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IT IS NOT SELF-DEFENSE: DIRECT PARTICIPATION IN HOSTILITIES AUTHORITY AT THE TACTICAL LEVEL

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A U.S. soldier at a forward operating base (FOB) watches a high definition camera feed. On it, he sees a man in civilian clothing digging a hole in the road and emplacing an improvised explosive device (IED). The road is approximately eight kilometers from the FOB and there are no U.S. or coalition soldiers nearby. The soldier notifies his commander, who calls for an attack helicopter. By the time the helicopter arrives, the man has finished emplacing the IED, has mounted his motorcycle, and has traveled three kilometers from the IED site. His actions and movements have been tracked the entire time on camera. The helicopter pilot informs the commander that although there are no collateral damage concerns in the area, the man bears no visible weapons and does not appear to be doing anything threatening. The commander clears the pilot to engage the man with deadly force. The pilot, unsure if this is legal, asks the commander to state the engagement authority on the recorded audio. The commander hesitates.¹

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In this scenario, the pilot and commander identify that someone is taking part in hostilities, but are unsure of the legal authority to use force against him. Their confusion is the result of a legal framework developed for a different kind of warfare. In the context of conventional warfare, where the uniformed army of one nation fights the uniformed army of another, the Law of Armed Conflict² (LOAC) presumes that civilians can be distinguished from members of an armed force; and are therefore protected even during combat.³ The recent increase in insurgent, asymmetrical and hybrid forms of warfare has challenged this premise.⁴ As Lieutenant General H.R. McMaster succinctly put it, “There are two ways to fight the U.S. military—asymmetrically and stupid.”⁵ While

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¹ This is a fictional scenario drafted for this article, but represents a situation commonly encountered in insurgent warfare.

² INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, JA422, OPERATIONAL LAW HANDBOOK 83 (2015) [hereinafter OPLAW HANDBOOK] The term “Law of Armed Conflict” is synonymous with the terms International Humanitarian Law and Law of War.

³ INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 4 (Niles Melzer ed., 2009) [hereinafter ICRC IG] (“Its origins, at least in terms of treaty rules, lie at a time when civilian populations were largely spared from the direct effects of hostilities and actual fighting was carried out only by combatants.”).

⁴ Although there are distinct differences in these types of warfare, each features fighters engaging in combat dressed in civilian clothing. Insurgent, asymmetrical, and hybrid warfare are collectively referred to as insurgent warfare for this paper. See, e.g., John R. Davis, *Defeating Future Hybrid Threats*, MIL. REV. (2013).

⁵ Jeff Schogol, ‘American War Generals’ A Sobering Reflection on U.S. Failures in Iraq, MIL. TIMES (Sep. 11, 2014), <http://www.militarytimes.com/story/entertainment/201409/11>

defeating the enemy's forces remains the objective of modern warfare, achieving that objective becomes more difficult when fighters engage in hostilities dressed as civilians.⁶ Complicating matters further, a vital component of success in insurgent warfare is gaining the support of the civilian population.⁷ This creates the unenviable situation where working closely with local populations has gained importance at the same time that distinguishing civilians from enemy forces has become increasingly difficult.

The legal framework the United States currently uses does not make this task any easier. Stated in the unclassified annex to the U.S. Standing Rules of Engagement (SROE), U.S. forces have two bases for using force—self-defense or mission accomplishment.⁸

Self-defense is the broader of the two authorities, applying in both times of peace and in armed conflict.⁹ At the same time, it is also the more restrained regarding the amount of force that may be applied.¹⁰ It is broad because, when acting in self-defense, a soldier may use force against anyone, including a civilian, who presents an imminent threat.¹¹ It is restrictive because once force is authorized, only as much force as is necessary to neutralize the threat may be used.¹² Additionally, force may only be used where it is not possible to mitigate the threat by other means.¹³

Though mission accomplishment sounds broad, under current U.S. policy the reality is that it is primarily limited to using force against

/american-war-generals-a-sobering-reflection-on-us-failures-iniraq/15467649/ (quoting Lieutenant General H.R. McMaster).

⁶ *St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight*, in D. Schindler & J. Toman, *THE LAWS OF ARMED CONFLICTS* 102 (1988) (“the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy”).

⁷ U.S. DEP’T OF ARMY, *FIELD MANUAL 3-24, INSURGENCIES AND COUNTERING INSURGENCIES* 1–8 (2 June 2014).

⁸ CHAIRMAN, JOINT CHIEFS OF STAFF, *INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCES FOR U.S. FORCES* enclosure A (13 June 2005) [hereinafter SROE]; see also *OPLAW Handbook*, *supra* note 2, at 84.

⁹ U.S. DEP’T OF DEF., *LAW OF WAR MANUAL 41* (June 2015) at 47 [hereinafter *LAW OF WAR MANUAL*].

¹⁰ *Id.* at 41. Force may be used in self-defense, but only to the extent that it is required to repel the armed attack and to restore the security of the party attacked. *Id.*

¹¹ *Id.*

¹² *Id.*; SROE, *supra* note 8, at A-3.

¹³ *LAW OF WAR MANUAL*, *supra* note 9, at 41; SROE, *supra* note 8, at A-3.

militaries and organized armed groups that have been declared hostile (referred to as declared hostile force authority).¹⁴ Under the LOAC, members of a hostile armed force are subject to attack based solely on their status as a member of a hostile force.¹⁵ This is true even when they do not present an imminent threat.¹⁶ However, before force may be used, a person's membership in the hostile group must be confirmed.¹⁷ This is most often accomplished by observing the person wearing an enemy uniform or other distinctive markings, or through intelligence verifying the person's membership in the group.¹⁸

Because declared hostile force authority is limited to use against fighters that can be identified as members of a particular group, it is difficult to implement against fighters whose group affiliation is hard to determine, because they engage in hostilities wearing civilian clothing.¹⁹ This results in self-defense being the default use of force authority in many tactical situations. The opening scenario emphasizes the limitations present when only self-defense or declared hostile force authority are available. Common sense tells the pilot and commander in the scenario to prevent a hard-to-identify enemy from escaping. However, under declared hostile force authority they cannot attack the person, because they do not have enough information about him to determine if he is part of a declared hostile force.²⁰ At the same time, the limitations applicable to self-defense prevent them from firing on him because he poses no imminent threat.²¹

This result is untenable. It undermines counterinsurgency campaigns and imposes restrictions on soldiers that are not required by the LOAC.²²

¹⁴ SROE, *supra* note 8, at A-2 (“Once a force is declared hostile by appropriate authority, US forces need not observe a hostile act or demonstrated hostile intent before engaging the declared hostile force.”).

¹⁵ *Id.*

¹⁶ SROE, *supra* note 8, at A-2.

¹⁷ *Id.*

¹⁸ See Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 44, June 8, 1977, U.N. Doc. A/32/144, [hereinafter AP I]; LAW OF WAR MANUAL, *supra* note 9, at 218.

¹⁹ See OPLAW HANDBOOK, *supra* note 2, at 83.

²⁰ *Id.*

²¹ See SROE, *supra* note 8, at A-3.

²² See, e.g., Michael Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 85 INT'L L. STUD. 307, 327 (2007) [hereinafter Schmitt *Targeting and IHL*]; see also LAW OF WAR MANUAL, *supra* note 9, at 229–30.

It leaves commanders and soldiers little option but to distort or ignore the rules of engagement (ROE) and self-defense requirements. This in turn erodes soldiers' respect for the ROE and the law. It paints higher headquarters and their legal advisors as being "echelons above reality" and willing to put soldiers at unnecessary risk. It also perverts the purposes of the LOAC by rewarding enemies who eschew uniforms and embrace unlawful belligerency, thus placing uninvolved civilians at greater risk by forcing soldiers to make difficult and imperfect targeting decisions.

It does not have to be this way. A third basis for use of force exists specifically to address situations such as the IED emplacer—the authority to attack any person who is directly participating in hostilities—referred to as direct participation authority.²³ Civilians who elect to take direct part in hostilities may be attacked for such time as they directly participate in hostilities.²⁴ The authority to attack civilians who take a direct part in hostilities is an exception to the general rule that civilians may not be attacked.²⁵ This authority is recognized in international law by the Geneva Conventions,²⁶ the Additional Protocols to the Geneva Conventions,²⁷ the International Committee of the Red Cross,²⁸ and a long history of customary practice.²⁹ Additionally, it is explicitly recognized by the

²³ See AP I, *supra* note 18; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(3), June 8, 1977, U.N. Doc. A/32/144, Annex I [hereinafter AP II]. The rule whereby civilians lose their protection against attack when and for such time as they take a direct part in hostilities is contained in article 51(3) and article 13(3) respectively. *Id.* Although the United States is not a signatory to Additional Protocol I, it does regard the principle on which this portion of the article is based as customary international law, and therefore binding. See also LAW OF WAR MANUAL, *supra* note 9, at 223 n.218 and accompanying text.

²⁴ See AP I, *supra* note 18, art. 51(3); AP II *supra* note 23, art. 13(3); see also LAW OF WAR MANUAL, *supra* note 9, at 220–33.

²⁵ See GC III, *supra* note 18, art. 3; AP I, *supra* note 18, art. 51(3); AP II, *supra* note 23, art. 13(3); LAW OF WAR MANUAL, *supra* note 9, at 222.

²⁶ GC III, *supra* note 18, art. 3.

²⁷ AP I, *supra* note 18, art. 51(3); AP II, *supra* note 23, art. 13(3).

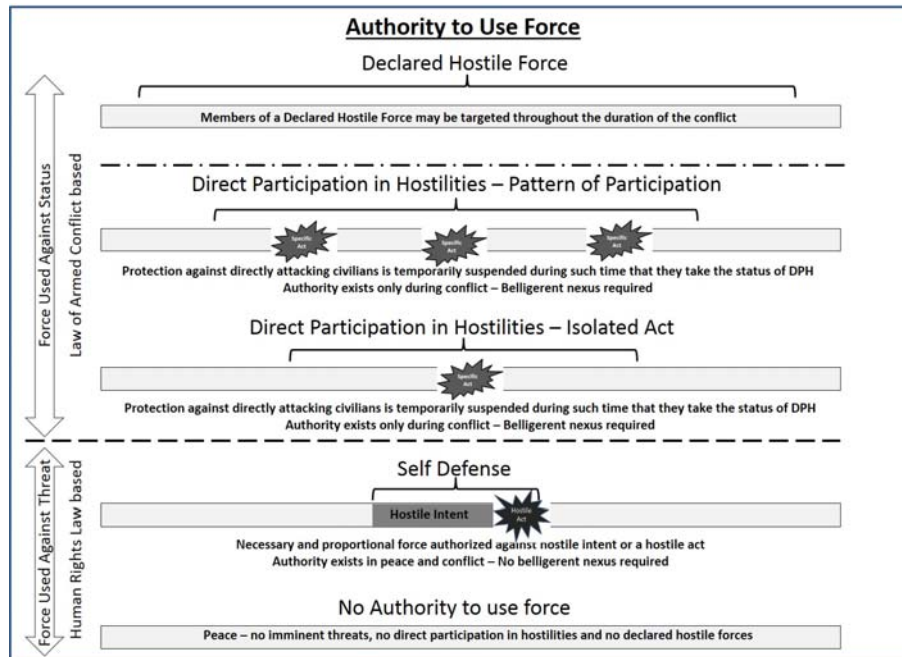
²⁸ *Customary International Humanitarian Law Database*, INT'L COMM. OF THE RED CROSS r.6, https://www.icrc.org/customary-ihl/eng/docs/v1_rul (last visited June 7, 2016) [hereinafter ICRC *Customary IHL*].

²⁹ See Emily Camins, *The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity*, 90 INT'L REV. OF THE RED CROSS 853 (2008).

United States in the new U.S. Department of Defense *Law of War Manual*.³⁰

Although direct participation authority is firmly rooted in international law and provides substantial benefits as a bridging authority between self-defense and declared hostile force authority, it is currently ignored in U.S. use of force policy at the tactical level.³¹ It is the application of direct participation authority to these tactical level situations—where individual soldiers and junior leaders encounter non-uniform wearing insurgents on the battlefield—that this paper will address.

The diagram at figure 1 illustrates how the three use of force authorities nest within one another on the battlefield. The chart at figure 2 outlines the characteristics, advantages and limitations of the three authorities.



Figure³²

³⁰ LAW OF WAR MANUAL, *supra* note 9, at 222.

