

As it has been seen in this stage of the research, the Argentine Criminal Code in paragraph 4 of section 34 establishes that the one who acts in fulfillment of an obligation or in legitimate exercise of a right, authority or position may not be punished.

311. Republic of Guatemala; Ministry of Defense", Rules of engagement in Support of Public Security. Available at [http:// www.mindef.mil.gt/noticias/ley_reglas.html](http://www.mindef.mil.gt/noticias/ley_reglas.html)

312. Brasil, Ministério da Defesa; Regras de Engajamento para a Operação da Força de Pacificação no Rio de Janeiro; (Diretriz Ministerial nº 15/2010, de 04 DEZ 10)

It could also be seen that countries such as Mexico and Brazil, when they use their armed forces in operations to support civil authorities, they authorize military personnel to use force both in individual self- defense or defense of the unit and of property as well as to assure fulfillment of the mission.

The United Nations, in its United Nations Master List of Numbered ROE, authorizes the use of force for defense of oneself, members of the UN, civil personnel, property and to guarantee freedom of movement but it does not mention anything related to the use of force for the fulfillment of the mission.

The same words do not guarantee the same reaction when ROE must be applied to a certain situation. This is not enough to avoid problems if the ethos or culture of two armed forces are slightly different.

These different concepts and treatment which, from each national law, are recognized to self- defense are made clear through reserves and restrictions (caveats) that are to be opposed to ROE in order to adapt them to the national legal framework which operates in each state. Reserves and restrictions are to be considered in order to distribute missions and assign obligations to different groups.

Other definitions related to Rules of Engagement

Escalation of force

To the extent they serve to three purposes (legal, political and military of controlling the use of force, ROE are also frequently related to the concept of escalation of force. This is a tool used to set, at all moments, means to be used and intensity of force allowed to repel hostile acts or attempts of hostile acts to which combatants may need to oppose to depending on seriousness which will promote to reconsider ROE that may be necessary to put into practice when there is more risk or danger.

This also makes it necessary to consider the concepts “hostile act”, “hostile attempt” and “warning shots” when talking of ROE as expressions mentioned help to better identify threats or acts of force or aggression (military aspect of ROE) and the pertinent response that must be given in order to prevent an increase in the escalation of force (political aspect of ROE) always within the limits imposed by law (judicial aspect of ROE)³¹³.

In the White Book of National Defense³¹⁴, in its 1999 edition, the following was stated as to ROE: Rules consider among many other aspects: the definition of “hostile act”; restrictions and conditions to open fire; magnitude and extension of violence to be deployed; limitation of tactics, techniques and geographical spaces.

This is why, for an operation, ROE very frequently define certain concepts, such as act, intention and hostile force as characterizing them as such has main implications when deciding whether it is legitimate to make use of force and, in particular, of lethal force.

313. Sttaford, W.A.; “How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, RDE & the Rules of Deadly Force”, *The Army Lawyer*, vol. nov.; 2000; p. 20.

314. Ministry of Defense of the Argentine Republic; *White Book of National Defense*; Buenos Aires; 1999; p. 105

Declared hostile force

Force may be declared hostile because an act is carried out, hostile intentions are shown or because it has been declared as such by competent authorities.

According to Professor Grunawalt, there are two basic concepts that operate as premises for the use of force. One is for defense and consists in the possibility a military man has to self- defense when he is part of a hostile act or demonstrations of hostile acts that prevent fulfillment of the mission assigned. For these cases, there is a series of ROE that authorize the use of force only depending on hostile behavior that a third person may have.

Moreover, there may be other ROE that authorize the use of force when a military man faces elements declared as hostile by a competent authority, in which case we would be in presence of ROE that allow for direct use of force without the need that by such declared hostile force, we can necessarily observe any hostile behavior. The latter mainly have to do with attack and would be addressed mainly to situations of war or armed conflict.

In this last case, ROE do not require to resort to legitimate defense to justify use of violence, but only recognition and identification of the element as “hostile force”. In these situations, there is the prevailing concept of “military target” and, therefore, forces will act guided by the only purpose of getting total or partial destruction, capture or neutralization. The mere fact of having the opponent been declared as hostile force will make armed forces act subject to ILAC and to ROE of the military operation.

It is worth mentioning that in peace operations in which the purpose is to reduce tension, use of lethal force is generally authorized for self- defense. However, there may be circumstances, normally in peacekeeping operations in which the use of lethal force is also authorized to allow for the fulfillment of the mission. Although it is not very common, this authorization may come with a declaration of “hostile force” with which, once it has been identified, engagement against said forces will be authorized.

The Manual of San Remo on Rules of Confrontation³¹⁶ defines a declared hostile force as “any civil, paramilitary or military force or terrorist organization which has been declared as hostile by a proper authority”.

This definition is very similar to the one stated in permanent ROE/ RUF of the United States³¹⁷.

Hostile act- hostile attempt

One of the features of ROE is that they have to cover reactions of the military man to perceive a hostile attempt as well as a hostile act. Hostile acts are normally evident but hostile attempts are much more difficult to define and, thus, to identify. There are many cases of acts carried out by a potential opponent that may not be a threat although it may

315. Grunawalt, J. (1997), “The JSC Standing Rules of Engagement: A Judge Advocate’s Primer”, The United States Naval War College, Joint Military Operations Department, reprinted by permission from *The Air Force Law Review*, vol. 42, pp. 245–258.

316. International Institute of Humanitarian Law; “Manual of San Remo on Rules of Confrontation”; San Remo; March; 2010.

317. Chairman of the Joint Chiefs of Staff Instr. 3121.01b, Standing Rules of Engagement/ Standing Rules for the Use of Force for U.S. Forces (13 June 2005).

require self- defense measures, such as the capacity and level of preparation of the unit that exercises threat to cause damage and evidence that indicates the intention to attack.

In general, we could say that a hostile act is an attack or any other use of force by an armed group, while a hostile intention is the threat or imminent use of force.

In general and in current conflicts, there is no objective difference between combatants and civilians so force may only be used based on a hostile behavior or signs of hostility observed from an individual or group of individuals.

However and although this may seem to be obvious, Eric S. Miller³¹⁸ states that even when most countries agree as to ROE in relation with a hostile act, decisions regarding when and how to act in case of a hostile act are the causes of most differences in multinational operations. There were problems as to different interpretations with respect to the limit between a hostile act and a hostile attempt.

Grunawalt³¹⁹ claims that former Commandant of Navy Operations of the US Navy, Admiral Frank Kelso has said during a symposium on ROE that determination of a hostile attempt is the most difficult decision a Commandant must make in times of peace.

If this is so for someone with experience, it will surely be more difficult for a corporal in a vessel in a foreign port who must determine whether a motor boat, a jet ski, an aircraft or a vehicle that gets closer at high speed is a demonstration of a hostile attempt, especially when these are ports in which there are armed groups, pirates, etc.

How should a member of a crew act while fulfilling an obligation required by custom international law of giving aid to a vessel in danger of sinking in the sea in order to defend himself against an armed person who tries to avoid rescue from being carried out?

If during a period of tension between two countries X and Y, the Commandant of a recognition aircraft Y reports that a vessel from X is throwing objects similar to mines, in that case, the Commandant of a vessel from Y that is in the nearby, does he have authority to capture the alleged mine holder claiming the right to national self- defense?

Is a civil aircraft of a state at war that does not fulfill the guidelines given by an air controller evidence that the aircraft is being used for military or hostile purposes?

In the first part of the research³²⁰, it has been seen that there are different ROE that refer to different criteria, such as:

- > The degree of hostility shown by the suspected person;
- > Demonstration of force that troops have to do before resorting to lethal force through the use of oral warnings or even warning shots;
- > ROE related to the protection of property and foreign citizens (apart from those relative to the protection of forces and co- nationals);
- > Those relative to alert state and control of anti- air defense systems that offer

318. Miller, Eric S. "Interoperability of Rules of Engagement in Multinational Maritime Operations"; Center for Naval Analyses; CRM 95-184/ October 1995; p. 16.

319. Grunawalt, J. op. cit.; p. 253.

320. Trama, Gustavo A. Contraalmirante (RE); de Vergara, Evergisto, General de División (RE); Reglas de Empeñamiento Historia, definición y objetivos; (tomo I); Escuela Superior de Guerra Conjunta de las Fuerzas Armadas; Biblioteca Virtual 01, 2012, p. 62.

criteria to interpret when to resort to force in case of threat and those addressed to land forces in the same sense;

- > The ones that specify which troops must be armed, what type of weapons they have to carry and ammunition to be used;
- > The ones that establish the levels of command with power to authorize the use of certain systems of weapons, which require the target to be identified by one or more human or electronic means;
- > The ones that establish geographical or territorial areas where troops must not open fire which limit the number of troops that may operate in a certain geographical or territorial area and the ones that prohibit the selection of certain persons or facilities as targets.

