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NATO Rules of Engagement

On ROE, Self-Defence and the Use of Force during Armed Conflict

By

Camilla Guldahl Cooper

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Oslo, 10 September 2019

Abbreviations

AAP	Allied Administrative Publication
AJP	Allied Joint Publication
AMPL	Amplification
AP I/II	Additional Protocol I/II
CAS	Close Air Support
CDE	Collateral Damage Estimation
CDM	Collateral Damage Estimation Methodology
CER	Collateral Effects Radius
CHA	Collateral Hazard Area
CHECO	Contemporary Historical Examination of Current Operations (U.S. project)
CIVCAS	Civilian Casualties
CJCS	(U.S.) Chairman of the Joint Chiefs of Staff
COPD	Comprehensive Operations Planning Directive
DESIG	Designate
DoD	(U.S.) Department of Defense
DPH	Direct Participation in Hostilities
DPKO	Department of Peacekeeping Operations
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EoF	Escalation of Force
FRAGO	Fragmentary Order
GC	Geneva conventions; General Chamber of ECHR
GENTEXT	General text
HA	Hostile Act
HI	Hostile Intent
IAC	International Armed Conflict
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
IHRL	International Human Rights Law
IED	Improvised Explosive Device
ILC	International Law Commission
LOAC	Law of Armed Conflict
LOW	Law of War

MACV	Military Assistance Command, Vietnam
MC	Military Committee
MOAG	Member(s) of Organised Armed Group
NAC	North Atlantic Council
NATO	North Atlantic Treaty Organisation
NIAC	Non-International Armed Conflict
NSL	No-Strike List
OPCOM	Operational Command
OPCON	Operational Control
OPLAN	Operational Plan
PDSS	Person with Designated Special Status
PID	Positive Identification
PROE	(U.S.) Peacetime Rules of Engagement
QRF	Quick Reaction Force
ROE	Rules of Engagement
ROEAUTH	Rules of Engagement Authorisation
ROEIMPL	Rules of Engagement Implementation
ROEREQ	Rules of Engagement Request
RTL	Restricted Target List
SACEUR	Supreme Allied Commander Europe
SHAPE	Supreme Headquarters Allied Powers Europe
SOFA	Status of Forces Agreement
SOP	Standing Operating Procedures
SROE	(U.S.) Standing Rules of Engagement
STANAG	Standardised Agreement
TACOM	Tactical Command
TACON	Tactical Control
TCN	Troop Contributing Nation
TIC	Troops in Contact
TOA	Transfer of Authority
TST	Time Sensitive Targeting
TTP	Tactics, Techniques, and Procedures
UNCLOS	United Convention on the Law of the Sea
UNSC	United Nation Security Council
VCLT	Vienna Convention on the Law of Treaties

CHAPTER 1

Introduction

1.1 Background and Purpose

The question posed and answered in this book is: When may military forces[1] use force during armed conflict? In order to focus the book the decision has been made to limit this question to the use of force against persons. Operationally, this is determined by the rules of engagement (ROE), and the focus here is on NATO ROE. Legally, the answer is not so simple. Although the law of armed conflict (LOAC) is central to the regulation of the use of force during armed conflict, it is not the only applicable law. In particular, self-defence still applies. As a result, this book aims to tackle the relationship between LOAC and self-defence, and NATO ROE and self-defence. In doing so, answers will be sought to why there is a tendency among military forces to rely so heavily on self-defence during armed conflict, and how LOAC and ROE are best applied in operations where the opponents cannot be easily distinguished from the civilian population.

For those tasked with carrying out military orders, the most important questions are: "What are we authorised to do? What will we be punished for doing or not doing? When and against whom can we use lethal force?" Rather than academic discussions setting out complex criteria which lawyers struggle to agree upon, military forces need, and deserve, clear answers. When the operational realities are complex, military forces should be given clear rules and guidance on when they may use force. It is precisely in complex situations, however, that following the rules is often difficult. In addition, military operations are likely to be subject to further political and operational restrictions to ensure respect for both the law and political and operational sensitivities. This complex picture makes it difficult for military forces to know exactly when they are permitted to use force, and it may be hard to distinguish legal requirements from other mission-specific limitations. This book will therefore analyse what the NATO 'use of force' concepts authorise, what is required by applicable

1 When referring to military personnel, terms such as military forces, soldiers, and troops will be used interchangeably and are intended to include all military servicemembers, whether soldiers, sailors, airmen or marines, as well as privates, non-commissioned and commissioned officers.

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law, and how the operational tools reflect and ensure compliance with the legal requirements.

The main sources for the 'use of force' directions for military forces participating in a NATO operation are the ROE for the operation. ROE are means of exercising political and operational control over military forces. They are designed to help ensure that military forces act in a manner that is both lawful and supports the political purpose and operational considerations of the mission. In NATO, ROE are developed from a standardised set of ROE set out in the Military Committee Decision (MC) 362/1 *NATO Rules of Engagement*. They determine when, where, how and against whom force may be used during NATO[2] military operations and consist of both permissions for, and restrictions on, the use of force and other provocative actions. Although the focus is on NATO ROE, the underlying principles apply to all use of force during armed conflict; NATO ROE are merely an operational reality used here to shed light on questions concerning the application of law to the use of force by military forces during armed conflict.

ROE are political restraints on the *otherwise lawful* use of force.[3] The use of force against another person must have a clear legal authority in order not to be arbitrary.[4] As a result, a central theme of this book is the legal principle that no person may be arbitrarily deprived of his or her life. All use of force must have a clear legal justification, and ROE authorising the use of force should therefore have a clear legal authority. As will be further explained throughout the book, this means that NATO ROE cannot authorise force that is not permitted by applicable law, which during armed conflict primarily is LOAC.[5] This

2 The reference to NATO forces, operations or missions is intended to include both NATO and NATO-led forces, operations or missions. Furthermore, the reference to the use of force by NATO forces should be interpreted as referring to the use of force by combatants, but not, for instance, medical personnel or civilian contractors, as this raises separate issues.

3 NATO, *Military Decision on MC 362/1 – NATO Rules of Engagement* [hereinafter *MC 362/1*], 30 June 2003, p. 2, emphasis added. The MC 362/1 is NATO UNCLASSIFIED, however, permission to use parts of the document for the purposes of this research is granted by the NATO Military Commission in document IMSTAM(O&P)-0006-2018 (copy on file with the author). See also NATO, *STANAG 2597: Training in Rules of Engagement*, ATrainP-4 [hereinafter: *STANAG 2597*], 4 May 2015 (available at http://nso.nato.int/nso/zPublic/ap/ATrainP-4%20EDA%20V1%20E.pdf) p. B-28. The STANAG main document is available at https://nso.nato.int/nso/zPublic/stanags/CURRENT/2597EFed01.pdf, both last accessed 24.04.2019.

4 This fundamental requirement is examined in Chapter 4.

5 As will be further explained in Chapter 5 (Section 5.1.1), LOAC is viewed as a legal basis for the use of force during armed conflict, distinct amongst others from the legal authority to use force under the *jus ad bellum*. See also Section 4.3, '*The Relationship between the* Jus ad Bellum *and the* Jus in Bello*: Related in Fact, but Not in Law'.*

should influence both the formulation and interpretation of the ROE. If there is a need for ROE authorising the use of force in connection with activities outside the ambit of hostilities and therefore not regulated by LOAC, *inter alia*, because it relates to crime rather than armed conflict, the legal authority for such use of force must be found elsewhere. For instance, if applicable, national law enforcement legislation may provide the necessary legal basis for using force. Importantly, NATO ROE does not deal with the use of force in self-defence as this is left for the respective nations to define.

Although the prohibition on arbitrary deprivation of life is today related to the human right to life, the idea that people cannot be killed without a proper reason is considerably older than modern human rights law, and its application to situations of armed conflict is uncontroversial.[6] There are four general exceptions to this prohibition: the use of defensive force; the use of force to effect a lawful arrest or prevent the escape of a detained person; the use of force to quell a riot; and the use of force amounting to lawful acts of war.[7] In armed conflict operations, the most relevant exceptions are the use of force amounting to lawful acts of war and self-defence. Although LOAC is the primary legal basis, situations may arise where LOAC does not provide the necessary authority, for instance, because the imminent threat does not amount to direct participation in hostilities, in which case self-defence may be relied upon.

This relationship between LOAC and self-defence is a running theme in the book. Why does military forces claim to rely on self-defence when LOAC provides sufficient legal authority? As will be explained, there is a tendency among NATO forces to refer to all types of reactive or defensive force as 'self-defence', regardless of the applicable legal authority. In other words, it appears that an operational concept of 'self-defence' has developed, amongst others as a result of the policy that any use of force not authorised by ROE must be self-defence. This causes unhelpful confusion concerning the applicable legal requirements for such defensive force. Which rules apply? Are the limitations imposed by necessity and proportionality sufficient to ensure compliance with LOAC? Although the legal concept of self-defence is important, LOAC is the primary

6 See e.g. U.S., 'Instructions for the Government of Armies of the United States in the Field' (Lieber Code) [1863] Articles 23 and 44, printed in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988) pp. 3ff.

7 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) [1950], as amended by Protocols Nos. 11 and 14, *ETS* 5, Article 2(2) and 15(2); UN Human Rights Committee, *Draft General Comment No. 36 – Article 6: Right to Life* [hereinafter *Draft General Comment 36*], UN Doc CCPR/C/GC/R.36/Rev.2 [19 October–6 November 2015] para. 18; and *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, *I.C.J. Reports* [1996] 226, para. 25.

legal regime for the use of force against lawful targets. This includes situations where the opponents are attacking or about to attack NATO forces. The better approach would therefore be to separate the use of force in response to such attacks, based on LOAC, from the legal concepts of use of force in self-defence. In the meantime, it is important to understand the contents and implications of the operational self-defence concept.

LOAC requires that force is only directed at the persons who may legally be considered lawful targets. In order to comply with this rule, it is necessary to distinguish such persons from protected civilians. This can be particularly difficult when the opposing forces fail to distinguish themselves by wearing uniforms, for instance. Nonetheless, the ROE authorising the use of force against persons must somehow designate who those persons are, in a manner that is possible to apply in practice. The legal and operational requirements for identifying opposing forces are therefore central to this book. Although this problem of facing opponents who do not wear uniforms is most prevalent in non-international armed conflicts, it is equally applicable to international armed conflicts. NATO forces may, *inter alia*, face members of the civilian population who decide to resist military forces by forceful means, or conventional forces operating in an unconventional manner (so-called 'hybrid warfare'[8]).

The operational aspect introduced by NATO ROE raises unique challenges due to NATO's multinational nature. As will be further explained in Section 1.4, 29 States entails 29 different versions of self-defence, 29 interpretations of international law, and last but not least, a wide range of international legal obligations. As a result, there is no uniform 'NATO approach' to the law regulating the use of force authorised by NATO ROE or how the law should be applied.

The combination of complex 'use of force' categories and differing views on the applicable law may result in uncertainty regarding the scope of application of the ROE. Such uncertainty is both unhelpful and undesirable, and the aim of this book is therefore to paint a clearer picture of the potential legal room for manoeuvre military forces have during armed conflict, through the lense of NATO ROE. This will be done by: providing a detailed examination of NATO ROE and the use of force categories in NATO ROE doctrine; explaining the need for a clear legal authority for the use of force and what this entails for ROE; setting out what the relevant legal rules are and how they should be applied during armed conflict; examining the relationship between applicable

8 According to NATO, hybrid threats "are those posed by adversaries, with the ability to simultaneously employ conventional and non-conventional means adaptively in pursuit of their objectives". NATO, 'NATO countering the hybrid threat', ACT, 23 September 2011, http://www.act.nato.int/nato-countering-the-hybrid-threat, last accessed 24.04.2019.

law, and between self-defence, which is not regulated by NATO ROE, and ROE based primarily on LOAC; and finally, by examining the connects and disconnects between the NATO ROE use of force categories and relevant law. The hope is to contribute towards enhanced clarity in an area inherently prone to uncertainty; namely the 'fog of war'.[9]

1.2 NATO Rules of Engagement

According to the NATO ROE doctrine, MC 362/1, NATO ROE are: "[d]irectives to military forces that define the circumstances, conditions, degree, and manner in which force, or actions which might be construed as provocative, may be applied."[10] While the definition and understanding of NATO ROE will be examined in detail in Chapter 2, some examples will be provided here in order to visualise the topic.

NATO ROE doctrine consists of templates that may be used to develop tailored ROE for a NATO operation. As the definition suggests, both the use of force and other provocative acts are regulated. The following are examples of ROE regulating provocative acts not involving the use of force:

> Use of all illuminants or illumination systems is authorized.[11]
>
> Use of Riot Control Agents where necessary for purposes of mission execution is authorized, but only where such use is not a method of warfare.[12]

Furthermore, there are templates authorising the use of different forms of force, from the use of non-deadly forces, to minimum force (up to and including deadly force), and attack:

> Use of non-deadly force to prevent the taking possession of or destruction of water facilities is authorised.[13]

---

9 The reference to the term 'fog' in relation to war may be traced to by Carl von Clausewitz, who explained that "[w]ar is the realm of uncertainty; three quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty". Carl von Clausewitz, *On War* (Michael Howard and Peter Paret (eds/trs), Princeton University Press, Princeton NJ, 1984) p. 101.

10 NATO, *MC 362/1* (n 3) p. 2. See also NATO, *STANAG 2597* (n 3) p. 1.

11 NATO, *STANAG 2597* (n 3) p. B-70.

12 ibid, p. B-73.

13 ibid, p. B-32.

Use of minimum force to prevent the taking of possession or destruction of radio tower is authorised.[14]

Attack against DESIG forces or individuals who demonstrate hostile intent (not constituting an imminent attack) against NATO forces is authorised.[15]

Attack against DESIG forces or individuals who commit or directly contribute to a hostile act (not constituting an actual attack) is authorised.[16]

DESIG means to designate, and suggests that the ROE drafters may provide further detail. The 'use of force' categories will be examined in Chapter 3.

1.3 Scope

1.3.1 *Focus on the Use of Force against Persons during Armed Conflict*

As mentioned above, as a result of the interest in the relationship between LOAC, ROE and self-defence, this book is only dealing with NATO ROE for operations involving participation in armed conflict, and only the use of force against persons and not objects. Furthermore, the focus is on the use of force, which excludes detailed analysis of the NATO ROE regulating the use of provocative actions not involving the use of force.

In LOAC, there are two general categories of armed conflicts: international armed conflicts (IACs) and non-international armed conflicts (NIACs).[17] IACs include both armed conflicts involving two or more States and the occupation of one State by another.[18] The threshold of IACs is relatively low.[19] While the

14 ibid, p. B-33.

15 ibid, p. B-35.

16 ibid, p. B-37.

17 Classification of conflicts is examined in detail in numerous books and articles. For a thorough analysis, see Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press, Oxford, 2012).

18 Article 2 common to Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) [1949], Laws of Armed Conflict, printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 6) pp. 459ff.; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II) [1949], ibid, pp. 485ff.; Geneva Convention (III) relative to the Treatment of Prisoners of War (GC III) [1949], ibid, pp. 507ff.; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (GC IV) [1949], ibid, pp. 575ff.

19 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, Cambridge, 2016) p. 1.

jus ad bellum regulates the initial recourse to force, it contains little detail on the conduct of hostilities. This is mainly found in LOAC. As a result, it is "logical and in conformity with the humanitarian purpose of the Conventions that there be no requirement of a specific level of intensity of violence to trigger an international armed conflict."[20] The test set out in LOAC is a factual one; an IAC will exist when one or more States have recourse to armed force against another State,[21] regardless of the recognition by one or both parties of a state of 'war'.[22] Occupation is also classified as an IAC.[23] As explained in the 2016 Commentary to Common Article 2, an IAC occurs "when one or more States have recourse to armed force against another State, regardless of the reasons for or the intensity of the confrontation."[24]

IACs may take place on the territories of both or all involved States, but may also occur within one State. Examples of the latter include armed conflicts where non-State forces opposing the State are fighting on behalf of another State, or where State A conducts out of area operations in State B, without State B being able to attack State A's territory, as was the case of the NATO campaign against Libya in 2011.

NIACs include all armed conflicts not of an international character.[25] The armed conflict may take place between a State and a group within that State; between a State and a group in another State, or between two or more groups.[26] The threshold for finding that a NIAC is taking place and international law applies is higher than for IACs, requiring a higher degree of intensity.[27]

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20 ICRC, Commentary on the First Geneva Convention – Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [hereinafter: GC I Commentary] (second edition, 2016, https://ihl-databases.icrc.org/ihl/full/GCI-commentary, last accessed 24.04.2019) commentary to Article 2, para. 265.

21 *Prosecutor v. Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case No. IT-94-1-A, ICTY, Appeals Chamber [2 October 1995] para. 70.

22 GC I-IV Common Article 2 (n 18).

23 The specific rules of occupation are beyond the scope of this book.

24 ICRC, *GC I Commentary* (n 20), commentary to Article 2, para. 218.

25 GC I-IV (n 18), Common Article 3, and if ratified and requirements for application are met; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) [1977], printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 6) pp. 775ff.

26 Norwegian Armed Forces, *Manual i krigens folkerett* (*Trans: Manual of the Law of Armed Conflict*), issued under the authority of the Chief of the Defence [2013] [hereinafter: *Norwegian LOAC Manual*] p. 18.

27 William H. Boothby, *The Law of Targeting* (Oxford University Press, Oxford, 2012) p. 49. See also *Prosecutor v. Tadic* (Opinion and Judgement), Case No. IT-94-1-T, ICTY, Trial Chamber [7 May 1997] para. 562, where it is emphasised that a NIAC must be of certain intensity. For a detailed examination of the threshold for NIAC, see Yoram Dinstein,

This is because States have retained greater liberty to use force within their own territory to deal with internal disturbance under national, rather than international, law. The accepted threshold for NIACs is set forth in Article 1(2) of Additional Protocol II, although it is generally considered applicable beyond the limited scope of that treaty, at least where the conflict takes place within a State.[28] A negative definition, it emphasises that "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature"[29] are not armed conflicts. Such situations will in many States be dealt with by law enforcement officers, albeit possibly supported by military forces. Where the situation has escalated beyond internal disturbances and tensions, it will rise to the level of a NIAC to which the treaty rules and, more importantly, customary rules for such conflicts apply. Depending on the degree of control over territory, the conflict will either be regulated by AP II[30] (if ratified) or Common Article 3.[31] NIACs within a State are also particularly likely to see interaction between LOAC and international human rights law (IHRL), because the conflict is occurring within the State's jurisdiction.[32] Finally, although AP I provides in Article 1(4) that certain NIACs involving a fight for self-determination should be regulated as if they were international, this rule has little practical importance.[33]

Non-International Armed Conflicts in International Law [hereinafter: *NIAC*] (Cambridge University Press, Cambridge, 2014) pp. 37–52.

28 See e.g. *Norwegian LOAC Manual* (n 26) p. 18. See also Dino Kritsiotis, 'War and Armed Conflict: The Parameters of Enquiry', Chapter 1 in Rain Liivoja and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (Routledge, Milton Park, Abingdon, Oxon, 2016) p. 21, fn. 111. See also Francoise J. Hampson, 'The relationship between humanitarian law and human rights law from the perspective of a human rights treaty body', 90 *International Review of the Red Cross* 871 (September 2008) p. 555.

29 AP II (n 25), Article 1(2).

30 ibid, Article 1(1) states that the protocol will apply to "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

31 GC I-IV (n 18), Common Article 3 applies to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties". On the distinction between AP II and Common Article 3 type NIACs, see Boothby, *The Law of Targeting* (n 27) pp. 47–50; Dinstein, *NIAC* (n 27) pp. 38–50; and Marco Sassoli *et al. How does law protect in war? Online*, https://casebook.icrc.org/glossary/non-international-armed-conflict, last accessed 24.04.19.

32 See further Sections 4.2.1 (on the distinction between IAC and NIAC in the context of human rights application) and 4.4 (on the relationship between LOAC and IHRL).

33 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) [1977], printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 6) pp. 711ff, Article 1(4) refers to

In addition to the traditional civil war type NIACs, NIACs may also occur across international borders. IACs require State parties on both sides of the conflict, so if one or both sides is a non-State actor, the conflict must be classified as non-international, even if it is transnational. According to AP II Article 1, that protocol only applies to conflicts occurring within the territory of the State.[34] The only provision in the Geneva Conventions applicable to transnational NIACs is therefore Common Article 3. As a result, customary international law plays a significant role. The threshold test set out in Article 1(2) of AP II is still considered relevant,[35] albeit with one important difference. Because the non-State actor is operating across a border and therefore partly in another State, or potentially in international waters, the situation is less likely to be considered as "internal disturbances and tensions". This means that the threshold for this international form of NIACs to all intents and purposes will be lower.

The law of armed conflict and the issues particularly relevant for the book will be examined in further detail in Chapter 5.

1.3.2 *That Which Is Not Dealt With*

1.3.2.1 Operations Not Involving Conduct of Hostilities or Self-Defence

In order to focus the book on issues relating to ROE, LOAC and self-defence, operations below the threshold of armed conflict or before the commencement of an armed conflict are excluded. Furthermore, activities amounting neither to the 'conduct of hostilities'[36] nor involving personal self-defence are also excluded. This entails, *inter alia*, that law enforcement tasks and the ROE and legal issues relating to such activities are not examined. In addition to being beyond the scope of the book, law enforcement has been declared not to be a NATO function.[37] It seems likely, however, that the challenges arising from

"armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination". According to Boothby, the rule is of limited relevance today and may therefore be redundant. Boothby, *The Law of Targeting* (n 27) p. 47.

34 AP II (n 25) Article 1(1).

35 See e.g. ICRC, *GC I Commentary* (n 20), commentary to Article 3, para. 386.

36 'Conduct of hostilties' refers to the use of means and methods of warfare by parties to an armed conflict. The 'conduct of hostilities' is regulated by LOAC.

37 NATO, *MC 362/1* (n 3) p. 6. It should, however, be noted that NATO forces may in exceptional circumstances become involved in such tasks, if it is considered necessary for mission accomplishment and is authorised by a UNSC resolution and the NAC. Nikoleta-Paraskevi Chalanouli and Sherrod Lewis Bumgardner, 'Rules of Engagement, NATO's Approach and National Caveats', in Barbara Janusz-Pawletta (ed.), *Zasady użycia siły* (*ang. Rules of Engagement*) – *wybrane problemy* prawne [Rules of Engagement – legal problems] (Towarzystwo Wiedzy Obronnej, Warsaw, 2011) p. 107. Operations Ocean

hybrid warfare will cause this approach to change in order to enable NATO forces to counter the use of unconventional weapons and tactics ('asymmetric actions'), such as terrorism and other crimes, in hybrid campaigns on the territory of NATO States prior to an armed attack.

In situations below the threshold of armed conflict, NATO forces operating in areas where they may come into contact with forces from other States are likely to have ROE controlling the use of force, should the need arise. This will also apply during an armed conflict in relation to States that are not party to the ongoing armed conflict. Whether force may be used to deal with such a situation, beyond the scope of personal self-defence, will be regulated by the *jus ad bellum*, in particular UN Security Council Resolutions and States' right of self-defence.[38] If the situation escalates beyond the threshold of armed conflict, LOAC will apply. The relationship between the *jus ad bellum* and LOAC or *jus in bello* is subject to debate. Because the approach taken to that discussion affects the question of legal basis for the use of force authorised by ROE, it is examined separately and in detail, in Section 4.3.

1.3.2.2 Detention

While there may be some debate among NATO States on whether detention amounts to the use of force, the decision was made to exclude detention from the book. The NATO ROE series on detention does not raise particularly challenging questions, but there is extensive legal debate concerning, *inter alia*, the legal basis for interning in NIACs and the relationship between LOAC and IHRL with regard to the decision to detain, the legal review of that decision, and the duration of detention. This is not an area where LOAC and self-defence potentially interact and is therefore not dealt with in this book.

1.3.2.3 Other Areas of Law

Because the focus in this book is on the relationship between the two main 'use of force' authorities for military forces involved in an armed conflict, namely

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Shield and Active Endeavour are examples of such an exception. See Lone Kjelgaard, 'The Importance of Law in the Theatre', in Edoardo Greppi, *Conduct of hostilities: the Practice, the Law and the Future,* Proceedings of the 37th Round Table on Current Issues 2014 (International Institute of Humanitarian Law, 2015, http://iihl.org/wp-content/uploads/2019/03/Conduct-of-Hostilities.pdf, last accessed 24.04.2019) pp. 39–40.

38 As explained in the UN Department of Peacekeeping Operations, *Handbook on Multidimensional Peacekeeping Operations* (United Nations, December 2003) p. 57, "sometimes the Security Council will authorize a peacekeeping operation to use armed force in situations other than in self-defence. The circumstances under which the operation may use armed force will then be spelt out in the relevant resolution of the Council".

LOAC and self-defence, other areas of law are only examined to the extent relevant, as is the case of human rights law, or they are not covered at all. This does not mean that these are the only two relevant legal authorities; others may of course also be relevant for military operations,[39] in particular for the NATO ROE authorising the use of force in other circumstances than the attack ROE.[40] Which areas of law will be applicable will depend on the context and the operation. While a detailed or exhaustive overview of other legal regimes is beyond the scope of this book, a few comments will be made to illustrate the legal complexities of military operations.

Depending on the operation, domestic law may affect the ROE development. In operations in support of and on the territory of a NATO State, the host nation will be able to influence the ROE development and vote against ("break silence"[41]) any ROE that authorise the use of force prohibited by their domestic legislation. Operations involving support of non-NATO States may also include use of force authorised by domestic legislation, both in the form of force necessary to enable mission accomplishment and in instances where NATO forces are supporting law enforcement authorities. Host nation law and authorities will be particularly important for operations below the threshold of an armed conflict. Compliance with the domestic laws of the respective Troop Contributing Nations (TCNs) will usually not affect the ROE development because it can be ensured through the use of caveats.[42] It may, however, have an impact on ROE application and interpretation, such as the ability to use lethal force to protect property or use military forces for counter-narcotics operations.

Other areas of international law of relevance to the development of NATO ROE for operations involving participation in an armed conflict will primarily be rules regulating activities not considered part of the armed conflict and hence unregulated by LOAC, but that are nonetheless part of the NATO operation. For instance, if the operation involves maritime forces, UNCLOS and customary international law of the sea will regulate *inter alia* the right to exercise sovereign rights of the coastal State, the right to visit and search and the right of hot pursuit.[43] The degree to which force may be used is, however, limited by the duty to avoid adverse consequences such as creating hazards to the vessel or exposing

39 See also Kjelgaard, 'The Importance of Law in the Theatre' (n 37) p. 38.

40 This 'use of force' category is described in Section 3.4.

41 See further Section 2.4.2.

42 On caveats, see Section 2.4.2.

43 See United Nations Convention on the Law of the Sea, adopted at the Third United Nations Conference on the Law of the Sea (UNCLOS), U.N. Doc. A/CONF.62/122 [1982] (reprinted in 21 *I.L.M.* 1261 [1982]) Articles 73, 110, and 111 respectively.

the marine environment to an unreasonable risk.[44] NATO forces may also be tasked through a United Nations Security Council (UNSC) resolution to conduct maritime interdiction operations, although the international rules regulating, for instance, prevention of terrorism or the proliferation of nuclear, chemical or biological weapons does not apply to activities of armed forces during an armed conflict, because LOAC will apply instead.[45] Similarly, NATO forces may be tasked with enforcing a no-fly zone, although the use of force involved during an armed conflict would be regulated by LOAC.[46] One of the exceptional areas where the permission to use force has long been recognised is for the purpose of combating piracy,[47] which may form part of a NATO mission. Piracy may for instance prevent the desired establishment of a safe and secure environment in the area of operation, or pose a threat to NATO or host nation forces.

NATO operations may also include cyber operations. At the present, however, NATO does not conduct cyberattacks, but conducts instead only defensive operations. The degree to which cyber measures will entail something akin to use of force, especially against persons which is the focus here, is therefore limited.[48]

1.4 Sources and Methodology

1.4.1 *A Complex Picture*

During military operations, more than one area of law is likely to apply at the same time. In order to give the best picture of the legal regulation of the use

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44 ibid, Article 225.

45 International Maritime Organization (IMO), *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* [14 October 2005] http://www.refworld.org/docid/49f58c8a2.html, last accessed 24.04.2019, Article 2 bis.

46 Program on Humanitarian Policy & Conflict Research at Harvard Univ. [HPCR], *Manual on International Law Applicable to Air and Missile Warfare* [hereinafter: *AMW Manual*] (2009, version 2.1 March 2010, HPCR, Harvard University) Section P, commentary para. 8, Rule 105(a-b) with commentary, and Rule 153(a) with commentary (aerial warfare). See also *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Prepared by International Lawyers and Naval Experts convened by the International Institute of Humanitarian Law (Cambridge University Press, 1995) para. 97.

47 UNCLOS (n 43) Articles 100 to 107 and 110. In order to deal with the piracy problems off the coast of Somalia, the UN Security Council has further expanded the UNCLOS authorised in UN Security Council Resolution 1816 and subsequent resolutions, authorising states to use "all necessary means to repress acts of piracy and armed robbery". UN S.C. Res. 1816 (Somalia), U.N. Doc. S/RES/1816 [2 June 2008], para. 7(b).

48 On cyber operations, see Michael N. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* [hereinafter *Tallinn Manual 2.0*] (2nd ed, Cambridge University Press, 2017).

of force, it is therefore necessary to consider several areas of law. Because the decision has been made to focus on operations involving participation in an armed conflict, the main legal regime is LOAC. However, there is increasing recognition of the fact that IHRL also applies, at least to some extent. In addition, the use of force may be based on self-defence. The concept of self-defence is found in several legal regimes: the *jus ad bellum,* international criminal law (ICL), and national criminal law. It has also been said to be a part of human rights law. The wide range of potentially applicable laws entailed that, in addition to identifying and setting out the applicable law, it has also been necessary to examine how the laws interact. In particular, there was a need to examine and clarify the understanding of the relationship between LOAC and IHRL,[49] and the *jus ad bellum* and the *jus in bello* or LOAC.[50]

While there is extensive literature on the respective topics covered, there is only a limited amount considering how they relate, and even less examining the legal issues in the context of NATO operations and ROE. As a result, a wide variety of sources have been relied upon, including books, articles, manuals, doctrines, and conversations with experienced military personnel.

A general challenge faced in this research is the tendency for the same terms to be used with reference to different concepts. This relates both to States or practitioners, and to commentators. Because terms are commonly used without clarifying which concept is being referred to, it is necessary to first decipher which concept or interpretation is adhered to before examining the use or comments about them. The most pertinent examples in this context are the terms 'hostile act' and 'hostile intent', which for some are self-defence concepts but which for NATO are defined as being threats or acts not giving rise to self-defence.[51] As will be shown, this has been a cause of confusion, and these ROE are commonly referred to as self-defence ROE.[52] A related issue is the fact that States differ in their

49 See Section 4.2.

50 See Section 4.3.

51 See Section 3.5.

52 For instance, when members of the International Society of International Law and the Law of War, many of which are government legal advisers in NATO states, were asked whether the legal basis for these ROE is self-defence or mission accomplishment, the answers were divided: "the respondents are split in respect of the question whether ROE's authorizing 'an attack on individuals and units carrying out a hostile act (not constituting an actual attack)' or 'demonstrating hostile intent (not constituting an imminent attack)' constitute an expression of the right of self-defence or an expression of ROEs for mission accomplishment". Terry Gill, Carl Marchand, Hans Boddens Hosang, and Paul Ducheine, 'General Report', in Stanislav Horvat and Marco Benatar (eds.), *Legal Interoperability and Ensuring Observance of the Law Applicable in Multinational*

interpretation of 'use of force'. Attempts to define it in the NATO context revealed that not all States consider 'use of force' to include both offensive and defensive force.[53] Other examples are 'necessity' and 'proportionality', which are usually referenced in relation to ROE without clarifying whether they refer to the LOAC principles, or law enforcement or human rights principles.[54]

There is also a tendency in international law to use terms without defining their meaning, and to accept that different States have different understandings of them. The term 'combatant', for instance, may be used both in a formal and functional sense. The former refers to State forces who have a right to participate in hostilities and who are entitled to POW status upon capture, while the functional use of the term refers to all those who are fighting.[55] 'Direct participation in hostilities' is another area where there is extensive debate on what this concept entails and how it should be applied.[56] The LOAC term 'attack' is also given different meanings. For AP I States, it includes the use of force in both offence and defence,[57] while for instance the U.S. has emphasised that it only includes the use of force in offence.[58] Defensive force is generally considered to be regulated by self-defence.[59]

Deployments (Proceedings of the 19th International Congress, Quebec, XIX Recueil of the International Society of Military Law and Law of War, Brussels, 2013) p. 151. See also Erica L. Gaston, 'Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege', 8(2) *Harvard National Security Journal* 283 (2017) p. 283, presenting the NATO concepts as self-defence.

53 See Section 3.1.

54 The LOAC principles are introduced in Section 5.1.1, while proportionality is considered further in Section 5.5. On the self-defence principles of necessity and proportionality, see especially Sections 8.2.4 and 8.2.5.

55 See Section 5.2.2.

56 See Section 5.2.3.

57 AP I (n 33) Article 49(1).

58 See e.g. the criticism of the provision in U.S. Department of Defense (DoD), *Conduct of the Persian Gulf War*, Final Report to Congress, 31(3) *ILM* 1992, available at http://www.globalsecurity.org/military/library/report/1992, last accessed 24.04.2019, p. 614: "Use of the word "attacks" in this manner is etymologically inconsistent with its customary use in any of the six official languages of Protocol I. Conversely, the word "attack" or "attacks" historically has referred to and today refers to offensive operations only". See also W. Hays Parks, 'Air War and the Law of War', 32 *Air Force Law Review* 1 (1990), pp. 113–115. See, however, U.S. Army, *Operational Law Handbook* (U.S. Army Judge Advocate General's Legal Center and School, International and Operational Law Department, Charlottesville, Virginia, 2017) p. 12, applying the formulation of AP I Article 49(1). The AP I definition is not commented on in the U.S. DoD *Law of War Manual*. U.S. Department of Defense (DoD), *Law of War Manual* (December 2016 update), Office of the General Counsel of the Department of Defense, Washington, 2016, available at https://www.hsdl.org/?abstract&did=797480, last accessed 24.04.2019.

59 See Section 5.1.3.

'Self-defence' is a further example of a source of confusion. Unless it is specified, it may refer to State self-defence, unit self-defence or personal self-defence.[60] Furthermore, as will be explained in Section 8.3, the term 'self-defence' also appears to be used to describe the operational authority to use force without ROE, regardless of the legal basis. When it is stated in NATO ROE that it does not limit the inherent right of self-defence, what is the legal foundation for that right?

Many of these terms and the diverging views on their meaning go to the heart of the book, and the challenges they create are dealt with throughout the book as they arise.

1.4.2 *International Law*

According to Article 38 of the ICJ Statute, which is considered to reflect general international law, the primary sources of international law are treaties and customary international law.[61] The definition of a treaty is found in the Vienna Convention on the Law of Treaties (VCLT),[62] Article 2(1)(a). A treaty is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[63] Customary international law is identified on the basis of State practice accompanied by an acceptance that the practice is required by international law (*opinio*

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60 See Chapters 6 and 8.

61 The full text of Article 38 is:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>   b. international custom, as evidence of a general practice accepted as law;
>   c. the general principles of law recognized by civilized nations;
>   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
> 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Statute of the International Court of Justice [18 April 1946] [hereinafter: ICJ Statute], available at http://www.icj-cij.org/en/statute, last accessed 24.04.2019.

62 Vienna Convention on the Law of Treaties (VCLT) [23 May 1969], U.N. Doc. A/CONF.39/27 [1969], reprinted in 8 *I.L.M.* 679 (1969).

63 ibid, Article 2(1)(a). According to Article 31(1), treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

juris sive necessitatis), or as phrased in Article 38(1)(b); "evidence of a general practice accepted as law". Article 38(1)(c) also includes a third source of primary law, namely general principles of law recognised by civilized nations. Although rarely applied,[64] the reference to personal self-defence as universal and inherent despite the lack of international treaty rules setting out such a general rule begs the question whether it is a general principle.

Finally, judicial decisions and writings of international experts may be used as secondary sources of how primary legal provisions should be interpreted.[65] In addition to the sources recognised in Article 38, binding decisions of international organisations may also be a source of law for the States party to the convention establishing the international organisation,[66] such as the United Nations.[67] Resolutions and guidelines that are not developed as legally binding obligations, for instance because the international organisation responsible does not have the authority to create new international law, but are nonetheless intended to be respected, are sometimes referred to as 'soft law'.[68]

There is some debate on whether there is a hierarchy of sources in international law.[69] The approach taken here is that the sources should be considered in a successive order, with the result that treaty law and customary law are primary sources. Secondary sources should only be relied upon if and when primary sources are not sufficient, and may clarify rather than alter the application of the primary sources of law.[70]

The focus on armed conflicts and the use of force by military forces makes the law of armed conflict (LOAC, also known as international humanitarian law or the *jus in bello*[71]) a central source of law for this book. As will be further explained in Section 5.1.2, LOAC is perceived as an independent legal authority for the use

64 Antonio Cassese, *International Law* (2. ed., Oxford University Press, Oxford, 2005) p. 193.

65 ICJ Statute (n 61) Article 38(1)(d).

66 Cassese, *International Law* (n 64) pp. 185–187.

67 According to Article 25 of the UN Charter, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". Charter of the United Nations (UN Charter) [24 October 1945] 1 *UNTS* XVI.

68 Cassese, *International Law* (n 64) pp. 196–197, and Anthony Aust, *Modern treaty law and practice* (Cambridge University Press, Cambridge, 2013) p. 49.

69 See e.g, Alain Pellet, 'Article 38', in Andreas Zimmermann *et al.* (eds.), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, Oxford, 2. Ed., 2012) pp. 841–848.

70 See also Cassese, *International Law* (n 64) p. 188. Others argue that there is no hierarchy among the sources. See e.g. Jan Arnold Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (Oxford University Press, New York, 2017) p. 25.

71 These terms LOAC and *jus in bello* will be used interchangeably. In particular, *jus in bello* will be favoured when discussing its relation to the *jus ad bellum*.

of force, its application being triggered by the existence of an armed conflict. Through the concept of 'combatant immunity', LOAC permits acts that would otherwise be impermissible, such as the taking of life.

In the context of LOAC, both treaty law and customary international law play an important role. In addition to the Geneva Conventions of 1949 and their Additional Protocols, more historic sources of law, such as the 1907 Hague Convention V on Land Warfare (1907 Hague Regulations), still apply. There are also several treaties regulating the means of warfare.[72] Because NATO States have ratified different treaties, the most notable example being Additional Protocol I to the Geneva Conventions, there is no common NATO approach to LOAC. As a result, where possible, customary international law is looked to in order to fill the gaps. Customary international law also plays an important role in the context of NIACs, due to the limited body of treaty law. International experts have therefore sought to record the customary international law of armed conflicts. In particular, the 2005 ICRC Customary Law Study is an important source of information on the rules that may be considered customary law.[73] However, the study has been met with some criticism, and should therefore be applied as a secondary source of law rather than expression of customary law.[74]

In addition, expert manuals have been developed on some of the areas where the identification of existing law has been particularly challenging. Among the manuals relied upon in this book are the ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities;[75] the Air and Missile Warfare Manual;[76] and the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations.[77] National LOAC manuals are also useful sources,

72 See e.g. discussion in Section 8.2.6.

73 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* [hereinafter: *ICRC CIL Study*] (Cambridge University Press, Cambridge, 2005) available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul, last accessed 24.04.2019.

74 Boothby, *The Law of Targeting* (n 27) p. 40. See also the analysis in Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC study on customary international humanitarian law* (Cambridge University Press, Cambridge, 2007) and John B. Bellinger III and William J. Haynes II, 'A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law', 89(866) *International Review of the Red Cross* 443 (June 2007).

75 ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law [hereinafter ICRC Interpretive Guidance] (May 2009, prepared by Nils Melzer, available at https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, last accessed 24.04.2019).

76 *AMW Manual* (n 46).

77 *Tallinn Manual 2.0* (n 48).

and if a manual is formally endorsed as the State's position on LOAC, it may be used as a source of State practice and *opinio juris*.

IHRL is regulated by fewer treaties. While all NATO States have ratified the International Convention on Civil and Political Rights (ICCPR),[78] the United States and Canada are not parties to the European Convention on Human Rights (ECHR).[79] The extent to which the differing treaty obligations affect the use of force during NATO operations is examined in Section 4.2, including whether the right to life applies irrespective of treaty obligations, as customary IHRL. The treaty rules are complimented by judicial decisions, most notably by the European Court of Human Rights (ECtHR), and interpretive comments such as the General Comments developed by the Human Rights Committee (HRC).[80] The ECtHR has in numerous cases considered the relationship between LOAC and human rights law and the potential for extraterritorial application of human rights law obligations, with varying and seemingly unpredictable results. Including human rights considerations in the book has therefore presented several challenges, resulting in a separate section on the question of *lex specialis* (Section 4.4). The approach taken is that LOAC is the *lex specialis* of armed conflict. Accordingly, although human rights law must be interpreted in light of LOAC during armed conflict, the *lex specialis* rule is not considered to displace the application of human rights completely.

Because the ICL provisions relevant to the current book are not among the more controversial rules, this area provided few methodological challenges, despite the fact that not all NATO States have ratified the Rome Statute. Similarly, because the focus with regard to the *jus ad bellum* is primarily on State self-defence, the main methodological challenge is the relationship between Article 51 of the UN Charter[81] and the pre-existing customary rule. In addition, although the position taken here is that the use of force during an armed conflict is legally premised on the application of LOAC, others perceive the *jus ad bellum* as the legal basis for the use of force, even when LOAC applies.[82] As a result, and as mentioned above, the relationship between the *jus ad bellum* and the *jus in bello* is examined in detail.[83]

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78 International Covenant on Civil and Political Rights (ICCPR) [16 December 1966] *UNTS* vol. 999, p. 171. Note that the U.S. does not recognise the extraterritorial application of the ICCPR. See further Section 4.2.3.

79 ECHR (n 7).

80 See examples in Section 4.2.

81 (N 67).

82 See e.g. Geoffrey S. Corn *et al.*, *The Law of Armed Conflict – an Operational Approach* (Wolters Kluwer Law & Business, New York, 2012) Chapter 1.

83 See Section 4.3.

States have taken different approaches to the relationship between international and national law. In some legal systems, international treaties apply domestically without legislation (monism). In others, international law must be given effect at the domestic level through a legislative act, for instance through the incorporation of the treaty into existing or new law (dualism). While States are generally considered to fall into one of the two categories, many legal systems combine elements from both approaches. The implications of this are, however, beyond the scope of this book.[84]

1.4.3 *National Law*

Because NATO leaves it to the member States to define 'self-defence', their respective domestic self-defence rules are relevant to the examination of the ability of NATO forces to use force during armed conflict. A study of domestic rules from different legal systems is not without its challenges. It is arguably impossible to fully understand a legal rule without having knowledge of the complete legal system it operates in and hence the context of the rule in question. For instance, while the wording of a rule may be comparable from one State to another, its application by the respective national courts may still be quite different. There are also practical challenges involved, such as the lack of language skills enabling national laws and legal decisions to be read. A comprehensive comparative study of the 29 NATO States' approaches to self-defence is not within the scope of this book. Nevertheless, where useful, an overview of relevant domestic law from select States has been provided in order to illustrate the different approaches taken and to demonstrate that the basic premises for self-defence relevant for this book are more uniform than perhaps expected.

The selection of examples is therefore based on two overall considerations. First, the availability of sources in a language I could work with, including commentaries on the interpretation and application of the self-defence rule to ensure the appropriate contextual understanding of the rule. Second, the decision was made to focus on States which are long-standing members of NATO and whose perceptions of self-defence may have influenced the development of the MC 362/1.

1.4.4 *NATO Publications*

The book relies heavily on NATO publications, in particular the NATO ROE doctrine MC 362/1. This raised two challenges in particular. The first is whether

84 For an explanation of the distinction, see Aust, *Modern treaty law and practice* (n 68) pp. 163–177.

NATO publications fit into the lists of recognised sources of international law set out above. In particular, do NATO ROE have any binding force on NATO States and troops participating in a NATO operation respectively? This is dealt with extensively in Section 2.2.2. The important methodological conclusion is that ROE are internal documents that are not intended to or perceived as creating legal obligations on NATO States or legal justifications for the use of force. For individual members of the military forces, however, ROE are legally binding as orders, and violations are regulated by national disciplinary and military penal law of the respective States.

The second challenge research on NATO publications raises is that mission specific ROE from current or recent operations are generally classified and therefore cannot be used in an open access publication. National interpretations on ROE issues are, to the extent they are formalised, also often classified. The decision was therefore made to rely on the NATO ROE doctrine and to provide fictional examples of ROE. The MC 362/1 is NATO unclassified, which means that its contents may only be shared with the public for certain purposes. However, permission is given by the Military Committee to use aspects of it in this book.[85]

As a result of NATO ROE being classified, there are relatively few publications on the topic, and most of the discussions and lectures relevant for the research are classified. The solution has been to rely heavily on U.S. ROE commentary, to the extent that it is relevant, and in the context of the NATO hostile act and hostile intent ROE in particular, to use non-classified discussions with experienced military personnel to enhance the arguments and examples in the book. Rigorous efforts have been made to ensure that the content of this book is non-classified.

The MC 362/1 is currently under review for update, and the proposals take some of the concerns raised here into account. However, because the draft has not yet been accepted by NATO States and it is impossible to predict the final result, the current discussion has not taken the draft into account.

1.5 The Structure of the Book

The book is divided into four parts and 13 chapters. After this introductory chapter, Part 1 (Chapters 2 and 3) examines rules of engagement and the 'use of force' categories in NATO ROE. Part 2 identifies and sets out the relevant

85 See n 3.

legal frameworks. First, Chapter 4 explains the approach taken to identifying the applicable legal basis for the use of force authorised by ROE. This includes a consideration of the prohibition on arbitrary deprivation of life; the impact of the approach taken to the relationship between the *jus ad bellum* and the *jus in bello*, and an explanation of how the applicable legal regimes interact. The next chapters (5 and 6) go on to examine the law of armed conflict and self-defence respectively. Part 3 examines the scope of the 'use of force' categories in light of the applicable law. After a brief introduction in Chapter 7, Chapter 8 examines in detail the potential scope of applying self-defence during armed conflict, and distinguishes between the legal concept of self-defence found in criminal law and more operational forms of self-defence. Chapters 9–12 considers the ROE 'use of force' categories in light of applicable law: from the use of force in response to attacks or imminent attacks by opposing forces; the use of force to accomplish designated tasks; the attack-ROE permitting force to be used against persons demonstrating hostile intent or committing or contributing to hostile acts, and finally, persons 'declared hostile'. Conclusions and recommendations are presented in Chapter 13, which makes up Part 4.

PART 1

The Point of Departure: NATO Rules of Engagement

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CHAPTER 2

Rules of Engagement: Introduction, Development and Use

2.1 Introduction

ROE have long played an important role in the execution of military operations.[1] At the strategic level, ROE are political constraints on the use of lawful force; at the operational level, ROE operate as a tool for regulating the use of force, commonly referred to as a command and control (C2) tool. As for most topics, the discussion of ROE should ideally be based on a clear and common understanding of what ROE are, where they come from, what purpose they have, and how they function. Although there is a general understanding of what ROE are, it is difficult to find agreement on a general definition of ROE, much less how they function and how they should be used. Ideally, ROE should combine "top-level guidance with lower-level discretionary power";[2] however, it can be challenging to reach an agreement on how this is best achieved, especially in the multinational context of NATO.

Individuals working for NATO or involved in NATO operations come from a variety of backgrounds, and will be influenced by various national and international understandings of the concept ROE. The result is a lack of uniform understanding of ROE even within NATO. With only limited overviews or commentaries on the system being published, this chapter will endeavour to explain the NATO ROE in detail. Although the main focus will be on NATO, information concerning both ROE in general and other ROE systems will also be drawn upon to provide a more comprehensive picture, especially in Sections 2.2 and 2.3.

1 An earlier version of this chapter was published as an article: Camilla Guldahl Cooper, 'Rules of Engagement Demystified: A Study of the History, Development and Use of ROEs', 2014, *Military Law and the Law of War Review / Revue de Droit Militaire et de Droit de la Guerre* 53 (2), pp. 189–246.

2 Scott D. Sagan, 'Rules of engagement', in Alexander L. George (ed.), A*voiding war – Problems of Crisis Management* (Westview Press, Oxford, 1991) p. 461.

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2.2 Analysing ROE: Definition, Scope and Form, and Legal Status

2.2.1 *Definitions, Scope and Form of Rules of Engagement*

Because the term 'rules of engagement' or ROE may be used in different contexts and with reference to differing concepts, the following section will set out how the concept is perceived and applied in this book. There are two aspects to defining ROE: the practical dimension of ROE, *i.e.* what a ROE should have as a function; and the formal dimension, that is, what a ROE should look like or what sort of documents the ROE should be found in. These will be dealt with separately, starting with some examples of how ROE are defined or described in national and multinational doctrines.

Many of the explanations found of what ROE are more descriptive than definitional, however. Because this distinction has limited practical implications for this book, it will not be examined further.

2.2.1.1 Multinational and National Approaches to ROE

In 2004, a U.S. report on the Legal Lessons Learned from Afghanistan and Iraq raised the issue of confusion regarding the applicable ROE, and stated that:

> [p]art of the confusion, and arguably a solution, might be a definitional matter: namely, what is a rule of engagement? Reaching consensus on what ROE are seems a logical first step toward understanding what sources should be consulted for ROE guidance.[3]

In fact, there are several definitions of ROE, with varying degrees of similarities, and those working in NATO will, as mentioned in the introduction, be influenced by these differing traditions. As mentioned in Chapter 1, NATO's ROE doctrine, the MC 362/1, has defined ROE as "[d]irectives to military forces that define the circumstances, conditions, degree, and manner in which force, or actions which might be construed as provocative, may be applied."[4] This

3 U.S. Army, *Legal Lessons Learned from Afghanistan and Iraq*, Volume 1 (U.S. Army Judge Advocate General's Legal Center and School, Center for Law and Military Operations, Charlottesville, Virginia, 2004) https://www.fas.org/irp/doddir/army/clamo-v1.pdf, last accessed 24.04.2019, p. 81.

4 NATO, *Military Decision on MC 362/1 – NATO Rules of Engagement* [hereinafter *MC 362/1*], 30 June 2003, p. 2. The MC 362/1 is NATO UNCLASSIFIED, however, permission to use parts of the document for the purposes of this research is granted by the NATO Military Commission in document IMSTAM(O&P)-0006-2018 (copy on file with the author). See also NATO, *STANAG 2597: Training in Rules of Engagement*, ATrainP-4 [hereinafter: *STANAG 2597*], 4 May 2015, available at http://nso.nato.int/nso/zPublic/ap/ATrainP-4%20EDA%20V1%20E.pdf, p. 1. The

definition is more precise than an older NATO definition of ROE, namely that ROE are "[d]irectives issued by competent military authority which specify the circumstances and limitations under which forces will initiate and/or continue combat engagement with other forces encountered".[5]

Similar to the MC 362/1 NATO definition, the Sanremo Handbook on Rules of Engagement provides the following description of ROE:

> ROE appear in a variety of forms in national military doctrines, including execute orders, deployment orders, operational plans, or standing directives. Whatever their form, they provide authorisation for and/or limits on, among other things, the use of force, the positioning and posturing of forces, and the employment of certain specific capabilities.[6]

The UN Department of Peacekeeping Operations *Guidelines for the development of rules of engagement* (*ROE*) *for United Nations peacekeeping operations* describes ROE as "the parameters within which armed military personnel assigned to United Nations Peacekeeping Operations (UNPKOs) may use force".[7] Further detail is provided in the UN Handbook on Multidimensional Peacekeeping operations: "The rules of engagement for the peacekeeping operation will clarify the different levels of force that can be used in various circumstances, how each level of force should be used and any authorizations that may need to be obtained from commanders".[8] Finally, in the 2006 EU Use of Force Concept, the following description of ROE may be found:

> ROE are directives to military commanders and forces (including individuals) that define the circumstances, conditions, degree, and manner in which force, or other actions which may be construed as provocative,

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STANAG main document is available at https://nso.nato.int/nso/zPublic/stanags/CURRENT/2597EFed01.pdf. Both sites last accessed 24.04.2019.

5 NATO, *AAP-06(2017): Glossary of terms and definitions* (NATO Standardization Office, Edition 2017). The definition was included in the glossary on 01 Jan 1973, and was changed in 2018 to reflect the MC 362/1 definition. See NATO, *AAP-06(2018): Glossary of terms and definitions* (NATO Standardization Office, Edition 2018).

6 Alan Cole *et al., Sanremo Handbook on Rules of Engagement* (International Institute of Humanitarian Law, 2009) p. 1.

7 UN Department of Peacekeeping Operations/Military Division, *Guidelines for the development of rules of engagement* (*ROE*) *for United Nations peacekeeping operations,* UN Doc. MD/FGS/0220.0001 [May 2002] p. 1.

8 UN Department of Peacekeeping Operations, *Handbook on Multidimensional Peacekeeping Operations* (United Nations, December 2003) p. 57.

> may, or may not, be applied. ROE are not used to assign tasks or give tactical instructions.[9]

Not surprisingly, similar definitions may be found in national handbooks or manuals. For instance, in the United States Army Operational Law Handbook, ROE are defined as "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which U.S. [naval, ground, air] forces will initiate and/or continue combat engagement with other forces encountered".[10] Canada's "Use of Force for CF [Canadian Forces] Operations" states that:

> ROE are an indispensable instrument of C2 for ordering and controlling the use of force or actions which may be construed as provocative during military operations. ROE are orders issued by military authority that define the circumstances, conditions, degree, manner, and limitations within which force, or actions which may be construed as provocative, may be applied to achieve military objectives in accordance with national policy and the law.[11]

The 2011 British Defence Doctrine similarly set out that "ROE define the constraints placed upon military activities, as well as the freedoms permitted and they reflect the operational context in which it is envisaged that force may be used".[12] Finally, the Norwegian Manual of the Law of Armed Conflict states

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9 Council of the European Union, *Use of Force Concept for EU-led Military Crisis Management Operations* (1st revision, Doc. 6877/06 of 28 February 2006), cited in Peter Dreist, 'Rules of Engagement in multinationalen Operationen – ausgewählte Grundsatzfragen', 49(3) *Neue Zeitschrift für Wehrrecht* 99 (2007), p. 107.

10 U.S. Army, *Operational Law Handbook* (U.S. Army Judge Advocate General's Legal Center and School, International and Operational Law Department, Charlottesville, Virginia, 2017) p. 77.

11 Canadian Forces, *Use of Force for CF Operations,* Joint Publication 5.1 (Document B-GJ-005-501/FP-001, issued under the authority of the Chief of the Defence Staff, 2008) p. 2–3.

12 Great Britain, *British Defence Doctrine*, Joint Defence Publication (JDP) 0–01 (4th edition, November 2011, Chief of Defence Staff, http://www.defencesynergia.co.uk/wp-content/uploads/2015/05/UK-Joint-Doctrine-Pub-0-01-Nov-2011.pdf, last accessed 24.04.2019) p. 1–24. Note that the definition is removed from the 2015 version, although the description of ROE in that version is very similar. UK, *UK Defence Doctrine*, Joint Defence Publication (JDP) 0–01 (5th edition, November 2014, Chief of Defence Staff) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33697/20111130jdp001_bdd_Ed4.pdf, last accessed 24.04.2019) p. 49: "The rules of engagement ensure that military personnel activities remain within the law and are consistent with government policy; define what we can legally do and not do; and reflect the operational context". The UK also has its own ROE doctrine, UK, *United Kingdom Compendium*

that "Rules of engagement are directives issued by competent authorities that regulate the circumstances under which military force may be used, and what type and degree of force that may be applied in those circumstances".[13]

Legal scholars apply similar, though less detailed, definitions or descriptions, such as "the tools that help the military commander tailor the use of force",[14] "rules of engagement (…) specify in detail the circumstances under which fire may be opened"[15] and "the set of directives given to commanders in the field to guide them on the circumstances and manner in which force may be used".[16]

As these examples illustrate, there seems to be at least a general agreement on what ROE are. At the centre of all the definitions and descriptions above there is the notion of a mechanism used by military forces that deals with the use of force. Furthermore, even though different words are used to describe how ROE are intended to be used, for instance whether ROE *define, authorise, delineate, regulate, specify or clarify circumstances for*, *help tailor* or *guide* the use of force, all the definitions and descriptions indicate that ROE are to be used by commanders to somehow influence the use of force by persons under their command. This aspect of ROE is emphasised for instance in the Canadian use of force manual, where it is explained that ROE are "intended to ensure that commanders and their subordinates do not use force or other measures beyond that authorized by higher command".[17] The scope of ROE as a Command and Control tool will be studied in further detail below (Section 2.5). The effectiveness of ROE as a Command and Control tool would presumably be different depending on whether they are viewed as mere guidance or legally binding orders, a question that will be discussed in Section 2.2.2.

