

## The Threat Assessment Process (TAP): The Evolution of Escalation of Force

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*As a warrior, you might one day face the single most difficult task any person will ever have to face: to decide whether to use deadly force and take a life. If you chose to take a life when you should not, or if you fail to take a human life when you should, a world of hurt will come down on you.*

*This is not an impossible task; it is a hero's task, a warrior's task. It is immensely difficult, but if we did not have men and women willing to walk out the door and face that challenge every day, within a span of a generation our civilization would no longer exist.*<sup>2</sup>

Somewhere in Iraq one such hero stands guard at a snap traffic control point (TCP).<sup>3</sup> As fellow members of his squad search vehicles, he scans the road for approaching threats. In the distance, through the dust and heat, he sees a car approaching. It doesn't appear to be slowing down.

The traditional role of escalation of force (EOF) is to help with the proportional application of force in self-defense situations.<sup>4</sup> The basic idea is simple—to increase the magnitude of force applied to an identified threat until the threat is deterred or, if necessary, eliminated.<sup>5</sup> It was envisioned to be used in times where there was no actual enemy.<sup>6</sup> Situations where angry civilians who might throw rocks and swing clubs at Soldiers could be calmed down and dispersed, hopefully, without having to resort to deadly force. In short, traditional EOF is a concept best suited for riot control, peacekeeping, and other types of military operations other than war (MOOTW).

How then did EOF find its way on to the counterinsurgency battlefields of Iraq and Afghanistan? In these conflicts, the issue has not been the excessive use of force against low-level threats, but rather the identification of who to use force against in the first place. Simply put, Soldiers were too often misidentifying threats and shooting the wrong people—people who posed no actual threat to them.<sup>7</sup> To address this problem, EOF has evolved into a new role and re-emerged on the counterinsurgency battlefield as a threat assessment tool.<sup>8</sup> In other words, in counterinsurgency EOF is not being used for its traditional purpose of limiting the amount of force used against an identified threat, but rather for the far more difficult task of threat identification. While EOF practices have been successful, EOF for threat assessment has also resulted in confusion as to its purpose and when the process is initiated. To eliminate this confusion, EOF must continue to evolve until it is a separate process whose purpose is to assist Soldiers in determining hostile act and hostile intent. A critical step in this transition is to rename this new threat assessment process to clearly distinguish it from traditional EOF. Threat Assessment Process—or TAP—is an easy to remember and appropriate name for this new threat assessment tool.

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<sup>2</sup> LIEUTENANT COLONEL DAVE GROSSMAN & LOREN W. CHRISTENSEN, ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND IN PEACE 114 (2004).

<sup>3</sup> Snap TCPs are TCPs which are quickly erected and operate for a short duration of time. See Center for Army Lessons Learned (CALL) Escalation of Force (EOF) Conference Packet, Carr Center for Human Rights and PKSOI Workshop, at the John F. Kennedy School of Government, Harvard University, at 15 (26–27 Mar. 2007) [hereinafter CALL EOF Conference Packet].

<sup>4</sup> See CENTER FOR ARMY LESSONS LEARNED, PUB. 07-21, ESCALATION OF FORCE HANDBOOK 1 (July 2007) [hereinafter CALL EOF HANDBOOK].

<sup>5</sup> *Id.*

<sup>6</sup> See The Judge Advocate General's Legal Ctr. & Sch., Standard Training Package, *Standing Rules of Engagement (SROE)* (20 Nov. 2006) [hereinafter TJAGLCS SROE STP] (“EOF procedures do not apply to Declared Hostile Forces.”).

<sup>7</sup> Greg Jaffe, *U.S. Curbs Iraqi Civilians Deaths in Checkpoint, Convoy Incidents*, WALL ST. J., 6 June 2006.

<sup>8</sup> Multi-National Corps–Iraq ROE card (Unclassified) (30 May 2007) [hereinafter MNC-I ROE card] (“2. Escalation of Force (EOF). If time and circumstances permit, use EOF to determine whether hostile act/intent exists.”).

## Traditional EOF

Prior to the Global War on Terror the thought process on rules of engagement (ROE) was simpler. The standing rules of engagement (SROE) anticipated two scenarios for the armed forces—a state of peace (applying force in self-defense) and a state of war (applying force against an identified declared hostile force).<sup>9</sup> Given the type of missions we expected to conduct in the 1990’s, EOF was seen as a useful tool in self-defense situations where there was no declared hostile force or dedicated enemy.<sup>10</sup> The prime concern in those types of operations was to avoid escalating the situation.<sup>11</sup>

One of the most common examples used for traditional EOF is a crowd control situation during peacekeeping operations. The “textbook” traditional EOF scenario often involved a squad of Soldiers manning a checkpoint between two ethnic groups as part of a peacekeeping mission. In the scenario, a visibly angry, but apparently unarmed, crowd approaches the Soldiers shouting at them and throwing rocks. In this type of situation, the squad should use the least amount of force necessary to respond to this low, but possibility escalating, threat.

