

**RULES OF ENGAGING IN FOREIGN DISASTER RELIEF:
A PROPOSAL**

MAJOR LESLIE M. SCHMIDT*

I. Introduction—A Hypothetical¹

Typhoon Acadia struck the Philippines with astounding force, dropping twelve inches of rain in the first twelve hours of the storm in some areas, with winds topping two hundred miles per hour. Eastern Mindanao took a direct hit, sustaining extensive damage to infrastructure, including 98 percent power outages, flooded roads, and no access to clean

* Judge Advocate, U.S. Army. Presently assigned as Staff Judge Advocate, Special Operations Command-Korea, Camp Humphreys. LL.M., 2022, The Judge Advocate General's Legal Center and School, United States Army; J.D., 2011, University of Virginia; B.A., 2006, The College of William & Mary. Previous assignments include Group Judge Advocate, 4th Psychological Operations Group (Airborne), Fort Liberty (formerly known as Fort Bragg), North Carolina, 2020–2021; Command Judge Advocate, 16th Military Police Brigade, Fort Liberty, North Carolina, 2018–2020; Operational Law Attorney, U.S. Army Africa/Southern European Task Force, Vicenza, Italy, 2017–2018; Operational and Administrative Law Attorney, 173d Infantry Brigade Combat Team (Airborne), Vicenza, Italy; Trial Counsel, 17th Field Artillery Brigade, Joint Base Lewis-McChord, Washington, 2014–2015; Legal Assistance Attorney, 7th Infantry Division, Joint Base Lewis-McChord, Washington, 2013; Administrative Law Attorney, 7th Infantry Division, Joint Base Lewis-McChord, Washington, 2012–2013. Member of the Virginia State Bar. This paper was submitted in partial completion of the Master of Laws requirements of the 70th Judge Advocate Officer Graduate Course. The views expressed herein do not necessarily represent the views of the Department of the Army, Department of Defense, or any other department of the U.S. Government.

¹ This scenario is fictional but loosely based on real-world natural disasters and risk assessments conducted for climate-change-related disaster. See DAVID ECKSTEIN ET AL., GLOBAL CLIMATE RISK INDEX 2021, at 13–14 (2021) [hereinafter GCRI 2021]; CLIMATE CHANGE COMM'N, CLIMATE CHANGE AND THE PHILIPPINES EXECUTIVE BRIEF 2018-01 (2018).

water for most of the population. The Philippine government estimates that the storm displaced sixteen million people due to flooding and destruction of homes. The death toll has reached seven thousand and is climbing as thousands more are reported missing. The world community rallies to support the Philippines, and the U.S. Bureau for Humanitarian Assistance requests Department of Defense (DoD) assistance in its relief efforts.² The U.S. Army's 7th Infantry Brigade Combat Team (7th IBCT), 25th Infantry Division, fresh from the Jungle Operations Training Course,³ is at Wheeler Army Airfield waiting to board planes and deploy in support of the foreign disaster relief (FDR) mission.⁴

Despite the U.S. Government's (USG) eagerness to assist, there is still some concern due to the real-world history between the United States and the Philippines. The United States colonized the Philippines from 1898 to 1946.⁵ During the colonization period, hundreds of thousands of civilians died due to war, famine, and disease.⁶ After Philippine independence, the United States' permanent military presence in the country continued until 1992.⁷ This history continues to color modern relations with the Philippines.

Today, the United States views the Philippines as an important partner in Southeast Asia. The United States-Philippines Mutual Defense Treaty has been in effect since 1951, and U.S. strategy frames this alliance as key to a "free and open Indo-Pacific."⁸ It is home to more than 300,000

² The Bureau for Humanitarian Assistance replaced the Office of U.S. Foreign Disaster Assistance (OFDA) in 2020. Because this change is recent, U.S. Department of Defense (DoD) policy and regulations have not caught up; therefore, OFDA will be referenced in this paper when citing older references or detailing OFDA historic actions. *Bureau for Humanitarian Assistance*, U.S. AGENCY FOR INT'L DEV., <https://www.usaid.gov/who-we-are/organization/bureaus/bureau-humanitarian-assistance> (last visited Apr. 10, 2023).

³ "The 25th ID Jungle Operations Training Course (JOTC) focuses on jungle mobility training, waterborne operations, combat tracking, jungle tactics, survival training, and situation awareness exercises at the Squad level." LIGHTNING ACAD., 24TH INFANTRY DIV., JUNGLE OPERATIONS TRAINING COURSE: COURSE DESCRIPTION AND JOINING INSTRUCTIONS.

⁴ The 7th Infantry Brigade Combat Team IBCT is a notional unit stationed at Schofield Barracks, Hawaii.

⁵ STANLEY KARNOW, IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES 436-37 (1989).

⁶ *Id.* at 194, 287-322 (describing how death associated with the Philippine-American War and the Japanese occupation of the Philippines during World War II (WII) continues to influence the opinions of the Filipino population regarding U.S. presence in the country).

⁷ *US-Philippine Joint Statement*, 2 U.S. DEP'T OF STATE DISPATCH 544, 544 (1991).

⁸ Mutual Defense Treaty, Phil.-U.S., Aug. 30, 1951, 3 U.S.T 3947; *Fact Sheet: Indo-Pacific Strategy of the United States*, THE WHITE HOUSE, (Feb. 11, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/11/fact-sheet-indo-pacific-strategy-of-the-united-states> (stating the U.S.-Philippines Mutual Defense Treaty is one of five such treaties the United States has in the Indo-Pacific, a region whose security is necessary to support U.S. vital interests).

American citizens, including many U.S. military veterans.⁹ The United States helped the Philippine government restore its infrastructure following several natural disasters over the last decade, providing millions of dollars in disaster relief and recovery funds.¹⁰ In addition to natural disasters, the Philippine government struggles with multiple threats to national security, including separatist groups on the island of Mindanao, terrorist organizations including a branch of the Islamic State, and friction with China over sovereignty disputes in the South China Sea.¹¹ In recent years though, the Philippine government has sought to develop a more positive relationship with China, which runs the risk of degrading U.S.-Philippine military cooperation.¹²

As the 7th IBCT waits for C-130 aircraft to take them to the Philippines, the brigade judge advocate (BJA) jumps on top of a pallet of ruck sacks and briefs the rules of engagement (ROE). The Soldiers dutifully take their ROE cards, noting that they look nearly identical to the cards they received during jungle warfare training the month prior. After the unit gets settled in the Philippines on the island of Mindanao, Alpha Company gets its first mission: providing force protection to engineers rebuilding a road allowing civilians to access supply points. The brigade intelligence officer briefs the commanders that separatist groups in the area have established a pattern of attacking and robbing supply points.

As the engineers work, the Alpha Company commander hears voices and people moving in the jungle to either side of the road. Earlier, he heard gunfire ahead of the group. Convinced that an ambush is imminent, he sends a team forward to scout the area. The team is moving through dense jungle when a man carrying a machete steps out in front of them, yelling in Visayan and gesticulating with a machete. The team engages him with

⁹ *U.S. Relations with the Philippines: Bilateral Relations Fact Sheet*, U.S. DEP'T OF STATE (Feb. 23, 2023), <https://www.state.gov/u-s-relations-with-the-philippines>.

¹⁰ *Id.*

¹¹ *The World Factbook-Philippines*, CENT. INTEL. AGENCY, (Apr. 4, 2023), <https://www.cia.gov/the-world-factbook/countries/philippines>.

¹² Jim Garamone, *Philippine President Restores Visiting Forces Agreement with U.S.*, DOD NEWS (July 30, 2021), <https://www.defense.gov/News/News-Stories/Article/Article/2713638/philippine-president-restores-visiting-forces-agreement-with-us> (discussing threats by President Duterte to cancel the Philippines-United States Visiting Forces Agreement, which is vital to the strong bilateral military relationship between the two countries); Press Release, Dep't of Def., Readout of Secretary of Defense Lloyd J. Austin III's Meeting with Philippine Secretary of National Defense Delfin Lorenzana (Sept. 10, 2021), <https://www.defense.gov/News/Releases/Release/Article/2771441/readout-of-secretary-of-defense-lloyd-j-austin-iiis-meeting-with-philippine-sec/> (announcing that the Secretary of Defense (SecDef) has reaffirmed the U.S.-Philippine alliance and their joint mission to secure peace and prosperity in the Indo-Pacific).

lethal force then hears branches snap to their right. Fearing they have stumbled on an ambush, they turn but hold their fire when they see a family carrying water jugs.

The resulting Army Regulation 15-6 investigation finds that no one in 7th IBCT acted wrongfully.¹³ The joint force command team developed the ROE per joint doctrine, and the BJA correctly briefed them.¹⁴ In compliance with the ROE, the company commander sent scouts to investigate a potential threat to the unit. And those scouts, based on the information they had at the time, perceived hostile intent and used proportionate and necessary means to neutralize that threat.

Unfortunately, the Philippine government and international community do not feel the Army investigation absolves the unit. Local media publishes that the man with the machete was trying to warn the Soldiers of landmines in the jungle and when they came across him trying to safely guide a family to the road. The photographs of the dead man and crying children, taken by a photojournalist embedded with the engineer group, go viral. The international media is swift and merciless. Stories showing protests and anti-American graffiti are all over the news. The area is now so dangerous that DoD forces and most USG civilians are withdrawing. Multiple Filipino news outlets bemoan the reinstatement of U.S. military power in the area, claiming that the humanitarian mission was a ruse. Official statements from the Chinese government paint a picture of imperialist Americans, massacring the native population, while portraying Chinese intervention as benevolent aid, building capacity in the Philippines. Social media explodes with calls to not trust the United States, cancel defense treaties, and expel USG personnel.

II. A Proposal

The operational environment is always changing. United States competitors are dissecting military action and using it to create their own narrative, highlighting the vulnerabilities of using the wrong paradigm for the use of force on humanitarian missions. Rules of engagement are

¹³ U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS (1 Apr. 2016). In the U.S. Army, this regulation establishes procedures for conducting investigations when other regulations or directives do not prescribe different procedures. *Id.* para. 1-1.