Despite this agreement on the fundamental characteristics of ROE, there are also noticeable differences in how ROE are viewed, in particular with regard to the scope of ROE and also their form. While some definitions and descriptions only refer to the use of force, others include the regulation of other acts as

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of National Rules of Engagement, UK Joint Service Publication 398 (UK Ministry of Defence, 21 October 2013).

13 Norwegian Armed Forces, *Manual i krigens folkerett* (*Trans: Manual of the Law of Armed Conflict*), issued under the authority of the Chief of the Defence, [2013], [hereinafter referred to as *Norwegian LOAC Manual*], p. 295, author's translation.

14 Mark David Maxwell, 'Individual Self-Defense and the Rules of Engagement: Are the Two Mutually Exclusive?', 41 *Mil. L. & L. War Rev.* 39 (2002), p. 41.

15 Daniel P. O'Connell, *The Influence of Law on Sea Power* (Manchester University Press, Manchester, 1975) p. 169.

16 Sagan, 'Rules of engagement' (n 2) p. 444.

17 Canadian Forces, *Use of Force for CF Operations* (n 11) p. 2–4.

well (scope). Furthermore, there seems to be some disagreement over whether the term ROE refers to a set of directives or orders, or whether ROE may be found in a variety of sources (form). These differences will now be looked at in more detail, together with further clarifications with respect to NATO ROE in particular. Finally, some conclusions will be offered on how ROE should be understood for the purpose of this book.

2.2.1.2 Scope of ROE

What may at first appear to be a significant difference in the definition of ROE, is that some sources only include the use of force within ROE, while others, such as the NATO definition, also include other provocative acts. Examples of provocative acts that do not include the use of force are aspects of information operations such taking control over a radio station to distribute information intended to influence the audience; the use of jammers to interfere with mobile phone signals or navigation systems; conducting military exercises in the vicinity of an adversary's border, and conducting simulated attacks.[18] This gives the impression that the scope of NATO ROE is quite different from other forms of ROE. However, the definitions or descriptions of ROE limiting them to the use of force only may generally be divided into two categories: those provided by legal scholars and those concerning peace operations.

Legal scholars have the liberty to only include the level of detail needed for the argument they are making. The overemphasis on the use of force, to the exclusion of other provocative acts, may therefore merely be an oversimplification; after all, most ROE have something to do with the use of force in some form. The focus on the use of force aspect of peace operations ROE is also easy to understand. Due to the limited legal authority to use force below the threshold of armed conflict,[19] ROE commonly focus on the exceptional circumstances in which force may be used. However, in addition to providing guidance on the complex question of how much force may be used, the ROE may also provide relatively detailed regulation of provocative measures that may escalate into a need to use force. The ROE for peace keeping operations are therefore also likely to include ROE regulating other provocative acts than the use of force, such as the authority to carry weapons.[20]

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18 See also Gary P. Corn, 'Developing Rules of Engagement: Operationalizing law, policy and military imperatives at the strategic level', in Geoffrey S. Corn, Rachel E. VanLandingham and Shane R. Reeves (eds.), *U.S. Military Operations – Law, Policy and Practice* (Oxford University Press, Oxford, 2016) p. 212.

19 On the threshold of armed conflicts, see Section 1.3.1.

20 See e.g. UNDPKO/MD, *Guidelines for the development of rules of engagement* (*ROE*) *for United Nations peacekeeping operations* (n 7), attachment 1, p. 2, rules 2 and 3 dealing

As a result, NATO ROE are not unique in regulating when, where, what and against whom both force or other acts which may be construed as provocative may be used.[21] Thus, in addition to regulating the use of force, ROE should also be expected to regulate acts such as the positioning of forces near the border of a neighbouring State; boarding of foreign vessels or aircraft; or illumination of a person or object for instance in order to track, warn off or identify. After all, a commander would want the ability to control the application of all acts which may be viewed as provocative by the opposing forces, or in any other way cause the situation to escalate. Or as the U.S. Operational Law Handbook phrases it, the ROE should cover all aspects of "combat engagement with other forces encountered";[22] the ordinary meaning of 'combat engagement' being expected to include more than the actual use of force. NATO targeting doctrine, for instance, defines 'combat engagement' as "actions (…) against an adversary".[23] Applying a definition that does not limit ROE to the use of force therefore makes operational, or practical, sense.

Another aspect of the scope of ROE is the level of detail included. ROE provide the framework for when force and other provocative acts may be used and hence for the operation as such, they do not define the solutions. According to the U.S. Department of Defense, "ROE should *not* delineate specific tactics, should *not* cover restrictions on specific system operations, should *not* cover safety-related restrictions, should *not* set forth service doctrine, tactics or procedures".[24] Thus, according to Roach, ROE should never be 'rudder orders', that is, specific directions on how Commanders should use their forces.[25] As Sagan explains, "ROE are meant to guide commanders' judgement about the appropriate uses of force, not to determine precisely when and how to respond to threats".[26] ROE are strategic and operational command and control tools, and should therefore be distinguished from specific tactical orders.

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respectively with the use of weapon systems such as riot control equipment and the authority to carry weapons.

21 See also Corn, 'Developing Rules of Engagement' (n 18) p. 212.

22 See e.g. U.S. Army, *Operational Law Handbook* (n 10) p. 77.

23 NATO, *Allied Joint Publication 3.9: Allied joint doctrine for joint targeting (AJP-3.9)*, (NATO Standardization Office (NSO), Edition A Version 1, 31 July 2017), https://www.gov.uk/government/publications/allied-joint-doctrine-for-joint-targeting-ajp-39a, last accessed 24.04.2019, p. 1–3.

24 JCS Pub 1, Department of Defense Dictionary of Military and Associated Terms (Washington, DC, U.S. Govt. Print. Off., 1979) p. 298, cited in Ashley Roach, 'Rules of engagement', 36(1) *US Naval War College Review* 46 (Jan/Feb 1983), p. 46. See also U.S. Army, *Operational Law Handbook* (n 10) p. 83, and NATO, *STANAG 2597*, (n 4) p. B-65.

25 Roach, 'Rules of engagement' (n 24) p. 46.

26 Sagan, 'Rules of engagement' (n 2) p. 451.

As a result, the most commonly used historic example of ROE, namely the order given at Bunker Hill on 17 June, 1775, presumably by William Prescott ("Don't fire 'til you see the whites of their eyes'"),[27] may not actually be a ROE. Instead, it is better viewed as a specific tactical order, or even a weapons handling instruction, to be executed at that time by the troops present.[28] As one commentator points out, it is "too clear and too brief to qualify [as an early rule of engagement]".[29] What could have been the ROE for this attack is something like 'Attack on British forces operating on the Charlestown peninsula is authorised'. ROE normally apply to more than one concrete situation and should in most cases be broad enough to cover several forces and/or available weapon systems. So, while for instance an order to await further orders before opening fire may be given to forces about to board an enemy ship or attack opposing forces, ROE regulate the use of force or other provocative acts for any boarding of enemy ships or any attack on opposing forces, using any weapon not specifically regulated or prohibited. Such specific tactical orders should, of course, be in accordance with the ROE. For the troops bound by both tactical orders and ROE, this distinction is perhaps not too important as they have to comply with both. However, the distinction is important for the understanding of ROE, and also a reminder to those who develop ROE that they should not be too specific.

2.2.1.3 Form of ROE

With regard to the form of ROE, there seems to be a narrow and wide approach: ROE being understood as certain directives or orders only, *i.e.* the ROE serial messages (numbered one-line messages) expressly authorising or prohibiting certain acts (narrow definition); or, as any communications regulating the use of force (wide definition).[30]

A *wide* definition of ROE may better reflect realities, and may be supported by the fact that most definitions of ROE refer to the term "directives" rather than, for instance, 'orders'. Guidance or instructions on the use of force and

27 See *e.g.*, Guy R. Phillips, 'Rules of Engagement: A Primer', *The Army Lawyer*, Department of Army Pamphlet 27-50-248 (July 1993), p. 5; and Maxwell, 'Individual Self-Defense and the Rules of Engagement' (n 14) p. 42, though Maxwell accredits the quote to General Israel Putnam rather than William Prescott. See also U.S. Army, *Legal Lessons Learned from Afghanistan and Iraq*, Vol. 1 (n 3) p. 81.

28 See also discussion in Corn, 'Developing Rules of Engagement' (n 18) pp. 213–214.

29 Gary D. Solis, *The Law of Armed Conflict: International humanitarian law in war* (Cambridge University Press, Cambridge, 2016) p. 474.

30 See also Hans Boddens Hosang, *Rules of Engagement* (PhD thesis, University of Amsterdam 2017, available at https://pure.uva.nl/ws/files/7940990/Boddens_Hosang_Thesis_complete.pdf, last accessed 24.04.2019) pp. 51–53.

other provocative acts regulated by ROE may in fact be found in a number of places. The wide approach to ROE is therefore to include in the definition of ROE not only the serial messages entitled ROE, but also other documents such as special instructions (SPINS),[31] standing operating procedures (SOP),[32] tactical directives,[33] restrictive target lists (RTL),[34] no strike lists (NSL),[35] fragmentary orders (FRAGO)[36], and fire control measures.[37] The U.S. Army *Legal Lessons Learned from Afghanistan and Iraq, Volume 1* states that "[i]n addition to the authorization serials, ROE also appeared in less intuitive places – places that oftentimes did not even mention "ROE"".[38] This wide approach to the definition of ROE is clearly supported in the above-mentioned description of ROE in the Sanremo ROE Handbook.[39] It is presumably also supported by

31 According to NATO, "SPINS are intended to provide information, and direction and guidance that apply to a longer period than just the intended ATO period or to more than one part of the ATO. SPINS should not contain already established procedures." NATO, *Allied Joint Doctrine 3.3 for Air and Space Operations* (*AJP-3.3*) (NATO Standardization Office (NSO), Edition B Version 1, April 2016, available at https://www.gov.uk/government/publications/allied-joint-doctrine-for-air-and-space-operations-ajp-33b, last accessed 24.04.2019) p. 2–6.

32 NATO, *AAP-06(2018)* (n 5), "A set of instructions covering those features of operations which lend themselves to a definite or standardized procedure without loss of effectiveness. The procedure is applicable unless ordered otherwise." Also known as standard operating procedure.

33 NATO, *AAP-06(2018)* (n 5), a directive is "A military communication in which policy is established or a specific action is ordered."

34 The restricted target list (RTL) "is a joint target list subset owned by the JFC and may include some joint prioritized target list targets. They are lawful targets that have temporary or permanent operational restrictions for engagement and require special consideration." NATO, *Allied Joint Publication 3.9: Allied joint doctrine for joint targeting* (*AJP-3.9*), (NATO Standardization Office (NSO), Edition A Version 1, 31 July 2017), https://www.gov.uk/government/publications/allied-joint-doctrine-for-joint-targeting-ajp-39a, last accessed 24.04.2019, p. 4–8.

35 The no-strike list (NSL) "is comprised of entities that are designated by the NAC as protected. Engagement of NSL entities violates international law, the Law of Armed Conflict, agreements, conventions, NAC policies or rules of engagement." ibid, pp. 4–8 and 4–9.

36 NATO, *AAP-06(2018)* (n 5), "An abbreviated form of an operation order, issued as required, that eliminates the need for restating information contained in a basic operation order. It may be issued in Sections."

37 NATO, *AAP-06(2018)* (n 5), fire control is "The control of all operations in connection with the application of fire on a target."

38 U.S. Army, *Legal Lessons Learned from Afghanistan and Iraq*, Vol. 1 (n 3) p. 83. See also, Randall Bagwell and Molly Kovite, 'It is not self-defence: Direct participation in hostilities authority at the tactical level', 224(1) *Military Law Review* 1 (2016), p. 11.

39 "ROE appear in a variety of forms in national military doctrines, including execute orders, deployment orders, operational plans, or standing directives. Whatever their form, they provide authorisation for and/or limits on, among other things, the use of force, the

those who, for instance, consider the ISAF Tactical Directives on the avoidance of civilian casualties (also known as the CIVCAS Directives) to be a form of ROE.[40] However, the wide definition seems impracticable. Depending on whether ROE are legally binding orders or not (see below), it may also be at risk of offending the principle of legality: legally binding orders ought to be clear and ascertainable. If the ROE are legally binding but nearly impossible to locate or get a complete overview over, it would seem unreasonable to sanction violations of those ROE.

By contrast, a narrow definition of ROE would arguably make it easier to locate and have a complete overview over the applicable ROE. It avoids the challenges and frustrations described in the Legal Lessons Learned from Afghanistan and Iraq:

> Another frequently reported problem created by using the term ROE in an imprecise manner is that operators and JAs [Judge Advocates] reported frustration over having to search through voluminous material to find all of the "applicable ROE". Certainly, if one applies a broad definition of ROE, which far exceeds that contemplated by the doctrinal definition of ROE, to include special instructions, fire control measures, tactics, techniques and procedures, and so on, then there literally is no end to the perpetual hunt for ROE.[41]

Operationally, the clarity provided by a narrow definition of what ROE are and where they can be found is beneficial both for the Commander and the troops. It ensures the necessary predictability of how troops will act, on the one side, and what is expected of them on the other. If the ROE are legally binding on the forces, the principle of legality makes such predictability essential. However, as

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positioning and posturing of forces, and the employment of certain specific capabilities." Cole *et al.*, *Sanremo Handbook on Rules of Engagement* (n 6) p. 1.

40 See e.g. Frits Kalshoven and Thyla Fontein, 'Some Reflections on Self-Defence as an Element in Rules of Engagement' in Mariëlle Matthee etc. (eds.), *Armed Conflict and International Law: In Search of the Human Face* (TMC Asser Press, The Hague, 2013) pp. 103–104, and Christopher D. Amore, 'Rules of Engagement: Balancing the (Inherent) Right and Obligation of Self-Defense with the Prevention of Civilian Casualties', 1 *National Security Law Journal* 39 (spring 2013), pp. 59ff.

The CIVCAS Directives are further commented on in Sections 2.4.1 and 5.5.

41 U.S. Army, *Legal Lessons Learned from Afghanistan and Iraq*, Volume 2 (U.S. Army Judge Advocate General's Legal Center and School, Center for Law and Military Operations, Charlottesville, Virginia, 2004, http://www.fas.org/irp/doddir/army/clamo-v2.pdf, last accessed 24.04.2019) p. 132.

will be explained below, ROE are fairly rigid and therefore can be difficult and time-consuming to change. Furthermore, in the context of NATO, ROE authorisation requires consensus among all States, which is more likely to be achieved if the details are left to be established elsewhere, in documents which are owned by the Commander rather than the North Atlantic Council. As a result, there is a need for additional ways of communicating how the ROE should be interpreted, both in light of changing mission requirements and threats,[42] and to enable further detail in the use of force direction. This additional guidance may be provided through documents such as Tactical Directives, and Standing Operating Procedures, even if they are not referred to as ROE.

A narrow definition of ROE does not necessarily exclude the existence of these documents otherwise included in a wider definition of ROE, but it does exclude them from having the formal status as ROE. Instead, they should be viewed as "complementary and separate".[43] By providing the more detailed instructions in other documents, the necessary information on the use of force and other provocative acts may be communicated without making the ROE themselves too detailed and voluminous. The information would still be there, but this distinction ensures a form of hierarchy among documents dealing with the use of force and other provocative acts, with ROE having a superior standing.[44] As a result, the ROE would be the first place to look for information on what force or provocative acts may be used, and any additional documents ought to comply with the ROE (*i.e.,* in the narrow sense), in the way that regulations have to comply with existing laws, for instance. Furthermore, as will be discussed below (in Section 2.2.2), although most countries consider ROE to be legally binding military orders, the legal status of other instruments is less clear.

By separating ROE and other guidance on the use of force and provocative acts, it becomes possible to provide such additional guidance without it amounting to legally binding obligations. It may instead be founded on policy only, and may for instance be intended to remind the forces of the purpose of

42 U.S. Army, *Legal Lessons Learned from Afghanistan and Iraq*, Vol. 1 (n 3) p. 83.

43 Bradd C. Hayes, *Naval Rules of Engagement: Management Tools for Crisis* (RAND/UCLA Center for the Study of Soviet International Behavior, Santa Monica (CA), No. RAND/-N-2963-CC, 1989, available at http://www.rand.org/content/dam/rand/pubs/notes/2005/N2963.pdf, last accessed 24.04.2019) p. 9.

44 Boddens Hosang, however, argues that "ROE cannot even be said to be a *primus inter pares* in the panoply of operational guidance and operational directives given for an operation". Hans Boddens Hosang, 'Rules of Engagement and Targeting', Chapter 8 in Paul AL Ducheine, Michael N. Schmitt, and Frans Osinga (eds.), *Targeting: The Challenges of Modern Warfare* (Asser Press, 2016) p. 173.

the mission rather than to change the conditions under which they operate by introducing additional legally binding restraints. It also enables States to distinguish between practice driven by policy only and practice influenced by an *opinio juris* in the context of customary law development.

A consequence of this distinction between legally binding ROE and other, non-binding, documents should be an increased awareness of whether new guidance on the use of force and other provocative acts is intended to be legally binding or not, in order to issue the guidance in the correct form. For States who view all instructions as legally binding orders, this hierarchy may still serve a useful role. Documents such as SOPs and Tactical Directives are often extensive and may contain a combination of direction and guidance not clearly distinguished from the other.[45] The ROE could then provide clearer instructions on what is expected and even serve as a useful tool for interpreting the other instruments. Preferably, the situation should have been possible to sum up by the following explanation offered by an ISAF Commander to his troops: "The R.O.E are the can and cannot. (…) They are the rules of the game. The Tactical Directive covers should and should not".[46]

Admittedly, although such a distinction would be preferable, the distinction is not that clear in practice. At least parts of a tactical directive should be perceived as orders and hence binding, and because the remainder will be a reflection of the Commander's intent, the forces may not choose to disregard it.[47] As Boddens Hosang explains, ROE "are an integral and essential part in a complex system, in which each of the parts must interact and be applied in proper cohesion with the others for the system to function as designed".[48]

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45 See also Jeffrey F. Addicott, 'The Strange Case of Lieutenant Waddell: How Overly Restrictive Rules of Engagement Adversely Impact the American War Fighter and Undermine Military Victory', 45 *St. Mary's Law Journal* 1 (2013), pp. 20–21.

46 Wesley Morgan, 'Weighing threats and rules of engagement', *New York Times* (23 August 2010, http://atwar.blogs.nytimes.com/2010/08/23/weighing-threats-and-rules-of-engagement-in-afghanistan/?_php=true&_type=blogs&_r=0, last accessed 24.04.2019). See also Addicott, 'The Strange Case of Lieutenant Waddell', ibid, p. 21, fn. 123, citing *Hearing on National Defense Authorization Act for Fiscal Year 2011 and Oversight of Previously Authorized Programs Before the Committee on Armed Services*, 111th Cong. 157 (2010): "it should be noted that the tactical directive … is command guidance and not a change to the Rules of Engagement".

47 See also Ian David Park, *The Right to Life in Armed Conflict* (Oxford University Press, Oxford, 2018) p. 121, explaining that "within the UK military justice system, disregarding a tactical directive may amount to a contravention of an order and therefore amount to a military disciplinary offence".

48 Boddens Hosang, 'Rules of Engagement and Targeting' (n 44) p. 173.

2.2.1.4 Mission Accomplishment ROE versus Self-Defence ROE

Though not reflected in the various definitions of ROE, a distinction is commonly made between self-defence ROE and mission accomplishment ROE.[49] Mission accomplishment ROE are "based on a detailed mission analysis, particularly an assessment of the threat environment, force protection requirements, and the extent to which coercive force will be needed to accomplish the mission."[50] Unlike self-defence ROE, mission accomplishment ROE will for instance establish guidelines for pre-planned attack.[51] However, as NATO ROE do not regulate the use of force in self-defence, this distinction will not be employed in this book.[52] NATO ROE are developed to enable a unified approach to the use of force in order to accomplish the common mission. As such, all NATO ROE are mission accomplishment ROE.

Before the MC 362 was developed, that is, during the Cold War, attempts were made to regulate the use of force in self-defence in NATO ROE. However, limitations imposed on the use of force in response to imminent attacks in particular were viewed as a limitation on the national interpretation of self-defence, and was thus a cause of great frustration for the United States, amongst others. As a result, when the MC 362 and later the MC 362/1 were developed, they did not include ROE on self-defence. Today, NATO emphasises that it has no authority to enforce a common legal position for all member states. Instead, the focus is on operational effectiveness, and an expectation that all member states operate within their respective applicable legal regimes.[53] As the scope of the right of self-defence differs among the troop contributing nations, this is left as a national matter.[54]

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49 See e.g. U.S. Chairman of the Joint Chiefs of Staff (CJCS), *Standing Rules of Engagement* (*SROE*)*/Standing rules for the use of force* (*SRUF*) *for U.S. Forces* [hereinafter: *SROE/SRUF*], CJCS Instruction 3121.01B (13 June 2005) p. A-2. See Michael N. Schmitt, 'Clipped Wings: Effective and Legal No-fly Zone Rules of Engagement', 72 *International Law Studies* Chapter XII (1998), p. 250.

50 Gary P. Corn, 'Should the Best Offense Ever be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force rules in the Standing Rules of Engagement', *49 Vanderbilt Journal of Transnational Law* 1 (2016), pp. 54–55.

51 Michael N. Schmitt, 'Targeting and International Humanitarian Law in Afghanistan', 85 *International Law Studies* 307 (2009), pp. 337–338, fn. 91.

52 NATO ROE does not include ROE on the use of force in self-defence. This is left for the respective TCNs to regulate.

53 Lone Kjelgaard, 'The Importance of Law in the Theatre', in Edoardo Greppi, *Conduct of hostilities: the Practice, the Law and the Future,* Proceedings of the 37th Round Table on Current Issues 2014 (International Institute of Humanitarian Law, 2015, http://iihl .org/wp-content/uploads/2019/03/Conduct-of-Hostilities.pdf, last accessed 24.04.2019) especially p. 38.

54 Despite this position, the MC 362/1 still makes reference to self-defence, and applies self-defence terminology in some of its ROE. See NATO, *MC 362/1* (n 4) p. 4, and NATO,

2.2.1.5 Mission Specific ROE versus Standing ROE

Another way to distinguish ROE is to differentiate between mission specific ROE and standing ROE. Mission specific ROE are tailored to a specific operation which may cover both armed conflicts and other operations where there is a need to control the use of force. For instance, NATO develops new ROE for all its operations. By contrast, standing ROE are in existence at any time, and will apply to all operations, subject to any additional guidance being issued for specific operations. Because standing ROE presume a form of standing force, they are commonly national and provide national policies and procedures for the use of force by the respective national forces. The best known examples of this form of ROE are the Standing Rules of Engagement (SROE)/Standing rules for the use of force (SRUF) for U.S. Forces and the predecessor U.S. Peacetime ROE (PROE).[55] The U.S. ROE system has clearly influenced the use of ROE both by other States and by international organisations.[56]

Because NATO has both standing multinational groups and has recently become more involved in activities which do not amount to operations with a corresponding Operational Plan (OPLAN)[57] and ROE,[58] it would be

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STANAG 2597 (n 4) pp. B17–18. This issue will be dealt with further in Chapter 8, while the law pertaining to self-defence is examined in Chapter 6.

55 The SROE is intended to "establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations and contingencies and routine Military Department functions occurring outside U.S. territory (…) and outside U.S. territorial seas". U.S. CJCS, *SROE/SRUF* (n 49) p. A-1. In U.S. J.P. 5-00.2, it is further explained that the SROE is intended to be "stand alone guidance for US forces worldwide that are equally applicable to all the combatant commands and can be easily and quickly amended or clarified to meet mission-specific requirements". U.S. Joint Chiefs of Staff, *Joint Publication 5-00.2: Joint Task Force Planning Guidance and Procedures* (13 January 1999, http://www.bits.de/NRANEU/others/jp-doctrine/jp5_00_2(99).pdf, last accessed 24.04.2019) p. IV-7. The SROE generally does not apply to multinational forces (*id*). For more information on U.S. SROE, PROE and wartime ROE, see for instance Dawn R. Eflein, 'A Case Study of Rules of Engagement in Joint Operations: The Air Force Shootdown of Army Helicopters in Operation PROVIDE COMFORT' 44 *Air Force Law Review* 33 (1998), pp. 38–44.

56 See also J.F.R. Boddens Hosang, 'Self-Defence in Military Operations: The Interaction between the Legal Bases for Military Self-Defence and Rules of Engagement', 47 *Military Law and Law of War Review* 25 (2008), p.77.

57 NATO, *AAP-06(2018)* (n 5), defines an OPLAN as: "[a] plan for a single or series of connected operations to be carried out simultaneously or in succession. It is usually based upon stated assumptions and is the form of directive employed by higher authority to permit subordinate commanders to prepare supporting plans and orders. The designation "plan" is usually used instead of "order" in preparing for operations well in advance. An operation plan may be put into effect at a prescribed time, or on signal, and then becomes the operation order."

58 On NATO ROE development, see further Section 2.4.

useful for NATO to have the possibility of using standing ROE. However, this is currently not part of the NATO ROE system (MC 362/1). Instead, standing multinational groups such as Quick Reaction Forces (QRF) or Very high readiness Joint Task Force (VJTF) may have pre-approved ROE which resemble standing ROE, but are dormant mission specific ROE than standing ROE.[59] These ensure that the forces will have ROE available when needed, despite their rapid deployment.

Activities not involving operations include for instance maritime interdiction carried out by NATO Standing Naval Forces in order to help deal with the refugee and migrant crisis in the Aegean Sea.[60] Because of the nature of the activities, NATO's operational planning procedures[61] are not best suited for planning the operation. However, ROE are an integral part of this process and the resulting OPLAN, which means that the current procedures do not envisage ROE outside of operations. Still, the forces involved will still need guidance on the use of force and other provocative acts. Standing NATO ROE would therefore be useful, but has currently not been developed.[62] One of the main challenges with establishing a form of 'NATO Standing ROE' would be to identify a standing legal basis for the use of force applicable to all NATO States. NATO activities, as opposed to operations, will commonly involve peacetime tasks rather than participation in an armed conflict. Because NATO ROE cannot be based on self-defence, alternative peacetime legal bases for the use of force would be required. The use of force by military forces during peacetime, beyond self-defence, is a complex topic. It may therefore be difficult for States, through the NAC, to come to an agreement on such ROE.[63] The alternative would be to only include ROE regulating the use of provocative measures not including force, such as physical obstruction, passing of warnings, exercising in the vicinity of a potential enemy, or conducting simulated attacks. The use of force would then only be authorised in cases of self-defence.

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59 Dormant ROE are further explained in Section 2.4.2.

60 For more information, see https://www.nato.int/cps/ic/natohq/topics_70759.htm, last accessed 24.04.2019. Although Operation Sea Guardian may be better described as activities than operation, it was the first non-Article 5 operation and had transitioned from the ongoing Operation Active Endeavour.

61 NATO, *Allied Command Operations Comprehensive Operations Planning Directive COPD V2.0* (Supreme Headquarters Allied Powers Europe (SHAPE), Belgium, 04 October 2013).

62 Suggestions have been made to include standing ROE in the update of the MC 362/1, however, this work was not completed by the time of the publication of this book.

63 The U.S. standing ROE, for instance, "focus primarily on providing implementation guidance on the exercise of self-defence." Corn, 'Developing Rules of Engagement' (n 18) p. 226.

2.2.1.6 Restrictive versus Permissive Approaches to ROE

Initially, the use of NATO ROE was intended to differ for operations below and above the threshold of an armed conflict.[64] ROE for peace operations would be *restrictive* in nature, in that Commanders would only have the authority to carry out actions provided for by ROE, apart, of course, from self-defence. During armed conflict, on the other hand, Commanders would be able to do anything permitted by law, unless prohibited or limited by ROE – a more *permissive* approach. In other words, ROE were intended to function differently as a Command and Control tool in these two types of situations, and the interpretation of ROE would differ depending on the operation. As will be explained below in Section 2.2.1.8, this distinction is no longer as clear, and all use of force and provocative acts are NATO forces are authorised to apply will be expected to be expressly authorised by ROE (with the exception of force used in self-defence).[65]

It should be noted, however, that terms permissive and restrictive commonly (and confusingly) are used in two different, though interrelated manners when describing ROE. In the abovementioned context, they are employed to describe the difference between ROE providing the sole authority for the use of force and other provocative acts, or simply imposing certain restrictions on the amount of force permitted by law. However, the terms restrictive and permissive are also used to describe the degree of political control over the use of force and other provocative acts, and how much room for manoeuvre the ROE provide a Commander and the forces.[66] For instance, the U.S. Army *Operational Law Handbook* explains that "[i]n contrast with U.S. ROE, which are generally considered permissive, NATO ROE may be considered by some to be more restrictive in nature. However, NATO ROE are always mission specific, and thus not by definition or default more restrictive that U.S. ROE".[67]

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64 See e.g. NATO, *MC 362/1* (n 4) pp. 5–6; Sylvain Fournier, 'NATO Intervention Abroad: How Roe Are Adopted and Jurisdictional Rights Negotiated', Stefano Manacorda and Adán Nieto Martin (eds.): *Criminal Law between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions: Proceedings of the XVth International Congress on Social Defense* (Ministerio de Justicia, Spain, 2009) p. 117, and Roach, 'Rules of engagement' (n 24) p. 49.

65 See also U.S. Army, *Operational Law Handbook* (n 10) p. 479.

66 Permissive ROE in this sense are also referred to as 'the Nelson touch'. The impact of restrictive or permissive ROE in this sense of the terms is further discussed in Section 2.4.1.

67 U.S. Army, *Operational Law Handbook* (n 10) p. 477. See further p. 80, where the same terms are used to describe ROE measures requiring express permission or where anything not restricted may be deemed permitted.

While the former use of the terms refers to the overall approach to ROE, the latter is a description or critique of the nature of the existing ROE. As a result, ROE of both the permissive (peacetime) and restrictive (armed conflict) approaches may be assessed as restrictive or permissive in the second meaning of the terms, depending on the perspective and expectations of whoever is making the assessment. When the terms restrictive or permissive are used in this book, it will therefore be made clear which of these types is being referred to. The issue of how existing ROE have been perceived is further discussed in Section 2.4.1.

2.2.1.7 NATO ROE as the Sole Authority for the Use of Force or Other Provocative Acts

NATO documents make reference to the view that with the exception of self-defence, all use of force and other provocative acts must be authorised by ROE. As a result, NATO ROE are the 'sole authority' for the use of force or other provocative acts during NATO operations.[68] This has been the cause of some confusion, for three reasons. First, as will be explained in Section 2.2.1.8, the 'sole authority' language is only used in the MC 362/1 in relation to peacetime operations.[69] Second, certain States have applied national ROE in addition to the mission specific NATO ROE, and the claim that NATO ROE provide the sole authority for the use of force and other provocative acts may be viewed as denying States the right to apply such national ROE. Although the existence of a parallel system of ROE may be confusing and thus undesirable, their application is not limited by NATO ROE being the sole authority for the use of force and other provocative acts. Provided that the alternative national ROE are only applied to operations carried out outside the NATO chain of command, as part of national operations, the use of such force or other provocative acts is not considered to have taken place as part of a NATO operation.

The third confusion concerning the 'sole authority' language is whether it implies that the ROE are the legal basis ('authority') for the use of force and other provocative acts. As will be explained further in Section 2.4 below, ROE are drafted in accordance with the applicable law, but are also intended to reflect operational and political considerations. They are intended to be

68 NATO, *STANAG 2597* (n 4) p. B-8. See also U.S. Army, *Operational Law Handbook* (n 10) p. 477, and Nikoleta-Paraskevi Chalanouli and Sherrod Lewis Bumgardner, 'Rules of Engagement, NATO's Approach and National Caveats', in Barbara Janusz-Pawletta (ed.), *Zasady użycia siły* (*ang. Rules of Engagement*) – *wybrane problemy* prawne [Rules of Engagement – legal problems] (Towarzystwo Wiedzy Obronnej, Warsaw, 2011) p. 107.

69 See NATO, *MC 362/1* (n 4) p. 2.

internal procedures, not international law creation.[70] The use of force or other provocative acts must always have a legal basis; the function of the ROE is to communicate to the forces what their Commander(s) authorise them to do, within the parameters set by the NAC and by applicable law. Only the use of force in self-defence is not affected by NATO ROE, as this is, as explained above,[71] regulated by the respective troop-contributing nations' domestic legislation.

2.2.1.8 Peacetime Operations (and Operations Prior to the Commencement of an Armed Conflict) versus Armed Conflict Operations

As mentioned above in Section 2.2.1.5, it was initially intended that NATO ROE would be applied differently during operations below or above the threshold of armed conflict (as well as, of course, applying different ROE). However, over the past fifteen years there has been a change in the way NATO applies ROE to armed conflict. Rather than differentiating between types of operations, NATO has applied the more restrictive approach, previously reserved for peacetime operations, to all operations when drafting ROE.[72] This means that NATO ROE are primarily formulated as authorisations, and are, with the exception of self-defence, the sole authority for the use of force and other provocative acts in NATO operations.[73] The ISAF operation in Afghanistan and operation Unified Protector in Libya are examples of this approach to ROE.[74] In practical terms, this means that if there is no NATO ROE permitting the use of force or an otherwise provocative act, and self-defence does not apply, that act cannot be undertaken.

It should be stressed, however, that this harmonisation of NATO ROE for operations below and above the threshold of armed conflict only applies to how ROE are drafted and thus used as a command and control tool. It does not

70 See further Section 2.2.2.1.

71 See Section 2.2.1.4.

72 According to STANAG 2597, "The MC 362/1 distinguishes between NATO ROE for peacetime operations from armed conflict operations by authorizing the use of force in peacetime and limiting the use of force during armed conflict. However, for policy reasons, the distinction is no longer as certain, and current NATO ROE are a mixture of authorisations and limitations for all types of operations". NATO, *STANAG 2597* (n 4) p. B-28.

73 See also U.S. Army, *Operational Law Handbook* (n 10) p. 479.

74 For a criticism of the changed methodology in regard to ISAF, see Wolff Heintschel von Heinegg and Peter Dreist, 'The 2009 Kunduz Air Attack: The Decision of the Federal Prosecutor-General on the Dismissal of Criminal Proceedings Against Members of the German Armed Forces', 53 *German Yearbook of International Law* 833 (2010), p. 856.

harmonise the approach to when, how, how much and against whom force or provocative acts may be used. For instance, the ROE authorising attack on the basis of the status of a person or object as a lawful target would only be available for operations entailing participation in an armed conflict. Furthermore, the degree of detail in the ROE and hence the degree of detailed command and control applied in a given operation will depend on the facts, including but not limited to the classification of the situation as an IAC or NIAC. For instance, the ROE for an NATO Article 5[75] operation are likely to be more robust than ROE for a so-called 'war of choice' because it is imperative that an Article 5 operation succeed. This may be achieved either by having ROE authorisations formulated in a wider manner, or alternatively, the originally intended methodology for armed conflict operations may be invoked, whereby the use of lawful force is authorised unless prohibited or restricted by the ROE. At the same time, it may also be that the ROE are even more detailed, in order to prevent a conflict in a NATO State from escalating into a full-blown war. Furthermore, although there will be stronger incentives to succeed in an Article 5 operation, the acceptance of risk to the civilian population will not necessarily be any greater than operations such as ISAF and OUP.

There is no official explanation for this shift in NATO's ROE methodology. A likely cause, however, is the increased desire for political and operational control over the use of armed force. This desire emanates both from political, strategic and operational levels of command as well as from civil society which appears to have an increasingly lower tolerance for errors made by military forces. It is not considered sufficient to permit military forces to do anything not prohibited by the law of armed conflict, and only impose certain limitations on this relatively wide room for manoeuvre in the form of ROE prohibitions. It significantly reduces the scope for using roe as a tool for political control of the operation, and from the strategic level perspective, this is the primary function of ROE. Furthermore, it would require all military forces to be experts of all applicable LOAC rules, and also to know and understand the

75 North Atlantic Treaty, Washington, D.C, 4 April 1949 (https://www.nato.int/cps/ic/natohq/official_texts_17120.htm, last accessed 24.04.2019) Article 5: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."

intentions of higher echelon well enough to act within the parameters of what they expect of their subordinate troops. The alternative and currently favoured approach in NATO is therefore to use ROE to define in more detail the parameters within which NATO forces may operate. This way, the decision on when, where, how and against whom force may be used, and who may authorise the use of such force, is not left for anyone to make.

The harmonisation of ROE methodology for all operations has the added value of making the ROE less complex and hence easier to train and apply. It is simply too complicated to have two separate approaches to the use of ROE within the same system, especially when the situation in an operation may change from peace to armed conflict and vice versa, thereby requiring a change in ROE methodology as well. It also enables the ROE to be adapted to differing situations within the same operation. There may, for instance, be a full blown armed conflict in one area of the operation and hybrid warfare with less clear attribution to the opposing forces in another area.

Finally, upholding a distinction in the ROE methodology between operations involving participation in an armed conflict and those that do not, would require NATO and the NAC to make a determination of whether a situation amounts to an armed conflict or not. However, NATO member States will not necessarily agree on this determination, as the situation in Afghanistan illustrated. For instance, Germany would not classify their contribution as participation in an armed conflict until after the 2009 Kunduz airstrike alleged to have killed several civilians.[76] Although the Geneva Conventions make it clear that the classification of a situation as an armed conflict or not should be based on the facts only,[77] it will in practice be as much a political as a legal determination. It will therefore not make sense to have a ROE system that depends on the NAC being able to reach consensus on such a complex issue. The appropriate determination to be made in the NAC is whether an Article 5 situation exists, and how robust ROE an operation should be authorised to have. States do not need to agree on their respective political and legal justifications for coming to such an agreement.

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76 Heintschel von Heinegg and Dreist, 'The 2009 Kunduz Air Attack' (n 74) pp. 842 and 864. See also discussion pp. 850–853. See further Erica L. Gaston, 'Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege', 8(2) *Harvard National Security Journal* 283 (2017), p. 305.

77 Common Article 2 common to GC I-IV, found e.g. in Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) [1949], Laws of Armed Conflict, printed in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988) pp. 459ff. On the classification of armed conflict, see further Section 1.3.1.

2.2.1.9 Interpretation of NATO ROE for the Purposes of This Book

Although some preliminary conclusions may be drawn on the nature and form of ROE, one of them must be that there is no harmonised understanding of ROE within NATO. However, for the sake of this book, ROE will be viewed as orders that regulate when, where, what and against whom force or other acts which may be construed as provocative may be used. Furthermore, a narrow interpretation will be applied, in that ROE are a set of orders in the form of ROE serial messages, expressly authorising or prohibiting certain acts. Other documents, such as SOPs and Tactical Directives, are considered to be supplemental documents setting out how the ROE should be applied. Finally, ROE will be viewed as providing the only authority for use of force and other provocative acts during NATO operations (except for self-defence situations), both for operations below and above the threshold of armed conflict.

2.2.2 *The Binding Force of NATO ROE*

The legal analysis of the use of force authorised by ROE begs the question of what ROE are, legally speaking. There are particularly two aspects that are relevant here: what is the consequence for individuals or States who fail to respect or comply with the ROE for a mission? And what is the relationship between ROE and other operational documents?

Considering that there is no universally accepted precise definition of ROE, but rather a common understanding what ROE generally entail, it is perhaps not surprising that there is no universal approach to the question of the binding force of ROE either, neither in relation to national nor international law. The question of the legal status or binding force of ROE may affect how States and individuals will relate to ROE, both in relation to interpretation and application, and especially with regard to compliance and the possibility of sanctioning violations. This will in turn affect the effectiveness of ROE as a command and control tool. The following section will therefore examine the legal status of ROE in international and national law.

2.2.2.1 Obligations on the State

The first question is whether NATO ROE give rise to any obligations on behalf of the States. NATO ROE require consensus among the 29 Member States in the NAC in order to be authorised.[78] As such, the ROE for an operation amount to a form of inter-State agreement. The extent to which this agreement is binding

78 See Section 2.4.2 for further detail on NATO ROE drafting.

on the States depend on whether it becomes a legally binding agreement or is merely an internal document which all NATO Members States are expected to comply with due to their NATO membership.

Agreements creating legal obligations under international law are commonly referred to as treaties. Treaties primarily bind States, not persons. States party to the treaty would be obliged to ensure compliance by persons acting on behalf of the State, such as members of their respective Armed Forces, respect it.[79] As explained in Section 1.4, the definition of a treaty is found in the VCLT, which in relation to international organisations applies to both the constituent instrument of the organisation and any treaty adopted within the organisation.[80] According to Article 2(1)(a), a treaty is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[81]

In its Commentary on the final Draft Articles of the VCLT, the International Law Committee has explained that the requirement 'governed by international law' embraces an "intention to create obligations under international law".[82] This requirement of intention was further elaborated on by the International Court of Justice in the *Aegean Sea Continental Shelf* case in 1978. The Court held that the parties to a 'Communiqué' had not intended to create a treaty to submit to the jurisdiction of the Court.[83] Thus, as Aust concludes, "If there is no such intention [to create obligations under international law], the instrument will not be a treaty".[84] Such reliance on the intention of the parties has been criticised by Klabbers, among others, in relation to inter-State agreements, for

79 The application of treaty law in national legislation depends on whether the State in question has taken a dualistic or monistic approach to international law. However, this is beyond the scope of this book.

80 Vienna Convention on the Law of Treaties (VCLT) [23 May 1969], U.N. Doc. A/CONF.39/27 [1969], reprinted in 8 *I.L.M.* 679 (1969), Article 5.

81 ibid, Article 2(1)(a). The requirement of treaties being agreements 'governed by international law' is also found in Article 1 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations [21 March 1986] UN Doc.A/CONF.129/15 [1986], reprinted in 25 *I.L.M.* 543 (1986).

82 UN ILC, 'Draft Articles on the Law of Treaties With Commentaries', *Yearbook of the International Law Commission* [1966], Vol. II, UN. Doc. A/CN.4/SER.A/1966/Add.l (http://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf, last accessed 24.04.2019) Part II, p. 189.

83 *Aegean Sea Continental Shelf* (Greece v Turkey), Judgement, *I.C.J. Reports* [1978] 3, pp. 39–44.

84 Anthony Aust, *Modern treaty law and practice* (Cambridge University Press, Cambridge, 2013) p. 17.

being "at odds with international practice".[85] However, a distinction should be made between inter-State agreements and the issue at hand here, namely documents created in order to enable cooperation and interoperability *within* NATO.

Rather than creating agreements to be relied upon in inter-State relations in general, NATO Member States consent to "standards and rules of general applicability [to be] adopted by subsidiary bodies".[86] Most of the documents produced by or approved by the NAC, such as ROE, are at least as much politics and operational considerations as law, and are intended to change as operations evolve and in some cases be replaced for each new operation. It is therefore unlikely that the purpose or intention of the NATO Member States is to create obligations under international law which if violated would be subject to sanctions, for instance by being subjected to the jurisdiction of the International Court of Justice. It is actually more likely that the intention of the States is the contrary: namely, to create documents which are *not* legally binding.

Similarly, documents like ROE are unlikely to amount to soft law. Soft law may be defined as "international instruments that their makers recognise are not treaties, even if they employ imperative language such as 'shall', but have as their purpose the promulgation of principles or rules (albeit not legally binding) that the authors of the text hope will become of general or universal application".[87] Those developing ROE will, however, have no intention of them becoming 'general or universal'; they are intended to function as political constraints on the use of force and a tool for command and control. In fact, most NATO documents are either classified or subject to limited release, and are thus of limited value for influencing States that are not members of NATO or part of the operation.

Consequently, it seems more appropriate to state that NATO regulations in general, such as in the form of doctrines, rules and policies, are internal documents or administrative agreements for NATO, applicable to State forces and personnel while involved in NATO operations.[88] Regulations approved by consensus by the NAC, or by a senior committee which NAC has delegated

85 Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, The Hague, 1996) p. 109. See also pp. 108–116.

86 Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, 'The Emergence of Global Administrative Law', 68(3/4) *Law and contemporary problems* 15 (2005), p. 17.

87 Aust, *Modern treaty law and practice* (n 84) p. 49.

88 See e.g. Gunther Moritz, 'The Common Application of the Laws of War within the NATO-forces', 13 *Mil. L. Rev.* 1 (1961), p. 2.

this authority to, may according to NATO be normative in the sense that they are binding upon all of NATO.[89] There is no set terminology used by NATO to signify that a document is normative, and an assessment must thus be made based on the content and purpose of the document. This is likely to be the case with ROE. As such they are binding on the organisation because they are created in order to carry out the legally binding aspects of the 1949 North Atlantic Treaty (a.k.a. the Washington treaty),[90] but they do not amount to a treaty or other legally binding agreements. In other words, any legal obligations arise from the North Atlantic Treaty, and documents such as ROE are merely produced as an internal mechanism to fulfil these legal obligations and to attain the purposes of the organisation. The fact that States do not require their respective domestic legislative bodies to consider the agreements supports this conclusion. According to Moritz, it may be assumed that "a member-state, as a rule, will only give consent where it is certain that the decision will not be contrary to the national law or that a necessary amendment of the national law will meet no difficulties".[91] Although this is generally correct, as will be explained in Section 2.4.2, NATO States do not actually 'give consent'. Instead they will be perceived to consent unless they announce objections by 'breaking silence', thereby potentially preventing the decision to be reached. In cases where States only object to their own involvement, they may allow the decision to be made, but caveat its application to its own forces.[92]

In order to avoid arbitrariness, even internal documents should be interpreted in accordance with general rules of interpretation, at least when there are no statements to the contrary.[93] This means that they should be interpreted primarily on the basis of the actual text; read in light of the ordinary meaning of the terms, as applied in NATO operations and doctrine; in good faith; and keeping the object and purpose of the specific document in mind.[94]

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89 NATO, AAP-42 NATO Glossary of standardization terms and definitions (NATO, Brussels, September 2011) 'NATO Regulation'.

90 North Atlantic Treaty (n 75).

91 Moritz, 'The Common Application of the Laws of War within the NATO-forces' (n 88) p. 3.

92 See also Chalanouli and Bumgardner, 'Rules of Engagement, NATO's Approach and National Caveats' (n 68) pp. 113–114.

93 VCLT (n 80) Articles 31 sets out general rules of interpretation for treaties. On the application of public international law on interpretation to agreements made by international organisations, see for instance Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', 70(1) *Modern Law Review* 1 (2007), pp. 16–17.

94 On historic and current rules of treaty interpretation, see e.g. Richard Gardiner, *Treaty Interpretation* (Oxford University Press, Oxford, 2008) Chapter 5.

The NAC Initiating Directive for the operation, the Political Policy Statement in the implemented ROE, and the Commander's Decision and Guidance for the operation are examples of relevant sources for ascertaining the object and purpose of the ROE. Because NAC's intention with ROE is to provide political constraints on the use of force, it is important to be restrictive in the interpretation, thereby ensuring compliance.

If there is a disagreement over the interpretation or application of the ROE, NATO's internal procedures do not dictate any general solution to such a problem. In practice, it will be a matter for the Commander for the given operation to handle, for instance by issuing clarification and further guidance in orders or directives. As mentioned above, States are, however, free to impose additional restrictions on the use of their respective forces in the form of caveats.[95] If the disagreement has severe consequences, the NAC would be expected to consult on the issue.

The conclusion must therefore be that ROE does not impose legal obligations on States; however, States are nonetheless expected to respect and comply with the NAC approved ROE. Failure by member States to respect NAC decisions could potentially undermine NATO as an organisation, which should hopefully provide the necessary incentives for compliance.

Before moving on to look at how ROE are dealt with in national law, two related questions of international law will be considered. First, the fact that NATO ROE do not create legal rights or obligations further supports the clarification presented in Section 2.2.1.7 on the phrase "ROE authorise". Although the term 'authorise' may seem to have certain legal connotations, it should merely be understood to mean that the Commander permits the (presumably lawful) actions to be undertaken.[96] This is why NATO descriptions of ROE refer to political constraints on the *otherwise lawful* use of force.[97]

The second issue is whether ROE represent State practice and thus development of customary international law.[98] Based on the above it should be concluded that States do not appear to consider the ROE themselves to be legally binding, and as a result, the element of *opinio juris* is lacking. However, the ROE may nonetheless affect customary law development, or at least interpretation of current rules, in so far as it provides an indication of what the States consider to be lawful. As has been pointed out, ROE do not amount to an independent

95 Caveats are further explained in Section 2.4.2 below.

96 See also Corn, 'Developing Rules of Engagement' (n 18) p. 222.

97 See NATO, *MC 362/1* (n 4) p. 2.

98 On customary law development, see Section 6.3.1.4. See also Antonio Cassese, *International Law* (2. ed., Oxford University Press, Oxford, 2005) pp. 153–169.

legal basis for use of force or other provocative acts, but must comply with existing law. The fact that the use of force in a given set of circumstances is authorised in a ROE, signifies therefore that States consider such force to be lawful. If the applicable law is unclear, the ROE will provide a useful example of interpretation of that law or of customary law.

For instance, during armed conflict, the use of force in accordance with ROE must only be directed at persons considered to be lawful targets. As mentioned, NATO ROE do not regulate the use of force in self-defence. Therefore, if the operation takes place in a NIAC, for instance, the ROE must only permit the use of force against persons who take direct part in hostilities,[99] whether as part of an organised armed group or independently.[100] For instance, this entails that NATO ROE authorising attack on persons carrying out a 'hostile act (not constituting actual attack)' or demonstrating 'hostile intent (not constituting imminent attack)' may be viewed as State practice on who is lawful targets under LOAC, especially the authority provided by the notion of 'direct participation in hostilities'.[101] However, although State practice during military operations provide important contributions to the evolution of international

99 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) [1977], printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 77) pp. 711ff, Article 51(3), and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) [1977], ibid, pp. 775ff., Article 13(3).

100 Direct participation in hostilities and its application to organised armed groups is examined further in Section 5.2.3.

101 See also Jody M. Prescott, 'Tactical Implementation of Rules of Engagement in a Multinational Force Reality', in Geoffrey S. Corn, Rachel E. VanLandingham and Shane R. Reeves (eds.), *U.S. Military Operations – Law, Policy and Practice* (Oxford University Press, Oxford, 2016) p. 253. It should be pointed out that NATO ROE concerning hostile act only cover those hostile acts that do not constitute actual attack, as it would otherwise impose restrictions on the right of self-defence, such as when the ROE were to be retained. The same applies to the hostile intent ROE; NATO ROE only cover those displays of hostile intent that do not constitute imminent attack, as imminent attacks would give rise to a right of self-defence. The NATO hostile act and hostile intent ROE are further explained in Section 3.5, and their relationship to LOAC as their legal basis is examined in Chapter 11. As a result, the reservations mentioned in the ICRC Interpretive Guidance on DPH concerning the use of practice on hostile act and hostile intent in relation to DPH is not applicable. ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* [hereinafter *ICRC Interpretive Guidance*] (May 2009, prepared by Nils Melzer, available at https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, last accessed 24.04.2019) p. 59. See also Chapter 11, note 12, and accompanying text.

law, their ability to influence other States is limited by the tendency to make operational orders and procedures classified.

2.2.2.2 The Status of ROE in National Law

As mentioned above, the binding force of ROE and the possibility for sanctioning violations of ROE will arguably encourage compliance with them and, as a result, affect the effectiveness of ROE as a command and control tool. As with other ROE related issues, however, national approaches to whether ROE are legally binding or not, vary greatly. According to Fournier, "some nations consider ROE to be instructions, directives or guidance where other treats [sic] them as valid order to be obeyed and respected".[102] This is supported by the results of a survey undertaken by the International Society of Military Law and the Laws of War in 2006, in preparation for the 17th International Congress on "Rule of law in peace operations".[103] The question of whether ROE are legally binding in many countries is related to the question of whether ROE are binding military orders. Therefore, the two following questions of the questionnaire are of relevance here: "*To what extent does your country consider ROE to be legally binding on the forces?"* and *"Are ROE considered to be orders?"*[104] Unfortunately, not all NATO Member States responded to the questionnaire, but the report still provides useful insight into how the questions are dealt with nationally.

Most of the countries looked at answered that ROE are orders,[105] while four countries (Belgium, Croatia, Greece and Latvia) answered that ROE are *not*

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102 Fournier, 'NATO Intervention Abroad' (n 64), pp. 117–118, footnotes omitted. See also Sherrod Lewis Bumgardner *et al., NATO Legal Deskbook* (ACT Staff Element Europe, Belgium, 2010, available at https://info.publicintelligence.net/NATO-LegalDeskbook.pdf, last accessed 24.04.2019) p. 257.

103 Stanislav Horvat (ed.), *The Rule of Law in Peace Operations* (Proceedings of the 17th International Congress, Scheveningen, XVII Recueil of the International Society for Military Law and the Law of War, Brussels, 2006).

104 ibid, p. 136. See also commentary on the questions in Boddens Hosang, *Rules of Engagement* (n 30) pp. 337–341.

105 Horvat (ed.), *The Rule of Law in Peace Operations*, ibid, National responses: 'Albania', p. 163; 'Austria', p. 190; 'Czech Republic', p. 388; 'Denmark', p.235; 'Germany', p. 171; 'Italy', p. 264; 'Luxemburg', p. 313; 'Norway', p. 324; 'the Netherlands', p. 334; 'Sweden', p. 376; and 'U.S.A'., p. 266. The answers from Bulgaria, Poland and Spain seem to imply that ROE are orders, but are not sufficiently clear to permit a definite conclusion: 'Bulgaria': "there is no need to have specific orders to apply [ROE]" (p. 221); 'Poland': "ROE are legally binding on PAF as long as they are placed in a commander's OPORDER (…). Commander's orders must always be obeyed by all soldiers / subordinates unless the orders are breaches of international or national criminal law." (p. 345); 'Spain': "ROE, after being adopted by the authority in charge of the operation and disseminated to participant Units though the

considered to be military orders in themselves. The Croatian answer, for instance, was as follows:

> Since ROE are by their definition guidelines for the use of force, and Croatian Armed Forces members act in accordance with laws, regulations and orders, the eventual application of ROE cards would need to be regulated by means of the appropriate state authority which would issue a regulation, and also by an order which would be issued, by the military Chain of command.[106]

A plausible cause for the different approaches taken to the character of ROE may be the divergence in national definitions of military orders. For instance, it may be the case that military orders are defined in such a way that they cannot encompass ROE, or that ROE may only be regulated by domestic legislation if it is expressly stated that ROE are viewed as a form of military orders. It may be that there is an exhaustive list of how military orders are to be communicated, and ROE are not listed due to its relatively recent introduction to NATO. For some States, particularly those who have joined NATO more recently, their position may also be influenced by the wording in the NATO definition ("directives" rather than "orders").

As military orders are normally legally binding upon troops, such as through military penal codes or disciplinary laws, it would be expected that all States who consider ROE to be orders to also answer that they are legally binding, and possibly vice versa: that States who do not consider ROE to be orders,

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proper chain of command, are mandatory and therefore legally binding for the forces (…). Therefore, any conduct in violation of ROE adopted by Spain would constitute at least an infraction of disciplinary order." (p. 258).

See also judgement by the Dutch Military Chamber of the Court of Appeal of Arnhem in the *Eric O.* case, where it was held that the Rules of Engagement constituted official instructions. *Eric O.* case, Gerechtshof Arnhem [Arnhem Court of Appeal] 21-006275-04 (4 May 2005, LJN: AT4899, www.rechtspraak.nl). This has later been incorporated in national legislation, Article 38(2) of the Dutch Military Criminal Code. See Kalshoven and Fontein, 'Some Reflections on Self-Defence' (n 40) pp. 109–110. See also Boddens Hosang, *Rules of Engagement* (n 30) pp. 342–350.

