

Training the Rules of Engagement for the Counterinsurgency Fight

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I. Introduction

*[C]ounterinsurgency is war, and war is inherently violent. Killing the enemy is, and always will be, a key part of guerilla warfare But successful counterinsurgents discriminate with extreme precision between . . . combatants and noncombatants.*¹

Over the past few years, U.S. Armed Forces have struggled with achieving the goals of counterinsurgency while not undermining the right of self-defense.² Though the objective of counterinsurgency is to garner the support of the local populace,³ the Standing Rules of Engagement (SROE) state that “[u]nit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or hostile intent.”⁴ The counterinsurgency objectives and the right of self-defense may force a commander to choose between protecting the Soldiers and the population. Can units garner support from the populace for the host nation government and not undermine the right of self defense?

Achieving counterinsurgency (COIN) objectives while effectively exercising the right of self-defense requires persistent and deliberate rules of engagement training. This article shows that the current ROE training methods do not sufficiently prepare leaders and Soldiers for the complexities

of counterinsurgency. Adequate ROE training for the counterinsurgency fight can educate and prepare leaders and Soldiers for the challenges associated with counterinsurgency operations. Commanders, with the assistance of their judge advocates, must tailor rules of engagement training to meet the mission requirements of the counterinsurgency fight.

II. The Rules of Engagement in Counterinsurgency

*A soldier fired upon in conventional war who does not fire back with every available weapon would be guilty of a dereliction of his duty; the reverse would be the case in counterinsurgency warfare, where the rule is to apply the minimum of fire.*⁵

Counterinsurgency doctrine and the rules of engagement are inseparable at the tactical level. Soldiers at this level face an indistinguishable enemy who attacks these Soldiers from buildings or other areas populated with noncombatant civilians to provoke the use of force in self-defense.⁶ Major General Robert Neller wrote, “[t]hough the inherent right of self-defense will always remain paramount in a COIN environment the default reaction must always be to ‘not shoot.’”⁷ This proposition is a harsh reality for Soldiers and Marines at the tactical level.

The current SROE for U.S. Forces “establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations”⁸ These rules set the foundation for

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¹ DAVID KILCULLEN, COUNTERINSURGENCY 4 (2010).

² See, e.g., Wesley Morgan, *Weighing Threats and Rules of Engagement in Afghanistan*, N.Y. TIMES (Aug. 23, 2010, 4:55 PM), <http://atwar.blogs.nytimes.com/2010/08/23/weighing-threats-and-rules-of-engagement-in-afghanistan> (arguing that Soldiers view the current rules of engagement as too restrictive); Sara A. Carter, *U.S. Troops Battle Both Taliban and Their Own Rules*, WASH. TIMES, Nov. 16, 2009 (contending that “insurgents have escaped because U.S. forces are enforcing the rules”); Dan Lamothe, *Rep.: Hold Rules of Engagement Hearing Now*, ARMY TIMES, (Apr. 15, 2010), http://www.armytimes.com/news/2010/04/marine_roe_041310w/.

³ U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-159 (15 Dec. 2006) [hereinafter FM 3-24].

⁴ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES app. A (13 June 2005) [hereinafter CJCSI 3121.01B].

⁵ DAVID GALULA, COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE 66 (1964).

⁶ See, e.g., Major General Charles J. Dunlap, Jr., *Lawfare: Decisive Elements of 21st Century Conflicts?*, 54 JOINT FORCE Q. 36 (2009) (citing Jason Stratziuso, *Official: Taliban Tricking the U.S. into Killing Civilians*, ARIZ. REPUBLIC, Nov. 8, 2008, http://www.azcentral.com/arizonarepublic/news/articles/2008/11/08/20081108_afghanistan1108.html). Major General Dunlap describes an incident in Afghanistan where the Taliban “held a wedding party hostage as they fired on U.S. forces in an ‘attack designed to draw airstrikes on civilians and stoke anti-American sentiment.’” *Id.*

⁷ Major General Robert Neller, *Lessons Learned*, MARINE CORPS GAZETTE, Feb. 2010, at 2.

⁸ CJCSI 3121.01B, *supra* note 4, at 1. In response to the Department of Defense (DoD) Commission on the Beirut Bombing of 1983, the Chairman of the Joint Chiefs of Staff established the Peacetime Rules of Engagement (PROE) in 1988 to provide a unified set of rules for peacetime operations. See Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 83 (1994). In 2000, the title changed from PROE to SROE. Colonel David M. Fee, *Rules of Engagement and the Obligations of the Strategic Commander* 8 (Feb. 19, 2010) (unpublished research project) (on file with author).

the development of theater specific ROE in the form of mission specific ROE or supplemental measures.⁹ In fact, because the SROE are fundamentally permissive, all commanders have to notify the Secretary of Defense of any further restrictions placed on the SROE.¹⁰ The SROE provide definitions and procedures for the use of force in self-defense and encompasses proportionality.¹¹ These concepts of self-defense and proportionality are at the heart of the friction between counterinsurgency doctrine and the rules of engagement.