¹⁴ Joint doctrine recommends the use of the standing rules of engagement (SROE) to develop guidance for the use of force in foreign disaster relief (FDR) missions. JOINT CHIEFS OF STAFF, JOINT PUB. 3-29, FOREIGN HUMANITARIAN ASSISTANCE, at IV-18 (14 May 2019) [hereinafter JP 3-29].

inappropriate and counterproductive for FDR missions because they emphasize defeating enemies and winning U.S. wars. Alternatively, rules for the use of force (RUF) balance de-escalation and respect for human rights with a commander's inherent right of unit self-defense, aligning it closely with the purpose and mission of FDR.¹⁵ This paper argues that strategic guidance must empower commanders to apply RUF to FDR missions rather than ROE, and, therefore, the Joint Chiefs of Staff must update doctrine applicable to foreign humanitarian assistance and the standing rules for the use of force (SRUF).¹⁶

Currently, DoD policy requires that U.S. forces comply with the "fundamental principles and rules" of the law of war during all military operations, not just during armed conflicts.¹⁷ To facilitate that policy, Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, on the standing rules governing engagement and the use of force for U.S. forces provides guidance for all DoD operations worldwide and incorporates the law of war.¹⁸ It lays out two frameworks for the use of force during DoD operations, the SRUF and the standing rules of engagement (SROE).¹⁹ Doctrinally, the two frameworks are applicable to distinct mission sets. The SRUF apply to all operations inside U.S. territory, force protection, and security operations at all DoD installations worldwide and to missions performing official security functions off installations abroad, for example, during convoy security operations or bilateral exercises.²⁰ The SROE apply to all other DoD missions outside

¹⁵ This paper only proposes to apply rules for the use of force (RUF) to FDR missions when conducted in predominantly permissive environments, not when natural disasters occur in areas where armed conflict is already taking place or erupts. Here, a permissive environment is defined as one in which the host nation has control and some intent and capability to assist operations. JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at GL-14 (17 Jan. 2017) (C1 22 Oct. 2018) [hereinafter JP 3-0]. JOINT CAMPAIGNS AND OPERATIONS, at GL-13 (18 June 2022) (defining "permissive environment" as "[u]ncontested conditions in which joint forces have freedom of movement").

¹⁶ This change will require updating JP 3-29, *supra* note 14, and CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (13 June 2005).

¹⁷ U.S. DEP'T OF DEF., DIR. 2311.01, DoD LAW OF WAR PROGRAM para. 1.2.a. (2 July 2020).

¹⁸ CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (13 June 2005) [hereinafter CJCSI 3121.01B].

¹⁹ *Id.* paras. 3.a.–3.b.

²⁰ *Id.*

U.S. territory.²¹ In accordance with joint doctrine, the SROE apply to humanitarian missions, including FDR.²²

How to regulate the use of force is a vital decision for the commander of any military operation that requires a careful analysis of how it affects the three levels of warfare: strategic, operational, and tactical.²³ This is no less true when planning FDR missions. Strategically, how is the mission contributing to the DoD's big-picture objectives for providing FDR?²⁴ Operationally, how is the use of tactical forces linked with those strategic goals?²⁵ And tactically, do the guidelines for using force give subordinate commanders the tools they need to protect the force and execute the mission?²⁶

This paper begins by evaluating why it is important to get the FDR mission right, focusing on the strategic goals and benefits of providing FDR. The next section explores historic FDR missions in Nicaragua and Haiti to demonstrate how ROE was ill-suited to the mission, and how the SRUF could have been a better framework for commanders at the operational and tactical levels. Finally, this paper justifies how RUF are more compatible with the DoD's objectives and obligations when providing FDR.

III. Why It Is Important to Get the FDR Mission Right

To establish the strategic-level value of providing FDR successfully, this section begins by briefly reviewing the domestic law, policy, and guidance governing FDR and how they support the U.S. foreign policy goals of providing aid. Next, it will discuss international norms in the provision of humanitarian aid and how they affect DoD strategic goals. Finally, it shows why FDR is a particularly important mission for the United States right now by discussing how climate change-related disaster compromises national security and how providing FDR will mitigate disaster-related instability and strengthen relationships.

²¹ *Id.*

²² JP 3-29, *supra* note 14, at IV-18.

²³ JP 3-0, *supra* note 15, at I-10.

²⁴ *See* JP 3-0, *supra* note 15, at I-11.

²⁵ *See* JP 3-0, *supra* note 15, at I-11.

²⁶ *See* JP 3-0 *supra* note 15, at. at I-11-12.

A. United States' Goal for FDR as Expressed in U.S. Law, Policy, and Guidance

This section highlights that the stated goal for USG intervention in disaster abroad is saving lives and relieving suffering. Then, it argues that the guidance recommending the use of SROE to develop rules to govern the use of force during FDR missions is not optimally suited to achieve that goal.

Legislation, executive orders, and the policy and guidance of both the DoD and the Department of State (DoS) all reiterate the goal of saving lives and relieving suffering when the USG provides disaster assistance abroad. The law governing how and why the USG provides international disaster assistance in natural or man-made disasters is The Foreign Assistance Act of 1961 (FAA).²⁷ The purpose for providing international disaster assistance in the FAA is to demonstrate “the humanitarian concern and tradition of the people of the United States” by providing “prompt United States assistance to alleviate human suffering caused by natural and manmade disasters.”²⁸

The U.S. Code and implementing executive order place the DoD in a supporting role to the DoS and U.S. Agency for International Development (USAID) in most humanitarian aid missions.²⁹ The DoD's speed, specialization, and efficiency are particularly in-demand traits when the barriers to saving lives and relieving human suffering are complex.³⁰ Leaders responding in FDR missions must ground their

²⁷ Foreign Assistance Act, 22 U.S.C. § 2151–2431. The Foreign Assistance Act (FAA) reorganized the way the USG provides foreign assistance and created the United States Agency for International Development (USAID) to bring multiple government programs and efforts under one agency. *USAID History*, USAID (Nov. 12, 2021), <https://www.usaid.gov/who-we-are/usaid-history>.

²⁸ 22 U.S.C. § 2292(a).

²⁹ *Id.*; Exec. Order No. 12,966, 60 Fed. Reg. 36,949 (July 14, 1995). The FAA grants the President broad authority to respond to foreign disasters, as well as to assist in disaster preparedness, prediction, and planning. 22 U.S.C. § 491. The President then delegates the FAA presidential functions to the Secretary of State, requiring consultation with the Administrator of USAID and/or the SecDef when necessary. Exec. Order No. 12,966, 60 Fed. Reg. 36,949 (July 14, 1995).

³⁰ STEPHEN DYCUS ET AL., *NATIONAL SECURITY LAW 467* (7th ed. 2020). Congress specifically authorizes the DoD to participate in foreign disaster assistance in 10 U.S.C. § 404, which outlines circumstances that may allow the DoD to aid outside the U.S. The President can direct the SecDef to provide foreign disaster assistance “when necessary to prevent loss of lives or serious harm to the environment.” 10 U.S.C. § 404. Executive Order 12966, the implementing order for Section 404, grants the SecDef the power to make a

decisions in the fact that the DoD is in a supporting role and that the primary goal is to save lives and relieve the suffering of foreign disaster victims.³¹ This fits within the broader DoD goal of providing humanitarian assistance globally.³² However, joint doctrine recommends the use of the SROE to develop guidance for the use of force in FDR missions.³³

unilateral decision to provide disaster assistance but only in emergency situations if it is necessary to save human lives, and when there is not time to get the concurrence of the Secretary of State. Exec. Order No. 12,966, 60 Fed. Reg. 36,949 (July 14, 1995). Otherwise, the SecDef may only provide disaster assistance at the direction of the President or with the concurrence of the Secretary of State. *Id.* Additionally, 10 U.S.C. § 2561 is an alternate authority that allows the DoD to expend funds for humanitarian assistance. The statute authorizes spending for the transportation of humanitarian relief and “other humanitarian purposes worldwide,” a broad clause that can encompass many FDR activities. 10 U.S.C. § 2561. While Section 404 allows the DoD to perform a broad range of FDR missions, it also contains strict reporting requirements, so it may not be the favored authority in emergency situations. DEF. SEC. COOP. AGENCY, U.S. DEP’T OF DEF., SECURITY ASSISTANCE MANAGEMENT MANUAL para. C12.2.7.5 (30 Apr. 2012) [hereinafter SMM]; *see also* NAT’L SEC. L. DEP’T, THE JUDGE ADVOC. GEN.’S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 296 (2021) [hereinafter OPERATIONAL LAW HANDBOOK]. Reporting for Section 2561 activities is rolled into the annual Humanitarian Assistance Report to Congress; therefore, the DoD generally performs FDR missions under this authority. The DoD submits activities authorized under Section 2561 annually as a part of the Humanitarian Assistance report to Congress. SMM, *supra*, para.C12.2.7.2.

³¹ JP 3-29 *supra* note 14, at I-1 (defining FDR as “assistance that can be used immediately to alleviate the suffering of foreign disaster victims”). The U.S. Agency for International Development (USAID) only requests DoD support in about 10 percent of USG responses to foreign disasters. OPERATIONAL LAW HANDBOOK, *supra* note 30, at 290.

³² The Secretary of Defense (SECDEF) laid out goals for humanitarian programs using the Overseas Humanitarian, Disaster, and Civic Aid Appropriation as follows:

[C]onsistent with references b through e, and to the extent permitted by law, the DoD HA program will be used to promote the following objectives globally: (1) improve the basic living conditions of the civilian populace in a country or region that is susceptible to violent extremism and/or is otherwise strategically important to the United States; (2) enhance the legitimacy of the HN by improving its capacity to provide essential services to its populace; (3) promote interoperability and coalition-building with foreign military and civilian counterparts; (4) generate long-term positive perceptions of DoD and the USG with HN civilian and military institutions; and (5) enhance security and promote enduring stability in the HN or region.

Memorandum from Assistant Sec’y of Def. for Special Operations and Low Intensity Conflict, subject: Policy Guidance for DOD Humanitarian Assistance Funded by the Overseas Humanitarian, Disaster, And Civic Aid Appropriation para. 3(c) (5 June 2012).

³³ JP 3-29, *supra* note 14, at IV-18. United States joint doctrine is official advice meant to guide the commanders of the joint force in pursuit of shared goals and generally does not

The DoS Foreign Affairs Manual on International Disaster and Foreign Assistance states in its general policy that “the United States may provide humanitarian assistance to affected populations.”³⁴ The primary DoS goal when providing refugee and humanitarian assistance is saving lives and relieving human suffering.³⁵ Thus, the DoD and DoS agree on the goal in FDR: saving lives and relieving suffering.

The next section will evaluate international norms and expectations. As stated in the FAA, part of the purpose of humanitarian missions is to “demonstrate the humanitarian concern and tradition of the people of the United States”³⁶ and using RUF will better express that to the global audience.

B. International Norms and Expectations

Rules of engagement logically apply when host-nation law enforcement is ineffective or hostile to U.S. forces.³⁷ In the humanitarian context, the host nation generally retains primary responsibility for law enforcement, including protecting the victims of the disaster.³⁸ Outside of armed conflict, there is no international justification for supplanting the local military/law enforcement role without host-nation consent. Therefore, when deployed on FDR missions, the DoD must comply with host-nation law and international obligations, rely on a status of forces agreement (SOFA), or assume risk.³⁹

The United Nations (U.N.) General Assembly approved guiding principles for “strengthening the coordination of humanitarian emergency assistance” in 1991.⁴⁰ Among those principles is that assistance “must be provided in accordance with the principles of humanity, neutrality, and

establish policy. JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, at I-1 (25 Mar. 2013) (C1 12 July 2017).

³⁴ 2 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL para. 061 (2022) [hereinafter DOF FAM].

