How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force

Lieutenant Colonel W. A. Stafford
United States Marine Corps
Assistant Staff Judge Advocate
United States Southern Command
Miami, Florida

"[T]he willingness of our men and women in uniform to put their lives at risk is a national treasure. That treasure can never be taken for granted . . . ." [1]

Introduction

A United States military patrol proceeds as trained–alert, camouflaged, and unified. They know the rules of engagement. They follow the plan and cover the ground designated by the chain of command. When someone shoots at them, a member fires back in self-defense, killing a civilian with one well-aimed shot. Investigation confirms that he complied with the rules of engagement. Is he subject to further criminal jurisdiction?

Such was the case for Corporal Clemente Banuelos, United States Marine Corps. On May 20, 1997, he shot and killed Esequiel Hernandez, Jr., a civilian in Texas.[2] Corporal Banuelos and his team, assigned to Joint Task Force 6 (JTF-6), patrolled the U.S.-Mexico border in support of the U.S. Border Patrol's drug-interdiction efforts.[3] Primarily a surveillance team, Corporal Banuelos' four-man unit followed Mr. Hernandez, a suspected lookout for drug smugglers, while they waited for the arrival of the Border Patrol.[4] Mr. Hernandez shot twice at Corporal Banuelos' team. When he pointed his weapon again at one of Corporal Banuelos' team members, Corporal Banuelos fired back.[5] The unit operated as instructed; they followed the rules of engagement.[6] Nonetheless, they became the subjects of two grand jury criminal investigations by the state of Texas, a third grand jury investigation by the Department of Justice, and two military investigations by JTF-6 and the Marine

1. William J. Perry, *The Ethical Use of Force, in* 10 Def. Issues 49 (Am. Forces Info. Service ed., 1995) *available at* http://www.defenselink.mil/speeches/1995/s19950418-perry.html.

2. S.C. Gwynne, *Border Skirmish*, Time, Aug. 25, 1997, at 40, *cited in* John Flock, *The Legality of United States Military Operations Along the United States-Mexico Border*, 5 Sw. J. of L. & Trade Am. 453, n.10 (1998); Hays Parks, Request for Expert Opinion Concerning Compliance with Rules of Engagement 5-6 (Nov. 15, 1997). Colonel W.H. Parks, U.S. Marine Corps Reserve (retired), is Special Assistant to The Judge Advocate General of the Army for International and Operational Law. He provided the requested opinion, in "a personal capacity," to the military investigating officer conducting the Marine Corps investigation. *Id.* at 1-2.

3. Gwynne, *supra* note 2, *cited in* Flock, *supra* note 2, at n.7; Parks, *supra* note 2, at 2. Military support to civilian law enforcement is restricted by the Posse Comitatus Act (PCA), which prohibits the use of the military "as a posse comitatus or otherwise to execute the laws" unless expressly authorized by the Constitution or Congress. 18 U.S.C. § 1385 (1994); *see* United States v. Walden, 490 F.2d 372, 375 (4th Cir. 1974) (finding the PCA applicable to all armed services, including the Navy and Marine Corps). The PCA was enacted during the Reconstruction Period "to eliminate the direct active use of Federal troops by civil law authorities." United States v. Banks, 539 F.2d 14, 16 (9th Cir. 1976) (upholding military's authority to arrest and detain civilians for civil law violations committed on board military installations). The PCA codified a deeply rooted "traditional insistence on limitations on military operations in peacetime." *See also* Laird, Secretary of Defense v. Tatum, 408 U.S. 1, 15 (1971) (commenting on presidential authority to order federal troops to assist during civil disorders in Michigan after the assassination of Dr. Martin Luther King); Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985) (citing a long tradition, beginning with the Declaration of Independence, in limiting military involvement in military affairs). Posse comitatus is defined as the "body of men summoned by a sheriff or other peace officer to assist him in making an arrest." Ballentine's Law Dictionary 964 (3d ed. 1969). The clause "to execute the laws" makes unlawful "the direct active participation of federal military troops in law enforcement activities." United States v. Red Feather, 392 F. Supp. 916, 924 (D.S.D. 1975) (holding that evidence of active participation by military troops in law enforcement is admissible in defense of interfering with law enforcement officers during the Indian occupation of Wounded Knee, South Dakota). Congress implicitly authorized military support in drug interdiction by enacting the Military Cooperation with Civilian Law Enforcement Agencies Act. 10 U.S.C. §§ 371-381 (1994). Specifically, the "Secretary of Defense may . . . provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials." *Id.* § 371(a) (authorizing use of information collected during military operations). Furthermore, Department of Defense personnel may operate equipment for the "[d]etection, monitoring, and communication of the movement of surface traffic outside of the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary." *Id.* § 374(b)(2)(B). A restriction remains on direct participation by military personnel in a "search, seizure, arrest, or other similar activity," such as investigation of crimes, interviewing witnesses, pursuit of escaped civilian prisoners, and search of an area for a suspect, unless authorized by law. *Id.* § 375; *Red Feather*, 392 F. Supp. at 925; *see also* United States v. Jaramillo, 380 F. Supp. 1375, 1381 (D. Neb. 1974) (upholding acquittal on charge of obstructing law enforcement officers at Wounded Knee on grounds that the prosecution failed to prove that the PCA was not violated by the military's contributions to the operation, thus raising a reasonable doubt as to whether the law enforcement officers were lawfully engaged in the performance of duties). *But see* United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1976) (holding that evidence of military activity at Wounded Knee was insufficient to overcome presumption that law enforcement officers acted in performance of duties). Military support to civilian law enforcement is not to adversely affect military preparedness. 10 U.S.C. § 376.

4. Gwynne, *supra* note 2, *cited in* Flock, *supra* note 2, at nn.9, 11; Parks, *supra* note 2, at 5.

Corps.[7] The investigations lasted for one year and three months.[8] Fortunately, for the marines involved, none of the investigations resulted in indictments.[9] However, the incident highlights a neglected point of law–that military members are generally subject to the criminal law and procedure of the state in which they operate.[10] Alarmingly, Corporal Banuelos' unit received no instruction on Texas law, even though it applied to their activity.

A serviceperson's right to protection from criminal liability for applying military rules should be as inherent as the right of self-defense. Unfortunately, criminal jurisdiction remains a neglected issue that directly impacts military individuals. Blindly instructing them to apply military rules, without considering local law, jeopardizes not only their personal freedom, but force protection and mission accomplishment as well. More importantly, the rules purport to authorize, in some cases, violation of governing law.

Legal review procedures should address the impact of international, foreign,[11] and domestic law. Trigger-pullers–every man and woman who puts the front-sight post on center mass–need to know when, and when not, to squeeze the trigger, without worrying about going to jail. The "fog of war" will create enough chaos without uncertainty about the rules. They should not be put in harm's way without training, confidence, and protection in the rules that permit them to send rounds down range. From the Khobar Towers[12] to Haiti[13] to the Balkans,[14] the rules

---

5. Gwynne, *supra* note 2, *cited in* Flock, *supra* note 2, at nn.12, 14; Parks, *supra* note 2, at 5-6.

6. Parks, *supra* note 2, at 8, 10 (agreeing with the JTF-6 investigating officer, that "[t]he Joint Chiefs of Staff . . . Standing Rules of Engagement . . . , which were in effect for this mission, were followed"); *see* Newsletter, Staff Judge Advocate to the Commandant of the Marine Corps, subject: JTF-6 Border Shooting Incident (July 1998), *available at* http://192.156.19.100/newsletter/NewsLetterArchive.htm [hereinafter SJA to CMC Newsletter] (stating that the Marine Corps investigation concluded that the Marines acted non-criminally, within the scope of duty, and in compliance with the rules of engagement and inherent right of self-defense).

7. *See* SJA to CMC Newsletter, *supra* note 6 (Sept. 1997) (stating that the Texas grand jury did not indict Corporal Banuelos for Mr. Hernandez' death, and that the other three team members testified under state and military immunity); *id.* (Apr. 1998) (stating that the Department of Justice closed its civil rights investigation with no indictments, finding insufficient evidence); *id.* (Aug. 1998) (stating that the Texas District Attorney concluded his second grand jury investigation with no bill).

8. Within three to four months of the incident, the first Texas grand jury ended with no bill, and JTF-6's investigation found that the Marines committed no criminal or civil rights violations. *See* SJA to CMC Newsletter, *supra* note 6 (Sept. & Nov. 1997). The Department of Justice's Civil Rights Division then joined the Marine Corps investigation. *Id.* (Nov. 1997). In February, 1998, the Department of Justice closed its federal grand jury investigation with no indictments, concluding the FBI's investigation. *Id.* (Apr. 1998). In June, 1998, the Marine Corps forwarded its investigation to the Secretary of Defense, after the investigating officer reviewed the federal grand jury evidence, released by court order. *Id.* (May & July, 1998). The Department of Justice also provided its federal grand jury evidence to the Texas District Attorney, who then opened his second grand jury investigation, finally concluding with no bill in August, 1998. *Id.* (May & Aug. 1998).

9. *See* SJA to CMC Newsletter, *supra* notes 6-8.

10. The Texas border shooting incident fueled an ongoing debate over the military's increased involvement in domestic and other non-combat operations. *See generally* W. Kent Davis, *Swords into Plowshares: The Dangerous Politicalization of the Military in the Post-Cold War Era,* 33 VAL. U.L. REV. 61 (1998) (stating that after the Cold War, the armed forces have assumed new tasks such as criminal law enforcement and international peacekeeping, which only marginally involve fighting and winning wars). *See also* David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement,* 30 AKRON L. REV. 619 (1997) (maintaining that the PCA was eroded by the drug war in the 1980s, and that PCA exceptions were used to procure military support for the Bureau of Alcohol, Tobacco and Firearm's raid on Branch Davidians in Waco, Texas, resulting in the deaths of four federal agents and seventy-six other men, women and children). One author argues that the type of support provided by Corporal Banuelos' unit violates the PCA. *See* Flock, *supra* note 2 (concluding that military border operations are surrogate law enforcement activities that violate the PCA and the Fourth Amendment, and advocating application of the exclusionary rule to exclude any evidence seized in such an operation). Another author advocates repealing the PCA and enacting a new statute that prevents military involvement in drug interdiction. Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal,* 75 WASH. U. L.Q. 953, 982 (1997). However, the courts have held that "military involvement, even when not expressly authorized by the Constitution or a statute, does not violate the Posse Comitatus Act unless it actually regulates, forbids, or compels some conduct on the part of those claiming relief." Bissonette v. Haig, 776 F.2d 1384, 1390 (8th Cir. 1985) (finding that the military's aerial surveillance of Indian Reservation residents at Wounded Knee did not violate the PCA and was not unreasonable for Fourth Amendment purposes); *see also* United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1976) (concluding the PCA prohibits military use which is regulatory, proscriptive, or compulsory upon citizens).

11. Foreign law is the domestic "law of a state or country other than the forum." BALLENTINE'S LAW DICTIONARY 488 (3d ed. 1969).

12. *See* Downing Report to the Secretary of Defense of the Assessment of the Khobar Towers Bombing, Downing Assessment Task Force, The Pentagon (30 Aug. l996); General Accounting Office Report to Congress on Combating Terrorism: Status of DOD Efforts to Protect Its Force Overseas, Letter Report, GAO/NSIAD-97-207 (July 21, 1997).

13. *See* CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LESSONS LEARNED FOR JUDGE ADVOCATES, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995, 34-45 (11 Dec. 1995). The lessons learned also discuss the problems inherent in operating without the benefit of a Status of Forces Agreement, and the importance of understanding the country's legal system. *See id.* at 50-53.

14. *See* CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LESSONS LEARNED FOR JUDGE ADVOCATES, LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995-1998, 56-74 (13 Nov. 1998). The lessons learned also cover aspects of international law and international agreements, emphasizing that judge advocates should know the "international legal basis for the mission and for the use of force," understand the host nation's legal culture, and expect "difficulties with information flow on international agreements." *Id.* at 76-79.

governing the application of force appear in lessons learned as an area for improvement. However, the jurisdictional issues associated with these rules appear forgotten. Assuming that personal freedom and diplomatic relations should continue after the application of force, this jurisdictional dilemma should be resolved.

This article first summarizes the unclassified Standing Rules of Engagement (Standing ROE)[15] and Rules for the Use of Deadly Force (Rules of Deadly Force)[16] that currently apply to military forces. Second, this article describes the international agreements that protect forces from foreign criminal process in some countries. Third, this article highlights international, foreign and domestic laws that subject U.S. forces to local jurisdiction, sampling four jurisdictions where the military rules could potentially violate criminal law. Finally, as a partial solution, this article advocates jurisdiction-specific standards that incorporate local law and U. S. policy concerning the application of force. Without limiting the inherent right of self-defense, jurisdiction-specific standards should modify the rules, appropriately excluding the authorization to go beyond self-defense when criminal liability is at stake. The solution is only partial because the United States cannot force sovereign nations to give up criminal jurisdiction, nor force domestic U.S. states to immunize military personnel. If the United States continues to send military personnel to such places, the risks will remain; however, they should be minimized as much as possible under the law.

This article will not address the issue of whether the individual right to use defensive force imposes an inherent duty to use force, like the obligation levied on commanders under the Standing ROE.[17] Furthermore, the issues raised herein exist neither in combat operations, nor in a chaotic society, where judicial infrastructure has collapsed and cannot be imposed on U.S. forces. On the contrary, these issues pertain to a broad scope of common military activity–such as transporting weapons along California highways between military bases for training, taking liberty in the United Arab Emirates (U.A.E.) during a deployment to the Middle East, or conducting a bilateral exercise in Thailand. In each of these peacetime environments, security is paramount; thus, rules governing the use of force apply. However, in each of these locations, the domestic law of the host jurisdiction–California, U.A.E., or Thailand–also applies. More importantly, the law may trump the U.S. rules and hold individuals criminally liable for their official actions.