The SROE have included the inherent right of self-defense since the first draft over ten years ago.¹² The SROE describe the inherent right defense by stating that

[u]nit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit.¹³

⁹ CJCSI 3121.01B, *supra* note 4, at 2.

¹⁰ *Id.* at I-1 (stating the “SROE are fundamentally permissive in that a commander may use any lawful weapon or tactic available for mission accomplishment, unless specifically restricted by approved supplemental measures . . .”). The permissive nature of the SROE is a result of a finding by the DOD Commission on the Beirut Bombing, which stated

The Commission believes that for any ROE to be effective, they should incorporate definitions of hostile intent and hostile act which correspond to the realities of the environment in which they are to be implemented. To be adequate, they must also provide the commander explicit authority to respond quickly to acts defined as hostile. Only when these two criteria are satisfied do ROE provide the on-scene commander with the guidance and the flexibility he requires to defend his force.

U.S. DEP’T OF DEFENSE, REPORT OF THE COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, OCTOBER 23, 1983, at 47 (20 Dec. 1983) (unclassified version).

¹¹ CJCSA 3121.01B, *supra* note 4, at A-2, A-3. The SROE states, “[t]he use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. *Id.* The SROE distinguishes between proportionality in self-defense and the law of war principle of proportionality by stating that “proportionality in self-defense should not be confused with the attempts to minimize collateral damage during offensive operations.” *Id.* at A-3.

¹² *Id.* at A-2; CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (13 Jan. 2000) [hereinafter CJCSI 3121.01A].

¹³ CJCSI 3121.01B, *supra* note 4, at A-2.

Under the current SROE, individual self-defense is not without limit and the unit commander regulates this individual right, which differs from the 2000 SROE. The previous definition separated unit self defense from individual self-defense and defined individual self-defense as

[t]he inherent right to use all necessary means available and to take all appropriate actions to defend oneself and US forces in one’s vicinity from a hostile act or demonstrated hostile intent is a unit of self-defense. Commanders have the obligation to ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense.¹⁴

The difference between these definitions is important to the counterinsurgency fight for two reasons. First, this change allows the unit commander to control the use of force in self-defense. The commander has discretion to respond, or not respond, to a hostile act or demonstration of hostile intent by an insurgent that is designed to create civilian casualties. For example, a common tactic of insurgents in Afghanistan is to commit a hostile act “with the primary purpose of enticing counterinsurgents to overreact, or at least to react in a way that insurgents can exploit . . .”¹⁵ On one occasion, the Taliban held a wedding party hostage while engaging Soldiers in the hopes of provoking a violent response, which would have created civilian casualties.¹⁶ Contrary to the Taliban’s intent, the commander limited his troops’ use of self-defense to avoid civilian casualties, which is consistent with General Petraeus’ guidance.¹⁷ The second reason is the persistent, incorrect belief that the right of individual self-defense is absolute.¹⁸ The 2005 SROE clarifies the role and limits of individual self-defense as a subset of unit self defense.

¹⁴ CJCSI 3121.01A, *supra* note 12, at A-3.

¹⁵ FM 3-24, *supra* note 3, para. 1-152; Telephone Interview with Colonel Richard C. Gross, Staff Judge Advocate, U.S. Central Command (Jan. 13, 2011) (discussing a common Taliban tactic in Afghanistan where the Taliban would engage ISAF from a civilian dwelling to entice the unit to overreact with an airstrike on the dwelling, which often caused many civilian casualties).

¹⁶ Major General Charles J. Dunlap, Jr., *Lawfare: Decisive Elements of 21st Century Conflicts?*, 54 JOINT FORCE Q. 36 (2009) (citing Jason Stratziuso, *Official: Taliban Tricking the U.S. into Killing Civilians*, ARIZ. REPUBLIC, Nov. 8, 2008, <http://www.azcentral.com/arizonarepublic/news/articles/2008/arizonarepublic/news/articles/2008/11/08/20081108afghanistan1108.html>).

¹⁷ Memorandum from General David Petraeus, to Soldiers et al., subject: COMISAF’s Counterinsurgency Guidance (27 July 2010) [hereinafter COMISAF COIN Guidance Memorandum].