³¹ See generally SROE, *supra* note 8, encl. A (lacking discussion of direct participation in hostilities authority); see also Schmitt *Targeting and IHL*, *supra* note 22, at 314–15.

³² See generally SROE, *supra* note 8, A-2–A-3; LAW OF WAR MANUAL, *supra* note 9, at 224–32 (discussing the three authorities).

Characteristics, Advantages and Limitations*					
<p style="text-align: center;">Self-Defense</p> <ul style="list-style-type: none"> • Human rights law based • Defensive/reactive by nature • Authority to use force is based on countering an imminent threat. • Authority ends when imminent threat no longer exists. • Requires attempts to deescalate, if possible • Requires use of minimum force • Authority ends when hostile act or hostile intent (imminent threat) ends • Cannot pursue and continue to use force unless the person continues to show hostile intent or commit hostile acts. 	<p style="text-align: center;">Mission Accomplishment</p> <table border="0" style="width: 100%;"> <tr> <td style="vertical-align: top; width: 50%;"> <p style="text-align: center;">Direct Participation in Hostilities</p> <ul style="list-style-type: none"> • Authority to use force is based on a person choosing to directly participate in hostilities by committing a measure preparatory to a specific act of direct participation • Authority ends when person redeploys from the site of the specific act of direct participation (ICRC approach) or when he opts out of direct participation status. </td> <td style="vertical-align: top; width: 50%;"> <p style="text-align: center;">Declared Hostile Force</p> <ul style="list-style-type: none"> • Authority to use force is based on a person being a member of an armed group that has been declared hostile. • Authority ends when the person is no longer a member of the group or the group is no longer declared hostile. </td> </tr> <tr> <td colspan="2" style="text-align: center;"> <p>Common to both DPH and DHF</p> <ul style="list-style-type: none"> • Law of Armed Conflict based • Offensive/aggressive by nature • Does not require the person to present an imminent threat • Does not require attempts to deescalate • Does not require using minimum force • Allows for pursuit even if no continuing threat presented </td> </tr> </table>	<p style="text-align: center;">Direct Participation in Hostilities</p> <ul style="list-style-type: none"> • Authority to use force is based on a person choosing to directly participate in hostilities by committing a measure preparatory to a specific act of direct participation • Authority ends when person redeploys from the site of the specific act of direct participation (ICRC approach) or when he opts out of direct participation status. 	<p style="text-align: center;">Declared Hostile Force</p> <ul style="list-style-type: none"> • Authority to use force is based on a person being a member of an armed group that has been declared hostile. • Authority ends when the person is no longer a member of the group or the group is no longer declared hostile. 	<p>Common to both DPH and DHF</p> <ul style="list-style-type: none"> • Law of Armed Conflict based • Offensive/aggressive by nature • Does not require the person to present an imminent threat • Does not require attempts to deescalate • Does not require using minimum force • Allows for pursuit even if no continuing threat presented 	
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*Based on the U.S. approach unless otherwise noted.

Figure 2³³

I. Why Self-Defense and Declared Hostile Force Authorities are Insufficient

The difficulties in applying the LOAC principle of distinction when engaging non-uniformed fighters are not new.³⁴ United States forces have fought individuals wearing civilian clothing in major conflicts throughout the nation's history.³⁵ However, the law and customs surrounding those engagements have changed over the course of the twentieth and twenty-first centuries, as has the prevalence of insurgent warfare.³⁶ While much

³³ See *supra* note 32 and accompanying sources.

³⁴ See Camins, *supra* note 29.

³⁵ *Id.* (quoting FRANCIS LIEBER, GUERRILLA PARTIES CONSIDERED WITH REFERENCE TO THE LAWS AND USAGES OF WAR, (D. Van Nostrand 1862) in LIEBER'S CODE AND THE LAW OF WAR 31, 42 (Richard Shelly Hartigan, Precedent 1983). The Civil War had its fair share of non-uniformed fighters. *Id.* Lieber even addressed how such fighters should be treated stating that if "they resort to 'occasional fighting and the occasional assuming of peaceful habits and to brigandage,' they should not be protected by the laws of war." *Id.* at 862. Vietnam and Korea are also examples of conflicts where the participation of non-uniformed fighters was prevalent. See BRUCE CUMMINGS, THE KOREAN WAR 181 (2010); see also DAVID L. ANDERSON, THE COLUMBIA HISTORY OF THE VIETNAM WAR 44 (2011).

³⁶ See Trevor A. Keck, *Not All Civilians are Created Equal: The Principle of Distinction, The Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare*, 211 MIL. L. REV. 115, 124–25 (2012).

of the treaty law emphasizing the importance of distinction was developed in the wake of World War II, the prevalence of conventional international armed conflict declined significantly in its aftermath.³⁷ The role of civilians in armed conflict shifted dramatically as a result.³⁸ In the recent conflicts in Afghanistan and Iraq, civilian clothing has been the primary dress for enemy fighters.³⁹ This change in enemy tactics, coupled with the need to maintain the support of civilian populations, pushed commanders and their legal advisors to place a priority on identifying fighters, and on developing rules for the use of force that allow targeting of these fighters, while also protecting civilians.

In our most recent conflicts, U.S. commanders recognized that attempting to engage these non-uniformed fighters as part of a declared hostile force was of little benefit, because doing so not only required the fighters to be recognized as taking part in hostilities, it also required that they be linked to membership in a particular declared hostile group.⁴⁰ Without enemy adherence to the practice of wearing uniforms, the only way to distinguish fighters from innocent civilians was through observing their belligerent actions, or through detailed and time-consuming intelligence collection. Authorizing the use of force against someone based on their actions seemed more in line with self-defense than declared hostile force authority, so commanders and their legal advisors gravitated to self-defense when citing the authority for these engagements.⁴¹ However, time and experience would prove that neither declared hostile force authority nor self-defense provided adequate authority when fighting a counterinsurgency.⁴²

³⁷ See ICRC IG, *supra* note 3, at 4.

³⁸ See Andreas Wegner & Simon J.A. Mason, *The Civilianization of Armed Conflict: Trends and Implications*, 90 INT'L REV. OF THE RED CROSS 835, 837 (Dec. 2008) (linking the growing involvement of civilians in armed conflict to the decline of inter-state wars and the rise of intra-state wars).

³⁹ See e.g., Michael Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 15 (2008); see also Schmitt *Targeting and IHL*, *supra* note 22, at 313.

⁴⁰ CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPT. 2001 TO 1 MAY 2003) 101 (2004) [hereinafter LESSONS LEARNED VOL. 1].

⁴¹ See, e.g., *id.* at 100–02. See, e.g., CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOL. II, FULL SPECTRUM OPERATIONS 131 (2 MAY 2003–30 JUNE 2004) (2005).

⁴² See CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, FORGED IN THE FIRE: LEGAL LESSONS LEARNED FROM 1994–2008, at 144–45; see also Schmitt *Targeting and IHL*, *supra* note 22, at 326.

A. The Inadequacy of Declared Hostile Force Authority in Insurgent Warfare

Declared hostile force authority is the broadest of any of the use of force authorities regarding duration of the authority to use force, and concerning how much force may be used.⁴³ At the same time, it is the most constrained regarding against whom force may be used.⁴⁴ Under this authority, before a person can be attacked he must first be identified as a member of a declared hostile force.⁴⁵ Once membership is verified, he may be attacked regardless of his immediate actions or his proximity to the fight, for the duration of his membership.⁴⁶ For example, under declared hostile force authority it is legal to attack a member of the hostile group even while he is sleeping.⁴⁷

While it was clear in Afghanistan during Operation Enduring Freedom (OEF) that al Qaeda and Taliban fighters were members of hostile armed groups, it was difficult to validate an individual's membership in these groups before targeting him.⁴⁸ It is also likely that some of the individuals in Afghanistan who, for example, manufactured and emplaced IEDs, were not formally affiliated with either al Qaeda or the Taliban, but had separate anti-coalition agendas.⁴⁹ Because of the difficulties in linking fighters to

⁴³ See, e.g., OPLAW HANDBOOK, *supra* note 2, at 83–84 (asserting that once a force is declared hostile, its members may be attacked at any time with lethal force).

⁴⁴ *Id.* Use of force under this authority is limited to individuals who are identified as members of the declared hostile force. *Id.* Unlike self-defense and direct participation authority, declared hostile force authority does not authorize the use of force against fighters whose group affiliation cannot be determined. *Id.*

⁴⁵ See *id.* at 83 (“Once a force or individual is identified as a [Declared Hostile Force], the force or individual may be engaged.”).

⁴⁶ See *id.* at 16 (“Combatants are lawful targets unless *hors de combat*, that is, out of combat status—captured, wounded, sick or shipwrecked and no longer engaged in hostilities.”).

⁴⁷ See LAW OF WAR MANUAL, *supra* note 9, at 216–17 (“For example, combatants who are standing in a mess line, engaging in recreational activities, or sleeping remain the lawful object of attack, provided they are not placed *hors de combat*.”).

⁴⁸ See Schmitt *Targeting and IHL*, *supra* note 22, at 313.

⁴⁹ See LESSONS LEARNED VOL. 1, *supra* note 40, at 101 (“The Taliban was an amorphously defined group comprised of the Taliban regime itself as well as their armed units, various members of which were not committed to any cause and willingly switched allegiances.”).

a particular hostile group, U.S. ROE drafters initially opted out of a declared hostile force rubric entirely.⁵⁰

As the Center for Law and Military Operations (CLAMO) *Legal Lessons Learned* manual summarizes:

Political and military concerns counseled against declaring forces hostile throughout Afghanistan on a number of counts, according to [Central Command]. First, it was difficult to determine who exactly was a hostile force in Afghanistan. The Taliban was an amorphously defined group comprised of the Taliban regime itself as well as their armed units, various members of which were not committed to any cause and willingly switched allegiances. Al Qaeda members similarly were difficult to define.⁵¹

Operation Iraqi Freedom (OIF) started out differently. In the opening days, the United States was engaged in an international armed conflict against a conventional military.⁵² Rules of Engagement drafters relied on both declared hostile force authority and self-defense for using force against the Iraqi military.⁵³ This worked well in the early weeks of the war against uniformed Iraqi forces, however, as the conflict transitioned into an insurgency, the shortcomings of this approach became apparent as recognition of enemy fighters became significantly more difficult.⁵⁴

Although some insurgent groups retained their designations as hostile forces, this was of minimal value when they could no longer be recognized as such by uniforms or other distinctive markings. Instead, “forces in effect displayed evidence of their ‘hostile’ status by committing hostile acts or displaying hostile intent.”⁵⁵ This blending of declared hostile force

⁵⁰ *Id.*; Schmitt *Targeting and IHL*, *supra* note 22, at 315 (“When the conflict began, the United States and its coalition partners declared no enemy forces hostile, to include the Taliban and Al Qaeda.”).

⁵¹ LESSONS LEARNED VOL. 1, *supra* note 40, at 101.

⁵² See Schmitt *Targeting and IHL*, *supra* note 22, at 315 (“During Operation Iraqi Freedom, by contrast, the Iraqi military was declared hostile from the outset of hostilities.”).

⁵³ *Id.*

⁵⁴ See LESSONS LEARNED VOL. 1, *supra* note 40, at 97–98.

⁵⁵ *Id.* at 107.

language (e.g. hostile status) with self-defense language (e.g. hostile acts and hostile intent) contributed to confusion as to which authority the United States was relying upon. In this complex environment, where U.S. ROE policy did not adequately address the situations commonly facing ground troops, commanders and their legal advisors explored other options.⁵⁶ This non-doctrinal and untrained use of force guidance was often documented in execute orders, fragmentary orders, fire support control measures, special instructions, and the collateral damage estimation policy methodology.⁵⁷ As one commentator noted, “the net result was a dense and often confusing normative environment, one in which [international humanitarian law] played a minor role relative to policy and operational considerations.”⁵⁸ This already confusing approach was further burdened by differing interpretation, uncertainty, and shifting discretion, resulting in an ineffective and dangerous way to conduct combat operations.