³⁵ *Id.* para. 061.2; *Refugee and Humanitarian Assistance*, U.S. DEP’T OF STATE, <https://www.state.gov/policy-issues/refugee-and-humanitarian-assistance> (last visited Apr. 11, 2023).

³⁶ 22 U.S.C. § 2292(a).

³⁷ *See* CTR. FOR L. & MIL. OPERATIONS, THE JUDGE ADVOC. GEN.’S LEGAL CTR. & SCH., U.S. ARMY & INT’L & OPERATIONAL L. BRANCH, JUDGE ADVOC. DIV., U.S. MARINE CORPS, ROE v. RUF [hereinafter ROE v. RUF].

³⁸ DOF FAM *supra* note 34. This would not be the case in situations where disaster strikes areas already involved in armed conflict.

³⁹ *See generally* U.N. Charter art. 2.

⁴⁰ G.A. Res. 46/182, ¶ 50 (Dec. 19, 1991).

impartiality” and “[s]overeignty, territorial integrity and national unity of States must be fully respected.”⁴¹ There is no exemption to sovereignty for providing humanitarian aid after a disaster; the USG needs the consent of the affected country to fulfill its mission.⁴²

United Nations General Assembly Resolution 58/114 reaffirms these guiding principles and elaborates on the role of the military in humanitarian efforts.⁴³ It emphasizes that humanitarian assistance is a civilian-led process and affirms that when military forces are used, their use should respect humanitarian law and principles.⁴⁴ It notes that the Oslo Guidelines can inform the use of force in humanitarian relief efforts.⁴⁵

The Oslo Guidelines are nonbinding guidance published by the U.N. Office for the Coordination of Humanitarian Affairs to “formaliz[e] and improv[e] the effectiveness and efficiency of the use of foreign military and civil defence assets in international disaster relief efforts.”⁴⁶ The U.S. military has incorporated the guidelines into doctrine in JP 3-29.⁴⁷ The Oslo Guidelines elaborate on the General Assembly Resolution guiding principles of sovereignty, territorial integrity, and national unity, including and defining the principles of humanity, neutrality, and impartiality.⁴⁸ They prohibit as a matter of principle the use of military forces actively engaged in combat to support humanitarian operations.⁴⁹ When military assets are used to support humanitarian operations, the overall mission “must retain its civilian nature and character.”⁵⁰ The host nation has primary responsibility for security.⁵¹

The international community may be skeptical of the use of militaries in humanitarian contexts. Thus, the USG may need to negotiate force protection and force posture with the host nation when providing aid.⁵² The U.N. Guidelines on the *Use of Military and Civil Defence Assets to*

⁴¹ *Id.*

⁴² Office for the Coordination of Humanitarian Affairs, Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, para. 21, U.N. Doc. OCHA/ESB/2008/6 (Nov. 1, 2007) [hereinafter Oslo Guidelines].

⁴³ G. A. Res. 58/114, ¶ 9 (Dec. 17, 2003).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Oslo Guidelines *supra* note 42, para. 16.

⁴⁷ Lieutenant Colonel John N. Ohlweiler, *Building the Airplane While in Flight: International and Military Law Challenges in Operation Unified Response*, ARMY LAW, Jan. 2011, at 9, 14. *See also* JP 3-29 *supra* note 14, at III-7.

⁴⁸ *See* Oslo Guidelines *supra* note 42, para. 20.

⁴⁹ Oslo Guidelines *supra* note 42, para. 23.

⁵⁰ Oslo Guidelines *supra* note 42, para. 32.iii.

⁵¹ Oslo Guidelines *supra* note 42, para. 29.

⁵² *See infra* Section IV.A. (explaining negotiations with the government of Nicaragua during Operation Fuerte Apoyo).

Support United Nations Humanitarian Activities in Complex Emergencies warn that the use of force can “compromise neutrality, impartiality, and other humanitarian principles.”⁵³ Losing neutrality can result in belligerents denying relief workers’ access to affected areas or targeting the affected population directly. This problem can go on for years and affect future disaster relief operations.⁵⁴ The U.N. also sees foreign forces under the authority of their own government, rather than under the U.N. mission, as potentially problematic on humanitarian missions.⁵⁵ The military may have other motivations, like to “legitimize missions, gain intelligence and or enhance protection of forces.”⁵⁶ Demonstrating a commitment to human rights, avoiding unnecessary use of force and distinguishing the mission from combat operations, may relieve any skepticism towards the DoD assisting USG efforts in FDR.

The next section will explain that climate change is a developing threat to U.S. national security and a stable international order. As disasters mount and compound, the need for effective help will only grow among U.S. partner nations. Doing more FDR missions may increase the risk that U.S. competitors seize on a mistake and use it against U.S. interests.

C. Climate Change and Its National Security Impact

Over the last century, the United States has developed a reputation as a world leader in the provision of FDR.⁵⁷ The USG does this partially as a demonstration of goodwill and solidarity with states who are victims of disaster, but also to promote security, stability, reduce conflict, and expand democracy and free markets.⁵⁸ As climate change creates unpredictable weather patterns, the number of complex and acute disasters that require the USG to call in the DoD for assistance will increase. If the United States is going to contribute to more FDR missions in the near future, it increases the chance that unnecessary use of force will derail the strategic goals of saving lives and relieving suffering to demonstrate good will.

⁵³ U.N. Off. for the Coordination of Humanitarian Aff., *Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies*, para. 32 (2006).

⁵⁴ *Id.*

⁵⁵ *Id.* para. 35.

⁵⁶ *Id.*

⁵⁷ See Julia F. Irwin, *The Origins of U.S. Foreign Disaster Assistance*, AM. HISTORIAN, Feb. 2018, at 43–49.

⁵⁸ *USAID History*, *supra* note 27.

The 2021 *DoD Climate Risk Analysis* finds that climate change is increasing the number and severity of extreme-weather-related disasters, and “impacts are likely to expand competition over regions and resources, affect the demands on and functionality of military operations, and increase the number and severity of humanitarian crises, at times threatening stability and security.”⁵⁹ The analysis specifically notes the security implications of climate change in the Indo-Pacific, and how “competitors such as China may try to take advantage of climate change impacts to gain influence.”⁶⁰

China has aggressively pursued relationships with small countries in South and Southeast Asia to gain influence and military advantage.⁶¹ The Philippines ranked fourth on the Long-Term Climate Risk Index, which tracked the countries most affected by climate change from 2000–2019.⁶² In fact, six of the top ten nations on the Climate Risk Index are in South or Southeast Asia, and climate-change-related disaster in that region could have a serious impact on U.S. national security.⁶³ If the DoD takes an active support role and an injudicious use of force occurs, it provides fuel that U.S. regional competitors can use. China is known to “exploit the conditions of the operational environment to achieve their objectives without resorting to armed conflict by fracturing the U.S.’s alliances, partnerships, and resolve.”⁶⁴ United States policy should guard against the risk of that exploitation.

Getting the FDR mission right means the primary goal is to save lives and relieve human suffering. This is the mandate of U.S. domestic rules and foreign policy goals governing FDR. International norms and expectations emphasize these goals but balance them with the sovereignty and dignity of the nations that need aid. And the looming threat of climate change–related disaster means that there will be more opportunities to fail and risk the stable world order the USG works to build and preserve. The next section will introduce case studies that illustrate how the DoD has worked in the past to fulfill the goals and mission of FDR, and how using ROE did not optimally support that effort.

⁵⁹ U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE CLIMATE RISK ANALYSIS 8 (2021).

⁶⁰ *Id.* at 6.

⁶¹ See JOSHUA T. WHITE, BROOKINGS INST., CHINA’S INDIAN OCEAN AMBITIONS: INVESTMENT, INFLUENCE, AND MILITARY ADVANTAGE (2020); MADIHA AFZAL, BROOKINGS INST., “AT ALL COSTS”: HOW PAKISTAN AND CHINA CONTROL THE NARRATIVE ON THE CHINA-PAKISTAN ECONOMIC CORRIDOR (2020).

⁶² GCRI 2021, *supra* note 1, tbl. 2.

⁶³ See *infra* Appendix B; WHITE, *supra* note 61; AFZAL, *supra* note 61.

⁶⁴ U.S. DEP’T OF THE ARMY, TRADOC PAM. 525-3-1, THE U.S. ARMY IN MULTI-DOMAIN OPERATIONS 2028 para. 2b (6 Dec. 2018).

IV. Case Studies

This section will explore two major disaster relief operations that took place in the last twenty-five years, Operation Fuerte Apoyo and Operation Unified Response. Each illustrates why the SROE is not the optimal tool for regulating the use of force in operations. Operation Fuerte Apoyo focused on providing relief to the thousands of people suffering from the effects of Hurricane Mitch in Central America in 1998.⁶⁵ During this operation, particularly in Nicaragua, commanders had trouble balancing force protection with public affairs and the need to demonstrate to the local population and the world at large that the purpose of the military presence was to relieve human suffering.⁶⁶ Operation Unified Response responded to a massive earthquake that devastated Haiti in 2010.⁶⁷ It was one of the largest deployments of U.S. forces for disaster relief, combining and amplifying the delicate issues faced by commanders in Central America.⁶⁸ Additionally, this section demonstrates the challenges of molding ROE for a situation where identified threats may also be the victims the USG intends to assist.

A. Operation Fuerte Apoyo: Central America, 1998

Hurricane Mitch struck at a terrible time for Central America. Following the 1997–1998 El Niño pattern, the nations occupying the isthmus between Mexico and South America were already struggling to recover from floods, droughts, and wildfires caused by extreme weather.⁶⁹ Hurricane Mitch formed as a Category 5 hurricane over the Caribbean Sea, but by the time it struck Honduras, it was only a Category 1 storm.⁷⁰ However, once it hit land on 30 October 1998, it stopped moving and

⁶⁵ See CTR. FOR L. & MIL. OPERATIONS, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH RELIEF EFFORTS, 1998–1999 LESSONS LEARNED FOR JUDGE ADVOCATES 8 (2000) [hereinafter HURRICANE MITCH RELIEF EFFORTS].

⁶⁶ See *id.* at 64–65.

⁶⁷ GARY CECCHINE ET AL., THE U.S. MILITARY RESPONSE TO THE 2010 HAITI EARTHQUAKE: CONSIDERATIONS FOR ARMY LEADERS 1–4 (2013).

⁶⁸ See *id.* at 31.

⁶⁹ Pan Am. Health Org., *Impact of Hurricane Mitch in Central America*, EPIDEMIOLOGICAL BULL., Dec. 1998, at 1, 1 [hereinafter PAHO].