In a scenario like the one above, traditional EOF was most often applied using the five S’s (Shout, Show, Shove, Shoot, Shoot) (Fig. 1).<sup>12</sup> Once the crowd demonstrated hostile intent or a committed hostile act, the squad would shout commands at the crowd to stop their actions and go home. If that failed to stop their threatening actions, the squad would then show their weapons and demonstrate their intent to use them. If that failed to pacify the crowd, the Soldiers would be authorized to shove the crowd back or use other non-lethal means. If this also failed to counter the threat, the Soldiers could then fire a warning shot. Finally, as a last resort having exhausted all other options, the squad could fire shots to eliminate specific threats within the crowd. Most of the ROE that contain the Shout, Show, Shove, Shoot, Shoot provisions also stated that if there was an immediate threat of serious injury or death, Soldiers could defend themselves or others without going through the progressive steps.<sup>13</sup>

**Traditional EOF Process<sup>14</sup>**

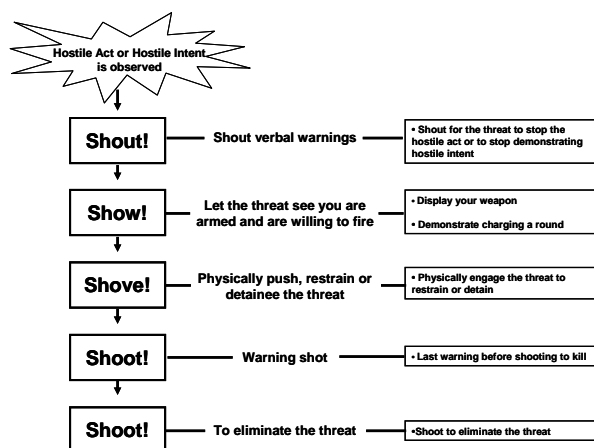


Fig. 1.

<sup>9</sup> See JOINT CHIEFS STAFF, INSTR. 3121.01B, THE STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES encl. A (13 June 2005) [hereinafter CJCSI 3121.01B]. The CJCSI 3121.01B actually allows ROE to be tailored for specific missions from restrictive self-defense based rules for peacetime and traditional peacekeeping operations, to the declaration of hostile forces during war. Though ROE can be tailored to fit between those two ends of the spectrum, ROE are still based on two paradigms: self-defense and declared hostile forces.

<sup>10</sup> TJAGLCS SROE STP, *supra* note 6, slide 23; see also Lieutenant Colonel Mark S. Martins, *Deadly Force Is Authorized, but Also Trained*, ARMY LAW., Sept./Oct. 2001, at 1; U.S. DEP’T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (14 June 2001) (this version superseded on 27 Feb. 2008).

<sup>11</sup> CJCSI 3121.01B, *supra* note 9, A-4.a.(1) (“When time and circumstances permit, the forces committing hostile acts or demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening actions.”).

<sup>12</sup> See ARCENT RUF card (unclassified) (7 July 2007) [hereinafter ARCENT RUF Card]. Used by U.S. Forces in Kuwait, it is an example of both the traditional EOF process and a mission where this type of EOF might be appropriate.

<sup>13</sup> TJAGLCS SROE STP, *supra* note 6, slide 24.

<sup>14</sup> See ARCENT RUF Card, *supra* note 12.

As the vehicle approaches, the Soldier at the snap TCP applies the rules of traditional EOF. Under these rules, he must wait until he has identified the driver of the vehicle as committing a hostile act or demonstrating hostile intent before he starts the EOF process. Traditional EOF offers no assistance in making the critical threshold decision—is the driver exhibiting hostile intent. It is only after the Soldier has determined the driver is a threat that the traditional EOF process can begin.

### Traditional EOF Becomes Threat Assessment EOF in Counterinsurgency

Applying traditional EOF in Iraq and Afghanistan is problematic to say the least. The current conflicts in these countries are not peacekeeping operations. While we are not fighting high-intensity, conventional conflicts, we are fighting counterinsurgency campaigns against real and determined enemies. Make no mistake—counterinsurgency is war.<sup>15</sup> The issue in counterinsurgency is not that we lack a designated enemy—the issue is we cannot tell the enemy from the innocent civilian.<sup>16</sup> The enemy in counterinsurgency is cloaked in the invisibility of the innocent civilians around him. He wears no uniform, he has no distinguishing characteristics, and he looks like every other civilian a Soldier encounters. If he is identified, he is likely killed or captured. Unlike in peacekeeping operations, in counterinsurgency campaigns we seek to engage the enemy.<sup>17</sup> Escalation of force procedures that encourage the enemy to disperse only to fight another day are both counterproductive and unacceptable.

Equally unacceptable was the high rate of civilian casualties suffered in Operation Iraq Freedom during the spring and summer of 2005, with many of these casualties occurring at checkpoints and during convoy operations.<sup>18</sup> In an effort to reduce civilian casualties, traditional EOF procedures were implemented in the Iraq theater of operations with a new purpose—to serve as a tool for threat assessment.<sup>19</sup> The impact was immediate and substantial as the number of civilian casualties dropped dramatically.<sup>20</sup> Interestingly, this decrease did not occur because Soldiers were using less force on civilians who presented actual threats. Rather by using EOF procedures to assess potential threats, Soldiers realized that the majority of the civilians they encountered posed no threat.

Threat identification is one of the major complaints Soldiers in Iraq and Afghanistan have with the ROE.<sup>21</sup> While the ROE tell them who they can use force against, they do not identify what those people look like. Unfortunately, when insurgents deliberately disguise themselves as civilians, ROE can never describe how to identify them. Instead, the ROE tells Soldiers that they can identify threatening individuals based on their conduct. The current Multi-National Corps – Iraq ROE card states that Soldiers “may engage the following individuals based on their conduct: persons who are committing hostile acts [and] persons who are exhibiting hostile intent.”<sup>22</sup> It also tells them that EOF is now used for threat identification, “use EOF to determine whether hostile act/intent exists.”<sup>23</sup> However, the ROE makes clear that if a hostile act or hostile intent is obvious, Soldiers may immediately engage with force to stop the threat.<sup>24</sup>

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<sup>15</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-28 (15 Dec. 2006) [hereinafter FM 3-24] (“Coin is an extremely complex form of warfare.”).

<sup>16</sup> *Id.* at 1-28, 7-7, D-3.