This classification is closely related with the criteria that must be followed when troops face a threat or act of hostility and, therefore, when they are legitimated to open fire or take part and when they are in light of a target that is qualified or designated as military target and which may be directly brought down.

In general, ROE of an operation give some guidelines regarding what could be a hostile attempt, for example:

- > Detection of strong interference with communication (jamming) that arise from hostile or potentially hostile territories.
- > Units that move to occupy attack positions, launch of weapons against one's own forces, navy units, aircraft or one's own territory.
- > Repeated and extensive events with the primary purpose of interrupting activities of a unit or vessel rather than causing damage.
- > The ship or aircraft has missile capacity, does not respond to warnings, it shows known attack modes, it gets closer to a constant marking (reducing distance) or lights up with a shooting control radar.

The Manual of San Remo on Rules of Confrontation states the following examples of actions that may, depending on circumstances, show a hostile attempt: address weapons, adopt an attack position, get closer to a distance from the attack, lighting with radar or laser markers, transfer information about targets, place or prepare to place navy mines. Also, it is possible to consider the possibility to face a hostile act when there is no response to proactive measures, such as: oral warning, visual signs, sound signs, physical barriers, change of direction and speed to determine whether there is still an attack profile, illumination with shooting control radar or warning shots³²¹.

In the following chart, it is possible to see the different definitions that countries and some international organizations have, including the UN, with respect to what each of them considers a hostile attempt or act.

321. International Institute of Humanitarian Law, "Manual of Rules of Confrontation"; San Remo; November, 2009, p. 23

CHART NO. 1: DEFINITIONS OF HOSTILE ACT AND HOSTILE ATTEMPT PER COUNTRY AND THEIR RESPECTIVE SOURCES

	FUENTE	ACTO HOSTIL	INTENTO HOSTIL
BRAZIL	Glossary of the Armed Forces	Attack or use of force against a nation, its national forces, maritime traffic, aircraft, territory or property	Imminent threat of use of force against a coalition of forces, members of a multinational force. This concept may be change according to national laws and the interpretation of each country.
	Ministry Resolution 15/2010	It is an aggressive and deliberate action with the intention of causing damage against people or property.	It is the purpose of committing a crime, shown by doubtful attitudes and behavior that indicate the possibility of hostilities that threaten physical integrity of people or damage to property.
CANADA	B-GJ-005-501/FP-001 <i>Canadian Forces Joint Publication, CFJP-5.1 "Use of Force for CF Operations"</i>	Hostile act (against Canada) An attack or attacks that threaten the security of Canada, its citizens, territory or property.	Hostile attempt (against Canada). Threat of an attack or other actions that threaten security of Canada, its citizens, territory, or property.
		Hostile act (against personnel of Canadian forces, units or forces). An attack or another use of force against personnel of Canadian forces, in which there is reasonable apprehension which may result in their death or serious injury. Immediate response to these attacks in self-defense is authorized.	Hostile attempt (against personnel of the Canadian Forces, Units or Forces) Threat of an attack or another use of force against where there is reasonable apprehension that may result in their death or serious injury. Immediate response to these attacks in self- defense is authorized.
UNITED STATES	Chairman of the Joint Chiefs of Staff Instr. 3121.01b, <i>Standing Rules of Engagement/ Standing Rules for the Use of Force for U.S. Forces</i> (13 June 2005).	An attack or another use of force against the United States, forces of the United States, other people or property designated. It also includes force used to avoid or prevent fulfillment of the mission and/or activities of forces of the United States including US	Threat of imminent use of force against the United States, United States forces, other people or property designated. It also includes force used to avoid or prevent fulfillment of the mission and/or tasks of forces of the United States including US

		personnel rescue or government essential property.	personnel rescue or government essential property.
UN	"Guideline for the Development of ROE for UN peacekeeping operations", MD/FGS/0220.0001,DPKO, May 2002, Annex B P.	An attack or another use of force, the intention of which is to cause death, physical damage or destruction.	Threat of imminent use of force, which is shown through an action that appears as preparation of a hostile act. It is only necessary to reasonably believe that there is a hostile attempt before authorizing the use of weapons. When there is a hostile attempt, this must be considered by the Commandant in the area of the act based on one or the combination of the following factors: a. Capacity and degree of preparation of threat b. Evidence available that indicates intention to attack c. Historical events within the area of responsibility of the mission.
NATO	<i>NATO Legal Deskbook Second Edition</i> 2010 P.255	Any intentional act that causes serious harm or represents serious danger for NATO forces, for forces appointed or personnel designated.	A possible threat that may be identified and recognized based on the two following conditions: a. Capacity and preparation to cause damage and b. Evidence that shows an intention to cause damage. Possible examples include maneuver to reach positions for the launching of weapons, deployment of targeting remote methods and observation and maintenance of contact (not necessarily permanently) over units or forces.
MANUAL OF SAN REMO	Annex D Glossary P. and 82	An attack or another use of force against a nation, Force or other persons or property designated.	This is the threat of imminent use of force. A determination of hostile attempt is based on the existence of a threat that may be identified and recognized based on the following conditions: i. Capacity ii. Intention

Source: Prepared by the authors based on sources analyzed

Partial conclusions about hostile act and attempt

As it could be seen, some countries such as Canada and Brazil make a difference as to what a hostile act or attempt against a nation and personnel.

When force is used to respond to a hostile act committed against a person or persons under one’s own command, this is legitimate defense and, therefore, it does not require ROE. Guidelines are those of international law, especially those relating to minimum force, proportionality and use of force as a last resource. However, ROE that respect ILAC can be drafted to clarify concepts or procedures.

When force is used to respond to a hostile act committed against other military men, government or non- government organizations, UN personnel, non- combatant or neutral civilians, items, locations, platforms and/or material, the implementation of specific ROE is required. Implementation of ROE is also required in case of continuous use of force against an attacker after a hostile act that exceeds the necessary force to exercise legitimate defense.

Imminent hostile attempt exists when there is reasonable evidence of the preparation of an imminent attack or another use of force against a person or unit (and when ROE in force allow to do so, against other military, government, non- government organizations, UN personnel or non- combatant or neutral civilians, items, places, platforms and/or materials) and when their reasonable belief that the most likely result will be death or serious human damage.

In spite of the differences in definitions, we could say that legitimate defense in response to a hostile attempt requires said threat to impose a clear and immediate need to take defense actions that do not leave any reasonable option other than using peaceful methods complying with the principles of necessity and proportionality.

It is difficult to previously determine the existence of a hostile attempt in all circumstances. The commandant is the one that has to make such determination based on criteria that must be complementary.

The concept of imminent hostile attempt increases circumstances under which defense actions may be taken. Its purpose is to assure survival of forces allowing for an anticipated action. For the UN, any hostile attempt that is not imminent requires authorization for the use of force. The following chart shows what we have expressed so far:

CHART NO. 2: SUMMARY OF RESPONSES IN CASE OF A HOSTILE ACT/ ATTEMPT

Response to hostile attempt	Self- defense	Response to a hostile act
(Requires ROE)	(Right or defense)	(Requires ROE)
Hostile intent	Hostile act/ imminent threat	Attack
There are signs of the fact that an attack is being prepared. Events may take place before.	Clear and immediate need of legitimate defense, without option to use peaceful means.	When aggression ends, there is the option to chase or not.

Source: prepared by the authors based on analyzed sources

Warning shot- destruction shot

The use of lethal force is normally considered a measure of last application in response to a hostile act or attempt. However, if armed forces are threatened, their purpose is to dissuade the opponent from continuing with a threatening attitude.

The first measure that is normally taken is to use warning shots after having made a series of oral or visual warnings for the opponent to stop its attitude. Anyway, it is necessary to take into consideration that, for some countries, these shots are understood as an actual use of force while, for some others, these are only acts of provocation although the existence of the right of self- defense is not clear.

For Sánchez Sánchez, for example, the catalog of ROE from NATO based on the different types of situations or operations considers warning shots as a warning rather than use of force, as it happens with the Catalog of the United Nations. However, in ROE from the United Nations, it is necessary to define for each operation, what warning shots are and to establish if they are considered use of force or not³²².

In general, warning shot is considered to be the one shot to a secure target in such manner that they avoid damage to personnel or collateral.