⁷⁰ JOHN L. GUINEY & MILES B. LAWRENCE, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., PRELIMINARY REPORT, HURRICANE MITCH, 22 OCTOBER–05 NOVEMBER 1998, at 2 (1999).

inundated the region with rain for four days.⁷¹ The extreme rainfall washed out bridges and destroyed roads, homes, hospitals, and other vital infrastructure.⁷² To this day, experts consider Hurricane Mitch the deadliest hurricane in the last 200 years, causing over 9,000 deaths in the region.⁷³ It caused widespread food insecurity, lack of access to drinking water and public health resources, and severely damaged the infrastructure necessary to bring help to the victims.⁷⁴ Honduras suffered the most extensive damage from the storm, with significant damage also occurring in Nicaragua, El Salvador, Guatemala, and some damage in Costa Rica.⁷⁵

The DoD was able to respond to Hurricane Mitch swiftly, primarily because there was already a joint task force (JTF-BRAVO) based at Soto Cano Airbase in Honduras.⁷⁶ Before the hurricane hit land, JTF-BRAVO prepared to act as an intermediate staging base.⁷⁷ The chief of mission (COM) in Honduras declared a disaster, freeing up disaster relief funding.⁷⁸ On 4 November 1998, the Joint Chiefs of Staff issued a deployment order in response to a request for support from U.S. Southern Command (USSOUTHCOM) for disaster relief operations.⁷⁹ The next day, the U.S. President directed that the DoD provide up to \$30 million in support to the mission.⁸⁰

Judge advocates (JAs) deployed in support of Operation Fuerte Apoyo reported that force-protection issues were a focus of their efforts during the initial emergency relief phase and through the rehabilitation and restoration phases of the operation.⁸¹ The area of responsibility (AOR) had a high crime rate, even before the emergency.⁸² Furthermore, in Nicaragua, JAs perceived an anti-U.S. sentiment among the locals based on U.S. support to the Contras in the 1980s.⁸³ The Joint Task Force (JTF) commander classified force protection as the number one priority of the task force, and said “nothing we do is worth serious injury or the loss of

⁷¹ HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 1-4.

⁷² HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 1-4.

⁷³ GUINEY & LAWRENCE, *supra* note 70, at 1; PAHO, *supra* note 69, at 2 tbl.1.

⁷⁴ PAHO, *supra* note 69, at 4-5.

⁷⁵ See PAHO, *supra* note 69, at 2 tbl.1.

⁷⁶ HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 5.

⁷⁷ HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 5.

⁷⁸ HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 5.

⁷⁹ A. MARTIN LIDY ET AL., INST. FOR DEF. ANALYSES, EFFECTIVENESS OF DoD HUMANITARIAN RELIEF EFFORTS IN RESPONSE TO HURRICANES GEORGES AND MITCH, ES-7 (2001). The National command authority approved USSOUTHCOM’s request. *Id.*

⁸⁰ HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 8.

⁸¹ HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 35.

⁸² HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 97.

⁸³ HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 97.

life.”⁸⁴ However, commanders also found that force protection did not necessarily require the use of force. For example, commanders found success using information operations and public affairs strategies to improve safety.⁸⁵ The force protection condition (FPCON) for the mission was ALPHA+, including security measures like limiting access and coordinating with the COM and local government about terrorist activity, but stopping short of naming any hostile group or advising any offensive security missions.⁸⁶ Rather, planning focused on force protection similar to that allowed by the SRUF.⁸⁷ Commanders cancelled missions in areas where confrontations were likely and the threat was high.⁸⁸ While FPCON ALPHA+ lists the potential for possible terrorist activity against protected persons and objects, it puts in place measures that will allow the command to protect the force.⁸⁹ All of these force protection measures short of the use of force are permissible under ROE; the SROE does not mandate any use of force.⁹⁰ However, the measures used here are an excellent example of how commanders would ensure force protection under the SRUF if the use of force is more restricted in a particular case.

Soldiers operated under ROE in Operation Fuerte Apoyo.⁹¹ Leaders in the 82d Airborne Division had already trained their paratroopers on the basics of ROE.⁹² Then, leaders in theater provided additional training to incorporate the USSOUTHCOM ROE and issued USSOUTHCOM ROE cards when the paratroopers arrived.⁹³ However, due to the lack of a SOFA, the USG negotiated the status of forces with Nicaragua as forces

⁸⁴ Memorandum from Commander, Joint Task Force Aguila, subject: Policy Letter #4, Force Protection (3 Jan. 1999), in CTR. FOR L. & MIL. OPERATIONS, THE JUDGE ADVOC. GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH RELIEF EFFORTS, 1998–1999, app. E-1 (15 Sept. 2000) [hereinafter Pol’y Letter 4].

⁸⁵ *Id.* at 118; see also LIDY ET AL., *supra* note 79, at II.18.

⁸⁶ Pol’y Letter 4, *supra* note 84, encl. 2.

⁸⁷ Pol’y Letter 4, *supra* note 84, encl. 2. Force protection condition (FPCON) was formerly known by the acronym THREATCON and is listed as such in this reference. U.S. DEP’T OF DEF., INSTR. 2000.16, TERRORIST THREAT CONDITION encl. 3, para. E3.1.1.7.2 (14 June 2001).

⁸⁸ HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 97.

⁸⁹ Pol’y Letter 4, *supra* note 84, encl. 2, para. c.

⁹⁰ See generally CJCSI 3121.01B *supra* note 18.

⁹¹ Commander, Joint Task Force Aguila, Gen. Order No. 1 (Dec. 6 1998) in CTR. FOR L. & MIL. OPERATIONS, THE JUDGE ADVOC. GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH RELIEF EFFORTS, 1998–1999, app. J-4 (15 Sep. 2000).

⁹² HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 99.

⁹³ HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 99.

deployed, likely making some of that ROE training and ROE development incomplete.⁹⁴

Negotiators did not reach agreement on a SOFA; instead, an exchange of diplomatic notes covered some of the issues relevant to the status of U.S. personnel.⁹⁵ However, the diplomatic notes did not contain the typical language allowing Soldiers to carry weapons for self-defense.⁹⁶ This was due to an objection by the Nicaraguan government to the “possible perception of such language” by the Nicaraguan population.⁹⁷ Nicaraguan leaders did not want the perception that U.S. forces were occupying territory; commanders had to take this into account when determining how best to provide for subordinate commanders’ right and obligation to exercise unit self-defense.⁹⁸ United States forces operated under an unspoken understanding and carried weapons discretely.⁹⁹ For example, engineers were limited to carrying sidearms rather than traveling in vehicles with large weapons mounted.¹⁰⁰

A study by the Institute for Defense Analyses examined the response to Hurricane Mitch to evaluate the U.S. capacity to provide humanitarian assistance following natural disasters.¹⁰¹ Evaluating the force protection requirements, the authors of the study found that stringent force protection measures impeded forces’ ability to conduct humanitarian missions, and recommended that in future efforts, commanders consider less-strict force protection measures in what they call a “non-conflictive” environment.¹⁰² These may include allowing missions to take place with less coordination of movement, lower approval levels, and fewer force protection personnel.¹⁰³

The analysis also notes that “large-scale natural disasters such as Hurricane Mitch have major political implications” and that commanders “confronted operational decisions with significant political implications within the host countries.”¹⁰⁴ Failure to address those issues appropriately “could have led to foreign policy or media relations difficulties, complicating the primary mission: meeting the relief needs of storm

⁹⁴ See LIDY ET AL., *supra* note 79, at B-104.

⁹⁵ LIDY ET AL., *supra* note 79, at B-104.

⁹⁶ HURRICANE MITCH RELIEF EFFORTS *supra* note 65, at 64–65.

⁹⁷ HURRICANE MITCH RELIEF EFFORTS *supra* note 65, at 64–65.

⁹⁸ See LIDY ET AL., *supra* note 79, at B-91.

⁹⁹ HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 64.

¹⁰⁰ HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 64.

¹⁰¹ See LIDY ET AL., *supra* note 79.

¹⁰² LIDY ET AL., *supra* note 79, at B-92.

¹⁰³ LIDY ET AL., *supra* note 79, at B-91.

¹⁰⁴ LIDY ET AL., *supra* note 79, at B-48.

victims.”¹⁰⁵ While the discussion does not specifically lay out the ROE as an example of these decisions, it does point out sensitivities to carrying arms openly and interacting with the local population.

B. Operation Unified Response: Haiti, 2010

Twelve years after Hurricane Mitch, another disaster struck in the USSOUTHCOM AOR, this time in the form of a massive 7.0 earthquake centered near Port-au-Prince, Haiti, on 12 January 2010.¹⁰⁶ Estimates show that the earthquake and resulting chaos killed over 230,000 people, injured 300,000, and displaced more than 1.5 million in a nation of nearly 10 million.¹⁰⁷ In Haiti, like in Nicaragua, the United States had a history of intervention in Haitian politics, sending troops in 1915 to protect American interests in Haiti during a period of extreme political unrest and again in 1994 to support the presidency of Jean-Bertrand Aristide.¹⁰⁸ In the aftermath of the earthquake, U.S. President Barack Obama directed the USG to “respond with a swift, coordinated, and aggressive effort to save lives,” and the DoD complied.¹⁰⁹ What followed was “the U.S. military’s largest international humanitarian effort in history.”¹¹⁰

By chance, the deputy commanding general of USSOUTHCOM, Lieutenant General (LTG) P.K. Keen was on the ground in Haiti on the day of the earthquake, and swiftly assumed leadership of the newly formed Joint Task Force-Haiti (JTF-H).¹¹¹ This task force leapt into action, relying heavily on verbal orders from LTG Keen to request forces and supplies swiftly and efficiently.¹¹² In doing so, the JTF-H planners sidestepped some policy procedures, like coordinating force personnel as they flowed into the AOR.¹¹³

The DoD assembled a joint force including an assault command post from XVIII Airborne Corps, an Air Force squadron to reestablish

¹⁰⁵ LIDY ET AL., *supra* note 79, at B-48.

¹⁰⁶ DEBARATI GUHA-SAPIR ET AL., U.S. AGENCY FOR INT’L DEV., INDEPENDENT REVIEW OF THE U.S. GOVERNMENT RESPONSE TO THE HAITI EARTHQUAKE 17 (2011).

¹⁰⁷ *Id.*

¹⁰⁸ Ohlweiler *supra* note 47, at 11–12.

¹⁰⁹ *Obama Vows Unwavering Support for Quake-Hit Haiti*, REUTERS (Jan. 13, 2021, 10:35 am), <https://www.reuters.com/article/us-quake-haiti-obama-statement/obama-vows-unwavering-support-for-quake-hit-haiti-idUSTRE60C3PW20100113>.

¹¹⁰ CECCHINE, *supra* note 67, at 31.

¹¹¹ CECCHINE, *supra* note 67, at 4.

¹¹² *See* CECCHINE, *supra* note 67, at 34.