The Standing Rules of Engagement

Rules of engagement are "[d]irectives issued by competent military authority which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered."[18] As military directives, the rules of engagement are not law.[19] Although they may be based in law, directives merely provide policy, authority, mission definition, and responsibility.[20] The Standing ROE,[21] issued by the Chairman, Joint Chiefs of Staff, provide "guidance on the application of force for mission accomplishment and the exercise of the inherent right and obligation of self-defense."[22] The Standing ROE used to apply "during *all* military operations and contingencies," without regard to location in or outside the United States.[23] However, as of 15 January 2000, the Standing ROE apply during "operations, contingencies, and terrorist attacks" *outside* the United States, and during attacks against the United States.[24]

The Standing ROE authorize the use of all "necessary means available and all appropriate actions" in self-defense.[25] They specify:

> (1) "Attempt to De-Escalate the Situation" if possible by providing the hostile force a warning and "opportunity to withdraw or cease threatening action;"
> (2) "Use Proportional Force[26]–Which May Include Nonlethal Weapons[27]–to Control the Situation;" and

---

15. Chairman, Joint Chiefs of Staff Instr. 3121.01A, Standing Rules of Engagement for U.S. Forces, Enclosure (A) (15 Jan. 2000) [hereinafter CJCS Instr. 3121.01A]. CJCS Instr. 3121.01A canceled Chairman, Joint Chiefs of Staff Instr. 3121.01, Standing Rules of Engagement for U.S. Forces (1 Oct. 1994) [hereinafter CJCS Instr. 3121.01]. CJCS Instr. 3121.01A, para. 2.

16. U.S. Dep't. of Defense, Dir. 5210.56, Use of Deadly Force and the Carrying of Firearms by DOD Personnel Engaged in Law Enforcement and Security Duties (25 Feb. 1992) (administrative reissuance incorporates change 1, 10 Nov. 1997) [hereinafter DOD Dir. 5210.56].

17. *See* CJCS Instr. 3121.01A, *supra* note 15, para. 6(b) & encl. A, para. 2(a). "These [Standing Rules of Engagement] do not limit a commander's inherent authority and *obligation* to use all necessary means available and to take all appropriate actions in self-defense of the commander's unit and other US forces in the vicinity." *Id.* (emphasis added).

18. The Joint Chiefs of Staff, Joint Pub. 1-02, Department of Defense Dictionary of Military and Associated Terms 390 (23 Mar. 1994; amended 24 Jan. 2000) [hereinafter Joint Pub. 1-02].

19. *See* Office of the Secretary of Defense, Directives Section, *DOD Issuances*, *at* http://web7.whs.osd.mil/general.htm (last visited Mar. 25, 2000). A directive is "a broad policy document containing what is required by legislation, the President, or the Secretary of Defense to initiate, govern, or regulate actions or conduct by the DOD Components . . . ." *Id.*

20. *Id.*

21. CJCS Instr. 3121.01A, *supra* note 15.

(3) "Attack to Disable or Destroy" when "the only prudent means" to stop a hostile act or intent.[28]

While these three measures appear conservative, the guidance further states "pursue and engage hostile forces that continue to commit hostile acts or exhibit hostile intent,"[29] an action that may go beyond restrictive views of self-defense.[30] Furthermore, the Standing ROE do not impose a duty to retreat in self-defense.[31] Instead, they contemplate escalating measures, beginning with a warning, if feasible, and culminating in an offensive pursuit.[32] They also confirm that "[t]he individual's inherent right of self-defense is an element of unit self-defense."[33]

---

22. *Id.* at encl. A, para. 1(a). "ROE supplemental measures apply only to the use of force for mission accomplishment and do not limit a commander's use of force in self-defense." *Id.* at para. 6b. A sample unclassified pocket card, based on the Standing ROE in effect 1994-1999 states:

> STANDING ROE DO NOT CHANGE—MEMORIZE:
> A. Self-defense—Take all Necessary and Appropriate Action to defend yourself and other U.S. Forces against a Hostile Act or Hostile Intent.
> B. Hostile Act—Attack or force used against U.S. Forces, or force used directly to impede the mission or duties of U.S. Forces.
> C. Hostile Intent—The threat of imminent use of force. Example—a weapon pointed at U.S. Forces.
> D. Necessary and Appropriate Action.
> 1. Try to control without force. Warn if time permits.
> 2. Use force proportional in nature, duration and scope to counter the hostile act or hostile intent and ensure U.S. Forces' safety.
> 3. Attack to disable or destroy only if necessary to stop the hostile act or hostile intent. Stop your attack when the imminent threat stops.
> 4. You may pursue and engage an attacker after the hostile act or hostile intent if the threat is still imminent (not into a third country).
> E. Minimize Collateral Damage to civilians and civilian property consistent with mission accomplishment and force protection.
> SUPPLEMENTAL ROE ARE SUBJECT TO CHANGE:
> F. Forces Declared Hostile by higher military authority may be engaged without observing hostile act or hostile intent.

Id. The 15th Marine Expeditionary Unit (Special Operations Capable), I Marine Expeditionary Force, used this card, with scenarios and mission-specific supplemental ROE, for two deployments in 1997-98, which included Operations Southern Watch and Desert Thunder. The back of the card contained the Law of War principles, applicable during all operations as a matter of policy. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01A, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM, para. 5 (1999).

23. *See* CJCS INSTR. 3121.01, *supra* note 15, at para. 3 (emphasis added). The former version made exceptions for forces not under control of a combatant commander, U.S. Coast Guard units, and forces supporting authorities in domestic civil disturbances or foreign or domestic disaster assistance missions. Those units were directed to follow use-of-force policy or ROE promulgated by the cognizant agency. *Id.* at encl. A, para. 1. Service personnel typically learn the ROE with scenarios and pocket cards as training tools.

24. CJCS INSTR. 3121.01A, *supra* note 15, at para. 3. "Peacetime operations conducted by US military within the territorial jurisdiction of the United States are governed by use-of-force rules contained in other directives or as determined on a case-by-case basis for specific missions . . . ." *Id.* at para. 3(a). For operations within the United States, the Standing ROE refers to the following directives for policy and guidance: U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCE (4 Feb. 1994); U.S. DEP'T OF ARMY, DEPARTMENT OF DEFENSE CIVIL DISTURBANCE PLAN, ANN. C (15 Feb. 1991) (Garden Plot); U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (15 Jan. 1993); U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (15 Jan. 1986); DOD DIR. 5210.56, *supra* note 16; U.S. Dep't of Justice Memorandum, Uniform Department of Justice Deadly Force Policy (16 Oct. 1995); CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3121.02, RULES ON THE USE OF FORCE BY DOD PERSONNEL DURING MILITARY OPERATIONS PROVIDING SUPPORT TO LAW ENFORCEMENT AGENCIES CONDUCTING COUNTERDRUG OPERATIONS IN THE UNITED STATES (31 May 2000); and U.S. COAST GUARD, COMMANDANT INSTR. M16247 SERIES, USE-OF-FORCE POLICY, MARITIME LAW ENFORCEMENT MANUAL 4, GLOBAL COMMAND AND CONTROL SYSTEM (GCCS) *available at* http://204.36.191.2/cghq.html. CJCS INSTR. 3121.01A, *supra* at encl. I, para. 2 (additional classified reference).

25. CJCS INSTR. 3121.01A, *supra* note 15, at encl. A, para. 8a.

26. *Id.* at encl. A, para. 8a(2). When necessary, "the nature, duration, and scope of the engagement should not exceed that which is required to decisively counter the hostile act or demonstrated hostile intent and to ensure the continued protection of US forces or other protected personnel or property." *Id.*

27. *Id.* Nonlethal weapons "are explicitly designed and primarily employed to incapacitate personnel or material, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment." *Id.* at glossary, GL-22. However, "[n]either the presence nor the potential effect of nonlethal weapons will obligate a commander to use them in a particular situation. In all cases, commanders retain the right for immediate use of lethal weapons, when appropriate, consistent with these rules of engagement and the right of self-defense." *Id.*

28. *Id.* at encl. A, para. 8.

29. *Id*. at encl. A, para. 8b.

30. The ROE Glossary on "self-defense" adds that "U.S. forces may employ such force in self-defense only so long as the hostile force continues to present an imminent threat." *Id.* at glossary, GL-26, 27. Thus, the right to pursue in self-defense exists under the ROE when the pursued hostile force still poses an imminent threat by continuing "to commit hostile acts or exhibit hostile intent." *Id.* at encl. A, para. 8b. However, the ROE even define "pursuit" as an "*offensive* [vice defensive] operation designed to catch or cut off a hostile force attempting to escape, with the aim of destroying it." *Id.* at glossary, GL-25 (emphasis added).

31. *See id.* at encl. A, para. 8.

32. *Id.* at encl. A, para. 8, glossary, GL-25 (defining "pursuit" as an "offensive operation," *see supra* text accompanying note 30).

The concept of self-defense in the Standing ROE incorporates the principles of "necessity"[34] and "proportionality"[35] and is grounded in international law.[36] The United Nations (U.N.) Charter recognized the inherent right of self-defense in a multilateral international agreement.[37] Even before the U.N. Charter entered into force, customary international law recognized the inherent right of self-defense. The right stems from a state's right of self-preservation.[38] "In the exercise of [self-defense], no independent State can be restricted by any foreign power."[39]

The United States maintains that customary international law and the U.N. Charter authorize anticipatory self-defense.[40] The United States position, though historically supportable, contradicts the restrictive views of some U.N. members.[41] The authorization to use force against "hostile intent" in the Standing ROE embraces the concept of anticipatory self-defense.[42] The Standing ROE defines "hostile intent" as:

> The threat of imminent use of force against the United States, U.S. forces, and in certain circumstances, U.S. nationals, their property, U.S. commercial assets, and/or other designated non-U.S. forces, foreign nationals and their property. Also, the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital [U.S. government] property . . . .[43]

The Standing ROE similarly define "hostile act" as not only an attack, but also "force used directly to *preclude or impede the mission and/or duties* of US forces . . . ."[44] Many countries do not share the aggressive American stance, woven into the fabric of the Standing ROE. Nonetheless, that stance is the one carried in the pockets of American troops everywhere. The risk this imposes upon military personnel is that they may use force

---

33. *Id.* at glossary, GL-17. Unit self-defense is the "act of defending a particular U.S. force element, including individual personnel thereof, and other U.S. forces in the vicinity, against a hostile act or demonstrated hostile intent." *Id.* at encl. A, para. 5d. "A unit commander has the authority and obligation to use all necessary means available and to take all appropriate actions" in unit self-defense. *Id.* at encl. A, para. 7c.

34. *Id.* at encl. A, para. 5f(1). Necessity "[e]xists when a hostile act occurs or when a force or terrorist(s) exhibits hostile intent." *Id.*

35. *Id.* at encl. A, para. 5f(2). The principle of proportionality mandates that "[f]orce used to counter a hostile act or demonstrated hostile intent must be reasonable in intensity, duration, and magnitude to the perceived or demonstrated threat based on all facts known to the commander at the time . . . ." *Id.*

36. International law develops from international agreements, custom, general principles of law, judicial decisions, and prominent scholarship. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 102-103 (1986). "International law is law like other law . . . . States . . . consider themselves bound by it . . . . It is part of the law of the United States, respected by Presidents and Congresses, and by the States, and given effect by the courts." *Id.* at ch. 1, introductory note; *see also* U.S. CONST. art. I, § 8 (referring to the "Law of Nations").

37. U.N. CHARTER art. 51. The United States joined the U.N. in 1945 when the U.N. Charter entered in force. The U.N. represents 188 countries. United Nations, *United Nations Member States*, *at* http://www.un.org/Overview/unmember.html (updated Mar. 10, 2000).

38. Henry Wheaton, *Elements of International Law, in* 19 THE CLASSICS OF INTERNATIONAL LAW 1, 75 (James Brown Scott, ed., Carnegie Endowment for Int'l Peace 1936) (1866).

39. *Id.* "[T]he exercise of these absolute sovereign rights can be controlled only by the equal correspondent rights of other States, or by special compacts freely entered into with others . . . ." *Id.*

40. The requirements for anticipatory self-defense originated in the classic *Caroline* case in 1837, when the Secretary of State agreed with the British Special Minister that force is authorized when the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." *See* JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906) (quoting letter from Mr. Webster, United States Secretary of State to Lord Ashburton, the British Special Minister to Washington, D.C. (Aug. 6, 1842)), *cited in* Sean M. Condron, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115, 130 (Sept. 1999) (explaining that the British attacked the *Caroline,* a U.S. ship carrying supplies to Canada during the Canadian Rebellion, resulting in the agreement on self-defense); *but see* Timothy Kearley, *Raising the Caroline,* 17 WIS. INT'L L.J. 325, 326 (1999) (arguing that the *Caroline* doctrine has been applied "to circumstances to which it was not intended to apply").

41. *See* Lieutenant Commander Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense,* 45 NAVAL L. REV. 126, 127 (1998) (discussing the *Caroline* principles and stating that the U.S. Standing ROE "grant the right of unit self defense a particularly wide ambit . . . [which] is not justified under international law").

42. *See* CJCS INSTR. 3121.01A, *supra* note 15, at encl. A, paras. 5(h), 7(c).

43. *Id.* at encl. A, para. 5(h). The Standing ROE Glossary further defines "hostile intent:"

> When hostile intent is present, the right exists to use proportional force, including armed force, in self-defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat. A determination that hostile intent exists and requires the use of proportional force in self-defense must be based on evidence that an attack is imminent. Evidence necessary to determine hostile intent will vary depending on the state of international or regional political tension, military preparations, intelligence and [indications] and [warning] information.

Id. at glossary, GL-15 (amplifying and assessing "hostile intent" further in classified text).

in self-defense in a country that views the inherent right of self-defense more restrictively than the United States. Consequently, foreign authorities may find the use of force excessive or criminal.