<sup>17</sup> *Id.* at 1-23, 1-25, 7-6; *see also* JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS VI-5 (10 Sept. 2001) [hereinafter JOINT PUB. 3-0]. In peace *keeping* operations, U.S. Forces generally monitor and facilitate the implementation of a peace agreement with the consent of the parties. In peace *enforcement* operations, U.S. Forces may use force to compel compliance, restore peace and order, or forcibly separate parties. *Id.* at VI-6. However, neither peace keeping operations nor peace enforcement operations include the active seeking and destroying of enemy fighters. *Id.* at VI-5, VI-6.

<sup>18</sup> Nancy Montgomery, *U.S. Seeks to Reduce Civilian Deaths at Iraq Checkpoints*, STARS & STRIPES, Apr. 6, 2006; Thom Shanker, *New Guidelines are Reducing Iraqi Civilian Deaths, Military Says*, N.Y. TIMES, June 22, 2006; Jaffe, *supra* note 7.

<sup>19</sup> Telephone Interview with Lieutenant Colonel Michael L. Kramer, Chief of Operational Law, MNC-I, during 2005, in Newport, RI (Dec. 17, 2007). The MNC-I Operations section drafted and implemented new guidance on EOF in 2005. *Id.* Until this point in OIF, EOF had not been stressed, presumably due to the transition from high intensity conflict to counter-insurgency. *Id.*

<sup>20</sup> Shanker, *supra* note 18; Jaffe, *supra* note 7.

<sup>21</sup> *See, e.g.*, Joshua Partlow, *Waiting to Get Blown Up*, WASH. POST, July 27, 2006, at A1.

<sup>22</sup> MNC-I ROE card, *supra* note 8 (“1. You may engage the following individuals based on their conduct: persons who are committing hostile acts [and] persons who are exhibiting hostile intent.”). Soldiers still have to be trained that not all individuals committing a hostile act or demonstrating hostile intent are the enemy. The reaction of the Soldier will depend on what type of threat the person poses.

<sup>23</sup> *Id.* (“2. Escalation of Force (EOF). If time and circumstances permit, use EOF to determine whether hostile act/intent exists.”).

<sup>24</sup> *Id.* (“When a hostile act or hostile intent is obvious, you may immediately engage with force to stop the threat.”).

In this role, EOF is not used for its traditional purpose of applying proportional force to deescalate or disperse an already identified threat, but instead is used as a method to assess potential threats. The goal in this new “threat assessment EOF” is to force the insurgent to self-identify while keeping innocent civilians from being mistaken for threats.<sup>25</sup> This approach works primarily because it uses non-force measures to put potential threats into situations where they must either comply with or disobey the Soldiers’ commands.<sup>26</sup>

Despite its successes, threat assessment EOF has resulted in confusion, frustration, and anger on the part of some Soldiers.<sup>27</sup> The source of this confusion is the conflict between traditional EOF and threat assessment EOF concerning the purpose of EOF and initiation of the EOF process. Since the purpose of traditional EOF is the proportional application of force, it follows that traditional EOF is only initiated after a Soldier recognizes a hostile act or hostile intent. Threat assessment EOF has a different purpose—to assess suspicious individuals to determine if they have hostile intent. However, even though EOF is now being used for threat assessment, Soldiers are still being trained to wait to initiate the EOF process until they recognize a hostile act or hostile intent. Confusingly, at the same time, they are also being told to use EOF to determine if hostile act or hostile intent exists.<sup>28</sup>

Contributing to this confusion is the fact that no formal, universal definition of EOF exists within the Army doctrinal structure. The Army Center for Lessons Learned Publication 07-21, *Escalation of Force Handbook*, defines EOF as “sequential actions that begin with nonlethal force measures (visual signals to include flags, spotlights, lasers, and pyrotechnics) and may graduate to lethal measures (direct action) to include warning, disabling, or deadly shots to *defeat a threat* and protect the force.”<sup>29</sup> In a recently posted training support package accessed through the U.S. Army’s Judge Advocate General’s Legal Center and School website, EOF is defined as the “use of lesser means of force when such use is likely to achieve the desired effects without endangering the Soldier or others.”<sup>30</sup> Escalation of force is also defined in Army Field Manual 3-24 as “using lesser means of force when such use is likely to achieve the desired effects and Soldiers and Marines can do so without endangering themselves, others, or mission accomplishment.”<sup>31</sup> In all of these definitions, the EOF process is triggered in response to a demonstrated hostile act or hostile intent and continues with force of ever increasing magnitude being applied.<sup>32</sup> None of the definitions account for the current use of the EOF process—to determine if a hostile act or hostile intent exists.

A conference packet assembled by the Center for Army Lessons Learned (CALL) after a March 2007 EOF workshop captures this confusion in one sentence: “However, if the driver refuses to obey *instructions and warnings*, but has not yet displayed *overt* hostile intent, Soldiers must *begin to consider* appropriate EOF measures.”<sup>33</sup> This sentence would confuse most Soldiers. It begins by assuming the Soldiers have already initiated EOF, otherwise they would not have issued instructions and warnings, which are part of both the traditional and threat assessment EOF processes. It then continues by telling the Soldiers that if the warnings do not work they must “consider” initiating EOF. To further add to the confusion, it tells Soldiers that they should only do so if the driver has not yet displayed “overt” hostile intent. The document does not explain the difference between “ordinary” hostile intent and “overt” hostile intent, or explain how a Soldier is to know the difference.

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<sup>25</sup> CALL EOF Conference Packet, *supra* note 3, at 3, 7.

<sup>26</sup> *Id.*

<sup>27</sup> Gordon Dillow, *Dillow’s Iraq: ‘Rules’ of War Limit Marines*, ORANGE COUNTY REG., Aug. 20, 2006; Jeffrey Barnett, *Frustration Likely Led to Marine Crisis in Haditha*, BIRMINGHAM NEWS, June 11, 2006; Bill Gertz, *Inside the Ring: Rules of Engagement*, WASH. TIMES, Feb. 16, 2007; James Lyons, *Untie Military Hands*, WASH. TIMES, Jan. 26, 2007.