¹⁸ See Rajiv Chandrasekran, *Petraeus Reviews Directive Meant to Limit Afghan Civilian Deaths*, WASH. POST (July 9 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/08/AR2010070806219_2.html?sid=ST2010070905635 (quoting a Soldier who stated that the “rules of engagement provide an absolute right of self defense.”). See also JOHN J. MERRIAM, NATURAL LAW AND SELF DEFENSE (2011) (contending that self

Furthermore, any use of force in self-defense, whether individual or unit self-defense, must comply with the principle of proportionality.¹⁹ SROE's definition of proportionality, however, is often confused with the Law of War Principle of Proportionality, which mandates that the "loss of life and damage to property must not be out of proportion to the military advantage to be gained."²⁰ The practical application of this principle in counterinsurgency is a paradox in itself.²¹ While Law of War's Principle of Proportionality universally applies in any targeting decision,²² the SROE's principle of proportionality only applies in self-defense.²³ The SROE defines proportionality as follows:

The use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. 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.²⁴

defense is rooted in natural law and "[t]he essence of natural law is the idea that there are certain first principles that cannot be abrogated, exist everywhere, and are understood by all by the operation of right reason."). See generally Richard A. Oppel, Jr. & Rod Nordland, *New Rules Stress G.I.'s Limits in Afghan Fighting*, N. Y. TIMES (Aug. 3, 2010), <http://www.nytimes.com/2010/08/04/world/asia/04petraeus.html> (quoting a Soldier venting frustration that the new rules are limiting his individual right of self defense).

¹⁹ CJCSI 3121.01B, *supra* note 4, at A-3.

²⁰ U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 41 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10].

²¹ See Commander Matthew L. Beran, *The Proportionality Balancing Test Revisited: How Counterinsurgency Changes "Military Advantage,"* ARMY LAW., Aug. 2010, at 1, 4 (proposing a new method for proportionality which requires the "commanders to confirm that a proposed action will likely result in a concrete and direct military advantage without excessive loss of civilians and civilian property"). This article addresses the impact of the counterinsurgency's objectives, winning the support of the local populace, on the proportionality analysis. *Id.* The primary focus of this paper is on the impacts of the counterinsurgency objectives on the SROE's principle of proportionality not the law of war principle. See *infra* notes 55–57 and accompanying text.

²² See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), annex I, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (defining attacks as "acts of violence against the adversary, whether in offence or defence"). See FM 27-10, *supra* note 20, para. 41 (applying proportionality to all bombardments or attacks).

²³ CJCSI 3121.01B, *supra* note 4, at A-3.

²⁴ Although the SROE's principle of proportionality is different from the Law of War's principle, it does not authorize actions that are inconsistent with the Law of War. See *id.* at 2 (stating that "[c]ommander's at all levels are responsible for establishing ROE . . . for mission accomplishment that comply with ROE . . . of senior commanders, the Law of Armed Conflict, applicable international and domestic law and this instruction.").

Although unit commanders have control over the proportional response in self-defense situations,²⁵ higher-level commanders have directed de-escalation in areas where civilians may be present.²⁶

One key component of the strategy in Afghanistan to reduce civilian casualties is the focus on an element of de-escalation, withdrawal,²⁷ prior to employing airstrikes or other uses of force against residential compounds.²⁸ Under this strategy, in responding to a hostile act or demonstration of hostile intent, Soldiers are required to consider other courses of action short of the use of force, including withdrawal. This type of de-escalation is consistent with General Petraeus' statement that "[e]very Afghan civilian death diminishes our cause. If we use excessive force or operate contrary to our counterinsurgency principles, tactical victories may prove to be strategic setbacks."²⁹ Although this strategy has had some success in controlling civilian casualties,³⁰ some legal scholars have debated the

²⁵ *Id.* at A-2.

²⁶ See Second Lieutenant Brendan Groves, *Civil-Military Cooperation in Civilian Casualty Investigations: Lessons Learned From the Azizabad Attacks*, 65A.F. L. REV. 1, 5 (2010) (stating that commanders direct ground forces to consider withdrawal prior to authorizing unplanned airstrikes); Chandrasekaran, *supra* note 18; Oppel & Nordland, *supra* note 18 (asserting that commanders placed even more restrictions on the employment of force in residential compounds to avoid civilian casualties).

²⁷ Withdrawal, as applied under the SROE's principle of de-escalation allows the enemy, "when time and circumstance permit," the "opportunity to withdraw or cease threatening actions." CJCSI 3121.01B, *supra* note 4, at A-3. For the purposes of this section, the term is used consistent with the directives in Afghanistan, which requires ISAF to consider withdrawing to de-escalate rather than escalate force in residential areas. See *infra* note 60 and accompanying text.