106 Horvat (ed.), *The Rule of Law in Peace Operations* (n 103) p. 232. Belgium explains that: "ROE are not considered to be an order as such but rather part of an order or guidelines imposed by an order. Once imposed by an order, ROE will be applied as such, unless they require an additional order for some instances of use of force". ('Belgium', p. 211); Greece replied that "The ROEs are not considered as orders (…)" ('Greece', p. 277); while the Latvian answer is that "ROE can not [sic] be considered to be orders" ('Latvia', p. 301).

would not consider them to be legally binding. This is not the case, however. Two of the countries which do not consider ROE to be orders, namely Greece and Latvia, still see them as binding upon the troops. However, they do not provide any explanation for how the ROE are legally binding.[107] Belgium and Croatia, on the other hand, state that ROE may become legally binding when they are incorporated into superior orders.[108] Presumably, this means that ROE are not legally binding, but the military orders, requiring compliance with the ROE, are.[109]

Despite the differences in approaches to ROE among NATO States, the practical outcome is not so divergent. Whether ROE are orders or an order is given to comply with ROE, the result is that the ROE are binding upon the troops, and any violation may be subject to disciplinary or penal sanctions, even when the act does not amount to a crime in itself. As will be seen below when dealing with ROE as a tool for command and control, this is important for the effectiveness of ROE.[110]

2.3 The History of Mission-Specific Rules of Engagement

A comprehensive understanding of ROE requires an understanding of the historic origins of the concept.[111] Rather than providing an extensive overview, however, the following will focus on the aspects most relevant for this book.[112] As a result of the focus on (mission-specific) NATO ROE and armed conflict,

107 ibid, 'Greece', p. 277, and 'Latvia', p. 301.

108 ibid, 'Belgium', p. 211, and 'Croatia', p. 232.

109 A similar approach may be found in Poland and Spain, two of the countries that were unclear on whether ROE are orders in themselves. ibid, 'Poland', p. 258, and 'Spain', p. 345. Luxemburg, on the other hand, despite having answered that ROE are military orders, provides a less clear answer on whether they are legally binding: "They are binding in the absence of other provisions which regulate the use of force in crisis." (Author's translation from French, ibid. 'Luxemburg', p. 312).

110 In light of the other responses, the most controversial approach is that of Sweden. Although not a NATO member, Sweden is a PfP-country which participates in NATO-led operations such as ISAF. Despite stating that ROE are orders, the answer goes on to state that: "ROE (…) are not legally binding" (ibid, 'Sweden', p. 376). Unlike other States which do not consider ROE in themselves to be legally binding military orders, the Swedish answer provides no information on how ROE could potentially become legally binding.

111 See also Corn, 'Developing Rules of Engagement' (n 18) p. 213.

112 For a more comprehensive overview, see Mark S. Martins, 'Rules of Engagement for Land Forces, A Matter of Training, Not Lawyering', 143 *Military Law* Review 1 (Winter 1994), pp. 33–55; Hayes, *Naval Rules of Engagement* (n 43) pp. 37–56, and Corn, 'Developing Rules of Engagement' (n 18) pp. 213–217.

classic examples of ROE challenges, such as the 1983 attack on a U.S. Marine Corps compound in Beirut, the Iraqi attack on USS *Stark* in 1987 or the shoot down of the Iranian Air Flight 655 by the USS *Vincennes* in 1988, will not be dealt with. Although important and interesting cases, the ROE applicable to these cases were standing ROE that regulated the use of force in self-defence.[113]

When looking at the history of ROE, it is important to distinguish between examples of ROE and of more limited orders. As explained in Section 2.2.1.2, the Bunker Hill order commonly referred to as an early example of ROE is by today's standards more appropriately characterised as a tactical order. A more suitable example of a historic order that resembles modern ROE may be found among German orders from the Second World War. For instance, after the Dieppe raid, Hitler issued the following order:

> From now on all enemies on so-called commando missions in Europe or Africa challenged by German troops, even if they are to all appearance soldiers in uniform or demolition troops, whether armed or unarmed, in battle or in flight, are to be slaughtered to the last man. (…) Even if these individuals, when found, should apparently be prepared to give themselves up, no pardon is to be granted them on principle.[114]

Unlike the order from Bunker Hill, it is a general rule for the use of force, and not merely an independent order for the use force in a concrete situation.

Similarly, it is important not to confuse ROE with expressions of the law of war or armed conflict (LOAC). Although legal rules in some cases may be considered so important that they are imported into the ROE, this is not usually the case. As will be further explained below, ROE should also reflect operational and political considerations, and in the case of a conflict of interest between the two, provide guidance on how they should be balanced. Thus, statements such as 'do not murder prisoners of war' or 'looting is prohibited' should generally not be viewed as ROE. [115]

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113 Roach, 'Rules of engagement' (n 24) p. 49.

114 Commando order [498-PS, Pros. Ex. 124] issued on 18 October 1942, reprinted in: *United States vs. Wilhelm von Leeb et al.* ('The High Command Trial'), Judgment of 27 October 1948, U.S. Military Tribunal Nuremberg, *Law Reports of Trials of War Criminals* (Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, London, 1949) Vol. XI, p. 526.

115 Hays Parks, 'Deadly Force is Authorized', 127(1) *US Naval Institute Proceedings* 35 (January 2001), p. 33. For examples of the opposite approach, see Amore, 'Rules of Engagement' (n 40) pp. 51–53, and Michael S. Reilly, *The Rules of Engagement in the Conduct of Special*

Historically, ROE appear to originate from naval traditions. As explained by O'Donnell and Kraska:

> [w]ith the advent of oar and sail, effective central control of a military asset by the sending government was lost once a ship got underway from port. It was incumbent upon the commanding officer to conduct the mission pursuant to the general guidance of the government. Virtually alone until the ship reached the next friendly port, or until the ship encountered another friendly vessel that could deliver news or orders, the commanding officer operated within broad parameters or rules issues by the leadership.[116]

In its modern form, ROE as a concept and term was used for the first time in maritime and air operations in the 1950s.[117] More specifically, it is argued that the first use of modern concept of ROE, although not yet referred to as such, was the 1948 United States Navy Regulations with Article 0614, "Use of Force Against a Friendly State".[118] The first time modern mission-specific ROE were used, appears to be during the 1950 air campaign over North Korea when "General MacArthur received orders from Washington that American bomber aircraft were neither to enter Chinese air space nor destroy the Suiho Dam on the North Korean side of the Yalu River."[119]

The term ROE itself appears to originate from a set of 'Intercept and Engagement Instructions' issued by the U.S. Joint Chiefs of Staff (U.S. JCS) on 23 November 1954.[120] The instructions were issued on the basis of several

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Operations (Naval Postgraduate School Thesis, 1996, available at http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA323924, last accessed 24.04.2019) pp. 16–17. See also *Prosecutor v. Ante Gotovina and Mladen Markac* (Application and proposed amicus curiae brief concerning the 15 April 2011 Trial Chamber judgement and requesting that the Appeals Chamber reconsider the findings of unlawful artillery attacks during Operation Storm), Case No. IT-06-90-A, ICTY, Appeals Chamber [12 January 2012] para. 11.

116 Brian T. O'Donnell and James C. Kraska, 'International Law of Armed Conflict and Computer Network Attack: Developing the Rules of Engagement', 76 *International Law Studies* 395 (2002), pp. 399–400.

117 Corn, 'Developing Rules of Engagement' (n 18) p. 214. O'Connell claims that the expression is a Malta coinage of the 1960s, but does not provide any sources for this: O'Connell, *The Influence of Law on Sea Power* (n 15) p. 169.

118 O'Donnell and Kraska, 'International Law of Armed Conflict and Computer Network Attack' (n 116) p. 400.

119 Scott R. Morris, 'Rules of Engagement: Origin, Practical Use, Doctrinal Integration, and Theoretical Concept' (1994) (unpublished article on file with the CLAMO), referred to in Martins, 'Rules of Engagement for Land Forces' (n 112) p. 35. See also Solis, *The Law of Armed Conflict* (n 29) p. 476.

120 Corn, 'Developing Rules of Engagement' (n 18) pp. 214–215.

dogfights between American and Soviet aircraft, resulting in the downing of least three American and three Soviet aircraft, and were referred to as "Rules of Engagement" by Air Force and Navy staffers. At the same time, it also made its way into NATO doctrines, as illustrated by a 1957 report on the suggested draft for "Rules for Engagement of Unidentified Aircrafts By NATO Fighters in Peacetime".[121] ROE was formally adopted by the U.S. JCS in 1958,[122] and was further developed during subsequent operations. The peacekeeping operations in the Dominican Republic 1965–66 is said to have "helped make the term "ROE" familiar to American soldiers, who assimilated it into their vocabulary as a curse word" because of the restraints they imposed.[123]

The first operation where the modern form of ROE were extensively used was the Vietnam War. Even as early as in 1962, ROE-like orders imposed restrictions on U.S. aircraft involved in combat support missions. For instance, the MACV[124] Directive Number 62 ordered that "no U.S. aircraft will operate closer than three miles to the Cambodian border"[125]. The now declassified ROE for Operation Rolling Thunder, the U.S. aerial bombardment campaign conducted against the Democratic Republic of Vietnam (North Vietnam) 1965–1968, reveal a vast amount of detailed ROE.[126] In fact, the politics of the conflict is said to have resulted in "ROE of unprecedented detail and restrictiveness".[127] When introducing the ROE into the U.S. Congressional Records in 1975, Senator Barry Goldwater stated that:

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121 NATO, Report by the International Planning Team to the Standing Group on Rules for Engagement of Unidentified Aircraft by NATO Fighters in Peacetime, Ref. IPT 152/39 (2nd Revised Final Draft), 28 August 1956 (http://archives.nato.int/uploads/r/null/1/0/100244/IPT_152_39_DRAFT_FINAL_REV_2_ENG_PDP.pdf, last accessed 24.04.2019).

122 Martins, 'Rules of Engagement for Land Forces' (n 112) p. 36.

123 ibid, p. 47.

124 MACV – Military Assistance Command, Vietnam.

125 L.E. Paterson, *Project CHECO Southeast Asia Report: Evolution of the Rules of Engagement for Southeast Asia, 1960–1965,* Pacific Air Forces HICKAM AFB HI CHECO DIV, 1966 (http://www.dtic.mil/get-tr-doc/pdf?AD=ADA486920, last accessed 24.04.2019) p. 7. Project CHECO (Contemporary Historical Examination of Current Operations) was a United States Air Force initiative to collect and document Air Force experiences in the war in Southeast Asia. The project began in 1962 and produced a series of classified reports on various phases of the air campaign. Many of these reports are now declassified and available online.

126 William R. Peers, *Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident*, United States Department of the Army, 1974, Books I and II, Volume III: 'Exhibits'.

127 Martins, 'Rules of Engagement for Land Forces' (n 112) p. 37.

> I am ashamed of my country for having had people who would have allowed such restrictions to have been placed upon men who were trained to fight, men who were trained to make decisions. … and men who were risking their lives. … I pray. … such foolish restrictions never be formed again and applied to our troops.[128]

There were three categories of rules controlling the use of airpower during operation Rolling Thunder: the rules of engagement, Operating Restrictions, and Operating Rules. The rules of engagement defined:

> geographical limits of SEA [Southeast Asia], territorial airspace, territorial seas, and international seas and airspace; definitions of friendly forces, hostile forces, hostile acts, hostile aircraft, immediate pursuit, and hostile vessels; rules governing what could be attacked by United States aircraft, under what conditions immediate pursuit could be conducted, how declarations of a "hostile" should be handled, and the conditions of self-defense.[129]

The Operating Restrictions were more specific, and included:

> prohibitions against striking locks, dams, hydropower plants, fishing boats, houseboats, and naval craft in certain areas; prohibitions against strikes in certain defined areas such as the Chinese Communist (ChiCom) buffer zone or the Hanoi/Haiphong restricted areas; conditions under which targets might be struck, such as validation requirements, when FACS [Forward Air Controllers] were required, distances from motorable roads.[130]

Finally, the Operating Rules concerned the use of Forward Air Controllers, the return of ground fire, the use of the AGM-45 (SHRIKE) missile, restrictions on mine-type munitions, and the requirements for navigational position determination. [131] According to a U.S. Air Force report, "[a]lthough, in theory, these

128 121(14) U.S. Congressional Record 17558 [1975] (United States Government Printing Office, Washington, 1975).

129 Project CHECO report 1969, reprinted in 131(13) U.S. Congressional Record 5248 [1985] (United States Government Printing Office, Washington, 1985).

130 ibid.

131 ibid.

three types of rules were distinct, in practice, they were almost always referred to collectively as 'Rules of Engagement'". [132]

The ROE for the Vietnam War, as exemplified by those for Rolling Thunder, were considered so detailed and impracticable that it in fact became impossible to achieve the military objectives. The involvement of political leadership in the detailed running of the operations, such as the White House requirement for visual identification of targets,[133] has been criticised for being the cause of the failures of the operation. Hays Parks, for instance, has contended that "Rolling Thunder was one of the most constrained military campaigns in history. The restrictions imposed by this nation's civilian leaders were not based on the law of war but on an obvious ignorance of the law – to the detriment of those sent forth to battle".[134]

The resulting frustration with and distrust in ROE most likely influenced the further development of the use of ROE so that ROE for subsequent operations appear to have been more robust and flexible. An example of such robust ROE may be found in the Iran-Iraq war (1980–1988), partly referred to as the 'Tanker War'. The United States Navy were involved in escorting Kuwaiti tankers through the area when the USS Samuel B. Roberts hit a mine laid by Iran. As a result, Operation Praying Mantis was initiated in April 1988, and President Reagan approved ROE that permitted U.S. forces to attack two Iranian oil platforms and to seek out and engage Iranian patrol frigates.[135] The robustness of these ROE is likely to also have been influenced by the 1987 missile attack by Iraqi forces on the USS Stark, killing thirty seven crew U.S. Navy personnel. The incident is commonly used as an example of ROE failure.[136]

Another example of more robust ROE may be found in Operation Desert Storm (1990–1991), known as the First Gulf War. Here, the political and policy constraints on the use of force are said to have taken "a backseat to the clear military objectives of the operations, the most important of which was reversing Iraq's invasion of Kuwait".[137] According to United States Air Force officer

132 ibid.

133 Hays Parks, 'Rolling Thunder and the Law of War', 33(2) *Air University Review* 2 (Jan/Feb 1982), p. 12.

134 ibid, p. 21.

135 Daniel Gouré and Rebecca Grant, *U.S. Naval Options for Influencing Iran* (Lexington Institute, April 2009, http://www.lexingtoninstitute.org/wp-content/uploads/2013/11/us-naval-options.pdf, last accessed 24.04.2019) p. 7.

136 See Hayes, *Naval Rules of Engagement* (n 43) pp. 37ff for a useful case study of U.S. ROE during the Iran-Iraq war.

137 John G. Humphries, 'Operations Law and the Rules of Engagement in Operations Desert Shield and Desert Storm', 11(3) *Airpower Journal* Fall 25 (1992), p. 28.

Lt Col Humphries, "[i]n the Persian Gulf, American political leaders embraced and heeded these lessons; they permitted their war fighters to conduct combat operations within the law of armed conflict without tying their hands with constraints. This, in turn, maximized the effectiveness of coalition air power".[138] In fact, Humphries goes so far as to argue that "[t]he Persian Gulf rules were different from those in Vietnam because they were about as broad as they could be".[139] One of the ways this was achieved was by allowing those who had to execute the ROE to assist in their development. For instance, rather than the ROE and strategic target lists being dictated by the White House, these were prepared by the U.S. Central Command Commander together with his war plan.[140] Furthermore, the involvement of Central Command Air Forces (CENTAF) judge advocates in the development of the ROE is said to have "ensured that the rules were no more restrictive than was required by the law of armed conflict and collateral limitations".[141]

As the historic examples considered above indicate, it is difficult to strike the right balance between the political and operational considerations when formulating ROE for an operation. This remains a challenge for current operations as well. As will be explained below, both overly restrictive and overly permissive ROE, in the sense that there arguably is too much or too little political control, are problematic. Perhaps not surprisingly, most operations are criticised for having either overly restrictive or permissive ROE, or both, depending on the background of the commentator.[142] Still, ROE have remained one of the main tools for controlling the use of force and other provocative acts, both during peace operations and operations involving participation in armed conflicts. The use of mission specific ROE has subsequently been refined through more recent operations such as the Iraq war or Second Gulf War, the war in Afghanistan and more recently the NATO operation in Libya.

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138 ibid, p. 29. See also William R. Hittinger, 'Rules of Engagement As A Force Multiplier', *CSC 2000* (http://www.smallwarsjournal.com/documents/hittinger.pdf, last accessed 24.04.2019) p. 50.

139 Humphries, 'Operations Law and ROE in Operations Desert Shield and Desert Storm' (n 137) p. 28.

140 Hays Parks, 'Rules of Engagement: No More Vietnams', *US Naval Institute Proceedings*, March 1991, 27, p. 27.

141 Humphries, John G., 'Operations Law and ROE in Operations Desert Shield and Desert Storm' (n 137) p. 29.

142 See e.g. Parks, 'Deadly Force is Authorized' (n 115).

2.4 ROE Development

2.4.1 *Law, Politics and Operational Considerations*

In addition to understanding where ROE come from, understanding why and how ROE are developed is crucial to better comprehend what they are and how they function. The purpose of ROE, as previously alluded to, is to impose political constraints on the otherwise lawful use of force and other provocative acts, and to enable operational control over the use of force. According to Schmitt, "First, and most fundamentally, ROE are the means by which the National Command Authorities (NCA) (or comparable authority in other countries) express their intent as to how force will and will not be used to achieve policy objectives".[143] For NATO, the comparable authority will be the North Atlantic Council and the Military Committee. For military forces participating in the operation, the ROE are more likely perceived as having an "inherently military operational nature",[144] the primary purpose being "to control the level of violence or confrontation in the area of operations".[145] Regardless of which purpose is considered more important, effective ROE needs to strike the right balance between the political and operational considerations, within the parameters set by applicable law.[146]

The political or policy influence on the development of ROE seeks to ensure that the political objectives of the mission are achieved. The ROE help ensure that the actions of the Commanders and their forces reflect the national and multinational policies and objectives for the mission.[147] Margaret Thatcher, who was the civilian Commander in Chief for the British forces during the Falkland War, understood ROE as "the means by which the politicians authorize the framework within which the military can be left to make the operational decisions".[148] In the context of NATO, the ROE are authorised by the NAC

143 Schmitt, 'Clipped wings' (n 49) p. 246, footnote omitted. The NCA consists of the President and the Secretary of Defense.

144 Boddens Hosang, 'Rules of Engagement and Targeting' (n 44) p. 164.

145 ibid.

146 See Bumgardner *et al., NATO Legal Deskbook* (n 102), pp. 254–255. See also JDP 0–01 British Defence Doctrine (n 12) p. 1–24; U.S. Army, *Operational Law Handbook* (n 10) pp. 77–78, and *Norwegian LOAC Manual* (n 13) p. 296. The Canadian 'Use of Force for CF Operations' also lists a fourth aspect of ROE; diplomatic considerations, referred to as: "the collective objectives of the alliance or coalition" (Canadian Forces, *Use of Force for CF Operations* (n 11) p. 2–5), as does Ashley Roach in his much-cited 1983 article 'Rules of Engagement' (n 24) p. 48.

147 U.S. Army, *Operational Law Handbook* (n 10) pp. 77–78.

148 Margaret Thatcher, *The Downing Street Years: 1979–1990* (1993), p 201, quoted in, Jody M. Prescott, 'Tactical Implementation of ROE' (n 101) p. 249.

which consists of the representatives of all the Member States. This secures the political control by all NATO Member States of the ROE. Operationally, the ROE define the Commander's room for action to use his or her forces to achieve the mission, as defined by the political interpretation of the mandate for the operation. In addition, ROE enable the operational level Commanders to exert control over subordinate forces and their approach to mission accomplishment, prevent unwanted escalation, and enable force protection.[149] From both the political and operational perspectives, ROE are a useful tool to control the forces and ensure to encourage desirable actions and discourage undesirable ones.

In addition to the political and operational purposes of ROE, ROE should mitigate the risk of violation of applicable law. As explained in the British Defence Doctrine, "ROE are designed to ensure that the activities of military personnel remain within the law and are consistent with Government policy; they are not a comprehensive statement of the law or policy, although they take account of both".[150] When developing ROE, it must be ensured that the application of the ROE will not result in any violations of applicable international or national law. As mentioned in Section 2.2.1.4, NATO has no independent legal doctrine or interpretation. One of NATO HQ's legal advisers, Lone Kjelgaard, has explained that:

> whether or not Allies other participating States agree on the exact legal justification or explanation underlying them, is in principle of little interest to NATO as an organization. Thus, rather than requiring adherence to a single common body of law, the Alliance's expectation is that all States participating in a NATO or NATO-led operation will act lawfully within the legal framework applicable to them.[151]

As a result, States must independently assess whether any proposed ROE are acceptable to their interpretation of applicable law. If not, and depending on the severity of the issue, they may refuse to consent to the ROE being authorised, or they may impose restrictions on the use of their own forces by declaring that they will only participate in parts of the operation or participate subject to caveats reflecting their concerns.[152] Because the ROE are intended to prevent violations of applicable law, they also provide commanders through

149 See e.g. U.S. Army, *Operational Law Handbook* (n 10) p. 78; Roach, 'Rules of engagement' (n 24) p. 48 and Fournier, 'NATO Intervention Abroad' (n 64) p. 116.

150 JDP 0–01 British Defence Doctrine (n 12) p. 1–24.

151 Kjelgaard, 'The Importance of Law in the Theatre' (n 53) p. 38.

152 ibid. The concept of 'caveats' is dealt with in further detail in Section 2.4.2 below.

the entire military chain of command with a tool for reducing the risk of the forces under their command carrying out unlawful acts for which they may be held criminally liable under the principle of superior responsibility.[153]

The interrelationship between the three considerations is commonly illustrated by the use of a Venn-diagram, consisting of three circles. In one area, all three circles overlap, indicating that all factors must be taken into consideration when creating and interpreting ROE. [154] The Venn-diagram may give the impression that all factors must be weighed against the others, with the result that the legal considerations must (or may) be balanced with politics and operational considerations. In reality, it should be viewed as an illustration of the three main driving forces of ROE. Unless the decision is made to operate beyond the law, those developing ROE cannot choose to set aside the law for political or operational reasons. The issue is therefore whether a decision is made to impose *additional* restraints on the use of force and other provocative acts, within what the law permits, on the basis of primarily political reasons. As a result, the real balancing act is done between the political and operational considerations. As explained by Scott Sagan:

> Rules of engagement (…) are designed to balance two competing requirements: the need to use force effectively to achieve the objective of an offensive or defensive mission, and the desire not to use force in unnecessary circumstances or in an excessively aggressive manner.[155]

While the law is relatively constant,[156] the political and operational considerations to be balanced will be context dependent. As a result, the difference

153 The concept of command or superior responsibility has developed as customary law for centuries, but is in its modern form considered to be developed in the (controversial) 1945 *Yamashita* case, 327 U.S. 1 (1946). The core of the concept is that commanders may be held criminally liable to the acts of their subordinates, either because the Commander ordered the acts or because he/she knew or should have known about it, but did not use the means at his/her disposal to prevent the crimes from occurring. For a formulation of a current standard of command responsibility, see e.g. AP I (n 99) Articles 86–87.

154 The Venn-diagram initially introduced by Roach consisted of four circles, the last being diplomacy, but this has usually not included in current presentations. See Roach, 'Rules of engagement' (n 24) p. 48.

155 Sagan, 'Rules of engagement' (n 2) p. 451.

156 Applicable law is to a large extent constant, especially for IACs and NIACs respectively. However, it should be noted that the result of the application of LOAC is in many areas context dependent. This is because LOAC rely to a large extent on subjective norms such as proportional, necessary, and feasible, which allow for the subjective assessment by those responsible, based on the information available at the time and their reasonable analysis and understanding of this information.

between ROE for two different operations, both involving participation in an armed conflict,[157] is therefore primarily caused by the different political and operational context and purpose of the operation.

Unless the ROE are worded identically to the law, the result of applying operational and political considerations must be that the ROE become more limited or restrictive than what the law permits, thereby imposing political and operational restraints on otherwise lawful use of force and other provocative acts.[158]

The ideal ROE are those that are sufficiently flexible to be able to "balance the legitimate need for top-level guidance on appropriate action with the necessity for field-level judgements about specific conditions, threats, and opportunities".[159] Ideals, however, are notoriously hard to achieve. Furthermore, as the terms 'appropriate' and 'necessary' conveys, there is no objective test for where the balance should be struck, and where subjective assessments have to be made, there is a potential for disagreement. This is particularly true for people with different backgrounds and priorities, such as politicians and officers; their perspectives will be influenced by who they are and what they do. Where the former may be concerned with national and international perception, the latter are more focused on getting the job done. Though both categories will influence the development of the ROE, they may have a very different view on what ROE are needed and thus how appropriate the existing ROE are. For instance, if a politician is asked whether a situation may be solved by the use of military force, he would consider whether diplomacy might be a more suitable alternative. A soldier, on the other hand, is more likely to reply that it would depend on whether they would be given the necessary resources and room for action to accomplish the mission.

While a slight imbalance is probably neither avoidable nor critical, serious problems may arise if the ROE are either too restrictive or too permissive in the sense that there is either too detailed or too little political control of the use of force.[160] Or as it also has been phrased: "The dilemma is one of action versus reaction".[161] Excessively restrictive ROE will leave the Commander unable to effectively complete the mission and ensure force protection, potentially

157 On the difference between IACs and NIACs, see Section 1.3.1.

158 See also Boddens Hosang,, 'Rules of Engagement and Targeting' (n 44) pp. 163–163.

159 Sagan, 'Rules of engagement' (n 2) p. 444.

160 The terms restrictive and permissive are here used to describe the degree of political control over the use of force. This must be distinguished from the debate on whether ROE consist of either authorisations or restrictions, depending on whether it is a peace operation or armed conflict, or whether ROE provide the sole authority for the use of force during all operation, as discussed in Sections 2.2.1.5-2.2.1.8 above.

161 Hayes, *Naval Rules of Engagement* (n 43) p. 21.

resulting in political failure and placing the men and women in the service of the State at unnecessary risk.[162] Excessively permissive ROE, on the other hand, may result in force being used "in a manner and degree that is deemed undesirable by national political authorities".[163] There is a real risk that the decisions made by so-called 'strategic corporals'[164] end up driving policy rather than enabling it. As States usually prefer to keep considerable political control over their military forces, there is more likelihood that the ROE are too restrictive than too permissive. Unfortunately, the list of examples of operations that have suffered from unnecessarily restrictive ROE is long, the archetypical example being the Vietnam War.[165] The ROE for Operation Rolling Thunder were later described by President George H.W. Bush as causing the forces to be "sent out to do a job with one hand tied behind their back".[166]

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162 See also Todd C. Huntley, 'Balancing Self-Defense and Mission Accomplishment in International Intervention: Challenges in Drafting and Implementing Rules of Engagement', 29 *Maryland Journal of International Law* 83 (2014), p. 86.

163 Sagan, 'Rules of engagement' (n 2) p. 451. See also Huntley, 'Balancing Self-Defense and Mission Accomplishment', ibid, p. 86.

164 General Charles Krulak introduced the phrase "strategic corporal" in 'The Strategic Corporal: Leadership in the Three Block War', *Marines Magazine*, January 1999. Krulak explained that "In many cases, the individual Marine will be the most conspicuous symbol of American foreign policy and will potentially influence not only the immediate tactical situation, but the operational and strategic levels as well. His actions, therefore, will directly impact the outcome of the larger operation; and he will become, as the title of this article suggests – the Strategic Corporal." (p. 5).

165 Criticising the tendency of micromanagement, Hays Parks draws upon the following examples: "Senior leaders who authorize air strikes, naval bombardments, and cruise missile attacks with slight attention to ROEs are for some reason drawn to the fine details of ground force ROEs like moths to a flame. A senior officer in the Carter administration sought to require the forces executing the ill-fated April 1980 Iranian rescue mission to shoot to wound. During the Reagan administration, Marines in Beirut were subjected to ROE tampering at all levels, contributing to the deaths on 23 October 1983 of 241 service personnel in the Marine barracks bombing. Personal weapons (pistols only) for U.S. military advisers in El Salvador were specified in a National Security Council meeting. In the opening moments of Operation Just Cause, four Seals from SEAL Team Four dies and nine were seriously wounded in their seizure of Paitilla airfield, and the mission and members of SEAL Team Two in Balboa Harbor were jeopardized, in large measure because of unnecessarily restrictive ROEs. *ROEs a carrier battle group commander and his seniors would reject out of hand were imposed from higher level down through the chain of command without so much as a hiccup from the SEALs' intermediate commanders.*" Parks, 'Deadly Force is Authorized' (n 115) p. 34, emphasis added.

166 Parks, 'Rules of Engagement: No More Vietnams' (n 140) p. 27. For more examples of the challenge to manage civilian control and military command, see Hayes, *Naval Rules of Engagement* (n 43) pp. 22–25.

There are several potential causes of ROE being perceived as excessively restrictive. The criticism may, *inter alia*, arise from a disagreement concerning the degree of political or strategic control over the use of force. One way to respond to political and public pressure for increased political control and accountability with the use of military force is to authorise and implement ROE that are sufficiently restrictive to enable political control even with tactical decisions. The pressure is most significant in the context of co-called 'wars of choice', meaning those operations that are not threatening the State itself. This was emphasised by Daniel P. O'Connell as early as 1975:

> [t]he Power despatching forces abroad must maintain a stricter posture of legality if its objectives are to be attained than one resisting pressure at home; and its rules of engagement must ensure tighter operational control and greater specification of the legal parameters of the operation.[167]

This is very much the case today as well, and the fact that mass media and the internet make detailed information of operations abroad available to anyone has arguably resulted in an increased desire for tighter political and operational control. People are confronted on a daily basis with pictures of suffering civilians from conflicts all over the world, and expect their authorities to do something to help. Coupled with increased awareness and expectations of modern technology, there is an increasing tendency to expect that military forces should not only be able to minimise the risk of mistakes being made, but that civilian losses could and thus should be avoided altogether.[168] Many of the conflicts where the ROE have been perceived as restrictive and even "simply patronizing in nature"[169] have been complex in nature, where it has been difficult to distinguish the opposing forces from protected civilians. For instance, in ISAF, the effort to enhance the protection of civilians resulted in both restrictive ROE and a continued emphasis on the need to avoid collateral injury or damage to civilians beyond the requirements of the LOAC, amongst others in the so-called CIVCAS Directives.[170] According

167 O'Connell, *The Influence of Law on Sea Power* (n 15) p. 173.

168 The so-called "ISAF CIVCAS Directives" are examples of this tendency (see below and Section 5.5). See also Erica L. Gaston, *When Looks Could Kill: Emerging State Practice on Self-Defense and Hostile Intent* (Global Public Policy Institute, 2017, http://www.gppi.net/fileadmin/user_upload/media/pub/2017/gaston_2017_hostile-intent_web.pdf, last accessed 24.04.2019) pp. 23 and 58.

169 Addicott, 'The Strange Case of Lieutenant Waddell' (n 45) p. 4.

170 The ISAF Tactical Directive regarding civilian casualties (CIVCAS) was first issued in June 2007 by the then-ISAF Commander (COMISAF) General Dan McNeill in response

to counterinsurgency (COIN) doctrines, such limitations are considered a prerequisite to mission effectiveness;[171] however, the limitations imposed on the ISAF forces' ability to use force was criticised for placing them at higher risk.[172] The emphasis on reducing civilian casualties was also influential during the 2011 Operation Unified Protector where only precision-guided munitions were permitted.[173]

Politicians generally prefer operations to be perceived as both legitimate and lawful. The emphasis on increased political control of the use of military force is therefore not surprising. As a result, the much-criticised practice

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to a May 2007 ISAF report discussing the effect of civilian casualties caused by an April 2007 U.S. air strike in Shindand, Herat province. See Center for Civilians in Conflict, *Civilian Harm Tracking: Analysis of ISAF Efforts in Afghanistan* (2014, http://civiliansinconflict.org/uploads/files/publications/ISAF_Civilian_Harm_Tracking.pdf, last accessed 24.04.2019) p. 3.

See also: Bob Dreyfus, 'Mass-Casualty Attacks in the Afghan War', *The Nation* (19 September 2013, t http://www.thenation.com/article/176262/mass-casualty-attacks-afghan-war?page=0,0, last accessed 24.04.2019); U.S. Joint and Coalition Operational Analysis, *Reducing and Mitigating Civilian Casualties: Enduring Lessons* (Suffolk, Virginia, 2013, http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA579024, last accessed 24.04.2019); and Prescott, 'Tactical Implementation of ROE' (n 101) pp. 265–267 (although as many other commentators, he lists the first CIVCAS directive as being the 2008 version by General McKiernan). See also discussion in Section 5.5.

171 See e.g. NATO LibGuide, *Counterinsugence Strategy*, (http://www.natolibguides.info/counterinsurgency, last accessed 24.04.2019). Such restrictions have, however, commonly been introduced through other documents than the ROE themselves. See above for discussion on the definition of ROE. For a consideration of ROE and COIN from a U.S. perspective, see Winston Williams 'Training the Rules of Engagement for the Counterinsurgency Fight', pp. 201–220 in Carol Connelley and Paolo Tripodi (eds.), *Aspects of Leadership – Ethics, Law and Spirituality* (Marine Corps University Press, Quantico, Virginia, 2012).

172 See e.g. Paul Szoldra, 'Marine: Strict Rules of Engagement Are Killing More Americans Than Enemy in This Lost War', *Business Insider* (24 Aug. 2012, http://www.businessinsider.com/one-marines-views-on-afghanistan-2012–8?r=US&IR=T&IR=T, last accessed 24.04.2019). For a criticism of restrictive ISAF ROE, see Addicott, 'The Strange Case of Lieutenant Waddell' (n 45). He argues in relation to COIN that: "This approach demands the use of overbearing ROE on our American forces under the naïve notion that the enemy will respond to our restrictive use of force with similar acts of kindness, and that the civilian population will view American soldiers with a greater degree of respect and admiration. In essence, our armed forces are ordered to fight the enemy with one hand tied behind their back. Ironically, the delusion of the sophisticated approach to warfare is so disoriented to reality that those with common sense cannot understand it." ibid, p. 8, footnote to the author's own work omitted.

173 Letter from Peter Olson, Legal adviser to NATO, to the International Commission of Inquiry on Libya, 23 January 2012, cited in Corn, 'Developing Rules of Engagement' (n 18) p. 240. See also NATO, *STANAG 2597* (n 4) p. B-51, and Kjelgaard, 'The Importance of Law in the Theatre' (n 53) p. 40.

during the Vietnam War whereby the Secretary of Defence, McNamara, personally approved not only targets but in some cases also "the aircraft, weapon loads, dates and times of strike, and routes of ingress to and egress from the target",[174] is not history, but in fact resembles the control the strategic level exercises over certain operations today. For instance, during the ISAF mission, all targets to be nominated by German forces to a target list had to be approved by the national authorities.[175] The U.S. applied a similar approach during Operation Enduring Freedom, where "pre-planned strikes, interdiction targets and time-sensitive targets all had to be approved by USCENTCOM",[176] and authorisation for a UK drone attack on UK citizens in Syria was given by the Secretary of State for Defence.[177]

Although a high degree of political control of the military may be frustrating for those subjected to it, it is nonetheless essential. As General Carl von Clausewitz explained:

> That the political point of view should wholly cease to count on the outbreak of war is hardly conceivable unless pure hatred made all wars a struggle for life and death. In fact, as we have said, they are nothing but expressions of policy itself. Subordinating the political point of view to the military would be absurd, for it is policy that has created war. Policy is the guiding intelligence and war only the instrument, not vice versa. No other possibility exists, then, than to subordinate the military point of view to the political.[178]

The situation is neatly summarised by Bradd C. Hayes who stresses that "[t]he logic of conflict is the logic of politics rather than the logic of the military".[179] However, what the politicians probably are aware of, and concerned about, is the fact that even though war has as its purpose to serve a political end, "the

174 Parks, 'Rules of Engagement: No More Vietnams' (n 140) p. 27.

175 Spiegel Staff, 'Obama's Lists – A Dubious History of Targeted Killings in Afghanistan', *Spiegel Online* (28 December 2014, https://www.spiegel.de/international/world/secret-docs-reveal-dubious-details-of-targeted-killings-in-afghanistan-a-1010358.html, last accessed 24.04.2019).

176 Schmitt, 'Targeting and IHL in Afghanistan' (n 51) pp. 320–321, citing Headquarters United States Air Force, Operation Anaconda: An Airpower Perspective 42–43 (2005), available at http://www.dtic.mil/dtic/tr/fulltext/u2/a495248.pdf, last accessed 24.04.2019).

177 Park, *The Right to Life in Armed Conflict* (n 47) p. 120.

178 Clausewitz, Carl von, *On War* (Michael Howard and Peter Paret (eds/trs), Princeton University Press, Princeton NJ, 1984) p. 607.

179 Hayes, *Naval Rules of Engagement* (n 43) p. 2.

nature of war is to serve itself".[180] These questions concerning the appropriate level of civilian control over the military relate to what has been referred to as the 'civil-military problematique', namely "the need to have an institution strong enough to protect civilians yet not so strong as to ignore civilian direction – in short, the problem of civilian delegation to and control of the military".[181] This has been the subject of extensive debate and research, most notably by Samuel Huntington and Morris Janowitz, and will not be dealt with further here.

Restrictive ROE are not only the product of political desire for increased control, however. As Hayes explains, "the military chain of command's desire to maintain control is every bit as strong as that of civilian leaders".[182] A further explanation for ROE becoming too restrictive is therefore that they become more restrictive as they are implemented down through the chain of command. A Commander may never expand upon the ROE given, but he may choose to limit them, unless this ability has been restricted by a superior Commander. For instance, a Commander may decide to introduce amplifications to ROE to reduce the risk of them being interpreted in way that is not in compliance with the higher levels of Command's intention, especially if the original ROE are vague and thus open to misunderstandings.[183] Commanders may also choose to restrict the ROE due to a desire for further detailed control over any operation they may be held accountable for, which is basically any operation carried out by persons under their command. For instance, a Commander in charge of an area which the ROE allow entry into, may order that entry into, for instance, a certain valley or village is prohibited because it may result in unwanted escalation of the conflict in that area. Similarly, Commanders may impose stricter requirements than what the ROE and SOPs require for vetting

180 Richard K. Betts, 'Is Strategy an Illusion?', 25 *International Security Fall* 2 (2000), p. 37, paraphrasing a conversation about Clausewitz in Richard Henrick's Crimson Tide (Avon, New York, 1995, p. 75).

181 Peter D. Feaver, 'The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control', 23 *Armed Forces & Society* 149 (1996), p. 170.

182 Hayes, *Naval Rules of Engagement* (n 43) p. 25.

183 See Reilly, *ROE in the Conduct of Special Operations* (n 115) pp. 32ff, especially p. 39, for a detailed study of how ROE become translated down through the chain of command. See also Laurie Blank, 'Rules of Engagement: Law, Strategy and Leadership', in Carol Connelley and Paolo Tripodi (eds.), *Aspects of Leadership – Ethics, Law and Spirituality* (Marine Corps University Press, Quantico, Virginia, 2012) p. 241, concerning the restrictive implementation of ISAF tactical directives on the prevention of civilian casualties.

sources of information used to determine whether a person or object is a lawful target.[184]

The perception of ROE as too restrictive or too permissive is also likely to influence and be influenced by the approach taken to how detailed ROE should be. This is related to the above discussion of degree of political control: more detailed ROE enables more control, and vice versa, a desire for increased control may result in more detailed ROE. As explained in Section 2.2.1.2, ROE should not be 'rudder orders'. ROE are intended to "provide boundaries and guidance on the use of force";[185] they should not amount to neither "tactical control measures nor substitutes for the exercise of the commander's military judgement".[186] Those supporting this interpretation of ROE would presumably consider all ROE containing such detail as overly restrictive.

However, not all view this level of detail inappropriate. Hays Parks, for instance, has criticised the description for not reflecting reality: "such a limited view of ROE is not consistent with their proper use at all levels, and particularly at the operational level".[187] As an example, Parks points out that ROE to the effect of "these targets will be attacked only with observed fire or guided munitions"[188] are not uncommon, and he does not appear to consider such ROE as inappropriately restrictive. Park's criticism is supported by Sagan, who stresses that the civil authorities have a legitimate interest in ensuring that military operations serve the higher political interests, and that this includes control

184 Although not a ROE, a good example of such additional limitations is the ISAF Tactical Directives on Civilian Casualties. In order to ensure compliance with the directives, subordinate commands introduced the additional limitation that weapons could never be fired inside a village. This was not what COM ISAF intended, and as a result, the 2010 version of the Tactical Directive emphasised that additional restrictions could not be imposed ("Subordinate commanders are not authorized to further restrict this guidance without my approval"). Extracts of the 1 August 2010 version of the Tactical Directive were published in ISAF News Release 2010-08-CA-004. According to Pennekamp, another common, and by some argued overused, tool used by commanders to regulate the soldiers' use of force, is Escalation of Force Procedures (Aaron Pennekamp, 'Standards of Engagement: Rethinking Rules of Engagement to More Effectively Fight Counterinsurgency Campaigns', 101 *The Georgetown Law Journal* 1619 (2013), pp. 1634–1635). Escalation of force procedures are considered further in Sections 3.5.3.3 (as a tool for identifying hostile act and hostile intent) and 8.2.5.2 (as a tool to ensure proportionate use of force in self-defence).

185 U.S. Army, *U.S. Operational Law Handbook* (n 10) p. 83.

186 ibid.

187 Hays Parks, 'Righting the Rules of Engagement', 115(5) *US Naval Institute Proceedings* 83 (May 1989), p. 86.

188 ibid.

over the use of weapons.[189] In other words, a certain level of detail should be expected, without it necessarily making the ROE too restrictive.

Finally, despite the legitimacy of political control of the use of force, it must be borne in mind that the emphasis on reducing expected collateral damage and thereby minimising international criticism may come at the cost of mission effectiveness.[190] For instance, if the troops are ordered to never open fire unless fired upon, or all targets are required to be approved by a time-consuming political process, defeating the opposing forces becomes harder. Such orders limit the number of available options for fighting the opposing forces, and the restrictions imposed on the troops may easily be taken advantage of by the opposing forces, leaving them even more at risk. Finding the correct balance between the political and operational demands is in other words crucial for mission success. As stressed by Reilly, it is important to remember that:

> [w]hile the political considerations and objectives are paramount, the political objectives will not be achieved unless the military considerations are properly addressed. If the ROE are too restrictive, then the commander cannot accomplish the military objective and could potentially suffer unnecessary human and material losses. Either military failure or unnecessary losses could translate into political failure.[191]

2.4.2 *NATO ROE Drafting*

The NATO ROE drafting procedure is described both in MC 362/1 and in the open access training material found in STANAG[192] 2597: *Training in Rules of Engagement.*[193] When NATO is planning an operation, the North Atlantic Council will task SACEUR (Supreme Allied Commander Europe)[194] and the subordinate commands to start preparing the plans for the mission, including the ROE.[195] NATO ROE development is based on the NATO ROE doctrine, the

189 Sagan, 'Rules of engagement' (n 2) p. 450.

190 See e.g. the criticisms voiced by Sagan, ibid.

191 Reilly, *ROE in the Conduct of Special Operations* (n 115) p. 32.

192 NATO Standardised Agreement.

193 NATO, *STANAG 2597* (n 4). The present author was a member of this working group, and one of the prime authors of the training package.

194 SACEUR is "[t]he NATO strategic commander commanding Allied Command Operations and responsible for the planning and execution of NATO operations." NATO, *AAP-06(2018)* (n 5). SACEUR is one of NATO's two strategic commanders and is the head of Allied Command Operations (ACO). NATO Topics, *Supreme Allied Commander Europe (SACEUR)*, https://www.nato.int/cps/en/natohq/topics_50110.htm, last accessed 24.04.2019.

195 Chalanouli and Bumgardner, 'Rules of Engagement, NATO's Approach and National Caveats' (n 68) p. 102.

MC 362/1.[196] The MC 362/1 provides a catalogue of ROE that may be adopted, divided into topics such as warnings, boarding, detention, identification of targets, information operations, and attack.[197] Within each topic (or series as they are known as) there are several alternative rules, some of which are mutually exclusive, such as when one authorises an act while another prohibits the same act.[198] The ROE will be chosen on the basis of among others the legal basis for the operation and the use of force therein, the strategic and operational analysis of the mission; and the planned course of action. The aim will be to achieve the best balance between political and operational considerations and ensure respect for the applicable law. As explained in Section 2.4.1, NATO does not determine the legal framework for an operation. According to Kjelgaard,

> the question of applicable law will be addressed pragmatically, in the specifics of the OPLAN and the ROE. What the planners prepare and SACEUR, through the Military Committee, presents for Council approval takes national positions into account, but in practical terms proposes specific rules and approaches for particular anticipated circumstances rather than offers conceptual views on the applicability of one or another legal doctrine or body of law.[199]

She goes on to explain that "[a]ny such differences are in any event likely to be relatively minor and inclined to being addressed at the level of implementation".[200] The differing legal obligations of NATO States will therefore usually not affect the ROE development.

Most of the suggested ROE in MC 362/1 require tailoring to the situation, such as by designating the categories of persons that may be detained[201] or

196 Fournier, 'NATO Intervention Abroad' (n 64) p. 116, and Peter Dreist, 'Rules of Engagement in NATO Operations – Application in Germany's Legal System', in Barbara Janusz-Pawletta (ed.), *Zasady użycia siły* (*ang. Rules of Engagement*) – *wybrane problem* prawne [Rules of Engagement – legal problems] (Towarzystwo Wiedzy Obronnej, Warsaw, 2011) p. 119.

197 Attack in NATO ROE only refers to situations when forces may attack individuals or objects, for instance, because they pose a threat or are members of the opposing forces. It does not include questions of individual self-defence, which is left to national regulation, or state self-defence, as regulated by the *jus ad bellum*.

198 NATO, *STANAG 2597* (n 4) p. B-7.

199 Kjelgaard, 'The Importance of Law in the Theatre' (n 53) p. 38.

200 ibid.

201 This is signified by the indicator DESIG. NATO, *STANAG 2597* (n 4) p. B-62. See also Boddens Hosang, 'Rules of Engagement and Targeting' (n 44) p. 166.

defining the degree of force that may be permitted to be used in the respective situations. In addition, the MC 362/1 contains spare rules and series that may be developed if the existing ROE are not sufficient, thereby enabling the doctrine to be applicable even to unforeseen ROE. If there is a need to provide further information on a ROE, a ROE amplification (AMPL) may be added, for instance stating the level of authority required for applying a ROE.[202]

The ROE form part of the Operational Plan (OPLAN) for the mission, as one of the annexes to the main plan, although the ROE are developed in parallel to the remaining parts of the OPLAN and its other annexes.[203] In order to know which ROE are needed to accomplish what the Commander wants to do, the concept for the operation must be evolved and the development of the OPLAN must have begun. At the same time, the completion of the OPLAN depends on the approval of the ROE. The successful integration of these two processes is therefore important for the effectiveness of the operation.[204] Once the draft is produced, these draft or illustrative ROE are discussed at various levels in NATO and in different military and political working groups. The final version of the proposed ROE (ROE request, ROEREQ) must be presented to the Military Committee[205] for endorsement, before it is finally presented to the North Atlantic Council[206] for authorisation (ROE authorisation, ROEAUTH).[207]

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202 NATO, *STANAG 2597* (n 4) p. B-75.

203 ibid, pp. B-45–46. For an overview of the operational planning process, see Boddens Hosang, *Rules of Engagement* (n 30) pp. 82–86.

204 James C. Duncan, 'The Commander's Role in Developing Rules of Engagement', 52(3) *Naval War College Review* 76 (Summer 1999), p. 85.

205 The Military Committee (MC) is the senior military authority in NATO. According to NATO "It is the primary source of military advice to the North Atlantic Council and the Nuclear Planning Group, and gives direction to the two Strategic Commanders. (…) As such, it is an essential link between the political decision-making process and the military structure of NATO." NATO Topics, https://www.nato.int/cps/en/natohq/topics_49633.htm, last accessed 24.04.2019.

206 The North Atlantic Council (NAC) is: "the principal political decision-making body within NATO. It oversees the political and military process relating to security issues affecting the whole Alliance. It brings together representatives of each member country to discuss policy or operational questions requiring collective decisions, providing a forum for wide-ranging consultation between members on all issues affecting their peace and security. (…) Policies decided in the NAC are the expression of the collective will of all member countries of the Alliance since decisions are made on the basis of unanimity and common accord." NATO Topics, https://www.nato.int/cps/en/natohq/topics_49763.htm, last accessed 24.04.2019.

207 See NATO, *STANAG 2597* (n 4) pp. B-64–70.

As previously mentioned, all decisions in the NAC are made with consensus. NATO has developed a 'silence procedure' as a means of reaching consensus. Rather than all representatives or States voting for a text, the text is circulated and will be adopted if no one objects to it or 'breaks silence'. If silence is broken, the working group proposing the text will typically meet again to resolve the issues.[208] No distinction is made between those NATO Member States who are participating in the mission at hand and those who do not plan to do so.[209] The NAC decisions is informed by assessment and justification of SACEUR and SHAPE for requesting the ROE as well as the military advice from the Military Committee and the International Military Staff and the political advice from the International Staff. The ROE that are authorised by the NAC are then implemented (ROE implementation, ROEIMPL) down through the chain of command in the form serial messages, that is, a list of coded one-line messages. At the lower levels, a distillation of relevant ROE is commonly presented in the form of soldier's cards or ROE cards, special (air) instructions (SPINS) or maritime instructions. These are shorter summaries of the most relevant and important ROE, tailored to the requirements of the respective tactical forces.[210]

Even though NATO ROE are formed on the basis of the consensus of all NATO States, a State may choose to caveat a particular rule at any time.[211] Caveats should preferably be notified during the planning phase so that they may be included in the OPLAN for the operation. In practice, they will be submitted to and published by SHAPE,[212] at the same time as the 'Transfer of Authority' (TOA) of national forces to NATO is executed.[213] Importantly, caveats may

208 U.S. Army, *Operational Law Handbook* (n 10) p. 474.

209 Fournier, 'NATO Intervention Abroad' (n 64) p. 116. See also Kjelgaard, 'The Importance of Law in the Theatre' (n 53) p. 38, where she explains that "In the case of Libya, for example, Germany was able to join consensus on the mandate for Operation Unified Protector despite having abstained on Security Council Resolution 1973 of 11 March 2011, the basis for the NATO operation, and being unprepared to participate in the operation itself".

210 Such cards are not a substitute for training in ROE, but serve as useful memory tools. For examples, see U.S. Army, *Operational Law Handbook* (n 10) pp. 101–106.

211 NATO defines a caveat as: "any limitation, restriction or constraint by a nation on its military forces or civilian elements under NATO command and control or otherwise available to NATO, that does not permit NATO commanders to deploy and employ these assets fully in line with the approved operation plan.

Note: A caveat may apply inter alia to freedom of movement within the joint operations area and/or to compliance with the approved rules of engagement." NATO, *AAP-06(2018)* (n 5).

212 U.S. Army, *Operational Law Handbook* (n 10) p. 478.

213 NATO, *STANAG 2597* (n 4) p. B-76.

only impose further limitations on the use of force and other provocative acts; they can never expand on what the NATO ROE permit. According to Fournier, there are four grounds for such caveats: 1) to ensure compliance with national law; 2) to ensure compliance with the State's differing interpretation of or obligations regarding international law; 3) because the State interprets the UN mandate differently; or 4) to impose additional restrictions or limitations on the use of the State's forces, such as geographical limitations or prohibitions on using certain ammunitions like rubber bullets or tear gas.[214] For instance, there may be disagreements among the troop-contributing nations as to the legal classification of a situation (*e.g.* whether armed conflict or not, and if an armed conflict, the type) or the application of human rights law. Although caveats are difficult to avoid and are a useful mechanism to enable NAC decisions in areas not all members States agree, they do create operational challenges in that they impose restrictions on the Commanders' use of the troops made available to him. Too many caveats may thus make the contribution of the State in question considerably less effective, and extensive use of caveats has been much criticised.[215] So-called 'undeclared caveats' are particularly problematic.[216] These are national limitations on the use of forces that are only declared if the issue arises, which makes it impossible for the Commander to take into account in the planning of an operation.

There is a tendency to leave the development of ROE to the lawyers, perhaps due to a misconception that ROE are legal instruments. However, as Daniel P. O'Connell points out, "the drafting operation is likely to be successful only if there has been the requisite thinking in advance about the questions that could arise, including the tactical factors that enter into the processes of legal appraisal".[217] Thus, in order for the ROE to best reflect the operational, political and legal considerations, the ROE should be developed by a combination of operators, especially from the current and future operations branches (J-3/3–5), and subject matter experts such as legal advisers and political advisers, as

214 Fournier, 'NATO Intervention Abroad' (n 64) p. 117.

215 See e.g. an overview of operational impacts of caveats in Chalanouli and Bumgardner, 'Rules of Engagement, NATO's Approach and National Caveats' (n 68) pp. 109–110. See also NATO, *Resolution 336 on Reducing National Caveats,* NATO Parliamentary Assembly, prepared by International Staff, 15 November 2005, document no. 238 SESA 05 E, available at https://www.nato-pa.int/download-file?filename=sites/default/files/documents/2005%20-%20238%20SESA%2005%20E%20-%20NATO%20PA%20POLICY%20RECOMMENDATIONS.doc, last accessed 24.04.2019.

216 Prescott, 'Tactical Implementation of ROE' (n 101) p. 263.

217 O'Connell, *The Influence of Law on Sea Power* (n 15) p. 170.

well as representatives from J-2 (intelligence) and J-5 (future plans).[218] As the J-3/J-5 is responsible for conducting and planning operations, it is natural that they are in charge of the ROE.[219] Perhaps in that way the following dire situation described by Hays Parks may be avoided: "By and large, ROE produced by the most lawyer-heavy military in the world are cut-and-paste, copycat products lacking in original thought or analysis for current missions".[220] Legal adviser will, however, play an important role in interpreting the applicable ROE and ensuring that they are applied in accordance with applicable law.

As mentioned above,[221] it was originally intended for ROE for operations below the threshold of armed conflict to be expressed as authorisations, while ROE for armed conflict operations would be written as prohibitions or restrictions. However, current practice indicates that the ROE for any operation are likely to consist of a combination of authorisations and prohibitions.[222] For instance, a ROE may state that 'Use of minimum force to prevent interference with the freedom of movement of NATO-led forces is authorised', while another ROE in the same ROE pack may state that 'Entry into State Bravo except for search and rescue purposes is prohibited'. Arguably, the requirement for a ROE for all use of force (unless self-defence) makes the use of prohibiting ROE redundant. However, it may still be necessary to use prohibiting ROE where it is crucial that something is not done or where there are limited exceptions to the rule. For instance, as illustrated above on ROE drafting, entry into a geographic area close to a neighbouring country may result in unwanted escalation and thus be prohibited. It may still be necessary to include an exception to allow for such entry for search and rescue purposes. In complex operations involving both traditional warfare and hybrid warfare, it may also be that there is a need to prohibit certain ROE for certain geographical areas. Extensive use of prohibitions should, however, be avoided in order to prevent overly complex ROE and misunderstandings. As Reilly explains, if a soldier sees an act being prohibited in one ROE or soldier's card, but do not see it in another, he may think the act is now allowed.[223]

Unless otherwise provided, Commanders at any level may decide to retain the power to authorise a ROE.[224] It may also be stipulated in a ROE that the

218 NATO, *STANAG 2597* (n 4) p. B-46.
219 Bumgardner *et al., NATO Legal Deskbook* (n 102) p. 258, and Duncan, 'The Commander's Role in Developing Rules of Engagement' (n 204) p. 85.
220 Parks, 'Deadly force is authorized' (n 115) p. 35.
221 See Section 2.2.1.8.
222 NATO, *STANAG 2597* (n 4) p. B-8.
223 Reilly, *ROE in the Conduct of Special Operations* (n 115) p. 26, fn. 33.
224 NATO, *STANAG 2597* (n 4) p. B-74.

power to authorise the use of the ROE in question is not to be delegated below a certain level of command. As a result, forces below that level of Command must ask for authorisation to use the retained ROE. A retained ROE may be released for a period of time, for a specific operation, or only when needed, thereby requiring the forces to contact the Commander in question when the need arises. Such release must be distinguished from delegation, whereby the authority to authorise the application of a ROE is given to a subordinate command. The use of a retained ROE may be authorised without delegating the release authority. If ROE are retained, this must be taken into consideration when planning an operation, for instance in the development of the concept for the operation (set out in the CONOPS) in question. In this way, the release of the ROE may be ensured prior to the commencement of the operation, or the Commander may be sufficiently prepared to make the decision to release the ROE at short warning when the need arises. A ROE Release Authorisation Matrix may be used to provide an overview of the release authority levels for all implemented ROE for an operation.[225]

It is also possible to use dormant ROE, that is, ROE that will become available when a predefined situation arises.[226] For instance, the operation may initially take place below the threshold of armed conflict, but there is a real risk of the situation escalating. Because it takes time to develop new ROE, the ROE necessary for an armed conflict may be developed in advance and pre-approved as part of a branch plan, ready for use if an armed conflict starts. In such circumstances it is important to clearly define who will have the authority to determine that the situation activating the ROE has occurred. When the dormant ROE are activated, the higher levels of command must be informed, including the NAC.[227] If the change is significant, such as when the plan to deter the adversary from creating an armed conflict has failed, the decision to transition into the branch plan and activate the dormant ROE is likely to be taken at the level of the NAC.