For the case of land operations, and based on the premise that the use of force is normally perceived as an extreme measure in response to a hostile act or attempt if military forces are threatened, their purpose must be to dissuade the opponent from continuing with their threatening attitude. Because of this, force must be applied gradually starting with oral negotiation and/or visual demonstrations followed by the use (if authorized) of disturbance control equipment loading weapons and trying to make the attacker verify visual and sound effects to persuade them of the fact that if they do not stop their attitude, lethal force will be used. In case threat continues, warning shots must be used until fire opening finishes. This opening must be controlled and not indiscriminate taking all safety measures to prevent collateral damage.

In spite of what has been said previously, we cannot think that warning shots can only be used in times of peace or during peace missions, whether for keeping or enforcement. Additional Protocol I to the Geneva Conventions of 1949 relating to the protection of victims of the year 1977, in section 57, paragraph 2 c) establishes that one of the measures that has to be taken during attacks is to “give notice in advance and through effective means of any attack that may affect civil population unless circumstances do not prevent”.

An example of this is the case of the Israel Defense Forces that had ROE that ruled them before attacking a building occupied by members of the Hamas organization to throw leaflets warning occupants to leave it, to try to contact them by telephone and shoot their rooftop³²³.

However, shots are not always an alert to a person or group of persons. In Irak³²⁴, warning shots against the Iraqi people were not effective, they did not fulfill the purpose

322. Sánchez Sánchez, Verónica; op. cit.; p. 101

323. State of Israel, “The Operation in Gaza: Factual and Legal Aspects” p. 8

324. Legal Lessons Learned from Afghanistan and Iraq: Volume I, Major Combat Operations (11 September 2001 to 1 May 2003); p. 108. Recuperado de <http://www.fas.org/irp/doddir/army/clamo-vl.pdf>

for which they were made and only served to increase tension and level of fire. This was so because the Iraqi did not know that the US armed forces, when shooting to the air, only wanted to warn them and thought that they were attacking them, which made them respond to an attack.

Another failed case regarding the use of warning shots took place in March, 2003 in the city of Najaf (Iraq). Two days after a bomb car killed four US military men of the 3rd Infantry Division in a checkpoint, soldiers of the same division ordered a car to stop. As the driver did not know about the warning, soldiers shot to the air and the vehicle motor but these did not have any desired effect. Soldiers, without the capacity to distinguish vehicle occupants, as a last resource, opened fire against this causing the death of seven women and children and injured other two people³²⁵. After the CNN published an article about this, procedures were modified and trace ammunition started to be used so as drivers could see shots during daily hours.

In the case of navy operations, there are three types of shots: warning, non-barring and destruction.

Warning shots are a sign to indicate that, if a vessel does not comply with the requirement or the order, force will be applied. These may be used to require a hostile vessel that is not cooperating to allow its visit or to prevent a unit from interfering with operations. In general, it is prohibited to do this on land as there is a reasonable possibility to cause injuries or damage. Warning shots may be made with minor weapons or greater weapons depending on what is appropriate or correct and the warned vessel captain needs enough time to satisfy the will of the one shooting.

A non-barring shot generally follows warning shots and precede destruction shots. It is inert ammunition shot to part of the vessel trying to cause minimum damage. For this, an oral warning will be made before the shot, with which impact points aimed at being reached will be indicated so that the area may be free from personnel. It is necessary to take into consideration that there may be risk of serious damage to the vessel or injuries to personnel when a non-barring shot is used.

Because of the risks imposed, destruction shots are considered as lethal force. To the extent possible, they are addressed to machines and the government system rather than personnel on board. Destruction shot must not be started until warning shots and barring fire have been made and have failed to make the aircraft stop.

As an example, in May 2011, the Israeli Navy stopped, by means of warning shots to the air, a commercial vessel that sailed under Moldavian flag to the waters of the Gaza strip subject to a maritime blocking by Israel³²⁶.

For the case of airspace context, this procedure is significantly different given the risks implied by the impact of a projectile even if it is inert against an aircraft. Surely this event will destroy the aircraft or will cause injuries or death of the people on board.

325. CNN, U.S. Investigates Checkpoint Shooting, Apr. 1, 2003, at <http://www.cnn.com/2003/WORLD/meast/04/01/sprj.irq.van.shooting/>

326. El Mundo; "Near East did not hide its destiny; the Israeli Army made a vessel sailing to Gaza stop with shots to the air"; May 16, 2011. Available at <http://www.elmundo.es/elmundo/2011/05/16/internacional/1305538992.html>

However, during a conflict, one of the parties may choose to block a civil aircraft instead of attacking it getting closer to a visual scope or a distance in which said aircraft is within the scope of weapons. Generally, purposes of blocking are to warn a civil aircraft not to enter an area of operations, identifying an aircraft, force it to divert or land on a certain airdrome.

In the case of the use of force within national territory, we have considered in this research that it is appropriate to include the procedure to follow until destruction shots are made against aircraft classified as suspicious of carrying illicit drugs in Brazilian territory due to the fact that a discussion about the promulgation of a similar law was subject to debate during the last years.

Lei do Tiro de Destruição³²⁷

In the Republic of Brazil, through Law No. 9614 dated March 5, 1998, the Aerospace Brazilian Code established by Law No. 7565 dated December 19, 1986 was modified and the *Lei do Tiro de Destruição* was enacted called by the media “*Lei do Abate*” in which the concepts of “coercive means”, “hostile aircraft” and “destruction measures” were defined.

Some years ago, Brazil started the modernization of the air defense system and air traffic control with the Amazon Surveillance System (SIVAM, in its Portuguese acronym). However, due to the lack of ruling of the interception of the “Law of Destruction”, the aircraft of the Brazilian air force responsible for controlling air space was ignored several times by clandestine flights given that there was not a protocol to force them obey the law. In many occasions and although there have been warning shots, there has been disobedience of orders issued by the authority.

Law is the result of a series of exchange of information with neighbor countries in order to juggle air interception procedures aiming at reducing misunderstanding. In this manner, it considers the moment in which, once legally established steps have been exhausted –in particular, the classification of hostile-, it will be possible to choose “destruction” having a prior authorization of the President of the Republic or an authority appointed by him.

First, law of destruction only refers to the case of aircraft suspected of being involved in international drug trafficking. Based on the UN Charter which sets the principle of legitimate defense, the Brazilian government considered it was necessary to rule the law for this aspect taking into consideration the increasing threat presented due to drug trafficking for the safety of their society.

Before being classified as “hostile” and, therefore, subject to destruction measures, the aircraft must be considered suspicious pursuant to specific procedures. There are two situations in which an aircraft may be considered suspected of drug trafficking:

- a) When it enters national territory without an approved flight plan from regions in which there sources of production or distribution of illicit drugs.

327. Presidencia da República; Casa Civil; Subchefia para Assuntos Jurídicos; Lei N° 9614, de 5 de marco de 1998 Recuperado de https://www.planalto.gov.br/ccivil_03/leis/19614.htm

- b) When it leaves out necessary information required by a state authority to air traffic control entities.

Aircrafts in charge of interception belong to the Brazilian Air Force and their actions to the Brazilian Airspace Defense Command (COMDABRA, in its Portuguese acronym). Among measures agreed, the following are included in the protocol:

INQUIRY:

- a) *Determination or confirmation of identity of an aircraft:* it includes distance recognition, pictures of the aircraft found and compiling information for records, type of aircraft, level of flight and important features.
- b) *Confirmation of record:* it takes place when information is given to the airspace defense authority entering the computing system of the Civil Aviation Department to check whether the license coincides with the type of aircraft, owner, address, identification data, validity of the airworthiness certificate, name of the pilot that normally operates it, license, medical check expiration, qualification and location data. If the aircraft is in a regular situation, it will only be accompanied.
- c) *Questioning in areas of expected frequency:* this is the knowledge necessary for each pilot which consists in the first attempt of two- way communication between the intercepting aircraft and intercepted aircraft.
- d) *“Mark” in the emergency international frequency:* from 121.5 to 243 MHz, as from 121,5Mhz VHF, frequency shown on a plate, the aircraft intercepted by the pilot of the Air Defense aircraft after having established visual contact with the nearest one.
- e) *Visual signs:* pursuant to rules internationally set forth.

INTERVENTION:

If the pilot of the suspected aircraft does not respond to any of the provisions already mentioned, the procedure establishes a second level of coercive means by means of two procedures:

- a) *Change of way:* determined by interception aircrafts, both on the radio, on frequencies available and through visual signs set forth in international rules and necessary knowledge.
- b) *Forced landing:* determined by the intercepting aircraft similar to the previous task..

PERSUASION:

A third level of measures established will be executed if the suspicious aircraft does not comply with the previous steps. This implies making warning shots with trace ammunition on the side of suspicious aircraft in a visible manner and without making an impact on it.