²⁸ See Groves, *supra* note 26, at 5 (stating that commanders direct ground forces to consider withdrawal prior to authorizing unplanned airstrikes); Oppel & Nordland, *supra* note 18 (contending that the tactical directive restricts the use of small arms fire where civilians may be present). See also Spencer Ackerman, *New Afghan Air War? Don't Count On It*, GENERAL SAYS, DANGER ROOM (Aug. 10, 2010, 7:50 AM), <http://wired.com/dangerroom> (quoting Brigadier General Jack Briggs, "[i]f it comes to a point where [ground troops] cannot withdraw, if they cannot maneuver themselves out of a situation, that's when air, and particularly our kinetic air [power], comes in and becomes sort of our choice of last resort."). Brigadier General Briggs was the commander of the 455 Air Expeditionary Wing in Afghanistan. *Id.*

²⁹ Press Release, International Security Force—Afghanistan, Updated Tactical Directive: Emphasizes Disciplined Use of Force (Aug. 4, 2010), available at <http://www.isaf.nato.int/article/isaf-releases/index.php>. The disciplined use of force is not only the practice of units in Afghanistan but also one of the "Principles of Joint Operations." See also U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. A-24 (27 Feb. 2008) [hereinafter FM 3-0] ("Restraint requires careful and disciplined balancing of security, the conduct of military operations, and the desired strategic end state. Excessive force antagonizes those friendly and neutral parties involved. Hence, it damages the legitimacy of the organization that uses it while potentially enhancing the legitimacy of any opposing party.").

³⁰ Press Release, United Nations Assistance Mission Afghanistan, Afghan Civilian Casualties Rise 31 Per Cent in First Six Months of 2010 (Aug. 10, 2010), available at <http://unama.unmissions.org/Default.aspx?tabid=1760&ctl=Details&mid=2002&ItemID=9958> (discussing "the mid-year civilian casualty report that saw a drop in casualties caused by Pro-

effectiveness of the current rules of engagement and the law of war in a counterinsurgency.³¹ Applying the rules of engagement in a population-centric operation is not an easy task.

Leaders and Soldiers face a daunting task on the ground in Afghanistan. While commanders, legal scholars, and the general public debate the proper application of the concepts of self-defense and proportionality,³² many Soldiers are engaged in day-to-day operations in Afghanistan under the existing rules of engagement. In order to prepare leaders and Soldiers for the challenges in counterinsurgency, commanders have to use the existing concepts and develop training that complies with not only the rules of engagement but also counterinsurgency doctrine.

III. Counterinsurgency Rules of Engagement Training

*Soldiers execute in the manner they train;
they will carry out their tasks in
compliance with the ROE when trained to
do so.*³³

The unique challenges of counterinsurgency require leaders to train Soldiers for a decentralized fight in a complex environment.³⁴ The general trends in Afghanistan “indicate the need for decentralized positions, distributed operations, effective small-unit³⁵ leaders, and well-trained small units that must bear the brunt of close combat.”³⁶ Furthermore, the adaptability of the enemy compounds the

challenges these small-unit leaders face.³⁷ With these challenges in mind, leaders and judge advocates should focus counterinsurgency ROE training toward empowering small-unit leaders to make critical decisions on the application of force. In order to achieve this goal, the training must be rooted in principles³⁸ and reinforced regularly.³⁹

A. Training ROE Principles for the Decentralized Counterinsurgency Fight

*You must train the squad leaders to act
intelligently and independently without
orders.*⁴⁰

In counterinsurgency, as in most conflicts, leaders and their Soldiers face situations where principle-based decisions are more effective than adherence to hard and fast rules.⁴¹ When these “principles conform both to tactical wisdom and to the relevant legal constraints on the use of force, then the larger system of ROE governing the ground component in a particular deployment will best serve military objectives and national interest.”⁴² The two relevant principles to the military objective in counterinsurgency, winning the local populace, are self-defense and proportionality. Judge advocates must develop training for small-unit leaders to educate their Soldiers on these two principles. To be effective, judge advocates should leverage Situational Training Exercise (STX) lanes⁴³ as the primary forum for company commanders and senior noncommissioned officers to train their Soldiers.

Government Forces, to include ISAF, and a corresponding rise in casualties caused by Anti-Government Elements”).

³¹ David E. Graham, *Counterinsurgency, The War on Terror, and the Law of War: A Response*, 95 VA. L. REV. IN BRIEF 79 (2009) (disagreeing with the premise that the existing law of war are ineffective in the current counterinsurgency).