While declared hostile force authority is still used in insurgent warfare, the challenge of identifying enemy fighters by their group affiliations continues to hamstring declared hostile force designation as a useful counterinsurgency authority.⁵⁹ Frustrated by the demands of declared hostile force authority, commanders and their legal advisors turned to their other alternative, self-defense, as their primary warfighting authority.⁶⁰

B. The Shortcomings and Stretching of Self-Defense

On its surface, self-defense appears to be an adequate authority for insurgent warfare. It allows force to be used when anyone—soldier, insurgent or civilian—commits a hostile act or demonstrates hostile intent.⁶¹ Because most insurgent actions will also qualify as hostile acts or demonstrations of hostile intent, U.S. soldiers are authorized to use force against these fighters while they are engaged in their hostile act or

⁵⁶ See Schmitt *Targeting and IHL*, *supra* note 22, at 315 (discussing the development of the “Likely and Identifiable Threat” authority).

⁵⁷ LESSONS LEARNED VOL. 1, *supra* note 40, at 80.

⁵⁸ Schmitt *Targeting and IHL*, *supra* note 22, at 314.

⁵⁹ Keck, *supra* note 36, at 126–27.

⁶⁰ See e.g., Schmitt *Targeting and IHL*, *supra* note 22, at 315.

⁶¹ SROE, *supra* note 8, at A-3.

are demonstrating hostile intent.⁶² However, because self-defense is focused on eliminating a threat rather than eliminating a person, only the minimum amount of force necessary to neutralize the threat may be used.⁶³ Consider the following hypothetical scenario in which self-defense is appropriate:

A U.S. armor unit is involved in combat operations overseas. While returning from a mounted patrol, a tracked vehicle swerves to avoid debris on the road and accidentally crushes a young boy who was waiting on the shoulder for the column to pass. When the convoy stops to render aid, a small group of local men gathers to see what happened. One man pushes through the crowd to see the boy, who he recognizes as his son. The soldiers recognize the man as a local farmer who has always been friendly toward U.S. and coalition forces. Inconsolable, the man runs back to his house, and moments later reappears running toward the soldiers with what appears to be an AK-47.

This is the kind of situation for which self-defense was designed, and it illustrates its benefits and constraints. The father has in no way demonstrated membership in an organization that wishes to target U.S. or coalition soldiers. Though his current actions are threatening and potentially violent, they are not the belligerent acts of a fighter. If the soldiers use force against him in self-defense, they must follow the requirements that self-defense imposes.⁶⁴ These requirements include: (1) determining if the man presents an imminent threat, (2) warning the man (if the situation allows), and (3) affording him the opportunity to withdraw (if possible).⁶⁵ They are further required to use only the minimum force necessary to address the threat presented, they must cease using force once the threat has also ceased, and then may pursue and use force against the man only if he continues to present an imminent threat.⁶⁶ The goal in this situation is to protect the soldiers while also deescalating the situation to provide time for the man to calm down without anyone being hurt.

⁶² See LAW OF WAR MANUAL, *supra* note 9, at 229–30.

⁶³ See SROE, *supra* note 8, at A-3.

⁶⁴ *Id.* at A-3–A-4.

⁶⁵ *Id.*

⁶⁶ *Id.*

While this is a laudable goal in many situations, strict adherence to the self-defense requirements make fighting an insurgency exponentially more difficult. Forced to fight offensive operations using self-defense, U.S. forces are left with little recourse but to stretch some aspects of self-defense, while modifying or ignoring others.

The most constraining requirement, and perhaps the most systematically abused, is that U.S. soldiers may exercise self-defense only when a threat is *imminent*.⁶⁷ United States policy allows force to be used in self-defense in response to hostile acts or demonstrations of hostile intent.⁶⁸ While recognizing a hostile act is usually easy, identifying a demonstration of hostile intent is more difficult. The SROE define hostile intent as the threat of an *imminent* use of force against the United States, U.S. forces, or other designated persons or property.⁶⁹ While the SROE state what imminent is not—“does not necessarily mean immediate or instantaneous”—they do not define what it is.⁷⁰ In contrast with the U.S. definition, most nations use a version of imminence defined in the *Caroline Incident* as, “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”⁷¹ This definition forms the basis of the North Atlantic Treaty Organization (NATO) self-defense policy,

⁶⁷ *Id.* at A-4 (emphasis added)

⁶⁸ *Id.* at A-3.

⁶⁹ *Id.* at A-2–A-3 (emphasis added).

⁷⁰ *Id.* at A-3.

⁷¹ *Letter from Secretary of State Daniel Webster to Lord Ashburton* (Aug. 6, 1842) in JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, VOL. II 412 (1906). *See also* Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and beyond*, 35 CORNELL INT’L L. J. 535 n.6 (2002).

Some have argued that the exchange of views concerning the *Caroline Incident* addressed and justified preemptive self-defense (before an armed attack occurs) but the incident involved a process of continual attacks on the government of Canada by insurgents operating in Canada and the United States. Lord Palmerston claimed that the particular act of destroying the *Caroline* was an act of self-defense. . . . The United States admitted that self-defense might justify the use of force, but only in “cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”

Id. (quoting MOORE, DIGEST RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 RN 3 (3d ed. 1987)).

which states that “imminent means that the need to defend is manifest, instant, and overwhelming.”⁷²

In applying the definition of imminent from both the *Caroline Incident* and NATO self-defense policy, it is clear that the IED emplacer in the opening scenario may be a threat sometime in the future, but he is not an imminent threat. Many commanders, however, feel compelled to prevent this fighter from going free and possibly emplacing more IEDs in the future. The U.S. solution in such situations has often been to stretch the definition of *imminent* to justify using force.⁷³ Unfortunately, stretching the definition of *imminent* blurred the line between offensive use of force and use of force in self-defense, resulting in confusion on the requirements of self-defense and causing U.S. policy to diverge from those of its coalition partners.

Eric Husby highlighted this blurring of lines in his 2012 article, *A Balancing Act: In Pursuit of Proportionality in Self-Defense for On-Scene Commanders*, where he stated, “in recent conflicts, self-defense . . . involving U.S. forces have often been quasi-offensive in nature.”⁷⁴ Later in the article, he uses the phrase “a ‘true’ self-defense scenario” to distinguish a situation where threat of harm to U.S. forces is actually imminent.⁷⁵ The discussion of “quasi-offensive self-defense” and “true self-defense” highlights the confusion among military lawyers concerning self-defense and direct participation authority that is caused by the United States’ overreaching definition of imminent.⁷⁶ Husby concludes in his article that what U.S. forces are currently doing in Afghanistan is more offensive than (self) defensive; therefore, the LOAC principles should apply in these situations.⁷⁷

While Husby is correct in his conclusion that the principles of the LOAC should apply in the situations he described, his rationale in reaching

⁷² North Atlantic Treaty Organization (NATO), MC 362/1, NATO Rules of Engagement (2003) [hereinafter MC 362/1].

⁷³ This statement is derived from the author’s (Bagwell) personal experience as the senior NATO legal advisor with Regional Command-South, Kandahar, Afghanistan, August 2012–July 2013 [hereinafter Bagwell Afghanistan Experience].

⁷⁴ Eric Husby, *A Balancing Act: In Pursuit of Proportionality in Self-Defense for On-Scene Commanders*, ARMY LAW., May 2012, 6 at 11.

⁷⁵ *Id.* at 13.

⁷⁶ *Id.* at 11–12.

⁷⁷ *Id.*

that conclusion is flawed. He fails to recognize that what U.S. forces were doing in these “quasi-offensive” self-defense situations was not self-defense, but rather engaging individuals who take direct part in hostilities. Because self-defense is based in human rights law⁷⁸ and exists in times of peace as well as during armed conflict, the LOAC principles do not apply to self-defense.⁷⁹ The LOAC principles do apply, however, when using direct participation authority, an authority based on the LOAC, and that exists only during armed conflict.⁸⁰

While the vast majority of the international community defines imminent to mean, “manifest, instant, and overwhelming,” the United States stands alone in its expansive interpretation.⁸¹ These conflicting approaches have practical and dangerous impacts in a coalition fight. For example, if U.S. forces call for fire support from other NATO forces and cite self-defense as the justification, the response may be delayed while the supporting command makes an independent determination of whether

⁷⁸ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948):

Article 3: Everyone has the right to life, liberty and security of person Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Id. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221 (“Article 2(2): Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence.”); see David B. Kopel et al., *The Human Right of Self-Defense*, 22 B.Y.U. J. PUB.L. 43 (2007) (providing a detailed discussion of the historical legal precedence of self-defense as a basic human right).

⁷⁹ LAW OF WAR MANUAL, *supra* note 9, at 230 (“[T]he use of force in response to hostile acts and demonstrations of hostile intent applies outside hostilities, but taking a direct part in hostilities is limited to acts that occur during hostilities.”); Michael Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SECURITY J. 6, 37 (2010) [hereinafter Schmitt *Critical Analysis*] (“To the extent it is based in law, self-defense applies to civilians who are not directly participating in hostilities rather than those who are participating (as they may be attacked without any defensive purpose).”).

⁸⁰ LAW OF WAR MANUAL, *supra* note 9, at 230; ICRC IG, *supra* note 3, at 41 (“[T]he concept of direct participation in hostilities cannot refer to conduct occurring outside situations of armed conflict . . .”).

⁸¹ See Winston S. Williams, Jr., *Multinational Rules of Engagement: Caveats and Friction*, ARMY LAW., Jan. 2013, 24 at 25–26.

the threat is truly imminent based on their own national self-defense standard. This delay exposes soldiers on the ground to increased danger, makes U.S. commanders wary of relying on coalition partners, and ultimately weakens our alliances.⁸² While using direct participation authority will not solve the problem created by differing definitions of imminent in actual self-defense situations, it will eliminate this problem in situations where direct participation authority is appropriate.

The requirement of imminence is not the only element of self-defense that makes it unsuitable in offensive operations. The deescalation requirement in self-defense is also problematic. Under U.S. self-defense policy, when time and circumstances permit, soldiers are required to warn individuals before using force to allow them the opportunity to cease their threatening actions or withdraw.⁸³ In situations such as the distraught father scenario, this requirement is reasonable, but in the IED emplacer scenario, it is not. In the IED scenario, it is difficult to argue that time and circumstances do not allow the commander an opportunity to warn the IED emplacer and allow him to stop his actions or withdraw. For example, if the attack helicopter arrived while the man was still emplacing the IED, the pilot could fly low over the site or hover nearby to make his presence known. This warning would likely cause the emplacer to stop his actions and withdraw without a shot being fired. While this is the desired and intended outcome under self-defense, it is a completely unacceptable outcome in a counterinsurgency, where the emplacer is likely to return and strike again.

The requirement to use force proportional to the threat (often expressed as “minimum force”) also makes self-defense a poor tool to fight an insurgency.⁸⁴ Under U.S. policy, proportionality for self-defense means that the force used should not exceed the nature, duration, and scope required to respond decisively to the hostile act or the demonstration of

⁸² Bagwell Afghanistan Experience, *supra* note 72 (observing that this situation was so pervasive in Afghanistan that the unified NATO command issued specific Rules of Engagement (ROE) in an effort align U.S. forces and coalition partners on this critical issue).

⁸³ SROE, *supra* note 8, at A-4.

⁸⁴ The phrase “minimum force” has been used in U.S. ROE cards for several operations. See OPLAW HANDBOOK, *supra* note 2, at 105–10 (2015) (containing ROE card examples with this language). The concept of using minimum force is often expressed as the “shout, show, shove, shoot” construct. *Id.*

hostile intent.⁸⁵ Traditional escalation of force procedures, such as “shout, show, shove, shoot,” have long been used as a tool in self-defense to help regulate the amount of force applied.⁸⁶ With traditional escalation of force, the idea is “to increase the magnitude of force applied to an identified threat until the threat is deterred or, if necessary, eliminated.”⁸⁷

While a useful tool in self-defense, escalation of force is both unhelpful and unnecessary in situations where civilians directly participate in hostilities, and thus immediate offensive attack is both warranted and permitted by the LOAC.⁸⁸ Traditional escalation of force was so unhelpful to the counterinsurgency fight that in 2005 in Iraq the term “escalation of force” morphed from a term describing a tool for applying minimum force, into a term used to describe a tool for distinguishing innocent civilians from civilians participating in hostilities.⁸⁹ The 2008 article *The Threat Assessment Process (TAP): The Evolution of Escalation of Force* discusses this new use of escalation of force.⁹⁰ It asserts that “the goal in this new ‘threat assessment EOF’ is to force the insurgent to self-identify while keeping innocent civilians from being mistaken for threats.”⁹¹ “In other words, in counterinsurgency escalation of force is not being used for its traditional purpose of limiting the amount of force used against an identified threat, but rather for the far more difficult task of threat identification.”⁹² These statements regarding the new use of escalation of force are correct in part, but miss the mark by couching what was occurring in terms of identifying a threat. A more correct statement is that escalation of force now describes a process designed to force the insurgent to self-identify while keeping innocent civilians from being mistaken for *individuals directly participating in hostilities*.⁹³

⁸⁵ SROE, *supra* note 8, at A-5.