There are procedured to be followed by air defense authorities for airspace surveillance. Only when initial procedures have been breached, the aircraft will be considered “hostile” and is subject to potential destruction measures. This implies

shots made by interception aircraft with the purpose of causing damage and prevent flight from continuing.

DESTRUCTION:

Destruction shot: It has to comply with strict requirements, as established by regulations included in Executive Order No. 5144/2004. These requirements are:

- a) Execution may only occur if all means involved are under operational control of the Brazilian Airspace Defense Command (COMDABRA, in its Portuguese acronym).
- b) Communication and procedures must be recorded.
- c) Procedures will be executed only by pilots and qualified air defense controllers pursuant to rules established by the Brazilian Airspace Defense Command (COMDABRA).
- d) This procedure will be carried out over routs used for drug trafficking but in áreas that are not highly populated and related to routes used for drug trafficking.

In sum, regulation of the “law of destruction” creates preventive measures or instruments that are proper for the surveillance of the Brazilian airspace and it is applied within a framework of strict safety measures with the explanation of procedures and conditions under which the destruction measure could be executed.

CHART NO. 3: STEPS TO BE FOLLOWED FROM THE MOMENT AN AIRCRAFT IS CLASSIFIED AS SUSPICIOUS³²⁸

Situation of the aircraft	Level of measure	Procedures
Normal	Normal situation	Verification of aircraft flight conditions
Suspicious	Inquiry measures	1) Distance recognition 2) License confirmation 3) Contact through air frequency radio 4) Contact through emergency frequency radio 5) Visuals Signs
	Intervention measures	6) Defeat change 7) Mandatory landing
	Persuasion measures	8) Warning shots
Hostile	Destruction measures	9) Destruction shots

Source: prepared by the authors based on analyzed sources

328. Força Aérea Brasileira. Centro de Comunicação Social da Aeronáutica “Entenda a lei do tiro Destruição. Available at <http://www.reservaer.com.br/legislacao/leidoabate/entenda-leidoabate.htm>

Lethal force- Non lethal force- Non lethal weapons

Lethal force is the level of application of force that has the purpose of causing death regardless of the fact that it may or not cause it. It is the last level of force to be applied. Non-lethal force responds to the level of application of force that does not have the purpose of causing death regardless of the fact that it produces it or not.

For the Manual of San Remo, lethal force may be used against persons that may be an imminent threat to life. National points of view in other circumstances in which lethal force may greatly differ from country to country³²⁹.

Also, the expression non-lethal weapon may be used for those weapons to bar persons or material during operations trying to cause minimum lethal damage, the least permanent injury as possible to personnel and undesired damage to facilities and the environment, thus trying to cause reversible effects on persons and material.

As an example, we include some general rules for the use of non-lethal weapons given to the Peace Forces from Rio de Janeiro as they are a good of the extent to which the use of force is authorized:

- a) For the case of ammunition that launch rubber projectiles, the purpose will preferably be the center of the body, great muscle areas and, if possible, limbs, trying not to shoot head or neck.
- b) If the purpose is to dissuade opponents, shots must be made to the knees.
- c) It is necessary to prevent shooting rubber projectiles to persons in high stores because of the possibility to cause losses that may lead to serious injuries or death.
- d) Minimum distances must be respected as set forth in the respective technical manuals of non-lethal weapons used.
- e) When using tear gas grenades, it is necessary to consider the existence of hospitals and schools in the surroundings.
- f) The use of tear gas against old people, pregnant women, children or disabled is prohibited and this will be avoided to the extent possible when they are confused with opponents.
- g) Heap strikes cannot be applied in vital parts of the human body.
- h) The use of water during rainy or humid days must be avoided.

In these rules, we can see that there are at least two types of non-lethal weapons: those that use kinetic energy, such as projectiles that shoot rubber or plastic bullets and water cannons and the ones that use chemical technology, such as tear gas or pepper spray. There are also other non-lethal weapons that use electric power, for example, Taser electroshock weapons. In general, these weapons called non-lethal would be showing the purpose of Humanitarian International Law when it sets forth that armed conflicts should be more human.

The difficulty is that these weapons have an ethical problem depending on why, how and where they are used. An example of this is was the use of a barring chemical agent to put an end to a terrorist attack in a theater in Moscow in October 2002³³⁰.

329. International Institute of Humanitarian Law, "Manual of Rules of Confrontation"; San Remo; November, 2009; p. 5.

This event³³¹, according to Fidler, apart from permitting to recognize the existence of non-lethal weapons started a discussion that has not finished yet and that will characterize the relation between non-lethal weapons and International Humanitarian Law in the future with respect to the need to apply, clarify and reinforce standards established by international law while more advanced technologies are developed.

In sum, the event in Moscow teaches that rapid technological changes will continue influencing international law as regards development and use of lethal and non-lethal weapons.

It is important to remember that Administrative and Tax Court II of the City of Buenos Aires confirmed the first instance ruling that had prohibited the use of Taser X 26 electroshock weapons by the Metropolitan Police because its application breaches the right to life, physical integrity and health recognized in the Magna Carta, International Treaties and Constitution of the City.

The ruling considered two international documents: the Convention against Torture adopted by the General Assembly of the United Nations with constitutional hierarchy and the Inter-American Convention to prevent and punish torture, agreements to which our country has³³² adhered which do not accept the use of Taser-type weapons although they are used in more than 40 countries.

Definitions and implementation of Rules of Engagement in South American countries

The following paragraphs have two purposes: presenting definitions and analyzing the implementation of ROE in three significant countries in South America. For this, we have taken ROE from Brazil and Peru as well as from Colombia as in these countries, military instrument is used to fight against certain conflicts that have taken place (and still do) within their borders.

Although from the point of view of this research, they should be called Rules for the Use of Force (RUF) as it happens with the Republic of Peru as they refer to operations carried out within the national territory, we have kept the expression ROE as this expression is used by the other two countries³³³. It is worth saying that ROE promoted by each country are of international use although each of them has established laws with respect to these rules.

In this context of these three countries, when ROE authorize the use of lethal force, this allows for the use of all minor levels of force permitted by law, including lethal force.

330. Fidler, David P. "The meaning of Moscow: non-lethal weapons and international law at the beginning of the 21st century" *International Journal of the Red Cross*. Available at <http://www.icrc.org/spa/resources/documents/article/review/6m4jqd.htm>

331. Attacks by Chechen terrorists to the Nordost theater in Moscow and the crisis that affected 830 hostages ended when Russian security forces spread a barring chemical agent in the theater which was allegedly an opiate fentanyl as a sign of the seizure of the building. Russian forces could kill all terrorists and rescue hundreds of hostages. However, 130 hostages died because of fentanyl.

332. Infojus Noticias; Agencia Nacional de Noticias Jurídicas; Administrative and Tax Court ruling; "Justice confirmed that the Metropolitan cannot use Taser weapons"; August 9, 2013. Available at <http://www.infojusnoticias.gov.ar/nacionales/la-justicia-confirmando-que-la-metropolitana-no-puede-usar-las-pistolas-taser-1122.html>

333. Brazil: "Reglas do Engajamento", Colombia: "Reglas de Encuentro" ["Rules of Encounter"] and Peru: "Reglas de empleo y uso de la fuerza" ["Rules for the use of force"]

Tactic, techniques and procedures to apply force or to use non-lethal force will differ based on factors such as context, weapon systems available, prevailing threat and applicable law.

Definitions regarding Rules of Engagement in Brazil³³⁴

Here are a group of derived concepts that extend explanation of Brazilian ROE. First, “minimum reaction” of Force used is understood as the least intensity of the use of violence –sufficient and necessary- to repel or avoid a hostile act and, if possible, without causing damage or injury. “Opponent” is understood as any person that acts involved in an adverse force or that shows the intention to promote a hostile act. Last, opponent –or adverse force- is defined as persons, group of persons or organizations whose activities pose a risk for the functioning of the democratic state of law, social peace and public order.

The use of force also requires a series of conditions proposed by law. When referring to “efficiency”, the military group must carry out activities rapidly and with expertise in order to reach high standards for security of the unit. For “proportionality” of force to exist, there must be a relation between action and reaction of the opponent in order to avoid an excess by peace force in operations with the purpose of establishing proper local safety. As regards “minimum force”, the Brazilian law understands the smallest level of force necessary to reach purposes proposed and discourage hostile intentions of the opponent. These concepts aim at causing the least amount of damage possible whether to the person –physical or psychological- or property.