³² See *id.*; Beran, *supra* note 21, at 9; Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745 (2009); Colonel Gian Gentile, *Time for the Deconstruction of Field Manual 3-24*, 58 JOINT FORCES Q. 116, 116 (2010). The validity of the proposed changes and applications of the rules of engagement in counterinsurgency are topics for a different paper. This paper assumes that the existing rules of engagement are sufficient for counterinsurgency.

³³ U.S. DEP’T OF ARMY FIELD MANUAL 1-04, LEGAL SUPPORT TO OPERATIONS para. A-44 (15 Apr. 2009) [hereinafter FM 1-04].

³⁴ See Lieutenant General Michael A. Vane & Colonel Robert M. Toguchi, *Achieving Excellence in Small-Unit Performance*, MIL. REV., May-June 2010, at 73, 73. See also FM 3-24, *supra* note 3, para. 1-146 (indicating that “effective [counterinsurgency] operations are decentralized, and higher commanders owe it to their subordinates to push as many capabilities as possible down to their level”).

³⁵ Vane & Toguchi, *supra* note 35, at 74 (“The traditional definition of a small unit tends to refer to the company level and below; however, the actual size of this unit may vary, depending on the scope, scale, and complexity of the mission.”).

³⁶ *Id.* at 73.

1. Situational Training for Self-Defense and Proportionality

The best method for teaching the application of self-defense and proportionality to counterinsurgency is situational training. This type of training “focuses on one or

³⁷ FM 3-24, *supra* note 3, para. 1-155 (“Competent insurgents are adaptive.”).

³⁸ Martins, *supra* note 8, at 83 (stating that the ROE training “on the Soldier level would consist of internalized principles rather than external, written text”).

³⁹ FM 3-24, *supra* note 3, para. D-8.

⁴⁰ KILCULLEN, *supra* note 1, at 34.

⁴¹ Martins, *supra* note 8, at 6. See also COMISAF COIN Guidance Memorandum, *supra* note 17 (stating that “[i]n the absence of orders, figure out what the orders should have been and execute them aggressively.”). This statement by General Petraeus reinforces the notion that Soldiers will need to make critical decisions based on principles not rules or directives.

⁴² Martins, *supra* note 8, at 6.

⁴³ See FM 1-04, *supra* note 33, para. A-45 (stating that this type of training “brings to life abstract rules contained in written ROE, giving Soldiers concrete terms of reference within which to determine their response”).

a small group of tasks—within a particular mission scenario—and requires that Soldiers practice until they perform the task to standard.”⁴⁴ Decentralized ROE training requires commanders and judge advocates to establish a “uniform standard.”⁴⁵ Thus, judge advocates should work with commanders to develop standards for ROE training far in advance of a deployment to a counterinsurgency operation.⁴⁶ After establishing these standards, the judge advocate develops realistic ROE vignettes based on theater lessons learned.⁴⁷

The most effective ROE vignettes are from the relevant theater of operations.⁴⁸ Realistic ROE vignette training provides “a window into how [a] Soldier thinks” and gives the leader an “opportunity to train the Soldier and teach him a different way of looking at the situation.”⁴⁹ Hence, ROE vignette training provides the proper forum for judge advocates to assist leaders with training Soldiers on the application of self-defense and proportionality in a counterinsurgency. At the completion of vignette development, the judge advocate should work with the small unit leadership to identify the proper trainers at the company and platoon levels, and plan to monitor the training, not run it himself.

2. Empowering Small Unit Leaders for Counterinsurgency ROE Training

Training a brigade combat team on the ROE is a difficult task for judge advocates because of limited legal assets at the brigade and battalion level. A recent AAR comment from Afghanistan shows that “[i]t is very hard for a brigade legal team to train and educate a 6,000 person

BCT on . . . the rules of engagement on a regular basis.”⁵⁰ To alleviate this burden, judge advocates should train the senior noncommissioned officers and company commanders and allow these leaders to train their Soldiers.⁵¹ Thus, the judge advocate is the primary trainer for the company commanders and the senior noncommissioned officers. These company level leaders will be the primary trainers for their Soldiers. The efficacy of this approach depends on timing; therefore, the training should start well in advance of a deployment.⁵²

Many judge advocates in the field have insufficient time to properly train the ROE in advance of their deployments,⁵³ and do not incorporate ROE into STX lane training. Even at the combat training centers, ROE training by the rotational unit is typically limited to a vignette driven briefing and not incorporated into STX lanes.⁵⁴ These current ROE training trends show that units are not incorporating the ROE into their collective training events during their pre-deployment timeline—the Army Force Generation cycle.⁵⁵

A unit’s timeline for deployment flows from the Army Force Generation cycle, which includes three distinct phases—reset, train/ready, and available.⁵⁶ The critical

⁴⁴ *Id.*

⁴⁵ Captain Howard H. Hoege, *ROE . . . also a Matter of Doctrine*, ARMY LAW., June 2002, at 1, 5.