⁸⁶ See CTR. FOR ARMY LESSONS LEARNED, PUB. 07-21, ESCALATION OF FORCE HANDBOOK 1 (July 2007).

⁸⁷ Randall Bagwell, *The Threat Assessment Process (TAP): The Evolution of Escalation of Force*, ARMY LAW., Apr. 2008, at 5 [hereinafter Bagwell *TAP*].

⁸⁸ See AP I, *supra* note 18, art. 51(3); AP II, *supra* note 23, art. 13(3.); LAW OF WAR MANUAL, *supra* note 9, at 222.

⁸⁹ Bagwell *TAP*, *supra* note 86, at 5.

⁹⁰ *Id.*

⁹¹ *Id.* at 8.

⁹² *Id.* at 5.

⁹³ The argument that direct participation authority was the underpinning of the new escalation of force (EOF) is bolstered by language in the 2007 Multinational Corps-Iraq, Rules of Engagement Card (2007) [hereinafter MNC-I ROE Card]; see also David Bolgiano et al, *The Rules of Engagement*, FRONTLINE, <http://www.pbs.org/wgbh/pages/>

The self-defense constraint on pursuit is also problematic. Pursuit of, and continued use of force against a person or group that commits a hostile act or demonstrates hostile intent is allowable under U.S. self-defense policy, but only for so long as they *continue* to commit hostile acts or demonstrate hostile intent.⁹⁴ In self-defense situations, this constraint makes sense because the goal of self-defense is to have the threatening individual cease his threatening behavior and withdraw.⁹⁵ With this goal in mind, pursuing a person and using force against him if he is not continuing to present a threat makes no sense. Consider the opening scenario where the IED emplacer has finished his work and is now riding away on his motorcycle. Under self-defense, pursuit of the man with the purpose of using force against him is not allowed because he has completed his hostile act and is not continuing to commit a hostile act or demonstrating hostile intent.⁹⁶

Clearly, the requirements and limitations on self-defense are well suited for situations where the goal is to de-escalate a situation with minimum harm. However, these same requirements and limitations make self-defense extremely ill-suited as the primary authority for fighting insurgents. Strictly and collectively applied, they will likely result in allowing the insurgent to retreat to his village unharmed, enabling him to return to fight another day. This is a disturbing thought to any combat commander.

C. Neither Happy Nor Medium: A Likely and Identifiable Threat

frontline/haditha/themes/roe.html (last visited June 7, 2016) (linking a facsimile of an ROE card carried in Iraq); *see also* OPLAW HANDBOOK, *supra* note 2, at 110 (“1. You may engage the following individuals based on their conduct: Persons who are committing hostile acts. Persons who are exhibiting hostile intent 2. Escalation of Force (EOF). If time and circumstances permit, use EOF to determine whether hostile act/intent exists.”) (emphasis added).

⁹⁴ SROE, *supra* note 8, at A-4.

⁹⁵ *Id.*

⁹⁶ However, he may be subject to arrest under a law enforcement paradigm. *See generally*, INT’L COMM. OF THE RED CROSS, THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGMS (2013), <https://shop.icrc.org/the-use-of-force-in-armed-conflicts-expert-meeting.html>.

In response to the shortcomings of self-defense and declared hostile force authority in the early days of the Afghanistan conflict, ROE drafters created a hybrid ROE solution referred to as “likely and identifiable threat” (LIT).⁹⁷ The LIT ROE stated, “certain enemy forces who posed a likely and identifiable threat to friendly forces could be considered hostile and engaged and destroyed.”⁹⁸ Unfortunately, the LIT ROE attempted to incorporate ROE standards that military personnel had not been trained on,⁹⁹ and did not have sound grounding in international law.¹⁰⁰ One handbook for deployed judge advocates at the time recommended avoiding the term entirely, stating, “LIT does not have a stated definition, resulting in greater ambiguity and greater risk that civilians would be targeted.”¹⁰¹

Not surprisingly, LIT did in fact immediately lead to significant confusion.¹⁰² One deployed judge advocate noted “all the subordinate

⁹⁷ Schmitt *Targeting and IHL*, *supra* note 22, at 315.

⁹⁸ LESSONS LEARNED VOL 1, *supra* note 40, at 100.

⁹⁹ *Id.* at 97, n. 61 (quoting an officer referring to the “likely and identifiable” (LIT) standard, “It cannot be stated too strongly that one of the greatest challenges early-deploying Judge Advocates had with the [Operation Enduring Freedom (OEF) ROE] was that it does not resemble any ROE with which we had previously trained.”); *see also id.* at 102 (“That said, even [Central Command] attorneys concede that injecting new, perhaps overly legalistic ROE terminology into an operation without sufficient time for operators and judge advocates to understand and train to the standard is problematic and should be avoided if at all possible.”).

¹⁰⁰ *Id.* at 100 (“Likely and identifiable threat appeared only in the OEF ROE not in the SROE or the subsequent [Operation Iraqi Freedom (OIF) ROE.”]; Schmitt *Targeting and IHL*, *supra* note 22, at 315 (“Afghanistan represented the first use of the LIT standard in an armed conflict.”). *See also* INT’L & OPERATIONAL LAW BRANCH JUDGE ADVOC. DIVISION HEADQUARTERS MARINE CORPS & CENTER FOR LAW AND MILITARY OPERATIONS, DEPLOYED MARINE AIR-GROUND TASK FORCE JUDGE ADVOCATE HANDBOOK 3–4 (2013) [hereinafter MAGTAF JA HANDBOOK].

Doctrine is now full of terminology that has no source in international law but attempts to clarify issues for the benefit of the warfighter. Terms like Positive Identification (PID), Likely and Identifiable Threats (LITs), Troops-in-Contact (TIC), and Time Sensitive Targets (TSTs) are now found and variously defined in different sources. These modern attempts to assist in the distinction of lawful targets and prevent collateral damage are only tools for the warfighter and do not reflect a consensus of approval in international law.

Id.

¹⁰¹ MAGTAF JA HANDBOOK, *supra* note 99, at 3–11.

¹⁰² LESSONS LEARNED VOL 1, *supra* note 40, at 100.

commands . . . immediately pressed for clarification from Central Command (CENTCOM) because the terms likely and identifiable are not used together in the Chairman of the Joint Chiefs of Staff (CJCS) SROE.”¹⁰³ Another noted, “when lawyers can easily argue about what [LIT] means or doesn’t mean as far as engaging targets, we have failed because the [twenty-one]-year-old corporal doesn’t have the luxury of such an academic exercise.”¹⁰⁴ Not only was LIT confusing to U.S. soldiers, its lack of a clear foundation in international law or doctrine meant high potential for interoperability issues with coalition partners.¹⁰⁵

While LIT was an attempt to address individuals or groups who dress as civilians while engaging in combat, it fell short as useful counterinsurgency ROE. Rather than shaping an offensive authority to attack fighters, the drafters considered LIT to be an aggressive self-defense-based ROE that fell between self-defense and declared hostile force authority.¹⁰⁶ This attempt at a happy medium landed far from the middle; “picture along a line spectrum, with hostile act/intent self-defense at the left end and declared hostile at the right end, LIT would fall just to the right of self-defense.”¹⁰⁷

In using self-defense as its foundational authority, the LIT ROE focused on eliminating a threat rather than eliminating a fighter or group engaging in hostilities.¹⁰⁸ This difference was subtle, but significant, and appears to have been the primary source of confusion. With no forces declared hostile, U.S. forces were to use self-defense when they observed

Likely and identifiable threat caused a great deal of confusion for deployed judge advocates who had not been exposed to the term before, and who were unsure if the new term was merely another way of stating that forces had been declared hostile, or another way of restating SROE self-defense principles, or something else entirely.

Id.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (“Likely and identifiable threat appeared only in the OEF ROE not in the SROE or the subsequent OIF ROE.”); Schmitt *Targeting and IHL*, *supra* note 22, at 315 (“Afghanistan represented the first use of the LIT standard in an armed conflict.”).

¹⁰⁶ LESSONS LEARNED VOL 1, *supra* note 40, at 102 n.80.

¹⁰⁷ *Id.*

¹⁰⁸ LESSONS LEARNED VOL 1, *supra* note 40, at 102 (“Thus, LIT was neither a declaration of hostility nor a restatement of SROE self-defense principles; it was an aggressive, self-defense-based ROE measure that fell in between the two extremes.”).

a hostile act or a demonstration of hostile intent. If they were able to recognize enemy fighters, such as the Taliban, who were not at that moment conducting a hostile act or demonstrating hostile intent, they were to use the LIT ROE against the likely and identifiable threat these forces presented. In retrospect, it is clear from their search for an authority between self-defense and declared hostile force that the drafters were actually struggling to develop ROE that would account for civilians taking a direct part in hostilities.¹⁰⁹ However, because they felt limited to using just the two use of force authorities in U.S. policy (self-defense and declared hostile force) they felt compelled to draft ROE based on one or the other.¹¹⁰ In the end, they chose to use self-defense as their basis and couch LIT ROE in terms of countering a threat.¹¹¹ Their attempt at “aggressive, self-defense-based ROE measure that fell in between the two extremes” of self-defense and declared hostile force became to many the equivalent of self-defense by another name, bringing with it the limitations and constraints of self-defense.¹¹²

In the short time LIT was used, it caused considerable confusion for U.S. forces and was ultimately abandoned in Afghanistan and never introduced in Iraq.¹¹³ With LIT unworkable, there remains a need in counterinsurgency campaigns for an authority between declared hostile force and self-defense authorities. Fortunately, the solution already exists: direct participation authority.

II. The Legal Framework for a Solution: Direct Participation Authority

¹⁰⁹ Schmitt *Targeting and IHL*, *supra* note 22, at 317 (“[Likely and identifiable threat] is a genre of the direct participation in hostilities . . .”).

¹¹⁰ *Id.* at 315.

When the conflict began, the United States and its coalition partners declared no enemy forces hostile, to include the Taliban and Al Qaeda. Instead, the “enemy” had to represent a “likely and identifiable threat” before being attacked. Those not meeting this standard could only be engaged if they had committed a hostile act or demonstrated hostile intent, the self-defense rule traditionally employed to respond to actions unconnected to the hostilities.

Id.

¹¹¹ *Id.* at 315 (quoting email comments from a Central Command (CENTCOM) ROE drafter discussing the creation of LIT, “‘Self Defense Plus’ is how I describe it.”).

¹¹² LESSONS LEARNED VOL 1, *supra* note 40, at 102.

¹¹³ *Id.* at 100; Schmitt *Targeting and IHL*, *supra* note 22, at 316–17.

The LOAC provisions prohibiting attack of civilians unless, and for such time as, they directly participate in hostilities contain both the general rule and its exception.¹¹⁴ The general rule is that “civilians may not be attacked.”¹¹⁵ The exception is, “unless, and for such time as, they directly participate in hostilities.”¹¹⁶ Restated in the affirmative, civilians who directly participate in hostilities may be offensively attacked for such time as they directly participate in hostilities.

Although the rule seems clear, the proverbial devil is in the details. Despite much contention over some parts of direct participation authority, aspects of it are well accepted. There is general agreement that: (1) direct participation authority is part of the LOAC and only exists during armed conflict;¹¹⁷ (2) that it is an offensive mission accomplishment authority allowing deliberate attack;¹¹⁸ and (3) that the authority becomes available based on the individual’s choice to directly participate in hostilities, not based on the imminent threat the person presents.¹¹⁹

While there is agreement on these aspects of direct participation authority, there is significant disagreement in other areas.¹²⁰ The three areas of dispute relevant to this paper are: (1) when direct participation begins; (2) when direct participation ends; and (3) what constitutes an act of direct participation.¹²¹ There is no clean divide in the international community on these areas, however, for purposes of this paper, they will be categorized as the U.S. approach and the International Committee of the Red Cross (ICRC) approach.¹²²

¹¹⁴ AP I, *supra* note 17, art. 51(3); AP II, *supra* note 23, art. 13(3).

¹¹⁵ *Supra* note 114 and accompanying sources.