¹¹³ GUHA-SAPIR ET AL., *supra* note 106, 106 at 47.

operations at the airport, U.S. Coast Guard cutters, U.S. Navy ships, and Special Forces teams, all within only three days of the emergency and all falling under the operational authority of LTG Keen and JTF-H.¹¹⁴ Collecting the forces to serve in the JTF was a complex undertaking.¹¹⁵ Units selected for deployment were scattered across the country, from the active and Reserve components, at varying readiness and mobilization states, and all of their deployments had to be coordinated as quickly as possible.¹¹⁶ At one point, over 22,200 people worked for JTF-H.¹¹⁷

Since 2004, the U.N. Stabilization Mission in Haiti (MINUSTAH) operated as a combined military force to stabilize the nation, following extensive armed conflict in the country that had resulted in a military coup.¹¹⁸ Tragically, the MINUSTAH headquarters building collapsed during the earthquake, killing the head of mission and his principal deputy along with dozens of MINUSTAH staff.¹¹⁹ Following the earthquake, MINUSTAH was authorized higher force levels to “support the immediate recovery, reconstruction and stability efforts in the country.”¹²⁰ One of their missions was to “protect U.N. personnel, facilities, installations, and equipment, and protect civilians under imminent threat of physical violence.”¹²¹ This mission belonged to MINUSTAH, and was not a U.S. authority or mission in Haiti, other than those U.S. forces specifically assigned to MINUSTAH.¹²²

The world community did not universally respond positively to the large-scale U.S. response. Even France, a strong ally, felt like the United States was disproportionately involved in the relief operation.¹²³ Some leaders from Latin America, including the president of Nicaragua, and other more typical dissenting voices like the President of Cuba, voiced suspicions that it was a U.S. military occupation of Haiti rather than a targeted relief mission.¹²⁴ Hugo Chavez, then-President of Venezuela, suggested that it was a military occupation and that U.S. weapons testing

¹¹⁴ See CECCHINE, *supra* note 67, at 33 fig.3.1.

¹¹⁵ See DAVID R. DIORIO, OPERATION UNIFIED RESPONSE – HAITI EARTHQUAKE 2010, at 8 (2010).

¹¹⁶ See *id.*

¹¹⁷ CECCHINE, *supra* note 67, at 40.

¹¹⁸ See *MINUSTAH Fact Sheet*, U.N. PEACEKEEPING, <https://peacekeeping.un.org/en/mission/minustah> (last visited May 3, 2023).

¹¹⁹ CECCHINE, *supra* note 67, at 1.

¹²⁰ *MINUSTAH Fact Sheet*, *supra* note 118.

¹²¹ CECCHINE, *supra* note 67, at 53.

¹²² CECCHINE, *supra* note 67, at 55.

¹²³ DIORIO, *supra* note 115, at 3.

¹²⁴ DIORIO, *supra* note 115, at 3.

caused the earthquake.¹²⁵ Partially to combat these rumors, the U.N. brokered an agreement wherein MINUSTAH continued its mission to conduct security and stability operations in the country, and JTF-H focused its attention on providing humanitarian assistance and disaster relief and maintained responsibility for the required ports, airports, and roads to transport supplies.¹²⁶ Joint Task Force-Haiti honed its communications to demonstrate to key audiences that the USG was part of a global effort to help and not an occupying force.¹²⁷

The USSOUTHCOM Office of Strategic Communications worked hard on strategic communications.¹²⁸ Joseph “Pepper” Bryars of that office recommended transparency, including sharing intelligence and rules of engagement.¹²⁹ He noted that the U.S. role in providing security in the area was subject to interpretation, and the Haitian, U.S., and international audiences would scrutinize any use of force, and, therefore, strategic communications needed to manage messaging on that mission.¹³⁰ One method he recommended was demonstrating a “unified face,” always focusing on showing JTF-H personnel working with or for USG civilians, not undertaking exclusive military missions.¹³¹

Violence levels were low in the immediate aftermath of the earthquake, despite delays in distributing relief, lack of local police, and the release of approximately four thousand inmates from a Port-au-Prince prison.¹³² However, as vital supplies dwindled, violence broke out across the country.¹³³ The European Union deployed 300–350 police officers to aid in providing security to protect convoys and supplies.¹³⁴

In the midst of this organized chaos, JAs were responsible for assisting the command in developing rules of engagement for the operation based on the SROE.¹³⁵ The deputy staff judge advocate for JTF-H during the first few months of the relief effort was Lieutenant Colonel John N. Ohlweiler.¹³⁶ During his time in Haiti, he identified two principal

¹²⁵ John “Jay” Boyd, *The Pitfalls of Well-Meaning Compassion Joint Task Force-Haiti’s Infowar of 2010*, MIL. REV., Jan.-Feb. 2021, at 108, 114; CECCHINE, *supra* note 67, at 3.

¹²⁶ CECCHINE, *supra* note 67, at 4–5; DiORIO, *supra* note 115, at 3.

¹²⁷ DiORIO, *supra* note 115, at 14.

¹²⁸ Boyd, *supra* note 125, at 110.

¹²⁹ Boyd, *supra* note 125, at 112.

¹³⁰ Boyd, *supra* note 125, at 112.

¹³¹ Boyd, *supra* note 125, at 112.

¹³² DiORIO, *supra* note 115, at 1.

¹³³ DiORIO, *supra* note 115, at 7–8.

¹³⁴ DiORIO, *supra* note 115, at 8.

¹³⁵ See Ohlweiler *supra* note 47, at 10, 15.

¹³⁶ Ohlweiler *supra* note 47, at 9.

challenges in developing ROE for the combat-tested force: recalibrating the purpose and effect of escalation of force (EOF) procedures for a humanitarian mission and identifying specific property that forces could protect with deadly force.¹³⁷

Traditionally, EOF was a method of assessing and possibly subduing threats identified by Service members.¹³⁸ During training and combat engagements in the Iraq and Afghanistan theaters over the previous nine years, EOF procedures became a tool of assessing threats and determining hostile intent prior to engaging with lethal force.¹³⁹ This subtle shift changed the mentality of Service members approaching civilians. Rather than assuming civilians were peaceful unless given evidence to the contrary, it trained Service members to see all civilians as a potential threat.¹⁴⁰ The ROE team in Haiti crafted EOF procedures that emphasized evaluating the situation and disengaging before resorting to non-lethal measures when possible.¹⁴¹

The commanders developed an ROE that only authorized lethal measures to defend U.S. forces or other designated persons and specifically designated property, including military weapons and some critical infrastructure.¹⁴² After much discussion, the JTF-H commander did not authorize Service members to defend food, water, and supplies, for the simple reason that the people trying to steal those supplies probably were in desperate need of them.¹⁴³ This guidance for the use of force incorporates the congressional mission and purpose as well as foreign policy goals. The SRUF can allow for the use of deadly force for self-defense, to protect assets vital to national security, inherently dangerous property, or national critical infrastructure.¹⁴⁴ When directly related to the mission, Service members may be authorized to use it where serious offenses involving the imminent threat of death or serious bodily harm to others occur.¹⁴⁵ Protection of food and supplies are unlikely to fall under any of these categories and are unlikely necessary to relieve suffering and save lives.

This is just one example of how the SRUF better meets congressional and foreign policy goals because it emphasizes restraint. The applicable restraint in the SROE in this case is the law of armed conflict, so a

¹³⁷ Ohlweiler *supra* note 47, at 15.

¹³⁸ Ohlweiler *supra* note 47, at 16.

¹³⁹ Ohlweiler *supra* note 47, at 16.

¹⁴⁰ Ohlweiler *supra* note 47, at 16-17.

¹⁴¹ Ohlweiler *supra* note 47, at 17.

¹⁴² Ohlweiler *supra* note 47, at 18.

¹⁴³ Ohlweiler *supra* note 47, at 20.

¹⁴⁴ CJCSI 3121.01B *supra* note 18, encl. L, para. 5.c.

¹⁴⁵ CJCSI 3121.01B *supra* note 18, encl. L, para. 5.c.

commander would be making a necessity and proportionality decision, possibly for every incident.¹⁴⁶ The ROE proportionality analysis has the commander weigh the use of force against what is sufficient to respond decisively to hostile acts or intent at the tactical level.¹⁴⁷ This is inefficient in an FDR mission, where the emphasis is on relieving human suffering and saving lives. Thus, the planners at the operational level would streamline the process if they use the SRUF to achieve strategic goals.

The urgency of the need and the uncertainty of the situation on the ground made the massive verbal-order-driven push of people and supplies into Haiti a bold choice that paid great dividends on the success of the mission; however, there were drawbacks. For example, forces arrived with less training, guidance, and direction than they would have in a normal orders-based process.¹⁴⁸ The JAs in the ROE planning cell were proposing EOF procedures that had never been seen—let alone used—by the vast majority of the force, which likely added to the burden of those JAs training Service members as they deployed to Haiti and the comprehension level of the training audiences.¹⁴⁹ These JAs responsible for training the force were not centrally located and Service members came from both the active and Reserve force, which required exponentially more coordination.

Many of the principles considered by the JTF-H legal team when developing the ROE were already incorporated in the SRUF, including de-escalation procedures and restrictions on the use of lethal force when not in self-defense.¹⁵⁰ Those far-flung JAs could have been looking up the SRUF in their trusty *Operational Law Handbooks* while still at home station preparing their training(s), rather than hoping they were on the right JTF-H listserv to receive a highly mission-specific ROE.¹⁵¹

The missions to Nicaragua and Haiti were very successful by most measures. They delivered vital supplies, repaired infrastructure, and fulfilled their primary mission to relieve human suffering.¹⁵² The leaders and JAs who deployed and worked hard to develop and train on ROE should be proud and commended. However, had the SRUF been the

¹⁴⁶ See OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL §§ 2.2, 2.4 (12 June 2015) (C2, 13 Dec. 2016).

¹⁴⁷ CJCSI 3121.01B *supra* note 18, encl. A, para.4.a.(3).

¹⁴⁸ See CECCHINE, *supra* note 67, at 40.

¹⁴⁹ See Ohlweiler *supra* note 47, at 16-18.

¹⁵⁰ See CJCSI 3121.01B *supra* note 18, encl. L, para. 5.

¹⁵¹ The Judge Advocate Legal Center and School publishes the Operational Law Handbook as a resource for judge advocates in the field practicing national security law. OPERATIONAL LAW HANDBOOK *supra* note 31.

¹⁵² See Ohlweiler *supra* note 47; HURRICANE MITCH RELIEF EFFORTS, *supra* note 65, at 10-14.

recommended framework, a lot of the measures forced to fit into ROE, like novel EOF procedures and tortuous force protection measures, may have been developed more easily, allowing leaders to focus on other vital decisions.

The next section will expand on many of the issues brought up in these case studies to show why RUF are better suited for FDR missions. Particularly, it will focus on the protections already contained in the SRUF, the preparation and training of Service members deploying on an FDR mission, and the importance and fragility of public perception and media attention on FDR missions.

V. Why RUF is Better Suited to FDR

Regarding the question at hand—what framework for the use of force should U.S. forces implement during FDR operations—there are at least three answers. The first option is to maintain the status quo and continue to use ROE, adjusting as necessary to suit the mission. The second is to develop a new framework specifically for the use of force during an FDR mission. The third option, and the one embraced by this paper, is to apply RUF, adjusting as necessary to suit the mission.