As “general rules”, ROE have the following characteristics:

First, all operations of the Order Forces must be carried out within the framework of the state of law. Moreover, neither citizens nor opponents may receive treatment as enemies, the use of force is only acceptable for the fulfillment of tasks compatible with Brazilian laws and this is used for the purposes of complying the mission imposed³³⁵. In any situation, before using force, the Army must dissuasion measures showing its strong intention to fulfill the mission. In the same manner, in control operations of disturbance, war ammunition cannot be used with the purpose of intimidating opponent forces.

Similarly, the use of force is applied in proportion to threat, taking into consideration, especially, the principles of surprise, mass, security and economy of efforts. As regards the use of ammunition, it is only used as a last resource for the protection of individual members of the peacekeeping force, of facilities under the responsibility of said force, of persons or property under custody and in light of a concrete threat by adverse forces. Even when the use of force is required for the fulfillment of the mission, this cannot exceed the limit of the dignity of a human being.

334. Rules for the operation of the peace force in Rio de Janeiro (Ministry Resolution N° 15/2010, 04 10 Dec), Ministry of Defense

335. O. Regras para a Utilização da Força a. As frações empregadas poderão, cumprindo determinação explícita dos Comandante de Fração, e atendendo aos preceitos legais vigentes, empregar a força, proporcionalmente à agressão, para: 1. autodefesa contra ataques diretos ou ameaças concretas a sua integridade física ou de inocentes; 2. evitar ser desarmada; 3. evitar a captura de qualquer de seus integrantes; 4. impedir furto ou roubo de material militar ou da Fazenda Pública; 5. manter posições importantes para o cumprimento da missão; e 6. evitar atos hostis que impeçam o cumprimento da missão.

Whenever possible, ROE must establish the record or photographs of actions carried out to allow to identify opponents and mainly as evidence to show that the procedure has been correctly carried out. In this sense, subordinate commands will take care of the details and describe situations that may pose specific threats. Media coverage of operations may be authorized provided this does not endanger the secret implied by the security of the operation, its physical integrity and it does not imply responsibility of the armed forces for the damage or death they may suffer during the development of activities.

The group must comply with the mission in spite of the difficulties or complexity of the operation to avoid loss of credibility of the peace force. In all occasions, this force must use dissuasive measures and show strong determination to fulfill the mission keeping enough space to allow opponents to stop using force. In all operations, population must be treated with respect.

Rules for the specific use of force allow groups, pursuant to the explicit determination of the commandant of the group and considering laws in force, to use force in proportion to aggression. Force may also be used in proportion to aggression to: prevent any member from being disarmed or captured, to prevent theft of State or military equipment, keep important positions for the fulfillment of the mission and avoid hostile acts that prevent its fulfillment.

The following are considered to be hostile acts by adverse forces: persons or vehicles that represent obstacles and do not respect deviation orders from the route taken; persons or vehicles that carry out harmful actions for the integrity of the person and property; persons that are aiming a fire weapon; persons that make shootings, even if they are aimed to the air; persons that throw objects (stones, sticks, etc.); persons that use a Molotov cocktail; persons that act against the army or authorities, utter challenges, threats or verbal insult with the imminent possibility of physical aggression; persons that launch explosives or vehicles in a deliberate manner towards personnel or facilities.

Attitudes such as the ones mentioned below, although the immediate use of force is not required as it is not a hostile act, are considered illegal and must be prevented: address threats, challenges, verbal aggression and provocation that show disdain towards the military unit or security group or to carry fire weapons without legal authorization.

In all situations, to the extent possible, ROE set forth that the following actions must be carried out: warn orally using speakers if necessary, negotiate and show force, use disturbance control groups, use non-lethal weapons (tear gas, water), shoot with rubber ammunition or special ammunition and make warning shots (shootings to the air).

With respect to the “rules for the use of weapons”, we can observe that the use of weapons must comply with requirements or criteria of proportionality and necessity. As regards the use of real ammunition, this must only be made before the determination of hostile act when this represents serious threat to physical integrity of members of the peacekeeping force or population and always as a last resource.

ROE also establish that the group of the peace force will only shoot by order of its commandant or in self-defense or defense of third parties complying with the following order: make warning shots, in visible places for the adverse forces to intimidate, if possible; shoot only in the direction of the opponent clearly identified; injure and not kill the

opponent; shoot directly to legs of the opponent with the purpose to incapacitate them or to the wheels of the vehicle; take reasonable measures not to injure anyone other than the opponent; shoot only as necessary and stop fire when the opponent is no longer a threat.

Definitions regarding Rules of Engagement in Peru

Legislative Order³³⁶, which establishes rules for the use of force by armed forces in the national territory, in section 19 states that:

As an exception, members of the Armed Forces in the fulfillment of the mission assigned may use fire weapons in self- defense or defense of third parties, in case of imminent danger of death or serious injuries with the only purpose of preventing a crime that is particularly serious which implies a serious threat for life, or with the purpose of preventing a person from representing such danger and present resistance to authority or to prevent their escape and only in case the least extreme measures to achieve those purposes are not enough.

Before said Order, in Peru there was the Law No. 29166 which established rules for the use of force by personnel of the armed forces in national territory which did not have legal validity after the sentence issued by the Constitutional Court which declared the second part of the second paragraph of section 7 and the expression “capacity of the enemy” in section 10 unconstitutional.

Therefore, in the expression of reasons³³⁷ of the legislative order, there are three contexts for the intervention of the Armed Forces in which the use of force is governed in military operations or actions.

The first context is when in a state of emergency, the Armed Forces carry out operations against military targets included in the category of hostile group, in which case force is used to neutralize the target, for the military advantage it represents in relation to the principles of necessity, distinction and proportionality pursuant to the provisions of International Humanitarian Law and especially as accepted as from section 3 common to the four Geneva Conventions of the year 1949 and Additional Protocol II. In this sense, hostile group is understood as a group of individuals in national territory that have three minimum conditions: to have minimum organization, capacity and decision to attack by means of weapons and in a prolonged manner to the State and directly take part in hostilities or collaborate with them. The category of hostile group includes both terrorist groups and related drug trafficking organizations which have to do with the drug-terrorist phenomenon. In this case, the use of lethal force in military operations may be the first resource and this requires this situation to be accepted only in state of emergency

336. Derecho Perú; Alan Emilio Matos Marzola; “Legislative Order 1095 establishes rules for the use of force by armed forces in the national territory”; Updated on September 1, 2010. Available at <http://derechoperu.wordpress.com/2010/09/01/decreto-legislativo-1095-establece-reglas-de-empleo-y-uso-de-la-fuerza-por-parte-de-las-fuerzas-armadas-en-el-territorio-nacional/>

337. Scribd. “Law that rules the use of force by the Armed Forces – Legislative Order 1095 - Peru – Expression of reasons”. Available at <https://es.scribd.com/doc/99906485/Ley-que-regula-el-uso-y-empleo-de-la-fuerza-por-FFAA-D-Leg-1095-Peru-Exposicion-de-motivos>

when the Armed Forces are in charge of internal order control and provided the use of force is necessary to get a military advantage previously determined and proportional in relation to incidental or collateral damage that it may cause.

The second context appears when the actions of the Armed Forces in state of emergency is oriented to face other situations of violence in which military targets are not set and, therefore, a hostile group is not addressed and military operations or operations for the application of International Humanitarian Law are not carried out. In this case, when the Armed Forces carry out military actions, the use of force is determined within the framework of International Law of Human Rights. This second context is significantly different from the previous one and the legislative order considers it as the case in which the Armed Forces act in state of emergency giving support to National Police responsible for internal order control. In these situations, the Armed Forces do not carry out military operations but military actions because they do not face military targets but one or more groups of individuals that, even if they are carrying out acts of violence, they are not an intentionally lethal threat. In this case, it is necessary to explain operational elements of the Armed Forces that will patrol being their movement subject to areas of responsibility assigned in the specific Guidelines stated by the Joint Command of the Armed Forces (CCFFAA, in its Spanish acronym), as the one ruled in Supreme Order No. 024-2005-DE/SG, Ruling of Law No. 28222.

In this second context, the Armed Forces must act applying Rules for the Use of Force, that is, by means of the preventive and reactive use of force with non-lethal means.

The third context defines action of the Armed Forces in support of the National Police in case of internal riot and in cases of illicit drug trafficking, terrorism, protection of strategic facilities for the running of the country and key public services, as well as other cases that are justified by the constitution in which capacity of the Police is exceeded in the internal control of internal order, may be foreseen or there is danger that this may happen. In this case, the Armed Forces may use of force within the framework of International Law of Human Rights. This third context relates to the action of Armed Forces giving support to National Police, as in the previous case, also within the framework of International Law of Human Rights and pursuant to international standards stated.