Rules for the Use of Deadly Force by Law Enforcement and Security Personnel

In the Khobar Towers bombing aftermath, robust force protection plans are mandatory,[45] requiring round-the-clock security during deployments. As a result, numerous deployed troops stand duty as security personnel in ports and camps, receiving ammunition and instruction on the Rules of Deadly Force in accordance with regional directives.[46] Like the Standing ROE, the Rules of Deadly Force exist in a military directive.[47] Thus, like the Standing ROE, the rules themselves are not law.[48] The rules establish policy and authorize military personnel "to carry firearms while engaged in law enforcement or security duties, protecting personnel, vital Government assets, or guarding prisoners."[49]

Under the Rules of Deadly Force, security and law enforcement personnel have authority to use deadly force, as a last resort, in circumstances that move beyond self-defense.[50] Specifically, they can use deadly force as follows:

(1) In defense of self and others;
(2) To prevent theft or sabotage of national security assets designated "vital" by appropriate authority;[51]
(3) To prevent theft or sabotage of property inherently dangerous to others;[52]
(4) To prevent serious offenses against persons;
(5) To apprehend or arrest certain persons; and,
(6) To prevent escape of certain prisoners.[53]

These rules, broader than the Standing ROE,[54] apply predominantly as a matter of force protection.[55] More importantly, they are triggered by the mere presence of U.S. forces, whether conducting operations, exercises, transit, or liberty. One author recently commented:

> As the United States military engages in operational missions at a record pace, the need for commanders to understand their force protection responsibilities has never been greater. Force protection responsibility for deployed personnel is one of the most confusing and contentious issues in every military operation. Because terrorism is a constant concern, commanders agonize over their force protection responsibilities and demand that the boundaries of their force protection authority be defined with laser-like preciseness.[56]

---

44. *Id.* at encl. A, para. 5g, glossary, GL-14 (amplifying and providing examples of "hostile act" in classified text) (emphasis added).

45. *See* U.S. Dep't of Defense, Dir. 2000.12, DOD Antiterrorism/Force Protection (AT/FP) Program (13 Apr. 1999) [hereinafter DOD Dir. 2000.12]; U.S. European Command, Operations Order 98-01, Antiterrorism/Force Protection (21 Feb. 1998) [hereinafter EuCom Op. Ord. 98-01]; U.S. Pacific Command, Operations Order 5050-99, Antiterrorism/Force Protection (11 Jan. 1999) [hereinafter PaCom Op. Ord. 5050-99]; U.S. Central Command, Operations Order 97-01A, Force Protection (15 Apr. 1999) [hereinafter CentCom Op. Ord. 97-01A]; U.S. Southern Command, *Command Specific Information*, *at* http://www.southcom.mil/scnet/J337/info.htm (last visited Mar. 11, 2000) [hereinafter SouthCom Specific Information].

46. *See* DOD Dir. 2000.12, *supra* note 45; EuCom Op. Ord. 98-01, *supra* note 45; PaCom Op. Ord. 5050-99, *supra* note 45; CentCom Op. Ord. 97-01A, *supra* note 45; SouthCom Specific Information, *supra* note 45.

47. DOD Dir. 5210.56, *supra* note 16.

48. *See* Directives Section, *supra* note 19.

49. DOD Dir. 5210.56, *supra* note 16, at paras. 2.2, 4-6. The directive does not apply in certain cases, such as when ROE are in effect during military operations, in a wartime combat zone, in a hostile fire area, when under control of another federal agency carrying firearms in support of the mission, in a civil disturbance mission area, or during a training mission. *Id.* at para. 2.3.

50. *Id.* at encl. 2; *see also* CentCom Op. Ord. 97-01A, *supra* note 45; U.S. European Command, Policy Letter No. 98-03, subject: Policy for the Arming of Security Personnel (22 Feb. 1999).

51. For example, in the U.S. Naval Central Command area of responsibility, naval ships and aircraft are designated as vital national security assets. Message, 061230Z Nov 96, U.S. Naval Central Command, subject: Designation of National Security Assets Justifying Use of Deadly Force (6 Nov. 1996). Assets are designated "vital" only when their "loss, damage, or compromise would seriously jeopardize the fulfillment of a national defense mission. Examples include nuclear weapons; nuclear command, control, and communications facilities; and designated restricted areas containing strategic operational assets, sensitive codes, or special access programs." DOD Dir. 5210.56, *supra* note 16, at encl. 2, para. E2.1.2.2.

52. DOD Dir. 5210.56, *supra* note 16, at encl. 2, para. E2.1.2.3. This rule protects property such as "operable weapons or ammunition, that are inherently dangerous to others [and] in the hands of an unauthorized individual, present a substantial potential danger of death or serious bodily harm to others. Examples include high risk portable and lethal missiles, rockets, arms, ammunition, explosives, chemical agents, and special nuclear material." *Id.*

Part of the precision commanders must demand includes knowing the consequences of using force, particularly in a host nation that: (1) retains primary criminal jurisdiction; and, (2) may regard the U.S. application of force as criminal. If the authority to use deadly force is not grounded in law, then such use of force may impose criminal liability.

International Agreements on Criminal Jurisdiction

An international agreement between nations signifies their intention to be bound in international law to its provisions.[57] Military directives govern the negotiation of international agreements, including status of forces agreements (SOFAs), by Department of Defense personnel.[58] A SOFA "defines the legal position of a visiting military force deployed in the territory of

---

53. *Id.* at encl. 2, para. E2.1.2. A sample troop pocket card elaborates as follows:

> Use of Force Rules for Law Enforcement and Security Personnel
> These rules do not limit your inherent right to use all necessary means available and to take all appropriate action in self-defense of yourself, your unit, and other U.S. forces in the vicinity.
> Definition—Deadly force is force that a person uses causing, or that a person knows or should know would create a substantial risk of causing, death or serious bodily harm.
> Deadly force is justified only under conditions of extreme necessity and as a last resort when *all lesser means have failed or cannot reasonably be employed*. Then deadly force is justified when it reasonably appears necessary in the following circumstances:
> 1. In Self-defense and Defense of Others. To protect security or law enforcement (LE) personnel or others who are reasonably believed to be in imminent danger of death or serious bodily harm.
> 2. In Defense of Property Involving National Security. To prevent actual theft or sabotage of assets designated vital to national security, including U.S. Navy ships, U.S. Navy and U.S. Marine Corps aircraft in the NavCent AOR.
> 3. In Defense of Property Inherently Dangerous to Others. To prevent actual theft or sabotage of weapons, ammunition, explosives and property whose theft or destruction presents a substantial potential danger of death or serious bodily injury to others.
> 4. To Prevent Serious Offenses Against Persons. To prevent commission of a serious offense involving violence and threatening death or serious bodily injury to another, such as murder, armed robbery, or aggravated assault.
> 5. Apprehension or Arrest. To arrest, apprehend or prevent the escape of a person who, there is probable cause to believe, committed an offense described above.
> 6. Escapes. When deadly force has been specifically authorized to prevent escape of a prisoner who security/LE personnel have probable cause to believe poses a threat of serious bodily harm to security/LE personnel or others.
> 7. Lawful Order. When ordered to use deadly force by competent authority. Competent authority in the NavCent AOR is an E-5 or above who has knowledge of the relevant facts and circumstances which justify deadly force in accordance with the rules above. The person who is directed to use deadly force must have a clear description of the person against whom deadly force is authorized, and a general knowledge of the circumstances that warrant deadly force.
> When using force:
> A. Use only the minimum amount of force necessary, applying a continuum of force including verbal commands, contact control, compliance techniques, and defensive tactics if possible, before resorting to deadly force.
> B. Warning shots are prohibited for safety reasons.
> C. If you must fire, fire with due regard for the safety of innocent bystanders.
> D. If you must fire, fire with the intent of rendering the person incapable of continuing the activity or behavior which prompts you to fire.
> E. Holstered firearms should not be unholstered unless there is a reasonable expectation that deadly force may be necessary.
> The killing of an animal is justified for self-defense, or to protect others from serious injury.

The 15th Marine Expeditionary Unit (Special Operations Capable), I Marine Expeditionary Force, used these rules, supplemented with force protection scenarios, to train thousands of Marines who stood peacetime security duty in low to high threat countries in Southeast Asia, the Middle East and Africa during deployments in 1997-98. The card is based on DOD Dir. 5210.56, *see id.,* and applicable implementing guidance by subordinate commands. *See* U.S. Central Command, Reg. 190-3, Use of Deadly Force and the Carrying of Firearms by USCentCom Personnel Engaged in Law Enforcement and Security Duties (26 Apr. 1993); U.S. Dep't of Navy, Secretary of the Navy Instr. 5500.29B, Use of Deadly Force by Personnel in Conjunction with Security Duties (28 Sept. 1992); U.S. Marine Corps, Order 5500.6F, Arming of Security and Law Enforcement Personnel and the Use of Force (20 July 1995); Message, 211230Z Nov 96, U.S. Central Command, subject: Guidance on Use of Deadly Force in Law Enforcement or Security Operations (21 Nov. 1996); Memorandum, Commander, U.S. Naval Central Command, subject: Rules for Use of Deadly Force (22 Apr. 1997) (authorizing deadly force on lawful order).

54. *See* CJCS Instr. 3121.01A, *supra* note 15. The Standing ROE authorize self-defense against a hostile act or demonstrated hostile intent directed at U.S. forces or other protected entities. *Id.* at encl. A, paras. 5(g)-(h), 7(c). Similarly, the Rules of Deadly Force authorize self-defense. DOD Dir. 5210.56, *supra* note 16, at encl. 2, E2.1.2.1. However, the Rules of Deadly Force also authorize deadly force to protect vital and inherently dangerous assets, to prevent violent crime against anyone, and to apprehend suspects or prevent escape of certain prisoners. *Id.* at encl. 2, E2.1.2.2-.6.

55. *See generally* DOD Dir. 2000.12, *supra* note 45; EuCom Op. Ord. 98-01, *supra* note 45; PaCom Op. Ord. 5050-99, *supra* note 45; CentCom Op. Ord. 97-01A, *supra* note 45; SouthCom Specific Information, *supra* note 45.

56. Major Thomas W. Murrey, Jr., U. S. Air Force*, Khobar Towers' Progeny: the Development of Force Protection*, Army Law., Oct. 1999, at 1.

57. *See* U.S. Dep't of Defense, Dir. 5530.3, International Agreements, encl. 2, para. E2.1.1 (11 June 1987) [hereinafter DOD Dir. 5530.3]; U.S. Dep't of Defense, Dir 5525.1, Status of Forces Policy and Information (7 Aug. 1979) (with change 2 of 2 July 1997) [hereinafter DOD Dir. 5525.1]; *see also* Policy Letter, Dep't of Defense General Counsel, Policy Letter, subject: Interim Guidance on DOD Directive 5530.3 (International Agreements) (11 July 1996). "[C]ontingency or operations plans that contain commitments not covered by existing agreements may constitute international agreements if they are cosigned or agreed to by U.S. and foreign officials." Chairman, Joint Chiefs of Staff Instr. 2300.01, International Agreements, para. 5 (15 Sept. 1994) (C1, 19 Aug. 1996) [hereinafter CJCS Instr. 2300.01].

a friendly state."[59] A SOFA is the "middle ground" between "sovereign immunity" from local criminal process and "blanket abdication of jurisdiction" to host nation criminal courts.[60] While diplomats are accorded "sovereign immunity" under customary international law, extending that privilege to military forces is no longer the norm due to political sensitivities.[61] On the other hand, total jurisdictional surrender of U.S. forces would hinder the military mission.[62]

A SOFA generally refers to the visiting country as the "sending state," and the host nation as the "receiving state."[63] A SOFA routinely addresses, among other issues, which country has criminal jurisdiction over the visiting country's forces.[64] Criminal jurisdiction may also be covered in other binding international agreements, such as a defense cooperation agreement (DCA), an access agreement, an exchange of diplomatic notes, or a temporary agreement limited to the duration of a military exercise or operation.

Criminal jurisdiction provisions generally take one of three forms:

> 1. The sending state has exclusive jurisdiction over its members in all cases;
> 2. The sending and receiving states have exclusive jurisdiction over offenses which are unique to their own laws; and
> 3. The states share concurrent jurisdiction, with primary jurisdiction apportioned according to the offense and victim.[65]

Administrative and technical (A&T) staff of American embassies generally benefit from the first type of provision–exclusive criminal jurisdiction with the sending state.[66] SOFAs commonly use the second and third types of provisions. These generally grant primary jurisdiction to the sending state for *official acts*, and crimes in which the victim is a sending state member. The receiving state has primary jurisdiction over all other cases. Either state may waive primary jurisdiction. Accordingly, a SOFA protects U.S. forces from foreign criminal liability for official duties. Thus, if a guard uses force in accordance with the Standing ROE or Rules of Deadly Force, his or her actions will be scrutinized in an American forum.

Such status agreements that cover criminal jurisdiction bind the parties under international law.[67] In combat or in a stateless society, where the U.S. can exert its own jurisdiction, the absence of a SOFA poses little risk. Conversely, a favorable SOFA should be the goal in other instances when military personnel enter a foreign jurisdiction–for training, exercises, deployments, liberty, and military operations other than war. While a SOFA need not provide blanket protection from sovereign criminal law, it should embrace official acts. However, sovereign nations must consent to an international agreement; thus, this goal may never be met. Therefore, some risk to military personnel will remain in these jurisdictions.

The North Atlantic Treaty Organization SOFA provides an example of a favorable agreement on criminal jurisdiction.[68] Article VII[69] grants the United States primary jurisdiction over official duty and U.S.-victim cases. The host nation retains primary jurisdiction in all other cases.[70] Actions taken under the Standing ROE or Rules of Deadly Force constitute official duties. Consequently, an agreement under the NATO model protects military personnel from being held criminally responsible in a foreign system for following these military rules.

---

58. DOD DIR. 5530.3, *supra* note 57; CJCS INSTR. 2300.01, *supra* note 57.

59. JOINT PUB 1-02, *supra* note 18, at 427.

60. William T. Warner, *Status of Forces Agreements, in* 4 ENCYCLOPEDIA OF U.S. FOREIGN RELATIONS 130 (Bruce W. Jentleson & Thomas G. Paterson eds. 1997).

61. *Id.* at 130-31.

62. *Id.*

63. *Id.* at 130.

64. *Id.*

65. *Id.* at 131 (listing two types of jurisdictional concepts contained in the NATO SOFA).

66. The Vienna Convention codified the privileges and immunities accorded diplomatic agents and missions that were already grounded in customary international law. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, arts. 22-45, 23 U.S.T. 3227, 500 U.N.T.S. 95-221 (entered into force on April 24, 1964; for the U.S. on December 13, 1972); s*ee generally* E. Denza, *Diplomatic Agents and Missions, Privileges and Immunities, in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1040 (Rudolf Bernhardt, ed., 1992) (1986 & 1990 addendum) (discussing historical development of diplomatic privileges and immunities and application to different categories of persons associated with the diplomatic mission).

67. Some SOFAs, such as the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA], are treaties, enacted with the advice and consent of the Senate as the supreme law of the land. *See* U.S. CONST. art. II, § 2, art. VI, cl. 2.