If a situation changes or a new need arises, making the existing ROE insufficient, the ROE may be updated.[228] As those developing the ROE would have been of the opinion that the existing ROE are the most appropriate for the

225 Boddens Hosang, *Rules of engagement* (n 30) p. 56.

226 NATO, *STANAG 2597* (n 4) p. B-71. See also Bumgardner *et al., NATO Legal Deskbook* (n 102) p. 256. The concept was introduced in the redrafting of the MC 362. Boddens Hosang, *Rules of Engagement* (n 30) p. 54.

227 Boddens Hosang, *Rules of engagement,* ibid, pp. 54–55.

228 For an explanation of ROE review in general, see Prescott, 'Tactical Implementation of ROE' (n 101) pp. 268–274.

missions, a request for new ROE are more likely to succeed if it can be demonstrated that there is a situation that the planners had not foreseen and that the existing ROE do not fit.[229] In NATO, changing ROE requires a ROE request to be sent up through the chain of command. However, such requests must be authorised by NAC, which means that the process may be very time consuming, depending on the operational and political complexity of the operation and the ROE requested. It is therefore more likely that clarification on the application of a ROE to a new situation is provided in, for instance, a tactical directive, or that the ROE is retained due to the increase sensitivity of its application.

If instead the decision is made to no longer allow the use of an existing ROE, perhaps because a type of operations is no longer going to be conducted, the ROE may be cancelled. An example of such ROE may be restrictions on conducting military exercises in the vicinity of a neighbouring, hostile state. If an armed conflict breaks out with that State, such a ROE will likely no longer be relevant. While a local Commander may restrict the use of certain ROE for forces under his or her command, the cancellation of a ROE for all the forces must be done at the strategic level (i.e. the NAC).

Last not but not least, in addition to the serial messages that make up the ROE, NATO ROE will also contain a political policy statement (PPS), reflecting the overall policy aim and providing the context for the mission. This statement will only be a short text, set out in the general text (GENTEXT) at the introduction to the ROE, reiterating the directions provided in the strategic documents for the operation.[230] For instance, it may state that the overall purpose of the operation is to establish a safe and secure environment for the civilian population and/or to remove the threat posed by insurgency groups. The PPS will be complemented by a political policy indicator (PPI), clarifying NAC's assessment of the effect NATO's efforts are intended to have on the situation.[231] Phrased differently, the PPI describes the desired end-state. The PPI may be 'de-escalation', 'maintain status quo' or 'risk of escalation is acceptable'.[232] The PPS and PPI should be taken into account when interpreting the ROE. For instance, if the PPI is 'de-escalate', this should affect how and when attack ROE are used, or how much force is used for example when securing the freedom of movement of NATO forces. The PPI is therefore an important aspect of the ROE, even if the short line containing it may be easy to overlook.

229 U.S. Army, *U.S. Operational Law Handbook* (n 10) p. 82.
230 NATO, *STANAG 2597* (n 4) p. B-50.
231 ibid. See also Prescott, 'Tactical Implementation of ROE' (n 101) p. 273.
232 NATO, *STANAG 2597* (n 4) p. B-50.

Because ROE dictate how forces may and are likely to act in response to threats, they provide information on how those forces are likely to act in the future. As such, they would be a useful tool for an adversary. As Phillips points out:

> [k]nowing the exact circumstances under which an opposing force will resort to the use of deadly force would aid an adversary in planning a devastating preemptive [sic] attack. Additionally, the ROE likely discloses the level of intelligence regarding an adversary's forces, capabilities, tactics, and expected threats or actions and may reveal classified technology for determining enemy identities or threats.[233]

For instance, Parks explains that during the Vietnam War, the U.S. forces were not permitted to attack surface to air missiles (SAMs) that were located in populated areas. The North Vietnamese became aware of this, and began to place their SAMs and antiaircraft sites "adjacent to or within populated areas whenever possible".[234] Similarly, certain ISAF forces were only permitted to attack opposing forces that were visibly armed. When this become known to the adversary, they would drop their weapons immediately after attacking ISAF forces, knowing that they would not be attacked back.[235]

As a result, ROE are usually classified. However, over the last decade there has been increasing public pressure on making the ROE more available to others.[236] Releasing parts of the ROE may also be done to send a message to the opponent. For instance, during the abovementioned 'Tanker war', the

233 Phillips, 'Rules of Engagement: A Primer' (n 27) pp. 4–5.

234 Parks, 'Rolling Thunder and the Law of War' (n 133) p. 10.

235 A similar problem has been reported from the war in Iraq: "The marines say insurgents know the rules, and now rarely carry weapons in the open. Instead, they pose as civilians and keep their weapons concealed in cars or buildings until just before they need them. Later, when they are done shooting, they put them swiftly out of sight and mingle with civilians." Chivers, C. J., 'Perfect Killing Method, but Clear Targets Are Few for Marines in Iraq', *New York Times* (22 November 2006, http://www.nytimes.com/2006/11/22/world/middleeast/22sniper.html, last accessed 24.04.2019). See also Prescott, 'Tactical Implementation of ROE' (n 101) p. 267, concerning similar issues during the NATO air operation in Libya.

236 See e.g. Peter Rowe, 'The Rules of Engagement in Occupied Territory: Should They be Published?', 8 *Melbourne J. Int'l L.* 327 (2007). According to the NATO Legal Deskbook, "ROE were for many years kept classified, but over the past decade this is less and less often the case, as awareness of ROE and their importance has spread to politicians, journalists, and laymen. It is now believed that bringing ROE into the open discourse is of benefit". Bumgardner *et al., NATO Legal Deskbook* (n 102) p. 254.

U.S. made the decision to publicly announce that the ROE had been expanded to permit the naval commanders to protect ships from friendly countries as well as U.S. ships. This has previously not been permitted, with the result that Iran began to attack such ships 'right under the nose' of the U.S. Navy. By making these changes known to the press, it was intended to "telegraph firm intentions to the Iranians".[237] Such openness about the use of military force may be important for democratic accountability and for public support of military operations. However, declassification of ROE gives rise to obvious operational challenges both concerning force protection and mission accomplishment. Again, we see the need to find the appropriate way to strike a balance between political and operational considerations. Perhaps a better way to achieve these political gains is to inform more generally about ongoing operations, without including the level of details that ROE represent. This way the desire for increased accountability may be taken into account, without enabling the opposing forces to predict how the forces will react to threats and possibly even what they are likely to do next.

2.5 ROE as a Tool for Command and Control

The actions of military forces will arguably "either bring order or escalation",[238] and the ROE are an important tool for controlling the direction of the forces and their impact on the situation.[239] As Boddens Hosang explains, "[b]y controlling the use of force, ROE can influence the actions taken by other parties (including opposing forces)".[240] In this final section of the ROE chapter, the function of ROE as a tool for command and control will be examined more closely.[241]

237 Hayes, *Naval Rules of Engagement* (n 43) pp. 53–54.

238 ibid, p. 57.

239 ibid.

240 Boddens Hosang, 'Rules of Engagement and Targeting' (n 44) p. 164.

241 Command and control theory is a separate field and a thorough study of C2 theory is beyond the scope of this book. For a general introduction to command and control in NATO operations, see e.g.: NATO, *Allied Joint Publication 01: Allied Joint Doctrine* (AJP-01) (NATO Standardization Office (NSO), Edition E, Version 1, February 2017) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/602225/doctrine_nato_allied_joint_doctrine_ajp_01.pdf, last accessed 24.02.2019) Chapter 5: 'Command and Control of Joint Operations', and Blaise Cathcart, 'Command and Control in Military Operations', Chapter 15 in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford, 2015).

'Command and control' as a joint concept is defined in NATO as:

> the functions of commanders, staffs, and other Command and Control bodies in maintaining the combat readiness of their forces, preparing operations, and directing troops in the performance of their tasks. The concept embraces the continuous acquisition, fusion, review, representation, analysis and assessment of information on the situation; issuing the commander's plan; tasking of forces; operational planning; organizing and maintaining cooperation by all forces and all forms of support.[242]

This definition does unfortunately not make the meaning of C2 entirely clear, neither with regard to the respective roles of command and control, nor the relationship between them. As stressed in one NATO doctrine, "[t]he terms command and control are not synonymous, although they share a close relationship and they are commonly used together".[243] In order to understand how ROE function as a C2 tool, it is therefore useful to understand the distinction between command and control.

NATO has defined command as both "[t]he authority vested in an individual of the armed forces for the direction, coordination, and control of military forces" and "the will of the commander expressed for the purpose of bringing about a particular action".[244] The will of the Commander may also be referred to as the Commander's intent. AJP-01 further explain command to be "how a commander impresses their will and intentions on subordinates to achieve particular objectives".[245] Control is defined by NATO as "[t]he authority exercised by a commander over part of the activities of subordinate organizations, or other organizations not normally under his or her command, that encompasses the responsibility for implementing orders or directives".[246] According to AJP-01, "[c]ontrol allows the commander to verify what actions have taken place and their effectiveness relative to the intent and the objectives set for the force to achieve".[247] Similar explanations are found in command and control theory. Pigeau and McCann describe the function of command as "to

242 NATO, *AAP-06: Glossary of terms and definitions* (E) 1988, cited in David S. Alberts and Richard E. Hayes, *Understanding Command and Control* (CCPR Publications, 2006, http://www.dodccrp.org/files/Alberts_UC2.pdf, last accessed 24.04.2019) p. 73, fn. 42.

243 NATO, *AJP-01(E)* (n 241) p. 5–2.

244 NATO, *AAP-06(2018)* (n 5).

245 NATO, *AJP-01(E)* (n 241) p. 5–3.

246 NATO, *AAP-06(2018)* (n 5).

247 NATO, *AJP-01(E)* (n 241) p. 5–3.

invent novel solutions to mission problems, to provide conditions for starting, changing and terminating control, and to be the source of diligent purposefulness".[248] According to Alberts and Hayes, control is intended to determine "whether current and/or planned efforts are on track. If adjustments are required, the function of control is to make these adjustments if they are within the guidelines established by command".[249] The essence of control should therefore be viewed as ensuring that the operation is carried out in compliance with the parameters set by command, especially Commander's intent.[250]

Stated simply, command determines and defines the direction, while control ensures and enables the desired shift.[251] Command includes control, and control enables command.[252] In addition to control, command also includes the ability to define the intention for the operation and to identify and assign missions or tasks to forces. Because command includes authoritative direction over all aspects of military operations, including logistics, discipline and training, Troop Contributing Nations (TCN) to NATO operations retain full command over their forces. Furthermore, TCNs tend to only transfer operational control (OPCON), not operational command (OPCOM).[253]

Although ROE is commonly referred to as a command and control tool,[254] it is perhaps first and foremost a tool for control. Control is the organisation,

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248 Ross Pigeau and Carol McCann, 'Re-conceptualising Command and Control', *Canadian Military Journal*, Spring 2002, 53, p. 56.

249 Alberts and Hayes, *Understanding Command and Control* (n 242) p. 59.

250 ibid. See also Pigeau and McCann, 'Re-conceptualising Command and Control' (n 248) p. 56.

251 Alberts and Hayes, *Understanding Command and Control* (n 242) p. 19–20.

252 Or as explained in AJP-3(B): "Control is inherent in command". NATO, *Allied Joint Publication 3: Allied Joint Doctrine for the Conduct of Operations* (AJP-3) (NATO Standardization Agency (NSA), Edition B, March 2011) p. 1–12.

253 Prescott, 'Tactical Implementation of ROE' (n 101) p. 263. See also NATO, *AJP-01(E)* (n 241) p. 5–5, and Chalanouli and Bumgardner, 'Rules of Engagement, NATO's Approach and National Caveats' (n 68) p. 113.

NATO, *AAP-06(2018)* (n 5) provides the following definitions of OPCOM and OPCON: "Operational command (OPCOM): The authority granted to a commander to assign missions or tasks to subordinate commanders, to deploy units, to reassign forces, and to retain or delegate operational and/or tactical control as the commander deems necessary. Note: It does not include responsibility for administration." "Operational Control (OPCON): The authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location; to deploy units concerned, and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it, of itself, include administrative or logistic control."

254 See e.g. Corn, 'Developing Rules of Engagement' (n 18) p. 212.

direction and coordination of forces and functions in order to execute Commander's intent.[255] By defining the parameters for the use of force and other provocative actions, ROE enables control over how forces may deal with individual situations. ROE also enable operational control over the use of force or other provocative acts by retaining the ability to authorise the use of certain ROE at a given level of command. The ability to use ROE as a control mechanism in this way is a result of the tendency in NATO to require all use of force to be authorised by ROE, unless it is self-defence; if the ROE is retained, the forces cannot carry out that act.[256] A Commander may decide to retain all use of a specific ROE, such as attack on opposing forces not posing a threat at the time, or just the application of a ROE to certain circumstances. For instance, ROE for operations known to be at risk of causing collateral damage may require higher level authorisation, even if the expected losses are within what is permitted by the law of armed conflict under the proportionality rule.[257] Another example may be to retain the authority to attack politically sensitive targets.

As with other forms of control, ROE release authority may be delegated to lower levels of Command. To some extent this exercise of control may be viewed as a reflection of command; by delegating certain authorities while retaining others, Commander sends a signal of how the operation should be conducted.[258] The Commander's intent will, however, be better set out in supplementary documents such as SOPs and Tactical Directives.

Distinguishing between ROE as either a command or control tool may give a false impression of the clarity of the distinction between those concepts, however. As mentioned above, the concepts are closely interlinked and interdependent, and command and control theory presents many different ways of understanding them.[259] The following text will therefore deal with the concepts jointly, while bearing in mind the depth and multiplicity of C2.

ROE have several potentials for being used as a C2 tool. First, as ROE provide information on when, where, against whom and how force and other

255 NATO, *AJP-3(B)* (n 252) p. 1–12.

256 See further Section 2.2.1.7.

257 As Schmitt explains, this was a prominent practice in Afghanistan, and "reflected an understanding that unintended civilian harm can have extra-normative consequences". Schmitt, 'Targeting and IHL in Afghanistan' (n 51) p. 321.

258 See also Blank, 'Rules of Engagement' (n 183) p. 249, where she explains that "ROE do more than give guidance for specific uses of force and other actions during military operations. They provide the link to communicate the commander's intent".

259 See e.g. Pigeau and McCann, 'Re-conceptualising Command and Control' (n 248) p. 53, and Alberts and Hayes, *Understanding Command and Control* (n 242) p. 7.

provocative acts may be used,[260] they may be used to impose limitations on the type of situations where force may be used, within the parameter of what the law would permit, and they may set restrictions on where force may be used both to avoid unwanted escalation and to protect own forces. Furthermore, the ROE may limit the use of force to persons posing some form of threat at the time or of certain importance, rather than permitting the use of force against all persons otherwise considered to be lawful targets. Finally, the ROE may impose requirements on the degree of force to be used, for instance, whether it may include deadly force or not; whether escalation procedures must be applied; and what means and methods of warfare may be employed. As a result, the ROE help reduce the risk of military forces acting in ways the Commander had not foreseen. From the perspective of subordinate Commanders, the ROE provide them with clear boundaries within which they may exercise discretion and initiative.[261]

ROE are often referred to as the *Commander's* tool for command and control, including in this book. Blank, for instance, explains that "ROE serve as a commander when the commander is not there".[262] It must, however, be borne in mind that the framework for using ROE as a command and control tool is determined by the body that decides on the ROE for a given operation, which for NATO is the NAC. Through the ROE, NAC imposes political control of the use of military force. For the Commander of the operation, the application of ROE as a C2 tool is subject to the outer limits defined by the NAC. Furthermore, as a result of the political consensus required to authorise NATO ROE, the ROE are commonly not very detailed. This does comply with the view that ROE should not be 'rudder orders';[263] however, it also means that when the Commander wishes to provide further guidance on the use of force in order to make his or her intent clear, this must be done through other operational documents. As previously mentioned, SOPs, Tactical Directives and FRAGOs are among the examples of alternative mechanisms. The more complex and politically sensitive the operation is, the greater the need for such guidance will be.[264] Although this is an operational reality for NATO, the fact that the

260 See e.g. Sagan, 'Rules of engagement' (n 2) pp. 445ff.

261 See also Addicott, 'The Strange Case of Lieutenant Waddell' (n 45) p. 20: "On the positive side, ROE can serve a useful purpose by providing the solider with specific guidance on when, where, and how to use force."

262 Blank, 'Rules of Engagement' (n 183) p. 256. The concept is further explained on pp. 249–255. See also Schmitt, 'Clipped Wings' (n 49) p. 246.

263 See Section 2.2.1.2.

264 See e.g. Reilly, *ROE in the Conduct of Special Operations* (n 115) pp. 27–28, and Parks, 'Righting the Rules of Engagement' (n 187) p. 187.

direction on the use of force is scattered out among several documents has been a cause for frustration and confusion, and is in this regard unfortunate.[265]

The multinational realities of NATO may also impact the effectiveness of ROE as a Commander's tool for command and control. First, as explained in Section 2.4.2, States are free to declare caveats both on their interpretation of how ROE should be implemented and to limit the operational use of their forces. Second, States may at any time declare that they will not carry out ordered tasks on the basis of national considerations; what is referred to as "showing the national red card".[266] During the 1999 Kosovo campaign, for instance, General Sir Michael Jackson refused to use British forces to seize Pristina airfield because it was expected to result in "senseless escalation of hostilities with Russian forces".[267]

The effectiveness of ROE as a command and control tool will also depend on the authority the Commander in question has been delegated. For instance, a Commander who has been delegated tactical control over forces will be able to do less with those forces than the superior who has operational command over those forces.[268] Furthermore, the use of ROE as a command and control tool will be affected by the approach taken with command and control in general. For instance, the use of ROE as a C2 tool will be different when applying a bottom-up approach to command and control as opposed to a top-down approach. The former approach, which is commonly referred to as mission command or decentralised command (*Auftragstaktik* in German or *oppdragsbasert ledelse* in Norwegian), is based on the principle that the Commander will decide what is to be achieved, but leave it to subordinate Commanders to decide how it should be done. The latter approach, on the other hand, is a form of centralised command, where detailed orders, for instance in the form of ROE, enable top level control of the execution of tasks. While mission command requires a certain room of manoeuvre in order for the Commanders to exercise

265 According to Addicott, "The use of so-called "tactical directives" has made a noteworthy contribution to the confusion surrounding ROE." Addicott, 'The Strange Case of Lieutenant Waddell' (n 45) p. 20. See further Section 2.2.1.3.

266 Prescott, 'Tactical Implementation of ROE' (n 101) p. 263. See also NATO, *STANAG 2597* (n 4) p. B-77.

267 Prescott, 'Tactical Implementation of ROE', ibid, p. 262.

268 For definitions of OPCOM and OPCON, see note 253. NATO, *AAP-06(2018)* (n 5) defines TACOM and TACON as: Tactical command (TACOM): "The authority delegated to a commander to assign tasks to forces under his command for the accomplishment of the mission assigned by higher authority." Tactical control (TACON): "The detailed and, usually, local direction and control of movements or manoeuvres necessary to accomplish missions or tasks assigned."

their discretion and initiative, centralised or detailed command discourages initiative and is commonly criticised for amounting to micromanagement.[269] Detailed command reduces the scope for the Commander's past experience, knowledge of threats to the forces, and understanding of the mission and the potential adversary to affect a decision to use force.[270] Extensive and detailed control should in other words be applied with caution, albeit recognising that certain operations are so sensitive that centralised command is necessary.[271] It is in other words important to find "the correct balance between encouraging creative command and controlling command creativity".[272]

The NATO command philosophy "promotes a decentralized style of command based on freedom and speed of action, and initiative, while remaining responsive to superior direction."[273] At the same time, it is emphasised that "the philosophy is flexible enough to allow commanders to exercise detailed command and command by veto according to the prevailing situation and type of joint force".[274] As a result, although the Commander's ability to exercise command and control for instance through ROE is limited by the parameters set by the NAC, the focus on mission command in NATO entails that those parameters will generally not be narrowly defined, thereby leaving Commanders the necessary flexibility to execute their mission.

As discussed in Section 2.4.1, ROE are commonly criticised for not appropriately balancing operational and political considerations and thus for being either overly restrictive or overly permissive, depending on the perspective of the commentator. Command and control theory may therefore to some extent

269 See e.g. Pigeau and McCann, 'Re-conceptualising Command and Control' (n 248) p. 57; U.S. Joint Chiefs of Staff, *Mission Command White Paper*, Washington, DC, 3 April 2012, http://www.jcs.mil/Portals/36/Documents/Publications/missioncommandwhitepaper2012.pdf; and U.S. Department of the Army, *Mission Command,* Army Doctrine Reference Publication (ADRP) 6–0, Washington, DC, 17 May 2012, http://www.fas.org/irp/doddir/army/adrp60.pdf.

270 According to Sagan, these are among the factors that should influence the decision to use force. Sagan, 'Rules of engagement' (n 2) p. 451.

271 From the Norwegian FFOD, 2014, p. 166, describing the Norwegian approach to mission command ("FFOD: "Sterk ordrestyring må brukes med forsiktighet: Utstrakt bruk av detaljstyring er tempodrepende, undergraver tillitsrelasjonene i organisasjonen og ødelegger viljen til å ta ansvar og å handle selvstendig på eget initiativ"). Forsvarsstaben (Norwegian Defence Command), *Forsvarets Fellesoperative Doktrine* (*Norwegian Joint Operational Doctrine*), 2014, https://brage.bibsys.no/xmlui/bitstream/id/317149/FFOD%202014.pdf., last accessed 24.04.2019.

272 Pigeau and McCann, 'Re-conceptualising Command and Control' (n 248) p.57.

273 NATO, *AJP-01(E)* (n 241) p. 5–1.

274 ibid.

help explain this friction. What some consider to be overly restrictive and hence poorly drafted ROE may in fact be a reflection of the decision to employ more detailed or centralised command.[275] From the perspective of mission command, extensive use of detailed control will slow down the operation and undermine the relationship of trust within the organisation. This may destroy the will to take responsibility and to act on own initiative. The decentralised C2 approach will therefore favour ROE that give the military forces more room to act on their own initiative and judgement. This should not, however, be misunderstood to mean that ROE are less important under the decentralised command approach. According to Blank, "ROE are at the center of this system of decentralized command and individual initiative – the parameters and guidance that ROE provide to senior and junior commanders enable them to internalize the intent of the senior leadership and implement it on the ground".[276]

Although ROE are a very useful tool for command and control, it is necessary to appreciate that ROE have certain limitations. First, ROE can never be a substitute for good training and professional judgement.[277] As Sagan points out:

> [e]ven if ROE are relatively well drafted and are fully understood by all relevant actors, they can nevertheless fail to produce the desired military action in the fog of crisis. The best ROE cannot *eliminate* the dangers of escalation or vulnerability; they can only reduce the likelihood of incidents and increase the likelihood that when incidents occur, they will be of the sort (underreaction or overreaction) "preferred" by political leaders.[278]

Second, and related to the above, although ROE play an important role as a C2 tool at the operational level, at the tactical level, the on-scene Commander is likely to rely more on training, briefing and direct leadership to direct the actions of the troops. Although this will be based on the applicable ROE and other operation specific documents, the ROE are likely to be translated into more concrete use of force guidance set out for instance in so-called soldier's cards. However, even at this level, the ROE will be important for communicating to other supporting or supported units or higher levels of command which authority is being relied upon or requested. For instance, if a unit is in need of

275 See also Blank, 'Rules of Engagement' (n 183) pp. 223 and 239–244. Other reasons why the ISAF ROE were considered too restrictive are misapprehension of the legal and operational requirements of such COIN operations. ibid, pp. 244–247.

276 ibid, p. 238.

277 Sagan, 'Rules of engagement' (n 2) p. 462.

278 ibid.

support of another unit to get out of a difficult situation, especially if they are requesting close air support, they must be able to identify the ROE authorising the action they are requesting.

As previously explained,[279] different TCNs may also have a different view on whether ROE are legally binding or not. There is no international agreement on the legal status of ROE, and the question is thus left to be determined by national legislations or policies. If ROE are orders, non-compliance may result in punishment, while if ROE are just guidance with little independent legal effect, not complying with them may not induce any consequences. With regard to those forces whose national legislation does not consider ROE to be legally binding, this lack of ability to enforce compliance with ROE arguably makes them a less effective tool for C2, compared to forces from countries that do.

Before leaving the topic of ROE as command and control tool, it should be stressed that the quality of the ROE cannot be determined from mission success alone, and vice versa; mission failure cannot necessarily be blamed on the ROE. This is because mission success depends on many factors. Alberts and Hayes therefore argue that the quality of the command and control in an operation "should be directly measured by examining how well the functions of C2 have been performed",[280] rather than whether the expected results of the mission were achieved. It would for instance not be sufficient alone to have the ideal ROE; the Commander must also have the appropriate means available and implement the ROE well. As a result, while the aim is for ROE to contribute towards mission success in the best possible way, when assessing the quality of ROE, it is necessary to keep the influence of other factors in mind as well.[281]

2.6 Conclusions

There is a general call for increased control of the use of military force. This is possibly due to increased awareness of what happens in the battlefield, coupled with expectations that modern technology should not only minimise but completely remove the risk of mistakes being made. ROE seem to be considered as one of the most suitable tools for such enhanced control, and as a result, there is an increased focus on ROE and their use as a command and control tool, both in military circles and among politicians. The use of ROE as a command and control tool may be less effective in a multinational than

279 See Section 2.2.2.2.
280 Alberts and Hayes, *Understanding Command and Control* (n 242) p. 33.
281 ibid, p. 67.

national context, but it nonetheless remains an important mechanism for the strategic level to impose political restraints on the use of force and other provocative acts. It enables Commanders to control the use of force and hence mission development and prioritisation.

The practice of using ROE as a tool for command and control is not new, both in terms of historical examples and arguably also in its modern form, however, it appears that the use of NATO ROE has changed. A restrictive approach to NATO ROE, whereby all use of force or other acts which may be construed as provocative must be expressly authorised by ROE, is increasingly applied to all types of NATO operations. This appears to be a consequence of the desire for further control of the use of force. As a result, all use of force during such operations require ROE authorisation, the only exception being the use of force in self-defence. In the next chapter, the 'use of force' categories in NATO ROE doctrine will be examined in further detail.

CHAPTER 3

'Use of Force' Categories in NATO ROE Doctrine

3.1 Introduction

The ROE for any given mission will cover a wide spectrum of topics, from geographical positioning to attack. As explained in Chapter 2, NATO ROE regulate both the use of force and other acts which may be construed as provocative.[1] As a result of the focus in this book on the use of force against persons, provocative acts not involving the use of force will not be further examined.[2] During armed conflicts, military forces will use force as a tool to influence the situation in a desired direction, that is, in order to achieve the commander's objectives and the end state of the mission, and in response to threats. In addition, force is used in a manner intended to mitigate collateral damage.

The introductory general text to NATO ROE (GENTEXT) will usually emphasise that all use of force must be necessary and proportionate. Because the authorisations or restrictions on the use of force or other provocative acts are set out in the ROE serials, the introductory text should be perceived as general guidance, including amongst others references to other documents and regulations. As a result, the reference to necessity and proportionality should be interpreted as a reminder of these fundamental legal restraints on the use of force, the meaning of which must be determined by the applicable law.[3] They will in particular have different implications under the law of armed conflict (LOAC) as compared to peacetime or human rights law.

For operations involving participation in an armed conflict, NATO ROE will be expected to authorise both reactive and proactive use of force. The use of force ROE in NATO ROE doctrine may be divided into the following four categories:[4]

1 See Section 2.2.1.2.

2 For further explanation of the concept 'other provocative acts', see Section 2.2.1.2.

3 J.F.R. Boddens Hosang, 'The Effects of Paradigm Shifts on the Rules on the Use of Force in Military Operations', 64(3) *Netherlands International Law Review* 353 (October 2017), p. 358.

4 See also NATO, *STANAG 2597: Training in Rules of Engagement*, ATrainP-4 [hereinafter: *STANAG 2597*], 4 May 2015 (available at http://nso.nato.int/nso/zPublic/ap/ATrainP-4%20EDA%20V1%20E.pdf) p. B-31. The STANAG main document is available at https://nso.nato.int/nso/zPublic/stanags/CURRENT/2597EFed01.pdf, both last accessed 24.04.2019.

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- The use of force in response to an attack or imminent attack (not expressly regulated in current NATO ROE doctrine)
  - Self-defence
  - LOAC-based defensive force
- The use of force for designated operations or activities
- Attack against persons who are considered a threat or to pose a danger, but are not involved in an imminent or ongoing attack (HA/HI)
- Attack against forces declared hostile in accordance with LOAC

The first main category is reactive and defensive, while the last category in particular is proactive and hence offensive. The middle categories may be reactive or proactive depending on the circumstances.[5] The distinction between defensive and offensive should, however, be viewed as descriptive rather than determinative in terms of the legal authority for the use of force. As will be explained in detail in this book, defensive force does not necessarily equate with self-defence, and both offensive and defensive force has the potential for being regulated by LOAC.[6]

The NATO ROE doctrine (MC 362/1[7]) does not provide any definition of 'use of force' or an explanation for the distinction between 'use of force' and 'attack'. The ROE authorising the use of force, as opposed to attack, will either authorise 'minimum use of force' or non-lethal force. Minimum force is defined as including deadly force, but the force must be "limited to the degree, intensity and duration necessary to achieve the objective".[8] As a result of the 'minimum use of force' requirement, the degree of force that may be used in such situations depends on the facts, including the threat it poses and how important it is for the military forces. By contrast, when 'attack' is authorised, there is no requirement to minimise the force used beyond what is required by applicable law. This means that deadly force is authorised as a first resort.

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5 The U.S. Army *Operational Law Handbook* refer to the NATO hostile act and hostile intent ROE as the "defensive NATO attack ROE". U.S. Army, *Operational Law Handbook* (U.S. Army Judge Advocate General's Legal Center and School, International and Operational Law Department, Charlottesville, Virginia, 2017) p. 479.

6 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) [1977], printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 77) pp. 711ff, Article 49(1). See further Section 5.1.3.

7 NATO, *Military Decision on MC 362/1 – NATO Rules of Engagement* [hereinafter *MC 362/1*], 30 June 2003. The MC 362/1 is NATO UNCLASSIFIED, however, permission to use parts of the document for the purposes of this research is granted by the NATO Military Commission in document IMSTAM(O&P)-0006–2018 (copy on file with the author).

8 NATO, *AAP-06(2018): Glossary of terms and definitions* (NATO Standardization Office, Edition 2018).

This does not, however, explain exactly what 'use of force' entails in the context of NATO ROE. First, it should be clear whether it includes both force against persons and property. It would for instance not be sufficient to define the use of force as "the use of lethal or potentially lethal force",[9] as is done in an ICRC publication on the interplay between the conduct of hostilities and law enforcement paradigms, because such a definition would appear to exclude the use of force against objects. A definition of 'use of force' would need to include destruction of property as well. However, when including destruction of objects or property in such a definition, the increased focus on cyber operations makes it necessary to explain whether property may be both tangible and intangible, and what amounts to destruction of intangible property. These are in themselves complicated questions.[10]

To complicate matters further, it could make sense from a European perspective to mirror the definition of attack found in Additional Protocol I and thereby include the use of force in both offence and defence.[11] However, the defensive use of force may be perceived by States not party to AP I as too closely connected to the use of force in self-defence. Because the latter is not intended to be regulated by ROE, including a reference to defensive force in the definition may cause confusion and result in opposition. Another question is the extent to which detention is considered part of use of force, especially whether the act of holding someone against their will amounts to use of force, or merely the capture.

Finally, the use of force potentially authorised by ROE is not limited to that directed at the opposing forces. Although the use of force affecting the civilian population and civilian property is generally regulated by the principle of proportionality, prohibiting harm that is excessive to the military advantage anticipated from an attack (i.e. the use of force in offence and defence),[12] destruction of civilian property resulting from military operations other than attack may also be lawful. According to Article 23(g) of the Hague Regulations, it is strictly forbidden "[t]o destroy or seize the enemy's property, *unless such destruction or seizure be imperatively demanded by the necessities of war*".[13] This

9 Gloria Gaggioli, *Expert Meeting on the Use of Force in Armed Conflict: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (ICRC, Geneva, 2013, https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf, last accessed 24.04.2019) p. 1.

10 See e.g. discussion in Michael N. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* [hereinafter *Tallinn Manual 2.0*] (2nd edition, Cambridge University Press, 2017) p. 437.

11 See Section 5.1.3.

12 AP I (n 6) Article 49(1).

13 Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its Annex: Regulations Respecting the Laws and Customs of War on Land ('1907 Hague

would, *inter alia*, justify the destruction of civilian property caused by military convoys in order to secure their freedom of movement.

In order to develop a NATO definition on 'use of force', all NATO States must accept the definition. Considering the number of sensitive issues the definition would affect, it is therefore not surprising that the NATO ROE doctrine, the MC 362/1, fails to define the meaning of use of force. Whether it will be possible to include such a definition in an updated version of the NATO ROE doctrine depends on how general the definition is, and how engaged States are in the details of a doctrine describing general concepts. They may choose to focus their efforts on actual ROE instead.

For the purpose of this book, the use of force will be employed as a description for acts causing death, injury or destruction. This includes inter-State use of force (regulated by the *jus ad bellum*) and the use of force by military personnel during an ongoing NATO operation. Furthermore, 'use of force' for the purpose of NATO ROE is considered to include both offensive and defensive use of force. Self-defence is excluded from NATO ROE, but defensive or reactive force may be legally founded on, for instance, LOAC or host nation law. The LOAC concept of direct participation in hostilities is particularly relevant to the use of force in response to hostile conduct, and is therefore examined in detail in both Chapters 5 and 11. The authorisation for NATO forces to use such force may be regulated by ROE; however, in practice NATO ROE does not always regulate such defensive use of force. As a result, all types of defensive force is referred to as 'self-defence', thereby enabling force to be used without ROE. The particular challenges relating to the legal justifications and ROE regulation of what may be described as 'defensive' force is one of the recurrent themes of this book.[14] Finally, because cyber issues are not specifically dealt with in this book, the definitional challenges arising in this domain will not be examined.

The use of force during military operations is commonly referred to as targeting, and the use of force in response to conduct or on the basis of status is known respectively as conduct-based targeting and status-based targeting. However, care should be taken not to equate all execution of targets with the operational targeting process,[15] commonly divided into dynamic

Regulations'), printed in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988) pp.66ff, Article 23(g), emphasis added. See further discussion in Chapter 10.

14 In addition to the categorisation in this Chapter, see particularly the discussions in Chapters 8 and 9.

15 This appears to be done e.g. by Park. See Ian David Park, *The Right to Life in Armed Conflict* (Oxford University Press, Oxford, 2018) p. 125.

targeting and deliberate targeting.[16] According to the NATO definition, targeting is "[t]he process of selecting and prioritizing targets and matching the appropriate response to them, taking into account operational requirements and capabilities".[17] As will be further explained in Section 12.2, joint targeting is an operational planning tool used to ensure that all necessary and relevant considerations are taken into account, including, but not limited to, the legality of the target and the planned means and methods of attack. It is also an important tool for ensuring campaign synchronisation and prioritisation, and de-confliction of targets and capabilities. Targeting is in other words much more than the use of force against a target; in fact, the use of force ('force execution') only occurs in the fifth of six phases of targeting.[18] As summed up by Henderson, "[t]he term *targeting* is used to describe the deliberate process followed by a military commander in deciding against which objectives he or she will apply force. This is distinguished from attacking a target, which is the actual application of force".[19] Furthermore, targeting does not necessarily involve the use of force, but may involve other effects as well, such as influence or capture. This is clearly reflected in the definition of a target, which is: "an area, structure, object, person or group of people against which lethal or non-lethal capability can be employed to create specific psychological or physical

16 Deliberate targeting is the prosecution of "planned targets known to exist in an area of operations with lethal or non-lethal actions scheduled against them. Targets may be engaged in accordance with a timed schedule or held on call to engage if the situation demands it." NATO, *Allied Joint Publication 3.9: Allied joint doctrine for joint targeting* (*AJP-3.9*), (NATO Standardization Office (NSO), Edition A Version 1, 31 July 2017, https://www.gov.uk/government/publications/allied-joint-doctrine-for-joint-targeting-ajp-39a, last accessed 24.04.2019) p. 1–2. Deliberate targeting normally support the future effort of the forces, usually 24–72 hours ahead.

Dynamic targeting is an aspect of current operations and planning, which is defined as the present 24-hour period. According to NATO doctrine, "[d]ynamic targeting normally prosecutes targets known to exist in the area of operations. They have received some target development but were not detected, located or selected for action in sufficient time to be included in the deliberate process. Dynamic targeting also applies to unexpected targets that meet criteria specific to operational objectives; on these occasions, resources are required to complete the target development, validation and prioritization. Prosecuting these targets may be possible by redirecting existing assets." ibid, p. 1–3.

See also Park, *The right to life in armed conflict,* (n 15) p. 125, where he examines the UK and NATO definitions.

17 NATO, *AAP-06(2018)* (n 8).

18 NATO, *AJP-3.9* (n 16) pp. 2–4 to 2–6. See also Section 14.2.

19 Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I* (Martinus Nijhoff Publishers, Leiden/Boston, 2009) p. 20.

effects. Note: person includes their mindset, thought processes, attitudes and behaviours".[20]

The targeting process is more likely to focus on objects than persons, because their location is easier to predict and their status as lawful targets less subject to change. However, it may also be used to target combatants or other persons considered to be a lawful target for a period of time,[21] in particular when those persons are considered sufficiently important to warrant the information collection required to determine the status of individual members of the opposing forces as lawful targets in advance of an attack, and in the case of pre-planned deliberate targeting, to predict their location.

Beyond the joint targeting process, force may also be used during combat engagement and in self-defence.[22] According to NATO doctrine, combat engagement "usually includes actions – actual, imminent or likely – against an adversary. It normally involves joint fires coordinated at the tactical level in accordance with rules of engagement".[23] Combat engagement includes all actions against an adversary that is not planned and therefore part of the joint targeting process, and do not amount to self-defence. As a result, it refers to actions in response to attacks or imminent attacks by opposing forces, and hostile acts not constituting an actual attacks and hostile intent not constituting an imminent attack. Combat engagement may also include attack on objects, such as hijacked fuel trucks intended to be used to attack a NATO facility. However, if the attack requires support from, *inter alia*, an air component, the attack is likely to be coordinated through the joint targeting process.

Because the targeting procedures are time and resource consuming, the use of force in emerging situations requiring immediate reaction from the NATO forces (i.e. combat engagement) will be subject to less stringent or formalistic requirements. Furthermore, tailoring the response to a target will amongst others require a choice of means and the technology to simulate the effects of those means to the current situation, which may not be available or not be applicable to moving targets. During combat engagement, the assessment and determination of appropriate response will in general be made locally, by those involved, on the basis of applicable law. However, if the forces involved

20 NATO, *AJP-3.9* (n 16), p. 1–2.

21 See discussion in Section 5.2.3.4 concerning continuous loss of protection on the basis of direct participation in hostilities, and Chapters 11 and 12 for the operational application of this LOAC rule.

22 See illustration of the engagement continuum in NATO, *AJP-3.9* (n 16) p. 1–4.

23 ibid, p. 1–3.

require further assistance, for instance in the form of close air support, the targeting procedures are likely to be applicable.

3.2 The Use of Force in Self-Defence

The use of defensive force in response to an attack or imminent attack may be permitted as self-defence. As will be explained in Chapter 6, the ability to use force in self-defence is subject to specific requirements, generally recognised but subject to slightly differing interpretations.[24] Of particular importance in the current context is that the threat or attack defended against must be unlawful. Self-defence is a recognition of the fact that the formal systems controlling the use of force may sometime fail, and that people (or States) are not required sit idly by if the person or persons (or State(s)) threatening them have no authority to do so, as, for instance in the case of engaging in law enforcement. As will be explained in detail in Chapter 8, if the person threatening to use or using force is entitled to do so, self-defence will not apply. Furthermore, if the use of force is regulated by another exceptional legal regime, such as LOAC, self-defence becomes less relevant.

As explained in Chapter 2, because States define and interpret self-defence slightly differently, NATO has left the definition of self-defence for the respective nations to decide upon.[25] In the *jus ad bellum* context, this is important because States should be permitted to make the determination whether or not they are the subject of an armed attack and whether they need to use force in self-defence of the State in accordance with Article 51 of the UN Charter.[26] It would run counter to the principle of State sovereignty if this determination could be made by other (NATO) States, possibly in contravention to the determination or consideration of the State in question. *Jus ad bellum* assessments are commonly highly political.

Beyond the context of *jus ad bellum*, the use of force in self-defence by individual persons is usually considered a criminal law issue. As will be illustrated in Section 6.3.2.3, the criminal concepts of self-defence found in the domestic legislation of NATO nations are similar but not identical. It would therefore be impossible to create a common definition. As a result, this is also left for the

24 See also U.S. Army, *Operational Law Handbook* (n 5) p. 478, where it is explained that "All NATO member nations share in principle the same definition [of self-defense], except for slightly different interpretations".

25 See further Section 2.2.1.4.

26 Charter of the United Nations (UN Charter), 24 October 1945, 1 *UNTS* XVI.

respective nations to determine. The fact that NATO does not intend to define self-defence, but rather leaves this to States to determine, must be borne in mind when dealing with the NATO definition of self-defence in MC 362/1 or other documents, and the reference to 'extended self-defence'. It should also affect the interpretation of military concepts such as 'unit self-defence'.

Self-defence is nonetheless examined in detail in this book because it is related to NATO ROE in several ways. First, there is the reference commonly found in the introduction to ROE that "nothing in these ROE will limit the inherent right to self-defence" or words to that effect.[27] Second, MC 362/1 includes a consideration of self-defence in general and extended self-defence in particular that begs the question of what is intended by the reference and how these concepts relate to ROE. Third, self-defence is related to ROE through the NATO policy that all use of force must either be authorised by ROE or be used in self-defence.[28] Finally, self-defence is indirectly relevant to the NATO concepts of 'hostile act' and 'hostile intent', which are defined as relating to threats that do not amount to an imminent or actual attack warranting the use of force in self-defence. As will be further explained in the chapters on self-defence, the term 'self-defence' is being used as a reference to defensive force in a broader sense, beyond the scope of the legal concepts of self-defence. A reference to self-defence may in other words be either to a legal concept or an operational concept.[29] The relevance of self-defence during NATO operations can therefore be categorised by the following categories: self-defence as a legal concept, self-defence as an operational concept, and self-defence as a defining limit to and starting point for the NATO hostile act and hostile intent ROE.

The emergence of self-defence concepts which differ from the legal concepts appear to be influenced by several factors, in particular, counter-insurgency (COIN) operations in Iraq[30] and Afghanistan. COIN-operations commonly

27 NATO, *MC 362/1* (n 7) p. 2, and NATO, *STANAG 2597* (n 4) p. B-19. This reference to the right of self-defence is common for several ROE systems, and is applied in all operations, including those involving participation in an armed conflict. See e.g. U.S. Chairman of the Joint Chiefs of Staff (CJCS), *Standing Rules of Engagement* (*SROE*)*/Standing rules for the use of force* (*SRUF*) *for U.S. Forces* [hereinafter: *SROE/SRUF*] (CJCS Instruction 3121.01B, 13 June 2005) pp. 2 and A-2, and Alan Cole *et al., Sanremo Handbook on Rules of Engagement* (International Institute of Humanitarian Law, 2009) pp. 3–4. See also Hans F.R. Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence: Their Relationship to Rules of Engagement', Chapter 24 in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford, 2015) p. 498, §24.25.

28 See e.g. NATO, *STANAG 2597* (n 4) pp. B-8 and B-16.

29 See especially Section 8.3.

30 The Second Gulf War was not a NATO operation, but several NATO States were involved.

involve opponents who fail to distinguish themselves from the civilian population, and the fighting will often take place in civilian populated areas. As a result, there is a higher risk of harm to civilians. In order to avoid civilian casualties, the ROE were restrictive, and additional restrictions on the use of force were introduced in amongst others Tactical Directives. The combination of restrictive use of force authorities and the NATO policy that all use of force must be authorised by ROE or be in self-defence, resulted in 'self-defence' becoming more relied upon than would be expected for an armed conflict operation. This evolution of an operational self-defence concept, functioning as an operational 'use of force'-authorisation rather than a reference to a legal basis, will be further examined in Section 8.3.

Another consequence of the opposing forces' failure to distinguish themselves from the civilian population by wearing uniforms or other fixed distinctive signs, was an increased focus on conduct as a basis for the use of force. The NATO ROE particularly well suited for conduct-based targeting, on the basis of the LOAC rule on direct participation in hostilities, are the NATO hostile act and hostile intent ROE. As explained, they are defined as being applicable where self-defence cannot be applied. However, because they closely resemble U.S. self-defence ROE both in terminology and the focus on conduct, there was confusion as to their true nature. Once again, the result was that 'self-defence' became unexpectedly central to NATO operations.

Finally, self-defence should be distinguished from the more general concept of 'force protection'. As will be explained in Section 8.3.5., NATO defines force protection as measures and means used to minimise vulnerability, not the use of force in response to threats.[31] An example of a force protection measure regulated by ROE is the laying of mines. 'Force protection' is therefore not a 'use of force' category or authorisation, and to the extent that the use of force is required for force protection, this should be permitted by either the NATO hostile act or hostile intent ROE or ROE authorising the use of force to achieve designated tasks, such as stopping someone trying to force an entry into a NATO property. If the force protection need arise as a result of an imminent or actual attack, the use of force will be regulated by the implicit authority to respond with force in accordance with LOAC (see the next section) or, in exceptional circumstances, self-defence.

31 The relationship between the NATO concept of 'force protection' and self-defence is further commented on in Section 8.3.5.

3.3 The Use of Force in Response to an Attack or Imminent Attack by Opposing Forces

The use of force in response to an attack or imminent attack by the opposing forces is an essential 'use of force' category. Despite this, there is no provision in the MC 362/1 for a ROE stating that you may use force in response to a lawful attack on own forces. According to Boddens Hosang, who participated at the negotiations regarding MC 362, NATO forces were expected to rely on self-defence in these situations.[32] However, as mentioned above and further discussed in Section 8.2, the legal concept of self-defence will in many cases not be applicable because the requirements for lawful self-defence are not met. Self-defence justifies the use of otherwise unlawful force in response to an unlawful attack, while during armed conflicts, attack on the opponents will be lawful if in accordance with LOAC.

The use of force in response to attacks or imminent attacks by opposing forces could be considered part of mission accomplishment in general and be covered by the ROE permitting the use of force to prevent interference with the mission (this category will be further dealt with in the next section). The challenge with this approach is that the lack of an express ROE to deal with the use of force in response to an attack would make it necessary to interpret such use of force as falling within one of the existing and broader ROE. Alternatively, when drafting the ROE, a new, *ad hoc*, ROE could be created by using a spare ROE number, although this does not appear to be the usual approach. Finally, it would be possible to state elsewhere in the ROE annex to the OPLAN that the use of force against forces 'declared hostile' is authorised unless otherwise restricted, however, this would challenge the current approach that all use of force require a clear ROE authorisation.

The result is that the regulation of the use of force in response to attacks or imminent attacks by opposing forces in NATO ROE is inconsistent, with different approaches potentially being taken both within NATO and from one NATO State to another in their national training. This is undesirable because a common understanding within NATO of when lethal force may be used is important, and due to the fact that it makes the training of tactical level forces more complicated.[33]

32 J.F.R. Boddens Hosang, 'Self-Defence in Military Operations: The Interaction between the Legal Bases for Military Self-Defence and Rules of Engagement', 47 *Military Law and Law of War Review* 25 (2008), p. 80.

33 See also Hans Boddens Hosang, *Rules of Engagement* (PhD thesis, University of Amsterdam 2017, available at https://pure.uva.nl/ws/files/7940990/Boddens_Hosang_Thesis_complete.pdf, last accessed 24.04.2019) p. 45, where he emphasises the benefits of developing ROE from a pre-existing compendium of generic ROE.

A potential and likely explanation for the lack of ROE to deal with this 'use of force' category may be the change in the intended use of the MC 362/1. As explained in 2.2.1.5, when the MC 362/1 was drafted, the intention was that the use of lawful force under LOAC would be permitted unless there is a ROE restricting or prohibiting it (restrictive approach). A ROE authorising the use of force in accordance with LOAC to defend against an attack would therefore be superfluous. During operations not involving participation in an armed conflict, an attack on NATO forces would not be lawful and LOAC would not be relevant. Therefore, the narrow circumstances where NATO forces would be permitted to use lethal force would either be defined in the ROE (permissive approach) or be regulated by the respective TCN approach to self-defence.

Unfortunately, the MC 362/1 has not been updated to better reflect the new practice of applying the restrictive approach also for international operations involving participation in armed conflict, or the corresponding requirement of ROE authorisation for the use of force in all circumstances where self-defence is not applicable. Furthermore, because NATO States differ in their approach to whether defensive force is self-defence only or may also be regulated by LOAC and hence ROE, it may be difficult for NATO States to reach an agreement on how to solve this issue when updating the MC 362/1.

Even if the ROE authority to use force to defend against an attack by the opponent in an armed conflict is not expressly provided, it is generally recognised in NATO. It may be that such use of force is considered so essential that it does not require a ROE, even under the restrictive ROE approach. If this is the case, it is most likely part of the 'operational self-defence' concept presented in Section 8.3.2 – the use of force in defence of an attack where the force is lawful under LOAC rather than being a case of personal self-defence. Concerns about this approach have been raised by Boddens Hosang. He argues that if NATO ROE would not be applicable to defensive force beyond personal self-defence against an imminent attack, "the first combat engagement in the operation in question would already be enough to render the ROE for the operation nullified and would beg the question why there are ROE in the first place".[34]

Introducing new ROE into the NATO ROE doctrine to confirm the right to use force in response to an attack or imminent attack during combat engagement would make this authority explicit rather than implicit, thereby clarifying both its existence and content. Importantly, however, such an ROE cannot

34 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 27) pp. 486–487, footnote 29.

be subjected to limitations by the Commander, for instance, by retaining its authorisation level. As will be explained in Section 4.2, military forces must be given the opportunity to defend their lives.[35]

3.4 The Use of Force to Accomplish Designated Tasks

The need for military forces to use force against persons is not limited to attacks on persons that due to their conduct or status are considered lawful targets, or who threaten or carry out an attack giving rise to a right of self-defence. Sometimes persons merely need to be prevented or stopped from interfering with the NATO mission. For instance, it may be that a person is restricting military forces' freedom of movement or resisting a search of themselves or their residence. The use of force may also be connected to detention operations, seizure of property, enforcement of check points, non-compliant boarding of a vessel, preventing persons from stealing military property, or preventing unauthorised access to military facilities or vehicles. As a result, NATO ROE will authorise NATO forces to use force in designated circumstances to accomplish certain tasks, either because this is necessary for mission accomplishment or for force protection.[36] In addition, the authority to use force to defend third parties such as civilians from serious crimes will also be regulated within this ROE category. Because States differ in the extent to which they permit the use of force in self-defence on behalf of others, this ROE is important in ensuring that all NATO forces have the same ability to respond to such situations.

This NATO ROE 'use of force' category has the potential for being applied in all types of operations, not just armed conflict. Unlike the ROE authorising attack, the focus is not on defeating the opposing forces. Instead, they are used to authorise certain actions which in themselves do not amount to use of force against the opposing forces, and to control the ability to use force to achieve the designated aim by limiting it to either minimum force (which includes deadly force) or non-deadly force.

To some extent this 'use of force' category may overlap with the NATO hostile act and hostile intent ROE, especially hostile acts causing serious prejudice to NATO forces. The need to make a distinction between the ROE will depend on whether they are retained or released to the same level, and the degree

35 See also Section 8.2.10 discussing the ability of Commanders to impose limitations on the use of force in self-defence, which is equally applicable here.

36 According to STANAG 2597, NATO ROE are supposed to provide Commanders with a sufficient range of force protection measures. NATO, *STANAG 2597* (n 4) p. B-81.

of force the respective ROE authorise. While the NATO hostile act and hostile intent ROE permit attack, the ROE for accomplishing designated tasks will, as mentioned above, authorise the minimum use of force and in some cases only non-deadly force.

3.5 Attack in Response to Hostile Act and Hostile Intent as Defined by NATO

3.5.1 *Introduction*

The NATO ROE permitting use of force ('attack') against persons who are considered a threat or to pose a danger, but are not involved in an imminent or ongoing attack, is probably the most complicated category of all the use of force ROE that is found in NATO ROE.[37] They have been described in U.S. doctrine as "defensive NATO attack ROE",[38] reflecting the inherent complexity of these ROE concepts. In addition, there are a limited number of writings on the topic.[39] It is therefore beneficial to provide a more detailed analysis of these NATO ROE concepts.

The NATO hostile act and hostile intent ROE authorise attack against designated persons committing or directly contributing to a hostile act (not constituting an actual attack) (HA) or demonstrating a hostile intent (not

37 On the distinction between use of force and attack, see Section 3.1.

38 U.S. Army, *Operational Law Handbook* (n 5) p. 479.

39 A rare example of academic writing focusing on hostile act, hostile intent and self-defence is the work Erica L. Gaston's article 'Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege' and her report *When Looks Could Kill*. She examines the different approaches taken to these concepts in the U.S., UK, France and Germany. However, although she recognises that the approach differs between the U.S. and European States, she fails to acknowledge that the main cause of the difference in approach is the fact that the terms "hostile act" and "hostile intent" are used in reference to distinct 'use of force' concepts in the U.S. and NATO systems. The European States apply the NATO concepts of 'hostile act' and 'hostile intent' which only authorise the use of force beyond self-defence, while the U.S. apply the U.S. self-defence concepts, even when participating in NATO operations where they have to deal with the separate NATO concepts as well. The reference in the NATO concepts of 'hostile act' and 'hostile intent' to acts not constituting imminent or actual attacks is not discussed. See Erica L. Gaston, 'Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege', 8(2) *Harvard National Security Journal* 283 (2017), e.g. at pp. 306–308, and Erica L. Gaston, *When Looks Could Kill: Emerging State Practice on Self-Defense and Hostile Intent* (Global Public Policy Institute, 2017, http://www.gppi.net/fileadmin/user_upload/media/pub/2017/gaston_2017_hostile-intent_web.pdf, last accessed 24.04.2019) pp. 18–19, where she includes the full text of the NATO hostile intent and hostile act ROE but fails to examine the implications of the additional wording.

constituting an imminent attack) (HI). These two ROE categories have proved challenging to apply in practice. This is because it is difficult to identify demonstrations of hostile intent which do not amount to an imminent attack, and to determine which hostile acts are targetable outside of actual attacks.[40] As will be explained later, it is particularly challenging in operations where the opposing forces are not wearing uniforms or equivalent distinguishing features. In addition, failure to identify hostile act or hostile intent, as defined by NATO ROE, is likely to result in considerable danger to own forces, while making the wrong decision risks harm protected civilians. There is therefore considerable pressure to make the right determination of the situation. To add to the complexity, there is some confusion regarding which legal regime regulates the use of force under these ROE.

It should be noted that while the term 'designated' suggests that those developing NATO hostile act or hostile intent ROE for an operation should define, for instance, the group to which the person needs to belong, this is not required. It may, for instance, only refer to 'persons' or 'anyone',[41] and specify that this is limited to 'persons in the target set'[42] or 'ROE defined opposing forces'. This enables the Commander to provide further description or definition of the opposing forces separately from the ROE itself, making the ROE more flexible and adaptable as the operation evolves. The level of detail will depend on the nature of the conflict, for instance, whether the opposing forces are easily referenced by a name. Another factor may be the presence of other groups in the area, who are likely to commit hostile act or demonstrate hostile intent as defined by NATO, and which the opposing forces must be distinguished from. Because the NATO hostile act and hostile intent ROE are primarily used for conduct-based targeting rather than status-based, the persons attacked do not need to belong to a particular group. The opposing forces may therefore be defined as persons taking direct part in hostilities.[43]

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40 The NATO 'hostile act' concept read in isolation would authorise the use of force in response to imminent threats, however, as this would overlap with self-defence, and would entail a limitation on the authority to use force in self-defence if the ROE was retained, the better interpretation is to consider imminent threats as excluded from the scope of the NATO 'hostile act' concept.