¹¹⁶ *Id.*

¹¹⁷ See ICRC IG, *supra* note 3, at 41

¹¹⁸ Schmitt *Critical Analysis*, *supra* note 79, at 37 (Those participating in hostilities “may be attacked without any defensive purpose.”); AP I, *supra* note 18, art 51(3); AP II, *supra* note 23, art 13(3).

¹¹⁹ Schmitt *Critical Analysis*, *supra* note 79, at 37 (“Instead, the notion of ‘threat’ is one of self-defense and defense of the unit, which is a different aspect of international law.”).

¹²⁰ See generally Schmitt *Critical Analysis*, *supra* note 79.

¹²¹ See generally ICRC IG, *supra* note 3; Schmitt *Critical Analysis*, *supra* note 79, at 36; Bill Boothby, “And For Such Time As”: *The Time Dimension to Direct Participation In Hostilities*, 42 N.Y.U. J. INT’L & POL. 741, 741 (2010) [hereinafter Boothby].

¹²² LAW OF WAR MANUAL, *supra* note 9, at 222–32; ICRC IG, *supra* note 3.

The chart in figure 3 is a quick reference guide to the three use of force authorities and highlights their individual characteristics.

Authorities for the Use of Force Comparison				
	Source of Law	Triggering Event	Duration	Amount of Force
Self Defense	Human Rights Law	Hostile Act or Demonstration of Hostile Intent. Threat must be imminent.	Until threat neutralized.	Minimum force necessary to eliminate threat.
Direct Participation	Law of Armed Conflict (International Humanitarian Law)	Individual directly participates in hostilities. Note: How far removed from the battlefield an act can be and still qualify as an act of direct participation is also an area of contention where the ICRC and US approach differ.	Disputed: ICRC: until participant has returned from site of the participation US: until participant opts out of direct participation.	Lethal force.
Declared Hostile Force	Law of Armed Conflict (International Humanitarian Law)	An armed force or group is declared hostile. (Individual must be identified as being a member of a hostile force before he can be targeted.)	As long as hostile force remains declared hostile. (And as long as individual can be identified as a member of the hostile force.)	Lethal Force.

Figure 3¹²³

A. Direct Participation Authority Is Recognized By International Law

Lawfully attacking civilians who directly participate in hostilities has a long history.¹²⁴ In her article *The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity*, Emily Camins makes a strong historical argument stating, “the general concept that non-combatants who engage in hostile acts may be exposed to attack . . . dates back several centuries.”¹²⁵ In support of her position, she cites Grotius: “by the law of war armed men and those who offer resistance are killed [I]t is right that in war those who have taken up arms should pay the penalty, but that the guiltless should not be injured.”¹²⁶ Camins explains that “during the late eighteenth and nineteenth centuries, the

¹²³ See generally SROE, *supra* note 8, at A-2–A-3; LAW OF WAR MANUAL, *supra* note 9, at 224–32 (discussing the three authorities).

¹²⁴ See generally, Camins, *supra* note 29.

¹²⁵ *Id.* at 855.

¹²⁶ *Id.* at 857 (citing Hugo Grotius, THE LAW OF WAR AND PEACE (1625) Book III, Chapter XI, Sec. X, reprinted in THE LAW OF WAR: A DOCUMENTARY HISTORY (Leon Friedman, ed.1972)).

practical response to non-uniformed fighters was usually ferocious” and that armed civilians were “attacked with ‘a draconian severity’ by opposing armed forces.”¹²⁷

In 1863, the U.S. military promulgated the Lieber Code, acknowledging the notion that civilians may join the fighting during armed conflict, regardless of the fact that they have no legal right to do so.¹²⁸ Article 15 of the Lieber Code states, “military necessity admits of all direct destruction of life or limb of armed enemies.”¹²⁹ Article 82 addresses direct participation, even more directly, stating,

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.¹³⁰

The idea that civilians can lose their usual protections also has strong grounding in treaty law.¹³¹ The protections of Common Article 3 to the 1949 Geneva Conventions apply to “persons taking no active part in hostilities.”¹³² This leaves the converse unspoken, but implies that the protections are not afforded to persons who *do* take an active part in hostilities.¹³³ The exception to the general protections afforded to civilians

¹²⁷ *Id.* at 860 (citing Amedee Brenet, *LA FRANCE ET L'ALLEMAGNE DEVANT LE DROIT INTERNATIONAL, PENDANT LES OPERATIONS MILITAIRES DE LA GUERRE 1870–1871* 29 (Arthur Rousseau & Henri Charles-Lavauzelle eds., 1902)).

¹²⁸ ADJUTANT GEN.'S OFFICE, U.S. WAR DEP'T, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, Art. 82, Gen. Ord. No. 100 (Apr. 24, 1863), [hereinafter Lieber Code].

¹²⁹ *Id.* art. 15.

¹³⁰ *Id.* art. 82.

¹³¹ GC III, *supra* note 18, art 3; AP I, *supra* note 18, art. 51(3); AP II, *supra* note 23, art. 13(3).

¹³² GC III, *supra* note 18, art. 3.

¹³³ *Id.*

is more explicitly stated in Additional Protocol I, Article 51(3) which states, “civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”¹³⁴ This same language is repeated in Additional Protocol II, confirming application of direct participation authority in non-international armed conflicts as well.¹³⁵

Writing that is more recent has also discussed authorities on direct participation. After extensive debate by international experts in 2009, the ICRC issued Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.¹³⁶ Although this guidance lacked consensus (and is thus caveated as “an expression solely of the ICRC’s views,”) it lays out the ICRC’s position on direct participation authority and offers some insight on how the authority can be implemented at the tactical level.¹³⁷ Most recently, the Department of Defense *Law of War Manual*, published in June 2015, recognizes direct participation authority and documents the U.S. position regarding it.¹³⁸

B. Direct Participation Authority Is an Offensive Authority

As an offensive warfighting authority, direct participation authority does not contain the same constraints as self-defense. The LOAC principles related to deliberate attack: necessity; humanity; distinction; and proportionality apply, because deliberate attack is based in the LOAC.¹³⁹ These principles are different and less restrictive than the necessity and proportionality requirements of self-defense.¹⁴⁰ Under the LOAC, necessity requires only that the attack must be against legitimate military objects.¹⁴¹ Distinction requires making efforts to ensure that non-

¹³⁴ AP I, *supra* note 18, art. 51(3).

¹³⁵ AP II, *supra* note 23, art. 13(3).

¹³⁶ *See generally* ICRC IG, *supra* note 3.

¹³⁷ *Id.* at 6; *see also* Schmitt *Critical Analysis*, *supra* note 79, at 6.

¹³⁸ *See generally* LAW OF WAR MANUAL, *supra* note 9, at 157–67, 222–32.

¹³⁹ *See* LAW OF WAR MANUAL, *supra* note 9, at 11–14.

¹⁴⁰ SROE, *supra* note 8, at A-3.

¹⁴¹ *See* Regulations Respecting the Laws and Customs of War on Land, annex to Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539, *reprinted in* U.S. DEP’T OF ARMY, PAM 27-1, TREATIES GOVERNING LAND WARFARE B-7 (1956) (“Art 23(g) It is forbidden “to destroy or seize the enemy’s

participating civilians are not subject to attack.¹⁴² Proportionality requires weighing the concrete and direct military advantage anticipated by attacking the civilian who is directly participating against the expected incidental injury or damage to non-participating civilians and their property.¹⁴³

C. Direct Participation Authority is based on a Person's Choice to Participate, not on the Threat the Person Presents

Under direct participation authority, civilians lose protection against attack when they choose to engage in hostilities.¹⁴⁴ Because direct participation in hostilities is an offensive authority, it is the person who is targeted, rather than a threat or an act.¹⁴⁵ The threat the person presents at the time is irrelevant.¹⁴⁶ This is in contrast to self-defense, where force may be used only to eliminate an imminent threat, not to eliminate a person.¹⁴⁷

For many in the U.S. military, the discussion on how direct participation is triggered will generate a debate on whether targeting under direct participation authority is conduct or status based targeting. To the extent that such categorization is helpful, direct participation is status based.¹⁴⁸ A civilian acquires the status as a direct participant once he chooses to directly participate in hostilities.¹⁴⁹ He holds the status for such time as he continues his direct participation.¹⁵⁰ While he holds the status, the protections afforded civilians are suspended and he is subject to attack

property, unless such destruction or seizure be imperatively demanded by the necessities of war."); ICRC Customary IHL, *supra* note 27, r.7.

¹⁴² *Id.* at r. 1.

¹⁴³ *Id.* at r.14

¹⁴⁴ AP I, *supra* note 18, art. 51(3).

¹⁴⁵ Schmitt *Critical Analysis*, *supra* note 79, at 37.

¹⁴⁶ *Id.*

¹⁴⁷ *See* SROE, *supra* note 8, A-3.

¹⁴⁸ The authors' view is that such categorization is unhelpful and unnecessary. However, logic dictates that if a person holds the status of combatant while he meets the criteria defining a combatant, a person would hold the status of direct participant while that person meet the criteria defining direct participation; *but see* ICRC IG, *supra* note 3, at 4 (it must be noted that the Interpretive Guidance disagrees with this position, although there was not consensus on this point by the group of experts).

¹⁴⁹ *See* LAW OF WAR MANUAL, *supra* note 9, at 230.

¹⁵⁰ *Id.*

until the status terminates and the protections resume.¹⁵¹ Though there are varying interpretations as to how long direct participant status attaches to an individual, and what events terminate it, no interpretation links the status to whether the person's conduct constitutes a threat;¹⁵² that is required only under self-defense.

D. What Constitutes an Act of Direct Participation?

The phrases “active part in hostilities” and “direct part in hostilities,”¹⁵³ though used extensively in the LOAC, are undefined in treaty law, leading to much debate on which acts constitute direct participation.¹⁵⁴ At a minimum, direct participation includes acts of actual fighting traditionally performed by combatants, such as firing weapons, emplacing or detonating explosives, and spotting for artillery fire.¹⁵⁵ The more closely an act resembles an act that a combatant would normally perform in combat, the more likely it is to qualify as direct participation.¹⁵⁶

¹⁵¹ *Id.*

¹⁵² While the Interpretive Guidance contains the phrase, “It [IHL] prevents attacks on civilians who do not, at the time, represent a military threat” the use of the term military threat does not carry the same meaning as a threat under individual self-defense; see ICRC IG, *supra* note 3, at 70; Nils Melzer, *Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report* 66–67 (2005), <https://www.icrc.org/eng/assets/files/other/2005-09-report-dph-2005-icrc.pdf> [hereinafter *Third Expert Meeting*]; Schmitt *Critical Analysis*, *supra* note 78, at 37.

¹⁵³ See Schmitt *Critical Analysis*, *supra* note 78, at 24 (“It is well accepted in international law that the terms “active” and “direct” are synonymous . . .”).

¹⁵⁴ See *id.* at 24–25 (“Unfortunately, the phrase ‘direct part in hostilities’ is undefined in IHL.”); ICRC IG, *supra* note 3, at 43 (“Treaty IHL does not define direct participation in hostilities, nor does a clear interpretation of the concept emerge from State practice or international jurisprudence.”).

¹⁵⁵ See *Third Expert Meeting*, *supra* note 151, at 17–36; Nils Melzer, *Fourth Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report* 39–52. (2006) <https://www.icrc.org/eng/assets/files/other/2006-03-report-dph-2006-icrc.pdf> [hereinafter *Fourth Expert Meeting*]; Nils Melzer, *Fifth Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report* 53–57 (2008), <https://www.icrc.org/eng/assets/files/other/2008-05-report-dph-2008-icrc.pdf> [hereinafter *Fifth Expert Meeting*]; ICRC IG, *supra* note 3, at 48; LAW OF WAR MANUAL, *supra* note 9, at 227.

¹⁵⁶ See *Third Expert Meeting*, *supra* note 151, at 17–36; *Fourth Expert Meeting*, *supra* note 154, 39–52; *Fifth Expert Meeting*, *supra* note 154, at 53–57, ICRC IG, *supra* note 3, at 48; LAW OF WAR MANUAL, *supra* note 9, at 227.