68. NATO SOFA, *supra* note 67.

Sovereignty of Foreign and Domestic Jurisdictions

"Obey the king's command . . . [s]ince the king's word is supreme . . . . Whoever obeys his command will come to no harm . . . ."[71]

In modern times, when on foreign and American soil, military personnel are generally subject to the law of the local jurisdiction.[72] Compliance with the Standing ROE and Rules of Deadly Force will not free an individual from the local criminal process. Unfortunately, neither the Standing ROE nor the Rules of Deadly Force address this issue prominently. Instead, they purport to authorize force without specifying its legal basis. The legal basis may change with each jurisdiction, whether foreign or American.

Foreign Jurisdictions

"The concept of domestic jurisdiction [of nations] signifies an area of internal State authority that is beyond the reach of international law."[73] International law, as codified in the U.N. Charter,[74] recognizes the general sovereignty of nations within their borders.[75] A sovereign state "governs itself independently of foreign powers."[76] Self-government includes the power to legislate.[77] Thus, in the absence of an international agreement governing criminal jurisdiction, U.S. military forces abroad are legally at the mercy of the host nation–including the sovereign's definition of crime, defenses thereto, pretrial detention, procedure, and punishment. While military vessels and embassies enjoy sovereign immunity,[78] if military personnel do not reach their ship or embassy before arrest, they can spend months or years in a foreign jail. Although the Foreign Claims Act[79] and diplomacy can assist in recovering a service member, they offer no guarantees. Consequently, to avoid jail, military personnel "must abide by the laws of the United States as well as the laws of the host nation. A force protection program must operate within the same restraints."[80]

Although the United States has international agreements that preserve criminal jurisdiction in many countries, risks remain in several nations where no such agreement exists.[81] To understand the risks involved with following the Standing ROE and Rules of Deadly Force in these nations, the military must con-

---

69. *Id.,* art. VII. Pertinent provisions state:

> The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian components and their dependents with respect to offenses, including offenses relating to the security of that State, punishable by its law but not by the law of the sending State. . . . In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply: (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to (i) offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent; (ii) offenses arising out of any act or omission in the performance of official duty. (b) In the case of any other offense the authorities of the receiving State shall have the primary right to exercise jurisdiction. (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

NATO SOFA art. VII, ¶¶ 2-3.

70. *Id.*

71. *Ecclesiastes* 8:2-5 (New International).

72. Exemption from local jurisdiction used to be implied when a sovereign permitted foreign military forces to pass through the sovereign's territory. Now, however, the "sovereign power of municipal legislation" extends to "the supreme police over all persons within the territory, whether citizens or not, and to all criminal offences committed by them within the same . . . ." Wheaton, *supra* note 38, at 118, 132.

73. Anthony D'Amato, *Domestic Jurisdiction, in* 1 Encyclopedia of Public International Law 1090 (Rudolf Bernhardt ed., 1992). The U.S. invoked the concept of domestic jurisdiction with the "Connally Reservation" to its acceptance of the International Court of Justice's (ICJ) compulsory jurisdiction, refusing to accept the ICJ's jurisdiction over matters within U.S. domestic jurisdiction. *Id.* at 1091.

74. "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State . . . ." U.N Charter art. 2, para. 7. The U.N. General Assembly also adopted a resolution which states, "No State, or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." U.N. GAOR, Supp. No. 28 at 121, U.N. Doc A/RES/2625 (XXV) (1970) (Friendly Relations Resolution). *But see* D'Amato, *supra* note 73, at 1093 (arguing that the Friendly Relations Resolution goes beyond Article 2 of the Charter, purporting to rule out actions such as humanitarian intervention and economic boycotts).

75. The international community may intervene in a domestic jurisdiction only in certain circumstances, i.e., when the nation is violating another international norm, such as human rights. U.N. Security Council measures are exempt from the Charter's restriction against intervening in matters of domestic jurisdiction. U.N Charter art. 2, para. 7, arts. 55-56 (human rights provisions).

76. Wheaton, *supra* note 38, at 44. A state acquires sovereignty upon its origin or independence. *Id.* at 28.

77. *Id.* at 110. "Every nation possesses and exercises exclusive sovereignty and jurisdiction throughout the full extent of its territory." *Id.* at 111. The effect of foreign law on a sovereign depends on the sovereign's consent. *Id.*

sider their legal systems, particularly criminal law and procedure.[82] Based on a thorough examination of the legal system, the military can adjust the Standing ROE or Rules of Deadly Force in order to maximize jurisdiction. The following descriptions of the legal systems in Thailand and Yemen provide examples of the criminal process that military personnel may face in countries without jurisdiction agreements.

Thai Criminal Law and Procedure

American military personnel frequently visit the Kingdom of Thailand in the course of duty.[83] Amphibious Readiness Group ships with Marine Expeditionary Units enroute to the Middle East and Africa stop in Thailand and other Asian countries for liberty, supplies, and limited training. Additionally, the United States conducts a bilateral military exercise, "Cobra Gold," annually in Thailand. Despite the regular United States military presence in Thailand, the United States does not have a SOFA with Thailand that retains criminal jurisdiction for official acts of Department of Defense personnel.[84] Consequently, an American service person who takes action in compliance with the Standing ROE or Rules of Deadly Force could face charges in a Thai criminal court.[85]

The Thai legal system rests primarily on civil law with common law influences, favoring written codes over jurisprudence.[86] Thai people culturally lean toward settling disputes out of court,[87] a posture that dovetails conveniently with the U.S. policy to promptly settle meritorious claims under the For-

---

78. The sovereign immunity of embassies was long recognized as a matter of customary international law and codified in the Vienna Convention. The embassy is immune from the law enforcement of the host nation, including entry, search, requisition, and service of process. Inviolability of the premises includes the host nation's duty to protect against intrusion, damage, or disturbance of the peace. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 22, 23 U.S.T. 3227, 500 U.N.T.S. 95-221; *see generally* E. Denza, *Diplomatic Agents and Missions, Privileges and Immunities, in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1040 (Rudolf Bernhardt ed., 1992) (1986) (discussing development and application of diplomatic privileges and immunities). The sovereign immunity of warships is also a matter of customary international law which the United States codified as a matter of domestic law, stating, "a foreign state shall be immune from the jurisdiction of the courts of the United States," with exceptions for state commercial activities. 28 U.S.C. §§ 1604-1605 (1994); *see generally* A.N. Yiannopoulos, *The Need for an Admiralty Sovereign Immunity Act,* TUL. L. REV. (1983), *reprinted in* 10A MODERN LEGAL SYSTEMS CYCLOPEDIA 10A.180.5, 10A.180.6 (discussing the absolute immunity of foreign warships and restrictive immunity of commercial vessels). "Warship" is defined under international law as a state's naval ship, distinctively marked, under command of a naval officer and manned by a crew under naval discipline. Convention on the High Seas, Apr. 29, 1958, art. 8, para. 2, 13 U.S.T. 2312, 450 U.N.T.S. 510; *see also* Yiannopoulos, *supra*, at 10A.180.14-.15 (discussing the immunity of hospital and other state ships).

79. 10 U.S.C. § 2734 (1994) (authorizing prompt payment of meritorious claims by foreign inhabitants for personal injury, death, and property damage caused by noncombat activities of U.S. servicemembers, whether due to negligent or criminal conduct, in order to promote friendly foreign relations).

80. Murrey, *supra* note 56, at 11 (citing U.S. DEP'T OF DEFENSE, INSTR. 2000.14, DOD COMBATING TERRORISM PROGRAM PROCEDURES, para. D.1.C (15 June 1994)).

81. The General Counsel, Department of Defense, is designated as the central repository for international agreements negotiated by its personnel, except for intelligence and standardization agreements. DOD DIR. 5530.3, *supra* note 57, at para. 5.2. The Department of State publishes an annual list of recorded international agreements to which the United States is a party. *See* TREATY AFFAIRS STAFF, DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1999 (1999), *available at* http://www.acda.gov/state (listing bilateral SOFAs in part 1 by country under "Defense," multilateral agreements in part 2 by subject, and citing sources of full texts). The Center for Law and Military Operations (CLAMO), The Judge Advocate General's School, U.S. Army, maintains a database of SOFAs and similar international agreements, available to registered Department of Defense legal personnel, linked through the Army Judge Advocate General's Corps homepage *at* http://jagcnet.army.mil/.

82. The world's legal systems fall into six basic categories: civil law, common law, customary law, Muslim law, Talmudic law, and mixed law. A civil law system, inspired by Roman law, favors codified written law. A common law system, inspired by English law and used in the United States, generally favors case law. Customary law systems may be based on practical experience or intellectual spiritual or philosophical tradition. Muslim and Talmudic systems are religious autonomous systems. The Muslim system is based predominantly on the Koran. A mixed legal system combines two or more systems. Faculty of Law, Univ. of Ottawa, Can., *World Legal Systems*, *at* http://aix1.uottawa.ca/world-legal-systems/eng-monde.htm (last modified Sept. 3, 1998).

83. Thailand is located in the area of responsibility (AOR) of the U.S. Pacific Command, headquartered in Hawaii. The Pacific Command AOR includes Australia, Bangladesh, Bhutan, Brunei, Burma (Myanmar), Cambodia, China, Comoros, Cook Island, Fiji, New Caledonia/French Polynesia (France), India, Indonesia, Japan, Kiribati, Laos, Madagascar, Malaysia, Maldives, Republic of Marshall Islands, Mauritius, Federated States of Micronesia, Mongolia, Nauru, Nepal, New Zealand, Niue, North Korea, Republic of Palau, Papua New Guinea, Philippines, Russia, Samoa, Singapore, Solomon Islands, South Korea, Sri Lanka, Taiwan, Thailand, Tonga, Tuvalu, Vanuatu, and Vietnam. *United States Pacific Command Area of Responsibility*, *at* http://www.pacom.mil/about/aor.htm (last visited Mar. 17, 2000).

84. Marine security guards and certain other military personnel such as Defense Attache Officers, are attached to American embassies and the Department of State vice the Department of Defense. They are typically covered by the embassy's Administrative and Technical (A&T) Staff agreement. An A&T agreement generally maximizes U.S. criminal jurisdiction over embassy personnel for most, if not all, offenses in the host nation. *See* Vienna Convention on Diplomatic Relations, *supra* note 66.

85. The United States maintains diplomatic relations with Thailand through an American Ambassador in Bangkok and a Thai Ambassador in Washington, D.C. Thailand, like the United States, has a constitution and three branches of government–the executive, legislative, and judicial; however, Thailand is run by a constitutional monarchy. The hereditary king is chief of state. The head of government is the prime minister, designated by the House of Representatives (*Sapha Phuthaen Ratsadon*), whose members are nationally elected by popular vote to four-year terms. The legislative branch, a bicameral National Assembly (*Rathasapha*), is composed of the House and the Senate (*Wuthisapha*), whose members are appointed to six-year terms. The monarch appoints the judicial branch–judges of the Supreme Court (*San Dika*). Thailand does not accept compulsory jurisdiction by the International Court of Justice of the United Nations. CIA, *The World Factbook*, *available at* http://www.odci.gov/cia/publications/factbook/th.html (last modified Jan. 1, 1999).

eign Claims Act.[88] Notwithstanding culture, Thai law permits both the Public Prosecutor and the injured person (or family) to institute criminal proceedings.[89] Individuals can prosecute criminal offenses by bringing a private criminal suit.[90] Moreover, the Public Prosecutor's decision not to prosecute will not bar the victim from pursuing criminal punishment.[91] Thus, without a SOFA, a U.S. serviceperson can be subject to Thai criminal law and procedure due to the insistence of the state or the victim (or family).[92]

The Thai Penal Code largely governs the criminal law of Thailand.[93] Section four establishes *in personam*[94] jurisdiction over offenders, stating: "Whoever commits an offence within the Kingdom shall be punished according to the law."[95] Ignorance of the law does not excuse criminal liability, thus a serviceperson could not defend on the ground that he or she had not been briefed on the application of Thai law.[96] The offense of murder can be punished by death, life imprisonment, or imprisonment for fifteen to twenty years.[97] The principle of self-defense, codified in section 67 of the Penal Code, states:

> Any person shall not be punished for committing any offence on account of necessity . . . when such person acts in order to make himself or another person to escape from imminent danger which could not be avoided by any other means, and which he did not cause to exist through his own fault; provided that no more is done than is reasonably necessary under the circumstances.[98]

Thus, Thai law permits actions in self-defense and defense of others in imminent danger, restricted by the principles of neces-

86. *See* Faculty of Law, Univ. of Ottawa, *supra* note 82 (defining and categorizing legal systems of the world); CIA, *supra* note 85*; see also* Apirat Petchsiri, Eastern Importation of Western Criminal Law: Thailand as a Case Study 149 (1987) (stating that Southeast Asia legal culture mixes Western and Eastern concepts of social order, including Hindu, Confucian and Buddhist ideals). Religion in Thailand is about ninety-five percent Buddhist, four percent Muslim, and less than one percent Christian, Hindu, and other religions. CIA, *supra* note 85 (1991 estimate).

87. Thai people characteristically "avoid public insistence upon their 'legal' rights [and] public litigation of their disputes in court," as public anger reflects poorly on victims, who instead may seek informal remedies such as *kha tham sop* (funeral payment) or *kha siahai* (payment for lost property or income) from the wrongdoer. An informal remedy will not preclude later criminal prosecution but will be considered favorably by a Thai court. Contrarily, in American courts, prior payments can be unfavorably considered as an admission of wrongdoing. David M. Engel, Code and Custom in a Thai Provincial Court: The Interaction of Formal and Informal Systems of Justice 62-63, 131 (1978). In addition, local police, "involved by law in every criminal infraction that occurs within their jurisdiction," may mediate minor criminal offenses under Sections 37-39 of the Criminal Procedure Code of Thailand. *Id.* at 94; Criminal Procedure Code [hereinafter Crim. Proc. Code] §§ 37-39 (Thail.), *translated in* The Criminal Procedure Code of Thailand (1981) (trans., ed. and publisher not provided in English). Such formal settlements must be approved by the prosecutor's office; however, they will preclude later criminal prosecution. Engel, *supra* note 87, at 94.

88. 10 U.S.C. § 2734. *See supra* note 79 and accompanying text.

89. Crim. Proc. Code §§ 5, 28; Petchsiri, *supra* note 86, at 163. The Criminal Procedure Code was promulgated provisionally in 1896, and permanently in 1935. Engel, *supra* note 87, at 125.