In these cases, military actions of the Armed Forces are limited to the Rules for the Use of Force and, as in the previous context, operational elements of the Armed Force will not patrol and its movement is subject to areas of responsibility assigned in the specific Guidelines stated in the Joint Command of the Armed Forces (CCFFAA) as governed in the Supreme Order No. 24-2005-DE/SG, Ruling of Law No. 28222.

Therefore, we can understand military operations as activities carried out to face the armed capacity of hostile groups within the framework of International Humanitarian Law and military actions are understood as those actions carried out by the Armed Forces different from military operations, which refer to those focused on internal order restoration or keeping.

Incidental or collateral damage is an unintentional consequence of military operations in which damage may be caused to civilians or protected property and the determination of excess (or not) may take place when being assessed through

military necessity and proportionality in relation with the concrete and direct military advantage.

The Order makes a distinction between lethal force, non-lethal force and non-lethal means. Lethal force is understood as the greatest level of force intensity with which it is possible to cause the death of the members of the hostile group. In military operations, its use is ruled by International Humanitarian Law. In military actions, this is the last resource that military personnel have.

Non-lethal force is compulsory means by which military personnel make a person or group of persons to comply with the law even against their will.

Non-lethal means are equipment and weapons, the use of which represents low damage potential.

As regards the purposes of ROE, internal order is the situation in which stability and normal operation of political-judicial institutional status of the State. Its purpose is to guarantee survival. In light of this, military advantage implies the specific advantage obtained from a military operation against a military target.

In general, within the territory of the Republic of Peru, the purpose of the intervention of the armed forces is to provide defense to the state of law and protection to society and they do this either facing a hostile group conducting military operations with a prior statement of state of emergency or giving support to national police in case of illicit drug trafficking, terrorism or protection of strategic facilities for the operation of the country.

Determination of the legal framework applicable refers to the situation when armed forces are focused on conducting military operations to face the capacity of a hostile group, pursuant to International Humanitarian Law, even when under these conditions, armed forces support police forces.

In this case, it is necessary to consider the main principles that are the basic criteria to use ROE. They refer to humanity with which it is necessary to treat people out of combat or that are not part of military activity, the distinction or difference between those who take part and those who do not take part in military hostilities, the restriction of means and use of force as these are limited, to “military necessity” and “proportionality”.

Legality of the use of force by members of the Armed Forces is governed by the Legislative Order and its ruling.

Among Peruvian ROE, it is clear that members of the armed forces that take part in military operations as regards planning, decision and execution are subject to International Humanitarian Law.

Definitions as regards Rules of Encounter in Colombia³³⁸

In May 2010³³⁹, the Ministry of Defense of the Republic of Colombia, Gabriel Silva, presented “Rules of Encounter” stating that they are a group of simple rules that

338. Rules of Encounter for FFMM; Guideline dated May 17, 2009; available at <https://www.fac.mil.co/?idcategoria=40729&download=Y>

339. El Espectador; “Pocket Manual for military men not to exceed in their functions”; March 10, 2010. Available at <http://www.elespectador.com/noticias/judicial/articulo192207-manual-de-bolsillo-militares-no-se-excedan-sus-funciones>

determine levels, intensity and types of use of force depending on the threat and are part of the human rights obligations and International Humanitarian Law to operational language, establishing circumstances in which military men may start combat.

Rules of encounter have to do with two events: the first one, when there is a context of hostility in which the use of force may be the first option when a military target previously identified is attacked. These are rules of confrontation for land combat.

The second one, applicable in situations in which the last purpose is to keep security guaranteeing consolidation of the territory and respect for the State of Law. In these ones, use of force is only possible in exceptional circumstances in exercise of the right of legitimate defense. These rules have been called rules for the use of force for security keeping land operations.

With the first ones, the ones who are forced to use force will understand that they can only attack military targets previously identified as such in operation orders in which all principles of international humanitarian law have been analyzed: the use of weapons cannot be indiscriminate and damage must be reduced to a maximum that may be caused.

In all cases, as it has always happened, Military Forces must protect civil population and civil property.

ROE are in line with the purpose of Defense Policy and Democratic Security and the challenge of consolidation and adaptation of the use of force to the different operational environments. Two main premises arise from this: the greater the intensity of hostilities and group organization, the greater the use of force, this use must be made as a last resource.

As regards requirements for application, there are certain elements for analysis in the order of operations. On the one hand, “military target” is defined as from a concrete and complete description of the target analyzing its nature, location or use efficiently contributes to military action. On the other hand, “military necessity”, that is, analysis based on intelligence information as to circumstances of mode, time and place that allow to infer the only possible measure to fulfill the mission without posing an unnecessary danger to one’s own troops.

For this, there is a limitation of means and methods, that is, a prior analysis of whether means (weapons) and methods (tactic) selected are legal, if they represent less danger for people and civil property and if they reduce the number of victims and damage. A “military advantage” is given as from a description based on intelligence information of why the operation to be deployed is an efficient contribution to concrete and direct military action over the enemy, stating the effect aimed to be achieved on it. Moreover, “proportionality” analyzes whether damage to population or civil property are in excess with relation to the concrete and direct military advantage.

Here, it is also important to “distinguish” as it requires to identify, based on intelligence information, the existence of protected persons or property and to verify that the target is limited to members of an armed group or persons who take part directly in hostilities.

“Coordination instructions” will be important tasks to include steps to be followed, contact information of judicial police authorities, Prosecutor’s Office and specific rules for the conduction of the operation.

As regards definitions, we can understand that “lethal force” is the use of means that may reasonably cause death. This is not measured based on the intention to cause it but because of likely damage. “Legal target” refers to members of armed groups and persons that take part directly in hostilities.

Soldiers are given a red card with ROE which, due to the fact that they are within an “order of operations”, it indicates that the use of force against the armed group has been previously authorized by the competent authority through the procedure designed for such purpose. Additionally, this order of operations, together with analysis and attachments, restricts the military target (for example, to access coordinates and identify the legal target) and indicate sides of the armed group against which the operation is addressed.

“Full identification of the target” is limited to the use of force necessary to verify the military target or legal target aimed at being attacked, an aspect that must be reasonably in line with what has been limited and identified previously in the order of operations, analysis and all attachments of law.

As regards “directed use of weapons and indiscriminate attack”, the first one must be made against the military target or the legal target. Indiscriminate attacks are those that are not addressed against a concrete military target or legal target. “Reduction to maximum damage” suggests the use of necessary means and methods but the obligation to reduce them does not imply a prohibition of the use of force, but an obligation to prevent to the extent possible that this causes damage to persons or protected property.

Force aims at preserving “protected property”, whether they are civil, essential for survival of civil population, cultural items or historic value items.

As stated by law, “protected persons” refer to the protection of civilians who do not directly take part in hostilities, who have been removed weapons and those who were out of combat. “Legitimate defense” refers to the right to make use of force in self- defense or in defense of others when there is unfair aggression, whether current or imminent, that cannot be avoided in any other manner.

“Danger” represents unfair aggression, whether current or imminent, against oneself or third parties. Therefore, each force will determine in what cases imminent danger against public items, ships or aircraft may be considered a certain danger that represents a threat against life or personal integrity. The question of the “last option” is not out of this, that is, the exhaustion of all means and methods –such as demobilization and capture- before reasonably executing those that may cause serious injury or death, provided imminence of danger allows it.

“Identification” of military forces occurs when members of them reveal it provided imminence of damage allows it. This is in line with the definition of “clear warning”, which is a mechanism prior to the use of force, warning about the intention with enough time so that the other party can notice it. However, if when giving these warnings, one is put in danger unduly, there will be risk of death or serious injury to others, or it is clearly improper or not useful, depending on the circumstances of the case, they can be omitted. Last, as regards the criteria of “proportionality”, it implies intensity, cadence and time of use of force necessary to end an imminent danger.

Partial conclusions with respect to definitions of Rules of Engagement/ Encounter in Brazil, Peru and Colombia

ROE are presented in a variety of forms according to national military doctrines of these three countries. In general and taking into consideration the different types of internal conflicts of each of them, regardless of what their form is give authorization or limits, among other things, as to the use of force, positioning and posture of forces and the use of certain specific capacities.

As it may be seen, the Republic of Colombia uses the expression Rules of Encounter which includes two types of rules: Rules of Confrontation for land combat and Rules for the Use of Force for land operations for security keeping within national territory.

In a similar manner, the Republic of Peru, the legislative order 1095 makes a distinction between Rules for the Use of Force (REF, in its Spanish acronym) and Rules for the Use of Force (RUF) because each of them refers to a different legal framework and to different capacities of action of the Armed Forces also within the national territory³⁴⁰.