With no international law definition, the ICRC Commentary to the Additional Protocols offers some help defining direct participation.¹⁵⁷ It states, “direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”¹⁵⁸ The U.S. approach documented in the *Law of War Manual* is consistent with using this definition as a baseline, stating, “at a minimum, taking a direct part in hostilities includes actions that are, by their nature and purpose, intended to cause actual harm to the enemy.”¹⁵⁹ The U.S. approach then expands beyond this minimum, explaining that engaging in actual combat is not the only action that is sufficient to meet this threshold.¹⁶⁰ Taking direct part in hostilities “also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations.”¹⁶¹ For example, under the U.S. approach, a person in a village away from actual fighting who assembles IEDs and trains people to emplace them may be considered to be taking direct part in hostilities.¹⁶²

Despite a lack of agreement on what acts may qualify as direct participation, it is widely accepted that determination of what equates to direct participation is made on a case-by-case basis, considering all of the circumstances known at the time.¹⁶³ How this analysis is made and what

¹⁵⁷ ICRC Commentary on the Additional Protocols as of 8 June 1977 to the Geneva Conventions of 12 August 1948 619 [hereinafter ICRC AP Commentary].

¹⁵⁸ *Id.*

¹⁵⁹ LAW OF WAR MANUAL, *supra* note 9, at 224.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 224–25.

¹⁶² See Kenneth Watkins, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation In Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 680–82 (2010) [hereinafter Watkins]; LAW OF WAR MANUAL, *supra* note 9, at 225.

¹⁶³ See U.S. DEP’T OF ARMY, NAVAL WARFARE PUBLICATION (NWP) 1-14M/U.S. MARINE CORPS WARFIGHTING PUBLICATION (MCWP) 5-12.1/U.S. COAST GUARD COMMANDANT’S PUBLICATION P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 8-1 (July 2007).

Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person’s behavior, location and attire, and other information available at the time.

factors must be considered are again subject to varying approaches. The *Law of War Manual* lists several factors that may be relevant when determining if an act qualifies as an act of direct participation.¹⁶⁴ They are:

- the degree to which the act causes harm to the opposing party’s person or objects, such as
- whether the act is the proximate or ‘but for’ cause of death, injury, or damage to persons or objects belonging to the opposing party; or
- the degree to which the act is likely to affect adversely the military operations or military capacity of the opposing party;
- the degree to which the act is connected to the hostilities, such as
- the degree to which the act is temporally or geographically near the fighting; or
- the degree to which the act is connected to military operations;
- the specific purpose underlying the act, such as
- whether the activity is intended to advance the war aims of one party to the conflict to the detriment of the opposing party;
- the military significance of the activity to the party’s war effort, such as
- the degree to which the act contributes to a party’s military actions against the opposing party;
- whether the act is of comparable or greater value to a party’s war effort than acts that are commonly regarded as taking a direct part in hostilities;

Id. Third Expert Meeting, *supra* note 151, at 35 (“Since, currently, the qualification of a particular act as direct participation in hostilities often depends on the particular circumstances and the technology or weapons system employed, it is unlikely that an abstract definition of direct participation in hostilities applicable to every situation can be found.”); Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-international Armed Conflict: Making Progress Through Practice*, 88 U.S. NAVAL WAR C. INT’L L. STUD. 181, 189 (2012) (“Any determination that a civilian is taking part in hostilities (and thus loses immunity from being made the object of attack) will be highly situational.”).

¹⁶⁴ LAW OF WAR MANUAL, *supra* note 9, at 225–27.

—whether the act poses a significant threat to the opposing party;
—the degree to which the activity is viewed inherently or traditionally as a military one, such as,
—whether the act is traditionally performed by military forces in conducting military operations against the enemy (including combat, combat support, and combat service support functions); or
—whether the activity involves making decisions on the conduct of hostilities, such as determining the use or application of combat power.¹⁶⁵

The ICRC Interpretive Guidance agrees that the determination of participation in hostilities must analyze the circumstances of a particular situation, but takes a different approach in doing so.¹⁶⁶ The Interpretive Guidance states that direct participation has three basic elements: a threshold of harm, direct causation, and a belligerent nexus.¹⁶⁷ In more specific terms,

1. [T]he act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict, or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. [T]here must be a direct causal link between the act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. [T]he act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).¹⁶⁸

Either approach will reach the determination that a civilian actively engaged in ongoing fighting is a direct participant.¹⁶⁹ Where the outcomes

¹⁶⁵ See *id.* at 226–27.

¹⁶⁶ ICRC IG, *supra* note 3, at 41–42.

¹⁶⁷ *Id.* at 46.

¹⁶⁸ *Id.*

¹⁶⁹ See *id.* at 46–54; LAW OF WAR MANUAL, *supra* note 9, at 225–39.

diverge is when the acts of the civilian are not part of the immediate actual fighting, but instead perform combat support functions that may be temporally or geographically remote from actual fighting.¹⁷⁰ A detailed analysis of the two approaches is necessary when assessing possible acts of direct participation that are remote from actual fighting. However, this is generally unnecessary when confronting acts of direct participation at the tactical level. At the tactical level, most often the act observed will be one that is close enough in time, distance, and function that it resembles an act a combatant would traditionally perform. In situations such as emplacing IEDs, shooting at forces belonging to a party to the conflict, maneuvering with heavy weapons, spotting for command detonated IEDs, and relaying tactical locations of forces, either approach would conclude that a civilian committing these acts is directly participating in the hostilities.

E. When Does Direct Participation Begin?

Under the ICRC approach, a person manifests his choice to engage in hostilities when he performs “measures preparatory to the execution of a specific act of direct participation.”¹⁷¹ In describing what preparatory measures are sufficient to trigger the loss of protections for a specific act of direct participation, the ICRC guidance offers the following: “[M]easures *aiming to carry out a specific hostile act* qualify as direct participation in hostilities, whereas preparatory measures *aiming to establish the general capacity to carry out unspecified hostile acts* do not.”¹⁷²

Through “preparatory measures” is a sufficient starting point for most determinations of direct participation at the tactical level, there is an argument that the ICRC approach is too restrictive and that an act of participation can begin much earlier.¹⁷³ This position is based on the duration of the chain of causation, which may begin well before the preparatory measures immediately preceding an act of direct participation.¹⁷⁴ The argument to start the period of participation earlier

¹⁷⁰ See ICRC IG, *supra* note 3, at 46–64; LAW OF WAR MANUAL, *supra* note 9, at 225–29.

¹⁷¹ ICRC IG, *supra* note 3, at 65.

¹⁷² *Id.* at 66.

¹⁷³ Schmitt *Critical Analysis*, *supra* note 78, at 36.

¹⁷⁴ *Id.* at 37, n.104.

may be beneficial for using direct participation authority in targeting at the strategic level. It is largely insignificant, however, in evaluating when participation starts for tactical level targeting, where typically the person is recognized as a direct participant by his commission of acts that fall well within the “measures preparatory” standard of the Interpretive Guidance.¹⁷⁵

F. When Does Direct Participation End?

The question of when a period of direct participation ends is significantly more problematic for implementation at the tactical level.¹⁷⁶ Under the ICRC approach, once a person commits measures preparatory to a specific act of direct participation, he temporarily loses the protected status afforded civilians, and may be attacked.¹⁷⁷ The loss of protection lasts from the initiation of the preparatory measures through deployment to the site of the act, during the commission of the specific act, and continues through return from the site.¹⁷⁸ Once the person has completed his return from the site, he regains his protected status as a civilian and may not be attacked.¹⁷⁹ The ICRC considers the return to end once the person has physically separated from the operation and resumed activities distinct from that operation.¹⁸⁰ This approach has been criticized for creating a “revolving door” for insurgents where the person can be a protected farmer by day and a targetable fighter by night.¹⁸¹

In response to the revolving door criticism, the ICRC Interpretive Guidance takes the position that non-isolated acts of direct participation may be evidence of membership in an organized armed group belonging to a party to the conflict.¹⁸² It states, “where individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities

¹⁷⁵ See ICRC IG, *supra* note 3, at 65–67.

¹⁷⁶ *Id.* at 37; Boothby, *supra* note 120, at 759–61; Watkins, *supra* note 161, at 660; Third Expert Meeting, *supra* note 151, at 60–66.

¹⁷⁷ See ICRC IG, *supra* note 3, at 65–66.

¹⁷⁸ *Id.* at 70–73.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 67.

¹⁸¹ *E.g., id.* at 72; LAW OF WAR MANUAL, *supra* note 9, at 230–32; Schmitt *Critical Analysis*, *supra* note 78, at 33; Quinta Jurecic, *Throwback Thursday: The Lieber Code*, LAWFARE BLOG (July 23, 2015, 4:16 PM), <https://www.lawfareblog.com/throwback-thursday-lieber-code>.

¹⁸² ICRC IG, *supra* note 3, at 72.

and become members of an organized armed group belonging to a party to the conflict, international humanitarian law (IHL) deprives them of protection against direct attack for as long as they remain members of that group.”¹⁸³ Under the Interpretive Guidance, individual membership in an organized armed group hinges on whether a person assumes a continuous combat function for the group.¹⁸⁴ “Membership in an organized armed group begins in the moment when a civilian starts to *de facto* assume a continuous combat function for the group, and lasts until he or she ceases to assume such function.”¹⁸⁵

The disadvantage to this approach is that it requires linking the individual to a particular armed group belonging to a party to the conflict in the same way linking to a particular group is required under declared hostile force authority.¹⁸⁶ As previously discussed, this may be difficult to accomplish. However, once determined to be part of a group, under the ICRC approach the person loses immunity from attack for as long as he remains a member of that group as evidenced by his continued performance of a continuous combat function.¹⁸⁷ Whether a person has disengaged from their continuous combat function must be assessed based on the prevailing circumstances.¹⁸⁸ According to the ICRC, “Disengagement from an organized armed group need not be openly declared; it can also be expressed through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an exclusively non-combat function (e.g., political or administrative activities).”¹⁸⁹

The United States takes a different approach. Under the U.S. approach, once a person opts to directly participate in hostilities, he is targetable until he opts out of direct participation.¹⁹⁰ The person can opt

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 33.

¹⁸⁵ *Id.* at 72.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 73.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Schmitt *Critical Analysis*, *supra* note 78, at 38; LAW OF WAR MANUAL, *supra* note 9, at 230–32; *see also* Schmitt *Targeting and IHL*, *supra* note 22, at 318 (discussing an alternate position raised at the ICRC expert meetings on the notion of direct participation, stating, “They proposed an alternative which locks the door after exit: once an individual has opted into the hostilities, he or she remains targetable until unambiguously opting out.”).

out in two ways: (1) he can affirmatively declare his intention to no longer directly participate in hostilities, or (2) sufficient time passes without a specific act of direct participation thus evidencing his intent to no longer participate in hostilities.¹⁹¹ “Sufficient time” may be very short or lengthy depending on the extent of the individual’s participation.¹⁹² A person who commits a single isolated act of participation would regain his protected status almost immediately upon redeployment, while a person who has habitually committed acts of direct participation would require more time to evidence his abandonment of his direct participant status.¹⁹³ Affirmatively opting-out may be difficult under this standard, but because the person chose to opt-in to his targetable status by directly participating in hostilities, it is reasonable that the burden should be on him to demonstrate that he has opted-out.¹⁹⁴

While the U.S. approach may appear to create a situation where a person who opts to become a direct participant indefinitely holds the status, in practice this is not the case. In recent years, some U.S. forces in Afghanistan operating under the North Atlantic Treaty Organization’s Rules of Engagement (NATO ROE) have targeted individuals taking a direct part in hostilities.¹⁹⁵ This ROE was based on NATO ROE MC 362/1, rules 421 and 423, which authorize attack against individuals or groups who demonstrated hostile intent (not constituting imminent attack)¹⁹⁶ and rules 422 and 424 authorizing attack against individuals and groups who commit or directly contribute to a hostile act (not constituting an actual attack).¹⁹⁷ Importantly, these ROE are explicitly offensive attack ROE, not based on self-defense.¹⁹⁸

The practical application of this ROE was twofold. When U.S. forces (operating as part of the NATO command) witnessed an act of direct participation such as a person emplacing an IED, they were authorized to

¹⁹¹ Schmitt *Targeting and IHL*, *supra* note 22, at 318.

¹⁹² LAW OF WAR MANUAL, *supra* note 9, at 230, n.245.

¹⁹³ *Id.*

¹⁹⁴ Schmitt *Targeting and IHL*, *supra* note 22, at 318 (“Although it may be difficult to determine whether a potential target has opted out, since the individual did not enjoy any privilege to engage in hostilities in the first place, it is reasonable that he or she bear the risk that the other side is unaware of withdrawal.”).