This section begins to explore those three options by analyzing the salient differences between the SROE and the SRUF. It starts by examining the doctrinal language and then analyzing why those differences are important in deciding which framework to apply to the mission sets. Next, it will discuss how using RUF helps Soldiers succeed by allowing leaders to separate the battlefield mindset from humanitarian missions. It will also discuss the benefit of using a tool that is already in the DoD toolkit: the SRUF. Then, it will discuss the role of public perception and the media in FDR and how RUF help the DoD project the right message about its goal to save lives and relieve human suffering. Finally, it will address how the DoD's focus is changing from counterterrorism/counterinsurgency operations to large-scale combat operations (LSCO), how that may affect the SROE and how they are trained and applied, and why it pulls the SROE even farther from alignment with the goals of FDR.

A. ROE and RUF are Different

Rules of engagement are the commander's tool to regulate the use of force during operations outside the United States, to manage risk, and to

achieve mission success.¹⁵³ The rules are highly scalable, but they always provide for a commander's inherent right and obligation to defend the unit against a hostile act or demonstrated hostile intent.¹⁵⁴ The rules can restrict weapons authorized, restrict areas of operation, declare certain forces hostile, and restrict targeting locations among many other options.¹⁵⁵ However, the SROE are largely nonrestrictive; individual commanders can determine if a particular weapon or tactic complies with the law of armed conflict, unless the SROE specifies a higher approval authority or an approved supplemental measure already restricts the use of that weapon or tactic.¹⁵⁶

While ROE are flexible enough to apply to many different missions, with different levels of risk, doctrinal language generally associates ROE with missions that anticipate conflict. Rules of engagement are defined as “[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will *initiate and/or continue combat engagement* with other forces encountered.”¹⁵⁷ The SROE restate U.S. national security policy “to ensure the survival, safety, and vitality of our [N]ation and to maintain a stable international environment consistent with U.S. national interests.”¹⁵⁸ It specifies the objectives of defeating armed attack or terrorist actions against protected persons.¹⁵⁹ The SROE allow commanders to declare a force “hostile,” allowing U.S. forces to target them based on their status whether or not they pose an imminent threat of death or serious bodily harm to the unit.¹⁶⁰ Rules of engagement are best suited to engagements that anticipate conflict with hostile actors.

The SRUF bear many similarities to the SROE. They also consistently emphasize a commander's inherent right and obligation to exercise unit self-defense, and include an identical definition of self-defense.¹⁶¹ However, unlike the SROE, the SRUF are primarily restrictive, so weapons and tactics that the SRUF do not approve require SECDEF

¹⁵³ See CJCSI 3121.01B *supra* note 18, at 1-3. Rules of engagement can also apply to air and maritime forces on homeland defense missions inside the U.S. CJCSI 3121.01B *supra* note 18, para. 3.a.

¹⁵⁴ See CJCSI 3121.01B *supra* note 18, at 2.

¹⁵⁵ See CJCSI 3121.01B *supra* note 18, at 2-3.

¹⁵⁶ CJCSI 3121.01B *supra* note 18, at 3.

¹⁵⁷ JOINT CHIEFS OF STAFF, JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS, at GL-3 (2 Aug. 2016) (emphasis added).

¹⁵⁸ CJCSI 3121.01B *supra* note 18, encl. A, para.2.c.

¹⁵⁹ CJCSI 3121.01B *supra* note 18, encl. A, para.2.c.

¹⁶⁰ CJCSI 3121.01B *supra* note 18, encl. A, para.2.b.

¹⁶¹ See CJCSI 3121.01B *supra* note 18, encl. L.

approval.¹⁶² Differences in the SRUF largely arise from the fact that the SRUF incorporate protections to civilians granted in U.S. law, especially the U.S. Constitution.¹⁶³ In circumstances where the SRUF apply outside the United States, providing those protections acknowledges that those operations are in a permissive environment and the military is supporting a functioning local government rather than replacing it.¹⁶⁴ In those cases, DoD personnel need force protection because of their presence and not because they are there to engage in hostilities.¹⁶⁵ Some may argue that applying the RUF in FDR missions is overly protective, since foreign citizens do not hold rights under the U.S. Constitution in their own countries. However, the DoD already uses RUF in overseas missions, like protection of U.S. installations and some force protection missions.¹⁶⁶

There is no option under the SRUF to declare a force “hostile.”¹⁶⁷ The SRUF balance commanders’ force protection requirements with respect for human rights. The first procedure listed under the SRUF is de-escalation, stating that “when time and circumstance permit, the threatening force should be warned and given the opportunity to withdraw or cease threatening actions.”¹⁶⁸ It goes on to emphasize that force of any kind will be “used only as a last resort, and the force used should be the minimum necessary.”¹⁶⁹ Deadly force is authorized “when all lesser means have failed or cannot reasonably be employed” and only under specified circumstances when lives are in danger.¹⁷⁰ Otherwise, only limited uses of deadly force are authorized, and only when in direct support of the mission.¹⁷¹

The SRUF emphasize restraint and narrow the times when Service members can use force. Conversely, the goal in formulating ROE is “to ensure they allow maximum flexibility for mission accomplishment while providing clear, unambiguous guidance to the forces affected.”¹⁷² The SRUF only authorize deadly force in situations where lives are at stake,

¹⁶² CJCSI 3121.01B *supra* note 18, encl. L, para. 3.a.

¹⁶³ Major Daniel Sennott, *Interpreting Recent Changes to the Standing Rules for the Use of Force*, ARMY LAW., Nov. 2007, at 52, 53, 58.

¹⁶⁴ See ROE v. RUF, *supra* note 37, at 2.

¹⁶⁵ ROE v. RUF, *supra* note 37, at 2.

¹⁶⁶ See CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES, encl. L, para. 1.a (13 June 2005).

¹⁶⁷ See *id.* encl. L (providing no opportunity throughout the entirety of the Standing Rules of Engagement to declare a force “hostile”).

¹⁶⁸ *Id.* encl. L, para. 5.a.

¹⁶⁹ *Id.* encl. L, para. 5.b.(1).

¹⁷⁰ *Id.* encl. L, para. 5.c.

¹⁷¹ *Id.* encl. L, para. 5.d.

¹⁷² *Id.* encl. I, para. 2a.

and not where necessary solely for mission accomplishment.¹⁷³ Furthermore, the SRUF anticipate that it may not be the only binding authority on the use of force; they specifically state that “host nation laws and international agreements may limit U.S. forces means of accomplishing their law enforcement or security duties.”¹⁷⁴

Commanders know they must prepare for the operating environment to change rapidly. Should the environment cease to be permissive—because the local government becomes unwilling or unable to provide force protection in the area where forces are operating—a commander should rightfully ask if RUF are sufficient. If the situation on the ground changes so much that RUF are insufficient, then the entire mission is changing. Potentially, it may mean withdrawal, or it may mean moving to an offensive posture where new ROE are appropriate. Even if forces were operating under more RUF-like ROE, like those used in Haiti, retraining and reorienting would be necessary when the mission changes.

Foreign disaster relief is one tool that the United States can employ to stabilize and support allied governments and create international goodwill when disaster strikes. Therefore, the United States should take action that will foreseeably improve its chances of mission success. The next section discusses how using the SRUF instead of the SROE will help leaders put their Soldiers, Airmen, Sailors, and Marines in the best possible position to succeed.

B. Helping Service Members Achieve Mission Success

Using RUF instead of ROE will better prepare Service members to conduct FDR missions, decrease the chances of conflict, better protect them while they are operating in foreign jurisdictions, and help JAs accurately and swiftly advise commanders planning FDR missions. Using RUF changes the way the command trains Service members. Going back to the doctrinal definition of ROE, they control how Service members “initiate and/or continue combat engagement with other forces encountered.”¹⁷⁵ This emphasis on combat translates to an emphasis on

¹⁷³ *Id.* encl. L, para. 5.d.(1); See *infra* Appendix A for the full text of Standing Rules for the Use of Force.

¹⁷⁴ *Id.* encl. L, para. 1a.

¹⁷⁵ JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 207 (8 Nov. 2010) (C1 15 Feb. 2016).

combat vignettes when training on ROE.¹⁷⁶ Individuals trained in “combat engagement” are generally training to expect the declaration of a hostile force.¹⁷⁷ In humanitarian situations, training de-escalation and strictly limiting uses of force may be better choices to accomplish the mission.¹⁷⁸

On 20 May 1997, a Marine corporal assigned to patrol the Texas border on an anti-drug mission shot and killed a U.S. citizen.¹⁷⁹ At the time, he was operating under ROE.¹⁸⁰ When the Marine perceived a civilian had a weapon and was firing it in his team’s direction believing his team was under threat, he returned fire and killed the civilian.¹⁸¹ The State of Texas, the U.S. Department of Justice, and the military all conducted investigations of the incident, but there were no indictments.¹⁸² There was no evidence that the Marines were, in fact, under threat from the civilian.¹⁸³ At the time, no SRUF existed.¹⁸⁴ Some scholars felt that the Marine would have perceived the threat differently and acted differently if he had received training better tailored to a domestic mission.¹⁸⁵ Others felt that the fact that there was no indictment is evidence that the DoD does not need specialized rules to protect Service members, because self-

¹⁷⁶ This assertion is based on the author’s recent professional experiences developing and delivering ROE briefs as Group Judge Advocate, 4th Psychological Operations Group (Airborne), Ft. Liberty, North Carolina, 2020–2021; Command Judge Advocate, 16th Military Police Brigade, Ft. Liberty, North Carolina, 2018–2020; Operational Law Attorney, United States Army Africa/Southern European Task Force, Vicenza, Italy, 2017–2018; Operational and Administrative Law Attorney, and 173d Infantry Brigade Combat Team (Airborne), Vicenza, Italy. *E.g.* CTR. FOR ARMY LESSONS LEARNED, HANDBOOK NO. 11-26, ROE VIGNETTES OBSERVATIONS, INSIGHTS, AND LESSONS (May 2011) [hereinafter Professional Experience].

¹⁷⁷ See ROE v. RUF, *supra* note 37; Professional Experience, *supra* note 176.

¹⁷⁸ See ROE v. RUF, *supra* note 37.

¹⁷⁹ ROE v. RUF, *supra* note 37, at 1.

¹⁸⁰ Jesse Katz, *Marines Faulted in Own Report on Teen’s Death*, L.A. TIMES (Sept. 20, 1998), <https://www.latimes.com/archives/la-xpm-1998-sep-20-mn-24833-story.html>.

¹⁸¹ *Id.*

¹⁸² See ROE v. RUF, *supra* note 37, at 1; Katz, *supra* note 180.

¹⁸³ See ROE v. RUF, *supra* note 37, at 1; Katz, *supra* note 180.

¹⁸⁴ ROE v. RUF, *supra* note 37, at 2–3. The various documents controlling RUF were consolidated into CJCSI 3121.01B after September 11, when the DoD became involved in homeland defense efforts. The SRUF in their current state were developed in 2005 with the publication of the current CJCSI 3121.01B. See CJCSI 3121.01B *supra* note 18, at 1.