Both countries use the expression Rules of Engagement/Confrontation for operations within the national territory.

Brazil, Peru and Colombia face a growing level of threat from organized crime and drug trafficking (leaving aside fight against terrorism in Colombia and Peru). However, any of the three countries under analysis have different legal positions as to operational matters and a clear acceptance of the complementation between domestic security and national defense.

Planning and carrying out of military operations must consider different circumstances of national policy. Although military operations are subject to international and national law, they coexist in circumstances in which there are limits to the level of damage allowed, whether this is “circumstance” or “collateral” under those accepted by ILAC.

The three countries recognize a right of self-defense that is the use of force to defend oneself against an attack or imminent attack. More specifically, the use of force does not only refer to the right of an individual to defend oneself, but also to the right the commandant has to use it to prevent robbery or theft of military material or prevent fulfillment of the mission. However, the Republic of Peru considers that the use of fire weapons must be exceptional.

In all cases, it is explained that citizens must be protected – “protection of others”-, the persons that do not belong to the armed forces.

With respect to hostile acts and hostile attempts, it is shown that they appear in response to a hostile act (attack) and/or hostile intention. In this response, there is the question of the degree or proportion of the response that the Force must give to the opponent. The use of force must be proportional as the nature, extension and scope of force used must not exceed what has been required. This is so because ROE can limit the degree to which persecution is authorized, depending on the military and political situation. The distinction between “intense persecution” and the relation between self-

340. In the first part of this research, we have seen Peru uses the same criteria.

defense and ROE as to the fulfillment of the mission, that is, both individuals and units have the right to defend themselves against an attack and an imminent attack.

We have seen that the expressions “hostile act” and “hostile attempt” from the perspective of Brazil are also related to the fulfillment of the mission.

In situations of international armed conflicts, only combatants and civilians that directly take part in hostilities and military targets may be subject to attack. In non-international armed conflicts, only combatants and civilians who directly take part in hostilities and military targets may be attacked. Here, there is the fact that commanders, planners and legal advisors must recognize that not all countries are part of the same treaties of ILAC and even if they were, only some of them understand laws included in those treaties in the same manner.

“Common language” is the one that will allow to design a series of rules and principles related to the use of force, as exposed by ROE of South American countries.

This happens with “military necessity” as this is the requirement by which one of the opponents has the right to apply any measure that is necessary to achieve the purpose of a military operation that is not prohibited by ILAC. This also happens with distinction, that is, the possibility to distinguish between civil population and combatants, between civil items and military targets; with proportionality, that is the prohibition of an attack that may cause incidental loss of life, damage to civil items or a combination of these consequences, which are excessive in relation with the anticipated concrete and direct military advantage; with humanity, that is, the prohibition to cause unnecessary suffering, damage or destruction for the fulfillment of legitimate military purposes; with precaution, indicating that for the carrying out of military operations, it is always necessary to protect population and civil items and, last, with the prohibition of weapons that cause superfluous damage or unnecessary suffering.

General conclusions of the Third Part

Rules of Engagement or Confrontation require judgment as to their application. It is based on the principle that the use of weapons must be the last resource, collateral damage must be avoided, if possible, before using weapons, it is necessary to think of the following day, the prevailing concept is self- defense and one’s own extended defense and the application of such concepts may mean initiative in the use of weapons.

Use of force must meet the following requirements:

- > Be necessary, which implies to be essential in order to assure legitimate defense
- > Be proportional to the perception of the level of threat presented
- > Be used in case of an imminent attack in a clear and immediate manner

Self- defense may also include “extended self- defense” which allows military personnel, whether from the organization or not, to protect in certain circumstances “persons qualified with a special status”, such as diplomats, health personnel, refugees, etc.

Decision of self- defense, in many cases, must be made by isolated soldiers in situations of anger, urgency or fear to death and, for these reasons, it cannot be expected

that someone in this situation decides as easily as someone who, comfortably at their desk, after events took place may do. However, the decision to use a weapon or not is at the good discretion of a soldier.

The intention is to reduce these mistakes by saying that fire can only be opened in presence of an officer or petty officer in the place, which is many times impracticable. If it is decided that facts will be judged pursuant to a post facto judicial analysis, the trend is not to use weapons to avoid problems and not to be involved in a research of uncertain result. For example, if the rule of engagement is to defend a “ballot box” and is given to an armed soldier with a gun, he should use his discretion in case he sees ten men armed with sticks trying to take it, would anyone open fire knowing that their action will later be subject to a post facto judicial analysis? If good discretion, as required, is applied, the answer is probably no.

ROE need to put into practice by those who have to apply them before some events. An intense practice will reduce mistakes and it is, therefore, necessary to have a catalog of ROE approved by a political authority in which cases that may occur for the use of weapons to be applied are included. Then, for each operation ordered, it is necessary to list ROE that will be applied to that particular case, including those that have been practiced.

As a general rule, inexperienced troops shoot their weapons when someone near them does it, as an instinct of protection. Telling an inexperienced troop that “fire is only opened upon an order” shows absolute lack of knowledge of reality. This is different with experiences troops who have an experiences spirit in case of danger.

An inexperienced soldier will hit the deck when he listens a roar or a cannon shot. An experienced soldier will stand still, apathetic because experience has shown that if they listen an extended whistle of the projectile in the air means that it will not fall near them, but if whistle is shorter, it means it is falling near them. Moreover, he knows that if they listen to the whistle of a projectile of a portable weapon, this is because it has not impacted because if that had happened, they would not listen to the sound³⁴¹.

All of this is worse in flagrant cases because they require an immediate reaction. Delay in reaction due to the attempt to apply good criteria and fear to do it wrongly may have serious consequences.

The principle of self- defense, in all variants analyzed in this research seems to be only applicable in land context and maybe in cyber space, both during an armed conflict and peace missions ordered by the UN Security Council. However, said principle is also applicable in other contexts and circumstances. The UN Convention on the Law of the Sea, of which our country is a signatory country, sets forth in section 107- Vessels and aircraft authorized to capture due to piracy- which only war vessels, military aircraft or other vessels or aircraft that carry clear signs and may be identified as vessels or aircrafts for the service of a government and are authorized for such purpose, may carry out capture due to piracy.

341. First, impact is listened to and then the explosion of muzzle because speed in the muzzle of the gun may be 800 m/s and speed of sound is 300 m/s. But this is only given by experience and the one judging it must know it (or must have experienced it by themselves) to know the difference.

Nowadays, it is largely accepted that piracy at sea is a highly organized criminal activity. The UN Convention on the Law of the Sea of the year 1982 –UNCLOS– makes it clear that piracy at open sea is prohibited and illegal and all states have the right to chase and capture all those who are responsible of piracy at open sea.

The question to be made is if, given the case of pirates who, showing a hostile attitude, get closer to a merchant vessel and its Captain asks for help against that attack to a Commandant of an Argentine war vessel at open sea, could it apply the concept of “extended self- defense” and by virtue of this, make warning and destruction shots against pirates? In what cases is it necessary to resort to rules of engagement and in what other cases to rules for the use of force?

These questions, as they have been left without any answer throughout this research, show the need to have a permanent catalog of Rules of Confrontation or Engagement both for times of peace, crisis or war and another catalog of Rules for the Use of Force.

Armed forces are the armed component of national power that acts under political direction to defend from aggression and protect life, freedom and property of its inhabitants. If they are restricted in any manner in the use of weapons provided is reasonable because the use of force obeys to a political purpose. Weapons are means and means can never be considered isolated from their purpose. But if eventual violation is judged pursuant to the Criminal Code thought to assure pacific life among co- citizens in times of peace, the Armed Forces would not serve the purpose for which they were created: impose the State’s will. Restrictions and prohibitions in the use of weapons would have stopped them.

Although crimes must be prosecuted, this has to be done by reasonable and expert judges –it would be ideal to be judged by military courts as real rather than personal jurisdiction- duly considering the context of the environmental environment of an armed conflict, the mood of the author, confusion and tension, etc.

Only a catalog of Rules of Confrontation or Engagement and Rules for the Use of Force drafted in times of peace by a team of experts formed by military men from different groups and stages and advised by specialists from ministries involved may avoid vague and ambiguous drafting of ROE with the urgency imposed by circumstances surrounding at all moments of confusion and conflict.

The inclusion of ROE as legitimate orders of higher authorities and that, therefore, must be obeyed will allow military men to feel supported to make use of force, including lethal, both for self- defense to comply with the mission imposed.