⁴⁶ See Martins, *supra* note 8, at 83. The standards for counterinsurgency ROE training must require each Soldier to understand the right of self-defense, proportionality, and counterinsurgency objectives. See *supra* notes 45, 56, 64 and accompanying text.

⁴⁷ See CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, AFTER ACTION REPORT, 82ND AIRBORNE DIVISION, OPERATION ENDURING FREEDOM, 2009–2010, at 18 (23 June 2010) [hereinafter 82ND AIRBORNE DIVISION AAR]; Captain Torres Cady, *Make On-The-Spot Corrections to Uphold the Standard*, ARMY MAG., Nov. 2006, at 58, 62, available at http://www.ausa.org/publications/armymagazine/archive/2006/11/Documents/CC_1106.pdf. Situational training involves the use of mission specific scenarios and trainers refer to these scenarios unofficially as “vignettes,” and to this type of training as “lane training.” FM 1-04, *supra* note 33, at A-45.

⁴⁸ 82ND AIRBORNE DIVISION AAR, *supra* note 47, at 18. The Center for Law and Military Operations (CLAMO) is a good resource for theater ROE vignettes and lessons learned. See CENTER FOR LAW AND MILITARY OPERATIONS, <https://www.jagcnet.army.mil/8525751d00557eff>.

⁴⁹ Cady, *supra* note 47, at 62 (highlighting the importance of understanding the Soldier’s thought process and tailor the training to adjusting that thought process to conform with the training standards).

⁵⁰ CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, AFTER ACTION REPORT, 4TH BRIGADE COMBAT TEAM, 4TH INFANTRY DIVISION, 2009–2010, at 18 (10 Aug. 2010).

⁵¹ See Hoege, *supra* note 45, at 3–5. Captain Hoege gives several reasons for empowering NCOs to train Soldiers on ROE. He rightly points out that training Soldiers is a primary task of NCOs, and that NCO leadership can identify the strongest trainers for ROE. He also notes that NCOs have knowledge JAs lack on the specific needs of the unit, and can integrate ROE training with the constant training they give the Soldiers. A point he does not mention is that Soldiers will take instruction from the leaders who will be with them in combat far better than from a staff officer whose duties do not lie there.

⁵² Martins, *supra* note 8, at 82.

⁵³ Interview with Captain Matthew Lund, Senior Observer/Controller, Joint Readiness Training Ctr., in Charlottesville, Va. (Mar. 4 2011) [hereinafter Lund Interview]; e-mail from Major William Johnson, Senior Observer/Controller, Joint Multinational Readiness Ctr. (Feb. 24, 2011) [hereinafter Johnson e-mail] (on file with author). Both of these training centers conduct Mission Readiness Exercises for units deploying to Afghanistan. INT’L OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (2010).

⁵⁴ Lund Interview, *supra* note 53 (stating that the pre-deployment priority for the brigade legal section is military justice and adverse administrative actions, which leaves little time for ROE training events); Johnson e-mail, *supra* note 53.

⁵⁵ All brigade combat teams deploying to Afghanistan execute a Mission Readiness Exercise at one of the three combat training centers. U.S. DEP’T OF ARMY, FIELD MANUAL 7-0, TRAINING FOR FULL SPECTRUM OPERATIONS para. 4-1 (12 Dec. 2008) [hereinafter FM 7-0].

⁵⁶ *Id.* The Army Force Generation cycle provides combatant commands with forces that are ready to deploy to contingency operations. Units conduct all of their individual training and squad level collective training during the reset phase. This phase is the optimum time period for judge advocates to train commanders and senior noncommissioned officers. The train/ready phase usually involves a combat training center rotation where the unit executes higher level collective training.

phases for ROE training are the first two phases where the units conduct individual and collective training.⁵⁷ Judge advocates should endeavor to conduct ROE individual training during the reset phase. The audience for this training is the company commanders and senior noncommissioned officers.⁵⁸

Early execution of the situational training for company commanders and senior noncommissioned officers will allow them to incorporate ROE vignettes into the squad level collective training, which also occurs in the reset phase.⁵⁹ The judge advocate plays a supervisory role in the train/ready phase by getting feedback⁶⁰ from the collective training and after-action reviews during the combat training center rotation.⁶¹ The benefit of this approach to ROE training is that it produces more trainers at the company level and below which enables frequent rules of engagement training.⁶² More ROE trainers in the small units are indispensable to providing the necessary feedback for the unit to conduct ROE refresher training in theater.