90. Crim. Proc. Code § 28; Engel, *supra* note 87, at 103-04. To go to court, a Thai plaintiff must characterize the suit as a private criminal suit (seeking state punishment for actions detrimental to society) or as a civil suit (seeking damages), or join the two suits (with the civil portion governed by the Civil Procedure Code). Crim. Proc. Code § 40; Engel, *supra* note 87, at 103-04. The private criminal suit has been permitted since the beginning of the modern Thai judicial system primarily "because the office of the public prosecutor would [have been] perceived as a new and somewhat suspicious institution in provincial Thailand . . ." *Id.* at 105.

91. Crim. Proc. Code § 34. Ordinarily, if both the victim and public prosecutor institute prosecution, the cases will be joined. *Id.* § 33.

92. There are two ways to trigger the Thai criminal process: (1) the public prosecutor screens the police officer's investigation or administrative official's inquiry and then decides to institute proceedings (vice issue a non-prosecution order); or (2) the injured person institutes a charge directly with the court, which judicially screens the case by conducting a special preliminary investigation. Petchsiri, *supra* note 86, at 163.

93. *Id.* at 162. The Penal Code is divided into three Books: Book I contains general principles of criminal law and punishment; Book II defines specific crimes and penalties, including offenses against the royal family and against individual life and body; and Book III contains penalties for petty offenses. Penal Code (Thail.), *translated in* The Thai Penal Code (1985) (trans., edition and publisher not provided in English) [hereinafter Penal Code]; Petchsiri, *supra* note 86, at 162-63. The Penal Code was promulgated in 1908. Engel, *supra* note 87, at 125.

94. "*In personam*" jurisdiction is defined as "[j]urisdiction over the person of the defendant which can be acquired only by service of process upon the defendant in the state to which the court belongs or by his voluntary submission to jurisdiction." Ballentine's Law Dictionary 691 (3d ed. 1969).

95. Penal Code § 4. Courts have territorial jurisdiction. Crim. Proc. Code § 22.

96. Penal Code § 64. Ignorance can be considered to reduce punishment. *Id.*

97. *Id.* § 288. Related crimes that might occur while carrying out the ROE or Rules of Force include assaults and some petty offenses. Called "Offences Against Bodily Harm," assaults carry punishment of up to ten years imprisonment. *Id.* §§ 295-300. Relevant "Petty Offences" include carrying arms openly and publicly, without reasonable cause, or in a religious or entertainment gathering; unnecessarily firing a gun in a place with a conglomeration of people; and drawing or showing arms in the course of a fight. These petty offenses rate a small fine, forfeiture of the arms, and/or ten days imprisonment. *Id.* §§ 371, 376, 379.

98. *Id.* § 67.

sity and proportionality. If reasonable under the circumstances, self-defense constitutes a lawful defense and requires a finding of not guilty.[99] Even if a person acts excessively, beyond reason, "if such act occurs out of excitement, fright or fear, the Court may not inflict any punishment at all."[100]

Thai criminal procedure is governed by the Criminal Procedure Code.[101] A police officer, superior administrative official, or court may issue an arrest warrant.[102] The arresting official must notify the offender of the warrant's contents and produce the warrant, if requested.[103] In addition, a search warrant may be issued in order to find the person to be arrested.[104] Thus, unless on a U.S. vessel or embassy, where the United States has sovereign immunity,[105] a military unit could be subject to search in Thailand in order to locate an alleged offender.[106] More importantly, if the person to be arrested resists, "the arrester may use all means and precautions necessary to effect the arrest according to the circumstances of the situation."[107]

Once taken into custody, an offender may be questioned at any time by the inquiring official.[108] Certain safeguards apply, though not to the level of *Miranda*[109] or Uniform Code of Military Justice, Article 31[110] warnings with which U.S. military personnel are accustomed. In Thailand, the offender must be warned that his or her words may be used as evidence against him or her at trial.[111] Furthermore, "[d]eception, threats, or promises to the alleged offender in order to induce him to make any particular statement concerning the charge against him are forbidden." Offenders may be held in custody during the inquiry into the offense, with time limits specified by law according to the gravity of the offense.[112] For murder, the Court can issue a warrant of detention for up to eighty-four days if necessary to complete the inquiry.[113] The court may authorize further detention upon entry of a charge, during a preliminary examination, or during trial.[114]

---

99. *Id.* § 68. The law also provides that a person shall "not be punished for an act done in accordance with the order of an official, even though such order is unlawful, if he has the duty or believes in good faith that he has the duty to comply with such order, unless he knows that such order is unlawful." *Id.* § 70. The Code does not define "official." If "official" includes U.S. officials, an accused American serviceperson, otherwise ignorant of Thai law, might claim in defense that he or she was following the order of officials given in the ROE or Rules of Deadly Force.

100. *Id.* § 69. If a person acts "in excess of what is reasonable under the circumstances or in excess of what is necessary" without the excuse of excitement, fright or fear, the court may impose punishment, though less than what the offense prescribes. *Id.* The court also has authority to put a person under restraint in a hospital if the court opines such person has a defective mind, mental disease or infirmity, and is not safe for the public. *Id.* § 48.

101. Petchsiri, *supra* note 86, at 163.

102. Crim. Proc. Code § 58; Petchsiri, *supra* note 86, at 164. The warrant may issue on motion of the court or official, or upon application by another person. If based on an application, the official or court must make an inquiry and find evidence of reasonable grounds to issue the warrant. Grounds may be derived from sworn testimony or any other circumstances. Crim. Proc. Code § 59. Grounds for an arrest warrant include: (1) the offender has no fixed place of residence; (2) the offense is punishable by a maximum of three years imprisonment or more; (3) the offender fails to appear or absconds; or (4) the offender fails to make bond. *Id.* § 66. Arrest without a warrant can be based on: (1) a flagrant offense; (2) an attempted or intended offense; (3) reasonable suspicion of an offense and intent to abscond; or (4) the request of another person who states a regular complaint has been filed. *Id.* §§ 78, 80.

103. *Id.* § 62.

104. *Id.* § 69(4).

105. *See supra* note 78 and accompanying text.

106. "A warrant of arrest may be executed throughout the Kingdom." Crim. Proc. Code § 77.

107. *Id.* § 83. The Code also authorizes private persons to make arrests for certain flagrant offenses, i.e., offenses causing death or bodily harm, or when an official requests assistance. *Id.* §§ 79, 82, 267 sched. Authorized private persons may also use all means necessary to effect the arrest. *Id.* § 83. Consequently, the arrester is authorized to give first aid to the arrested person, if necessary, before delivering him to the administrative or police official. *Id.* § 84.

108. *Id.* §§ 17-18.

109. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

110. UCMJ art. 31 (2000). Under U.S. military law, before being questioned, a military suspect must be advised of the right to remain silent, that any statement could be used against the suspect at trial, of the right to consult with a lawyer (appointed or retained) before questioning, of the right to have the lawyer present during questioning, and of the right to stop answering questions at any time. *Id.*

111. Petchsiri, *supra* note 86, at 163.

112. Crim. Proc. Code § 87; Petchsiri, *supra* note 86, at 163. Custody shall generally be no longer than necessary to take a statement, ascertain identity and residence, and conduct an inquiry. The initial maximum period of custody, forty-eight hours, may be extended by necessity up to seven days. Beyond seven days, if a person must be held in order to complete the inquiry, the Public Prosecutor or inquiry official must ask the court to issue a warrant of detention. For petty offenses, the court may grant one remand for up to seven days; thus, a petty offender could be held up to fourteen days. For more serious offenses that carry up to ten years imprisonment, custody shall not exceed forty-eight days. For offenses that carry a maximum punishment of ten years or more, custody shall not exceed eighty-four days. Crim. Proc. Code § 87. Offenders may also be released with or without bail. Petchsiri, *supra* note 86, at 163.

When charged by the Public Prosecutor, the accused has the following rights at the preliminary examination: to appear; to receive a copy of the charge and an explanation of it; to enter a plea; to make or refuse to make a statement; and to have the assistance of counsel.[115] The accused has no right to adduce evidence during a Public Prosecutor's preliminary examination.[116] When charged by a private prosecutor, the accused has no right to appear at the preliminary examination or to make a statement; however, the accused does have the right to counsel, to cross-examine witnesses, and to receive a copy of the charge.[117] If the prosecutor establishes a prima facie case,[118] the court accepts the charge and proceeds to trial.[119]

At trial, the accused ordinarily has a right to appear[120] in open court.[121] For serious offenses such as murder, which carry a maximum sentence of ten years or more, the accused also has a right to court-appointed counsel.[122] The presumption of innocence applies, and both sides present opening statements, evidence and argument.[123] Nonetheless, "the court may at any time conduct its own investigation" and take over witness examination.[124] There is no provision in the Thai Penal Code for trial by jury. At the trial's conclusion, the court dismisses the case and releases the accused, or convicts the accused and determines appropriate punishment.[125] To determine punishment, the court may consider prior informal settlements, which do not bar prosecution, as well as extenuating circumstances.[126]

In summary, Thailand justifies homicide in self-defense, including defense of others, but provides no justification in circumstances beyond self-defense. In addition, Thai criminal procedure provides no right to trial by jury, no right to appointed counsel except at trial for the most serious offenses, and no right to be present at a preliminary examination by a private prosecutor. Consequently, if military personnel apply the Rules of Deadly Force as written, they risk a serious conviction and punishment, even death, under the Thai legal system.

Yemeni Criminal Law and Procedure

The Republic of Yemen borders the Middle Eastern countries of Oman and Saudi Arabia.[127] Located on a strategic shipping lane between the Red Sea and the Gulf of Aden,[128] Yemen has been frequented by U.S. military ships and personnel on duty in the U.S. Central Command area of responsibility.[129] As in Thailand, military personnel are subject to local criminal

113. Crim. Proc. Code § 87; Penal Code § 288.

114. Crim. Proc. Code §§ 71, 88. Detention shall then continue until the court issues a warrant of release in appropriate cases or issues a warrant of imprisonment. *Id.* §§ 71-73.

115. *Id.* § 165.

116. *Id.*

117. *Id.* At a "private" prosecution, "the Court has the power to hold the preliminary examination in the absence of the accused . . ." *Id.* If not in attendance, the accused may conduct cross-examination through counsel. If allowed to attend, the accused may cross-examine witnesses with or without counsel. *Id.*

118. "Prima facie case" is defined as a "case supported by sufficient evidence to warrant submission to the jury or trier of the fact and the rendition of a verdict or finding in accord therewith." Ballentine's Law Dictionary 987 (3d ed. 1969).

119. Crim. Proc. Code § 167. If there is no prima facie case, the charge is dismissed. *Id.*

120. Crim. Proc. Code § 172. At the beginning of trial, the charge will be read and explained, and the accused will be asked whether or not he committed the offense and what will be his defense. The accused will also be allowed to make a statement. *Id.* After that, the court can proceed in the accused's absence if: (1) the maximum punishment does not exceed three years, 5000 baht, or both, when the accused has counsel and has been excused; (2) there are several accused and the prosecutor satisfies the court that certain evidence does not involve the absent accused; or (3) there are several accused and the court decides to take evidence against each accused in the others' absence. *Id.*

121. *Id.* The court may hold the trial within closed doors in the interest of public order, good morals, or national security. Crim. Proc. Code §§ 177-178.

122. *Id.* § 172; Penal Code § 288.

123. Crim. Proc. Code § 174; Petchsiri, *supra* note 86, at 164-165.

124. Petchsiri, *supra* note 86, at 164-165.

125. Crim. Proc. Code §§ 185-186. The court must read the judgment in open court within three days after trial, unless the re is reasonable ground for an extension. Crim. Proc. Code § 182. The judgment is effective immediately. § 188. If more than one judge sits on a case, decision shall be given to the majority of votes. If a majority cannot be reached on any point, that point shall be decided in favor of the accused. Crim. Proc. Code § 184. The accused also has a right to appeal on questions of fact and/or law in certain cases and to petition the King for pardon. Crim. Proc. Code §§ 193, 216, 259.

126. Penal Code § 78; Engel, *supra* note 87, at 131; Petchsiri, *supra* note 86, at 175. In criminal cases, if the defendant has already appropriately compensated the victim, the court may nonetheless have to render a verdict, but may treat the defendant as leniently as possible. Engel, *supra* note 87, at 131. Extenuating circumstances permit the court to reduce punishment by no more than one half. Such circumstances include lack of intelligence, distress, good conduct, repentance, efforts to minimize consequences, surrender, information given to the court for trial, or other similar circumstance. Penal Code § 78.

process because the United States does not have an international agreement with Yemen retaining criminal jurisdiction.[130]

Like Thailand, Yemen has a mixed legal system.[131] Islamic law dominates; however, customary law influences rural areas.[132] The three primary sources of Yemeni law are the Koran, Sacred Law (Shari'ah),[133] and the customary, non-written law of the urf. Nomadic Bedouins and rural peasants, the majority of Yemeni population, may reject Sacred Law, common in urban areas, if it conflicts with custom. Instead, Bedouins often invoke urf.[134]

> [U]rf is based on a mystical belief in the unity of the tribal blood, meaning that members of the group are jointly liable and the blood of one allows such a member to redeem the crime of another. A person guilty of murder is not alone in his crime; adult members of his family through the fifth generation are equally responsible.[135]

To settle disputes, Bedouins use *muhakkam* (arbitrators), who usually require the guilty party to indemnify the victim.[136] The arbitrator cannot award penalties.[137] On the contrary, "Yemenite Bedouins have neither prisons nor executioners."[138] Instead of meting out punishment, Bedouins and peasants observe the law of retaliation, offering sanctuary to members considered guilty of murder in order to deter a family's revenge.[139] Yemenite peasants similarly observe customary law–"[h]onor dictates that everyone should keep his pledged word and also protect guests, refugees, route companions, or women against aggression."[140] Consequently, the risks to U.S. military personnel under Yemeni customary law among Bedouins and in rural areas may be minimal. The customary redress of indemnification, vice punishment, would be authorized for payment under the U.S. Foreign Claims Act.[141] In con-

127. Yemen is one of the poorest Arab countries; however, oil production, restructuring and foreign debt relief have improved Yemen's economic condition over the last decade. Yemenis are predominantly Arab in ethnicity and Muslim (Sunni and Shi'a) in religion. There are also African-Arabs on the west coast, South Asians in the south, and Europeans in metropolitan areas, as well as Jewish, Christian, and Hindu religions. CIA, *The World Factbook*, *available at* http://www.odci.gov/cia/publications/factbook/ym.html (last visited Jan. 1, 1999).