<sup>28</sup> MNC-I ROE card, *supra* note 8.

<sup>29</sup> CALL EOF HANDBOOK, *supra* note 4, at 1 (emphasis added).

<sup>30</sup> TJAGLCS SROE STP, *supra* note 6, slide 22.

<sup>31</sup> FM 3-24, *supra* note 15, para. 1-142.

<sup>32</sup> *Id.* slide 24 (“[Y]ou may use the following escalation of force in response to hostile and/or the display of hostile intent.”).

<sup>33</sup> CALL EOF HANDBOOK, *supra* note 4, at 3 (emphasis added).

The term “perceived” hostile intent, which has recently appeared in threat assessment EOF, adds yet another source of confusion.<sup>34</sup> It is used to overcome the fact that traditional EOF only begins once a hostile act or hostile intent has been identified. In attempting to create a lower threshold for initiating EOF, the users of the terms “perceived” and “overt” hostile intent have instead created further uncertainty for Soldiers who must now decide between perceived, overt, or ordinary hostile acts or hostile intent.

This conflict is evident in the threat assessment EOF diagram at Figure 2. In this diagram, Soldiers are told to initiate EOF when a hostile act or hostile intent is observed or perceived. They are then told to “Shout, Shock, and Show,” none of which involve the actual use force. These non-force measures are intended to get the attention of, and to warn, possible threatening individuals to desist and depart. If “Show” fails to work Soldiers are then instructed to make a “split second observation and re-evaluate the threat.”<sup>35</sup> In other words, at this point in the process, the Soldier must decide “for real” if the person is actually committing a hostile act or demonstrating hostile intent before the Soldier progresses to the next step, “Shoot.”

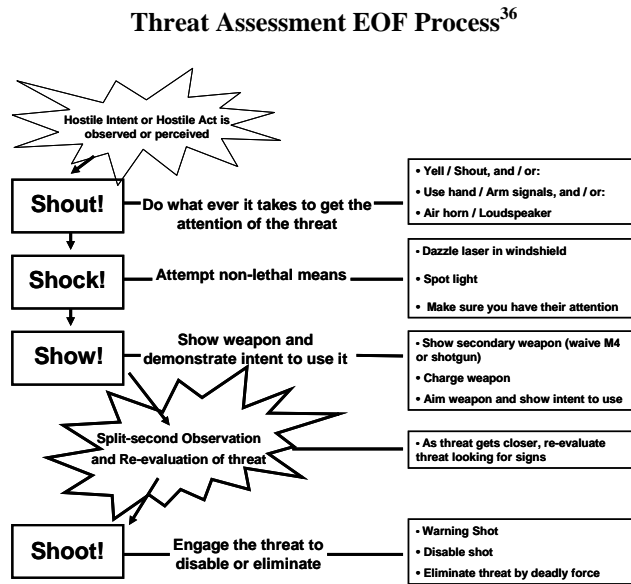


Fig. 2.

As long as we continue to struggle to identify faceless enemies, threat assessment EOF will be required. Traditional EOF will also be necessary for use in crowd control and peacekeeping operations. Much of the confusion between these two separate and distinct EOF processes could be avoided if these were known by two separate and distinct names. Threat assessment EOF is a new process with a new purpose and should be renamed to reflect its new role. “Threat Assessment Process” (TAP) is both a simple and appropriate name and it is also easy for Soldiers to remember—“when you see a potential threat, TAP it.”

A separate name makes even more sense given that TAP is neither escalation nor force. It is not a progression of sequential force measures, rather it is a menu of tactics, techniques, and procedures (TTPs) that a Soldier can apply to a potential threat to determine if it is in fact an actual threat. These TTPs can be used in any number of combinations and sequences depending on the circumstances of the particular situation. Using the term “escalation” incorrectly gives Soldiers the impression that the measures must be used in a predetermined sequence and that there is a trigger that sends them from one measure to the next. This creates a potentially disastrous “try and fail before you can advance” mentality. Also, TAP is not force because TAP ends when the potential threat departs the area, is satisfactorily identified as non-threatening, or is

<sup>34</sup> CALL EOF Conference Packet, *supra* note 3, at 10, 32; *see also* Task Force Phoenix EOF Training Presentation (8 Oct. 2007) [hereinafter TF Phoenix EOF Training Presentation] (on file with author) (given to Soldiers upon their arrival at TF Phoenix in Afghanistan). Initiate EOF when hostile act or hostile intent is observed or perceived.

<sup>35</sup> TF Phoenix EOF Training Presentation, *supra* note 34.

<sup>36</sup> *See id.* Figure 2 is based on a diagram in a slide presentation used by TF Phoenix in Afghanistan to teach EOF.

identified as a threat. Waving a flag, shouting at someone, using signs, aiming lasers, or shining spotlights is not force. Under TAP, force is only used after TAP has ended by identifying an individual as a threat.

As the vehicle approaches, the Soldier manning the snap TCP applies the rules of threat assessment EOF to help him determine if the approaching driver is a threat. He recalls from training that before he initiates any EOF measures he must first observe or perceive the driver committing a hostile act or demonstrating hostile intent. Unfortunately, it is left to the Soldier to figure out what is a “perceived” hostile act or hostile intent before he can start the EOF process.

### Threat Assessment EOF Should Become TAP

A separate threat assessment procedure will eliminate confusion and allow Soldiers to accurately assess potential threats. This final step in the evolution of EOF procedures will not require major change as it builds upon the significant progress already made by the threat assessment EOF. Threat assessment EOF has proven to be successful because it accomplishes three things—it gets the attention of people who are potential threats; it communicates to these people what they need to do to avoid the use of force being used against them; and it provides time for Soldiers to make an informed threat decision. It accomplishes this while still maintaining standoff distance for identified threats to be safely engaged. The TAP adopts and builds on these three areas of success.