¹⁹⁵ Bagwell Afghanistan experience, *supra* note 72.

¹⁹⁶ MC 362/1, *supra* note 71, at A-19.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

attack the person.¹⁹⁹ The NATO ROE does not specifically cite direct participation as its authority, nor does it provide guidance on when the authority to attack would terminate.²⁰⁰ However, applying it as direct participation authority permitted the person to be attacked, at a minimum, until the person completed his redeployment from the site of his specific act of direct participation.²⁰¹

When actually applying the NATO ROE in combat, determining when the authority terminated did not prove to be an issue.²⁰² In the overwhelming majority of cases where ROE were employed, the identity of the person being attacked was not known (he was only recognized as an unknown person emplacing an IED), therefore as soon as he could no longer be visually identified as the person who committed the act, he could no longer be attacked.²⁰³ In this situation, it was not a unique limitation of direct participation authority that terminated authority to continue the attack.²⁰⁴ Instead, once the person blended back into the civilian population, the LOAC principle of distinction prevented him from being targeted as he could no longer be distinguished from innocent civilians.²⁰⁵ As a result, in this tactical level situation, the difference between the ICRC and U.S. approaches on when direct participation ends had no practical effect.

The second way U.S. forces, acting under NATO ROE, used direct participation authority—again without directly citing it—was by gathering intelligence over time that linked a particular individual to continuous acts of direct participation.²⁰⁶ In these situations, the nature of the acts committed and the amount of intelligence linking the individual to the acts enabled U.S. forces to determine whether the individual was directly participating in hostilities.²⁰⁷ If determined to be a direct participant, the person was placed on a list of verified targets.²⁰⁸ Attack was authorized

¹⁹⁹ Bagwell Afghanistan experience, *supra* note 72.

²⁰⁰ MC 362/1, *supra* note 70, at A-19.

²⁰¹ ICRC IG, *supra* note 3, at 67; Schmitt *Critical Analysis*, *supra* note 78, at 35; Bagwell Afghanistan experience, *supra* note 72.

²⁰² Bagwell Afghanistan experience, *supra* note 72.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* The term direct participant used here is for clarity of reading, it must be noted that it was not used at the time by U.S. forces.

against the person for such time as he remained on the list.²⁰⁹ To account for the fact that a person can indicate he is no longer a direct participant by not committing any acts of direct participation over a period of time, the person's inclusion on the list was not permanent.²¹⁰ United States forces were required to refresh his status with new intelligence evidencing the person's continued direct participation within a given timeframe.²¹¹ Otherwise, the person was removed from the list.²¹²

Under the U.S. approach, a pattern of continuous acts of direct participation does not necessarily equate to being a member of an organized armed group. "The U.S. approach has been to treat the status of belonging to a hostile non-State armed group as a separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities."²¹³ In other words, individuals who can be linked to membership in a non-State armed group that has been declared hostile are considered targetable under declared hostile force authority. Individuals who take part in hostilities, and are not linked to membership in a particular declared hostile armed group, can be attacked under direct participation authority for as long as they hold the status of direct participant.²¹⁴ This is true even if they continuously participate in hostilities.

III. Direct Participation and Self-Defense Authorities

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ LAW OF WAR MANUAL, *supra* note 9, at 218, 224.

²¹⁴ *Id.* at 230.

In most situations, a specific act of direct participation in hostilities will also qualify as a hostile act, triggering the right of self-defense.²¹⁵ In fact, during much of the current Afghanistan and Iraq conflicts, U.S. forces have been told to use self-defense when encountering situations of direct participation.²¹⁶ As previously discussed in this paper, doing so comes at a cost. If the requirements of self-defense are followed, identified insurgents may be able to escape. If the requirements are ignored, respect for the law and the ROE are diminished. This situation can be avoided by applying direct participation authority to direct participation situations. If the acts of an individual who is not identifiable as a member of a declared hostile group qualify as direct participation, direct participation authority provides greater flexibility than self-defense to engage the individual.²¹⁷ The chart in figure 4 below illustrates the differences between self-defense and direct participation authorities.

Figure 4²¹⁸

The gray bars on the chart illustrate the duration of the various authorities. If the actions of a person qualify as an act of direct participation, the authority to use force against that person begins much

²¹⁵ *Id.* at 229.

²¹⁶ Bagwell Afghanistan experience, *supra* note 72.

²¹⁷ See figure 2, *supra*, for chart explaining the difference between self-defense and direct participation authority.

²¹⁸ The chart at figure 4 demonstrates the duration of the three use of force authorities. See generally SROE, *supra* note 8, at A-3; LAW OF WAR MANUAL, *supra* note 9, at 230-32; ICRC IG, *supra* note 3, at 70-73.

earlier (at measures preparatory) than under self-defense.²¹⁹ This is true even when applying the broader definition of hostile intent in U.S. self-defense.²²⁰ It is important to note that in situations where direct participation authority is appropriate, using it rather than self-defense eliminates the alignment problem created by the United States' and partner countries' differing definitions of imminence. With direct participation authority, under either the U.S. or ICRC approach, the person becomes targetable once he undertakes measures preparatory to an act of participation.²²¹

More importantly, direct participation authority provides clear authority to attack the person after he has completed the hostile act.²²² Both the ICRC and the U.S. approaches allow the person to be attacked while returning from the site of the act.²²³ Under the U.S. approach, this authority could extend even further.²²⁴ This represents a significant departure from self-defense where the immediate use of lethal force is generally not permitted, and the authority to use force ends as soon as the hostile act is complete.²²⁵

Returning to the IED scenario at the beginning of the paper, under self-defense, U.S. soldiers would not be permitted to use force against the IED emplacer until his hostile intent is determined.²²⁶ Hostile intent will likely not be apparent until the man starts to prepare the hole in the road in which he will bury the IED. For coalition soldiers, the determination of hostile intent will likely be later. For countries with a definition of imminence similar to NATO's, hostile intent may only become apparent when the man is actually placing the IED in the hole.²²⁷ Under either the U.S. or NATO versions of self-defense, if the man successfully completes his work and begins to depart the scene, no force may be used against him, as his act is complete and he no longer presents an imminent threat.²²⁸ Even when force is permitted, only the minimum force necessary is allowed and

²¹⁹ LAW OF WAR MANUAL, *supra* note 9, at 230–32; ICRC IG, *supra* note 3, at 70–73.

²²⁰ SROE, *supra* note 8, at A-3.

²²¹ See LAW OF WAR MANUAL, *supra* note 9, at 224; ICRC IG, *supra* note 3, at 65–67.

²²² See LAW OF WAR MANUAL, *supra* note 9, at 230–32; ICRC IG, *supra* note 3, at 67–68.

²²³ See *supra* note 222 and accompanying sources.

²²⁴ LAW OF WAR MANUAL, *supra* note 9, at 230–32.

²²⁵ See SROE, *supra* note 8, at A-3–A-4.

²²⁶ *Id.*

²²⁷ MC 362/1, *supra* note 71, at 4.

²²⁸ See *id.*; SROE, *supra* note 8, at A-3–A-4.

he should first be given the opportunity to cease his actions and withdraw.²²⁹

The outcome is different under direct participation authority. Once the man completes a preparatory measure, for example loading the IED in his bag and getting on his motorcycle, he is a direct participant and is subject to attack.²³⁰ Use of minimum force is not required, as lethal force is immediately authorized.²³¹ The person remains targetable throughout his deployment to the site, while prepping the site, while actually emplacing the IED, and most significantly, throughout his return from the site.²³² Being targetable after the conclusion of the hostile act is a significant difference from self-defense and one of the main reasons direct participation is such a useful authority in counterinsurgency.²³³

How long the person remains subject to attack is different under the U.S. and ICRC approaches, but in practice the difference will often be inconsequential. In the IED-emplacer scenario, once he redeploys back into the anonymity of the civilian population he will not be targetable.²³⁴ Under the ICRC approach, even if he could be identified later, he would not be subject to attack without further evidence of his membership in an organized armed group.²³⁵ Under the U.S. approach, the outcome will likely mirror that of the ICRC approach, as there is no evidence that this particular individual's act is anything other than an isolated instance.²³⁶ If, however, there is evidence that this particular individual is engaging in a pattern of direct participation in hostilities, he could be subject to later attack, assuming he does not affirmatively opt out of direct participation beforehand.²³⁷

²²⁹ MC 362/1, *supra* note 71, at 4; SROE, *supra* note 8, at A-3-A-4.

²³⁰ See LAW OF WAR MANUAL, *supra* note 9, at 224; ICRC IG, *supra* note 3, at 65–67.

²³¹ See AP I, *supra* note 17, art 51(3); AP II, *supra* note 23, art 13(3).

²³² See ICRC IG, *supra* note 3, at 65; LAW OF WAR MANUAL, *supra* note 9, at 224, 230–32.

²³³ *Supra* note 232 and accompanying sources.

²³⁴ *Id.*

²³⁵ See ICRC IG, *supra* note 3, at 71–73.

²³⁶ See LAW OF WAR MANUAL, *supra* note 9, at 230–32.

²³⁷ *Id.*

IV. Implementing Direct Participation Authority

With direct participation authority both legally sound and operationally necessary, the next logical step is to incorporate it into U.S. policy and training. This should be accomplished by including direct participation authority into the unclassified annex to the SROE,²³⁸ and by incorporating it into training at all levels.

A. Adding Direct Participation to the Standing Rules of Engagement

It is clear from the *Law of War Manual* that the United States already recognizes direct participation as a valid authority.²³⁹ What is currently missing in U.S. policy is inclusion of this authority in the SROE and authorization of its use at the tactical level. The unclassified annex to the SROE is a conflict-generic document that provides guidance on the United States position on use of force in the event of a conflict.²⁴⁰ It serves to document U.S. self-defense policy, provides a starting point for conflict-specific ROE, provides an unclassified summary of the United States' use of force policy on which soldiers can train, and informs coalition partners of certain aspects of U.S. ROE policy to enhance interoperability.²⁴¹ If the U.S. is going to implement direct participation authority for use at the tactical level, it should be added to the unclassified portion of the SROE. To accomplish this, the following language could be inserted into the unclassified enclosure to the SROE:

When approved by the appropriate authority, attack is authorized against individuals or groups that take a direct part in hostilities against U.S. forces or other designated persons or property.

Individuals or groups take a direct part in hostilities when they commit, or take preparatory measures to commit, a belligerent act. A belligerent act is one specifically designed to directly cause an adverse effect to the military operations or capacity of U.S. forces or other designated persons or property.

²³⁸ See SROE, *supra* note 8, encl. A.

²³⁹ LAW OF WAR MANUAL, *supra* note 9, at 222–32.

²⁴⁰ SROE, *supra* note 8, encl. A.

²⁴¹ *Id.*

The authority to use force against individuals or groups directly participating in hostilities begins when the individuals or groups take preparatory measures to commit the belligerent act and, at a minimum, extends throughout their deployment to, and return from, the location of the act's execution.

The intent of this proposed ROE is to provide direct participation authority to the soldier and the tactical-level leader. Using this wording, the earliest termination of the authority to target a direct participant is upon the individual's return from the act of direct participation. This is consistent with the ICRC approach, however, it does not represent agreement with the ICRC approach.²⁴² Instead, it offers it as a baseline minimum and recognizes that at the tactical level, once the person redeploys from the scene of the act, he will most often again become lost in the anonymity of the civilian population, and thus become untargetable.²⁴³ By using the phrase "at a minimum," the ROE recognizes that in some situations, such as those where direct participation is tracked through intelligence gathering, the authority to attack may extend further.²⁴⁴ It is important to note that most junior soldiers will never apply direct participation authority beyond the tactical level, because they will be targeting individuals based only on their immediate, observable acts of direct participation, not on intelligence. When soldiers go on missions to capture or kill a person whose direct participation was determined by intelligence, they will likely merely be told that the person is legally targetable under the ROE. The determination that the person is legally targetable under the ROE will have been made during mission planning; individual soldiers will not be required to make a personal determination regarding the authority to target.

This does not mean that the United States does not need an additional ROE provision to address individuals who exhibit a pattern of direct participation. This updated ROE should specifically address situations where intelligence indicates that an individual is committing a series of incidents of direct participation. In such cases, the ROE should allow for

²⁴² See ICRC IG, *supra* note 3, at 67–68.

²⁴³ See *id.*; LAW OF WAR MANUAL, *supra* note 9, at 230–32.