41 See e.g. UK, *Baha Mousa Public Inquiry*, October 2010, Module 4, Witness Statement Annex A, Serial 3, Document MIV001853, 'Platoon Commanders Battle Course – Rules of Engagement' (http://webarchive.nationalarchives.gov.uk/20110805153733/http://www.bahamousainquiry.org/module_4/mod_4_witness_statem/exhibit_mje.htm, last accessed 24.04.2019) p. 9.

42 ibid, p. 10.

43 On the relationship between the NATO hostile act and hostile intent ROE and the LOAC concept of DPH, see Chapter 11.

As a result of the bracketed text "not constituting an imminent attack/not constituting an actual attack", the NATO concepts of 'hostile act' and 'hostile intent' are unique. Although they look and sound similar to the hostile act and hostile intent concepts referred to by the same terms in, for instance, U.S. SROE,[44] Canadian Use of Force for CF Operations,[45] and the Sanremo Handbook on Rules of Engagement,[46] the NATO concepts are in fact fundamentally different. In other ROE doctrines, the reference is to "hostile act" and "hostile intent" without any such qualifications, and the terms are used as expressions of situations that give rise to a right of self-defence. By contrast, the NATO concepts of 'hostile act' and 'hostile intent' are defined negatively through reference to requirements for self-defence (imminent attack and actual attack). As a result, these NATO ROE authorise the use of force in situations that amount to a certain level of risk that needs to be dealt with, but is not severe enough to give rise to a right of self-defence.[47]

This conflation of the terms 'hostile act' and 'hostile intent' to mean something different to what the terms usually portray is unhelpful and likely the cause for confusion and frustrations regarding the nature of these NATO

44 U.S. SROE defines hostile act as: "An attack or other use of force against the United States, U.S. forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property." Hostile intent is defined as: "The threat of imminent use of force against the United States, U.S. forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property." U.S. CJCS, *SROE/SRUF* (n 27) p. A-4. See also Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 39) pp. 287 and 306, and Gary D. Solis, *The Law of Armed Conflict: International humanitarian law in war* (Cambridge University Press, Cambridge, 2016) pp. 489–491.

45 Canadian Forces, *Use of Force for CF Operations*, Joint Publication 5.1 (Document B-GJ-005-501/FP-001, issued under the authority of the Chief of the Defence Staff, 2008). Hostile act is defined as "an attack or other use of force against CF personnel where there is a reasonable apprehension that death or serious injury will be the likely result" (p. 1–7). Hostile intent is defined as "the threat if an attack or other use of force against FC personnel where there is a reasonable apprehension that death or serious injury will be the likely result" (p. 1–8).

46 Cole, *Sanremo Handbook on Rules of Engagement* (n 27) p. 3.

47 See also U.S. Army, *Operational Law Handbook* (n 5) p. 478, and Peter Dreist, 'Rules of Engagement in NATO Operations – Application in Germany's Legal System', in Barbara Janusz-Pawletta (ed.), *Zasady użycia siły* (*ang. Rules of Engagement*) – *wybrane problem* prawne [Rules of Engagement – legal problems] (Towarzystwo Wiedzy Obronnej, Warsaw, 2011) pp. 127–129, although in the latter, the focus is on the *ad bellum* context, and NATO hostile intent and hostile act ROE are perceived as ROE regulating 'extended self-defence'.

ROE[48] – a confusion that in fact was the reason for choosing this research topic for the book. The lack of appreciation of the distinction between the NATO and U.S. concepts has both operational and legal consequences. Operationally, it may cause troops to not get the help they need, as the following example from ISAF illustrates:

> U.S. forces in Afghanistan called in close air support (CAS) claiming a self-defense situation. The CJOC dispatched non-U.S. fighter jets. Over the target, the pilots cancelled the mission, because the situation on the ground – which was undoubtedly a self-defense situation under U.S. ROE – did not meet the requirements of the national self-defense concept of the NATO member nation that provided the CAS, as the threat was not imminent under its national self-defense law. An engagement of the target under NATO ROE (hostile intent) was not possible because the member nation had a caveat that CAS was only to be provided in case of self-defense.[49]

Legally, in addition to the issue of what the ROE actually are intended to regulate, this raises the important question of which law applies to the use of force authorised by these ROE. As will be further examined in Part 3, during armed conflict, the primary legal regime for the use of force beyond self-defence is LOAC. The relationship between the NATO 'hostile act' and 'hostile intent' concepts and LOAC will be dealt with in more detail in Chapter 11.[50]

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48 See also Boddens Hosang, 'Self-Defence in Military Operations' (n 32) pp. 77–81, Michael N. Schmitt, 'Targeting and International Humanitarian Law in Afghanistan', 85 *International Law Studies* 307 (2009), p. 326, and Terry Gill, Carl Marchand, Hans Boddens Hosang, and Paul Ducheine, 'General Report', in Stanislav Horvat and Marco Benatar (eds.), *Legal Interoperability and Ensuring Observance of the Law Applicable in Multinational Deployments* (Proceedings of the 19th International Congress, Quebec, XIX Recueil of the International Society of Military Law and Law of War, Brussels, 2013) p. 153. The confusion has not only caused NATO ROE to be misinterpreted, but has also resulted in an expanded interpretation of the U.S. ROE concepts. See Gary P. Corn, 'Should the Best Offense Ever be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force rules in the Standing Rules of Engagement', *49 Vanderbilt Journal of Transnational Law* 1 (2016), p. 10. He concludes on p. 47 that that "the concepts of hostile act and hostile intent have evolved into DPH-related offensive targeting terms no longer suitable as ROE guidance for the legitimate exercise of self-defense".

49 U.S. Army, *Operational Law Handbook* (n 5) p. 479.

50 See also Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 39) p. 307, where she concludes that for the European States who perceive hostile act and hostile intent as exceeding self-defence, the use of force in response to hostile act and hostile intent is

The fact that something is considered *not* to constitute a demonstration of hostile intent (not constituting an imminent attack) or hostile act (not constituting an actual attack), does not mean that NATO forces will not be able to use force in a given situation. The necessary authorisations may be provided in other ROE, such as the ROE permitting attack on forces that are lawful targets in accordance with LOAC regardless of their current threat level (see Section 3.6), or ROE permitting the use of force to accomplish designated tasks (see Section 3.4). Furthermore, in the case of an imminent attack or actual attack, the use of force will be authorised either by ROE or the exception to the ROE that force may be used in 'self-defence' (see Sections 3.2 and 3.3). Whether the legal basis for the use of defensive force is the criminal law concept of self-defence or LOAC depends on the concrete circumstances.[51]

The requirements for use of force will, however, differ depending on the ROE category applied. For instance, NATO ROE on the use of force to accomplish designated tasks will be limited to either minimum force, up to including deadly force, or non-deadly force. ROE permitting attack on members of the opposing forces not considered to pose a threat or danger at the time, either because they are not at the time doing anything sufficiently imminent or they do not at the time have the capability to act on their intentions, may require that the targets are identified as opposing forces and therefore lawful targets through an elaborate, pre-planned process. Importantly, if there is no NATO ROE authorising the use of force, and it is not permitted in self-defence, troops participating in a NATO operation will not be able to use force (see further Sections 2.2.1.5-2.2.1.8. above regarding the practice of considering NATO ROE as the sole authority for using force beyond self-defence).

The practical implications and hence importance of distinguishing the NATO hostile act and hostile intent ROE from self-defence can be illustrated by the following example. A car is travelling at high speed towards a military convoy during an armed conflict. The troops in the convoy know that it is a common *modus operandi* for the opposing forces to operate in civilian clothing and to use suicide bombers in cars to attack convoys. Despite warnings and warning shots being used to encourage the driver to stop, he continues at high speed towards the convoy. The troops shoot the driver, killing him and a passenger. If this was a case of self-defence, the force used must be necessary and proportionate to the threat. It might be sufficient to damage the car by

"only justifiable as a form of offensive action legally premised on an authorization to use force under IHL".

51 This distinction is elaborated on in Chapter 8.

shooting at the engine. Because the passenger is not a threat, injury to the passenger must be avoided as far as possible.[52]

In this scenario, the troops might later be questioned for using excessive force. If this is an armed conflict and the military forces are acting on behalf of a party to the conflict, the troops may have reasonable grounds for believing that the person is part of the opposing forces or a civilian taking direct part in hostilities.[53] The fact that this is a common way to carry out attacks in the area and the driver's lack of response to repeated warnings and warning shots, could support this conclusion. LOAC allows lawful targets to be killed, and civilian losses may be lawful collateral damage if they are not excessive to the military advantage achieved. In other words, LOAC allows more use of force and thus a wider room for manoeuvre for military forces than self-defence. Applying LOAC standards to the case, it is likely that the forces defending the military convoy acted lawfully. Ambiguity regarding the legal basis for the NATO hostile act and hostile intent ROE has, in other words, clear and direct implications for those who risk their lives on behalf of their State and NATO.

The section will initially present the NATO definitions and doctrinal explanations of NATO hostile intent (not constituting an imminent attack) or hostile act (not constituting an actual attack) (Section 3.5.2). The concepts are commonly shortened to 'hostile intent' and 'hostile act', thereby resembling the self-defence concepts used in among others U.S. ROE and substantiating the confusion as the meaning of the concept.[54] Still, for the sake of readability, these abbreviations will also be applied here, but it will be made clear either expressly or from the context that the reference is to the NATO version of the concepts. After having explained the NATO definitions of the concepts in more detail, Section 3.5.3 will provide examples of what may be viewed as 'hostile act' or 'hostile intent' under the NATO concepts in the given circumstances. The purpose of the chapter is to provide a clearer picture of what these concepts of 'hostile act' and 'hostile intent' entail, and to provide the necessary basis for examining how the applicable legal basis affects their scope of application (Chapter 11).

52 If the use of force directed at the person causing the threat incidentally injures or kills a third person, in this case the passenger, this could either be argued to be an aspect of the necessity and proportionality required by use of force in self-defence, or it could be viewed as being subjected to the principle of necessity. See further Section 8.2.7.

53 On categories of lawful targets under LOAC, see Section 5.2.

54 See also Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 27) p. 487, §24.13.

3.5.2 *The NATO Concepts of 'Hostile Act' and 'Hostile Intent'*

3.5.2.1 MC 362/1 Definitions and Examples

In the NATO ROE doctrine, the MC 362/1, hostile intent (not constituting an imminent attack) is defined as a "likely and identifiable threat recognisable on the basis of both the following conditions:

a) capability and preparedness of individuals, groups of personnel or units which pose a threat to inflict damage and,
b) evidence, including intelligence, which indicates an intention to attack or otherwise inflict damage".[55]

MC 362/1 provides the following tactical and non-tactical events as examples of hostile intent indicators, that is, indicators that what may lead military personnel to consider the necessary capability and preparedness to inflict damage to exist, and therefore respond against designated forces or individuals who demonstrate hostile intent:

a) manoeuvring into weapons launch positions (whether within effective range or not)
b) the deployment of remote targeting methods
c) the use of shadowers or tattletails [*sic*] to provide picture compilation
d) increased indications of mobilisation or warlike gestures revealed to public or gained from intelligence
e) increased movements of ammunition and the requisition of transportation.[56]

Isolated acts of harassment, without intelligence or other information indicating an intention to attack or otherwise inflict damage will not normally be considered hostile intent.[57]

Hostile act (not constituting actual attack) is defined as "any intentional act causing serious prejudice or posing a serious danger to NATO/NATO-led forces or designated forces or Personnel".[58] "The status of the crisis, the political situation at the time and, if known, the intent of the perpetrator (e.g., a defecting pilot)" are mentioned as relevant in determining whether a hostile act has occurred.

Examples of 'hostile act' include:

a) "one or more units conducting mine-laying operations imposing restrictions upon the movements of NATO/NATO-led forces or PDSS;

55 NATO, *MC 362/1,* p. A-1–1, cited in NATO, *STANAG 2597* (n 4) p. B-35.
56 NATO, *STANAG 2597* (n 4) p. B-35.
57 ibid, p. B-36.
58 NATO, *MC 362/1*, p. A-1–2 cited in ibid, p. B-37.

b) military aircraft penetrating NATO airspace or airspace over a secure area and refusing to comply with interception instructions;
c) intentionally impeding NATO/NATO-led military operations; or
d) breaching or attempting to breach the security of a NATO/NATO-led military installation or restricted area."[59]

3.5.2.2 Comments on the Definitions and Examples in MC 362/1

As the examples below will illustrate, it may be difficult to determine exactly where the dividing line between NATO 'hostile act' and 'hostile intent' concepts should be drawn. In fact, in many cases they will overlap. Also, it is difficult to determine whether a situation should be categorised as a 'hostile intent' or as an imminent attack, or 'hostile act' or actual attack.

The NATO hostile act ROE regulates the use of force in reaction to "any intentional act causing serious prejudice or posing a serious danger", except acts amounting to an attack. According to Boddens Hosang, the drafters of MC 362 viewed 'hostile act' as "an act detrimental to the objectives and purposes of the Force but not giving rise to the level of an actual attack".[60] There is no definition of 'serious prejudice' in the MC 362/1, but the logical interpretation must be that it encompasses acts that do not in themselves cause a danger, but which nonetheless hamper NATO military operations. The requirement to cause *serious* danger suggests that it is likely to be limited to acts contributing to a later danger, as opposed to mere inconvenience. The context of the act and, if known, the intention of the perpetrator, can help identify an act as hostile. In many cases, the intention is not known, but can be inferred from the conduct and its context, including knowledge of previous behaviour of the opposing forces. In its application, the focus is likely to be on whether the act objectively causes serious prejudice or poses a serious danger to NATO forces or other predefined categories, and whether this appears to be intentional rather than accidental or coincidental.

In many cases, the acts being considered in light of the NATO 'hostile act' concept will be easily identified due to their clear connection with the armed conflict. The act of building an IED to be used against NATO forces is one such example. Other examples include minelaying operations and preparing to release bombs or fire missiles. In such cases, intention is easily inferred because the activities in question are unlikely to be carried out unintentionally. They

59 ibid.
60 Hans F.R. Boddens Hosang, 'Force Protection', Chapter 22 in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford, 2010, 2012 reprint) p. 425, §22.11.

are basically acts that "are not sufficiently imminent to authorize a response in self-defence, but which are nonetheless hostile in nature".[61]

However, because the NATO 'hostile act' concept also may encompass acts that cause serious prejudice to NATO forces, not all hostile acts will be directly related to an attack. Phrased differently, not all acts that fall within the NATO 'hostile act' concept may be perceived as threats that are more imminent than 'hostile intent' and less imminent than self-defence.[62] Such acts will in many cases be difficult to identify as hostile.[63] For instance, the MC 362/1 lists as an example of a hostile act to intentionally impede NATO military operations. Military operations may, for example, be impeded by placing a vehicle in the middle of a road where a military convoy is expected to arrive shortly. If the intention is to enable an attack, this would be a hostile act; however, it may be difficult to distinguish between the intentional hostile act and someone's car breaking down in the middle of a road. Similarly, it may be difficult to determine whether a person standing on a hill is gathering information about nearby forces, preparing to direct an attack on those forces, or merely taking advantage of the mobile phone reception on the hill. Furthermore, if a person or vehicle enters a restricted zone and fails to turn around when instructed to do so, it may be difficult for a soldier to distinguish between someone who is lost and confused and someone who is doing so because he or she is participating in hostilities.

As the examples above illustrate, while some acts may be easy to define as hostile, the wide range of situations potentially included in the NATO 'hostile act' concept entail that the act that attracts the attention of NATO forces may

61 Boddens Hosang, 'Self-Defence in Military Operations' (n 32) p. 80.

62 Boddens Hosang, for instance, argues that NATO hostile intent should be seen as "intent to commit a hostile act". Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 27) p. 487, §24.13. Because the NATO 'hostile act' concept is defined wider than acts inflicting damage, while the MC 362/1 definition hostile intent includes a reference to this requirement, this definition appears only to be workable for certain aspects of 'hostile act'. Similar presentations of hostile act may be found in U.S. Army, *Operational Law Handbook* (n 5) illustration p. 479; Boddens Hosang, 'Self-Defence in Military Operations' (n 32) pp. 80–81; Brian Bengs (Lt Col, then of NATO School), 'NATO Rules of Engagement and Use of Force', presentation available at https://www.scribd.com/document/214365856/Use-of-Force-Nato-Roe, slide 32; and Dreist, 'Rules of Engagement in NATO Operations' (n 47) pp. 127–128.

63 In a way, this is the opposite of the self-defence version of the concepts, where hostile acts usually will be considerably easier to identify than hostile intent. See also Todd C. Huntley, 'Balancing Self-Defense and Mission Accomplishment in International Intervention: Challenges in Drafting and Implementing Rules of Engagement', 29 *Maryland Journal of International Law* 83 (2014), p. 88.

also be carried out by persons with no intention of causing serious prejudice to those forces. Further information will therefore be required in order to determine that the acts are hostile; it cannot merely be assumed from the act standing alone.

It may be that the NATO 'hostile act' concept is easier to apply at the strategic as opposed to the tactical level. As mentioned in the definition above, the political situation at the time could help in determining whether an act fits within the NATO 'hostile act' concept. For instance, a nuclear submarine penetrating the national territorial waters of the opponent during an armed conflict may be easier to identify as a potential threat, permitting a response under the NATO hostile act ROE, than the person entering a restricted zone.

The NATO hostile intent ROE permits the use of force towards persons who intend to attack or otherwise inflict damage, and who are considered capable of doing so. Damage should be interpreted as acts causing or directly contributing to physical damage or injury. Had acts merely causing prejudice been intended to be included, this would have been specified, as it is for the NATO 'hostile act' concept. The fact that the NATO hostile intent ROE effectively authorises the use of lethal force in response to a future intention warrants a restrictive interpretation of the terms. The NATO definition of hostile intent as set out in MC362/1 may be interpreted to mean that the NATO hostile intent ROE regulates the use of force in dealing with threats that are not yet sufficiently imminent to justify the use of force in self-defence, but that could end up as such if not stopped in time.[64] The ROE thereby enables NATO forces to deal with threats before an attack occurs or even becomes imminent, provided, of course, that the forces have sufficient information to confirm the threat. Because intention may be hard to determine, the examples provided of hostile intent "look in part to objective, physical indicators of ill intent".[65]

While certain acts potentially included in the NATO 'hostile act' concept could be difficult to distinguish from innocent acts, in the context of the NATO hostile intent concept, what draws the attention of the military forces are basically early signs of an upcoming attack. As explained above, the person concerned must behave in a manner that indicates capability, preparedness and intention to carry out an attack or otherwise inflict damage. The NATO hostile

64 See also U.S. Army, *Operational Law Handbook* (n 5) p. 487: "The broad NATO definition [of hostile intent] (…) allows for the assumption of a broad temporal scope of 'imminence'".

65 Jody M. Prescott, 'Tactical Implementation of Rules of Engagement in a Multinational Force Reality', in Geoffrey S. Corn, Rachel E. VanLandingham and Shane R. Reeves (eds.), *U.S. Military Operations – Law, Policy and Practice* (Oxford University Press, Oxford, 2016) p. 256.

intent ROE will therefore authorise attack on persons before their planned attack becomes imminent. Because the NATO 'hostile act' concept may also include acts preparatory to self-defence, the concepts will therefore have the potential to partially overlap.

If both the NATO hostile act and hostile intent ROE are released and available, the distinction between these two concepts is of little practical importance. The forces will be able to apply both ROE, and by applying them together, they do not necessarily need to specify exactly where they would draw the line between them.[66] However, it may be that one or both ROE are retained[67] at a higher level of command, thereby requiring a release before being employed. When this is the case, it may be necessary to provide justification for the release of the ROE respectively, which will prompt those planning the operation and making the request for release (ROEREQ) to make a distinction between them.

As explained above, NATO hostile act and hostile intent ROE differ substantially from other hostile act and hostile intent ROE, such as the U.S. SROE, because of their negative definitions as being limited to those "not constituting imminent attack or actual attack". This is undoubtedly a cause for confusion for those who apply ROE, who may not have been given the necessary training to fully appreciate the significance of the limitations.[68] Another consequence of the NATO hostile act and hostile intent ROE being negatively defined by reference to self-defence, is that the scope of application of these ROE will not be identical for all NATO States. As explained, NATO leaves to the Member States to define the right of self-defence in accordance with their respective domestic legislations. However, the respective national rights of self-defence differ with regards to when force may be used and how much force is permitted. Because the NATO hostile act and hostile intent ROE are defined by what is *not* self-defence, there will, as NATO explains, "not always be consistency between the nations as to where the right to use force in self-defence ends and the use of force authorised by ROE begins".[69]

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66 As Gaston points out, the hostile act and hostile intent ROE tend to be authorised jointly, with the result that "in practice, soldiers rarely distinguished between the two". Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 39) p. 292.

67 See further Section 2.4.2.

68 See also U.S. Army, *Operational Law Handbook* (n 5) p. 479, emphasising the importance for Judge Advocate's working in a NATO operational environment to fully understand the distinction.

69 NATO, *MC 362/1,* Annex A, as quoted in NATO, *STANAG 2597* (n 4) p. B-19. See also Boddens Hosang, 'Self-Defence in Military Operations' (n 32) pp. 80–81.

By providing ROE authorisations for the use of force to deal with threats that do not amount to a self-defence situation, the NATO hostile act and hostile intent ROE ensures that all forces from all troop contributing nations, including those with a narrow definition of self-defence, have the ability to deal with threatening situations that arise under NATO ROE. This "assures the commander of a combined force that the forces under his command will respond uniformly to the actions of the enemy".[70] The legal basis for this use of force will of course not be self-defence. What is being harmonised is the ability to act, not the legal basis for doing so.[71] In practice, this means that there will be situations where forces from States with a wide right of self-defence will operate under that legal regime, while forces from States with a more narrow right of self-defence will require ROE in order to use force in the same situation. It should be noted, however, that the NATO hostile act and hostile intent ROE do not necessarily cover the use of force to defend third parties in general, only NATO forces and PDSS. The extent to which other persons may be defended will depend on authorisation being provided in other ROE, especially for NATO forces whose domestic self-defence rule has a narrow approach to the defence of others.[72]

Before moving on to look at examples of 'hostile act' and 'hostile intent', it should be reiterated that ROE only *authorise* the use of force or other provocative actions; they do not compel them. This means that although the hostile intent and hostile act ROE authorise '*attack*', forces may decide to employ less offensive means of force or provocative actions instead, should they consider that appropriate in the situation.[73] Additionally, the NATO hostile act and hostile intent ROE specifically authorise attack on *persons*. These ROE are therefore unlikely to be used to authorise attack objects, the attack on which will be covered by separate ROE. As a result, it may for instance not be possible to attack an Unmanned Aerial or Underwater Vehicles (UAV or UUV) under these ROE. Instead, the force would theoretically be employed against the pilots that potentially demonstrate a hostile intent (not constituting an imminent attack) or who commit or directly contribute to a hostile act (not constituting

70 U.S. Army, *Operational Law Handbook* (n 5) p. 479.

71 Lone Kjelgaard, 'The Importance of Law in the Theatre', in Edoardo Greppi, *Conduct of hostilities: the Practice, the Law and the Future* (Proceedings of the 37th Round Table on Current Issues 2014, International Institute of Humanitarian Law, 2015, http://iihl.org/wp-content/uploads/2019/03/Conduct-of-Hostilities.pdf, last accessed 24.04.2019) p. 38. See further discussion in Section 2.4.1.

72 See further Chapter 11 on the use of force to accomplish designated tasks.

73 For the related discussion on whether there is a legal duty to capture rather than kill under LOAC, see Section 5.3 below.

an actual attack). If the UAV or UUV were to be attacked, this would require authorisation by a different ROE, such as one permitting attack on specified equipment, installations and facilities.

3.5.3 *Examples of 'Hostile Act' and 'Hostile Intent'*

3.5.3.1 Introduction

The following are hypothetical examples developed with the support of personnel from the Norwegian Special Forces and the Telemark battalion (an elite mechanised Norwegian Army infantry unit). Because the ROE and corresponding operational guidance usually are classified, examples of real ROE will not be used. All examples are set within an armed conflict (and are thus not related to *jus ad bellum* issues). As explained in Section 3.5.2.2, national approaches to self-defence differ, and thus the scope of application of the NATO hostile act and hostile intent ROE will also differ. It is therefore likely that for forces from some States, the examples would give rise to a right of self-defence and therefore not be regulated by NATO ROE, but instead by national rules on the use of force in self-defence.[74]

The NATO hostile act and hostile intent ROE are particularly relevant in operations where it is difficult to identify the opposing forces, typically because they are operating without a uniform. Their participation in the armed conflict must to a large extent be determined on the basis of their past, current and (to a certain extent[75]) behaviour. In addition to information on their actions, the persons need to be accurately located and identified (i.e. geospatially). This is commonly referred to as 'positive identification' or PID.[76] Because ROE permitting attack on persons who are at the time demonstrating a hostile intent (not constituting an imminent attack) or committing or directly contributing to a hostile act (not constituting an actual attack) require both that there is some form of threat and that the person or persons responsible are located and identified, these ROE are useful and important tools enabling tactical foces to deal with threats likely to arise during armed conflicts. As a result, they have, for instance, been actively used in NATO's ISAF operation in Afghanistan.[77] By contrast, in an operation where the opposing forces wear uniforms, it would be easier to identify who may be attacked, and the NATO hostile intent/hostile

74 These may, however, be communicated to troops through national ROE.

75 The question of whether persons may be perceived as a lawful target based on expected future actions is further dealt with in Section 5.2.3 below.

76 On positive identification, see further Section 5.4.3.

77 See also Prescott, 'Tactical Implementation of ROE' (n 65) p. 253, and Gaston, *When Looks Could Kill* (n 39) p. 6.

act ROE would play a less significant role in identifying threats. In these types of operations, opposing forces may be declared to be lawful targets ('declared hostile'), and the ROE permitting attack are unlikely to be limited to situations included in the NATO 'hostile act' and 'hostile intent' concepts.[78]

The context of the majority of the following examples will therefore be a conflict where the opposing forces fail to distinguish themselves with uniforms or other fixed distinctive signs. It may, for instance, be a non-international armed conflict, or an international armed conflict where the opponent uses unconventional methods and forces ('hybrid warfare'). The first examples are intended to provide some guidance on the threshold for the NATO hostile act and hostile intent ROE. This assessment will, however, depend of the facts available at the time and the circumstances in which the situations arise.[79] The second group of examples will focus on factors contributing towards a determination of 'hostile act' and 'hostile intent'.

As explained,[80] the fact that a situation fails to satisfy the NATO 'hostile act' or 'hostile intent' requirements does not mean that those involved may not be attacked. Instead, the attack would have to be carried out under a different ROE, such as one permitting attack on forces 'declared hostile'. If there are no alternative ROE, use of force would only be permissible if there is a right of self-defence, as defined by the respective nations' legislation. Whether arrest is an alternative to attack, on suspicion of involvement in criminal activity under applicable domestic legislation, is beyond the scope of this book and will therefore not be discussed.[81]

3.5.3.2 Threshold of NATO Hostile Intent and Hostile Act ROE

3.5.3.2.1 *Examples of Hostile Intent*

A group of visibly armed persons seen reconnoitring an area where troops are entering, and manoeuvring into positions favourable for attack, could be

78 This category is described in Section 3.6.

79 As Gaston explains, "[p]art of the ambiguity is because what kinds of behaviour trigger (...) a 'hostile intent' determination may vary based on the conflict zone and the immediate threat patterns". She refers to both hostile act and hostile intent as 'hostile intent' for the sake of brevity. Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 39) pp. 292–293.

80 Section 3.5.1.

81 The ability to arrest often requires a permission environment, while "[c]ounterinsurgencies are often fought in non-permissive environments where an arrest attempt would place lawful armed forces combatants *in extremis*". Albert S. Janin, 'Engaging Civilian-Belligerents Leads to Self-defense/Protocol I Marriage', *Army Lawyer* (July 2007, DA PAM 27-50-410) p. 88.

demonstrating hostile intent. The identification of the hostile intent could be helped by knowing that there are no friendly forces in the area, so that any armed persons behaving in a military manner are likely to be hostile.

While placing an IED into the road would be a hostile act, the person making the IED or transporting it to an area where it is going to be used to hit the next convoy of troops, would be demonstrating hostile intent.

If someone is overheard, such as over the radio, as saying they are going to attack or otherwise inflict damage on the opposing forces, and they are considered to have the means to do so, this would be an example of demonstration of hostile intent. A person building an ambush position in the form of small rock structures that are difficult to spot along a road commonly used by opposing forces would also be demonstrating hostile intent. When they place weapons into the ambush position, they would also commit or directly contribute to a hostile act.

Running towards an area of ongoing fighting with weapon in hand may be an example of a demonstration of hostile intent. Local people armed for self-defence are more likely to run away from the fighting. However, if the persons are unarmed and running towards the fighting, especially if the fighting has slowed down or stopped, they may want to help injured persons. In both of the latter cases, the persons are not committing a hostile act or demonstrating hostile intent.

A person travelling to a place where there are good views of the troops may be intending to gain information that can be used to enable attack on them or to find an advantageous position to carry out an attack, and as such may be demonstrating hostile intent. However, it is also possible that the person is simply curious or just happens to be in the area. If the person has to walk far from his original course to reach the vantage point, it is less likely to be an uninvolved person such as a shepherd. As the examples illustrate, it can be very difficult to achieve sufficient certainty to conclude that such persons are in fact demonstrating the necessary hostile intent. Yet if the person is observed moving a weapon into an attack position, this is clearly a case of hostile intent.

Repositioning of forces during battle would also demonstrate hostile intent. Forces may reposition in the same area to shield themselves from attack or have a better position from which to attack, or be seen moving to a new area where they expect the opponent to be moving. If a person is recognised or it has been possible to follow the person's movements without interruptions (continuous 'positive identification'[82]), there is no need to for any weapons

82 'Positive identification' (PID) is further examined in Section 5.4.3.

to be visible. Persons who have been involved in a firefight and are moving to a different position in the same area, rather than moving away from the area, are likely to be intending to reengage. Repositioning must, however, be distinguished from withdrawal. Should the forces move to an area where they are unable to affect the troops with their available weapons, they no longer have an offensive posture. Similarly, if they are moving away from the area of fighting into a neutral area, they no longer demonstrate a clear and substantial threat and therefore lack the hostile intent required to permit attack under this ROE. Thus in order to consider the persons to still be demonstrating hostile intent, it is necessary to have information indicating that forces that are in fact going to attack again. Furthermore, a group of people identified as being members of the opposing forces will not be demonstrating a hostile intent that signals a clear and identifiable threat when they are unaware of the presence of NATO troops or otherwise do not appear to have any intention of engaging them.

Isolated acts of harassment will not normally be considered as demonstrations of hostile intent unless there is information indicating an intention to attack or otherwise inflict damage. Harassment is defined as "repeated, deliberate and intimidating activities intended to discourage, impede and disrupt".[83] Basically they are activities that are undesirable for NATO forces, but their primary objective is not to inflict damage. Examples of harassment could be a "show of force" where forces, vessels or aircraft demonstrate their presence and readiness in order to intimidate the opposing forces and harassing fire that is not clearly capable of inflicting damage to NATO forces.

3.5.3.2.2 *Examples of Hostile Act*

As mentioned above, placing an IED in a road frequently used by opposing forces in order to hit the next convoy that passes and kill or injure the persons in the vehicle could also be viewed as a hostile act. It is closely linked to an attack, but in most cases the threat will not be sufficiently imminent to give rise to a right of self-defence.

In scenarios where NATO forces are fighting groups that fail to distinguish themselves from civilians, opposing forces are unlikely to have access to the same standard of equipment as the NATO forces. They may therefore try to take possession of the higher quality equipment such as weapons that are more precise or have longer range than what they already have. They may also attempt to get hold of communication equipment in order to listen to conversations and gain information of the movements and plans of the other side.

83 NATO, *AAP-06(2018)* (n 8).

Reprogramming the communications equipment in order to prevent the fighters being able to use, for instance, stolen radios may be very time consuming, and the loss of such equipment during an ongoing battle would cause serious prejudice and danger to the forces involved. Persons stealing the equipment of NATO forces, in order to take advantage of that equipment in their operations, would be committing a hostile act.

Persons directing forces during an ongoing firefight through a radio or mobile phone from a nearby hill would be committing a hostile act. They would also be committing a hostile act if they are informing other elements of their forces of troop movements, number of personnel, or the equipment in order to facilitate attack in the near future or to direct fire during an attack. The challenge is to determine whether that is what the person is doing, unless it is somehow possible to listen to the conversation. If the person is making the call from among the civilian population, it may be difficult to make the determination that what is being observed is a hostile act, unless the person is known to be a signaller or spotter. If that person is standing on a roof top or a hill overlooking the troops, the likelihood that it is an enemy fighter increases. However, it may also be that the mobile phone signals are poor in the area and thus the only place to get sufficient reception simply to make a phone call is on hills and roof tops. Similarly, if the person is using binoculars and looking in the direction of the troops while talking on the phone, it is more likely to be an example of 'hostile act'. It is also less likely to be an innocent bystander if there is fighting going on nearby and remaining on the hill or building places the person at considerable risk of being injured.

During an armed conflict, people may be interned in order to avoid their continued participation in the armed conflict. To enable such persons to escape and re-join the conflict would cause serious prejudice to NATO forces. Therefore, a person who has been given access to the prisoners, for instance by being employed as a cleaner, and opens a gate to allow opposing forces to escape so they can continue fighting, would be committing a hostile act.

Maintaining freedom of movement is essential for troops both to enable mission accomplishment and force protection. To dig a ditch across the road or destroy a bridge in order to prevent movement of NATO forces may therefore be considered a hostile act, if the circumstances are such that the act causes serious prejudice rather than inconvenience for the NATO forces. The ditch on its own is not an attack, but if there is a plan to use the ditch to stop NATO forces and then attack them, it would also demonstrate hostile intent.

Although it is more likely to involve traditional, uniformed troops, another example of a hostile act would be to drop sonobuoys into the sea from a helicopter in order to detect, locate and track submarines.

Hacking into a military computer may also be a hostile act, for instance if it is done to gather information or to deny or disrupt the use of a program. Because the NATO 'hostile act' concept is defined as those hostile acts not constituting an attack, and 'attack' is generally understood as acts causing death or injury to persons or destruction of tangible objects, it is particularly challenging to define the scope of a hostile act in the cyber context. This discussion is, however, particularly complex, and therefore beyond the scope of this book where the main focus is on the use of force against persons.[84]

3.5.3.3 Factors Contributing towards the Determination of 'Hostile Act' and 'Hostile Intent' as Defined by NATO

Several of the examples above could, in a completely different context, be totally innocent and in no way make the persons subject to attack by military forces. It may also be that situations considered part of the NATO 'hostile act' or 'hostile intent' concepts in one scenario, are perceived as more threatening when occurring in more peaceful situations, thereby giving rise to a right of self-defence.[85] For instance, while unknown persons carrying weapons and behaving in a strange manner may be perceived as very threatening if it is peacetime and people generally do not carry weapons, during an armed conflict where civilians carry weapons for their own protection, it may be viewed as a hostile intent or hostile act, depending on the circumstances. The identification of an act or behaviour as hostile depends on the geopolitical context of the situation, including whether the tension levels causes the situation to be an armed conflict.[86]

Within an ongoing operation, perhaps the most important sources of information for determining the application of the NATO 'hostile act' and 'hostile intent' concepts are the *modus operandi* or known 'tactics, techniques and procedures' (TTP) for the opposing forces in the area, together with the pattern of life and behaviour of civilians. It is therefore important to have considerable knowledge of both the opposing forces and the civilians in the area, as well an ability to analyse and distribute the information among one's own forces. Because the NATO 'hostile act' and 'hostile intent' concepts both require a determination of whether the act or threat is hostile, the following indicators may be equally relevant to both.

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84 For an examination of cyber in military operations, see *Tallinn Manual 2.0* (n 10) especially Part 4.

85 Boddens Hosang, 'Self-Defence in Military Operations' (n 32) p. 81.

86 Similar criteria for identifying 'hostile intent' and 'hostile act' are mentioned by Boddens Hosang in 'Self-Defence in Military Operations', ibid, p. 81.

When analysing the TTPs of the opposing forces, it is important to understand that TTPs are context and culture dependent. As a result, care should be taken not to apply one's own standards and TTPs to the opposing forces, especially if the culture is quite different. An example that may illustrate this is the manner in which weapons are carried. While some forces may carry a rifle on the back or along their side until it is going to be used, others may carry it across the front or in their hands at all times. As a result, carrying weapons across the front or in the hands could appear threatening, but may nonetheless be insufficient indication of NATO hostile intent as defined by NATO. Also, if visible weapons commonly result in attack, opposing forces may begin to hide their weapons until they are going to be used. Visible weapons may therefore be an inappropriate requirement to identify hostile forces. Similarly, it may be safe in some cultures to conclude that persons operating larger weapons such as rocket-propelled grenades (RPGs) are armed forces or groups; in other cultures, it may be common for other security forces such as the police to have that kind of weapon as well. Furthermore, there may be armed groups in the area that are supporting the NATO forces or at least not fighting against them.[87]

Previous behaviour of forces in the area will provide important information regarding their TTPs and therefore how the opposing forces are likely to act in the future. If a previous attack was successful, they may choose to use the same site or tactics again. For instance, if someone climbs to the top of a hill every afternoon to shoot at a nearby base, a person climbing the hill at the same time the following day could be viewed as demonstrating hostile intent within the NATO concept. If IED attacks are usually followed by an ambush, an attack should be expected, and persons about to attack may be identified through their actions and positions before one becomes imminent. If it is common to place more than one IED in the same area to attack forces coming to the aid of the first attacked vehicle, and IEDs usually are remotely operated, then a person on a hill with a phone or a radio looking at the forces is more likely to be perceived as committing an act subject to the NATO hostile act ROE if forces have just hit an IED. If IEDs are commonly used, someone digging at the side of the road may be placing an IED there. However, it may not be safe to conclude that anyone digging in the road or side of the road for instance at night and in the dark is placing an IED. People may also be digging to improve the irrigation of nearby fields, and if daytime temperatures are very high, hard physical work like this may be best done at night. Thus, although digging by the road at night may seem suspicious, it may also have an innocent explanation.

87 Schmitt, 'Targeting and IHL in Afghanistan' (n 48) p. 319.

Tactical movement or manoeuvring, or other military like behaviour, may be another indication of the hostile nature of a person's intentions or actions, thereby enabling the identification of hostile intent or hostile act under NATO ROE. Civilians are likely to take the shortest distance between two places, move in a relatively straight line and prefer easier terrain. Fighters are more likely to move in a manner that avoids detection, or depart from what would be a logical route in order to reach vantage points that enable reconnaissance and a potential attack. The presence of persons with the general characteristics of the opposing forces in an area where there is no obvious reason for civilians to be would therefore be a possible indicator of hostile intent, although it may not be sufficient in itself to warrant attack. If there is a possibility of shepherds being in the area, the animals should be visible, and shepherds are most likely to operate alone or in small groups. Similarly, if an area is known to have been evacuated of civilians, the presence of large groups of men may be an indicator of their potential future intentions. Furthermore, if a person or persons are moving towards a military vehicle or installation in a concealed manner, they may be attempting to gain access and thereby commit a hostile act. They may also, however, be intending to attack, and depending on the imminence of the threat, it may therefore be a demonstration of hostile intent as well. The presence of weapons, the number of people and knowledge of previous attempts to either gain entry or attack would be relevant in determining whether they intend to gain access or attack.

Another alternative may be to apply escalation of force (EoF) procedures.[88] The traditional, law enforcement purpose of EoF procedures has been to minimise the use of force. [89] As such, it is not required by LOAC, but may have the desired effect of potentially de-escalating the situation when persons who do demonstrate hostile intent or who are about to commit a hostile act under NATO ROE become aware that they have been exposed. However, EoF has also evolved into being a tool for distinguishing innocent civilians from persons who directly participate in hostilities.[90] EoF procedures may, for instance,

88 Escalation of force procedures are also considered below in Section 8.2.5.2.

89 See for instance Cole *et al*, *Sanremo Handbook on Rules of Engagement* (n 27) pp. 24–25, and UN Department of Peacekeeping Operations/Military Division, *Guidelines for the development of rules of engagement (ROE) for United Nations peacekeeping operations* (UN Doc. MD/FGS/0220.0001, May 2002) Attachment 2: Annex C-2.

90 Randall Bagwell, 'The Threat Assessment Process (TAP): The Evolution of Escalation of Force', *Army Lawyer* (April 2008), pp. 5–16, and Randall Bagwell and Molly Kovite, 'It is Not Self-Defence: Direct Participation in Hostilities Authority at the Tactical Level', 224(1) *Military Law Review* 1 (2016), p. 17. See also Cole *et al, Sanremo Handbook on Rules of Engagement* (n 27) pp. 22–23, U.S. Army, *Operational Law Handbook* (n 5) p. 85, and Multi-National Corps–Iraq ROE card (Unclassified) (MNC-I ROE card) (2005), available

include verbal and visual warnings such as displaying weapons, the firing of pen flares, the use of spotlights to illuminate vehicles and pedestrians at a safe distance, or the use of warning shots. If it is an innocent civilian, he is likely to change behaviour when he realises that he is being perceived as a threat. However, knowledge of the effect of such procedures in the area in question is crucial, as the following quote from an ISAF publication illustrates:

> Most of the roads here are very bad, the cars are old and drivers are not well trained or experienced. So actually it's extraordinary when people hear, see, and understand our warning signs and stop where we want them. Next time they do not respond to your signs or verbal warnings, ask yourself the question: 'Is it a threat or is it just a mistake?' In 99% of the cases it is not intentional. The risk is far less that you will be hurt than your bullet will ricochet and kill or wound an innocent person. Unless you're absolutely certain that the driver is a threat to you or your coalition buddies, don't fire. You are probably not going to change his driving behavior, but there is a chance that you add another CIVCAS [civilian casualties] to the list.[91]

Another important source of information is the behaviour of civilians in the area. Knowledge of the local pattern of life may provide early warning of attacks. First of all, it is necessary to know what the normal pattern of life is in order to be able to identify a suspicious departure from the norm. To provide a well-known example, if it is normal to have a market day on Friday, and the town suddenly is empty on a Friday, it is likely that the civilians have evacuated because they know that something is about to happen or have been evacuated by the opposing forces. Also, if it is uncommon for civilians to travel in large groups on motorbikes, a large group of men on motorbikes with two persons on each bike may be perceived as a group of fighters deploying.

The reactions of presumed civilians to the presence of troops are also a source of information and potentially early warning of threats. As mentioned above, if civilians evacuate an area, they probably have knowledge of an upcoming attack. However, although the absence of civilians may be an indicator

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in U.S. Army, *Operational Law Handbook,* ibid, p. 106: "2. Escalation of Force (EOF). When time and circumstances permit, EOF Measures assist CF to determine whether hostile act/intent exists in a particular situation".

91 Gilbert Overmaat (Chief of Staff of CAAT [COMISAF Advisory and Assistance Team]), 'Actions Speak Louder than Words: Escalation of Force and CIVCAS', in ISAF, 1 *Coin Common Sense* 1 (February 2010), p. 4.

of imminent attack, the presence of civilians would not necessarily mean that an area is friendly, because civilians may be prevented from leaving. Whether local people are willing to talk to NATO forces can also provide indications of whether an area is hostile or friendly and thus whether an attack is likely. Either the civilians are hostile themselves, or they know they are being watched and there is therefore risk involved in speaking to the troops. Civilians may even ask NATO forces to leave because they know there are fighters nearby and do not want fighting to break out in urban areas. Finally, operators point out that children find it harder to hide emotions, and they may therefore be more likely to reveal local animosity towards NATO forces, such as by shouting or spitting, through hand movements, or by throwing rocks. The behaviour and facial expression of children may therefore provide important information that helps to determine whether there is a clear and substantial threat in the area.

Sometimes measures can be taken to better determine if someone is behaving in a suspicious manner. Changing one's own behaviour to see if the person or persons continue to behave in a threatening manner may help ascertain whether or not they are a threat. For instance, a person on a motorbike that stops every time the convoy stops and starts again, would be acting suspiciously and is likely to be kept under observation in order to determine whether he demonstrates a hostile intent or is intending to commit a hostile act.

3.5.3.4 Concluding Remarks on the Examples of Application of the NATO Hostile Act and Hostile Intent ROE

In many cases it will be difficult to apply the NATO hostile act and hostile intent ROE because the application of the concepts is very contextual and requires detailed situational awareness. A lot depends on how the situation is perceived at the time by those who are present, and whether that perception is reasonable.[92] The contextual application also makes it difficult to re-examine the assessments made. Difficult does not, however, mean impossible, and in some circumstances the situation will be very clear to the forces involved.

The concepts are closely interlinked but raise different challenges. The NATO 'hostile intent' concept permits attack on a person intending to attack NATO forces or PDSS before the threat becomes imminent, thereby requiring information about future intentions. Under the NATO 'hostile act' concept, the person must commit or directly contribute towards an act deemed to pose a danger or otherwise cause serious prejudice. The challenge with this concept

92 As will be explained in Section 5.4, the person using force must act in honest belief and the decision must be reasonable, meaning that a reasonable person in the same situation would have made the same decision.

is to distinguish between hostile acts and innocent acts. As a result of the contextual nature of these ROE, it is important that NATO forces are provided with mission specific use of force guidance on the application of the concepts which includes cultural and contextual considerations. In addition, the legality of the use of force on the basis of any ROE will always be subject to applicable law, and military forces are trained in this as well.[93] As will be further explained in Chapter 11, the NATO 'hostile act' and 'hostile intent' concepts are important ROE for conduct-based targeting, and their application closely resembles the LOAC concept of 'direct participation in hostilities'.

Although troops would prefer to be absolutely certain that they have perceived the situation correctly before using lethal force, this is often not possible. When making these difficult determinations, forces are likely to be influenced by the level of threat the situation constitutes to them. The higher the risk, the lower the certainty tolerated, as long as it remains reasonable to conclude that the person is in fact a lawful target who they are authorised to attack under the NATO hostile act or hostile act ROE.[94] Furthermore, the decision whether to attack or not is only partly determined by whether the attack is permitted. Military forces would also want their application of force to make tactical sense and be morally acceptable.

3.6 Attack on Forces 'Declared Hostile'

The ROE authorising attack on persons based on their status as lawful targets, as opposed to being in response to a hostile act or demonstration of hostile intent, is perhaps the least complicated 'use of force' category. Because there is no requirement of a current threat to NATO forces or persons designated a special status (PDSS), it enables NATO forces to take the initiative. The main requirements are that the attack is directed at persons or objects that are considered lawful targets in accordance with LOAC and is otherwise conducted in accordance with LOAC rules, and that the persons are defined as opposing forces for the operation for which the ROE are implemented. The category or categories of persons or objects that may be attacked will usually be defined at the strategic level. This process is sometimes referred to as forces being 'declared hostile', and attack under this 'use of force' category is known as status-based targeting. For instance, the ROE may permit attack on anyone within

93 See e.g. the requirements under LOAC for identification of targets set in Section 5.4.

94 On the questions of certainty and reasonableness, see further Section 5.4.

the category of lawful targets, or the authority to attack may for political or operational reasons be subject to limitations, such as only permitting attack forces that have been previously engaged in an attack or are currently involved in certain types of military activities.

Compared to conduct-based targeting, which is usually very dynamic, status-based targeting is more suitable for pre-planned operations and deliberate targeting where the target is known and the conduct at the time the person is located, identified and attacked is less relevant. Where the status of a person as a lawful target is recognisable, for example on the basis of their military uniform, status-based targeting will also be useful during dynamic targeting.[95] The extent to which NATO forces are authorised to seek out and attack targets that are not at the time posing a threat, will also depend on the applicable political policy indicator, and whether it permits the forces to escalate the situation (PPI Zulu).[96]

95 See definitions in note 16.

96 The concept of PPI is further explained in Section 2.4.2.

PART 2

"Otherwise Lawful Use of Force": the Law Regulating the Use of Force during Armed Conflict

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CHAPTER 4

Introduction: the Search for a Legal Basis

4.1 The Lotus Principle, Human Rights, and the Relevance of the Relationship between the *Jus ad Bellum* and *Jus in Bello*

NATO ROE authorises the NATO forces participating in an operation to use force in defined circumstances. As explained in Chapter 2, ROE are political and operational restraints on the otherwise lawful use of force. In addition, they ensure that the forces operate within the realm of applicable law. In particular, the use of ROE is a tool for the State to avoid military personnel taking life arbitrarily. This has been stressed, *inter alia*, by Gary Corn: "ROE have evolved as a primary means of meeting this obligation [i.e. to ensure that the use of force by State agents comply with international law], and as such must be consistent with the international law standards governing the prohibition against arbitrary killings".[1] The focus of Part 2 of the book is to identify the primary rules regulating the use of deadly force under NATO ROE during an armed conflict. To what extent are States bound by rules in their use of military force? Do States need an actual legal basis to use force, or is it sufficient that the use of force is not expressly prohibited? Which rules does the use of force authorised by ROE need to comply with in order to be lawful?

In international law, States have traditionally been free to act in any way they wish provided there is no rule prohibiting that act. This is commonly referred to as the Lotus principle, from the 1927 *Lotus case* before the Permanent Court of International Justice. The Court famously held that:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[2]

1 Gary P. Corn, 'Should the Best Offense Ever be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force rules in the Standing Rules of Engagement', *49 Vanderbilt Journal of Transnational Law* 1 (2016), pp. 37–38.

2 *SS Lotus* (France v Turkey), Judgment, *PCIJ Rep Series* A No 10 [1927] [hereinafter: *Lotus case*], p. 18.

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The Court went on to explain that:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. [3]

One of the areas where international law imposes limitations is the law of armed conflict (LOAC). Triggered by the occurrence of an armed conflict,[4] this legal regime is intended to regulate relations between belligerent States and the conduct of hostilities.[5] Historically, the focus was on reducing unnecessary suffering among the military forces, especially by extending "the humanitarian hand of assistance to all wounded combatants".[6] In the aftermath of the Second World War, the rules were considerably expanded. Most notably, the protection of civilians was significantly enhanced. Today, the main purpose of LOAC is to protect all victims of armed conflict and regulate the conduct of hostilities.[7] Furthermore, the rules have evolved from being prohibitive to both provide limitations and entitlements or authorisations.[8] For instance, AP I Article 43(3) makes it clear that "combatants (…) have the right to participate directly in hostilities".[9] This evolution of LOAC is illustrative of a general shift in international law, from the Lotus approach of merely limiting actions of

3 ibid, p. 19.

4 Jean S. Pictet (ed.), The Geneva Conventions of 12 August 1949: Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field [hereinafter: GC I Commentary], Vol. 1 (ICRC, Geneva, 1952) p. 32, and ICRC, Commentary on the First Geneva Convention – Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [hereinafter: GC I Commentary] (second edition, 2016, https://ihl-databases.icrc.org/ihl/full/GCI-commentary, last accessed 24.04.2019) para. 241.

5 Daragh Murray *et al.*, *Practitioners' Guide to Human Rights Law in Armed Conflicts* (Oxford University Press, Oxford, 2016) p. 13.

6 Dino Kritsiotis, 'War and Armed Conflict: The Parameters of Enquiry', Chapter 1 in Rain Liivoja and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (Routledge, Milton Park, Abingdon, Oxon, 2016) p. 11.

7 See also Nils Melzer, 'The Principle of Distinction between Civilians and Combatants', in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014) p. 296.

8 Kritsiotis, 'War and Armed Conflict: Parameters' (n 6) p. 27. See further Section 5.1.1.

9 On combatant immunity, see Section 5.1.2.

States to greater focus on legal justifications for acts adversely affecting rights of individuals.

Another important example of this trend is the evolution of international human rights law (IHRL), which imposes limitations and duties on the State vis-à-vis its citizens or persons otherwise under its jurisdiction. The most relevant implication of IHRL for the current topic is that "a deprivation of life that lacks a legal basis or is otherwise inconsistent with life-protecting laws and procedures is, as a rule, arbitrary in nature".[10] As a result, military forces, whether acting as State actors or individuals, will not be able to employ unfettered force.

The prohibition on arbitrary deprivation of life applies at all time, including during armed conflict.[11] As will be explained in Section 4.2, it plays a central role in IHRL, and arguably in international law in general.[12] States are not free to act as they wish with regard to individuals; they must refrain from arbitrarily depriving individuals of their lives. According to the ICJ, the test of what is arbitrary deprivation of life depends on the applicable *lex specialis*.[13] The details of the exceptions to the prohibition on arbitrary deprivation of life are in other words not set out in IHRL, but rather in applicable national and international law. This point is particularly important for the topic of this book, that is, the identification of the appropriate legal basis for the use of force authorised by ROE. The references to and focus on the prohibition on arbitrary deprivation of life do not suggest that IHRL regulates the use of force during armed conflict. During armed conflicts, the law of armed conflict, with the concepts of 'lawful acts of war' and 'combatant immunity', provides military forces with

10 UN Human Rights Committee (HRC), *Draft General Comment No. 36 – Article 6: Right to Life* [hereinafter *Draft General Comment 36*] [19 October–6 November 2015], U.N. Doc CCPR/C/GC/R.36/Rev.2, para. 17. The prohibition on arbitrary deprivation of life is further examined in Section 4.2.

11 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law,* [hereinafter: *ICRC CIL Study*] (Cambridge University Press, Cambridge, 2005, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul, last accessed 24.04.2019) Rule 89. See further Section 4.2.4. On the question of extraterritorial application of human rights obligations, see Section 4.2.3.

12 The relevance of IHRL to situations of armed conflict is met with considerable criticism, especially from the U.S. Solis, for instance, refers to those arguing for human rights application as "human rights activists", and explains that the U.S. "believes that human rights law was not intended to be, and should not be, controlling in *jus in bello* situations". Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, Cambridge, 2016) p. 487.

13 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports* [1996] 226, para. 25.

further authorities for using force that would otherwise violate human rights (see Chapter 5). LOAC is the *lex specialis* of armed conflict, which means that it is the primary legal regime governing the use of force by military forces participating in an armed conflict.[14] The use of force during armed conflict causing death or serious injury must comply with LOAC in order to be lawful, unless it occurrs in self-defence or as part of law enforcement.

Self-defence is both the more general exception to the prohibition on arbitrary deprivation of life and the narrower one: it applies to everyone, but is formulated as an exception, to be applied as a measure of last resort. Furthermore, as a result of LOAC being the primary legal regime for the use of force during armed conflict, for military forces participating in an armed conflict, the scope for applying what is essentially an exception to the human right to life is limited.[15] Despite its relatively small role during armed conflict, it is nonetheless important. It permits the use of force in situations where life it at stake, but LOAC does not provide the necessary authorities to act. Furthermore, because individual service members arguably retain a right to life despite being military or participating in an armed conflict, ROE cannot be so restrictive that it prohibits forces to defend themselves, thereby arbitrarily depriving the military forces of their life.[16]

Finally, although NATO generally does not do law enforcement operations,[17] military forces may be granted further authorities by way of being State agents. For forces operating in another State, this requires authorisation based on host nation legislation.[18] Because such authorities must comply with IHRL, the use of deliberate lethal force may only be permitted in situations where this is absolutely necessary to protect human life.[19] Due to the armed conflict focus of

14 As explained in Section 1.4, *lex specialis* is used to explain that a legal regime takes primacy, however, other areas of law may also be applicable in the same circumstances and be complimentary to the *lex specialis* regime. The impact of the rule is to clarify that if those regimes are in conflict, the *lex specialis* rule will prevail. The same will apply if the *lex specialis* rule has more explicit rules. See further Section 4.4.

15 See also Solis, *The Law of Armed Conflict* (n 12) p. 488.

16 This point is discussed further in Sections 4.2.2 and 8.2.10.

17 See Section 1.3.2.1.

18 According to the *Lotus case*, "the first and foremost restriction imposed by international law on a State is that – failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another State." *Lotus case* (n 2) p. 18.

19 UN, *Basic Principles on the use of Force and Firearms by Law Enforcement Officials* (1990, https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-use-of-force-and-firearms-by-law-enforcement-officials/, last accessed 24.04.2019) prov. 9. The principles were adopted by the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990; and reaffirmed by the GA (A/RES/45/166) during the sixty-ninth plenary meeting on 18 December 1990. See also Jan Arnold Hessbruegge,

the book, law enforcement will not be examined further; however, the scope for using force that causes harm to civilians beyond what LOAC permits is examined in Chapter 10.