128. *Id.*

129. The U.S. military maintains a presence in the Central Region to "preserve U.S. interests," including the "free flow of energy resources, access to regional states, freedom of navigation, and maintenance of regional stability." U.S. Central Command, *Central Command's Theater Strategy*, *at* http://www.centcom.mil/theater_strat/theater_strat.htm (last visited Mar. 24, 2000). The U.S. Central Command Area of Responsibility includes the countries of Afghanistan, Bahrain, Djibouti, Egypt, Eritrea, Ethiopia, Iran, Iraq, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Oman, Pakistan, Qatar, Saudi Arabia, Seychelles, Somalia, Sudan, Tajikistan, Turkmenistan, United Arab Emirates, Uzbekistan, and Yemen. United States Central Command, *Area of Responsibility*, *at* http://www.centcom.mil/aor_pages/aor_page.htm (visited Mar. 24, 2000).

130. Marine security guards and other military personnel at embassies, attached to the Department of State, are covered by an agreement conferred as a matter of international law under the doctrine of diplomatic immunity. *See* Vienna Convention on Diplomatic Relations, *supra* note 84 and accompanying text.

131. One source categorizes Yemen's legal system as a mix of Muslim, common and civil law. *See* Faculty of Law, Univ. of Ottawa, *supra* note 82 (defining world legal systems). *But see* CIA, *supra* note 127 (describing Yemen's legal system as "based on Islamic law, Turkish law, English common law, and local tribal customary law," not civil law). The United States maintains diplomatic relations with Yemen through an American ambassador in Sanaa, the nation's capitol, and a Yemeni ambassador in Washington, D.C. The Yemeni government is composed of a President as chief of state (elected by popular vote to five-year terms), an appointed Prime Minister as head of government, a unicameral House of Representatives (elected by popular vote to four-year terms), and a Supreme Court. Yemen has not accepted compulsory jurisdiction by the International Court of Justice of the United Nations. *Id.*

132. Janice Mack & Yorguy Hakim, *The Legal System of the Yemen Arab Republic (YAR), in* 5A MODERN LEGAL SYSTEMS CYCLOPEDIA 5A.50, 5A.50.13 (Kenneth Robert Redden ed., 1990) (Sept. 1995).

133. Shari'ah, including Hadilt-sayings and Sunna-practices of the prophet. *Id.*

134. *Id.*

135. *Id.* (citing Joseph Chelhod, *La societe Yemenite et le droit,* L'HOMME 72 (Apr.-June 1975) (Paris). *See also* S.H. AMIN, LAW AND JUSTICE IN CONTEMPORARY YEMEN 58 (1987).

136. Mack & Hakim, *supra* note 132 at 5A.50.13-.14.

137. *Id.* at 5A.50.14.

138. *Id.* at 5A.50.13.

139. *Id.* at 5A.50.14 (citing Chelhod, *supra* note 135).

140. *Id.*

141. 10 U.S.C. § 2734. *See supra* note 79 and accompanying text.

trast, in urban areas, the established criminal process imposes greater risks of punishment.

The Yemeni Code of Criminal Procedure covers the entire criminal process, including offenses and penalties.[142] Arrest procedures parallel those in Thailand.[143] Following arrest, the criminal process unfolds in two stages. During the first stage, which includes inquiry, investigation, inquisition, prosecution, and custody, the accused has no right of defense.[144] Trial before a one-judge court comprises the second stage.[145] The presumption of innocence applies;[146] however, under Islamic law the accused has no right to trial by jury.[147] The accused has a right to counsel, which may be appointed only for serious offenses, or he may defend himself.[148] In rendering a decision, the judge may only consider evidence introduced in open court.[149] The defendant has a right to appeal the preliminary court's decision, usually within thirty days, to the appellate court.[150]

The precise penalties and defenses for violent crime in Yemen remain unclear under available sources;[151] however, it is clear that a criminal violation could expose U.S. military personnel to severe punishment. Violent crime would most likely be dealt with under Shari'ah or customary law, depending on the location.[152] "Blood money is payable either by the culprit or by his kin or tribe . . . . Whether or not blood money or retaliation is to be invoked, the action to be taken depends upon the tribal society, represented by the Sheikh's Council, which alone is able to pronounce and execute the death sentence."[153] Capital punishment is authorized by crucifixion, stoning, decapitation, and death by firing squad.[154] Other penalties include flogging and severing the right hand and leg.[155]

---

142. Code Crim. Proc. (Yemen), *noted in* Mack & Hakim, *supra* note 132, at 5A.50.21. "Available sources do not disclose that there is a [substantive] criminal code in the YAR." Mack & Hakim, *supra* note 132, at 5A.50.21. Although customary law may prevail in rural areas, the government issued the Code in 1979 to provide penal justice principles "for all citizens . . . regardless of religious and tribal affiliation . . . ." *Id.* at 5A.50.18. The Criminal Procedure Code consists of four books: ~~Book I lays out individual rights and freedoms~~ and pretrial proceedings such as fact-gathering, crime detection, inquiry and investigation, and custody; Book II governs the trial phase, including jurisdiction, insanity, witnesses, evidence, review costs, severity of sentence, and annulment of judgements; Book III covers appeals; and Book IV covers sentence execution and abatement. H.A. Al-Hubaishi, Legal System and Basic Law in Yemen 82-83 (1988).

143. Arrests may be made with or without a warrant in appropriate cases. The arresting official may use reasonable force to enter property if there is a strong presumption the suspect is there; however, tradition prohibits entry if women are in the house. The official may use non-excessive force, if necessary, to overcome resistance by the arrested person or others. The suspect must be notified of the reason for arrest, and that he is entitled to see the warrant and contact a lawyer or other person. The arrested person must be treated as though innocent, and kept separate from convicts. Confessions may not be extracted by bodily or mental harm. The accused may be freed on bond. Code Crim. Proc. arts. 2, 99-100; Mack & Hakim, *supra* note 132 at 5A.50.19-.20; Amin, *supra* note 134, at 60-62.

144. Al-Hubaishi, *supra* note 142, at 83.

145. One-judge preliminary courts have jurisdiction in district capitals and counties. Mack & Hakim, *supra* note 132, at 5A.50.16. The Yemeni government originally established the judiciary and court structure with the Law of Judicial Authority No. 23 of February 21, 1976, subsequently replaced by No. 28 of September 20, 1979. *Id.* at 5A.50.14 (citing Charles S. Rhynes, Law and Judicial Systems of Nations 842-843 (1978); Tashri'at 167 (1980) (Yemen legislation in Arabic)). The Law established a High Court, Appellate Courts, Preliminary Courts, and Prosecuting Department. Mack & Hakim, *supra* note 132, at 5A.50.14-.16. Citizens and agencies may also complain directly to the Shari'ah Grievance Board. *Id.* at 5A.50.17-.18.

146. Yemen Const. art. 24 (1974), *noted in* Mack & Hakim, *supra* note 132, at 5A.50.18, *and* Al-Hubaishi, *supra* note 142, at 42; Code Crim. Proc. art. 2, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.19-.20.

147. *Id.* 5A.50.19.

148. *Id.* at 5A.50.20; Amin, *supra* note 135, at 62-63. He has a right "to present his defense and to be the last one to speak de jure on his own behalf." Mack & Hakim, *supra* note 132, at 5A.50.20-.21. The court must also provide an Arabic translator to a foreign accused, if necessary, to protect his right to know what is said at trial. Code Crim. Proc. art. 278, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.20. The accused also enjoys confidentiality with counsel. Code Crim. Proc. arts. 137, 156, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.20.

149. Code Crim. Proc. art. 303, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.19.

150. Code Crim. Proc. art. 247, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.21; Civil and Commercial Procedure Code art. 198 (Yemen), *noted in* Mack & Hakim, s*upra* note 132, at 5A.50.17 (stating that Judicial Circular No. 13 of April 19, 1980, clarified ambiguities in the Code and specified appeal time limits). At the appellate court, three magistrates conduct proceedings and rule by majority vote. Mack & Hakim, *supra* note 132, at 5A.50.15.

151. Amin, *supra* note 134, at 63; Mack & Hakim, *supra* note 132 at 50A.50.22; Al-Hubaishi, *supra* note 142, at 111-112.

152. Mack & Hakim, *supra* note 132, at 50A.50.22.

153. *Id.* (citing Chelhod, *supra* note 135, at 82).

154. Code Crim. Proc. arts. 407-413, *noted in* Mack & Hakim, *supra* note 132, at 50A.50.21; Amin, *supra* note 134, at 63. Sexual offenses carry severe penalties under Islamic law. The crimes of adultery, beastiality, homosexuality, and false accusation of unlawful intercourse are punishable by death. Mack & Hakim, *supra* note 132, at 50A.50.21. The Koran forbids alcohol consumption; public drunkenness is thus punishable by six months in jail and possible flogging. *Id.* Capital punishment and limb severance must be approved by the President, subject to pardon. Code Crim. Proc. arts. 339, 409, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.21.

Obviously, military personnel should not be exposed to these potentially extreme consequences for violating the law of Yemen, or any other country. Nonetheless, the military rules purport to authorize force without examining foreign law, even in countries without SOFAs. As a result, military personnel are currently exposed to extreme penalties if they follow the military rules as written.

Domestic Jurisdictions of the United States

The risk of severe penalties such as crucifixion and limb severance[156] do not exist in American jurisdictions. Nonetheless, in domestic activities, the military must still operate with the utmost caution. As stated by the Eighth Circuit:

> Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights.[157]

As stated earlier, the military rules are not law. Neither the Standing ROE nor Rules of Deadly Force fall under the Supremacy Clause to preempt state law on the application of force.[158] For example, while transporting equipment along state highways, is a sentry authorized to use deadly force to prevent someone from stealing inherently dangerous weapons or ammunition? The Rules of Deadly Force suggest he is so authorized;[159] however, state law does not recognize adherence to the military rules as a defense to homicide.

American jurisdictions each contain their own legislative and judicial laws on self-defense. Some impose a duty to retreat before resorting to deadly force, while others grant a right to stand ground. A sample of two service-populated jurisdictions, Texas and California law, shows critical distinctions between state law and the Defense Department's rules justifying force. In some cases, using force under a military rule would violate state law.

Texas Law of Self-Defense

In Texas, a "person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force."[160] Texas imposes a duty to retreat before resorting to deadly force, unless "a reasonable person in the actor's situation would not have retreated."[161] A person may then use deadly force "to the degree he reasonably believes the deadly force is immediately necessary: (A) to protect himself against the other's use or attempted use of unlawful deadly force; or (B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery."[162]

The Texas duty to retreat could critically restrict military defensive action under both the Standing ROE and Rules of Deadly Force. "The [Texas] statute requires that the defendant retreat, if he can do so safely, before taking human life."[163] While the military rules permit only force deemed *necessary*, the military rules do *not* contemplate withdrawal.[164] Without specific training, most military personnel would not consider

155. Code Crim. Proc. arts. 415, 418, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.21; Amin, *supra* note 134, at 63.

156. Code Crim. Proc. arts. 407-413, 415, 418, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.21.

157. Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985) (commenting on the threat to constitutional government inherent in military enforcement of civilian law arising during civil disorder at Wounded Knee, South Dakota, where plaintiffs claimed damages for unreasonable search, seizure and confinement). Interestingly, the Chief of Staff of the Army's 82d Airborne Division advised the Department of Justice to adopt more conservative Rules of Engagement against civilians during the occupation of Wounded Knee in 1973. Initially ordered to Wounded Knee to advise the Department of Defense whether federal troops should assist law enforcement, Colonel Volney Warner "counseled Department of Justice officials on the scene to substitute a shoot-to-wound policy for a then-existing shoot-to-kill policy, and suggested the use of other Rules of Engagement which were a part of a military contingency plan for civil disorders." U.S. Marshals and FBI agents adopted his advice. United States v. McArthur, 419 F. Supp. 186, 192, n.2 (D.N.D. 1976).

158. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2.

159. *See supra* note 52 and accompanying text.

160. Tex. Penal Code Ann. § 9.31(a) (Vernon 1999). "'Reasonable belief' means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." *Id.* § 1.07(a)(42). "Unlawful" includes "what would be criminal or tortious but for a defense not amounting to justification or privilege." *Id.* § 1.07(a)(48).

161. *Id.* § 9.32(a)(2). The duty to retreat does not apply in one's home against an intruder. *Id.* § 9.32(b). *See* Fielder v. State, 683 S.W.2d 565, 592 (Tex. Crim. App. 1985) (judging duty to retreat by an objective standard).

162. Tex. Penal Code Ann. § 9.32(a)(3).

163. *Fielder,* 683 S.W.2d at 592.

retreat–an action that runs counter to training and indoctrination to accomplish the mission. Nonetheless, in other ways, Texas law complements the Standing ROE, matching concepts of hostile act and intent with "use or attempted use of unlawful force," and incorporating principles of necessity and proportionality.[165] Texas law also parallels the military rule that authorizes deadly force to prevent violent offenses; however, Texas does *not* permit deadly force to prevent theft or sabotage of inherently dangerous property or vital assets.[166] Such deadly force would arguably violate Texas law.

California Law of Self-Defense

California generally authorizes defensive action when someone is in "imminent peril of death" or serious bodily harm.[167] California imposes no duty to retreat–persons have a right to stand their ground, unless they initiated the affray.[168] In addition, like the Standing ROE, California has a limited right to pursue in self-defense.[169] However, like Texas, California has no equivalent to the military rules that authorize deadly force to protect dangerous property or vital assets. Thus, when armed guards transport weapons along California highways, they have no right, under California law, to use deadly force to prevent theft of those weapons.

Specifically, California law justifies homicide for self-defense, defense of others, defense of habitation,[170] violent-felon apprehension,[171] riot suppression, and peacekeeping.[172] The law also justifies homicide by "public officers and those acting by their command" in the discharge of legal duty, to retake escaped felons or to arrest fleeing felons.[173] Judicial interpretation limits the Code's justifications for homicide.[174] Similar to the Standing ROE, California case law employs the principles of proportionality and necessity to limit the degree of force one may use in self-defense. Resistance must be propor-

164. *See* CJCS INSTR. 3121.01A, *supra* note 15, at encl. A, para. 8.