B. Periodic ROE Reinforcement Training in Theater

*Training counterinsurgents in ROE should be reinforced regularly*⁶³

The complex counterinsurgency environment often renders pre-deployment ROE training and planning ineffective upon the unit's arrival in theater.⁶⁴ Furthermore, this environment entails a "cycle of adaptation . . . between insurgents and counterinsurgents; both sides continually adapt to neutralize existing adversary advantages and develop new (usually short-lived) advantages of their own. Victory is gained through a tempo or rhythm of adaptation that is beyond the other side's ability to achieve or sustain."⁶⁵ In order to keep pace with this cycle of

adaptation, ROE training should be continuous throughout the deployment.⁶⁶ Judge advocates should leverage the unit's update briefs and the small-unit leadership to adjust ROE training to enemy tactics and distribute training resources to the lowest level. The small-unit leaders, who understand the ROE,⁶⁷ will not only disseminate these training resources but also provide input on their relevance and effectiveness.

Most units in theater have some form of update brief on a daily or weekly basis, which provides the staff and the commanders with situational awareness.⁶⁸ These update briefs will provide the requisite situational awareness⁶⁹ to develop new ROE vignettes. The shift-change briefing is a briefing conducted by the staff, which includes significant enemy activity over a twenty-four hour period.⁷⁰ During this briefing, the intelligence section briefs "significant enemy actions" and "changes in the most likely enemy courses of action."⁷¹ This portion of the brief gives the legal team a snapshot of enemy activity,⁷² which will enable the team to identify trends and update the vignettes for periodic ROE training. While judge advocates use these briefs to gain situational awareness, they should also study the results of investigations related to the ROE and discuss these with their primary trainers—company commanders and senior noncommissioned officers.

Since the company leaders "bear the brunt"⁷³ of the combat operations in counterinsurgency, these leaders are the subject matter experts on enemy tactics and trends. The company commanders rely on their company intelligence support teams to provide them with the updated enemy situation, analysis and trends.⁷⁴ Consequently, prior to developing ROE refresher training in theater, judge

⁵⁷ *Id.* para. 4-3, 4-4.

⁵⁸ *See id.* para 4-20 to 4-23. The company commanders "prepare and execute training" and the NCOs "responsible for individual training." *Id.* Therefore, these leaders are the prime audience for ROE training conducted by judge advocates to set conditions for reset phase collective training.

⁵⁹ *Id.* para. 4-3. During the reset phase and throughout the pre-deployment cycle, new leaders assume command and other leadership positions. The focus for the ROE training should be on the incoming commanders and leaders if practicable.

⁶⁰ *See* Hoege, *supra* note 45, at 5.

⁶¹ FM 7-0, *supra* note 55, para. 4-188.

⁶² Hoege, *supra* note 45, at 5.

⁶³ FM 3-24, *supra* note 3, para. D-8. *See also* FM 3-0, *supra* note 29, para. A-24 (stating that "[c]ommanders at all levels ensure their personnel are properly trained in rules of engagement and quickly informed of any changes.").

⁶⁴ *See* FM 3-24, *supra* note 3, para. 5-114. The enemy's adaptability may make vignettes that were relevant during the unit's predeployment training irrelevant upon the unit's arrival in theater.

⁶⁵ *Id.*

⁶⁶ *See* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, AFTER ACTION REPORT, SPECIAL FORCES TASK FORCE-81, 2009-2010, at 8 (5 Oct. 2010).

⁶⁷ *See supra* note 58 and accompanying text. The small-unit leaders' knowledge and understanding of the ROE is critical to the efficacy of refresher training development and dissemination.

⁶⁸ U.S. DEP'T OF ARMY, FIELD MANUAL-INTERIM 5-0.1, THE OPERATIONS PROCESS para. 2-76 (31 Mar. 2006) (C1, 14 Mar. 2008) [hereinafter FM 5-0.1]. Situational awareness is "knowledge of the immediate present environment including the knowledge of METT-TC." *Id.* METT-TC is an acronym for Mission, Enemy, Terrain, Troops, Time and Civil Considerations. FM 3-0, *supra* note 29, para 1-42. This acronym describes mission variables, which are "those aspects of the operational environment that directly affect a mission." *Id.*

⁶⁹ FM 3-24, *supra* note 3, para. 4-22.

⁷⁰ FM 5-0.1, *supra* note 68, para. 2-76.

⁷¹ *Id.* para. 2-77.

⁷² *See id.*

⁷³ Vane & Taguchi, *supra* note 34, at 73.