The approach taken to the question of legal basis is influenced by the perception of the relationship of the *jus in bello* or LOAC to the *jus ad bellum*. If these two areas are considered separate, as suggested in Section 4.3, the application of LOAC is determined solely on the basis of the factual situation, irrespective of the perceived responsibility for starting the armed conflict, thereby ensuring equal application of the rights and obligations therein. Alternatively, the *jus ad bellum* may be viewed as the legal basis for the use of force both at the outset and during the armed conflict.[20] For instance, if one State attacks another in violation of Article 2(4) of the UN Charter,[21] the military forces fighting on behalf of that State would be perceived as acting unlawfully, regardless of their compliance with LOAC. Those supporting the latter approach may consider lawful all use of force that is necessary and proportionate to achieve the *jus ad bellum* aim of the operation, unless prohibited by LOAC or other applicable law. As a result, there is in their view no need for connecting the use of force ROE with a rule found in LOAC or elsewhere, as is done in this book. However, as will be further explained in Section 4.3, this approach fails to take into account both the lessons learned from the post-Second World War trials, where it was made clear that German forces who complied with LOAC had not acted unlawfully,[22] as well as the evolvement of IHRL.

4.2 The Right to Life and Prohibition on Arbitrary Deprivation of Life

4.2.1 *Introduction*

International human rights law (IHRL) imposes obligations on the State in the respect to persons under its authority or control.[23] They require the State and

Human Rights and Personal Self-Defense in International Law (Oxford University Press, New York, 2017) pp. 103–117.

20 For an example of this approach, see Geoffrey S. Corn *et al.*, *The Law of Armed Conflict – an Operational Approach* (Wolters Kluwer Law & Business, New York, 2012) Chapter 1.

21 Charter of the United Nations (UN Charter), 24 October 1945, 1 *UNTS* XVI.

22 For examples, see e.g. Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, Cambridge, 2011) pp. 171–172.

23 While Article 1 of ECHR uses the term 'jurisdiction', ICCPR Article 2(1) refers to "all individuals within its territory and subject to its jurisdiction". The main practical implication of this difference arise in the context of extraterritorial human rights application, which is considered below. An extensive study of this issue is, however, outside the scope of this book. European Convention for the Protection of Human Rights and Fundamental

State organs to protect the human rights of individuals within its jurisdiction, ensure that other individuals or groups do not violate the human rights of those individuals, and ensure that all such individuals have the opportunity to obtain their human rights, such as the right to a fair trial.[24] Human rights are relevant for NATO operations in two ways: as concurrently applicable law during an armed conflict, and as the primary body of international law regulating activities beyond the context of armed conflict, to which LOAC does not apply.[25] The applicability of human rights during armed conflict and its relationship to LOAC is further examined in Section 4.4. The intention with this chapter is not to repeat the debate on what is an extensively covered topic,[26] but to provide an explanation for the approach taken in this book to the application of IHRL, in particular the right to life, during armed conflict.

Because NATO States do not transfer full command for their forces to NATO,[27] the forces remain under national authority. The question whether States continue to have 'effective control'[28] over their forces, as debated in cases arising from UN operations, does therefore not arise.[29] It has increasingly been suggested that NATO as an international organisation may have international responsibility for the acts of NATO forces or NATO headquarters, which could include human rights obligations; however, this issue is beyond the scope of this book.[30]

The focus of this book is on the operational authorities (ROE) and legal bases for using force against another person during armed conflict. Because the

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Freedoms (ECHR) (1950), as amended by Protocols Nos. 11 and 14, *ETS* 5, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, *UNTS* vol. 999, p. 171.

24 Murray *et al.*, *Practitioners' Guide* (n 5) pp. 18–19.

25 ibid, p. 12.

26 See e.g. references in note 188.

27 See Section 2.5.

28 This much debated human rights concept was first introduced on *Loizidou v Turkey* [GC] (Judgement), App. No. 15318/89 (ECtHR, 18 December 1996), para. 52: "the responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory".

29 See e.g. *Jaloud v. the Netherlands* (Judgement), App. No. 47708/08 (ECtHR, 20 November 2014), 3.11.3; *Behrami v. France* [GC], App. No. 71412/01 (ECtHR, 2 May 2007), and *Saramati v. France, Germany and Norway* [GC], App. No. 78166/01 (ECtHR, 2 May 2007). See also Park, who argues that because States are likely to always retain full command over their forces deployed to UN or NATO operations, they will also retain human rights obligations for their actions. Ian David Park, *The Right to Life in Armed Conflict* (Oxford University Press, Oxford, 2018) pp. 119–120.

30 See for instance David Nauta, *The International Responsibility of* NATO *and its Personnel during Military Operations* (Brill/Nijhoff, 2017).

use of force against individuals would generally violate their right to life, these legal authorities are necessarily influenced by the recognised exceptions to the right to life. The right to life is one of the most fundamental human rights,[31] and it is codified in all major international human rights conventions.[32] It is also reflected in domestic legislations, such as in the crime of murder. Although the right to life is viewed as a peremptory right,[33] it is not absolute: only arbitrary deprivation of life is prohibited.[34] The prohibition on arbitrary deprivation of life has now become customary international law,[35] and plays an important role in military operations in two respects: as a limitation on the use of force by military forces, and as the defining parameters for the military forces' right to defend themselves.

IHRL impose procedural and substantive obligations on States. The procedural obligation relevant to the right to life is the duty to undertake effective investigation where there has been a deprivation of life as a result of the use of force.[36] Because this aspect of the obligation is unlikely to affect the decision or authorisation to use force, it is not further examined here.[37] The substantive

31 *Salman v. Turkey* [GC], App. no. 21986/93, Judgment (Merits and Just Satisfaction) (ECtHR, 2000-VII), para. 97: "Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted."

32 See the ICCPR (n 23) Article 6; ECHR (n 23) Article 2(2); American Convention on Human Rights, Organization of American States, *"Pact of San Jose"* (Costa Rica, 22 November 1969, https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm, last accessed 24.04.2019) Article 4(1); African Charter on Human and Peoples' Rights ("Banjul Charter"), Organization of African Unity, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 *I.L.M.* 58 (1982), Article 4; and Arab Charter on Human Rights, League of Arab States, 15 September 1994, Article 5. It is also included in the Universal Declaration of Human Rights, Adopted by General Assembly Resolution 217 A(III) of 10 December 1948 (http://www.un.org/en/universal-declaration-human-rights/, last accessed 24.04.2019) Article 3.

33 UN HRC, *Draft General Comment 36* (n 10) para. 69.

34 Murray *et al.*, *Practitioners' Guide* (n 5) p. 119.

35 Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare* (2013, European Parliament, EXPO/B/DROI/2012/12) p. 18. See also Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', 25 *George Journal of International and Comparative Law* 287 (1995/96), p. 343, especially examples in footnote 229.

36 *McCann and others v. the UK*, App. No. 18984/91 (ECtHR, 27 September 1995), §161, and *Finogenov and Others v. Russia* (Judgement), App. Nos. 18299/03 and 27311/03, (ECtHR, 20 December 2011), paras. 268–272. See also UN HRC, *Draft General Comment 36* (n 10) para. 31–32, and Fiona Leverick, *Killing in Self-Defence* (Oxford Monographs on Criminal Law and Justice, Oxford University Press, Oxford, 2006) p. 178.

37 For a detailed examination, see Park, *The Right to Life in Armed Conflict* (n 29) Chapters 2 and 4.

obligations are twofold: the obligation of the State to take measures to protect the right of persons under its jurisdiction, such as the criminalisation of the use of force, and a limitation on the actions of State actors.[38] Because military forces may use force both on the State's territory and abroad, the question of extraterritorial application of human rights obligations is also relevant.

The human rights regimes most relevant for NATO operations are those of the ECHR and ICCPR. Article 2 of the ECHR prohibits intentional deprivation of life that is not absolutely necessary for an exhaustive list of reasons. In addition, the ECHR allows in Article 15(2) for derogation from Article 2 on the basis of lawful acts of war committed during armed conflict.[39] The ICCPR Article 6 prohibits arbitrary deprivation of life. Article 6 is non-derogable,[40] but as will be explained below, lawful acts of war have been interpreted as not being arbitrary. The practical implications of the two approaches are very similar,[41] and the examination of the prohibition on arbitrary deprivation of life will therefore consider them together.

The application of IHRL during armed conflict will to some extent be affected by the type of conflict, both with regard to the question of jurisdiction and the relationship between LOAC and human rights.[42] IHRL are most likely to apply in situations of occupation and NIACs. A State involved in an occupation will exercise control over public authorities within the occupied territories and will therefore have jurisdiction for the purposes of human rights application.[43]

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38 See e.g. Leverick, *Killing in Self-Defence* (n 36) pp. 190–191 and David Harris, 'The Right to Life under the European Convention on Human Rights', 1 *Maastricht Journal of European and Comparative Law* 122 (1994), pp. 122–128.

39 The process of derogation and consequences of States' failure to formally derogate when participating in operations involving participation in armed conflict, and the possibility for derogating in the context of operations occurring outside the State's territory, are outside the scope of this book. For commentary on these issues, see for instance *Hassan v. the UK* [GC] (Judgement), App. No. 29750/09, (ECtHR, 16 September 2014), especially para. 103; Murray *et al.*, *Practitioners' Guide* (n 5) pp. 105–107; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, Cambridge, 2016) pp. 29–31; and Park, *The Right to Life in Armed Conflict* (n 29) Chapter 6.

40 UN HRC, *Draft General Comment 36* (n 10) paras. 68–69, and UN Human Rights Committee, *General Comment No. 29: Article 4: Derogations During a State of Emergency* [31 August 2001] U.N. Doc CCPR/C/21/Rev.1/Add.11, para. 7.

41 This assumes that the ECHR Member State affected has derogated in accordance with Article 15(2), or the State practice not to derogate implies that this is not required. The implications of States' failure to formally derogate from Article 2 is beyond the scope of this book.

42 The relationship between LOAC and IHRL is further examined in Section 4.4.

43 Park, *The Right to Life in Armed Conflict* (n 29) pp. 171–172. According to Park, "an assessment of jurisdiction is determined more by the actions of the state agents rather than as a consequence of the international humanitarian law notion of 'occupation' being ascribed

If it is a NIAC occurring within the territory of a State, the human rights obligations of that State will apply in full, unless derogations are made.[44] Furthermore, the rules for NIACs in general are less extensive and detailed than for IACs.[45] If it is argued that "where IHL treaties are silent, human rights law might be offered as an answer",[46] human rights would play a significantly greater role in this type of conflict.[47]

The lack of treaty rules for NIACs may, however, give a skewed impression of the extent to which LOAC rules are applicable and accordingly the scope for applying IHRL. Many of the conduct of hostilities rules relevant for this book found in treaties regulating IACs apply to all conflicts as customary international law. This will arguably reduce the scope of the application of IHRL.[48] Admittedly, the lack of clarity, for example with respect to the concept of 'direct participation in hostilities', begs the question of whether LOAC alone may be used to determine the legality of the use of force.[49] This has led Lubell to suggest that in NIACs, where the distinction between civilians and lawful targets is less clear, attempts should be made to capture rather than kill opposing forces.[50] However, although the concept of 'direct participation' is complicated to apply, this exception from civilian protection is clearly founded in both

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to the actions of the state." ibid, p. 171. See also Noam Lubell, 'Human Rights in Military Occupation', 94(885) *International Review of the Red Cross* 317 (2012), p. 337. The ICJ has only recognised extraterritorial application of human rights in cases of occupation. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, *I.C.J. Rep* 2004, p. 136, para 109; and *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda), Judgment, *I.C.J. Rep* 2005, p. 168, para. 216. The ECtHR has considered human rights in situations of occupation in for instance *Cyprus v Turkey* [GC] (Judgement), App. No. 25781/94 (ECtHR, 10 May 2001), and *Loizidou v Turkey* [GC] (Judgement) (n 28).

44 For an overview of the issue, see Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict', 87(860) *International Review of the Red Cross* 737 (2005), pp. 746–750. See also Park, *The Right to Life in Armed Conflict* (n 29) p. 171.

45 See also Section 1.3.1.

46 Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (n 44) p. 746.

47 See also Corn, 'Public Authority to Use Force in Military Operations' (n 1) p. 37.

48 See also Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (n 44) p. 747.

49 See Park, *The Right to Life in Armed Conflict* (n 29) pp. 112–114, where this issue is examined in light of the ECtHR decision in *Hassan v. the UK* (n 39). See also Louise Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law provide all the Answers?', 89 *International Review of the Red Cross* 881 (2006), p. 882. Direct participation in hostilities is examined in detail in Section 5.2.3.

50 Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (n 44) p. 750: "during a non-international armed conflict, whenever the State has enough control over a particular situation to enable it to attempt to detain individuals, then such an attempt must

treaty and custom, and is equally applicable in NIACs.[51] The approach adopted in this book is that the right to life will not be violated if LOAC is complied with; this is equally the case in both international and non-international armed conflicts.[52]

4.2.2 *Prohibition on Arbitrary Deprivation of Life*

In General Comment 36, deprivation of life is defined as involving "a deliberate or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission".[53] The ECtHR has emphasised that the deprivation of life need not be intentional. It also encompasses "'use force' which may result, as an unintended outcome, in the deprivation of life."[54] Because it is a fundamental right, it is important that the circumstances in which life may be deprived be strictly construed.[55] The use of force must be absolutely necessary, which according to the McCann case entails that "a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is 'necessary in a democratic society'".[56] Furthermore, it has been interpreted to imply that the use of force must be "strictly proportionate to the achievement of permitted aims".[57] This entails, *inter alia*, that the use of lethal force must be a measure of last resort, the amount of force used be limited to that strictly needed, and the force must be directed as far as possible only against the person of interest, for instance the attacker in a self-defence situation.[58] According to the Human Rights Committee (HRC), the deliberate use of potentially lethal force cannot be proportionate

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be made before force can be used, and non-lethal force must be favoured if possible." The idea of 'capture rather than kill' is further examined and criticised in Section 5.3.1.

51 See also Park, *The Right to Life in Armed Conflict* (n 29) p. 113.

52 See also ibid, p. 129.

53 UN HRC, *Draft General Comment 36* (n 10) para. 6, footnote omitted. See also *Salman v. Turkey* [GC] (n 31) para. 98, and *Andreou v. Turkey*, App. No. 45653/99, Judgment (Merits and Just Satisfaction) (ECtHR 27 October 2009), para. 48, where it is emphasised that the right to life not only covers intentional killing but also other deliberate use of force which may result in deprivation of life, even if the outcome is unintended.

54 *McCann and others v. the UK* (n 36) para. 148, confirming *Stewart v. the UK* (Decision), App. No. 10044/82 (ECtHR 10 July 1984), para. 15.

55 *Salman v. Turkey* [GC] (n 31) para. 97.

56 *McCann and others v. the UK* (n 36) para. 149.

57 *Salman v. Turkey* [GC] (n 31) para. 98. The proportionality requirement is not reflected in the right to life provisions, but is read into the qualification of absolutely necessary as opposed to merely necessary. Hessbruegge, *Human Rights and Personal Self-Defense* (n 19) p. 170.

58 UN HRC, Draft General Comment 36 (n 10) para. 18. See also Gloria Gaggioli, *Expert Meeting on the Use of Force in Armed Conflict: Interplay Between the Conduct of Hostilities*

if directed at a person "who does not pose a serious and imminent threat to the lives or bodily integrity of others".[59] Some States do accept the use of lethal force to protect critical infrastructure; however, their critical nature is usually a result of the serious consequences an attack on the object would have for persons.

Article 2 of ECHR sets out three exclusive permissible aims for the use of force: in defence of any person from unlawful violence, to effect an unlawful arrest or prevent the escape of a person lawfully detained, or to quell a riot or insurrection.[60] The HRC has used the same categories to explain the circumstances in which deprivation of life will not be arbitrary under ICCPR Article 6.[61] In addition, it is recognised that deprivation of life consistent with LOAC will not be arbitrary.[62] This was confirmed by the ICJ in the *Nuclear Weapons Advisory Opinion*: "In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".[63] This includes deprivation of life both caused by the use of force by a combatant towards a lawful target, and resulting from incidental harm to civilians and other protected persons.[64]

The use of force by NATO forces must therefore either be directed at lawful targets in accordance with LOAC, or it must be based on a different legal authority permitting the use of force to achieve one of the abovementioned permitted aims.[65] Unless the forces are tasked with law enforcement duties, the

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and Law Enforcement Paradigms (ICRC, Geneva, 2013, https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf, last accessed 24.04.2019) p. 8.

59 UN HRC, *Draft General Comment 36* (n 10) para. 18. See also Murray *et al.*, *Practitioners' Guide* (n 5) p. 125, and Hessbruegge, *Human Rights and Personal Self-Defense* (n 19) p. 105.

60 ECHR (n 23) Article 2(2).

61 See e.g. UN HRC, *Draft General Comment 36* (n 10) para. 18. See also Daniel D. Nsereko, 'Arbitrary Deprivation of Life: Controls of Permissible Deprivations', in B. G. Ramcharan (ed.), *The Right to Life in International Law* (Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster, 1985) p. 258.

62 For ECHR (n 23) this is regulated in Article 15(2).

63 *ICJ Nuclear Weapons Advisory Opinion* (n 13) para. 25, commenting on the right to life under the ICCPR. For a discussion of this paragraph, see e.g. Dale Stephens, 'Human Rights and Armed Conflict – The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case', 4 *Yale Human Rights and Development Journal* 1 (2001), Article 1. The status of LOAC as *lex specialis* is further dealt with in Section 4.4.

64 See also Murray *et al.*, *Practitioners' Guide* (n 5) pp. 119 and 123.

65 Note that authority in domestic legislation does not automatically prevent the use of force from being arbitrary. According to General Comment 36, "A deprivation of life may be authorized by domestic law and still be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include

most relevant aim is to defend a person from unlawful violence. Because the use of force outside the ambit of LOAC must be absolutely necessary, force may only be used where there is "a real and immediate danger to life and limb",[66] and lethal force may only be used if that threat is immediate.[67] The legality of the use of lethal force in such circumstances will therefore require sufficient preparations in the planning of the operation to minimise the risk of loss of life to the greatest extent possible, for instance, by considering the possibility of evacuating civilians and by analysing the effect of the proposed weapons.[68] The requirement that lethal force only may be used as a matter of last resort has to be taken into account both during the planning stage and during the execution of the operation. Furthermore, the use of force must be proportionate to the aim of saving lives, taking into account both the life of the "target" and of innocent bystanders, in addition to the military forces involved.[69] However, the ECtHR has emphasised that "the obligation to protect the right to life must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities".[70] For instance, harm to innocent bystanders does not *per se* violate their right to life, but the threshold of both necessity and proportionality will be high,[71] and the harm must be reasonable, which excludes harm that is intentional or reckless.[72] Because incidental harm

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elements of inappropriateness, injustice, lack of predictability, and due process of law as well as elements of reasonableness, necessity, and proportionality." UN HRC, *Draft General Comment 36* (n 10) para. 18.

66 Murray *et al.*, *Practitioners' Guide* (n 5) p. 125.

67 ibid.

68 *Tagayeva and Others v. Russia*, App. No(s) 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11, 37096/11, Judgment (Merits and Just Satisfaction) (ECtHR, 13 April 2017), paras. 562–274; *Kerimova and Others v. Russia*, App. No(s). 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, Judgment (Merits and Just Satisfaction) (ECtHR, 3 May 2011), para. 248; *Isayeva v. Russia* (Judgement), App. No. 57950/00, Former First Section (ECtHR, 24 February 2005), para. 181; and *McCann and Others v. the UK* (n 36) para. 294.

69 Murray *et al.*, *Practitioners' Guide* (n 5) p. 136. See also *Finogenov and Others v. Russia* (n 36) para. 210, and *McCann and Others v. the UK*, ibid, para. 194.

70 *Kerimova and Others v. Russia* (n 68) para. 246. For this reason, the Court held that it "may be prepared to accept that the Russian authorities had no choice other than to carry out aerial strikes in order to be able to take over Urus-Martan, and that their actions were in pursuit of one or more of the aims set out in paragraph 2 (a) and (c) of Article 2 of the Convention". ibid, para. 247.

71 Gaggioli, *The Use of Force in Armed Conflict* (n 58) p. 9, fn. 33. See also Hessbruegge, *Human Rights and Personal Self-Defense* (n 19) p. 180.

72 In *Gülec v. Turkey*, for instance, the ECtHR concluded that the use of machine guns to disperse demonstrators could not be regarded as proportionate. *Gülec v. Turkey* (Judgement), App. No. 21593/93 (ECtHR, 27 July 1998), paras. 68 and 71.

to innocent bystanders resulting from military forces using force beyond the scope of LOAC is most likely to arise in the context of self-defence, this complex issue is examined in detail in Chapter 8.[73] As a result of the right to life of persons not participating in the armed conflict, the scope for using lethal force in situations not permitted by LOAC is limited.

In addition to restricting the amount of force military forces may use, the right to life also creates obligations owed to the members of the State's military forces.[74] The contention that "the combatant trades his right to life for the right to kill"[75] is, in other words, inaccurate. Individual members of the NATO forces are also citizens of a State who enjoy human rights.[76] However, the ECtHR has explained that "when interpreting and applying the rules of the Convention (…), the Court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces".[77]

Further guidance on the right to life of military forces has been provided by ICTY in the *Erdemovic* case. The question at hand was whether duress could afford a complete defence to a soldier charged with killing innocent persons. In a Joint Separate Opinion, Judges McDonald and Vohrah declared that:

> we are of the view that soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened. Soldiers, by

73 See Section 8.2.7.

74 See generally Council of Europe, *Recommendation CM/Rec(2010)4 of the Committee of Ministers to Member States on Human Rights of Members of the Armed Forces* (24 February 2010, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf8ef, last accessed 24.04.2019) recommendation A; Organization for Security and Co-operation in Europe (OSCE), *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* (7 April 2008, https://www.osce.org/odihr/31393, last accessed 24.04.2019); Park, *The Right to Life in Armed Conflict* (n 29) p. 177; Peter Rowe, 'Members of the Armed Forces and Human Rights', in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014) pp. 537–540.

75 William Absresch, 'A Human Rights law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', 16 *European Journal of International Law* 740 (2005), p. 757.

76 See also Noëlle Quénivet, 'The Right to Life in International Humanitarian Law and Human Rights Law', Chapter XII in Roberta Arnold and Noëlle Quénivet, *International Humanitarian Law and Human Rights Law – Towards a New Merger in International Law* (Martinus Nijhoff Publishers, Boston, 2008) p. 343: "HRL applies to both civilians and combatants/fighters, i.e. it does not know of this distinction."

77 *Engel and others v Netherlands,* App. No(s) 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, Judgment (Merits) (ECtHR, 8 June 1976), para. 54.

> the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight. The relevant question must therefore be framed in terms of what may be expected from the ordinary soldier in the situation of the Appellant. What is to be expected of such an ordinary soldier is not, by our approach, analysed in terms of a utilitarian approach involving the weighing up of harms. Rather, it is based on the proposition that it is unacceptable to allow a trained fighter, whose job necessarily entails the occupational hazard of dying, to avail himself of a complete defence to a crime in which he killed one or more innocent persons.[78]

Because this case concerned the defence of duress, it should not be interpreted to mean that self-defence would not be available. In fact, as will be explained in Section 6.3.1.2 concerning self-defence in international criminal law, courts have been willing to consider pleas of self-defence made by military forces, even for situations arising during armed conflict. As Stephens argues, "the right to life ensures that governments cannot place their military forces in harms [sic] way and withhold them the right to defend themselves".[79] The importance of the extract is its indication that military forces are expected to accept a higher degree of risk than civilians.

Unlike civilians, military forces are lawful targets and have accepted the risk to life that combat entails.[80] Furthermore, unlike civilians, military forces have a right to participate in hostilities, and their use of force in accordance with LOAC will be considered lawful.[81] In their recommendation on the human rights of armed forces, the Council of Europe explains in the context of the right to life that "[m]embers of the armed forces should not be exposed to situations where their lives would be *avoidably* put at risk without a clear and legitimate military purpose or in circumstances where the threat to life

78 *Prosecutor v. Erdemovic* (Judgement), Case No. IT-96-22-A, ICTY, Appeals Chamber, 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 84.

79 Dale Stephens, 'Rules of Engagement and the Concept of Unit Self-Defense', 45 *Naval Law Review* 126 (1998), p. 147. Stephens go on to argue that self-defence is a non-derogable right and even an obligation, although the legal authority for these claims is unclear.

80 The UK Supreme Court has held that "it clear that it would not be compatible with the characteristics of military life to expect the same standard of protection as would be afforded by article 2(1) to civilians who had not undertaken the obligations and risks associated with life in the military". *Smith and others* (*FC*) (*Appellants*) *v The Ministry of Defence* (*Respondent*) [2013] UKSC 41, para. 71. See also Park, *The Right to Life in Armed Conflict* (n 29) p. 181.

81 On lawful acts of war, see Section 5.1.2.

has been disregarded".[82] Unavoidable risk with a clear and legitimate military purpose will, in other words, not be considered a violation of military forces' right to life.[83] The right to life of military forces, and hence the scope of application of self-defence, is therefore more restrictive than for civilians. As will be explained in detail in Chapter 8, their status as military forces will, among other things, affect the assessment of whether it was necessary to use force. Arguably, the risk must be more immediate and the harm more severe.[84] Furthermore, the application of self-defence that requires the initial attack must be unlawful, which will not be the case if those attacking are combatants directing their force at lawful targets.[85]

Where the risk to the military forces is immediate and severe, however, they must be permitted to defend themselves. As will be explained in Section 8.2.10, military forces are not expected to be killed without resisting, since this would be tantamount to suicide. The discussion in that section focuses on the possibility for military commanders to limit their subordinates' right of self-defence, but it is equally applicable to the use of defensive force based on LOAC in situations where self-defence does not apply.[86]

The right to life of military forces may also be discussed in the context of the training and equipment made available to military forces by their State.[87] However, due to the focus on the use of force by NATO forces, this aspect of the right to life will not be examined here.[88]

4.2.3 *Extraterritorial Application*

NATO forces can be expected to operate beyond their State's territory, either in support of another NATO member or when participating in operations outside NATO (so-called 'out-of-area-operations'). This raises the issue of

82 Council of Europe, *Human Rights of Members of the Armed Forces* (n 74) para. 6, emphasis added.

83 See also Park, *The Right to Life in Armed Conflict* (n 29) p. 181: "genuine mistakes by military commanders and tactical decisions made in the heat of battle are unlikely to amount to substantive violations of Article 2." As a result, "the areas likely to attract scrutiny in respect of battlefield operations relate to the way in which military personnel are trained, deployed, and equipped, rather than the decisions taken by military commanders in the heat of battle that might expose their subordinates and colleagues to risk". ibid.

84 This issue is examined further in Section 8.2.10.

85 See further Section 8.2.3.

86 Defensive force not based on self-defence is introduced as a 'use of force' category in Section 3.3, while its relationship with LOAC is examined in Chapter 9.

87 See e.g. *Smith and others v The Ministry of Defence* (n 80), and *R* (*Smith*) *v Secretary of State for Defence* [2010] UKSC 29.

88 For a detailed discussion, see Park, *The Right to Life in Armed Conflict* (n 29) pp. 183–189.

extraterritorial application of human rights to the activities of military forces as state agents and to the rights of the individual members of the military forces vis-a-vis their State.

The issue of extraterritorial application of human rights is complex for several reasons. First, the clauses regulating the application of different human rights regimes such as the ECHR and ICCPR are worded differently, and there is therefore no universal approach to the issue. Second, the interpretation and application of these provisions by international bodies like the ECtHR and HRC have changed over time, and does not necessarily reflect the ordinary reading of the provisions.[89]

Article 1 of ECHR makes it clear that States party must secure the rights and freedoms of the Convention to "everyone within their jurisdiction", regardless of their location. The test for this has been the subject of extensive debate, however, the ECtHR provided further clarification in the *Al Skeini* case. In addition to the territorial principle, a person falls within the jurisdiction of a State if he or she is in an area over which the State exercises effective control; or the State exercises control and authority over the person through its agents.[90] In the former category, the most relevant examples of where military forces involved in an armed conflict have an obligation arising from the right to life are occupation, where human rights apply in full, or where the military forces have temporary control over an area, in which case the human rights obligations may be tailored and divided.[91] The State is be considered to have authority or control over a person when its agents exercise physical control over that person, as in the case of detention, and depending in the circumstances, when conducting check-points.[92]

By contrast, ICCPR Article 2(1) requires States party to that Convention "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant".[93] The inclusion of territory in addition to jurisdiction, as a cumulative rather than alternative requirement, has been interpreted by many States party to the ICCPR, including the United States, to mean that the ICCPR does not apply extraterritorially.[94]

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89 According to Murray *et al.*, "the scope of extra-territorial jurisdiction under the European Convention of Human Rights has been progressively clarified in the numerous cases on Article 1 jurisdiction of the last decade". Murray *et al.*, *Practitioners' Guide* (n 5) p. 62.

90 *Al Skeini and others v. the United Kingdom* (Judgement), App. No. 55721/07 (ECtHR, 7 July 2011), paras. 133–140. See also Murray *et al.*, *Practitioners' Guide* (n 5) pp. 65–66.

91 Murray *et al.*, ibid p. 66.

92 See e.g. *Jaloud v. the Netherlands* (Judgement) (n 29).

93 ICCPR (n 23).

94 See UN Human Rights Committee, *Summary Record of the 1405th Meeting* (24 April 1995) U.N. Doc. CCPR/C/SR.1405, pp. 6–7, para. 20. See also U.S. Department of Defense

The HRC contends, however, that it should be interpreted as extending human rights obligations to "all persons who may be within their territory and to all persons subject to their jurisdiction."[95] The ICJ has also been very clear on this issue; the criteria 'territory' and 'jurisdiction' apply disjunctively,[96] and the ICCPR may therefore be applicable when a State is exercising jurisdiction outside its own territory.[97] As a result, the HRC argue that the obligations under Article 6 should be viewed as extending to "all persons over whose enjoyment of the right to life it exercises power or effective control".[98] Despite the objections of States party and the counterlogical intepretation of the term "and" to mean "or", the current tendency is therefore to expect the ICCPR to be applied extraterritorially in same way as the ECHR.[99] For instance, according to the HRC, Article 6 may apply in full to "persons located outside any territory effectively controlled by the State who are nonetheless impacted by its military or other activities in a [direct], significant and foreseeable manner".[100]

Whether or not this expectation is warranted, however, is of lesser relevance for the questions at hand. This is because the prohibition on arbitrary deprivation of life has a unique status and has a core that is applicable at all times. As Melzer explains, a distinction should be made between the different aspects of the right to life. Within a State's territorial jurisdiction, the State has a positive duty to *protect* the right to life, while extraterritorially, the duty is limited to *respecting* the right to life.[101] The latter duty, which corresponds with the prohibition on arbitrary deprivation of life, is considered part of customary law

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(DoD), *Law of War Manual* (December 2016 update, Office of the General Counsel of the Department of Defense, Washington, 2016, https://www.hsdl.org/?abstract&did=797480, last accessed 24.04.2019) para. 1.6.3.3, pp. 24–25.

95 UN Human Rights Committee, General Comment No. 31 – The Nature of the General Legal Obligation Imposed on States Parties to the Covenant [26 May 2004] U.N. Doc CCPR/C/21/Rev.1/Add. 13, para. 10.

96 *ICJ Wall Opinion* (n 43) paras. 108–111.

97 *ICJ Armed Activities* Case (n 43) para. 216.

98 UN HRC, *Draft General Comment 36* (n 10) para. 66.

99 See e.g. Murray *et al.*, *Practitioners' Guide* (n 5) p. 61. For a detailed analysis of extraterritorial application of human rights more in general, see ibid, Chapter 3.

100 UN HRC, *Draft General Comment 36* (n 10) para. 66. See also UN HRC, *General Comment 31* (n 95) para. 10, where it is made clear that the Convention "also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation".

101 Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare* (n 35) p. 32, fn. 146, emphasis added. The point is made in the context of innocent bystanders.

and applies regardless of where the military forces operate. In fact, it is even suggested to be a general principle of international law.[102]

As a result, whereas the extraterritorial application of other human rights may be "divided and tailored"[103] to the situation, the prohibition on arbitrary deprivation always applies. It is nonetheless adapted to situations of armed conflict, and arbitrariness will be assessed in light of both LOAC and IHRL.

Finally, with regard to the State obligations to protect and respect the human rights of their military forces, the issue is less complicated. Because military forces will always be under the authority and control of their State, regardless of where they are, their right to life will continue to apply vis-a-vis their State, albeit with the modifications set out in Section 4.2.2.[104]

4.2.4 *Concluding Remarks*

The right to life, and particularly the prohibition on arbitrary deprivation of life derived from that right, is one of the most fundamental rights of all individuals. According to Corn, both LOAC and IHRL set out "a normative protection of the right to life that finds its primary expression in the general prohibition against arbitrary killings".[105] The core of this prohibition is the limitation it imposes upon the use of force by State agents: States cannot authorise the use of force resulting in arbitrary killing.[106] During military

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102 According to Melzer, the fact that ICJ in cases concerning the prohibition on arbitrary deprivation of life of persons not engaged in military hostilities "did not find it necessary to assess State practice in order to prove the binding nature of these provisions suggests that it did not construe them as obligations of customary law (State practice and opinio juris), but derived them directly from "general principles of law recognized by civilized nations" within the meaning of Article 38(1)(c) ICJ Statute." Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare* (n 35) p. 19. See also Antonio Cassese *et al., International Criminal law* (Oxford University Press, Oxford, 2013) p. 210, and Quénivet, 'The Right to Life in IHL and HRL' (n 76) p. 331, both suggesting that the international norms protecting the right to life have the rank of *jus cogens*.

103 *Jaloud v. the Netherlands* (Judgement) (n 29) para. 226, and *Al Skeini and others v. the UK* (Judgement) (n 90) para. 137. See also Murray *et al.*, *Practitioners' Guide* (n 5) pp. 62–63.

104 See also Park, *The Right to Life in Armed Conflict* (n 29) p. 177.

105 Corn, 'Public Authority to Use Force in Military Operations' (n 1) p. 35.

106 See also ibid, p. 35, fn. 153, where he explains that "what constitutes an unlawful use of force in the context of armed conflict is fundamentally different from what is tolerated outside the ambit of hostilities. What is important, however, is the recognition that in either situation, the authority states may confer on their agents to employ force on their behalf is not unfettered".

operations, ROE have become a primary tool for ensuring compliance with this obligation.[107]

The core of prohibition on arbitrary deprivation of life applies regardless of whether or not the victims fall within the human rights jurisdiction of that State. As explained by Kretzmer, "[a] state's duty to respect the right to life (as opposed to its duty to ensure that right) follows its agents wherever they operate".[108] This norm is peremptory, and in addition to being set out in IHRL, it is also reflected in LOAC rules. According to AP I Article 75(2)(a), violence to life and murder are "acts [which] are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents".[109] As a result, even if the victims cannot claim human rights vis-a-vis a State that include a duty to investigate and enable a claim for compensation, the right to life will nonetheless limit the use of force a State may authorise its military forces to use. NATO forces will therefore only lawfully be able to use lethal force if it is in compliance with LOAC; if it meets the requirements of personal self-defence; or they have been given authorities to use force beyond the application of LOAC and the use of force is absolutely necessary in order to protect life. These limitations apply regardless of the human rights responsibilities the troop contributing nations have or do not have for the victims.

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107 ibid, pp. 37–38.

108 David Kretzmer, 'Targeted Killing of Suspected Terrorists', 16(2) *European Journal of International Law* 171 (2005), p. 185. Melzer makes the same argument: the fact that the right to life is customary law does not imply "that States would be obliged to actively protect the right to life outside their territorial jurisdiction, but it does require that States refrain from deliberately infringing the right to life in their extraterritorial activities". Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare* (n 35) p. 18. See also Corn, 'Public Authority to Use Force in Military Operations' (n 1) p. 35.

109 See also Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) [1949], Laws of Armed Conflict, printed in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988) pp. 459ff., Article 50; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II) [1949], ibid, pp. 485ff., Article 51; Geneva Convention (III) relative to the Treatment of Prisoners of War (GC III) [1949], ibid, pp. 507ff., Article 130; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (GC IV) [1949], ibid, pp. 575ff., Article 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) [1977], ibid, pp. 775ff., Article 4(2)(a); and *ICRC CIL Study* (n 11) Rule 89.

4.3 The Relationship between the *Jus ad Bellum* and the *Jus in Bello*: Related in Fact, but Not in Law

4.3.1 *Introduction*

Historically, the law pertaining to the use of armed force has been divided into two categories: the *jus ad bellum* and the *jus in bello*. While the former regulates the legality of resorting to armed force in contravention with the prohibition on the use of force in the UN Charter,[110] the latter regulates the use of means and methods during armed conflict.[111] Simply put, the *jus ad bellum* regulates the 'when' while *jus in bello* focuses on the 'how'. The relationship between these two areas of law is the subject of constant debate, both on a general basis and triggered by new challenges to their respective practical application. The approach taken to their relationship, coined by some as separationist and conflationist stances,[112] affects the interpretation and application of the *jus in bello* in particular. As explained in Section 4.1, it is also central to this study of the legal basis for the use of force authorised by ROE. Conflationists argue that LOAC does not authorise the use of force, merely regulate it. If the existence of an armed conflict, and the resulting application of LOAC, is not considered to provide the legal authority for the use of force, the legal justification for the use of force must be found elsewhere. Because the approach taken to this question has such fundamental implications for the study, the debate will be examined in detail.

The impact of the approach taken to the relationship between the *jus in bello* and *jus ad bellum* may be illustrated by a simple scenario. During an armed conflict, a military convoy is moving from place A to place B. It is vital that it reaches B as soon possible, for instance because they must prevent opposing forces from releasing biological or chemical weapons or from setting off

110 *Jus ad bellum* regulates the initial use of force or threat of use of force by one State against another State or against groups on the territory of another State. Such acts are prohibited by the UN Charter (n 21) in Article 2(4), but there are exceptions to this rule. The most commonly recognised exceptions are: mandate from the UN Security Council pursuant to UN Charter Chapter VII and the right of States to act in self-defence, as recognised in UN Charter Article 51. If the State whose sovereignty could have been violated consents to the presence of foreign forces, there is no violation of Article 2(4), and it will in practice be an exception to the prohibition on the use of force.

111 See further Chapter 5.

112 Joseph HH Weiler and Abby Deshman, 'Far Be It from Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between Jus ad Bellum and Jus in Bello', 24(1) *European Journal of International Law* 25 (2013).

explosives in civilian market. However, there is a group of innocent civilians (for instance teachers and school children) crossing the road. The convoy cannot avoid them; they have to stop or hit them. The ROE authorise the use of force to secure freedom of movement, but the force used must be lawful. Would LOAC permit harming the individuals? Because the convoy does not qualify as an attack, the civilians cannot be considered as collateral damage, and LOAC would therefore not permit such harm. Or is it sufficient that the use of force is necessary for mission accomplishment, which has its legal justification in the *jus ad bellum*? The latter approach is of course easier to apply, but would, as will be further explained below, entail an undesirable conflation of these two areas of law which should be avoided.

4.3.2 *Background*

It is probably safe to state that the traditional approach to the relationship between the *jus ad bellum* and *jus in bello* has been that of separation,[113] even if this separation has been constantly challenged.[114] One of the ultimate questions in the debate is whether all parties to a conflict deserve and are entitled to equal rights or liberties, or whether some are more entitled than others due to the perceived responsibility for the armed conflict. The approach taken when negotiating and applying the *jus in bello* or LOAC has been that of equal application.[115] For instance, after the Second World War, it was debated whether the German and Japanese soldiers were entitled to the combatant privilege and immunity for lawful acts of war or whether they should be held liable for their States' acts of aggression. In the end, the distinction between the *jus ad bellum* and *jus in bello* was upheld and the question of the legality of the initial use of force or invasion held not to affect the rights and duties under the *jus in bello*.[116]

The independence of the *jus in bello* from the *jus ad bellum* was further reiterated in the 1949 Geneva Conventions. In Common Article 1, it is stated that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in *all circumstances*" (emphasis added). The commentaries to Article 1 of GC I specifies that the guarantees of the Conventions are

113 See e.g. Dinstein, *War, Aggression and Self-Defence* (n 22) p. 167.

114 Marko Milanovic, 'A Non-Response to Weiler and Deshman', 24 *European Journal of International Law* 63 (2013), p. 65.

115 Kritsiotis, 'War and Armed Conflict: Parameters' (n 6) p. 11.

116 See e.g. *United States vs. List et al.* ('The Hostages Trial') (Nuremberg, 1948) 11 *NMT* 1230, p. 1247. See also Hersch Lauterpacht, 'The Limits of the Operation of the Law of War', 30 *British Yearbook of International Law* 206 (1953), at 215–220.

not affected by the cause for the conflict and whether it was just or unjust.[117] This is reaffirmed in the preamble to the 1977 First Additional Protocol.[118] Furthermore, while the application of the Geneva Conventions previously depended on the (political) declarations of war, the Common Article 2 replaced this subjective test with a more objective requirement of the factual character of the conflict.[119] The position of the ICTY has also been very clear:

> [T]he Appeals Chamber recalls the fundamental distinction in international law between the rules governing a State's right to resort to armed force (jus ad bellum) and the rules applicable in armed conflict (jus in bello). The Appeals Chamber has previously held that the application of the latter rules is not affected by the legitimacy of the use of force by a party to the armed conflict. [120]

The separation is also reflected in the Rome Statute of the International Criminal Court in the assertion that a person's participation in a defensive operation in the *ad bellum* sense will not constitute a ground for excluding criminal responsibility under the rule of personal self-defence.[121] Finally, a similar

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117 ICRC, *GC I Commentary* (n 4) para 186, and Pictet (ed.), *GC I Commentary* (n 4) p. 27.

118 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) [1977], printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 109) pp. 711ff, Preamble, Para 5: "the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict".

119 ICRC, *GC I Commentary* (n 4) commentary to Common Article 2, paras. 215–216.

120 *Prosecutor v. Boskoski and Tarculovski* (Judgement), Case No. IT-04-82-A, ICTY, Appeals Chamber, 19 May 2010, §44, referring to *Prosecutor v Kordic and Cerkez* (Judgement), Case No. IT-95-14/2-A, ICTY, Appeals Chamber, 17 December 2004, para. 812; and *Prosecutor v. Martic*, (Judgement), Case No. IT-95-11-A, ICTY, Appeals Chamber, 8 October 2008, para. 268.

121 Rome Statute of the International Criminal Court [hereinafter: *Rome Statute*], opened for signature 17 July 1998, 2187 *UNTS* 3 (entered into force 1 July 2002), Article 31(c). Commenting on this last sentence of the provision, Albin Eser explains its importance in the following way: "Most fundamentally, "self-defence" as known in public international law and as used in criminal law is to be distinguished." This entails, he explains further, that "'private self-defence' (...) is not privileged only because its operational framework is legal, nor is it foreclosed only because the operational context is illegal – just as *ius ad bellum* and *actio in bello* are to be kept distinct". Albin Eser, 'Article 31. Grounds for excluding criminal responsibility,' in Otto Triffterer, C*omments on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article* (2nd ed, Beck/Hart, München, 2008) pp. 879–880, footnote omitted. See also: Massimo Scaliotti, 'Defences

emphasis is found in the Commentaries to the 2001 Articles on State Responsibility: "As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct".[122]

Although this language appears to settle the debate, the need to include this language and reaffirm it in the 1977 Additional Protocols bears evidence of a continued debate or even ongoing battle. In a thorough article on these questions, Joseph HH Weiler and Abby Deshman explain that "[i]n the battle zone between Separationist and Conflationists (…) no quarter is given, no prisoners are taken". Both sides argue that their approach is the only possible approach, and many of the arguments are based on politics and morality as much as law. In the following, the two opposing approaches will be presented, before discussing further how the competing interests may best be balanced.

4.3.3 *Reasons for Separation*

The separationist approach is to argue that the *jus ad bellum* and *jus in bello* are completely separate. The *jus ad bellum* regulates the situation until the threshold of an armed conflict is reached, at which stage the *jus in bello* 'takes over' and regulates the hostilities. According to Weiler and Deshman, there are two main strands of separationist approaches: the pragmatic and the foundational.[123] The pragmatic separationists refer to the inability to determine, objectively, who was entitled to use force and who was not. Because both parties will claim to have acted lawfully, a system that would relieve the "victim" State of certain *jus in bello* obligations would result in the total protection set out in *jus in bello* would never being applied. The foundational strand of separationism rests on the humanitarian objectives of the *jus in bello*, and

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Before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility – Part 1', 1 *International Criminal Law Review* 111 (2001), p. 171; Kai Ambos, 'Other grounds for excluding criminal responsibility', in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court – A commentary*, Volume I (Oxford University Press, Oxford, 2002) pp. 1033 and 1034; Cassese *et al.*, *International Criminal Law* (n 102) p. 211; Mark Klamber, 'Article 31(1)(b)', *Commentary on the Law of the International Criminal Court* (CLICC) (updated 30 June 2016, https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/, last accessed 24.04.2019).

122 UN ILC, 'Draft Articles on State Responsibility with Commentaries', *Yearbook of the International Law Commission,* 2001, Vol. II, Part Two, p. 30, at p. 74, Article 21, Commentary para 3.

123 Weiler, and Deshman, 'Far Be It from Thee to Slay the Righteous with the Wicked' (n 112) p. 27.

the importance of protecting those adversely affected by the conflict.[124] The victims of armed conflict, whether *hors de combat* or civilians, need the same protection regardless of their State's role in initiating the conflict. *Jus in bello* affords rights and duties to both States and individuals, and the rights of an individual provided by international law should not be lost due to an unlawful act by the State.[125] Furthermore, as the final report to the ICTY Prosecutor by the Committee Established to review of the NATO bombing campaign against the Federal Republic Yugoslavia emphasises: "An argument that the 'bad' side had to comply with the law while the 'good' side could violate it at will would be most unlikely to reduce human suffering in conflict".[126]

It is not uncommon to combine the pragmatic and foundational arguments for separation. For instance, in a NATO standardised training package on LOAC, developed by representatives from NATO member States, it is stressed that "LOAC addresses the reality of armed conflict without considering the reasons for or legality of the initial resort to force. (…) Its provisions apply to the warring parties irrespective of the reasons for the conflict and whether or not the cause upheld by either party is just".[127] This approach is explained both by the fact that "the denunciation of the parties to a conflict (…) would be bound to arouse controversy and paralyse implementation of the law, since each adversary would claim to be a victim of aggression" and furthermore, that "LOAC is intended to protect war victims and their fundamental rights, no matter to which party they belong".[128] The legal equality between belligerent parties also makes sense from a practical perspective. As Dinstein explains, "[t]he *jus in bello* has in the past succeeded in curbing excesses, notwithstanding the

124 Weiler and Deshman appear to place the ICRC into this latter category, but their arguments seem to confuse the concept of 'hors de combat' with protected civilians, which they refer to as 'innocent civilians'. ibid, pp. 41–42.

125 Dinstein, *War, Aggression and Self-Defence* (n 22) p. 168. See also Marco Sassoli, 'Jus ad Bellum and Jus in Bello – The separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected In Warfare: Crucial or Outdated', in Michael N. Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (BRILL, 2007) p. 246.

126 ICTY, *Final Report to the Prosecutor by the Committee Established to review of the nato bombing campaign against the Federal Republic Yugoslavia* [hereinafter: *OTP Report*] (13 June 2000, http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf, last accessed 24.04.2019) para 32. See also Lauterpacht, 'The Limits of the Operation of the Law of War' (n 116) p. 212.

127 NATO, *STANAG 2449: Training in the Law of Armed Conflict*, Annex F to ATrainP-2, Edition A Version 1, March 2013 (available at http://nso.nato.int/nso/zPublic/ap/ATrainP-2%20EDA%20V1%20E.pdf, last accessed 24.04.2019) p. F-15.

128 ibid, p. F-15. See also U.S. DoD, *Law of War Manual* (n 94) p. 87.

pervasive animosity towards the enemy that is characteristic of every war, only because it has germinated mutual advantages for both sides".[129] Separationism is therefore an important incentive for State compliance with the *jus in bello*.

A further related argument is that of responsibility: should soldiers be held individually responsible for the actions of their State? As Weiler and Deshman points out in relation to the Second World War Tribunals, "[t]here was no precedent in living memory for placing unequal legal or moral blame on the military officers of an aggressive nation".[130] If the *jus ad bellum* is permitted to affect how the *jus in bello* is applied, for instance by denying the troops of the 'wrongful' or unjust State certain rights, the result would be to hold them responsible for the decisions of the State. As the U.S. law of war manual explains, it would be unjust to hold individual military servicemembers responsible for decisions they had no influence on.[131] The fundamental nature of this distinction between individual responsibility and State responsibility was emphasised in the famous Caroline incident. In response to the imprisonment of a British (Canadian) sheriff involved in the attack, the British Minister Mr. Fox emphasised that:

> It would be contrary to the universal practice of civilized nations to fix individual responsibility upon persons who with the sanction or by the orders of the constituted authorities of a State engaged in military or naval enterprizes in their country's cause; and it is obvious that the introduction of such a principle would aggravate beyond measure the miseries, and would frightfully increase the demoralizing effects of war, by mixing up with national exasperation the ferocity of personal passions, and the cruelty and bitterness of individual revenge. (…) Her Majesty's Government cannot believe that the Government of The United States can really intend to set an example so fraught with evil to the community of nations, and the direct tendency of which must be to bring back into practice of modern war, atrocities which civilization and Christianity have long since banished.[132]

129 Dinstein, *War, Aggression and Self-defence* (n 22) p. 169.

130 Weiler and Deshman, 'Far Be It from Thee to Slay the Righteous with the Wicked' (n 112) p. 35.

131 U.S. DoD, *Law of War Manual* (n 94) p. 87.

132 *Caroline Incident Letters*, published in British and Foreign State Papers, 1840–1841 (London, Ridgeway, 1857, vol. 29, p. 1126, http://hdl.handle.net/2027/mdp.39015019751299, last accessed 24.04.2019) p. 1129.

Furthermore, if individual soldiers would be held individually responsible for the political decision of using force in the first place, they would be required to assess and second-guess whether the orders they are given are in accordance with the political and *jus ad bellum* framework of the operation. However, there is no way of ensuring that all members of military forces share the views and interpretations of their politicians and strategic leadership, and the political and strategic levels will to some extent lose control of the use of force. This is highly problematic, as discipline is essential for the ability of the military to achieve its tasks and for the military and political control of the use of force. Some even go so far as to argue that it is "axiomatic that servicemembers have no independent right to engage in hostilities".[133] Rather than concerning themselves with politics and shifting positions, the military should be permitted and required to adhere to a clear set of 'rules of the game' for the use of military force. Abandoning the historic separationist approach may therefore have unintended and undesirable consequences.

4.3.4 *Challenges to Separation: Conflationism*

If separation ensures protection of the victims of armed conflicts on all sides and encourages centralised control of the use of military force, the next question then is: why conflate the two areas of law? Why has the separation been the subject of continued challenge? And why is it so hard to come to an agreement? Weiler and Deshman refer to "those who would, in this or that circumstance, conflate the two [areas of law] or at least link them"[134] as conflationists. There are two manners in which the *jus ad bellum* may influence the *jus in bello*: by changing its mode of application or as a relevant source of interpretation.[135] From a separationist perspective, the application of *jus in bello* should be determined on the basis of the actual situation on the ground, and not whether a party's presence in an area is legitimate.[136] Although the argument has been made that forces operating under a UN Mandate do not become party to a conflict, such as by certain European NATO members participating in the UN authorised air strikes on Bosnian Serb artillery positions

133 Corn, 'Public Authority to Use Force in Military Operations' (n 1) p. 27. See further Section 8.2.10 for a discussion of the ability of military orders to limit the soldiers' ability to rely on self-defence, the only legal basis that enables them to use force independently.

134 Weiler and Deshman, 'Far Be It from Thee to Slay the Righteous with the Wicked' (n 112) p. 27.

135 Sassoli, 'Jus ad Bellum and Jus in Bello' (n 125) pp. 248–249.

136 ibid, p. 248. See also Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission – Partial Award: Central Front – Ethiopia's Claim 2, 28 April 2004, *Reports of International Arbitral Awards*, Vol XXVI, pp. 155–194, paras. 27–31 and 78.

during 1994–1995,[137] this view is fortunately uncommon. The main issue is therefore whether the *jus ad bellum* may influence the interpretation of *jus in bello*. For instance, should the military advantage gained from an attack be assessed on the basis of tactical or operational considerations only, or are strategic considerations also relevant?[138]

Under the *jus in bello*, both parties have to comply with the same rules, in all circumstances. This means that there is no requirement of reciprocity; a party to the conflict is still bound by the rules even if the other party does not respect them.[139] The only way to apply the rules unequally would therefore be through the influence of *jus ad bellum*.[140] As mentioned above, one of the main challenges to separation is the view that one party is entitled to use of force in the *ad bellum* context, and therefore should be entitled to more rights under the *jus in bello*, and hence be relieved of some of the *jus in bello* obligations. Such arguments have previously been made in the context of just war theory, and appear to have been revived in the relation to UN mandated operations with a humanitarian focus, and the fight against international terrorism.[141]

One of the ultimate questions in the debate is whether all parties to a conflict deserve and are entitled to equal rights, or whether some are more entitled than others due to the perceived responsibility for the armed conflict. For instance, Terry Gill argues that "it is fair to say that the greater the scale of violation of the *ius ad bellum* by one side, the more latitude the *ius ad bellum* will give the 'defending side' to lawfully employ force to overcome the unlawful use of force *within* the scope and confines of IHL/LOAC, including relating to targeting. In other words, the larger the scale of an unlawful attack is, the

137 For a brief discussion of this example, see Sassoli, 'Jus ad Bellum and Jus in Bello', ibid, p. 260.

138 For an example of the conflationist approach, see the U.S. DoD, *Law of War Manual* (n 94) p. 57: "in assessing the military advantage of attacking an object, one may consider the entire war strategy rather than only the potential tactical gains from attacking that object". See also pp. 215–216: "'military advantage' is not restricted to immediate tactical gains, but may be assessed in the full context of the war strategy" (footnote omitted). This issue is also raised in Section 5.5.

139 ICRC, *GC I Commentary* (n 4) commentary to Common Article 1, para 188.

140 Sassoli, 'Jus ad Bellum and Jus in Bello' (n 125) p. 247.

141 Kenneth Watkin, *Warriors Without Rights?: Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy* (Program on Humanitarian Policy and Conflict Research Occasional Paper Series, 2005) Volume 2, pp. 12–16, and Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance', 42 *New York University Journal of International Law and Policy* 641 (2009–2010), pp. 667–674.

greater the scope of targeting military objectives under IHL/LOAC will be".[142] However, it is unclear how exactly the 'defending side' may gain a greater scope of targeting without violating the *jus in bello*.

As explained above, one of the challenges stressed by separationists has been the inability to determine which party to the conflict is legitimately using force. This is particularly the case in situations where one or both sides are claiming to act in self-defence. However, when the use of force is authorised by the UN Security Council, it is generally accepted that it is legitimate and hence moral, especially when the purpose of the mandate is to protect civilians. While it is no longer debated whether UN forces must comply with the *jus in bello*,[143] it has been argued that State practice is to relax the *jus in bello* standards in light of a *jus ad bellum* justification of the operation. For instance, Judith Gardam argues that in relation to the 1990–1991 Gulf war that "[i]n the assessment of proportionality, civilians, and to a lesser extent combatants, of the aggressor state were accorded less weight in the balancing process than combatants of the 'just side'".[144] Similarly, Weiler and Deshman argue that the justness of NATO's cause in the 1999 Kosovo intervention[145] affected the *jus in bello* expectations. They argue that the decision to execute a bombing campaign from a minimum height of 15,000 feet to avoid risk to their own forces could only be acceptable when taking the purpose of the intervention into account.[146] At the same time, the operation was also criticised for exactly the same reasons: if the purpose is humanitarian, how can it be justified that the bombs were dropped at such high altitude, when this meant increased risk of civilian casualties? Similar criticisms were voiced in the context of the NATO bombing campaign in Libya.

In other words, it is possible to argue both that the mandate should lessen some of the *jus in bello* obligations, and that it should have a limiting effect on the rights and possibilities provided by the *jus in bello*. Ian Henderson, for

142 Terry Gill, 'Some Considerations Concerning the Role of the *Ius as Bellum* in Targeting', Chapter 5 in Paul AL Ducheine, Michael N. Schmitt, and Frans Osinga, eds., *Targeting: The Challenges of Modern Warfare* (Asser Press, 2016) pp. 104–105.