In Soldier training terms, TAP equals Attention, Communicate, and Decide. Remembering three things—attention, communicate, and decide—is easy enough for most Soldiers to do. Soldiers and trainers must keep this framework simple and not get lost in the specifics of how to complete the three parts. Available equipment, TTPs, and the overall situation will be constantly changing. As new equipment becomes available and situations and missions evolve, new TTPs can be specifically tailored. During generic The Army School System (TASS) training and unit home-station training, Soldiers can be taught that the three basic components are of primary concern, and that specific TTPs to implement those components are less significant as they will be constantly evolving.

### Threat Assessment Process (TAP)<sup>37</sup>



Fig. 3.

<sup>37</sup> This diagram is not intended to be a TAP Soldier card. It is intended only as an illustration of the TAP process.

### *Initiate TAP*

As a foundational point, Soldiers must understand that a potential threat is different than an actual threat. A vehicle approaching a checkpoint is a potential threat, but not all vehicles approaching checkpoints are actual threats. The same is true for the people; most will be innocent civilians, but a few will be threats.<sup>38</sup> The distance between the potential threat and the Soldier is the deciding factor for initiating TAP. As long as the Soldier feels there is sufficient distance<sup>39</sup> between him and the potential threat, no further steps are taken aside from continued monitoring. Once the potential threat closes to a distance where it causes the Soldier to feel even the slightest suspicion, TAP can be initiated. A Soldier does not have to wait until he sees any type of hostile act or hostile intent—perceived, overt, or ordinary. Since the initiating act in TAP is only getting the potential threat's attention, the Soldiers or the civilians are never hurt by initiating the TAP process. The triggering event is one of the main distinctions between threat assessment EOF and TAP. Threat assessment EOF is triggered by the recognition of a hostile act or hostile intent.<sup>40</sup> TAP is triggered by the approach of a potential threat.

### *Get Their Attention*

Once TAP has been triggered, the Soldier must get the attention of the potential threat. A Soldier may use both active and passive measures to get the potential threat's attention. Passive measures include things such as signs, cones, lights, and barriers. Active measures include shouting, sirens, lasers, loudspeakers, spotlights, flags, and displaying the intent to use weapons. There is no sequence that dictates how these measures are to be employed.<sup>41</sup> Specific measures and the order of employment are entirely dependent upon the circumstances of the particular situation. The critical point is that the Soldier take some action that gets the attention of the potential threat as the outcome of the threat decision will depend heavily on the Soldier knowing that the potential threat was aware of the Soldier and chose to ignore his warnings and instructions. A primary benefit of TAP is that it gets the attention of innocent, but inattentive, people.<sup>42</sup>

### *Communicate Your Commands*

Now that the Soldier has the attention of the potential threat, he must effectively communicate what the person must do to avoid a potentially deadly force confrontation. The person's reaction to these commands will play a significant role in the Soldier's threat decision.<sup>43</sup> It is the failure of this critical step that has often resulted in innocent civilians being misidentified as threats.

When a person, either on foot or in a vehicle, approaches a U.S. checkpoint, the Soldiers manning that checkpoint have specific actions that they want an approaching person to take. They must be trained and equipped with the means to effectively communicate these specific actions to the person approaching. Some of the most effective methods of communication in checkpoint situations have been signs, lights, and barriers.<sup>44</sup> Used effectively these measures can help get the person's attention as well as inform them of what actions they are to take to avoid the use of force. Signs in their native language let people know what is expected of them; lights help them read the signs at night and draw attention to the checkpoint; and barriers channel them to proceed in a desired direction. These measures, along with hand and arm signals and simple native language voice commands, have proven to be effective means of communication in many situations.<sup>45</sup>

Communication becomes even more difficult in convoy situations. While many military vehicles have signs instructing other motorists to "stay back 100 meters,"<sup>46</sup> these signs have proven to be ineffective in some areas and unrealistic in high

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<sup>38</sup> CALL EOF Conference Packet, *supra* note 3, at 2.

<sup>39</sup> "Sufficient" distance is determined by a host of factors, including friendly TTPs, enemy TTPs and the Soldier's "gut" feelings.

<sup>40</sup> TJAGLCS SROE STP, *supra*, note 6, slide 24.

<sup>41</sup> Unit specific TTPs may dictate a preferred sequence to employ certain measures at the unit level.

<sup>42</sup> CALL EOF Conference Packet, *supra* note 3, at 2.

<sup>43</sup> *Id.* at 5.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Alex Kingsbury, Street Scenes in Baghdad: A Reporter's Notebook, U.S. NEWS & WORLD REP., Mar. 20, 2007, <http://www.usnews.com/usnews/news/articles/070320/20greenzone.htm>. The use of the "Stay back 100 meter" signs on MNF-I vehicles is so common that the phrase is now sold on T-shirts and coffee mugs in the International Zone in Baghdad, Iraq and on the internet. *Id.*

traffic areas such as Baghdad. Additionally, these signs only address potential threats that approach from the rear of the convoy. They do not address vehicles that approach the convoy from the front or sides. Other measures currently used to communicate with approaching vehicles include hand and arm signals, loudspeakers, lasers, flags, and in some cases, warning shots.

### *Make the Threat Decision*

The ultimate purpose for conducting TAP is the threat decision. The threat decision depends on the independent and sound judgment of the Soldier and is not based on completing rote steps in a process. The Attention and Communication steps, while important, merely provide information, which along with other information will be used to make the threat decision.<sup>47</sup> If a Soldier is unable to get the potential threat's attention or is unable to effectively communicate with the potential threat, the Soldier must make a threat decision. The inability to gain the potential threat's attention and communicate with him is not dispositive, but it provides the Soldier with important information to assist in making an informed threat decision.