⁷⁴ BRICE JOHNSON, COMPANY INTELLIGENCE SUPPORT TEAM HANDBOOK 5 (2012), available at <http://usacac.army.mil/cac2/call/Products.asp>; Major Rod Morgan, *Company Intelligence Support Teams*, ARMOR, Jul.-Aug. 2008, at 23-24, available at <http://www.dami.army.pentagon.mil/site/dig/documents/COIST-Armor%20Magazine-JUL-AUG08.pdf>.

advocates should seek input from company commanders and senior noncommissioned officers. The input from these leaders will enhance the relevance and effectiveness of the training. After gathering all the input from shift change briefs, investigations, and company leadership, the judge advocate develops and disseminates updated ROE vignettes for refresher training.⁷⁵

Small-unit leaders have multiple methods of conducting refresher training and reinforcing the ROE at their level outside of the standard classroom briefing. These leaders can incorporate the updated ROE vignettes in the unit's rehearsals.⁷⁶ For battalion level operations, company commanders can include the updated ROE vignettes in the unit's combined arms rehearsal.⁷⁷ For company level operations and below, squad leaders can update their battle drills and standard operating procedures in accordance with the latest vignettes.⁷⁸ The integration of the ROE into these rehearsals provides the leaders with the necessary knowledge to adapt and continue to achieve the counterinsurgency objectives while not undermining the right of self-defense.

IV. Conclusion

*What is dubbed the war on terror is, in grim reality, a prolonged, worldwide irregular campaign — a struggle between the forces of violent extremism and those of moderation. Direct military force will continue to play a role in the long-term effort against terrorists and other extremists.*⁷⁹

⁷⁵ One method of disseminating the updated ROE vignettes is by fragmentary order (FRAGO). A FRAGO is an "abbreviated form of a operation order issued as needed after an operation order to change or modify that order" U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, THE OPERATIONS PROCESS para. I-9 (26 Mar. 2010), [hereinafter FM 5-0]. The frequency of ROE refresher training will vary depending on METT-TC.

⁷⁶ U.S. DEP'T OF ARMY, FIELD MANUAL 3-24.2 TACTICS IN COUNTERINSURGENCY para. 4-132 (26 Mar. 2010). There are five types of rehearsals, "confirmation brief, the back brief, the combined arms rehearsal, the support rehearsal, and the battle drill or SOP rehearsal." *Id.*

⁷⁷ FM 5-0, *supra* note 75, para. E-3. This type of rehearsal is a synchronization tool for subordinate units and occurs after these units receive an operation order. *Id.*

⁷⁸ *Id.* para. I-11. A battle drill is defined as "a collective action rapidly executed without applying a deliberate decisionmaking process." *Id.* Battle drills are ingrained into every Soldier at the lowest levels and become an unthinking response to an enemy action. *See generally id.* Thus, the goal of the judge advocate is to incorporate as much of the ROE into these drills to ensure that the response to enemy action does not undermine the law of war or the mission objectives.

⁷⁹ Robert M. Gates, *A Balanced Strategy*, FOREIGN AFFAIRS, January/February 2009, available at http://www.jmhinternational.com/news/selectednews/files/2009/01/20090201_20090101_ForeignAffairs_ABalancedStrategy.pdf.

Counterinsurgency operations is still one of the primary missions of the U.S. Armed Forces⁸⁰ As long as these types of operations continue, leaders at all levels will struggle with the challenges of "winning the hearts and minds" of the local populace⁸¹ and exercising the right of unit self-defense. Unit predeployment ROE training and theater refresher training can assist leaders with clearing some of the "fog of war,"⁸² related to applying the ROE in the counterinsurgency fight. Incorporating and co-opting as many leaders and noncommissioned officers into ROE training are vital to the Soldiers' understanding of the application of the ROE in the counterinsurgency fight. These leaders will continually train their Soldiers in theater to adapt to the changing enemy situation and garner the support of the local populace.

⁸⁰ U.S. DEP'T OF DEFENSE, SUSTAINING U.S. GLOBAL LEADERSHIP: PRIORITIES FOR THE 21ST CENTURY 6 (2012), available at http://www.defense.gov/news/Defense_Strategic_Guidance.pdf.

⁸¹ FM 3-24, *supra* note 3, para. A-26. "'Hearts' means persuading people that their best interests are served by COIN success. 'Minds' means convincing them that the force can protect them and that resisting it is pointless." *Id.*

⁸² Ruth Wedgewood, *Law in the Fog of War*, TIME.COM (May 13, 2002), <http://www.time.com/time/magazine/article/0,9171,1002407-1,00.html>.