143 UN, Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, 38 *ILM* 1656 (1999).

144 Judith Gardam, 'Proportionality and Force in International Law, 87 *American Journal of International Law* 391 (1993), p. 393.

145 The Kosovo campaign may be perceived as rare example of humanitarian intervention, but it also gained the support of the UN Security Council and was eventually authorised by UN S.C. Res. 1244 (Kosovo) (10 June 1999) UN Doc S/RES/1244

146 Weiler and Deshman, 'Far Be It from Thee to Slay the Righteous with the Wicked' (n 112) p. 44.

instance, proposes that "the scope of the mandate will affect what is a military advantage that may lawfully be sought from any particular attack",[147] a stance that has been criticised for imposing constraints on UN mandated forces that are "not required by the applicable law".[148] The existence of a UN mandate is therefore clearly posing a particular challenge to the relationship between the *jus ad bellum* and *jus in bello*, and will be further addressed in the next subsection.

Another challenge to the separation is the ongoing fight against international terrorism. As Sassoli points out, the prohibition on terrorism makes it clear that the terrorists are definitely on the 'wrong' side, which places States trying to defeat them on the 'right' side.[149] In fact, terrorism may as easily be viewed as criminal activity rather than war. The challenge is that law enforcement on another State's territory without its consent is a violation of the UN Charter. On the other hand, as the case of Syria illustrates, it could be possible to use force against a non-State actor in self-defence if the State acting in self-defence argues that there has been an armed attack and the local Government consents to force being used against the non-State actor or is unwilling or unable to prevent the threat.[150] The pursuing armed conflict would be regulated by the law of armed conflict, and the State will have recourse to use force against the 'terrorists'.

However, this does not only give rise to opportunities, but also obligations. Although the terrorists become lawful targets, they also gain the protections offered by the *jus in bello*, especially under Common Article 3 and also the customary law application of provisions such as AP I Article 75.[151] Those who perceive this as inappropriate and incorrect have instead argued that the 'terrorists' should be viewed as 'unlawful combatants', meaning that they are lawful targets at all times but have no special rights.[152] The argument goes that they should not be using force in the first place, and their participation in the

147 Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I* (Martinus Nijhoff Publishers, Leiden/Boston, 2009) p. 154. See also Michael Bothe, 'The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY', 12(3) *European Journal of International Law* 531 (2001), at p. 535.

148 William H. Boothby, *The Law of Targeting* (Oxford University Press, Oxford, 2012) p. 527.

149 Sassoli, 'Jus ad Bellum and Jus in Bello' (n 125) p. 261.

150 See e.g. UNSC, 'Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council', U.N. Doc. S/2016/513 (3 June 2016). See also references in Chapter 6, note 101.

151 See e.g. *ICRC CIL Study* (n 11) Rule 99.

152 On the distinction between lawful and unlawful combatants, see also Section 5.2.

conflict is therefore deemed unlawful. What the appropriate approach should be is not important here; the point is that the *jus in bello* and *jus ad bellum* is clearly conflated in the debate on the so-called 'war on terror'.[153]

Further examples of conflation may be found in both treaties and decisions by international courts.[154] For instance, AP I Article 1(4) declares that conflict which would otherwise be non-international should be treated as if they were IACs, thereby providing the soldiers with the status as lawful combatants, if they are fighting against colonial domination, alien occupation or racist regimes. The classification of the conflict is not merely based on the factual situation but also the justification for the conflict, and was even at the time criticised as being an impermissible introduction of *jus ad bellum* into *jus in bello*.[155] Similarly, Article 44(3) reduces the requirement for forces to distinguish themselves from civilians if "the nature of the hostilities" makes it practically impossible to continue fighting. This will for instance be the case for soldiers fighting an occupation of their territory. The use of force in response to alien occupation is permitted under the *jus ad bellum* concept of self-defence, and the *jus in bello* was therefore adapted to make it possible.[156]

Maintaining the distinction has also proved to be difficult for the International Court of Justice. In its *Nuclear Weapons Advisory Opinion*, the ICJ stressed the importance of separation,[157] but still appear to have confused the two areas of law. Having concluded that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law" the Court goes on to state that it nonetheless was unable to "conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".[158] This has been interpreted to mean that the use of a weapon that is unlawful under the *jus in bello* would still be lawful if the *jus ad bellum* cause would justify it (*i.e. in extremis*). Alternatively, the text could be interpreted to mean that although nuclear weapons are generally prohibited by the *jus in bello*, there are circumstances where it would be permitted,

153 See also Milanovic, 'A Non-Response to Weiler and Deshman' (n 114) p. 65.
154 See generally Kritsiotis, 'War and Armed Conflict: Parameters' (n 6) pp. 12–13.
155 Weiler and Deshman, 'Far Be It from Thee to Slay the Righteous with the Wicked' (n 112) p. 40, and Sassoli, 'Jus ad Bellum and Jus in Bello' (n 125) p. 255.
156 Sassoli, 'Jus ad Bellum and Jus in Bello', ibid, p. 253.
157 See e.g. *ICJ Nuclear Weapons Advisory Opinion* (n 13) para 39.
158 ibid, para. 105(2)(e).

but only in extreme situations of self-defence.[159] Either way, the Court departs from the traditional approach of strict separation.

The Court also appears to conflate the *jus ad bellum* with the *jus in bello* in the *Palestinian Wall Opinion* and the *Oil Platforms case*. In the former, it concluded that the wall violated the *jus in bello* but that *jus ad bellum* circumstances, such as self-defence, potentially could justify the *jus in bello* violations.[160] In the *Oil Platforms case*, the Court relied on *jus in bello* requirements of legitimate military targets when assessing the legality of use of force in State self-defence.[161] By contrast, in the *Armed Activities case,* the *jus ad bellum* and *jus in bello* is considered separately.[162] As a result, rather than providing guidance on how to deal with the renewed challenges to separation, the ICJ has instead added to the confusion.

4.3.5 *The Impact of the* Jus ad Bellum *on the* Jus in Bello*: a Balancing Act*

Those in favour of the separationist perspective appear to consider the approach to be more objective, meaning further removed from ('inappropriate') political and moral arguments such as 'rightful' or 'just' use of force. It ensures that States cannot depart from applicable legal obligations on the basis that the opposing side is undeserving of the rights they would otherwise be bestowed. Because the application of the *jus ad bellum* is particularly political in nature, and there is no court available to determine the legality of any conflict at its beginning, allowing the scope and application of the *jus in bello* to depend on the *jus ad bellum* would render it ineffective.

The challenge is that the application of *jus in bello* is also inherently political. As pointed out above, certain provisions appear to permit the *jus ad bellum* to influence the specific *jus in bello* rules. For instance, AP I Article 1(4) illustrates that the classification of conflicts is not completely removed from

159 For a useful overview of the debate, see Dinstein, *War, Aggression and Self-Defence* (n 22) pp. 172–173 and Weiler and Deshman, 'Far Be It from Thee to Slay the Righteous with the Wicked' (n 112) pp. 45–49.

160 *ICJ Palestinian Wall Opinion* (n 43) para 139, discussed in Sassoli, 'Jus ad Bellum and Jus in Bello' (n 125) p. 251.

161 *Case Concerning Oil Platforms* (Iran v United States), *I.C.J. Reports* [2003] 161, pp. 186–7, discussed in Dinstein, *War, Aggression and Self-Defence* (n 22) p. 173. See also James A. Green, 'The *Oil Platforms* case: An Error in Judgement?', 9 *Journal of Conflict and Security Law* 357 (2004), pp. 380–381, and James A. Green and Christopher P.M. Waters, 'Military Targeting in the Context of Self-defence Targeting', 84 *Nordic Journal of International Law* 3 (2015).

162 *ICJ Armed Activities Case* (n 43) paras. 153 and 165 (*jus ad bellum*) and paras. 206–208, 211, and 219 (*jus in bello*).

political arguments, even if the test is supposed to be factual and hence apolitical. Furthermore, the *jus in bello* rules on who are entitled to participate in hostilities, and who are entitled to POW-status upon capture, is influenced by the *jus ad bellum* idea that only States are entitled to wage war.[163] Perhaps more importantly, it should never be forgotten that war is merely an instrument of politics; wars should not be fought for the sake of the fighting.[164] The military operation and the application of the *jus in bello* cannot be undertaken in complete isolation of the political circumstances, nor from the legal framework regulating the alternatives for dealing with the political or social problem, namely the *jus ad bellum*. The question is how the competing interests of separation and conflation are best balanced.

According to Martti Koskenniemi, international law must be both normative and concrete. By this he means that "it binds a State regardless of that State's behaviour, will or interest but that its content can nevertheless be verified by reference to actual State behaviour, will or interest".[165] It must avoid being so dependent on State policy that it is perceived as infinitely flexible and hence apologetic, and at the same time not be so moralistic that it becomes utopian.[166] The conflationist approach may be criticised as being apologetic, letting the States define the law in accordance with their own political preferences. On the other hand, maintaining a strict separation between war and politics is perhaps somewhat utopian, appearing almost naturalistic or religious. As shown above, although separation is perhaps argued, both States and the ICJ struggle to maintain this separation at all times, and international law unfortunately does not provide a clear answer.[167] As a result, anyone dealing with these issues must decide how the competing interests are best balanced in relation to their work, and justify the approach taken.

The debate on the relationship between the *jus ad bellum* and *jus in bello* may also be viewed as reflecting the longstanding debate of positivism and naturalism. While positivism views law as a social construct that can be identified and described in purely factual and empirical terms, natural law views law as being influenced by "universally valid principles governing the life of man in

163 U.S. DoD, *Law of War Manual* (n 94) pp. 40–41 and 88.

164 Carl von Clausewitz, *On War* (Michael Howard and Peter Paret (eds/trs), Princeton University Press, Princeton NJ, 1984) p. 607.

165 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006) p. 17.

166 ibid, pp. 23–24.

167 In fact, Koskenniemi argues that "international law is singularly useless as a means for justifying or criticizing international behaviour". ibid, p. 67.

society, principles that have not been created by man but are discovered, *true* principles, binding on everyone, including those who are unable or unwilling to recognize their existence".[168] If the justification for including *jus ad bellum* considerations in the interpretation and application of the *jus in bello* is based on extra-legal considerations such as morality, justness and legitimacy, then this conflation is likely to be a reflection of the general approach taken to the definition of law, namely that it includes natural law considerations.

This debate between legal positivism and natural law, or even what Koskenniemi calls the balancing of apology and utopia, is of course not unique to the issue at hand. However, the inherent nature of war makes it particularly difficult to maintain a strict separation between the *lex lata* and moral and political considerations. As Marko Milanovic explains, the *jus in bello* suffers from an "internal moral coherence (being a body of law that legitimizes the routine killing of people, albeit in a nice way)". He goes on to state that "[t]here is (…) no other part of international law that is so openly exposed to the apology/utopia dynamic, that is so existentially concerned with the need to reconcile normativity with practicality, that is so obsessed with appearing objective and apolitical when trying to regulate war, that most political of human endeavours".[169] This is perhaps why many writers surrender to the temptation to conflate the two areas of law.

The reality is that both political and moral considerations will affect decisions during armed conflict. However, the question from a legal perspective is what military commanders and forces are legally required to take into account. I would argue that the *jus in bello* applies in full, regardless of the legal basis or justification for the use of force under the *jus ad bellum.*[170] There is no basis in law for conflating the two areas of law, and the arguments in favour of maintaining the distinction outweigh those in favour of conflation. The *jus ad bellum* prohibition on the use of force and the corresponding exceptions were already in existence when the Geneva Conventions and its Additional Protocols were drafted, and the decision was still made to emphasise the importance of separation. The question of the impact of *jus ad bellum* has already been considered when developing the *jus in bello* rules, and should therefore not be used as a reason to change those rules.

168 Alf Ross, 'Validity and the Conflict between Positivism and Natural law', in Stanley L. Paulson and Bonnie Litschewski Paulson, *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press, Oxford, 1998) pp. 147–163, at p. 151.

169 Milanovic, 'A Non-Response to Weiler and Deshman' (n 114) pp. 64–65 (footnote omitted).

170 See also U.S. DoD, *Law of War Manual* (n 94) p. 86.

At the same time, the *jus in bello* cannot be interpreted or applied in complete isolation of other areas of law that apply simultaneously, such as the *jus ad bellum* obligations both towards the opposing side and neutral States. The question is what the practical implications are of applying both legal regimes. Should the *jus ad bellum* considerations of necessity and proportionality be interpreted into the *jus in bello* rules, thereby affecting their application? Or are they separate rules applied as an additional layer to the conduct of hostilities regulated by the *jus in bello*?

There is one area in particular where commentators struggle to uphold the important separation between the *jus ad bellum* and the *jus in bello*. *Jus ad bellum* arguments tend to be used in interpreting the *jus in bello* through the concept of 'military necessity'. 'Military necessity' dictates that the force used during armed conflict must be necessary to achieve the State's legitimate military goals.[171] These goals are developed on the basis of and in furtherance of the political goals of that State, which again will be influenced by the (*jus ad bellum*) justification or legal basis for the operation.[172] Despite stressing the importance of separation of these branches of law, Greenwood, for instance, makes the argument that military necessity must be interpreted in light of the applicable *jus ad bellum*.[173] In his view, "[t]he changes in the *ius ad bellum* brought about by the UN Charter have added a new dimension to this principle of military necessity".[174] However, as explained above, the *jus in bello* is intended to and needs to be apolitical. Although the political and military goals may sometimes overlap, and the latter should be informed by the former, they are two separate considerations.[175] As Clausewitz explained: "Policy, of

171 St. Petersburg Declaration (Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight) [29 November / 11 December 1868] in Schindler and Toman, *The Laws of Armed Conflicts* (n 109) pp.102ff. The basic LOAC concepts are further examined in Section 5.1.1.

172 Sigrid Redse Johansen, *On military necessity: And the commander's assessment of military necessity under the international law of armed conflict during conduct of hostilities* (PhD thesis, University of Oslo, 2017, copy on file with the author, forthcoming CUP publication) p. 27.

173 See e.g. Christopher Greenwood, 'Self-Defence and the Conduct of International Armed Conflict', in Yoram Dinstein and Mala Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989) p. 286 vs. 275.

174 Christopher Greenwood, 'Historical Development and Legal Basis', Chapter 1 in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford University Press, Oxford) 2009, p. 35 (footnote omitted). Note that the text is reprinted in the 3rd edition (2013, at p. 35), where the author of the updated chapter is Mary Ellen O'Connell.

175 See also Johansen, *On military necessity* (n 172) p. 27.

course, will not extend its influence to operational details. (…) But they [political considerations] are the more influential in the planning of war, of the campaign and often even of the battle".[176] If the political purpose behind the use of armed force could influence what is military necessity for the sake of regulating means and methods of warfare, it would undermine the abovementioned underlying principle of equal application of the *jus in bello*.

The better view, therefore, is that rather than changing the rules of *jus in bello*, the legal basis for the use of force found in *jus ad bellum*, such as in the form of a UN Security Council mandate, imposes additional obligations on the State, and that these obligations continue to apply after the commencement of hostilities. Although the UN Security Council in theory may impose obligations that prevail over other international law,[177] in practice, the resolutions frequently call on all parties "to comply with their obligations under international humanitarian and human rights law".[178] The *jus ad bellum* informs the application of the *jus in bello* by providing overall limitations on how the *jus in bello* may be applied, such as by limiting the geographical area of operations or types of lawful targets.[179] Within these parameters set by the *jus ad bellum*, the *jus in bello* defines the conditions for lawful use of force. The use of force that military forces are authorised to use during armed conflict, through the ROE for example, must therefore be based on the *jus in bello* (or other applicable laws). However, the development of the ROE and other mission-specific plans, orders and directives must also reflect any *jus ad bellum* limitations. This also means that Commanders in particular receive clear guidance on how the political and strategic levels interpret the legal framework for the operation and how this is expected to impact the operational and tactical application of force.

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176 Clausewitz, *On war* (n 164) p. 606. Later in the chapter (at p. 610), he went on to emphasise that: "war is an instrument of policy. It must necessarily bear the character of policy and measure by its standards. The conduct of war, in its great outlines, is therefore policy itself, which takes up the sword in place of the pen, but does not on that account cease to think according to its own laws".

177 UN Charter (n 21) Article 103.

178 UN S.C. Res 2011 (Libya), U.N. Doc. S/RES/2011 [12 Oct. 2011], p. 4. See also U.S DoD, *Law of War Manual* (n 94) p. 88, and Keiichiro Okimoto, 'The Relationship Between *jus ad bellum* and *jus in bello*', Chapter 56 in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law,* Oxford University Press, Oxford, 2015, pp. 1218–1223.

179 For a more detailed discussion of how jus ad bellum may impact the jus in bello, see Gill, 'Some Considerations Concerning the Role of the Ius as Bellum in Targeting' (n 142), and Greenwood, 'Self-Defence and the Conduct of International Armed Conflict' (n 173) pp. 273–288.

Although the practical consequences of this separationist approach may be similar to those resulting from integrating *jus ad bellum* considerations into the interpretation of *jus in bello* rules, they differ in two particularly important respects. First, it influences the question of responsibility for wrongful acts; the consequences of violating the two respective legal regimes differ. Violations of the *jus in bello* may amount to a war crime if they are sufficiently serious, and both the person carrying out the war crime and their superiors may be held accountable. In addition, the State in question is responsible for the acts by persons forming part of its armed forces.[180] By contrast, the use of force in contravention of the *jus ad bellum* primarily gives rise to State responsibility. Even though acts of State are in fact acts of persons,[181] individual responsibility for a crime of aggression is, at least in the case of the Rome Statute, limited to: "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations".[182] This does not, therefore, include the members of the armed forces in general.

Maintaining separation is therefore a way to ensure that the responsibility for any *jus ad bellum* violations is appropriately placed with the State and those responsible for the decision to act in contravention with the UN Charter, rather than the individual soldiers who were never in the position to influence that decision. In order to ensure respect for the *jus ad bellum* as well as the *jus in bello*, States should, as mentioned above, provide clear guidance to their military forces on how it views its *jus ad bellum* obligations. In addition, they should integrate such guidance into military orders to ensure compliance. If military forces fail to comply with those orders, it could be a national disciplinary or criminal matter for the person or persons involved. The violation of the *jus ad bellum* would remain the responsibility of the State. If the State's interpretation of its obligations is found by an international court to be erroneous, it would also be the State rather than the military forces acting in compliance

180 AP I (n 118) Article 91.

181 See e.g. UN ILC, 'Draft Code of Crimes against the Peace and Security of Mankind', Report of the International Law Commission on the work of its 48th Session 6 May – 26 June 1996, *Yearbook of the International Law Commission* 1996, Vol II, Part Two, p. 17, Commentary to Article 16, p. 43.

182 Rome Statute of the International Criminal Court [hereinafter: *Rome Statute*], opened for signature 17 July 1998, 2187 *UNTS* 3 (entered into force 1 July 2002), Article 8 *bis* (1) (inserted 2010).

with the orders that would be responsible under international law for the *jus ad bellum* violation.

The second practical distinction between the separationist and conflationist approaches, and the one most important to this book, is its impact on the question of the legal basis for the use of force by military forces participating in an armed conflict. As alluded to in the introduction, if the two are conflated, the *jus ad bellum* is perceived as the legal basis for the use of force as long as the *jus ad bellum* is relied upon, including during armed conflicts. The result of the conflationist approach is therefore to view the *jus in bello* not as an independent legal regime determining the legality of the use of force, but merely as rules setting out how the force justified by the *jus ad bellum* may be carried out. By contrast, when the separationist approach is applied, as is done in this book (for the many reasons set out above), the legal authority for the use of force during an armed conflict must be found elsewhere. As will be further explained, the legality of the use of force will in most cases be premised on the application of and adherence to the *jus in bello,* although in certain cases where the *jus in bello* does not provide the necessary permissions, personal self-defence will apply.

4.3.6 *Concluding Remarks*

As the above discussion indicates, the relationship between the *jus ad bellum* and the *jus in bello* is complicated. The principle of equal application demands that their separation is maintained, as do the question of responsibility. Conflation would shift the responsibility for *jus ad bellum* compliance from the State to the soldiers who were never involved in the decision to 'go to war'. It would mean that the legality of the use of force of individual soldiers would be affected by the politics of the *jus ad bellum* rather than adherence to the *jus in bello.* If military forces are instructed that in a post war trial, those perceived to have been on the wrong side will be considered to have acted unlawfully regardless of their compliance with LOAC, it will not only give the soldiers on the losing side no incentive to the respect that law, it will arguably also discourage their surrender, thereby prolonging the conflict.

At the same time, it is difficult to contend that the *jus ad bellum* ceases to be relevant once hostilities commence.[183] After all, the *jus ad bellum* and in particular UN Security Council resolutions provide the reasons for States to use

183 See also Christopher Greenwood, 'The relationship between the *ius ad bellum* and *ius in bello*', *Review of International Studies,* Vol. 9, No. 4 (Oct., 1983), pp. 221–222.

force in the first place, and the conditions for acting in contravention of the UN Charter cannot be ignored once the hostilities have begun. However, rather than affecting the application of the *jus in bello,* the *jus ad bellum* should be viewed as an additional layer of obligations, imposed on the State rather than on the individual members of the armed forces.

The implications for this book is that the use of force authorised by NATO ROE for operations involving participation in an armed conflict must be permitted by one of the recognised exceptions to the prohibition on arbitrary deprivation of life. The *jus ad bellum* cannot provide further authorities for the conduct of hostilities, but may entail limitations, in which case the ROE would also need to reflect those limitations.

4.4 When Does What Apply? On *Lex Specialis*

When more than one area of law can potentially be applied to one situation, it becomes necessary to determine how the legal regimes interact. With respect to the use of force against individuals during armed conflict and the prohibition on arbitrary deprivation of life, it is clear that LOAC applies. It is also increasingly recognised that human rights continue to apply as well.[184] Applying IHRL and the right of self-defence to actions taken by military forces during an armed conflict poses challenges due to their fundamentally different nature from LOAC.[185] While human rights are intended to prevent States from abusing its own citizens, the focus in LOAC is on the responsibility of individuals, and it is intended to protect civilians and reduce suffering on the battlefield.[186]

As mentioned above, the relationship between LOAC and other legal regimes have been solved both by courts and experts by application of the rule *lex specialis derogat legi generali*.[187] However, the concept of *lex specialis* has been put under increasing pressure, particularly when the concept is being

184 See also Murray *et al.*, *Practitioners' Guide* (n 5) p. 88.

185 The relationship between LOAC and State self-defence, or the *jus in bello* and *jus ad bellum* in general, is dealt with in Section 4.3, while the relationship in practice is considered in Section 6.24.

186 See also *Prosecutor v. Kunarac et al.* (Judgement), Case no. IT-96-23-T & IT-96-23/1-T, ICTY, Trial Chamber, 22 February 2001, para. 470, and Gaggioli, *The Use of Force in Armed Conflict* (n 58) pp. 6–8.

187 The *lex specialis* status of LOAC is for instance confirmed in *Ex Parte Quirin*, 371 U.S. 1 (1942); *ICJ Palestinian Wall Opinion* (n 43) para 106; *ICJ Nuclear Weapons Advisory Opinion* (n 13) para. 25.

used as an argument for applying one legal regime to the complete exclusion of others.[188]

It should first be emphasised that much of LOAC entails the same protection of human rights as IHRL, making their coexistence unproblematic.[189] For instance, both LOAC and IHRL prohibits ill-treatment.[190] In fact, in these cases LOAC arguably provides better protection, since the rules are more detailed and tailored to the situation and are not subject to derogation.[191] In other areas, the rules are inherently opposed. While human rights purport to protect all lives, LOAC accepts the fact that both those participating in the armed conflict and innocent civilians will be harmed. As mentioned with regard to the right to life, under IHRL, "the life of the individual posing an imminent threat himself is to be taken into account, in contradistinction to IHL".[192] Attempts must therefore be made to avoid harming that person. As a result, "under IHRL [and thus SD], the use of deadly force in the sense of an intentional, premeditated, and deliberate killing by state actors cannot be legal, because, unlike in armed conflict, it is never permissible for killing to be the sole objective of an operation. IHRL simply does not tolerate 'shoot-to-kill' orders".[193] As Dinstein explains, "[t]he very conduct of hostilities is completely alien to the underlying

188 See in particular Marko Milanovic, 'The Lost Origins of Lex Specialis', in Jens Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* (ASIL Studies in International Legal Theory, Cambridge University Press, Cambridge, 2016) pp. 78–117. See further Dinstein, *Conduct of Hostilities* (n 39) pp. 27–45; W. Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect', 42 *New York University Journal of International Law and Policy* 769 (2009–2010), pp. 797–799, especially footnote 86 which provides detailed overview of sources; and Gaggioli, *The Use of Force in Armed Conflict* (n 58).

189 Murray *et al.*, *Practitioners' Guide* (n 5) pp. 101–102.

190 See for instance GC I-IV CA 3, GC I Article 12, GC II Article 12, GC III Article 87, and GC IV Article 32 (n 109); AP I (n 118) Article 75(2); ICCPR (n 23) Article 7, and ECHR (n 23) Article 3.

191 Dinstein, Conduct of Hostilities (n 39) p. 34. See also ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law [hereinafter ICRC Interpretive Guidance] (May 2009, prepared by Nils Melzer, available at https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, last accessed 24.04.2019) p. 38, where it is argued that in cases of doubt whether LOAC or law enforcement/self-defence apply, it is "particularly important in this context to observe the general rules of IHL on precautions and presumptions in situations of doubt".

192 Gaggioli, *The Use of Force in Armed Conflict* (n 58) p. 8.

193 Corn, 'Public Authority to Use Force in Military Operations' (n 1) p. 42, citing Ben Emmerson (Special rapporteur on the Promotion of Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Report of the Special Rapporteur on the Promotion of Protection of Human Rights and Fundamental Freedoms While Countering Terrorism,* §60, U.N. Doc. A/68/389 [September 18, 2013] (p.17), and Kenneth Watkin,

values of human rights law".[194] It is in these cases the *lex specialis* rule will be relevant.[195]

Although it may be tempting to draw the distinction between peacetime and armed conflict rules, this is an oversimplification. It is not a matter of 'either/or'. In the *Nuclear Weapons Advisory Opinion*, the ICJ explained that "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law".[196] Because both areas of law apply, it is necessary to determine which is the primary legal regime and which is secondary. This determination is done on the basis of several considerations.[197] Assuming there is an armed conflict, are the military forces involved in conduct of hostilities or law enforcement? Does LOAC provide explicit rules designed for the situation?[198] Are the criteria for human rights application met? This is for example more likely for occupation and NIACs within a State than IACs, and more likely for detention than for instance combat engagement.[199]

According to Murray *et al.*, "the case law appears to have moved beyond a strict application of the principle of *lex specialis* and towards a 'complimentary' or 'integrated' approach, where although one body of law may provide the primary framework in light of its appropriateness to the regulation of the situation at hand, both bodies of law are applicable and capable of informing the overall legal framework".[200] In the context of the right to life, this

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'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflicts', 98 *Am.J.Int.L.* 1 (2004) (p. 18).

194 Dinstein, *Conduct of Hostilities* (n 39) p. 32.

195 As explained in the commentary to Article 55 of the Draft Articles on State Responsibility, "For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other". UN ILC, 'Draft Articles on State Responsibility with Commentaries' (n 122) p. 140, Article 55, Commentary para. 4.

196 *ICJ Nuclear Weapons Advisory Opinion* (n 13) para. 106.

197 See also Murray *et al.*, *Practitioners' Guide* (n 5) p. 89.

198 See e.g. *Hassan v. the UK* (n 39) para. 104, stating that "It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 [of ECHR (n 23)] could be interpreted as permitting the exercise of such broad powers". See also Jann K. Kleffner, 'Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of *jus in bello* Proportionality as We Know It?', 45(1) *Israel Law Review*, 35 (2012), p. 48, where he explains that In "situations that, while occurring during an armed conflict, closely resemble those for which human rights standards have been developed with a greater degree of specificity", these human rights standards are argued to be applicable.

199 See also Sections 4.2.1 and 4.2.3.

200 Murray *et al.*, *Practitioners' Guide* (n 5) p. 88, fn. 41.

complimentary approach is particularly clear. For the purpose of the ECHR, the right to life is one of the few areas where the relationship with LOAC is expressly considered; deaths resulting from lawful acts of war are recognised exceptions from the non-derogable right to life.[201] Similarly, according to the ICJ and HRC, the prohibition on arbitrary deprivation of life set out in ICCPR Article 6(1) must be interpreted not to be violated when the use of force is in accordance with LOAC.[202]

On a more general note, the wariness by the ICTY Trial Chamber "not to embrace too quickly and too easily concepts and notions developed in a different legal context" should be recalled.[203] The Trial Chamber goes on to explain that "notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law".[204] Furthermore, whichever approach is taken to this complex legal question, it must be possible to apply in practice. This point is emphasised by Hampson, who explains that "[t]he solution to the *lex specialis* problem in practice has to be capable of being applied by those involved at the time they act or take decisions. It cannot be determined after the event, even if that is when it is enforced".[205] The approach taken to the relationship between IHL and IHRL should not be so context-dependent that it becomes impossible to provide military forces clear guidance on what is expected of them.

The effect of applying the prohibition on arbitrary deprivation of life to military operations is twofold. First, because military forces are State agents, it limits their ability to use force. Second, it affects the relationship between the State and the members of its own military forces.[206] The limits on the use of force by military forces will primarily be LOAC, but where LOAC does not provide explicit rules for the use of force against a person, the prohibition requires that force may only be used to the extent there is an alternative legal basis. Importantly, where LOAC does provide the necessary authorities for using forces, it will be the primary legal framework for military forces to apply.[207]

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201 ECHR (n 23) Article 15(2).

202 *ICJ Nuclear Weapons Advisory Opinion* (n 13) para. 25, and UN HRC, *Draft General Comment 36* (n 10) para. 68.

203 See also *Prosecutor v. Kunarac et al.* (Judgement) (n 186) para. 471.

204 See also ibid.

205 Francoise J. Hampson, 'The relationship between humanitarian law and human rights law from the perspective of a human rights treaty body', 90 *International Review of the Red Cross* 871 (September 2008), p. 562.

206 See further Sections 4.2.1 and 4.2.2 above.

207 There are different views on whether LOAC provides prohibitions or authorisations on the use of force, or a combination thereof. The view taken here is that LOAC consists of both permissions and restrictions that must be complied with. See also Section 5.1.1.

The human rights responsibilities towards the State's own military forces means that military forces cannot be denied the ability to defend their lives. However, as will be discussed in Chapter 8, although self-defence is applicable at all times, its application is very contextual, and the circumstances military forces find themselves in during armed conflict often differ dramatically from those arising outside of armed conflicts. In particular, the application of self-defence presumes that the response is otherwise unlawful, while the use of force in accordance with LOAC is considered lawful. As a result, the scope for using force in self-defence will be different than during peacetime or by ordinary civilians,[208] but the primary legal framework (LOAC) will in most cases provide the necessary authorities to use force. Unlike human rights, however, LOAC does not provide any protections for military forces vis-a-vis their own State. IHRL and particularly the prohibition on arbitrary deprivation of life with the resulting right to use force in self-defence will therefore remain important to military forces, regardless of the scope for using force under LOAC.

In addition to the situations where LOAC and IHRL either overlap or differ, there are areas where LOAC is silent on an issue that IHRL regulates, such as the freedom of expression.[209] In such cases, as Murray *et al.* explains, it must be borne in mind that "the gap in the law of armed conflict may be a deliberate omission, reflective of the reality of armed conflict. It cannot be assumed that international human rights will apply unaltered."[210] However, this is of limited relevance for this book and its focus on the use of force against individuals.

Because self-defence is both an aspect of IHRL and criminal law, its relationship with LOAC is more complicated than for human rights in general. The application of self-defence presumes that the response is otherwise unlawful and therefore in need of a criminal law defence. As a result, the relationship between personal self-defence and LOAC may also be affected by how LOAC is implemented in domestic law. As will be explained in Section 5.1.2, the combatant privilege is commonly regarded as an aspect of the authorisation given to military forces to use force on behalf of the State, and will as such amount to an exception to the criminal law prohibitions when the acts concerned comply

208 It is important to distinguish this criminal law concept of self-defence with the right and ability of military forces to defend themselves during an armed conflict. Because LOAC regulates the use of force both in offence and defence, the latter will in many cases be regulated by LOAC. However, as will be explained in Chapter 8, the right of military forces to defend themselves in any situation is commonly referred to as self-defence. This may cause confusion when attempts are made to clarify the true application of the criminal law concept to military operations involving participation in armed conflict.

209 Murray *et al.*, *Practitioners' Guide* (n 5) p. 102.

210 ibid.

with LOAC. If a situation arises where the reasonableness of the use of force is questioned, such as when it was considered disproportionate or directed at the wrong (i.e. not lawful) target, compliance with LOAC may be applied as a response or as a form of defence. Depending on the facts, self-defence may also be a relevant defence.[211]

4.5 Conclusion: Two Main Legal Bases for the Use of Force

As a result of the prohibition on arbitrary deprivation of life, all use of force must have a clear legal basis. In the context of military forces participating in an armed conflict, the use of force against another person should be primarily founded on the law of armed conflict, which is the *lex specialis* of armed conflict. Because members of military forces are individuals as well as State actors, self-defence may apply as an additional exception in order to protect their right to life or that of others. As will be further examined in Chapter 6, the conclusions reached regarding the relationship between the law of armed conflict and the *jus ad bellum*, including State self-defence, entail that the legal concept of self-defence most relevant will be personal self-defence.

211 See further Section 8.2.

CHAPTER 5

The Law of Armed Conflict

5.1 Introduction

5.1.1 *Fundamentals*

The law of armed conflict, which is also known as international humanitarian law or laws of war, is a set of rules specifically designed (*lex specialis*) for the conduct of hostilities.[1] In the current text, the term 'law of armed conflict' or its abbreviation LOAC will be used. As explained in Section 4.1, the application of LOAC is premised on the factual situation of belligerent hostilities and the necessities that entails.[2] Although LOAC was developed as a means to reduce suffering, it was not intended to prohibit war.[3] Instead, the rules developed are the result of "a compromise based on a balance between military necessity, on the one hand, and the requirements of humanity, on the other".[4] As Schmitt

1 The *lex specialis* concept is further examined in Section 4.4.

2 See also Section 1.3.1 where armed conflict is defined, including the distinction between IACs and NIACs.

3 See also Dino Kritsiotis, 'War and Armed Conflict: The Parameters of Eenquiry', Chapter 1 in Liivoja, Rain and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (Routledge, Milton Park, Abingdon, Oxon, 2016) pp. 9–10. For a detailed overview of the historic evolution and sources of the law concerning targeting, see for instance William H. Boothby, *The Law of Targeting* (Oxford University Press, Oxford, 2012) pp. 13–29. On the history of LOAC in general, see e.g. Frits Kalshoven, 'The History of International Humanitarian Law Treaty-Making', Chapter 2, in Rain Liivoja and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (Routledge, Milton Park, Abingdon, Oxon, 2016), and Geoffrey S. Corn *et al.*, *The Law of Armed Conflict – an Operational Approach* (Wolters Kluwer Law & Business, New York, 2012) Chapter 2.

4 Yves Sandoz, Christopher Swinarski, and Bruno Zimmermann (eds.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* [*hereinafter: AP Commentary*] (ICRC, Martinus Nijhoff Publishers, Geneva, 1987) para. 1389 and 2206. See also the St. Petersburg Declaration, which was intended to "fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity". St. Petersburg Declaration (Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight) [29 November / 11 December 1868] in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988) pp.102ff., Preamble. See further Program on Humanitarian Policy & Conflict Research at Harvard Univ. [HPCR], *Manual on International Law Applicable to Air and Missile Warfare* [hereinafter: *AMW Manual*] (2009, version 2.1 March 2010, HPCR, Harvard University) Rule 4, Commentary para. 2.

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explains, "no state likely to find itself on the battlefield would accept norms that place its military success, or its survival, at serious risk".[5]

There is some debate whether LOAC provides permissions or authorisations, prohibiting all that is not authorised, or whether it imposes prohibitions, leaving anything not prohibited as authorised.[6] While it may historically have been the case that States considered themselves to be unconstrained when waging war, with the exception of certain generally accepted prohibitions,[7] modern LOAC is no longer merely prohibitive, neither with regards to its nature nor the contents of the rules. The view that will be applied here is that LOAC provides the legal basis for the use of force during armed conflict, and that its rules are formulated both as permissions (such as military necessity) and restrictions (such as proportionality) that must be complied with in order for the acts of war to be lawful.[8] LOAC rules commonly include terms of a discretionary nature, such as proportionate, necessary and feasible. This enables military forces, and particularly Commanders, to assess how to strike the best balance between the driving force of military necessity and the limitations required by humanitarian considerations, within the parameters set out by the applicable rules.[9] As a result, LOAC is constant in what applies, but how it will apply depends on the relevant facts and how they are perceived at the time.

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5 Michael N. Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis', 1 *Harvard National Security Journal* 5 (2010), p. 6.

6 Hans Boddens Hosang, *Rules of Engagement* (PhD thesis, University of Amsterdam 2017, available at https://pure.uva.nl/ws/files/7940990/Boddens_Hosang_Thesis_complete.pdf, last accessed 24.04.2019) p. 210. See also Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I* (Martinus Nijhoff Publishers, Leiden/Boston, 2009) pp. 38–40; Kritsiotis, 'War and Armed Conflict: Parameters' (n 3) pp. 7 and 27; Jann K. Kleffner, 'Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of *jus in bello* Proportionality as We Know It?', 45(1) *Israel Law Review*, 35 (2012), p. 39; Christopher Greenwood, 'The relationship between the *ius ad bellum* and *ius in bello*', *Review of International Studies*, Vol. 9, No. 4 (Oct., 1983), p. 229; and Nils Melzer, 'Targeted Killing or Less Harmful Means? – Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity', 9 *Yearbook of International Humanitarian Law* 87 (2006), pp. 104–111.

7 See discussion of the 'Lotus principle' in Section 4.1.

8 Sigrid Redse Johansen, *On military necessity: And the commander's assessment of military necessity under the international law of armed conflict during conduct of hostilities* (PhD thesis, University of Oslo, 2017, copy on file with the author, forthcoming CUP publication) pp. 38–41.

9 ibid, p. 65. See also discussion in Sandoz et al. (eds.), AP Commentary (n 4) para. 1390, and ICTY, *Final Report to the Prosecutor by the Committee Established to review of the nato bombing campaign against the Federal Republic Yugoslavia* [hereinafter: *OTP Report*] (13 June 2000, http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf, last accessed 24.04.2019) paras. 50 and 52.

Most of the rules are centred on the concept of 'attack', which is defined to include the use of force in offence or defence.[10] There are, for example, rules on who or what may be considered a lawful target; limitations on the means and methods of attack; and regulation of the permissible consequences of attack. There are also more general rules, as in the case of the treatment of persons under control of a party to the conflict and occupation. Because the focus of the book is on the use of force against persons during an armed conflict and how this is regulated by ROE and applicable law, the LOAC rules most relevant here are those on the conduct of hostilities. More specifically, the focus will be on the rules determining who is a lawful target, what it entails to be a lawful target, and how attacks are to be carried out, including identification of lawful targets and precautions in attack. As explained in Section 3.5, the most complicated NATO use of force ROE, namely the NATO hostile act and hostile intent ROE, authorise attack on individuals or groups on the basis of their conduct, and the LOAC concept of 'direct participation in hostilities' (DPH) will therefore be examined in detail. To a large extent, the rules governing the conduct of hostilities considered here may be deemed customary international law equally applicable to IACs and NIACs, and in those cases, a distinction will not be made between the two types of conflict.[11]

LOAC is commonly summed up in a varying number of principles or rules, such as distinction, military necessity, and proportionality, and unnecessary suffering or humanity.[12] It is, however, important to note that these are the

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) [1977], printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 4) pp. 711ff, Article 49(1). See further Section 5.1.3.

11 In particular, the rules on attack, which is the focus of this Chapter, have become "nearly indistinguishable": Michael N. Schmitt, 'Targeting and International Humanitarian Law in Afghanistan', 85 *International Law Studies* 307 (2009), p. 308. See also *Prosecutor v. Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case No. IT-94-1-A, ICTY, Appeals Chamber, 2 October 1995, para. 127. For an overview of relevant customary international law, see e.g. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* [hereinafter: *ICRC CIL Study*] (Cambridge University Press, Cambridge, 2005, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul, last accessed 24.04.2019) although it should be noted that States have been critical to parts of rules proposed and also to the method of reaching the conclusion that a customary rule has been formed. On the use of *the ICRC CIL Study*, see references in Chapter 1, fn. 74.

12 There are various approaches to the basic principles of LOAC. NATO STANAG 2449, for instance, include humanity instead of unnecessary suffering, with the latter being a part of the former. NATO, *STANAG 2449: Training in the Law of Armed Conflict*, Annex F to ATrainP-2, Edition A Version 1, March 2013 (available at http://nso.nato.int/nso/zPublic/ap/ATrainP-2%20EDA%20V1%20E.pdf, last accessed 24.04.2019) pp. F-24–25.

driving forces behind the developed rules rather than additional rules, and may therefore not be used as a justification for violating LOAC rules.[13] This is especially the case with respect to military necessity.[14] Although it may be debated whether they strictly speaking are principles, in the sense that they have an independent legal impact,[15] this discussion will not be dealt with here, and the term principle will be used.

The principle of distinction[16] demands that the parties to the conflict "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".[17] This principle is easy to describe though challenging to apply in practice,[18] a challenge that lies at the heart of this book.

Humanity may, however, also be viewed as a consideration rather than a principle, see Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper and Gro Nystuen, *Searching for a 'principle of humanity' in international humanitarian law* (CUP, Cambridge, 2013). Another principle sometimes included is that of chivalry. See for instance Boothby, *The Law of Targeting* (n 3) p. 60.

13 On the principle of necessity in particular, see Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 1389; Boothby, *The Law of Targeting*, ibid, p. 58; Boddens Hosang, *Rules of Engagement* (n 6) p. 209; Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 41; and Kleffner, 'Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities' (n 6) p. 41. For an in-depth discussion on balance between humanity and military necessity, see Michael N. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' 50 *Virginia Journal of International Law* 796 (2010). See also Johansen, *On military necessity* (n 8) pp. 112–114.

14 Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 2206.

15 Kjetil Mujezinovic Larsen Camilla Guldahl Cooper and Gro Nystuen, 'Introduction by the editors: is there a 'principle of humanity' in international humanitarian law?', Chapter 1 in Larsen *et al., Searching for a 'principle of humanity' in international humanitarian law* (n 12) p. 1.

16 This principle is sometimes also referred to as the principle of discrimination or identification. UK Ministry of Defence, *The Manual of the Law of Armed Conflict* [hereinafter *UK LOAC Manual*] (Oxford University Press, Oxford, 2004) Section 2.5.1 (Distinction). For a more in-depth study of the principle of distinction, see John J. Merriam, 'Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters', 56 *Virginia Journal of International Law* 83 (2016), pp. 86–107.

17 AP I (n 10) Article 48, considered to reflect customary law applicable in both IACs and NIACs. See *ICRC CIL Study* (n 11) Rule 1. See also *UK LOAC Manual*, ibid, Section 2.5 (Distinction).

18 Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance', 42 *New York University Journal of International Law and Policy* 641 (2009–2010), p. 646.

Military necessity is the hardest of the three principles to define. Although it has been the subject of discussions too extensive to cover here,[19] the UK LOAC Manual captures the essence of the principle: "Military necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources".[20] Military necessity must, as mentioned, be balanced with humanity, namely the prohibition on inflicting "suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes".[21]

Finally, the proportionality rule requires those who plan or decide upon an attack to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".[22] Attacks expected to cause excessive incidental loss of civilian life, injury to civilians, damage to civilian objects are classified as "indiscriminate" and are hence prohibited.[23]

With the exception of certain prohibitions such as perfidy, most LOAC conduct of hostilities rules focus on the effects rather than on the means or methods of attack. Thus, they remain relevant even for current conflicts. However, certain aspects of LOAC have been challenged. One example that is particularly relevant to the current topic is the intended dichotomy between combatants and civilians. These are considered mutually exclusive categories, with

19 See e.g. Johansen, *On military necessity* (n 8); Nobuo Hayashi, 'Contextualizing military necessity', 27(1) *Emory International Law Review* 189 (2013); Nobuo Hayashi, 'Military Necessity as Normative Indifference', 44(2) *Georgetown Journal of International Law* 675 (2013); and Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law', 28(1) *Boston University International Law Journal* 39 (2010).

20 *UK LOAC Manual* (n 16) Section 2.2 (Military Necessity), footnote omitted. See also Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 1389: "[m]ilitary necessity means the necessity for measures which are essential to attain the goals of war, and which are lawful in accordance with the laws and customs of war.", and the St. Petersburg Declaration (n 4) where it is noted that "[t]he only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."

21 *UK LOAC Manual* (n 16) Section 2.4 (Humanity).

22 AP I (n 10) Article 57(2)(a)(ii). See also *UK LOAC Manual*, ibid, Section 2.6 (Proportionality).

23 AP I, ibid, Article 51(4) and 51(5)(b), considered to reflect customary law applicable in both IACs and NIACs. See *ICRC CIL Study* (n 11) Rules 11–12.

separate rights and duties. However, as will be discussed in Section 5.2, current conflicts often involve a non-state party, which, for the sake of targeting may be viewed as combatants, but in other respects qualify as civilians.[24] The result is an unclear legal framework. Because of this unclarity, proposals have been made for a third category on members of organised armed groups.

5.1.2 *Lawful Acts of War*

LOAC is premised on State control over the use of force, and the principle that military forces that act on behalf of the State in accordance with LOAC will not be acting unlawfully. As Baxter explained, "the act of the soldier who conforms to the law of war and does not engage in private acts of warfare is an act of state depriving the enemy state of jurisdiction".[25] This is known as the 'combatant's privilege' or 'combatant immunity', and is premised on the idea of 'lawful acts of war'. The application of LOAC makes behaviour that would otherwise be unlawful permissible, provided the person acting is bestowed the privilege to take part in the hostilities, as is the case for combatants.[26] The concept of 'lawful acts of war' is central to this book. It illustrates how LOAC permits the use of force rather than merely regulating it; it means that the use of force against persons will not be arbitrary, affecting the scope of application of personal self-defence by providing another and more robust legal basis for the use of force.[27]

There is no express authority for this concept in LOAC, but it is implicit both in the rules providing who may lawfully participate in hostilities[28] and the requirement that a detaining power only prosecutes prisoners of war for acts they would also prosecute their own forces for, thereby excluding lawful acts

24 See also U.S. Department of Defense (DoD), *Law of War Manual* (December 2016 update, Office of the General Counsel of the Department of Defense, Washington, 2016, available at https://www.hsdl.org/?abstract&did=797480, last accessed 24.04.2019) pp. 100–101.

25 Richard Baxter, 'The Municipal and International Law Basis of Jurisdiction over War Crimes', 28 *British Yearbook of International Law* 382 (1951), p. 385.

26 Kritsiotis, 'War and Armed Conflict: Parameters' (n 3) p. 7.

27 See also Ian Henderson and Bryan Cavanagh, 'Military members claiming self-defence during armed conflict – Often misguided and unhelpful' [hereinafter: 'Claiming self-defence on the battlefield'], in Jadranka Petrovic (ed.), *Accountability for Violations of International Humanitarian Law – Essays in honour of Tom McCormack* (Routledge, London/New York, 2016) p. 77.

28 Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its Annex: Regulations Respecting the Laws and Customs of War on Land ('1907 Hague Regulations'), printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 4) pp.66ff, Articles 1 and 2, and AP I (n 10) Article 43(3).

of war.[29] It has also been argued that it is part of the customary international law applicable to armed conflicts,[30] and is reflected in the Rome Statute to the ICC Article 31(3) when read together with Article 21(b).[31] The obligation on the opposing State not to prosecute prisoners of war and other opposing forces for acts committed in accordance with LOAC will naturally only apply in an IAC, where the opposing side is a State. States, however, are also likely to grant immunity to their own forces for acts during a NIAC that do not violate the law of NIACs.[32]

There are two ways in which the concepts of 'combatant privilege' and 'lawful acts of war' may be approached in national legislation, whether this is accomplished for instance by changing existing law or interpreting existing law in a new way. First, the combatant privilege may be viewed as an authorisation, forming part of the authority provided to military forces to use force on behalf of the State. Where such an authority is provided, soldiers will not need to rely on personal self-defence to justify the use of force, since their use of force is lawful. This may be complemented by a provision in the penal code providing that the use of force in accordance with international law will not violate national criminal law, as the examples of national approaches given below illustrate.

Alternatively, lawful acts of war may be an exculpatory ground in criminal law that justifies the use of force, either on its own or as part of a 'public authority' defence. By requiring a defence in criminal law, it is implied that the use of force in accordance with LOAC is not itself an exception to the national criminal law. This distinction is particularly important for the relationship between the two main legal authorities for military forces to use force during an

29 Geneva Convention (III) relative to the Treatment of Prisoners of War (GC III) [1949], printed in ibid, pp. 507ff., Article 87. See also discussion in Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 27) p. 78.

30 *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D.Va 2002): "Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets". Cited in John J. Merriam, 'Natural Law and Self-Defense', 206 *Military Law Review* 43 (2010), p. 73.

31 Article 31(3) of the Rome Statute allows the Court to apply defences not expressly dealt with in the Article 31, provided they are found within the possible sources of law as listed in Article 21. Article 21(b) permits the Court to apply "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict". Rome Statute of the International Criminal Court [hereinafter: *Rome Statute*], opened for signature 17 July 1998, 2187 *UNTS* 3 (entered into force 1 July 2002).

32 Boothby, *The Law of Targeting* (n 3) p. 433.

ongoing armed conflict, namely LOAC and personal self-defence. If the use of force in accordance with LOAC is itself lawful, self-defence will not be relevant in the same circumstances because there is no alleged crime to defend against. By contrast, if the 'lawful acts of war' concept is a criminal defence, this implies that there is a need for a criminal defence, and other criminal law defences such as self-defence may also be relevant.[33]

As explained by Radin and Schmitt, "[u]nlike human rights law and practice, which view any death as a possible breach of the right to life that must be investigated, IHL bestows immunity on combatants for deaths that are in accordance with its strictures".[34] 'Lawful acts of war' as a concept is therefore most likely to be considered and applied in the context of a criminal prosecution. First, it may function as a basis for not charging the suspect with committing a crime because the elements of the crime are negated by way of being lawful acts of war. For instance, the killing of a lawful target will in most cases not be unjustified, which is commonly a criterion for unlawful killing. In this sense it will negate the need for criminal defences such as self-defence since there is no unlawful force to justify.

Second, in the case of a trial, it will function as a defence in that it will be argued that the elements of the crime are not met, although as will be explained, the concept of 'lawful acts of war' is strictly speaking an authority to use force rather than a criminal defence like self-defence and necessity. As will be shown below, this practical application of 'lawful acts of war' when a trial is initiated is reflected in the U.S. approach. It is mainly set out in the U.S. military's Manual for Courts-Martial, and is therefore formulated in the form of a defence. In such situations, especially where it is unclear whether the use of force had fully complied with LOAC, self-defence may be relevant as a secondary defence. However, as will be explained below in Section 8.2, the scope of application of the criminal law concept of self-defence during an armed conflict is relatively limited, and if it is reasonable to kill someone in self-defence, it is likely to have been reasonable to believe that the use of force was lawful under LOAC.

Most States have provisions that to some degree reflect the concept of 'lawful acts of war' in their domestic legislation.[35] A comprehensive comparative

33 On the relationship between self-defence and LOAC/lawful acts of war, see further Sections 4.4 and 8.2.3.

34 Sasha Radin and Michael N. Schmitt, 'Investigations Under International Humanitarian Law', in Rain Livoja and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (Routledge, London, 2016) p. 563, footnote omitted.

35 Gary P. Corn, 'Should the Best Offense Ever be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force rules in the Standing Rules of Engagement', *49 Vanderbilt Journal of Transnational Law* 1 (2016), p. 28 referring

study of national approaches is beyond the scope of this book, and will only function to illustrate that different countries have taken different approaches.[36] Instead, a selection of national approaches will be included to illustrate the variety in solutions.

In Norway, there is no general law on the use of force by the military.[37] The traditional approach appears to have been that a lawful act of war is something the State is authorised to carry out without express foundation in law.[38] This was confirmed by the Norwegian Supreme Court in 1946.[39] The issue has not been considered by Norwegian courts since the trials arising from the Second World War. 'Lawful acts of war' is, in other words, a customary law notion. Continued use of the Norwegian armed forces in operations involving armed conflict indicates that this customary rule still applies. There is a tendency in academic literature to deal with 'lawful acts of war' together with criminal law justifications, as another reason that the use of force may be justified and hence lawful.[40] However, a suggestion to codify 'lawful acts of war' as a criminal law defence in the recent update of the penal code was unsuccessful.[41]

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to U.S. Manual for Court-Martials Rule (RCM) 916(c), and fn. 118, referring to Albania, Australia, Brazil, Canada, Israel, Kosovo and Spain. He only makes reference to a public authority defence, as it the approach in the U.S., but he does not appear to consider the distinction set out above.

36 As mentioned in Section 1.4, the implications of monist or dualist approaches to how States give effect to international law in their respective domestic legislation is beyond the scope of this book.

37 Only the use of force by the police for law enforcement purposes is regulated, e.g. Lov om Kystvakten (re. The Coastguard) LOV-1997-06-13-42; Instruks om Forsvarets bistand til politiet (re. assistance to the Police) FOR-2012-06-22-581; Instruks om tildeling av begrenset politimyndighet til militære grensevakter ved den norsk-russiske grensen (re. limited police authority to military border guards on the Norwegian-Russian border) FOR-2005-08-05-851; and § 101(3) of the Norwegian Constitution of 1814, updated 2018, regarding the use of military force against Norwegians in a situation of riot.

38 See e.g. NOU 1992: 23 *Ny straffelov – alminnelige bestemmelser* (Norwegian Green Paper 1992: 23 New penal code – general rules), p. 89, Section 5.6 which due to its context focuses on the police, but also provided general comments on State use of force. ("Offentlige myndigheter, særlig politiet, har i blant rett til å foreta handlinger som ellers er straffbare. Det er i dag ikke generelt regulert ved lov når i hvilken utstrekning politiet har rett til å bruke makt for å gjennomføre sine tjenestehandlinger").

39 Rt 1946 s. 880.

40 See e.g. Ståle Eskeland, *Strafferett* (5. ed. by Alf Petter Høgberg, Cappelen Damm Akademiske, Oslo, 2017) p. 177; Johs. Andenæs, *Alminnelig strafferett* (5.ed, Universitetsforlaget, Oslo, 2004) p. 150; Arne Willy Dahl, *Håndbok i militær folkerett* (Cappelen Akademiske Forlag, Oslo, 2008) pp. 467–468.

41 NOU 2002:4 *Ny straffelov* (Norwegian Green Paper 2002: 4 New penal code), Chapter 8, Subsection 8.3.1, pp. 209–210. See also Ot.prp.nr.90 (2003–2004) *Om lov om straff*

The relationship between 'lawful acts of war' and Norwegian law, in particular the penal code, was considered sufficiently established through a general article stating that "[t]he criminal legislation applies subject to the limitations that follow from agreements with foreign states or otherwise by international law".[42] The provisions of the Penal Code must be interpreted restrictively in light of Norwegian international law obligations, with the result that lawful acts of war will not violate its provisions.[43]

Provisions similar to that found in the Norwegian Penal Code, providing that acts carried out in accordance with international law will not amount to a violation of national criminal law, are also found in the laws of other European countries. According to the Danish Penal Code §12, the application of the penal code is limited by internationally recognised exceptions.[44] Article 25 of the German Basic Law states that "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory".[45] In the Netherlands, the Dutch Military Criminal Code provides that "an otherwise unlawful act committed during an armed conflict that is in conformity with IHL and within the limits of a soldier's competence cannot

(*straffeloven*) (Proposition Concerning the law on penalties (penal code)), Chapter 9, Subsection 9.2.6.

42 Lov om straff (Straffeloven) (Norwegian Penal Code of 1905), LOV-2005-05-20-28, 2005 update, Section 2 (previously Section 1.2), known as the 'folkerettsreservasjon', meaning international law reservation.