165. TEX. PENAL CODE ANN. § 9.31(a).

166. *Id.* § 9.32(a)(3).

167. People v. Keys, 145 P.2d 589, 596 (Cal. Ct. App. 1944).

168. *See* People v. Collins, 11 Cal. Rptr. 504, 513 (Cal. Ct. App. 1961). "A person who without fault on his part is exposed to sudden felonious attack need not retreat . . . . [H]e may stand his ground and . . . he may pursue his assailant until he has secured himself from danger . . . ." *Id.* The right to stand one's ground in self-defense developed from case law and does not appear in the Penal Code.

169. *See id.* at 513 (upholding the right to pursue a felonious assailant, if reasonably necessary, until one is secure from danger, *even though* safety may be gained more easily by flight or withdrawal). However, "[w]hen that danger has passed and when the attacker has withdrawn from combat, the defendant is not justified in pursuing him further and killing him, because the danger is not then imminent . . . ." *Keys*, 145 P.2d at 596.

170. *See* People v. Ceballos, 526 P.2d 241, 242-43, 246, 250 (Cal. 1974). The court limited the defense of habitation to burglaries which reasonably create a fear of death or serious bodily harm. The court upheld conviction for assault with a deadly weapon of a defendant who had set a trap gun in his garage, injuring the victim, an intended burglar, while the premises were vacant. *Id.*

171. The courts distinguish between violent and nonviolent felonies, prohibiting the use of deadly force against a fleeing nonviolent-felony suspect. *See* Kortum v. Alkire, 138 Cal. Rptr. 26, 30-31 (Cal. Ct. App. 1977). The court held that Section 197 of the Penal Code prohibits deadly force "against a fleeing felony suspect unless the felony is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another." *Id.*

172. CAL. PENAL CODE § 197 (Deering 1999). Section 197 justifies homicide in the following situations:

> 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
> 2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,
> 3. When committed in the lawful defense of such person, or of a [household member], when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; . . . or,
> 4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any [violent] felony committed, or in lawfully suppressing an riot, or in lawfully keeping and preserving the peace.

Id. Justification under Section 197 will also shield the defendant from a civil suit for money damages for wrongful death. *See* Gilmore v. Superior Court, 281 Cal. Rptr. 343, 345-46 (Cal. Ct. App. 1991). "[T]here is no civil liability for a justifiable homicide . . . [which] is, in legal effect, a privileged act." *Id.* at 346.

173. CAL. PENAL CODE § 196. U.S. armed forces are not defined as "public" or "peace officers." *Id.* §§ 830.1-.2.

174. *See supra* notes 168-71 and accompanying text. The California Civil Code also states: "Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a [relative or household member], or guest," but does not authorize deadly force solely for the protection of property. CAL. CIV. CODE § 50 (Deering 1999); *see also Ceballos*, 526 P.2d at 246 ("[T]here may be no privilege to use a deadly mechanical device to prevent burglary of a dwelling house in which no one is present.").

tional to the threat.[175] Force must be only that necessary to meet the danger,[176] and it must stop once the attacker is disabled.[177] For example, a California court refused to hold as a matter of law that deadly force was justified against an unarmed assailant. Although the defendant had the right to defend himself, he did not believe the assailant intended to use a weapon; thus, his force in self-defense went beyond what was necessary.[178]

Echoing the military rule on crime prevention, the California Supreme Court clearly limited the right to use deadly force in felony-resistance cases to violent offenses such as murder, mayhem, rape, robbery, and some burglaries.[179] Similarly, California courts[180] have incorporated the U.S. Supreme Court decision that using deadly force to apprehend felons requires a threat of death or serious injury.[181] Overall, California imposes an objective standard in self-defense–an actor must actually and reasonably believe in the need to defend.[182] To achieve "perfect self-defense," the fear must reasonably be of imminent death or great bodily harm, judged under the totality of the circumstances.[183]

Thus, unlike Texas, California imposes no duty to retreat before resorting to self-defense.[184] On the other hand, similar to Texas, California provides no equivalent to the military rules that authorize deadly force to protect dangerous property and vital assets. Consequently, without modifying the rules to comply with state law, military personnel may become criminal defendants in state court.

---

175. *See* People v. Lopez, 23 Cal. Rptr. 532, 538 (Cal. Ct. App. 1962) (holding that "the degree of resistance" must appear not clearly disproportionate to the injury threatened).

176. *See* People v. Harris, 97 Cal. Rptr. 883, 885 (Cal. Ct. App. 1971) (holding that "use of excessive force destroys the justification," and justifying the use of only such force as is, or reasonably appears to be, necessary to resist the harm).

177. *See* People v. Lucas 324 P.2d 933, 936 (Cal. Ct. App. 1958) ("The danger which justifies homicide must be imminent . . . . [M]easures of self-defense cannot continue after the assailant is disabled . . . .").

178. *See* People v. Clark, 181 Cal. Rptr. 682, 687-88 (Cal. Ct. App. 1982).

179. *See Ceballos*, 526 P.2d at 256-46.

180. California cases have turned on the facts surrounding both the crime and the arrest. For example, one court exonerated a man who killed the fleeing nighttime burglar of his son's unoccupied residence. The court held that Section 197(4), *supra* note 172, applies at least to crimes that were felonies at common law, e.g., nighttime residential burglaries, but limited its interpretation to offenses that precede the U.S. Supreme Court's decision in *Tennessee v. Garner,* 471 U.S. 1 (1985)). *See* People v. Martin, 214 Cal. Rptr. 873, 881-82 (Cal. Ct. App. 1985) (affirming trial court that set aside manslaughter charge, finding defendant's gun use necessary to apprehend the victim-burglar under the circumstances, but stating that, "necessarily limits the scope of justification for homicide under section 197"). In contrast, the court denied the felony apprehension defense to a defendant who killed a burglar two days after the crime, stating the burglary of an unoccupied apartment did not threaten death or serious bodily harm. *See* People v. Quesada, 169 Cal. Rptr. 881, 883-85 (Cal. Ct. App. 1980); *see also* People v. Piorkowski, 115 Cal. Rptr. 830, 833-34 (Cal. Ct. App. 1974) (limiting the justification to use deadly force to make an arrest, under Section 197 of the Penal Code, to felonies which threaten death or great bodily harm).

181. In *Tennessee v. Garner,* 471 U.S. 1, the U.S. Supreme Court held:

> [A] Tennessee statute permitting police to use deadly force to prevent escape of all felony suspects whatever the circumstances, is constitutionally unreasonable. It noted that insofar as the statute authorizes use of such force against apparently unarmed, nondangerous suspects it violates the Fourth Amendment [of the U.S. Constitution on unreasonable searches and seizures]. The court held that deadly force may not be used unless it is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the pursuing officer or others.

Martin, 214 Cal. Rptr at 882 (citing *Garner*, 471 U.S. at 2-4).

182. *See* People v. Humphrey, 921 P.2d 1, 6 (Cal. 1996). An honest but unreasonable belief, called "imperfect self-defense," nonetheless reduces murder to manslaughter, as the criminal intent of malice is deemed lacking. *Id.*

183. *See id.*; People v. Lucas, 324 P.2d 933, 936 (Cal. Ct. App. 1958) (fearing that danger will *become* imminent is insufficient); People v. Turner, 195 P.2d 809, 814 (Cal. Ct. App. 1948). "The circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone." CAL. PENAL CODE § 198 (Deering 1999).

184. *Compare* People v. Collins, 11 Cal. Rptr. 504, 513 (Cal. Ct. App. 1961), *with* TEX. PENAL CODE ANN. § 9.32(a)(2) (Vernon 1999).

Jurisdiction-Specific Standards

To comply with local law, the Department of Defense should promulgate jurisdiction-specific modifications to the military rules. For example, if using deadly force to prevent theft of inherently dangerous property would violate foreign law and risk foreign criminal jurisdiction, then a modification to the Rules of Deadly Force should apply in that country. Alternatively, the Department of Defense should articulate the legal basis and policy for authorizing violations of state and foreign law. The on-scene commander should not be expected to determine U.S. foreign or domestic policy in this regard, nor make ad hoc adjustments to the governing rules after hasty interagency coordination. More importantly, in a foreign jurisdiction, the on-scene commander may not have authority to negotiate with local authorities. An "international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State."[185] Many international agreements are classified; the fact that some agreements even exist is classified. Moreover, these sensitive agreements are not ordinarily distributed to the units that are expected to interpret and apply them.[186]

Currently, standard legal review procedures are in place for operation plans.[187] However, these review procedures do not cover the breadth of military activity that occurs outside of an operation plan. Standard legal review procedures are also in place to maximize compliance with environmental law in foreign jurisdictions.[188] Similarly, standard legal review procedures should be in place to maximize compliance with local law on the use of force. Such procedures are not established within the Standing ROE or the Rules of Deadly Force.

The Standing ROE refer to "legal considerations" in the "Mission Analysis" task step of the ROE process, stating:

> Review higher headquarters planning documents for political, military, and legal considerations that affect ROE. Consider tactical or strategic limitations on the use of force imposed by . . . [i]nternational law, . . . U.S. domestic law and policy [and host nation] law and bilateral agreements with the United States.[189]

However, this passing reference to law incorrectly suggests that the law imposes "tactical or strategic" legal limitations; that the limitations, if any, will appear in higher planning documents; and that international, domestic, and host nation law are merely legal "considerations" instead of binding law that may trump the military rules. Similarly, the Rules of Deadly Force make only a passing reference to the law, stating, "consult as appropriate with the DOD [or Component] General Counsel . . . for *legal sufficiency* of use of deadly force implementing guidance."[190] Thus, neither the Standing ROE nor Rules of Deadly Force establish legal review procedures to ensure compliance with governing law.

To determine jurisdiction-specific standards that comply with law, this article proposes a five-step legal review process:

> 1. Determine the governing law in the jurisdiction.
> 2. Analyze the legal basis for use of force.
> 3. Compare the law to the applicable military rules.

185. DOD Dir. 5530.3, *supra* note 57, at para. 7.1 (citing the Case-Zablocki Act, 1 U.S.C. § 112b (1994)); *see* 22 C.F.R. pt. 181 (1985) (implementing the Case-Zablocki Act "on the reporting to Congress and the coordination with the Secretary of State of international agreements of the United States.").

186. *See* Murrey, *supra* note 56 (stating that a "classified agreement makes it difficult for the personnel deployed to or stationed in these countries to know the limitations of their force protection authority.").

187. *See* Chairman, Joint Chiefs of Staff Manual 3141.01A, Procedures for the Review of Operations Plans, encl. A, 13, 32-34, 36, 94, 110 (15 Sept. 1998) (reviewing whether the plan complies with U.S. domestic, international and host nation law, and whether it resolves status of forces issues).

188. The environmental law compliance standards provide a useful analogy to jurisdiction-specific legal standards. By incorporating Department of Defense guidance, host nation standards, and international agreements, theater commanders have to issue country-specific requirements in environmental law to establish fundamental compliance. Specifically, in *Federal Compliance with Pollution Control Standards*, the President mandates compliance with host nation environmental standards at overseas installations. Exec. Order No. 12,088 (1978); *see also* U.S. Dep't of Defense, Dir. 4715.5, Management of Environmental Compliance at Overseas Installations (22 Apr. 1996) (implementing Executive Order 12,088). Under the Executive Order, Environmental Executive Agents (EEAs) have ultimate regulatory authority for military components in foreign countries. The EEA must issue, for each country assigned to it, substantive provisions in Final Governing Standards (FGS). The Order also requires the publication of a baseline guidance document. The Department of Defense thus published the Overseas Environmental Baseline Guidance Document (OEBGD), containing objective criteria and management practices. The OEBGD provides environmental compliance standards to combatant commands, establishing minimum environmental protection criteria for military installations worldwide. "In cases of conflicting requirements, the standard that is more protective of human health and the environment shall apply." Harry M. Hughes, *Environmental Law for Overseas DOD Installations*, *at* http://aflsa.jag.af.mil/GROUPS/AIR_FORCE/ENVLAW/INTERNATIONAL/primover.html (last visited Aug. 23, 1999).

189. CJCS Instr. 3121.01A, *supra* note 15, at encl. L, para. 2b(1)(c). The ROE appendix on *Defense of U.S. Nationals and Their Property at Sea* also makes a passing reference to compliance with law, stating, "Defense of U.S. nationals and their property [at sea] will conform with US and international law." *Id.* at encl. B, app. A, para. 2b. However, even this reference fails to address the applicability of foreign domestic law in a host nation's territorial waters. *See id.* at encl. B, app. A. The ROE appendix on *Noncombatant Evacuation Operations* similarly states, "NEOs will be conducted in accordance with applicable US and international law," failing to address the applicability of foreign domestic law, especially in a permissive environment where the host nation government is still in control. *Id.* at encl. G, para. 2.

190. DOD Dir. 5210.56, *supra* note 16, at encl. 2, E2.1.1 (emphasis added).

4. Conduct a risk analysis.
5. Modify the rules to comply with law, or assume some risk.

Determine the Governing Law in the Jurisdiction

The first step in the analysis is to determine what law governs in a particular jurisdiction. In a foreign jurisdiction, the primary sources of law are foreign law–the domestic law of the host nation–and international law. If, however, judicial and police infrastructure in the host nation has collapsed, leaving no method to *impose* foreign law, then foreign law would not, in actuality, govern the jurisdiction. In such a case, international law and United States law would govern U.S. military forces. Next, in an American jurisdiction, the primary sources of law are the domestic law of the state or territory, and U.S. federal law. Finally, in any jurisdiction, U.S. military law applies to the actions of military forces.[191]

Analyze the Legal Basis for the Use of Force

The second step is to analyze the governing law on justifications for the use of force. The international law of the right to self-defense applies in a foreign jurisdiction. However, as noted earlier, the United States view of anticipatory self-defense under the U.N. Charter and customary international law, and the ROE's definitions of hostile act, hostile intent and the right to pursue, may go beyond the self-defense views held by some countries. Accordingly, the host nation's view of the international right of self-defense should be examined in order to determine whether differing views are of any consequence under the host nation's criminal law and procedure.