Said catalog, judicially recognized, will support the action of armed forces and will serve as basis for training avoiding possible excess in the use of force.

In sum, we can say that on January 29, 2014, the Chief of Staff of Defense from Spain, Admiral Fernando García Sánchez, chaired the meeting³⁴² for the presentation

342. Government from Spain; Ministry of Defense; Staff of Defense; Meeting for the publication of the catalog of rules of confrontation for the Spanish Armed Forces, 29/01/2014; “The Head of Staff of Defense, Admiral Fernando García Sánchez, chaired the meeting for the presentation of the National Catalog of Rules of Confrontation in the context of the Spanish criminal jurisdiction”. Available at <http://www.emad.mde.es/EMAD/novemad/noticias/2014/01/140128-roes.html>

of the National Catalog of Rules of Confrontation with the purpose of disclosing, in the context of the Spanish criminal jurisdiction, aspects that are relevant regarding Rules of Confrontation.

The purpose of the meeting was to facilitate knowledge and understanding of legal, strategic and operational aspects regarding this subject and the procedure for approval and implementation making processes and legal and operational control clear in relation with the use of force, in contexts of emergency, crisis and conflict.

During the meeting, there were present: Legal Advisor of the Army Headquarters, general auditor Gonzalo Zarranz Domenech with a lecture titled “Rules of Confrontation. General aspects”; a representative from the Strategy and Plans Division of the Joint Staff, Colonel Pablo Ramón García Sastre, with a lecture titled “Catalog of Rules of Confrontation for the Spanish armed forces” and a representative from the Operations Command, Colonel Francisco Javier Fiol Gómez that dealt with “Operational aspects of the Rules of Confrontation”.

With the purpose of facilitating integration of said knowledge in the treatment of judicial aspects that may have a relation with the action of Spanish troops within the framework of the development of missions assigned, during the meeting there were representatives of the National Audience, Prosecutor’s Office as well as the Central Military Court and Judicial Advisors of the Ministry of Defense, Armies, Navy and Staff of Defense.

FINAL CONCLUSIONS

It is known that all conflicts are as old as humankind. At war, there have always been custom practices but States started to create international regulations aimed at limiting the effects of armed conflicts for humanitarian reasons only in the last 150 years.

Geneva Conventions and Hague Conventions are the main examples of said regulations. This branch of law, usually called International Humanitarian Law is also known as “Law of war” or “Law of armed conflicts” and its purpose is to protect people who do not take part or no longer take part in hostilities as well as those are ill, the injured, prisoners and civilians; it defines rights and obligations of parties at conflict with relation to conduction of hostilities.

With time, military missions in the world were extended and beyond traditional combat activities, military men started to take part in many other activities called “non-war military operations”. Examples of these are peace operations, aid in emergency and catastrophes both in foreign territories and one’s own territories, stability operations, safety against terrorism, military operations against drug trafficking and related crimes, evacuation of co-nationals from territories at war, the exercise of the right of interference in its different forms and, last, the ones under the concept of “Responsibility to protect” (R2P).

Nowadays, conflicts seem to be similar to battles between two or more armies with uniforms at conflict for which Geneva conventions were designed.

After the first decade of the 21st century we are in a world in which confrontation because of border issues was reduced, in which armed operations were dealt with by governments and their armed forces and there were changes in peace and international security in poor countries – or not so poor- in which social and economic inequalities exist.

These are settings of internal and bloody fights as the ones that take place in Central Africa and, nowadays, in the Middle East, fights in which the line that clearly separates combatants from non-combatants disappears.

The current range of confrontation goes from highly sophisticated armies that operate against irregular combatants to those in which paramilitary and criminals get confused with local population. Current wars are many times carried out by sirs of war, mercenaries, contractors and even children.

As a result of the changes in the type of operations requested to military men, the way to use force is not the same as in prior conflicts, destroy or defeat opponent forces or break the will to fight of the enemy.

Due to the changes in the way to use armed forces (more precisely, from the war of Korea), Rules of Engagement (ROE) were used by governments to rule the use of lethal power of weapons.

In more recent years, also the concepts of limitations, restrictions and imposition to the use of combat power were introduced in light of the need to balance several objectives that are opposing such as not to use force beyond the purpose of the political power, not to risk security of one's own force, comply with the mission assigned, prevent unnecessary collateral damage to cultural items and protection of the environment and assure fulfillment of the mission.

On the one hand, there are those limitations that will condition a commandant and that in one way or another will limit him, for example, dimensions of the Theater of Operations, human and material means assigned, time required to fulfill the mission, methods to use combat power, non- target lists, among others.

There will also be other conditions that will limit freedom of action to the Commandant. These impositions and restrictions will respectively indicate what they must and must not do.

Imposition may be political or operational and will try to legitimate military actions, for example, avoid exceeding a certain level of collateral damage. They arise from national laws, treaties signed by the country, International Law of Armed Conflicts, the Agreement on the status of forces, and the mandate of the Security Council.

Physical and moral limits are restrictions to the application of the military instrument. These are imposed in the Planning Guidelines in a specific manner or as ROE. For example: not to act during the evening, not to attack or deploy out of their area of deployment, not to violate air space of the opponent, not to attack worship centers even if they are used to attack.

ROE are out of the three concepts mentioned although in the Campaign Plan, limitations, restrictions and impositions will appear reflected as ROE for inferior levels.

These rules of engagement are not related with what the world and, specifically, in the context of the armed forces, is called Rules of Behaviour. The latter refer to rules for troops pursuant to International Law of Armed Conflicts.

In sum and beyond the different definitions that are in the world, ROE are essentially authorizations, limitations and prohibitions in the use of combat power. All of them will be part of the Annex of ROE to the Campaign Plan.

By means of them, guidelines will be defined pursuant to the mission for the commandant and forces in operations to know when, how, where and to what extent the use of force is authorized. Therefore, they must be drafted and developed from the first part of the planning process. Different circumstances only need different rules rather than different systems of rules.

Throughout this research, we have seen that there are differences and similarities among different countries with respect to what rules of engagement must be applied to one mission. This is mainly due to different laws.

When there is a catalog of ROE, the Commandant selects, for each phase of the campaign, which ones should be applied based on the criteria and advice received from the Staff. When this does not happen, they must be drafted at the very last minute which will surely have a negative effect on the training of those who must comply with them.

In both cases, it will not be necessary to order armed forces to take ROE for which they are not prepared, equipped or trained, it will not be necessary to restrict ROE to the point to place armed forces in situations in which life can be lost unnecessarily or to put armed forces in situations in which the legal context in which ROE are applied is uncertain or is not clear nor to order the armed forces to take missions in which ROE are not issued.

In this work, we have focused on the need to distinguish Rules of Engagement from Rules for the Use of Force as the first ones are the ones that must be used in missions carried out outside national territory and the second ones in those that are exclusively carried out in spaces of national jurisdiction.

Despite sharing the same principles, ROE are based on national and international law, while RUF are exclusively based on National Law. Therefore, any definition and concept that includes RUF must consider their origin is in the Constitution and national laws.

Both ROE and RUF do not assign specific tasks to commandants; do not control tactic procedures and do not indicate the level of the use of force that commandants must exercise, indicate only the level of force that commandants must not exceed. In other words, ROE establish the level of the use of force within which commandants must act.

There is, thus, the need to have before using force a catalog of rules of engagement and rules for the use of force drafted by a team of experts, formed by military men from different groups and stages advised by specialists from ministries involved in order to avoid vague and ambiguous drafting due to urgency imposed by circumstances that exist in times of tension and crisis.

This catalog, judicially recognized and approved by competent authorities will support the action of the Armed Forces and serve for the preparation and training of air, land and navy forces. <

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Armed Forces at international level have had different roles that gave rise to discussion about Rules of Engagement, a main concept for the conduction of current military operations.

The use of force is different from what it was in prior conflicts and the mission of Armed Forces has had to consider the need to prevent collateral damage.

This work, which is the result of the compilation of the three prior books previously published, explains the definition, classification and objectives of Rules of Engagement. Also, it analyzes the relation between them and the planning and operation process and it highlights the importance to draft Rules of Engagement in a coordinated and joint manner.

Last, there is an approach to the concepts of self-defense, self-defense of the military unit, escalation of force, lethal and non-lethal force, military necessity, proportionality and minimum reaction due to the impact that they will have over the use of force by the armed component of national power.

Judgment criteria are provided to show the need to have a permanent catalog of Rules of Engagement and Rules for the Use of Force, approved by a competent authority to properly train troops and, thus, prevent mistakes contrary to international law.

This catalog, legally and politically approved, will support the action of Armed Forces and will contribute to the preparation and training of troops.

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