An infinite number of factors shape the threat decision. It is impossible to list all the possible decision factors; however, several common factors have emerged from the current conflicts. If the potential threat understands the commands, lack of compliance with the Soldier's commands is a significant indicator of hostile intent.<sup>48</sup> Another good indicator has been the location of the potential threat's hands as most hostile actions are initiated by the hands.<sup>49</sup> The fact that a potential threat keeps his hands from a Soldier's view can be an indication of his hostile intent.<sup>50</sup> Maneuvering by a potential threat that seems to be designed to gain a tactical advantage is also an indicator of hostile intent.<sup>51</sup> In vehicle situations, head counting has proven a valuable indicator as almost all vehicle born suicide bombers travel alone.<sup>52</sup> Multiple people present in a vehicle, and especially children, is a good indicator that the vehicle is not a threat.

Many Soldiers have also reported what they can only categorize as strange or weird behavior on the part of potential threats. General nervousness, excessive sweating, and shifty eyes, can all be contributing factors in making a threat decision. While no factor standing alone can be dispositive of hostile intent, all factors contribute to the totality of the circumstances that go into the threat decision. Predeployment training based on current, theater specific scenarios is necessary to inform Soldiers of threat indicators they will likely encounter on their arrival in theater.<sup>53</sup>

The standard for determining whether a person constitutes a threat is objective.<sup>54</sup> Would a reasonable Soldier under similar circumstances believe the person was committing a hostile act or demonstrating hostile intent?<sup>55</sup> "Similar circumstances" takes into account, among other things, the training and experience of the Soldier as well as the often split-second and chaotic nature under which the threat decision is made. Additionally, this standard allows for a reasonable mistake on the part of the Soldier. If the totality of the circumstances is such that a reasonable Soldier under similar circumstances would have also determined a threat existed, the Soldier is justified in using force, even if a post-incident examination determines the individual actually posed no threat. This position has been backed up by the words and actions of our most senior military leaders.<sup>56</sup>

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<sup>47</sup> This is not to diminish the significance attention and communication play in warning off innocent civilians. Attention and communication play a two part role of providing warning to civilians and providing information for the threat decision.

<sup>48</sup> CALL EOF Conference Packet, *supra* note 3, at 3; *see also* UREY W. PATRICK & JOHN C. HALL, IN DEFENSE OF SELF AND OTHERS 138 (2005).

<sup>49</sup> PATRICK & HALL, *supra* note 48, at 139.

<sup>50</sup> Martins, *supra* note 10, at 8.

<sup>51</sup> PATRICK & HALL, *supra* note 51, at 139.

<sup>52</sup> Montgomery, *supra* note 18 ("Counting heads in a vehicle—few, if any suicide car bombers have contained more than one person in the vehicle—is just one of the things [Lieutenant General] Chiarelli [MNC-I Commander] wants soldiers to do").

<sup>53</sup> *Cf.* U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 4.18c(4) (3 Aug. 2007).

<sup>54</sup> *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(e) (2008) [hereinafter MCM].

<sup>55</sup> *Id.*

<sup>56</sup> *See* MULTI-NATIONAL FORCE-IRAQ, FRAGMENTARY ORDER 06-481, MOD 1, MNF-I ESCALATION OF FORCE POLICIES AND TTPS STRATEGIC DIRECTIVE (4 Mar. 2007) (Unclassified) ("No one may issue supplementary guidance that forecloses the judgment of an individual facing a split-second and



Four additional points shape TAP. First, TAP is a continuous process. Beginning when a potential threat approaches, TAP ends when the potential threat departs the area, is satisfactorily identified as non-threatening, or is identified as a threat. Until one of these three outcomes occurs, TAP remains an ongoing process.

Second, in many situations the three components of TAP will occur simultaneously. For example, when a Soldier shouts at an approaching person to halt, he may be simultaneously getting the person's attention, communicating a command, and making a threat decision based on the person's response. Whether these actions happen consecutively or simultaneously will depend on the situation and the speed in which the incident occurs. Training should stress that TAP is not a step-by-step process.

Third, since TAP is a tool for threat assessment, if a threat is obvious there is no need to use TAP. The threat may be obvious before starting TAP or may become obvious at some point in the process. Regardless, once a threat is identified, TAP stops and appropriate force may be used against the threat.

Lastly, for Soldiers to effectively employ TAP, the process must allow for sufficient standoff distance to safely engage individuals identified as actual threats. In TAP, distance equals time. Time to get a potential threat's attention; time to communicate to a potential threat what he must do to avoid force being used; time to continually assess the situation as attention and communication measures are applied; and time to engage an actual threat if necessary.<sup>57</sup> Most ROE issues can be eliminated before they arise if proper tactics are used. Proper tactics result in both distance and time.<sup>58</sup> Improperly applied tactics result in the potential threat getting too close to allow time for the threat assessment process work. When there is no time to evaluate and react, Soldiers often feel they have no option but to treat the person as a threat and engage.<sup>59</sup>

### **TAP Has Identified a Threat—How Much Force Can Be Used?**

#### *Judgment-Based-Force Application*

The TAP ends when the potential threat departs the area, is satisfactorily identified as non-threatening, or is identified as a threat. The first two of these events require no force to be used, but if a threat is identified, proportionate force may be used. Fortunately, the outcome of the TAP threat decision produces more than just a determination of threat or no threat. It also simultaneously reveals the degree of threat the person presents. Any time a Soldier assesses a potential threat, he instinctively calculates the seriousness of the harm that threat could do. The result is a two part outcome to the threat decision—is there a threat and if so, to what degree. When a Soldier knows the degree of threat he is facing, he can then select an appropriate level of force to counter that threat allowing for judgment-based-force-application.