²⁴⁴ See generally LAW OF WAR MANUAL, *supra* note 9, at 230–32; Watkins, *supra* note 161, at 692.

the individual to be placed on a list of direct participants who may be attacked for an extended period.

In many ways, this intelligence-based approach to direct participation is the functional equivalent of the person being a member of a declared hostile force. The difference is that unlike declared hostile force authority, there is no requirement to link the individual to a particular armed group.²⁴⁵ Inclusion on the target list is contingent upon intelligence evidencing the individual's direct participation, not the collective acts of a particular group.²⁴⁶ Additionally, there should be a time requirement whereby new intelligence indicating continued, direct participation must be collected or the person must be removed from the list. This time requirement will account for the requirement under the U.S. approach that a person's targetable status as a direct participant ends once sufficient time has passed with no incidents of direct participation, unless they have already affirmatively opted out.²⁴⁷ Because the enemy may be able to use the knowledge of a specific time limit to his advantage, this ROE is better suited for the classified portion of the SROE.

B. Education and Training

Once the direct participation authority is incorporated into the SROE, education and training must follow. One of the primary criticisms of the LIT ROE was the difficulty and inefficiency of introducing a new ROE concept during the course of an ongoing conflict.²⁴⁸ Following the Army axiom of "we fight like we train," if we do not train the use of direct participation authority in peacetime, we will have difficulty successfully implementing it in combat.

Before training soldiers can begin, we must educate commanders and their legal advisors. For years now, commanders and legal advisors alike have essentially utilized direct participation authority in Afghanistan and

²⁴⁵ Compare OPLAW HANDBOOK, *supra* note 2, at 83 ("Once a force or individual is identified as a DHF [declared hostile force], the force or individual may be engaged . . .") with LAW OF WAR MANUAL, *supra* note 9, at 224 ("The U.S. approach as generally been to refrain from classifying those belonging to non-state groups as 'civilians' to whom this rule [direct participation authority] would apply.").

²⁴⁶ See LAW OF WAR MANUAL, *supra* note 9, at 224.

²⁴⁷ *Id.* at 230–232; Schmitt *Critical Analysis*, *supra* note 79, at 38.

²⁴⁸ See LESSONS LEARNED VOL I, *supra* note 40, at 100–03.

Iraq, but called it self-defense.²⁴⁹ This has resulted in many commanders and legal advisors failing to understand the difference between the two authorities. In Regional Command-South, where the NATO ROE allowed commanders to openly use direct participation authority, one U.S. brigade combat team commander was asked to describe the change in operations after the NATO ROE was implemented.²⁵⁰ His response summed up the issue succinctly, “this doesn’t change what we are doing; it’s just that now we can be honest about it.”²⁵¹

While commanders own the ROE, legal advisors are most often its keepers and trainers.²⁵² Legal advisors must thoroughly understand the benefits and limitations of the three use of force authorities and know when it is appropriate to use each. When training soldiers, they must be careful not to mix self-defense terminology with direct participation terminology. It may be convenient to describe “measures preparatory to a specific act of direct participation” as “hostile intent,” but they are not the same.²⁵³ Likewise, while they may look similar on the ground, a “hostile act” under self-defense is not the same as a “specific act” of direct participation in hostilities.²⁵⁴ Mixing the terminology will only blur the lines between the authorities and add to soldiers’ confusion. Instructors will need to use care when discussing the differences between self-defense and direct participation authority and use example-based training to reinforce the differences.

Educating commanders and legal advisors is important, but even more critical is training soldiers. Soldiers must be trained to recognize an act of participation in hostilities, and to distinguish it from an imminent threat meriting a response in self-defense. Rules of Engagement classes that highlight the three authorities followed by hands-on situational training is

²⁴⁹ Bagwell Afghanistan Experience, *supra* note 72.

²⁵⁰ *Id.*

²⁵¹ Personal conversation with author (Bagwell), February 2013, Kandahar Airfield, Afghanistan.

²⁵² U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO OPERATIONS 7-1 (1 Mar. 2013).

²⁵³ Compare SROE, *supra* note 8, at A-3 (“Hostile Intent. The threat of imminent use of force . . .”) with ICRC IG, *supra* note 3, at 65–66 (“Preparatory measures include acts of a military nature and so closely linked to the subsequent execution of a specific act of direct participation that they constitute an integral part of that act.”).

²⁵⁴ Compare SROE, *supra* note 8, at A-3 (“Hostile Act. An attack or other use of force . . .”) with ICRC IG, *supra* note 3, at 46 (“A specific act must meet three criteria; threshold of harm, direct causation, and belligerent nexus.”).

vital to ensuring soldiers are equipped to correctly use these authorities on the battlefield. To be effective, however, training must be accomplished before deploying to combat. Waiting until the soldier is in the conflict is too late. Incorporating direct participation authority in the SROE will enable peacetime training on all three use of force authorities, and will fully equip soldiers to implement the correct authority regardless of the type of conflict they face.

Some commanders and legal advisors may be concerned that empowering the average soldier with direct participation authority will result in higher casualties of innocent civilians due to misapplication. Recent history proves this concern is misplaced.²⁵⁵ Not only can U.S. soldiers correctly apply direct participation authority at the tactical level, a review of the actions of U.S. forces in Afghanistan and Iraq demonstrates they have been doing so since at least 2005.²⁵⁶ Perhaps they did not recognize the legal authority behind what they were doing as direct participation authority, but their instincts told them not to follow the restrictions of self-defense when they identified someone who was clearly an insurgent.²⁵⁷ As early as 2005, soldiers were applying tools such as Threat Assessment Escalation of Force to sort innocent civilians from non-uniformed insurgents.²⁵⁸ By 2007, commanders and their legal advisors had adjusted ROE cards, moving away from limiting soldiers to “defending” against hostile acts and demonstrations of hostile intent to allowing soldiers to “engage” (i.e. attack) individuals who committed hostile acts or demonstrated hostile intent.²⁵⁹ Authorized to engage the enemy, U.S. soldiers proved more than capable of knowing against whom to use minimum force under self-defense and whom to shoot immediately as an insurgent.²⁶⁰ Additionally, in Regional Command-South in Afghanistan, where direct participation authority was openly implemented at the tactical level, incidents of innocent civilians being killed actually decreased.²⁶¹

²⁵⁵ Bagwell Afghanistan experience, *supra* note 72; Bagwell TAP, *supra* note 85, at 7.

²⁵⁶ Bagwell Afghanistan experience, *supra* note 72; Bagwell TAP, *supra* note 85, at 7; MNC-I ROE card, *supra* note 92.

²⁵⁷ Personal conversation between a U.S. brigade commander and author (Bagwell), February 2013, Kandahar Airfield, Afghanistan.

²⁵⁸ Bagwell TAP, *supra* note 86, at 7.

²⁵⁹ MNC-I ROE card, *supra* note 92.

²⁶⁰ See Bagwell TAP, *supra* note 86, at 13–15 (discussing soldiers using appropriate force).

²⁶¹ Bagwell Afghanistan experience, *supra* note 72. While many factors may have contributed to this outcome, incidents of civilian deaths during the Regional Command-South (RC-S) rotation from 2012–2013 drop significantly from the previous 2011–2012 rotation that did not allow the use of direct participation authority. *Id.*

Once properly trained on self-defense, direct participation, and declared hostile force authorities, soldiers will understand how these authorities nest within one another and will be able to apply them correctly. Soldiers will know that if they encounter a civilian on the battlefield who is not committing a hostile act or demonstrating hostile intent, is not committing an act of direct participation, or is not a person whom they identify as a member of a declared hostile group, then the person is an innocent civilian who should not be attacked. If soldiers encounter a civilian who is committing a hostile act or demonstrating hostile intent rising to the level of an imminent threat, but the nature of the hostile act or hostile intent does not amount to the belligerent acts of a fighter, then they are limited to acting in self-defense, with the minimum force necessary to neutralize the threat.²⁶² If, however, soldiers encounter a civilian who is committing the belligerent acts of a fighter, the soldiers will know that this person is directly participating in hostilities and they are authorized to attack him for such time as he is a direct participant.²⁶³ Finally, if soldiers encounter either a person dressed as a civilian who they recognize to be a member of a declared hostile group, or a person wearing the uniform of enemy forces, they will know that under declared hostile force authority they have identified the enemy and may attack him.²⁶⁴

Because the nuances of direct participation authority can be easily debated in academic settings with hard-to-reconcile examples of when the authority begins, when it ends, and what remote acts can qualify, it is easy to think that junior soldiers will not be able to understand the authority or correctly apply it. The direct-participation situations faced by soldiers at the tactical level, however, tend not to be nuanced. They are usually obvious, unambiguous examples of direct participation such as a suicide-bomber approaching a checkpoint, a person maneuvering on a forward operating base with a rocket-launcher, or a person emplacing or detonating an IED.²⁶⁵ At the tactical level, the difficulty is not so much identification of the act as one of direct participation, but rather in forcing the individual to reveal himself as a direct participant while there is sufficient time and standoff distance to protect both soldiers and innocent civilians. When fighters deliberately camouflage themselves as innocent civilians, soldiers

²⁶² SROE, *supra* note 8, at A-3.

²⁶³ See LAW OF WAR MANUAL, *supra* note 9, at 224–32; ICRC IG, *supra* note 3.

²⁶⁴ SROE, *supra* note 8, at A-3; OPLAW HANDBOOK, *supra* note 2, at 83.

²⁶⁵ Bagwell Afghanistan experience, *supra* note 72.

should use techniques such as the Threat Assessment Process to sort innocent civilians from individuals warranting the use of force under self-defense or direct participation.²⁶⁶ In situations where the actions of a person in civilian clothing are ambiguous, soldiers must be trained to err on the side of determining him to be an innocent civilian, and not attack him.

V. Conclusion

Currently, in situations where direct participation authority is the more suitable authority, U.S. forces assert that they are acting in self-defense. This creates confusion and frustration with the international community as well as among U.S. commanders and soldiers.²⁶⁷ International partners are frustrated by having to adjust to the United States' strained and overreaching version of self-defense.²⁶⁸ United States commanders are frustrated by having to send soldiers out to fight the enemy with only the authority of self-defense.²⁶⁹ Soldiers, and their family members, are justly concerned that soldiers are being sent on offensive missions allowed to act only in self-defense.²⁷⁰ Complicating matters further, many commanders and their legal advisors are no longer clear exactly what self-defense really means and fail to fully understand what is required before it may be used.²⁷¹

Embracing direct participation authority will greatly reduce this confusion and frustration. Once direct participation authority is implemented, the United States will no longer need to rely on a strained and overreaching definition of imminence, and targeting based on direct participation will be in line with that of our international partners. This will not only reduce confusion, it will enhance interoperability. While fighting enemies who dress as civilians will always be frustrating, having an offensive authority that allows U.S. soldiers to attack the enemy, once identified, will reduce this frustration.

Self-defense will always have a place on and off the battlefield, but when fighting a war waged overwhelmingly by fighters dressed as

²⁶⁶ See Bagwell *TAP*, *supra* note 85.

²⁶⁷ Bagwell *Afghanistan Experience*, *supra* note 72.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

civilians, direct participation authority is more correct, more precise, and provides better protection to soldiers and innocent civilians. Self-defense should be the reason nations go to war, not the authority soldiers must use to fight one. Though self-defense allows a soldier to protect himself, it does not allow him to offensively attack the enemy. When the rules soldiers must follow fail to comport with the operational reality of their assigned mission, they become disillusioned with the law, the mission, and their leaders. A common complaint throughout both OEF and OIF is that U.S. soldiers feel the ROE forces them to fight with their hands tied.²⁷² This complaint both accurately identifies the limitations self-defense has placed on U.S. forces and masks the disheartening stretching of U.S. self-defense policy that is required to accomplish basic mission objectives.

Commanders and soldiers understand that in a counterinsurgency, fighters will dress to blend in with the civilian population and that identification of the enemy will likely remain the toughest challenge faced in these conflicts. More often than not, the only time fighters will be distinguishable from civilians is while they are actually performing an act of combat. When they finally do self-identify as fighters, U.S. use of force policy should include the authority to attack using direct participation authority, which is significantly better than using self-defense.

²⁷² See, e.g., BILLY VAUGHN, *BETRAYED: THE SHOCKING TRUE STORY OF EXTORTION 17 AS TOLD BY A NAVY SEAL'S FATHER* (2013).