¹⁸⁵ See ROE v. RUF, *supra* note 37; W. Hays Parks, *Deadly Force Is Authorized*, 127 U.S. NAVAL INST. PROC. 1 (2001). The thesis of the Parks article is that overly restrictive ROE handicap and endanger U.S. forces, which seems to run contrary to the thesis of this paper. See Parks, *supra* at 1. However, the situation described by Parks is one where leaders neither understand nor teach self-defense well, and the rules applicable at the time predate the current standing rules. See Parks, *supra* at 1.

defense is already a legal defense.¹⁸⁶ However, the issue is about more than whether or not criminal liability will attach. This event, and the fallout in the media, effectively ended the DoD mission at the border in that form; in fact, the DoD did not use regular military forces to patrol the southwest border in support of the U.S. Border Patrol again until the “Faithful Patriot” deployment in 2018.¹⁸⁷

A 1992 incident demonstrates how Service members that do not receive specific training can inadvertently fall back on general training in ways that can potentially be disastrous for the mission. This incident gave proof to the quotation popularly ascribed to the Greek poet Archilochus, “We do not rise to the level of our expectations, we fall to the level of our training.”¹⁸⁸ Marines detailed to assist local law enforcement during the Los Angeles riots provided support to police at a private home where a domestic disturbance was underway.¹⁸⁹ When the local police knocked, birdshot fired from inside the house struck the police officers.¹⁹⁰ The officers shouted “cover me” to the Marines, by which the police officers meant get your weapons ready and keep your eyes open.¹⁹¹ To the Marines however, that phrase meant lay down fire.¹⁹² The Marines fired an estimated 200 rounds into the house, though amazingly no one was hurt.¹⁹³ Had someone been hurt, one can only imagine the fallout in the media and public perception of the DoD mission in Los Angeles.

Service members trained in ROE have that mentality locked in their minds. Using ROE for FDR that looks identical to the ROE used on a deployment, with slight modifications, may not be sufficient to switch from a battlefield mindset to a humanitarian mission mindset. Foreign

¹⁸⁶ Lieutenant Colonel Mark Martins, *Deadly Force is Authorized, but Also Trained*, ARMY LAW., Sept./Oct. 2001, at 1, 6.

¹⁸⁷ Manny Fernandez, *U.S. Troops Went to the Border in 1997. They Killed an American Boy*, N.Y. TIMES (Nov. 27, 2018), <https://www.nytimes.com/2018/11/27/us/esequiel-hernandez-death-border-mexico.html>; David Ignatius, *Mattis is Walking the Trump Tightrope. It's Agonizing to Watch*, WASH. POST, (Nov. 1, 2018), https://www.washingtonpost.com/opinions/mattis-is-walking-the-trump-tightrope-its-agonizing-to-watch/2018/11/01/9f712962-de0e-11e8-b732-3c72cbf131f2_story.html. Use of the operation name “Faithful Patriot” ended shortly before the midterm elections in 2018 because some felt it had “political overtones.” Nancy Youssef, *Pentagon Dropping Use of ‘Faithful Patriot’ as Name for Border Deployment*, WALL ST. J., (Nov. 7, 2018), <https://www.wsj.com/articles/pentagon-dropping-use-of-faithful-patriot-as-name-for-border-deployment-1541605581>.

¹⁸⁸ JOHN F. ANTAL, LEADERSHIP RISING 78 (2021); Sennott, *supra* note 163, at 67.

¹⁸⁹ Sennott, *supra* note 163, at 66–67.

¹⁹⁰ Sennott, *supra* note 163, at 66.

¹⁹¹ Sennott, *supra* note 163, at 66–67.

¹⁹² Sennott, *supra* note 163, at 67.

¹⁹³ Sennott, *supra* note 163, at 67.

disaster relief missions are distinguishable from combat missions, and the definition of success is different. The use of force training needs to be distinguishable also, or the DoD is jeopardizing its own success.

Leaders should also be concerned about protecting Service members' due process rights when they are performing duties in a foreign jurisdiction.¹⁹⁴ If a SOFA is in place granting exclusive jurisdiction to the United States, then uses of force by Service members will be subject to U.S. jurisdiction and protections. If there is no SOFA, uses of force may be subject to local law.¹⁹⁵ Even with a SOFA, frequently the United States is not granted exclusive jurisdiction, meaning that the United States may need to prove additional facts before it can claim jurisdiction. For example that the action in question was taken as a part of official duties, or that the victim was a U.S. citizen.¹⁹⁶ This is especially challenging in FDR missions because the DoS does not know what country will need assistance and cannot predict if a favorable agreement will be in place.

If the host nation may have jurisdiction, several issues could put Service members at further legal risk. For example, the United States allows for "anticipatory self-defense," a concept in U.S. security law that other nations frequently do not recognize.¹⁹⁷ Additionally, "legal duty" and "obedience to orders" may be an excuse in some cases under the Uniform Code of Military Justice, but not local law.¹⁹⁸ By using ROE instead of RUF, the DoD encourages Service members to take more risk in the course of their duties. United States commanders will not be able to protect Service members' due process in areas with insufficient SOFA protections. Appendix B contains a table showing the top ten countries most affected by climate change in the last twenty years and lists their SOFA status for an idea of the risks should the DoD provide FDR in these countries in the future. Because of their vulnerability to climate change, these countries are at higher risk of a disaster requiring USG assistance. If the DoD deploys to these countries, Service members will not have the benefit of an established SOFA in at least half of them, and only partial jurisdiction in three more. In many countries where Service members may deploy to provide FDR, they are at risk of being subject to the local law and jurisdiction.

¹⁹⁴ INT'L SEC. ADVISORY BD., REPORT ON STATUS OF FORCES AGREEMENTS 11–14 (2015).

¹⁹⁵ *Id.*

¹⁹⁶ Lieutenant Colonel W. A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction ROE and the Rules of Deadly Force*, ARMY LAW., Nov. 2000, at 1, 8.

¹⁹⁷ *Id.* at 20.

¹⁹⁸ *Id.*

Finally, the development of appropriate RUF is less time-consuming and RUF training is easier to deliver clearly, providing a direct benefit to Service members. Training RUF is one of the Judge Advocate General's Corps's enumerated collective tasks, so a JA in a national security law position should be able to brief it.¹⁹⁹ Support to massive disasters is difficult to plan. Frequently in rapid deployment situations, commanders are not contemplating the use of force until the deployment order arrives.²⁰⁰ Judge advocates may have to scramble to squeeze ROE into a humanitarian context.²⁰¹ Starting with the SROE forces JAs and commanders to contrive ROE from scratch that meet U.S. goals and requirements, and the requirements of the host nation and international law. It also forces them to anticipate every scenario where authority to use force should be held to a higher level. If the team developing the guidelines for the use of force start with the SRUF, it already addresses many of these considerations. And as the SRUF is restrictive, the team does not have to foresee every possible use of force that a subordinate commander may authorize.²⁰²

The next section will discuss how uses of force, even if they are justified or just contemplated, can derail an FDR mission if it fails to communicate the mission's true goals. When leaders fail to ensure their Service members are well-trained and prepared for the mission at hand, they increase the chance a small incident escalating and changing the international perception of military actions.

C. Public Affairs and International Perceptions

As the media gains access to military operations and look for a worldwide audience, incidents that result in civilian casualties are held to increasing levels of scrutiny by both the American public and international

¹⁹⁹ U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO OPERATIONS app. C, tbl.C-1 (8 June 2020) (stating that training RUF is a collective task in support of the warfighting functions movement and maneuver and command and control).

²⁰⁰ This assertion is based on the author's recent professional experiences preparing for multiple rapid domestic deployments and operations as Command Judge Advocate, 16th Military Police Brigade, Ft. Liberty, North Carolina, 2018–2020.

²⁰¹ See JP 3-29 *supra* note 14.

²⁰² See *supra* Part IV for difficulties of reworking ROE in Honduras and ROE development in Haiti in the midst of a complex rapid deployment of forces.

audiences.²⁰³ This increased level of scrutiny may lead to less public and political support from American and international communities.²⁰⁴ If a part of the U.S. purpose in conducting FDR is demonstrating good-will and earning the trust and respect of international partners, bad press can mean mission failure. If the mission loses political support, it may lose funding before it meets its objectives, and again the mission will fail. Civilian casualties can rarely be pinned on one thing that went wrong at one level of command, but ambiguity in the guidelines governing the use of force will be one contributing factor.²⁰⁵

The DoD public affairs office can also take a lesson from Haiti, and should encourage transparency.²⁰⁶ Unlike the SROE, the SRUF is unclassified, and thus a public affairs officer can share it with partner forces and the media freely.²⁰⁷ Transparency may go a long way to assuring the media and international partners about the true goal and purpose of the use of force. If the public affairs officer can release the SRUF and show how an action fell under it, it may allow the United States to continue to demonstrate its good will.

The DoD cannot control the narrative of FDR missions, but it can decide to influence the message or passively let the narrative control the mission. The case study on Haiti lays out a scenario where the media and global perceptions threatened to become more persuasive to the global community than the DoD public affairs plan. United States competitors are only too eager to seize a slip-up to spin U.S. humanitarian action in a way that favors their own interests, whether that be to portray the United States as conducting an offensive attack, colonizing, or just being generally careless about the lives and livelihoods of citizens of developing nations. The public affairs officer's role to distribute information about the U.S. mission to U.S. and international audiences and to stay linked to the media is especially important during delicate operations like FDR.²⁰⁸

Looking forward, leaders in the legal field foresee changes to the legal environment in which the United States fights its wars. The next section will explore how these changes may affect the SROE and argue that it will become even less applicable to the goals of FDR.

²⁰³ Major Sherry K. Oehler, *The Unintended Consequences of Killing Civilians 8* (2012) (Monograph, School of Advanced Military Studies, United States Army Command and General Staff College) (on file with the Defense Technical Information Center).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 50.

²⁰⁶ *See supra* Part IV.B.

²⁰⁷ JOINT CHIEFS OF STAFF, JOINT PUB. 3-61, PUBLIC AFFAIRS, app. C para. 2.c.(4) (14 May 2019).

²⁰⁸ *See* JP 3-29, *supra* note 14, at IV-3.

D. Transition to Large-Scale Combat Operations

In 2017, the U.S. Army started to refocus its attention on LSCO.²⁰⁹ Army leaders recognized that while the Army focused on counterterrorism and counterinsurgency, U.S. near-peer competitors were developing their own military power.²¹⁰ During that time, the Army developed gaps in its conventional warfighting capabilities, putting the United States at risk in a LSCO situation.²¹¹ As the Army shifts its focus to man, train, and equip for LSCO, JA leaders are reevaluating how they recommend leaders draft and apply ROE.²¹²

Lieutenant General Charles Pede, formerly The Judge Advocate General of the U.S. Army, identified gaps in the DoD's legal preparation and training as well.²¹³ He describes the ROE developed for counterinsurgency operations as "constrained" when compared to the broader authorities permitted under the law of armed conflict.²¹⁴ Rules of engagement are policy, and that policy has been conservative, withholding strikes based on status to high levels.²¹⁵ Policymakers may take LTG Pede's recommendation and redesign the SROE to adhere to the law of war more closely and move it further from a policy-based structure that "serve[s] humanitarian purposes."²¹⁶ If that happens, the SROE will become even harder to apply to FDR missions.