Judgment-based-force application is an alternative to traditional EOF as a method to proportionally apply force. While traditional EOF generally necessitates trying and failing with lesser means of force, judgment-based-force application allows Soldiers to immediately use a degree of force appropriate to defeat the degree of threat presented.<sup>60</sup> Traditional EOF ignores the fact that in many use-of-force situations a Soldier will only get one opportunity to use force. In many cases there will not be time to try, fail, and try again; and the price of failure is often severe. Judgment-based-force application is similar to traditional EOF in that Soldiers are provided with a variety of force options of greater and lesser magnitude. The difference is that rather than requiring a sequential progression through force options of increasing magnitude until they hit upon one that works, in judgment-based-force application Soldiers are allowed to immediately select one that is in their judgment

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independent decision whether to engage a threat. Your chain of command will stand with you"); *see also* Memorandum, Lieutenant General Raymond T. Odierno, Headquarters, Multi-National Corps–Iraq, Baghdad, Iraq, to All Members of the Multi-National Corps–Iraq, subject: Warrior's Edge (15 Feb. 2007) (Unclassified) ("The split-second decision on when and how to eliminate a threat is a matter of sound judgment left to individual troopers, leaders, and commanders.").

<sup>57</sup> CALL EOF Conference Packet, *supra* note 3, at 4; *see also* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 92 (2007) ("Properly used, EOF measures allow Soldiers more time and better information with which to make use of force decisions.").

<sup>58</sup> CALL EOF Conference Packet, *supra* note 3, at 4 ("Lessons learned from OIF reveal that the more control measures and barrier equipment at a TCP, the more time a Soldier has to make an EOF decision. More time often results in enhanced situational awareness, which may lessen the requirement to escalate to higher levels of force.").

<sup>59</sup> *Id.* at 4, 15.

<sup>60</sup> While most traditional EOF procedures use terms such as "if possible," "if time and circumstances permit," or the phrase "if there was an immediate threat of serious injury or death, you may defend yourself or others without going through the progressive steps" when discussing how much force to use, the very name "Escalation of Force" implies a try, fail, and try again approach to force application.

appropriate to the threat presented. With judgment-based-force application, the Soldier selects from a pool of force options an amount of force he believes is appropriate to counter the threat present. Judgment-based-force application creates a significantly different mindset for Soldiers. This builds trust and confidence between the Soldiers and their leaders by recognizing that Soldiers have the common sense and combat experience to make sound judgment-based decisions.

To illustrate judgment-based-force application, consider a Soldier who is faced with the possibility of varying degrees threats represented in this example by a Phillips screw, a flathead screw, and a nail. He is given force options of a Phillips screwdriver, a flathead screwdriver, and a hammer. If during the TAP process the Soldier recognizes a Phillips screw, he should use his judgment to select the Phillips screwdriver as the most appropriate force option. Both the flathead screwdriver and the hammer will probably work, but both will cause more damage than he would like. If on the other hand the TAP reveals the threat as a flathead screw, judgment-based-force application allows the Soldier to use his judgment to immediately select the flathead screwdriver as the appropriate level of force without having to try and fail with the Phillips screwdriver. Judgment-based-force application also allows the soldier to know that based on the degree of threat presented by the flathead screw, a hammer is not appropriate.

### *What Is Appropriate Force?*

The phrase “appropriate force” is significantly different than the phrase “minimum force” which often appears in ROE.<sup>61</sup> Minimum force implies there is a known, precise, and absolute amount of force necessary to counter a particular threat. It implies reward for erring on the side of using too little force and punishment for using even slightly too much force. Unfortunately, force is most often applied as a result of a split-second decision made amidst chaos and confusion—conditions far from precise and absolute. The phrase “appropriate force” captures the approximate nature inherent in all force application, while still incorporating the concept of proportionality. It further reinforces judgment-based-force application as the word “appropriate” inherently implies an exercise of judgment, while still providing for right and wrong limits.

The authority to exercise judgment always comes with accountability and responsibility. The decision on how much force is appropriate is no exception; however, the latitude to decide what degree of force is appropriate for a specific threat is very broad.<sup>62</sup> Ensuring that Soldiers understand this point is critical to maintaining their confidence in their leaders and in the ROE. Soldiers must know that their leaders understand there is no precise formula for applying force. Out of necessity, the decision of how much force to use is an educated guess often made in an instant with incomplete information and limited force options. Training, commander’s intent, available intelligence, experience, ethics, and values all contribute to the information supporting this “educated guess.”

Despite this latitude, Soldiers can be held accountable for using excessive force. A Soldier is allowed to use the amount of force that in his judgment,<sup>63</sup> is required to respond decisively to the degree of threat presented.<sup>64</sup> “Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required” to respond decisively and to dissuade further hostile acts or demonstrations of hostile intent.<sup>65</sup> The language “respond decisively” sets the outer limit on what amount of force is appropriate. It is clear from this language, that the range of what is “appropriate force” is very broad. This means that a Soldier’s decision on the degree of force to use will not be judged on information learned after the incident indicating that less force could have sufficed, but will instead take into account the individual circumstances of that particular Soldier when the decision on what degree of force to use was made.

Despite such a broad continuum of allowable force, Soldiers must still exercise great discretion. Sound judgment involves knowing more than just the limits of the law. It requires consideration of all available factors. Soldiers must ask not only “are their actions legal”, but also “are their actions the right thing to do?” Sound judgment is grounded in personal values, forged in training, and guided by commander’s intent. Training in this area includes teaching that in

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<sup>61</sup> See MNC–I ROE card, *supra*, note 8. A fact not lost on the MNC–I ROE Card, which does not have the phrase “minimum force” on it.

<sup>62</sup> See, CJCSI 3121.01B, *supra* note 9, at A.4.a(3).

<sup>63</sup> MCM, *supra* note 54, R.C.M. 916(e)(1)(B). “The test for [believing that the force used was necessary] is entirely subjective.” *Id.* R.C.M. 916(e) discussion.