In a foreign jurisdiction, this step requires analyzing not only the host nation's substantive criminal law, but also the legal system and procedure.[192] A foreign legal system may be based on codes, cases, custom, religion, or a mixture of these elements. In addition, foreign criminal procedure may accord substantially fewer rights than American procedure, increasing the risk to personnel suspected of violating the law.

In American jurisdictions, due process under the Constitution will be standard; however, substantive distinctions on the duty to retreat must be analyzed, in addition to the justifications for the use of force in self-defense, defense of others, crime prevention, felony-arrest, and other situations. Furthermore, if the military is conducting an authorized activity in support of law enforcement, the analysis should determine whether military personnel would be considered "public" or "peace officers" under state law, with different justifications to use force that should be analyzed.[193]

In addition to the defenses of self-defense and defense of others, military criminal law allows defenses of "legal duty" and "obedience to orders" as justification for homicide and assault.[194] However, to meet the justification of "legal duty," the duty must be "legal" and "imposed by statute, regulation, or order."[195] Similarly, the defense of "obedience to orders" fails if the accused subjectively or objectively knew the orders were unlawful.[196] Consequently, if the Standing ROE or Rules of Deadly Force are not grounded in law, a serviceperson could be held liable under the Uniform Code of Military Justice for exceeding the law.[197]

---

191. *See* UCMJ art. 2 (2000).

192. Country law studies must already be maintained by "the designated commanding officer for such country, " with copies forwarded to the Judge Advocates General of the Military Services. DOD DIR. 5525.1, *supra* note 57, at paras. 4.4.1-.2. "This study shall be a general examination of the substantive and procedural criminal law of the foreign country, and shall contain a comparison thereof with the procedural safeguards of a fair trial in the State courts of the United States." *Id.*

193. "Police officers are constitutionally subjected to many burdens and restrictions that private citizens are not." Kortum v. Alkire, 138 Cal. Rptr. 26, 30 (Cal. Ct. App. 1977) (citing Kelley v. Johnson, 425 U.S. 238 (1976)).

194. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(c)-(e) [hereinafter MCM]. Under military law, homicide and assault are justified in self-defense and defense of another based on a reasonable apprehension that death or grievous bodily harm is "about to be inflicted" wrongfully. *See id.* R.C.M. 916(e).

195. *Id.* R.C.M. 916(c), discussion. "A death, injury, or other act caused or done in the proper performance of a *legal* duty is justified and not unlawful . . . . The duty may be imposed by statute, regulation, or order." *Id.* (emphasis added).

196. *Id.* R.C.M. 916(d). "It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful." *Id.*

197. If a killing or assault under the ROE or Rules of Deadly Force is unlawful, and the defenses of self-defense, defense of others, legal duty, or obedience to orders do not apply, a military member could be found guilty of murder or assault. *See* UCMJ arts. 118(b), 128; MCM, *supra* note 194, R.C.M. 916(c)-(e). Under the UCMJ, the elements of murder with "[i]ntent to kill or inflict great bodily harm" are: "(a) That a certain named or described person is dead; (b) That the death resulted from the act or omission of the accused; (c) That the killing was unlawful; and (d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person." UCMJ art. 118(b)(2). The elements of "[a]ssault consummated by a battery" are "(a) That the accused did bodily harm to a certain person; and (b) That the bodily harm was done with unlawful force or violence." *Id.* art. 128(b)(2). Murder with intent to kill or inflict great bodily harm carries "such punishment other than death as a court-martial may direct," including life imprisonment, a dishonorable discharge (for enlisted) or dismissal (for officers), and forfeiture of all pay and allowances. *Id.* art. 118(e). Assault carries a maximum punishment of dishonorable discharge, total forfeitures, and ten years confinement (for "[a]ssault in which grievous bodily harm is intentionally inflicted . . . with a loaded firearm"). *Id.* art. 128(e).

Compare the Law to the Applicable Military Rules

The third step is to compare the governing law to the applicable military rules–the Standing ROE and the Rules of Deadly Force. Rule by rule, and definition by definition, this step must find the common ground between the law and the military rules. More importantly, this crucial step must determine where the military rules would violate the law, subjecting military personnel to criminal liability. In a foreign jurisdiction, this step may include the difficult task of interpreting foreign terms that have no English synonym, or distinguishing the real-time differences between "immediate" and "imminent."

If military forces are operating under the Standing ROE, that is, in an overseas operation or contingency (or attack on the United States), then the ROE's concepts of hostile act, hostile intent, and actions in self-defense, such as the right to pursue, should be compared to: (1) the host nation's concept of actions authorized under the inherent right of self-defense under international law; and (2) the justifications for the use of force embodied in the host nation's criminal law and procedure. Even though the United States may not cater to a host nation's more restrictive view of self-defense, this detailed comparison will enable an accurate risk analysis in the next step.

If the Rules of Deadly Force apply, each of the six rules contained therein should be compared to the justifications authorizing the use of force under local law. In Thailand, Yemen, Texas and California, the two rules that authorize deadly force in defense of property (inherently dangerous property and vital assets)[198] commonly violate the law. On the other hand, the rules that authorize deadly force in defense of self and others and to prevent serious crime establish common ground from which to make adjustments, for example, to the duty to retreat. Those jurisdictions did not expose a trend in laws regarding the last two rules on arrest and escape. Thus, like the rest of the Rules of Deadly Force, they should be compared to the law of the jurisdiction.

Conduct a Risk Analysis

The fourth step in establishing jurisdiction-specific standards is to conduct a risk analysis in cases where the military rules would violate the law. Obviously, if the rules comply with the law, there is no risk of criminal liability in following the rules; thus, no risk analysis or modification of the rules is required–the analysis is complete. However, if step three discloses that the military rules, without modification, would violate the law, then the analysis continues with step four. In this step, the interests in following the military rules that violate law must be weighed against the risks of not following the law.

Besides promoting an aggressive right of self-defense, the military rules incorporate interests in matters of national security, as evidenced by the authorization to use deadly force to protect vital national security assets. In addition, the authorization to use deadly force to protect inherently dangerous property advances an interest in force protection–arguably an extension of the right of self-defense. Consequently, the importance of protecting such interests must be weighed carefully against the risks of not following the law.

The greatest peril in not conforming the military rules to the local law is faced by individual military personnel. Disregarding the law exposes them to criminal liability, prolonged incarceration, and severe penalties. In countries where the United States has an international agreement that preserves U.S. criminal jurisdiction, or in countries that historically waive their right to criminal jurisdiction, the risk to military personnel is minimal. Nonetheless, even in these countries, failing to follow the law can jeopardize diplomatic relations. In American jurisdictions, in addition to exposing military personnel to criminal liability, violating the law contradicts the principle that "[c]ivilian rule is basic to our system of government."[199] Consequently, in American jurisdictions, any interest in following military rules will rarely, if ever, outweigh the risk of not following domestic law.

Modify the Rules to Comply with the Law, or Assume Some Risk

The final step in the analysis is to modify the military rules, if necessary, to comply with the law.[200] This final step will ensure that military personnel will not go to jail for following the military rules governing the use of force. Alternatively, if the law will not be followed, then appropriate authority should articulate the underlying policy. Such a policy implies that U.S. interests outweigh the risks of not following the law; that the risks will be assumed; and that the risks, including criminal liability and punishment, will be passed on to military individuals.[201]

---

198. *See supra* notes 51-52 and accompanying text.

199. Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985).

200. Applying this five-step analysis to the jurisdictions of Thailand and California, appendices A and B provide examples of jurisdiction-specific standards. The appendices assume that the Rules of Deadly Force, vice ROE, apply, and that the governing law of the jurisdiction will be followed.

201. Such a policy decision would raise another issue not addressed here—whether military personnel would have a legal obligation to follow military rules that contradict the law. As stated in the introduction, this article does not explore the issue of whether the *individual right* to use force under military rules imposes an *individual obligation* to use force under the military rules.

Conclusion

Confident trigger-pulling and equally confident trigger-restraint should remain high priorities in maintaining a force in readiness. Consequently, there should be no doubt in the minds of military personnel about when they can, should, and must, pull the trigger. In today's diverse military operations other than war[202] and terrorist threat environment, confidence includes knowing they will *not* be incarcerated for appropriately applying the military rules on the use of force. American military personnel unselfishly lay down their lives in the line of duty. "This Nation owes them the best protection we can provide."[203] In doing the right thing–protecting the liberty of others–they should not risk losing their own liberty in a foreign or domestic jail.

Therefore, jurisdiction-specific standards on the use of force should comply with the law to the maximum extent practicable without forfeiting the inherent right of self-defense. In any area where the military conducts activity, the law of the local jurisdiction ordinarily applies.[204] The Standing ROE and Rules of Deadly Force merely establish policy; they do not supersede law. Nonetheless, they imperil the liberty of military personnel by authorizing force that does not comply with the law, exposing them to criminal liability and severe penalties. Consequently, legal review procedures should determine the legal basis for the use of force, compare the law to the military rules, and modify the rules accordingly. Alternatively, if the rules do not incorporate the law, then U.S. policy should articulate the fact that certain U.S. interests outweigh the risks of violating the law. More importantly, the Department of Defense should inform military personnel of the personal criminal liability risks imposed on them by a policy that does not follow the law.

---

202. *See* CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3500.01A, JOINT TRAINING POLICY FOR THE ARMED FORCES OF THE UNITED STATES, para. 4 (1 Jul. 1997). "Although preparing US forces to fight and win wars remains the highest national military training priority, people and units must be prepared for [Military Operations Other Than War] . . . . Skills required for MOOTW missions . . . are different than those required for warfighting." *Id.*

203. Memorandum, General Wayne A. Downing, Director, Downing Assessment Task Force, The Pentagon, to Secretary of Defense, subject: Report of the Assessment of the Khobar Towers Bombing 1 (Aug. 30, 1996).

204. In some circumstances, the governing law may be disregarded with impunity, such as when the local infrastructure has collapsed and the government is unable to govern, the United States has entered the territory by force, or an international agreement grants criminal jurisdiction to the United States.

Appendix A

Standard Rules for the Use of Deadly Force by DOD Personnel Engaged in Law Enforcement and Security Duties in Thailand

The legal authority for the use of force in this jurisdiction is the inherent right of self-defense under Article 51 of the United Nations Charter, and Section 67 of the Thai Penal Code:

> Any person shall not be punished for committing any offence on account of necessity . . . when such person acts in order to make himself or another person to escape from imminent danger which could not be avoided by any other means, and which he did not cause to exist through his own fault; provided that no more is done than is reasonably necessary under the circumstances.

Based on the governing law, the Modified Rules for the Use of Deadly Force in this jurisdiction are as follows:

> These rules do not limit your inherent right to use all necessary means available and to take all appropriate action in self-defense of yourself, your unit, and other U.S. forces in the vicinity.
>
> Definition–Deadly force is force that a person uses causing, or that a person knows or should know would create a substantial risk of causing, death or serious bodily harm.

Deadly force is justified only under conditions of extreme necessity and as a last resort when *all lesser means have failed or cannot reasonably be employed*. Then deadly force is justified when it reasonably appears necessary in the following circumstances:

> 1. *In Self-defense and Defense of Others*. To protect security or law enforcement personnel or others who are reasonably believed to be in imminent danger of death or serious bodily harm.
> 2. *To Prevent Serious Offenses Against Persons*. To prevent commission of a serious offense involving violence and threatening death or serious bodily injury to another, such as murder, armed robbery, or aggravated assault.

When using force:

> A. Use only the minimum amount of force necessary, applying a continuum of force including verbal commands, contact control, compliance techniques, and defensive tactics if possible, before resorting to deadly force.
> B. Warning shots are prohibited for safety reasons.
> C. If you must fire, fire with due regard for the safety of innocent bystanders.
> D. If you must fire, fire with the intent of rendering the person incapable of continuing the activity or behavior which prompts you to fire.
> E. Holstered firearms should not be unholstered unless there is a reasonable expectation that deadly force may be necessary.

The killing of an animal is justified for self-defense, or to protect others from serious injury.

Appendix B

Standard Rules for the Use of Deadly Force By DOD Personnel Engaged in Law Enforcement and Security Duties in California

The legal authority for the use of force in this jurisdiction is the California Penal and Civil Codes and California Supreme Court case law.

I. Under Section 197 of the Penal Code, homicide is justified in the following situations:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,
3. When committed in the lawful defense of such person, or of a [household member], when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; or,
4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any [violent] felony committed, or in lawfully suppressing an riot, or in lawfully keeping and preserving the peace.

II. Under Section 50 of the California Civil Code, "Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a [relative or household member], or guest."

III. Under California Supreme Court case law, People v. Ceballos, 526 P.2d 241 (Cal. 1974):

1. Deadly force is not authorized solely for the protection of property.
2. Homicide in defense of habitation is justified only in the case of burglaries that reasonably create a fear of death or serious bodily harm.

Based on the governing law, the Modified Rules for the Use of Deadly Force in this jurisdiction are as follows:

These rules do not limit your inherent right to use all necessary means available and to take all appropriate action in self-defense of yourself, your unit, and other U.S. forces in the vicinity.

Definition–Deadly force is force that a person uses causing, or that a person knows or should know would create a substantial risk of causing, death or serious bodily harm.

Deadly force is justified only under conditions of extreme necessity and as a last resort when *all lesser means have failed or cannot reasonably be employed*. Then deadly force is justified when it reasonably appears necessary in the following circumstances:

1. *In Self-defense and Defense of Others*. To protect security or law enforcement personnel or others who are reasonably believed to be in imminent danger of death or serious bodily harm.
2. *To Prevent Serious Offenses Against Persons*. To prevent commission of a serious offense involving violence and threatening death or serious bodily injury to another, such as murder, armed robbery, or aggravated assault.
3. *Apprehension or Arrest*. To arrest, apprehend or prevent the escape of a person who, there is probable cause to believe, committed an offense described above.

When using force:

A. Use only the minimum amount of force necessary, applying a continuum of force including verbal commands, contact control, compliance techniques, and defensive tactics if possible, before resorting to deadly force.
B. Warning shots are prohibited for safety reasons.
C. If you must fire, fire with due regard for the safety of innocent bystanders.
D. If you must fire, fire with the intent of rendering the person incapable of continuing the activity or behavior which prompts you to fire.

E. Holstered firearms should not be unholstered unless there is a reasonable expectation that deadly force may be necessary.

The killing of an animal is justified for self-defense, or to protect others from serious injury.