VI. Conclusion

The timing is right to reevaluate the rules of engagement and rules for the use of force and their application to military missions. The national security law world has expected a revision to the SRUF and SROE for

²⁰⁹ See U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (6 Oct. 2017).

²¹⁰ Lieutenant General Michael D. Lundy, *Meeting the Challenge of Large-Scale Combat Operations Today and Tomorrow*, MIL. REV., Sept.-Oct. 2018, at 111, 112.

²¹¹ Lieutenant General Charles Pede & Colonel Peter Hayden, *The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on "Battlefield Next,"* MIL. REV., Mar.-Apr. 2021, at 6.

²¹² *Id.* at 7.

²¹³ See *id.* at 6-7.

²¹⁴ *Id.* at 7.

²¹⁵ See *id.* at 7.

²¹⁶ *Id.* at 10.

years.²¹⁷ The joint chiefs published the current version in 2005, and it is ripe for revision based on the changes in the operational and training goals of the DoD.²¹⁸ Some may say that there is no need to change, because FDR missions have used ROE without catastrophic issues for years. However, the case studies above demonstrate that deployed leaders and JAs on these missions who worked hard to make the ROE more like a RUF deserve credit for their success. They built rules that emphasize de-escalation over engagement and comply with the U.N. goal of humanity, neutrality, and impartiality.

Returning to the opening hypothetical, one should consider how implementing the SRUF would have changed the outcome. When the machete-wielding man surprised the scout team, robust RUF training would have provided tools to deescalate the situation. When the commander sensed danger and feared an ambush, his RUF training would have urged him to safely withdraw rather than to send scouts. And if the brigade intelligence element detected possible hostile actors in the region, the command would never have sent engineers to that project on that day.

In sum, applying the SRUF to FDR missions makes more sense. It will allow leaders to focus troops on the mission at hand and separate the battlefield mindset from the humanitarian mission mindset. It has value in how it will change the public perception of DoD action in FDR missions, allowing the United States to say that the DoD is treating the victims of the natural disaster as if they were U.S. citizens. It allows the military to better comply with international norms and expectations and with U.S. rules and foreign policy goals. It will ease the burden on JAs scrambling to train and deploy with their unit. Finally, it anticipates changes to our operational environment caused by climate change. It also anticipates a pivot to LSCO operations to ensure that FDR remains focused on relieving human suffering and saving lives.

²¹⁷ See NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 105 (2021) (stating "The 2005 version remains the most current publication of the SROE"); NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 6 (2016) (stating "A new version of the CJCSI is due for publication in 2014. At the time of this publishing the new SROE was not available."); NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 75 (2012) (stating CJCSI 3121.01B was "under revision").

²¹⁸ As briefly discussed in section V.D., as the Army is shifting to large-scale combat operations, it may impact the SROE. Developments in multi-domain warfare may also prompt change.

Appendix A

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ENCLOSURE L

STANDING RULES FOR THE USE OF FORCE FOR US FORCES

1. Purpose and Scope

a. Standing Rules for the Use of Force (SRUF) provide operational guidance and establish fundamental policies and procedures governing the actions taken by DOD forces performing civil support missions (e.g., military assistance to civil authorities and military support for civilian law enforcement agencies) and routine Service functions (including AT/FP duties) within US territory (including US territorial waters). The SRUF also apply to land homeland defense missions occurring within US territory and to DOD forces, civilians and contractors performing law enforcement and security duties at all DOD installations (and off-installation, while conducting official DOD security functions), within or outside US Territory, unless otherwise directed by the SecDef. Host nation laws and international agreements may limit US forces means of accomplishing their law enforcement or security duties. Additional examples of these missions, within the US, include protection of critical US infrastructure both on and off DOD installations, military assistance and support to civil authorities, DOD support during civil disturbance and DOD cooperation with Federal, State and local law enforcement authorities, including counterdrug support.

b. SRUF cancels CJCSI 3121.02, "RUF for DOD Personnel Providing Support to Law Enforcement Agencies Conducting CD Operations in the United States," and RUF contained in DOD Civil Disturbance Plan (Garden Plot). Existing standing Military Department and combatant commander RUF directives shall be reviewed and updated to comply with these SRUF. Existing SecDef-approved mission-specific RUF remain in effect, unless otherwise noted. Use of force guidance contained in this instruction supercedes that contained in DOD Directive 5210.56, Enclosure 2.

c. Unit commanders at all levels must teach and train their personnel how and when to use both non-deadly and deadly force in self-defense.

d. DOD forces detailed to other USG lead Federal Agencies (LFA) (e.g., support to US Border Patrol) will operate under common mission-

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specific RUF approved by the SecDef and the LFA. DOD forces always retain the right of self-defense, IAW these SRUF.

e. DOD forces under USCG control, conducting operations both outside and within the territorial limits of the US, will follow the Use of Force Policy for warning shots and disabling fire as issued by the Commandant, USCG, per 14 USC 637 (reference w). DOD forces, under USCG control and inside the territorial limits of the US, retain the right of self-defense IAW these SRUF.

f. DOD forces, under DOD control (and using DOD SRUF and mission-specific RUF), but operating in coordination with other LFA security forces, will coordinate with on-scene LFA personnel to ensure common understanding of DOD RUF. Combatant commanders shall notify the SecDef, through the CJCS, of any use of force issues that cannot be resolved.

2. Policy. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unit self-defense includes the defense of other DOD forces in the vicinity.

3. Combatant Commander Mission-Specific RUF

a. Combatant commanders may augment these SRUF as necessary by submitting a request for mission-specific RUF to the CJCS for SecDef approval. The message format for requesting approval of mission-specific RUF is contained in Enclosure P.

b. Unit commanders may further restrict mission-specific RUF approved by the SecDef. US commanders shall notify the SecDef, through the CJCS, as soon as practicable, of restrictions (at all levels) placed on Secretary of Defense-approved RUF. In time critical situations, make SecDef notification concurrently to the CJCS. When concurrent notification is not possible, notify the CJCS as soon as practicable after SecDef notification.

c. Combatant commanders will distribute these SRUF to subordinate commanders and units for implementation.

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a. Inherent Right of Self-Defense. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, service members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit.

b. Imminent Threat. The determination of whether the danger of death or serious bodily harm is imminent will be based on an assessment of all facts and circumstances known to DOD forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous. Individuals with the capability to inflict death or serious bodily harm and who demonstrate intent to do so may be considered an imminent threat.

c. Hostile Act. An attack or other use of force against the United States, US forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property.

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

e. Assets Vital to National Security. For the purposes of DOD operations, defined as President-designated non-DOD and/or DOD property, the actual theft or sabotage of which the President determines would seriously jeopardize the fulfillment of a national defense mission and would create an imminent threat of death or serious bodily harm. Examples may include, but are not limited to, nuclear weapons; nuclear command and control facilities; and designated restricted areas containing strategic operational assets, sensitive codes or special access programs.

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f. Inherently Dangerous Property. Property is considered inherently dangerous if, in the hands of an unauthorized individual, it would create an imminent threat of death or serious bodily harm. Examples may include, but are not limited to: portable missiles, rockets, arms, ammunition, explosives, chemical agents and special nuclear materials. On-scene DOD commanders are authorized to classify property as inherently dangerous.

g. National Critical Infrastructure. For the purposes of DOD operations, defined as President-designated public utilities, or similar critical infrastructure, vital to public health or safety, the damage to which the President determines would create an imminent threat of death or serious bodily harm.

5. Procedures

a. De-Escalation. When time and circumstances permit, the threatening force should be warned and given the opportunity to withdraw or cease threatening actions.

b. Use of Non-Deadly Force

(1) Normally, force is to be used only as a last resort, and the force used should be the minimum necessary. The use of force must be reasonable in intensity, duration and magnitude based on the totality of circumstances to counter the threat. If force is required, non-deadly force is authorized and may be used to control a situation and accomplish the mission, or to provide self-defense of DOD forces, defense of non-DoD persons in the vicinity if directly related to the assigned mission, or in defense of the protected property, when doing so is reasonable under the circumstances.

(2) The use of Service-approved, unit issued non-lethal weapons and riot control agents, including oleoresin capsicum (OC) pepper spray, and CS gas, is authorized in operations other than war. Detailed guidance for use of riot control agents by DOD personnel is governed by CJCSI 3110.07 Series, (references b and t listed in Enclosure K).

(3) When operating under SRUF, warning shots are not authorized within US territory (including US territorial waters), except when in the appropriate exercise of force protection of US Navy and Naval Service vessels within the limits set forth in Enclosure M.

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Enclosure L

UNCLASSIFIED

Appendix B

	Long-Term Climate Risk Index Countries ²¹⁹	SOFA Condition ²²⁰
1	Puerto Rico	N/A ²²¹
2	Myanmar/Burma	none
3	Haiti	A&T protections ²²²
4	Philippines	Less than exclusive jurisdiction ²²³
5	Mozambique	A&T protections ²²⁴
6	The Bahamas	unknown ²²⁵
7	Bangladesh	none
8	Pakistan	none
9	Thailand	none
10	Nepal	none

²¹⁹ The Long-Term Climate Risk Index ranks the top ten countries most affected from 2000 to 2019 by their annual averages. GCRI 2021 *supra* note 1, at 13.

²²⁰ For a list of all U.S. treaties in force as of 2020, see U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2020 (2020) [hereinafter 2020 TREATIES IN FORCE].

²²¹ Puerto Rico is an unincorporated territory of the United States; a status of forces agreement is not applicable.

²²² Agreement Regarding the Status of U.S. Military Personnel and Civilian Employees of the Department of Defense Temporarily in Haiti in Connection with their Official Duties., Haiti-U.S., May 10–11, 1995, T.I.A.S. No. 95-511. United States military personnel enjoy the same status as that provided to the administrative and technical staff of the U.S. Embassy.

²²³ Agreement Regarding the Treatment of United States Armed Forces Visiting the Philippines, Phil.-U.S., Feb. 10, 1998, T.I.A.S. No. 12931.

²²⁴ Agreement Concerning the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Temporarily Present in Mozambique in Connection with Humanitarian Relief Operations, Mozam.-U.S., Mar. 3–7, 2000, T.I.A.S. No. 00-307.1.

²²⁵ Agreement Regarding U.S. Military and Civilian Personnel and U.S. Contractors Who May be Temporarily Present in the Bahamas in Connection with Humanitarian Assistance and Disaster Relief and Recovery Efforts, Bah.-U.S., Sept. 11, 2019, 2020 TREATIES IN FORCE, *supra* note 220, at 24.

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