<sup>64</sup> See CJCSI 3121.01B, *supra* note 9, at A.4.a(3).

<sup>65</sup> *Id.*

counterinsurgency, sometimes the appropriate amount of force might be no force at all.<sup>66</sup> Army Field Manual 3-24, *Counterinsurgency*, lists several paradoxes of counterinsurgency that Soldiers must understand.<sup>67</sup>

- Sometimes, the more you protect your force, the less secure you may be.
- Sometimes, the more force is used, the less effective it is.
- The more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.
- Sometimes doing nothing is the best reaction.<sup>68</sup>

These statements are paradoxes because they contradict what many Soldiers believe to be common sense. That is the belief that if they see a threat, they should immediately shoot to eliminate it. Training in TAP and in the fundamentals of counterinsurgency can provide Soldiers with the tools necessary to assess the degree of threat against this backdrop. Counterinsurgency is a thinking Soldier's war requiring an understanding of tactical patience and restraint.<sup>69</sup> With sufficient training Soldiers can identify a threat, determine the degree of harm it presents, and select an appropriate amount of force to counter the threat while accounting for the complexities of counterinsurgency warfare. Currently in Iraq and Afghanistan, Soldiers are forced to make these types of decision hundreds of times everyday. The TAP and judgment-based-force application will empower them to make these decisions confidently and with greater accuracy and effectiveness.

As the vehicle approaches, the Soldier manning the snap TCP applies the rules of TAP. Since the vehicle is approaching in such a manner to raise the suspicions of the Soldier, he immediately starts TAP by attempting to get the attention of the driver and communicating what the driver needs to do as he approaches the TCP. Knowing that he can start TAP at any point, without first having to determine the driver to be a threat, provides him information, time, and confidence to make an informed threat decision. If he decides the approaching vehicle is a threat, he can then use judgment-based-force application to select an appropriate amount of force to counter the threat. Depending on time and available equipment, he might select spike strips, disabling fire, or shooting to kill the driver. Fortunately in this case, the driver sees the Soldier, slows his vehicle, and complies with the commands of the Soldier. The Soldier determines that the driver is not a threat and no force is used.

### Conclusion

Traditional EOF has evolved to provide a much needed tool for threat assessment. However, this new role of EOF is often confused and comingled with its traditional role as a guide to the application of proportional force against identified threats. Subsequently, this confusion has resulted in conflicting guidance to Soldiers in EOF training breeding frustration and distrust.<sup>70</sup> It starts when Soldiers are told that EOF begins when they witness hostile intent or hostile acts. To stay true to this requirement, Soldiers would have to believe that almost every civilian they encounter is demonstrating hostile intent before they as much as waive a flag, shine a laser, or shout a command. Experienced Soldiers know that it is unrealistic to wait until a person has committed a hostile act or demonstrated hostile intent before implementing non-force EOF measures. To protect both Soldiers and civilians the process must start much sooner. Attempting to correct this problem by using the term "perceived hostile act or intent" only adds to the confusion. If taught to correctly use TAP, Soldiers can understand and appreciate the new threat assessment tool they have been given.

Admittedly, the introduction of a new concept during existing conflicts will be challenging, but it has been done before and can successfully be done with TAP.<sup>71</sup> A relatively smooth transition is possible as we are not introducing a completely new concept, but rather clarifying and legitimizing a process Soldiers are already using. Soldiers are already using TAP; they have just been calling it EOF. The transition could begin with the senior commands in Iraq and Afghanistan embracing this new methodology. Once accepted, the training of deploying units on TAP and the issuing of revised Soldier ROE cards can

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<sup>66</sup> FM 3-24, *supra* note 15, at 1-27.

<sup>67</sup> *Id.* at 1-26.

<sup>68</sup> *Id.* at 1-26 to 1-28.

<sup>69</sup> *Id.* at 5-12; *see also* CALL EOF Conference Packet, *supra* note 3, at 3, 6.

<sup>70</sup> Based on multiple discussions by the author with Soldiers training for deployment to OIF and OEF.

<sup>71</sup> In the early phase of the OEF in Afghanistan, U.S. ROE required to identify targets as "Likely and Identifiable Threats" (LIT). That terminology has since changed to require targets to be "Positively Identified" (PID).

be accomplished as these units rotate into theater. Units with substantial time left in theater can be retrained on TAP. Units that will shortly rotate out of theater can continue to use the threat assessment EOF process they have used for most of their tour and receive TAP training after their deployment ends.

Commanders, Judge Advocates, and Soldiers must understand that this new process is not traditional proportional force EOF. We must review how we train Soldiers to ensure we are training the TAP of counterinsurgency, not the EOF of peacekeeping. We must accept that in the current conflicts, disproportional use of force against identified threats is not the primary issue. The number one issue currently facing Soldiers is threat identification. We must continue to seek new methods to get the attention of inattentive civilians and new ways to improve our ability to quickly and effectively communicate with potential threats. We must also ensure that Soldiers have the correct training and equipment to properly apply tactics in threat assessment situations and that they are equipped with a variety of force options.

Equally important, we must train Soldiers in judgment-based-force application. Soldiers must understand that they will not face prosecution for an honest judgment call. This will give them confidence that their leaders understand and support them in these tough decisions. Given confidence in leaders, counterinsurgency doctrine, and the current state of the conflicts, Soldiers can make informed, rational, and correct decisions to appropriately apply force against identified threats.

Once we accomplish these things, we will have taken great strides to improve Soldiers' ability to identify threats—thereby increasing force protection and reducing civilian casualties. Equally important, Soldiers can have confidence in their leaders and TAP. Confidence that the TAP is not a dangerous constraint, but instead a valuable tool to assess threats, protect the force, and spare innocent lives.