43 NOU 2002:4 (n 41) Chapter 8, Subsection 8.3.1, pp. 209–210. See also Ot.prp.nr.42 (1995–1996): *Om lov om endringer i straffeloven* (*forholdet til folkeretten – gjennomføring av havrettskonvensjonens krav til straffelovgivningen*) (Proposition Concerning the law on changes to the Penal Code (relationship with international law – integration of the UN Convention on the Law of the Sea (UNCLOS) into the criminal law)), Chapter 6, pp. 8–11, where the 'folkerettsreservasjon' or international law reservation was also deemed sufficient.

It should be noted that a recent change to the Constitution (Norwegian Constitution of 1814 as updated 2014, § 113), whereby any infringement by the authorities towards individuals must be based on law, may result in the customary rule authorising the Armed Forces to use force to be codified. However, this would also require the relationship between IHRL and LOAC to be spelled out, which is very complex, and no such law is expected to be developed in the near future.

44 Danish Penal Code of 1933 (LBK nr 977 af 09/08/2017), §12.

45 Article 25 of the Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100–1, as last amended by Article 1 of the Act of 23 December 2014 (Federal Law Gazette I p. 2438) (translated by Professor Christian Tomuschat and Professor David P. Currie, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0141, last accessed 24.04.2019).

be punished".[46] In 2005, France also introduced a similar provision, clarifying the authority for military forces to use force in accordance with international law as part of military operations conducted beyond French territory and territorial waters.[47]

The same approach is taken in the U.S. Model Penal Code[48] with regards to the use of lethal force. In Section 3.03(2)(b), it is proposed that killing that "occurs in the lawful conduct of war" should be treated as an exception from the criminalisation of taking another's life.[49] Other conduct "is justifiable when it is required or authorized by (...) the law governing the armed services or the lawful conduct of war".[50] However, as mentioned above, in the U.S. military's Manual for Courts-Martial (MCM), all lawful acts of war are treated as part of defences. Under rule 916(c), 'Justification', "A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful".[51] The comments provided (entitled 'Discussion') emphasises that "killing an enemy combatant in battle is justified".[52] Although this appears to suggest that the approach in the U.S. military legal system differs from those already discussed, it must be remembered that the MCM only applies when a case is prosecuted and tried. The argument that an act was lawful by way of being a lawful act of war will therefore function

46 Frits Kalshoven and Thyla Fontein, 'Some Reflections on Self-Defence as an Element in Rules of Engagement' in Mariëlle Matthee etc. (eds.), *Armed Conflict and International Law: In Search of the Human Face* (TMC Asser Press, The Hague, 2013) p. 109, citing Article 38 of the Dutch Military Criminal Code read in conjunction with Article 71. Note that the cited Article 38 is now paragraph 1 of the updated Article 38. See also Boddens Hosang, *Rules of Engagement* (n 6) p. 385.

47 Article L4123-12 of the French Code of Defense (https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006071307&idArticle=LEGIARTI000006540266&dateTexte=&categorieLien=cid, last accessed 24.04.2019).

48 American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes* (Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962, The Institute, Philadelphia, 1985).

49 ibid, Section 3.03(2)(b).

50 ibid Section 3.03(1)(d). This is dealt with under the Section on execution of public duty, and has been interpreted by some to mean that all lawful conduct of war is dealt with as a public authority justification. See e.g. Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 27) p. 85. This ignores the distinction made between rule 3.03(1) on justifications and 3.03(2) declaring lawful acts of war an exception.

51 United States Manual for Courts-Martial (MCM) (2016 Edition, https://jsc.defense.gov/Portals/99/Documents/MCM2016.pdf?ver=2016-12-08-181411-957, last accessed 24.04.2019) Rule for Courts-Martial (RCM) 916(c), p. II-116.

52 U.S. RCM 916(c), ibid. For a commentary on the rule, see e.g. Corn, 'Public Authority to Use Force in Military Operations' (n 35) pp. 27–31.

as a defence. When the use of force is considered reasonable, the act is considered lawful and an exception to criminal law prohibitions; there will be no prosecution. The application of 'lawful acts of war' in the U.S. military law is in other words similar to the approach taken in many European systems. This is confirmed by the argument that the application of 'lawful acts of war' excludes self-defence, so that self-defence would only apply to "other kinds of killings, where the decedent is not a lawful combatant but, rather, a civilian".[53]

The position in British law is not laid down anywhere and is therefore more difficult to discern. Documents from the Iraq Inquiry reveal that the UK Ministry of Defence considers the matter to be regulated by the traditional common law definition of murder. The definition usually referred to is that set out by Sir Edward Coke in 1797: "murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any country of the realm any reasonable creature *in rerum natura* under the King's peace, with malice aforethought, either expressed by the party or implied by law, so as the party wounded, or hurt, etc. die of the wound or hurt, etc. within a year and a day after the same".[54] The reference to "any reasonable creature *in rerum natura* under the King's peace" is interpreted to exclude the killing of an enemy during an armed conflict, thereby providing the necessary exception for lawful acts of war.[55] The use of force will of course have to comply with LOAC, with the result that the killing of persons who are no longer participating in the hostilities, such as prisoners,

53 Merriam, 'Natural Law and Self-Defense' (n 30) p. 73. Note that in the current thesis a distinction is made between the criminal law concept of self-defence on the one hand and operational concepts of 'self-defence', whereby military forces defend themselves during combat in accordance with LOAC, on the other. This distinction is further dealt with in Chapter 8, in particular Section 8.3.

54 Sir Edward Coke, *Institutes of the Laws of England: Concerning high treason and other pleas of the crown and criminal causes* (Printed for E. and R. Brooke, Bell-Yard, near Temple-Bar, London, 1797) p. 47. Note that death occurring within a day and a year is no longer considered part of the definition.

55 See Michael Wood, *Iraq,* letter to 'PS' dated 15 October 2002, Iraq Inquiry, Written Evidence, January 26, 2010 (http://webarchive.nationalarchives.gov.uk/20100919032927/http://www.iraqinquiry.org.uk/transcripts/oralevidence-bydate/100126.aspx, last accessed 24.02.2019) para. 4–5. This approach is consistent with older interpretations of the question. See e.g. *R v. Page* [1954] 1 QB 170 p. 175, cited in Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 27) p. 85; and William Blackstone, *Commentaries on the Laws of England in Four Books*, Book IV (Clarendon Press, Oxford, 1765–1769) p. 198. For a criticism of this view, see Peter Rowe, 'The Criminal Liability of a British Soldier Merely for Participating in the Iraq War 2003: A Response to Chilcot Evidence', 10 *Criminal Law Review* 752 (2010).

is not permitted.[56] This common law rule is considered to include acceptance for the LOAC rules on 'combatant immunity' even for the opposing forces.[57]

The national approaches taken to give effect to combatant immunity is likely influenced by the fact that criminal liability for actions of military forces participating in an armed conflict will only be considered if there are indications that the forces have acted unlawfully.[58] In fact, allegations of suspected breaches are only required to be investigated if they are credible.[59] The actions of military forces are continuously reviewed by their Commanders and the command group in order to evaluate mission success. If someone is suspected of committing or having committed an unlawful act, Commanders have a duty to prevent them and, where applicable, initiate the appropriate disciplinary or penal actions.[60] Actions that are considered reasonable and lawful will usually not be subject to further scrutiny,[61] and the legal authority for carrying out lawful acts of war is unlikely to be questioned.

Members of armed groups that are not part of the State's military forces or do not meet the requirements set out in Article 4A of the Fourth Geneva Convention will not be entitled to combatant immunity. They are not considered to have a right to participate in hostilities,[62] and their acts are therefore not considered lawful acts of war. Although this rule is only expressly set out in AP

56 David Ormerod *et al., Smith and Hogan's Criminal Law* (Oxford University Press, Oxford, 2015) p. 562. See also Blackstone, *Commentaries on the Laws of England in Four Books*, Book IV, ibid, p. 118 ("However, the position itself, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battel, or for necessary self-defence."); and Alexander Fraser Tytler, *An essay on military law, and the practice of Courts-Martial* (R.E. Mercier and Co, No. 31 Anglesea-Street, Dublin, 1800) p. 66 ("It is not common to put to death prisoners of war. They are detained in safe custody, till they are exchanged by cartel, for an equal number of our subjects who may be in the hands of the enemy, or till the conclusion of a peace restores them to their liberty: and in the mean time they are treated with humanity.").

57 Wood, *Iraq,* letter to 'PS' dated 15 October 2002 (n 55) para. 5. It does not appear to be limited to the act of killing.

58 Radin and Schmitt, 'Investigations under IHL' (n 34) p. 562.

59 ibid, p. 563.

60 In the context of LOAC violations, this duty is set out in AP I (n 10) Article 87(3), considered to reflect customary law applicable in both IACs and NIACs. See *ICRC CIL Study* (n 11) Rule 158. The procedures for dealing with suspected violations of domestic law will be set out in the respective domestic legislations.

61 According to Radin and Schmitt, in the absence of a purported violation, "Commanders, of course, may nevertheless choose to initiate investigations into any incident out of policy or operational concerns". Radin and Schmitt, 'Investigations under IHL' (n 34) p. 563.

62 AP I (n 10) Article 43(2).

I, it was recognised long before the 1970s.[63] In a commentary on the Norwegian post-Second World War trials, Andenæs commented that members of the Norwegian resistance movement were not combatants, and if captured, "would not be entitled to treatment as prisoners of war, but had to be prepared for being held responsible and maybe shot".[64] He further emphasises that this did not make the organisation unlawful under international law, they were merely not afforded combatant privileges.[65]

In addition to risking potential prosecution, the fact that non-state actors in a NIAC are not lawful combatant can also affect the potential application of personal self-defence. As explained in Section 8.2.3, because armed groups in a NIAC are not lawful combatants, their attack on NATO forces is not afforded prosecutorial immunity under international law; it therefore is likely to be considered unlawful under domestic law.[66] This means that the first requirement of self-defence is met, namely that of an unlawful or unjustified attack; however, the scope of application of self-defence remains limited and hence unsuitable for many combat situations.

5.1.3 *Attack: the Use of Force in Offence or Defence*

Many of the LOAC rules are centred on the notion of attack. Examples include who or what may be the object of attack, who or what enjoys special protection from attack, and precautions in attack. The attack rules are also the most relevant to the discussions in this book. During military operations, force is used in connection with dynamic or deliberate targeting, or in response to threats, hostile acts or attack by opposing forces (combat engagement).

63 An early recognition of the idea that civilians directly participating in hostilities do not have the right to do so may be found in the 1863 Lieber Code Article 82: "such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates." U.S., 'Instructions for the Government of Armies of the United States in the Field' (Lieber Code) [1863], printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 4) pp. 3ff. See also W. Hays Parks 'Air War and the Law of War', 32 *Air Force Law Review* 1 (1990), p. 118.

64 Johs. Andenæs, 'Okkupasjonstidens «likvidasjoner» i rettslig belysning', *Tidsskrift for rettsvitenskap* (TFR) 1948, 1–31, p. 5, own translation.

65 ibid.

66 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) [1977], printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 4) pp. 775ff., Article 6(5), encourages member States to provide amnesty to opposing forces where the Protocol applies, but they are not obliged to do so. Furthermore, this is only likely to be considered at the end of the conflict.

The LOAC rules examined in this chapter will be applicable to all of these situations.

According to Article 49(1) of AP I, 'attacks' means "acts of violence against the adversary, whether in offence or in defence".[67] 'Acts of violence' includes all acts with violent consequences, not just those of a kinetic nature.[68] The emphasis on 'offence or defence' entails that attack should be interpreted to entail all use of force, including where the opposing side attacks first and the use for force by NATO forces is in response to that first attack.[69] Although this statement may be contrary to the etymological meaning of the word attack and hence a source for confusion,[70] it is an important specification of the application of LOAC. It is particularly important in the discussion of the relationship between LOAC and self-defence, and therefore also between ROE and self-defence. When LOAC applies to the use of defensive force as well as offensive force, there is limited need for applying the exceptional legal regime of self-defence.[71]

It should be noted that LOAC refers to both attack and hostilities. 'Hostilities' is a broader concept than 'attack', and includes military acts not involving violence, such as psychological operations (PSYOPS).[72] Furthermore, according to Article 49(3), the definition of attack in Article 49(1) and the subsequent rules in AP I on the general protection against effects of hostilities formally only apply to warfare which affects civilians or objects on land.[73] However, the

67 AP I (n 10) Article 49(1).

68 Schmitt, Michael N., *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* [hereinafter *Tallinn Manual 2.0*] (2nd edition, Cambridge University Press, 2017) p. 416. See also *AMW Manual* (n 4) Rule 1(e), Commentary para. 7.

69 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, Cambridge, 2016) p. 3.

70 As explained in Chapter 1, fn. 58, the U.S. DoD has made it clear that in their view, defining attack as the use of force in both offence and defence is etymologically inconsistent with its normal use, and that "the word "attack" or "attacks" historically has referred to and today refers to offensive operations only." U.S. Department of Defense (DoD): *Conduct of the Persian Gulf War*, Final Report to Congress, 31(3) *ILM* 1992, available at http://www.globalsecurity.org/military/library/report/1992, p. 614. However, the U.S. Army applies AP I Article 49(1) when defining attack. See U.S. Army, *Operational Law Handbook* (U.S. Army Judge Advocate General's Legal Center and School, International and Operational Law Department, Charlottesville, Virginia, 2017) p. 12.

71 On the exceptional nature of self-defence and its limited scope of application by military forces during armed conflict, see Chapter 8.

72 Dinstein, *Conduct of Hostilities* (n 69) p. 3.

73 AP I (n 10) Article 49(3): "The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives

rules are generally applied as customary law in air and maritime operations as well, especially the rules on proportionality and precautions.[74]

5.2 Who Is a Lawful Target

5.2.1 *Introduction*

The use of force against persons by military forces participating in an armed conflict must be directed at persons who are lawful targets according to LOAC.[75] The only exception to this rule is the use of force in self-defence, as defined and regulated by the respective troop contributing nations. The two main categories of persons in LOAC are combatants and civilians,[76] and the principle of distinction between these categories is "the undisputed cornerstone" of LOAC.[77] While combatants may be lawfully attacked, civilians must not be the object of an attack and must be protected from the effects of the hostilities. The dichotomy is, however, a simplification of the categories of persons in

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on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air."

74 When the issue was discussed by a group of international experts in connection with the development of the AMW Manual, they concluded that "as a general principle, the same legal regime applies equally in all domains of warfare". *AMW Manual* (n 4) Commentary to Rule 30. See also *Tallinn Manual 2.0* (n 68) p. 415, and Michael N. Schmitt, 'Air Warfare', in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014) pp. 124–125.

75 AP I (n 10) Article 48 and AP II (n 66) Article 13(2).

76 See e.g. *ICRC CIL Study* (n 11) Rule 1 and Volume 1, Commentary Rule 1, p. 3, where this general rule is presented as applicable both during IACs and NIACs. Other categories which are less relevant and hence will not be discussed here are spies and mercenaries. Mercenaries and combatants who are captured while engaged in espionage without wearing their uniform, i.e. spies, will be lawful targets but are not entitled to prisoner of war status or combatant immunity for the acts carried out in that capacity. AP I (n 10) Article 47 (mercenaries) and Article 46 (spies). For a useful article on this topic, see for instance William Baxter, 'So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs', 28 *British Yearbook of International Law* 323 (1951).

77 Nils Melzer, 'The Principle of Distinction between Civilians and Combatants', in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014) p. 296. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports* [1996] 226, para 78; and Dinstein, *Conduct of Hostilities* (n 69) p. 41. For a useful historic overview of the principle in LOAC, see W. Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect', 42 *New York University Journal of International Law and Policy* 769 (2009–2010), pp. 772–783.

LOAC, especially in the context of targeting.[78] Other categories of persons who are not civilians may also not be the object of attack, namely medical and religious personnel,[79] civil defence personnel of the armed forces,[80] and persons *hors de combat,* such as prisoners of war and wounded soldiers.[81]

Civilians are defined negatively as all those who are not or are no longer combatants.[82] They are entitled to "general protection against dangers arising from military operations"[83] and shall not "be the object of attack".[84] The protection will be lost by the civilians if and "for such time as they take a direct part in hostilities".[85] By contrast, combatants are targetable at all times, unless they have become *hors de combat*. Combatants have traditionally been defined as members of the armed forces of a party to the conflict, both regular and

78 Melzer, 'The Principle of Distinction between Civilians and Combatants', ibid, p. 299. Outside the context of targeting, the dichotomy also fails to take into account that participants in a *levée en masse* are recognised as combatants, but are neither members of the armed forces nor civilians. ibid, p. 306. Watkin also criticises the traditional dichotomy and argues that there are five classes of participants in AP I: "lawful combatants under article 43 of Additional Protocol I; otherwise lawful combatants who fall within article 44(4); members of organized armed groups who are not lawful combatants under article 43; civilians who take a direct part in hostilities; and uninvolved civilians." In his view, the second, third and fourth categories should be viewed as unlawful combatants rather than civilians. Watkin, 'Opportunity Lost' (n 18) pp. 665–666. On 'unlawful combatants', see further Section 5.2.2.

79 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) [1949], Laws of Armed Conflict, printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 4) pp. 459ff., Article 24; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II) [1949], ibid, pp. 485ff., Article 36; AP I (n 10) Articles 12.1 and 15, and AP II (n 66) Article 9(1). The protection may be lost if the personnel carry out acts harmful to the enemy, cf. GC I, ibid, Article 21, and AP II, ibid, Article 11(2), which although they refer to medical units, is considered applicable by analogy to medical and religious personnel. See e.g. *ICRC CIL Study* (n 11) Rules 25 and 27; Commentary Rule 25, p. 85; and Commentary Rule 27, p. 91. See also Melzer, 'The Principle of Distinction between Civilians and Combatants' (n 77) pp. 300 and 309.

80 AP I (n 10) Article 67(1). The protection may be lost if the personnel carry out acts harmful to the enemy, cf. Article 67(1)(e).

81 AP I, ibid, Article 41(1–2); Common Article 3 to GC I-IV (n 79); and AP II (n 66) Articles 4(1) and 7(1).

82 AP I, ibid, Article 50(1). See also *Prosecutor v. Blaskic* (Judgement), IT-95-14-T, ICTY, Trial Chamber, 3 March 2000, §180: Civilians are "persons who are not, or no longer, members of the armed forces".

83 AP I, ibid, Article 51(1) and AP II (n 66) Article 13(1).

84 AP I, ibid, Article 51(2) and AP II, ibid, Article 13(2).

85 AP I, ibid, Article 51(3) and AP II, ibid, Article 13(3).

irregular such as militias and volunteer corps.[86] In addition to these two traditional categories, members of (non-State) organised armed groups are increasingly considered a separate category; they do not meet the requirements of lawful combatants, but do not resemble civilians either.[87] They are not entitled to participate in hostilities, but to the extent that they do, they are not entitled to civilian protection from being the object of an attack or being exposed to excessive harm, either. The challenge is that LOAC generally deals with the two traditional categories, and the rules applicable to members of organised armed groups are less clear. The different categories will be considered in further detail below.

The distinction between combatants and civilians directly participating in hostilities is important for understanding the operational concepts of conduct-based and status-based targeting and the corresponding NATO ROE.[88] Combatants are lawful targets due to their status as combatants, regardless of current activity, thereby enabling status-based targeting. Civilians who lose their protection due to their direct participation in hostilities are lawful targets based on their conduct, but continue to have status as civilians.[89] Non-state forces can be seen either as members of an organised armed group or as civilians taking a direct part in hostilities on a continued or regular basis. While the

86 1907 Hague Regulations (n 28) Articles 1 and 2. For further discussion of the definition of combatants, see Section 5.2.2.

87 See e.g. ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law [hereinafter ICRC Interpretive Guidance] (May 2009, prepared by Nils Melzer, available at https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, last accessed 24.04.2019) pp. 31–35.

88 For a brief distinction of conduct-based versus status-based targeting, see e.g. Eric D. Montalvo, 'When Did Imminent Stop Meaning Immediate? *Jus in bello* Hostile Intent, Imminence and Self-Defense in Counterinsurgency', *Army Lawyer,* August 2013, p. 24, pp. 29–31. See also Chapters 11 and 12 examining the relationship between LOAC and the conduct based NATO hostile act and hostile intent ROE and the status-based ROE authorising attack on lawful targets regardless of current activity.

89 *ICRC Interpretive Guidance* (n 87) pp. 25–26. See also Jody M. Prescott, 'Tactical Implementation of Rules of Engagement in a Multinational Force Reality', in Geoffrey S. Corn, Rachel E. VanLandingham and Shane R. Reeves (eds.), *U.S. Military Operations – Law, Policy and Practice* (Oxford University Press, Oxford, 2016) pp. 267–268. By contrast, see Dinstein, *Conduct of Hostilities* (n 69) p. 175: "a person directly participating in hostilities loses his civilian status and can be effectively assimilated to a combatant; and, for that matter, and unlawful combatant under customary international law". See also Randall Bagwell and Molly Kovite, 'It is not self-defence: Direct participation in hostilities authority at the tactical level', 224(1) *Military Law Review* 1 (2016), p. 26, contending that "direct participation is status-based" targeting, but adds that the categorisation is "unhelpful and unnecessary".

former would enable status-based targeting, the latter would remain a form of conduct-based targeting and therefore require information about the continued participation in order for an attack to be lawful.[90]

Status-based targeting has the benefit of removing the requirement of catching the person 'red handed'.[91] However, it is not clear what the criteria for 'membership in an organised armed group' should be or how it should be proved, considering that formal membership is unlikely. By contrast, conduct-based targeting requires information about the current activities of the person or persons to be attacked, which may also be challenging to attain. These issues will be further discussed in Section 5.2.3.4, on the possibility for continuous loss of protection on the basis of DPH, and Chapters 11 and 12 when examining the relationship between NATO attack ROE and LOAC. Finally, although the question of conduct-based versus status-based targeting is most relevant to the determination of when an attack may be carried out and how persons should be dealt with if captured, it can also affect the discussion of the relationship between LOAC and self-defence. Because conduct-based targeting is more akin to self-defence, there is a risk of confusing the applicable legal frameworks. Some have even argued that "LOAC deals with status based targeting and not conduct based targeting",[92] presumably implying that conduct-based use of force amounts to self-defence.[93] This concern is examined more fully in the context of operational concepts of self-defence.[94]

The question of lawful targets for a directed attack must be distinguished from the legality of effects of an attack on persons who were not the intended target. This distinction between direct attack and so-called collateral damage

90 The U.S. military would considered such person to be "persons declared hostile", and they would be targetable on the basis of that status. U.S. Army, *Operational Law Handbook* (n 70) p. 79. See also U.S. Chairman of the Joint Chiefs of Staff (CJCS), *Standing Rules of Engagement* (*SROE*)*/Standing rules for the use of force* (*SRUF*) *for U.S. Forces* [hereinafter: *SROE/SRUF*] (CJCS Instruction 3121.01B, 13 June 2005) p. A-2; Montalvo, 'When Did Imminent Stop Meaning Immediate?' (n 88) pp. 30–31, and Schmitt, 'Targeting and IHL in Afghanistan' (n 11) p. 314.

91 As will be explained below in Section 5.2.3, the picture is more nuanced than having to attack someone while in the middle of the act amounting to direct participation of hostilities, but it is simplified here to emphasise the distinction between conduct-based and status-based targeting.

92 Travis Normans, *US v. El-Hanafi* (*cont*), (LOAC blog, 19 June 2012) https://loacblog.com/tag/status-based-targeting/, last accessed 24.04.2019.

93 For an example of the view that conduct-based targeting is regulated by self-defence, see Albert S. Janin, 'Engaging Civilian-Belligerents Leads to Self-defense/Protocol I Marriage', *Army Lawyer* (July 2007), DA PAM 27-50-410, p. 89.

94 See Section 8.3.2.3.

will be further discussed in Section 5.3 below, while the issue of mistake or doubt will be examined in Section 5.4.

5.2.2 *Combatants*

The 1949 Geneva Conventions do not set out clear criteria for being a combatant.[95] Instead, definitions are provided in Article 4(A) of GC III of who is entitled to prisoner of war status.[96] Because both combatant and non-combatant members of the armed forces are entitled to this status, this provision does not provide a definition of who is a lawful target.[97] A clearer definition is provided in AP I Article 43(2): Combatants are those members of the armed forces of a party to the conflict who are not medical and religious personnel. The armed forces of a Party to the conflict is defined as "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party".[98] The forces must further be subject to an internal disciplinary system enforcing compliance with LOAC.[99] Whereas the main focus here is on NATO forces and therefore on combatant members of State armed forces, other groups of persons may also be considered members of the armed forces with the corresponding rights when they meet the criteria set out in Article 43(1). These include members of other militias and members of other volunteer corps, including organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, and participants in a *levée en masse*.[100]

Combatants must also, as a general rule, distinguish themselves from the civilian population by wearing a uniform or other distinctive signs.[101] If these

95 See also Melzer, 'The Principle of Distinction between Civilians and Combatants' (n 77) p. 299.

96 GC III (n 29) Article 4(A). See also GC I (n 79) Article 13, and 1907 Hague Regulations (n 28) Articles 1 and 3.

97 Melzer, 'The Principle of Distinction between Civilians and Combatants' (n 77) p. 301–302.

98 AP I (n 10) Article 43(1).

99 ibid.

100 Their right to prisoner of war status upon capture is confirmed in GC III (n 29) Article 4(A)(2) and 4(A)(6). See also 1907 Hague Regulations (n 28) Article 2.

101 AP I (n 10) Article 44.3 provides an exception for the requirement of distinction for situations where "owing to the nature of the hostilities an armed combatant cannot so distinguish himself". The status as a combatant can nonetheless be retained, "provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate." This has been interpreted to only apply in extreme situations such as occupation,

requirements are not met, the person will remain a combatant and a lawful target, but will not be entitled to POW status if captured while not complying with the principle of distinction.[102]

Combatants are lawful targets at any time, regardless of their current activity.[103] They cease to be lawful targets if they become *hors de combat*, that is, a combatant who "is in the power of an adverse Party", "clearly expresses an intention to surrender", or "has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself".[104] In addition, in order to remain *hors de combat*, the combatant must abstain from any hostile act and not attempt to escape.[105]

Unlike, for instance, civilians taking a direct part in hostilities, combatants have the right to participate in hostilities,[106] with the result that their acts are considered lawful acts of war, provided they comply with LOAC.[107] They are also entitled to the favourable treatment set out in GC III concerning prisoners of war.[108] This right is not an individual right but rather afforded because the individual is a member of the armed forces.[109]

The term 'combatant' was traditionally reserved for military forces representing a State in an IAC. Therefore, the concepts of 'combatant immunity' and 'lawful acts of war' are only regulated in treaties dealing with such conflicts.[110] As mentioned above in Section 5.1.2, it is common to refer to the State forces in a NIAC as combatants as well, and States will grant their own forces the right of combatant immunity for acts carried out on behalf of the State in

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where complying with the principle of distinction at all times would make it impossible to carry out any operations. See e.g. Norwegian Armed Forces, *Manual i krigens folkerett* (*Trans: Manual of the Law of Armed Conflict*), issued under the authority of the Chief of the Defence, [2013], [hereinafter referred to as *Norwegian LOAC Manual*], p. 112, and UK, *Reservations to the 1977 Additional Protocol 1* [hereinafter: *Reservations to API*], available at https://ihl-databases.icrc.org/ihl/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument, §c.

102 AP I (n 10) Article 44.2–5.

103 Parks, 'No mandate, no expertise, and legally incorrect' (n 77) p. 778.

104 AP I (n 10) Article 41.2. *ICRC CIL Study* (n 11) Rule 47 and Commentary Rule 47, p. 164. This rule is equally applicable to NIACs.

105 ibid.

106 AP I, ibid, Article 43(2). See also Dinstein, *Conduct of Hostilities* (n 69) p. 43.

107 See also Section 5.1.2 regarding national approaches to the concept of 'lawful acts of war'.

108 GC III (n 29) contains, inter alia, detailed rules pertaining the prisoners' security (Article 23); quarters, food and clothing (Articles 25–28); penal and disciplinary sanctions (Articles 82–108); and release and repatriation (Article 118).

109 NATO, *STANAG 2449* (n 12) p. F-27.

110 The term 'combatant' is not found in treaties regulating NIACs. See also Melzer, 'The Principle of Distinction between Civilians and Combatants' (n 77) p. 309.

all conflicts.[111] Unless the application of the combatant privilege in NIACs is secured in domestic legislation, this will of course be contingent on the State remaining in power at the end of the conflict. The other right arising from the status of lawful combatant, namely to be treated as a prisoner of war if captured by the adversary, will not be applicable during a NIAC because the adversary is not a State and is therefore not obliged to afford this status and treatment.

Even though the term 'combatant' historically and legally has been used to describe armed forces fighting on behalf of the State, there is a tendency to refer to all those who participate in hostilities as 'combatants'.[112] As a result, it has become common to refer to those who are entitled to participate in hostilities are as 'privileged combatants' or 'lawful combatants' in order to distinguish them from persons who participate in hostilities without having the right to do so.[113] The latter group is sometimes referred to as 'unprivileged combatants' or 'unlawful combatants',[114] although the term 'unlawful' is somewhat misleading because there is no provision in LOAC prohibiting their participation.[115] Their participation is, however, likely to be prohibited under applicable domestic legislation because it commonly includes the use of force not authorised by the State and thus in violation of national criminal law.[116] Furthermore, as

111 See also ibid, p. 318.

112 ibid, p. 321. See for instance *ICRC CIL Study* (n 11) Rule 1, and UN General Assembly, *Respect for Human Rights in Armed Conflict* (9 December 1970) UN GA Res. 2676 (XXV) preamble and § 5, referring to "combatants in all armed conflicts".

113 See e.g. Melzer, 'The Principle of Distinction between Civilians and Combatants' (n 77) p. 305 ('privileged combatants').

114 See e.g. Israel, *Detention of Unlawful Combatants* (*Amendment and Temporary Provision*) *Amendment and Law*, 5768-2008, (Mar. 19, 2008; July 30, 2008; Aug. 13, 2008). For an overview of the U.S. use of the term, see Knut Dörmann, 'Unlawful combatants', in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict,* Oxford University Press, 2014, pp. 620–622. See also Yoran Dinstein, 'Unlawful combatancy', in 'International law and the war on terror', 79 *Naval War College International Law Study* 151 (2003), and Kenneth Watkin, *Warriors Without Rights?: Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy* (Program on Humanitarian Policy and Conflict Research Occasional Paper Series, 2005) Volume 2.

115 See also *ICRC Interpretive Guidance* (n 87) pp. 83–85 and Melzer, 'The Principle of Distinction between Civilians and Combatants' (n 77) p. 323.

116 See for instance *Ex Parte Quirin*, 371 U.S. 1 (1942), page 317 U.S. 31: "Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful". See also Boothby, *The Law of Targeting* (n 3) pp. 68–69. The question of appropriate terminology for this category of persons is not sufficiently relevant for the focus on this book and will therefore not be further examined. Useful articles on the topic include, Charles H.B. Garraway, '"Combatants" – Substance or Semantics?', Chapter 12 in Michael

explained in the UK LOAC manual, the use of the terms is also misleading in the sense that a person who does not have the right to participate in hostilities does not meet the AP I definition of combatant.[117] For AP I States, 'unlawful combatant' would therefore be an oxymoron.[118]

The application of the term 'combatant' to categories of persons other than State armed forces is likely the result of imprecise regulation. The description and status of non-State forces in a NIAC is particularly controversial and unclear.[119] Although the term 'combatant' should be reserved for IACs, its application to all forms of armed conflicts has resulted in a corresponding expansion of the term 'unlawful combatants' to NIACs as well.[120] States have not clearly described or defined this category in international treaties. For instance, while

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N. Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (BRILL, 2007); Baxter, 'So-Called 'Unprivileged Belligerency' (n 76); and Melzer, 'The Principle of Distinction between Civilians and Combatants', ibid, p. 306.

117 *UK LOAC Manual* (n 16) para. 4.2.1, as amended 2010.

118 Boothby, *The Law of Targeting* (n 3) p. 66.

As mentioned in the introduction to this Chapter, there is some debate concerning the applicable rules on the treatment of detained or interned 'unprivileged' or 'unlawful' combatants which will not be examined in detail here. Because they are not entitled to the enhanced protections provided by GC III, the question is whether they are civilians and therefore protected by GC IV, or if only the fundamental guarantees for humane treatment set out in Common Article 3 and customary international law including the protections set out in AP I (n 10) Article 75 apply. For a detailed presentation of this debate, see Jelena Pejic, '"Unlawful/enemy combatants": Interpretations and Consequences', Chapter 13 in Michael N. Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (BRILL, 2007); Dörmann, Knut, 'Unlawful combatants' (n 114) pp. 607–618; and Knut Dörmann, 'The legal situation of "unlawful/unprivileged combatants"', 85 *International Review of the Red Cross* 45 (March 2003).

119 The topic has been the subject of extensive research, see e.g. Michael N. Schmitt, 'The Status of Opposition Fighters in a Non-International Armed Conflict', 88 *International Law Studies* 119 (2012); Jann K. Kleffner, 'From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities – on the Principle of Distinction in Non-international Armed Conflicts one Hundred Years after the Second Hague Peace Conference', 54(2) *Netherlands International Law Review* 315 (2007); and Yoram Dinstein, *Non-International Armed Conflicts in International Law* [hereinafter: *NIAC*] (Cambridge University Press, Cambridge, 2014) pp. 58–60.

120 This expansive application is criticised by Dörmann: "While the notion of 'unlawful combatant' has been used by some also in the context of non-international armed conflicts, it has a place only within the context of the law applicable to international armed conflicts as defined in the GCs and AP I. The law applicable in non-international armed conflicts does not foresee a combatant's privilege". Dörmann, Knut, 'Unlawful combatants' (n 114) p. 617.

Common Article 3 refers to "members of armed forces",[121] AP II distinguishes between armed forces of a High Contracting Party and "dissident armed forces or other organized armed groups".[122] In the *Manual on the Law in Non-International Armed Conflict*, the term 'fighters' was proposed as an alternative to combatants in order to avoid confusion.[123] However, as pointed out in the ICRC Customary International Law Study, "this term would be translated as 'combatant' in a number of languages and is therefore not wholly satisfactory either".[124] Although there are debates about the appropriate term for this category, State practice indicates that States generally consider such persons to be lawful targets and to not have the right to participate in hostilities.[125]

The existence of a third category in addition to combatants and civilians, to account for members of non-State organised armed groups, is further examined in Section 5.2.3.4.

5.2.3 *Civilians Taking Direct Participation in Hostilities* (*DPH*)

5.2.3.1 Background

Civilians are generally protected both from direct attacks and from attacks that are expected to cause excessive civilian losses compared to the military advantage anticipated to be achieved from an attack. These protections are lost if and when a civilian directly participates in hostilities. When civilians no longer directly participate, they regain civilian protection, although they may be prosecuted under domestic law for any unlawful acts carried out while taking a direct part in hostilities. As pointed out above, civilians do not have the right to participate in hostilities, as this right is reserved for combatants. This does not, however, mean that international law prohibits such participation. Instead, their acts are likely prohibited by domestic legislation.[126]

There is considerable debate and disagreement over the requirements for 'direct participation in hostilities' (DPH) and how the concept should be applied. Another complex aspect is the time requirement ('for such time'), that is,

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121 Common Article 3 to GC I-IV (n 79).

122 AP II (n 66) Article 1(1). For a discussion of the differences between Common Article 3 and AP II, see Melzer, 'The Principle of Distinction between Civilians and Combatants' (n 77) pp. 311–314.

123 Michael N. Schmitt, Yoram Dinstein, and Charles HB Garraway, *The Manual on the Law of Non-International Armed Conflict, with Commentary* (International Institute of Humanitarian Law, Martinus Nijhoff Publishers, Leiden/Boston, 2006) p. 4.

124 *ICRC CIL Study* (n 11) Commentary to Rule 3.

125 Melzer, 'The Principle of Distinction between Civilians and Combatants' (n 77) p. 312.

126 *ICRC Interpretive Guidance* (n 87) pp. 83–85 and Melzer, 'The Principle of Distinction between Civilians and Combatants', ibid, pp. 323–324.

how long the protection is lost. May a person be a farmer by day and fighter by night, or will he lose his protection for an extended period of time? And when does the participation end?[127] While the rule is only expressly set out in the Additional Protocols of 1977,[128] it is considered part of customary law applicable in all armed conflicts.[129] The following examination of what is entailed in directly participating in hostilities will therefore not distinguish between IACs and NIACs.[130]

In 2009, after six years of discussions between the ICRC and international experts, the ICRC issued an 'Interpretive Guidance on the Notion of Direct Participation in Hostilities'.[131] The group failed to reach consensus, and some of the international experts published their counterarguments to the ICRC approach in a separate publication.[132] Although few States have published similar declarations on the ICRC's proposal, lawyers in the defence sector commonly voice their concerns and criticisms when the topic is discussed in international fora.

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127 According to Bagwell and Kovite, there is significant disagreement in three areas: "(1) when direct participation begins; (2) when direct participation ends; and (3) what constitutes an act of direct participation". Bagwell and Kovite, 'It is not self-defence' (n 89) p. 22.

128 AP I (n 10) Article 51(3) and AP II (n 66) Article 13(3).

129 *ICRC CIL Study* (n 11) rule 6. See also Dinstein, *Conduct of Hostilities* (n 69) p. 175; and Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 13. Note, however, that the application of DPH is likely to be different in naval operations. See Wolff Heintschel von Heinegg, 'The Development of the Law of Naval Warfare from the Nineteenth to the Twenty-First Century – Some Select Issues', 17 *Yearbook of International Humanitarian Law* 69 (2014), p 86, where he explains that "Article 51(3) Additional Protocol I (1977) is inapplicable to "sea warfare", which does not "affect the civilian population, individual civilians or civilian objects on land"". On the application of Article 51(3) to air warfare, see *AMW Manual* (n 4) Section F.

130 See also Dinstein, *NIAC* (n 119) p. 61, footnote 207, where he states that the assessment of what amounts to direct participation in hostilities is the same for both forms of conflicts.

131 *ICRC Interpretive Guidance* (n 87).

132 *New York University Journal of International Law and Politics*, Volume 42, Number 3, Spring 2010: Forum: 'Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance'. Articles: Goodman, Ryan and Derek Jinks, 'The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: An Introduction to the Forum', p. 637; Watkin, Kenneth, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance', p. 641; Schmitt, Michael N., 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements', p. 697; Boothby, Bill, '"And for such time as": The Time Dimension to Direct Participation in Hostilities', p. 741; Parks, W. Hays, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No mandate, no expertise, and legally incorrect', p. 769; Melzer, Nils, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities', p. 831.

The main concern is that the proposed interpretation is too difficult to apply in practice.[133] Even though aspects of the Interpretive Guidance are controversial, it serves as a useful starting point for discussions, and will be used in that manner in this book.[134]

The concept of DPH has played an increasingly important role in military operations, both in relation to who may be the object of an attack and who must be taken into account when conducting a proportionality analysis or assessing whether precautions in attack are required. When the opposing side fails to comply with the principle of distinction, making it harder to distinguish them from protected civilians, conduct-based targeting becomes essential for the operation.[135] For instance, during Operation Enduring Freedom in Afghanistan, U.S. and its coalition partners did not declare any forces hostile, which would have enabled status-based targeting. Instead, they introduced the concept of 'likely and identifiable threat' (LIT) as a form of conduct-based targeting.[136] As will be further explained below in Chapter 11, DPH is probably the most relevant legal basis for conduct-based targeting on the basis of the NATO hostile act and hostile intent ROE.[137]

Furthermore, the demands to reduce civilian casualties beyond the requirements of LOAC have made it necessary to identify the status of persons in the

133 Boddens Hosang, *Rules of Engagement* (n 6) pp. 205–206.

134 See also Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 43: "the constitutive elements of direct participation, although not bereft of flaws, represent a useful step forward in understanding the notion".

135 The notion of 'direct participation in hostilities' is also relevant in the context of civilian contractors in the battlefield and the discussions regarding the tasks they should be permitted to carry out. This is, however, less relevant here where the focus is on who NATO forces may be authorised to use force against. For a presentation of challenges concerning the use of civilian contractors, see Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) pp. 7–10; and W. Hays Parks, *Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces* (Paper presented at the Third Expert Meeting on the Notion of Direct Participation in Hostilities Geneva, October 2005, https://www.icrc.org/eng/assets/files/other/2005-07-expert-paper-icrc.pdf, last accessed 24.04.2019).

136 Schmitt, 'Targeting and IHL in Afghanistan' (n 11) p. 315. The LIT standard was intended to reduce the risk of collateral damage and accidental attacks on friendly forces, and was therefore so restrictive is was referred to as "self-defence plus". ibid, citing e-mail to author from a "key participant in its development at US Central Command (US CENTCOM)".

137 See also Bagwell and Kovite: "direct participation authority is firmly rooted in international law and provides substantial benefits as a bridging authority between self-defense and declared hostile force authority". Bagwell and Kovite, 'It is not self-defence' (n 89) p. 6, voicing frustration over the fact that despite its central role, this authority "is currently ignored in U.S. use of force policy at the tactical level". ibid.

vicinity of a known lawful target to a greater extent. If all persons expected to be harmed by an attack can all be classified as either civilians taking a direct part in hostilities or members of an organised armed group, the attack will not be expected to cause civilian casualties and may therefore be carried out. This has resulted in an increased focus on what amounts to DPH and on how to apply the criteria. Combined with the failure of the opposing forces to wear uniforms or other distinctive signs, this CIVCAS policy has pushed Commanders and their legal advisers "to place a priority on identifying fighters, and on developing rules for the use of force that allow targeting of these fighters, while also protecting civilians".[138] Having identified and located a person who is a lawful target, the status of other persons in the vicinity must be assessed on the basis of information available at the time, such as their interaction with the target, the location of the target, the presence of weapons, and the nature of these weapons. It will, for example, be easier to make the determination if the intended target is in a building or vehicle known for being used by the opposing forces than if it is an unknown location or location known for civilian use. Furthermore, while civilians may carry arms for self-defence, it is less likely they carry military type weapons such as RPGs or sniper rifles.

The scope and application of the DPH concept has been subject to extensive research and debate in the aftermath of the release of the ICRC Interpretive Guidance. It is not the purpose of the following presentation to provide a complete overview of those discussions. Instead, the focus is on providing enough insight into the topic to enable a discussion of the relationship between NATO ROE and the use of force during armed conflict, in particular in response to persons demonstrating a hostile intent (not constituting an imminent attack) or who commit or directly contribute to a hostile act (not constituting an actual attack). However, as a result of the controversies surrounding the application of DPH, both with regard to individual acts and continuous loss of protection, the examination of DPH will be relatively detailed.

5.2.3.2 Direct Participation in Hostilities

In order to take a direct part in hostilities, or active part as it is sometimes described,[139] a person must be found to be involved in hostilities, and that

138 ibid, p. 8.

139 The phrase 'active part in hostilities' may be found in Common Article 3 to GC I-IV (n 79). See also *ICRC Interpretive Guidance* (n 87) pp. 43–44, and Dinstein, *Conduct of Hostilities* (n 69) pp. 174–175. In the case *Prosecutor v. Lubanga,* Case No. ICC-01/04-01/06, ICC, Trial Chamber, 2012, it was suggested that 'to participate actively in hostilities' should be interpreted wider than 'direct participation in hostilities' (51 *ILM* 1021 at p. 1068), however, this is criticised by Dinstein who contends that "there is not even slender evidence

involvement must amount to direct participation.[140] According to Melzer, "'hostilities' refers to the collective resort by parties to an armed conflict to means and methods of warfare", while "'participation' refers to individual involvement of a person in these hostilities".[141] In addition, the participation must be direct as opposed to indirect. Melzer explains the distinction in the following way: "Direct participation refers to hostile acts carried out as part of the conduct of hostilities between parties to an armed conflict and leads to the loss of protection against direct attack. Indirect participation, by contrast, may contribute to the general war effort, but does not directly harm the enemy and, therefore, does not entail the loss of protection against direct attack".[142]

According to the ICRC Interpretive Guidance, three cumulative requirements must be met in order for a civilian's behaviour to qualify as DPH: there must be a certain threshold of harm expected from the act; there must be a direct causal relation between the act and that harm; and the act must be part of the ongoing hostilities.[143]

In order to meet the first criterion, "a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack",[144] such as civilians and civilian property. The harm need not have materialised but there must be an objective likelihood that it occurs.[145] When the harmful act is directed at a military operation or capacity, there is no requirement of 'quantitative gravity', but it will not be sufficient that the civilian refuses to act in support of a part to the conflict.[146] In fact, "any consequence adversely affecting the military operations or military capacity" would suffice.[147] In addition to killing and physically injuring or damaging persons or property, the Interpretive Guidance includes as examples

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in practice for such an assertion". Dinstein, *NIAC* (n 119) pp. 59–60. See also Boothby, *The Law of Targeting* (n 3) pp. 144–145.

140 Melzer, 'The Principle of Distinction between Civilians and Combatants' (n 77) p. 325.

141 ibid, p. 325, citing the following articles as references: 1907 Hague Regulations (n 28) Article 22; and AP I (n 10) Articles 35(1), 43(2), 45(1) and (3), and 51(3).

142 ibid. See also Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 1944: "'direct' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces".

143 *ICRC Interpretive Guidance* (n 87) p. 46.

144 ibid, p. 47.

145 ibid.

146 ibid, pp. 47 and 49.

147 ibid, p. 47.

"armed or unarmed activities restricting or disturbing deployments, logistics and communications"; "denying the adversary the military use of certain objects, equipment and territory"; "electronic interference with military computer networks"; and "transmitting tactical targeting information for an attack".[148] If the act is not adversely affecting the military capacity or operations of a party to the conflict, the act must, in order to meet the threshold requirement, cause "at least death, injury or destruction" to protected persons or objects.[149] This excludes inconvenience and even arrest and deportation.[150]

By the second criterion, the threshold requirement, "there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part".[151] Because the treaty law refers to 'direct' participation, 'indirect' participation must be excluded. Support to the general war effort or war-sustaining activities such as building roads, ports, airports and bridges, or economic activities such as oil production will be indirect rather than direct.[152] According to the Interpretive Guidance, direct participation must be interpreted to require "one causal step".[153] As a result, activities such as scientific research, transport of weapons and equipment not "carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm",[154] recruitment and training of personnel, or "assembly or storing of an improvised explosive device (IED)",[155] will not qualify. It is contended that "[o]nly where persons are specifically recruited and trained for the execution of a predetermined hostile act can such activities be regarded as an integral part of that act and, therefore, as DPH".[156] An act that does not in itself meet the direct causation test but forms part of a collective operation may still amount to direct participation if it "constitutes an integral part of a concrete

148 ibid, p. 48.
149 ibid, p. 49.
150 ibid, p. 50.
151 ibid, p. 51.
152 ibid. See also the Commentary to Article 51(3), "There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context." Sandoz *et al.* (eds.), *AP Commentary* (n 4) 1945.
153 ICRC *Interpretive Guidance* (n 87) p. 53.
154 ibid.
155 ibid, p. 54.
156 ibid, p. 53.

and coordinated tactical operation that directly causes such harm".[157] Examples of such acts include transmitting tactical intelligence to attacking forces and giving instruction and assistance to troops "for the execution of a specific military operation".[158]

Finally, the third criterion proposed by the ICRC requires an act to be "specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another".[159] This requirement of a belligerent nexus excludes acts that are likely to directly cause harm of a certain threshold but that are unrelated to the conflict and should be dealt with by law enforcement.[160] It also means that the use of force in self-defence cannot amount to DPH because its purpose clearly is defensive rather than to support a party to the conflict.[161] The belligerent nexus requirement does not mean that the opposing forces must identify a subjective intent. Instead, the requirement refers to "the objective purpose of the act", which is "expressed in the design of the act or operation and does not depend on the mindset [sic] of every participating individual".[162] It may nevertheless be difficult to determine whether this requirement is met. Based on the conduct of the civilian, the circumstances prevailing at the time and place, it must be reasonable to perceive the act as having the necessary belligerent nexus.[163]

The ICRC Interpretive Guidance has been the subject of extensive debate and criticism. According to Yoram Dinstein, for instance, these criteria "are abstractions". In his view, "[t]he pivotal question is whether the activities engaged in 'by their nature or purpose, are likely to cause actual harm to the personnel or matériel' of the opposing side".[164] He argues that the following parameters should be applied instead of the ICRC criteria. First, "every instance of use of weapons in combat" will quality as DPH, even if the person is acting far from the contact zone, as will be the case with those launching a missile. Second, DPH is not limited to the use of force; it "goes beyond the straightforward commission of acts of violence and includes such ancillary acts as gathering military information".[165] Finally, activities that are not part of military operations

157 ibid, pp. 54–55.
158 ibid, p. 55.
159 ibid, p. 58.
160 ibid, pp. 59 and 60–61.
161 ibid, p. 61. See also Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 34.
162 ICRC Interpretive *Guidance* (n 87) p. 59.
163 ibid, p. 64.
164 Dinstein, *NIAC* (n 119) p. 61, citing *Prosecutor v. Dragomir Milosevic* (Judgement), Case No. IT-98-29/1-T, ICTY, Trial Chamber, 12 December 2007, para. 947.
165 Dinstein, *Conduct of Hostilities* (n 69) p. 179.

should not be considered direct participation of hostilities, even if they are "ultimately harmful to the enemy".[166] Whereas the ICRC criteria require further interpretation in order to be applied and therefore are difficult to apply in practice, especially for military forces lacking easily accessible legal advisers,[167] the parameters set out by Dinstein provide clearer guidance on how to approach the issue of DPH.

Perhaps the most significant difference between this approach and that of the ICRC is that it does not require a 'direct causal link' between the act and the harm. The direct causation criterion is one of the more controversial aspects of the ICRC proposal for interpreting DPH.[168] According to Schmitt, there is broad agreement that those who personally conduct attacks are directly participating in hostilities. However, international experts strongly disagree with the ICRC approach to civilians who are not directly involved in the attack or operation causing harm, but nevertheless provide support.[169] The proposed requirement of "one causal step" is so strict that Schmitt suggests that it may be "a poorly drafted explanation of the agreed upon need for a clear link between the act and the ensuing harm".[170] Instead, the test should be whether the act "constitute[s] 'an integral part' of the operation causing the harm"; integral is not to be equated with necessary.[171] Rather than providing a definition for the difficult cases, these ought to be resolved "on a case-by-case basis".[172] A similar approach has been taken by the ICTY: "[I]t is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to

166 ibid.

167 As Hans Boddens Hosang points out, it is unlikely that the ICRC rules for determining direct participation in hostilities "can easily be translated into ROE that would still meet the criteria of simplicity and ease of understanding". Boddens Hosang, *Rules of Engagement* (n 6) p. 193. See also Prescott, 'Tactical Implementation of ROE' (n 89) p. 252.

168 Boddens Hosang, *Rules of engagement*, ibid, p. 194. Other areas that have been criticised include the requirement that the direct participation in hostilities must impose harm on one side, thereby excluding acts that strengthens the enemy's capacity without causing direct harm. See Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) pp. 27–28.

169 Michael N. Schmitt and Eric Widmar, 'The Law of Targeting', in Paul AL Ducheine, Michael N. Schmitt; and Frans Osinga (eds.), *Targeting: The Challenges of Modern Warfare* (Asser Press, 2016) p. 127.

170 Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 30.

171 ibid, p. 30. Boothby, however, criticises the "integral part" requirement for "inappropriately restricting the scope of DPH". Bill Boothby, '"And for such time as"' (n 132) pp. 751–752.

172 Schmitt and Widmar, 'The Law of Targeting' (n 169) p. 127. See also Bagwell and Kovite, 'It is not self-defence' (n 89) p. 28.

ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time".[173]

In cases where the law needs to be flexible and is accordingly formulated in a general manner, attempting to define the rule further by setting out additional criteria has the potential of undermining the necessary and inherent flexibility of that rule. The application of DPH will depend on the circumstances at the time, including the pattern of life in the area, the nature of the conflict, and the tactics, techniques and procedures of the relevant party to the conflict. For example, a person carrying a rifle may be considered a likely threat in some places, while in others it is normal for all men to carry arms for self-protection. This is also made clear in the U.S. Law of War Manual: "Whether an act by a civilian constitutes taking a direct part in hostilities is likely to depend highly on the context, such as the weapon systems or methods of warfare employed by the civilian's side in the conflict. For example, in some contexts, training and logistical support may be viewed as taking a direct part in hostilities, while in other contexts it might not".[174] Rather than creating a more extensive and abstract definition than the single line in AP I Article 51(3) and AP II Article 13(3), the better approach may be to train military forces in the relevant parameters for making the determination and provide mission-specific examples of what is clearly within the definition and what will clearly fall outside it.[175]

The ICRC Interpretive Guidance provides numerous examples, some already mentioned above. Others include: "guarding captured military personnel of the adversary to prevent them being forcibly liberated (as opposed to exercising authority over them)";[176] "clearing mines placed by the adversary";[177] "wiretapping the adversary's high command";[178] "sniper attacks against civilians and the bombardment or shelling of civilian villages or urban residential areas";[179]

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173 *Prosecutor v. Tadic* (Opinion and Judgement), Case No. IT-94-1-T, ICTY, Trial Chamber, 7 May 1997, para. 616.

174 U.S. DoD, *Law of War Manual* (n 24) p. 229, footnotes omitted.

175 For a useful and extensive list of considerations that may be relevant to the determination of direct participation in hostilities, see ibid, pp. 230–231. The Manual also provide several examples of acts considered to amount to direct participation in hostilities and acts that are not. See ibid, pp. 231–233. The U.S. differs from the ICRC proposal with regard to "acts of the civilian population [that] are not part of the immediate actual fighting, but instead perform combat support functions that may be temporally or geographically remote from the fighting." Bagwell and Kovite, 'It is not self-defence' (n 89) p. 31.

176 *ICRC Interpretive Guidance* (n 87) p. 48.

177 ibid.

178 ibid.

179 ibid, p. 49, footnote omitted.

lookouts during an ambush;[180] and "the delivery by a civilian truck driver of ammunition to an active firing position at the front line".[181] However, some of the examples provided in the ICRC Interpretive Guidance are particularly controversial,[182] thereby revealing the inherent disagreement between international experts and the ICRC. As Boddens Hosang points out, "since those examples show the intensions of the ICRC behind the recommendations and how to interpret it, they are more than mere illustrations and therefore deserve careful scrutiny".[183] The most controversial examples concerns human shields and IEDs.

The example of human shields is commonly used to explain the distinction between voluntary and involuntary participation. There is general agreement that persons who are forced to participate in hostilities, for instance by being used as human shields, will not lose their civilian protection.[184] However, in many cases it will be difficult to determine whether a person is acting out of free will or not. In the particular case of human shields, where there is considerable practice of persons being forced to stand before military targets in an attempt to dissuade the opposing forces from attack, the ICRC Interpretive Guidance has attempted a novel solution. It proposes that the determination of whether voluntary human shielding amounts to direct participation depends on the effect it has on the opposing forces, which will in turn depend on the opposing forces' mode of attack. If the human shields create a physical obstacle for land forces or give physical cover to those fighting, their act will qualify as DPH. By contrast, if the attack is carried out from the air, the attack could physically still be carried out, but if the act of shielding does not cause the civilians to lose their protection, it would be expected to cause excessive civilian losses and hence be unlawful. It is, in other words, a legal rather than physical obstruction, and should in the view of the ICRC not result in a loss of protection because it is too indirect.[185]

This proposal has been met with much criticism. Boddens Hosang, for instance, calls it "flawed on several levels".[186] As he correctly points out, when a civilian engages in a physical act that adversely affects the military operations

180 ibid, p. 54.
181 ibid, p. 56.
182 Boddens Hosang, *Rules of Engagement* (n 6) p. 196.
183 ibid, p. 201.
184 *ICRC Interpretive Guidance* (n 87) p. 56, footnote 141. See also Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 31.
185 ICRC Interpretive Guidance, ibid, pp. 56–57.
186 Boddens Hosang, *Rules of Engagement* (n 6) p. 197.

of the opposing party, the fact that the adverse effect is caused by legal or physical effects "has no relevance".[187] As long as the act and the intent of the civilian engaged in the act adversely affecting the opposing forces is the same, the qualification of that act should not depend on how the opposing forces carry out their attack. According to Schmitt, the attempt to limit the circumstances in which any human shields lose protection is driven by a desire to prevent them from becoming the object of an attack. However, as he explains, the main reason others argue that voluntary human shields should lose their protection is not so they can be directly attacked, but because they should not count as civilians in the proportionality assessment.[188] There is limited military advantage gained from attacking civilians who choose to act as human shields, but their involvement should not be rewarded by making the military objective they are shielding unlawful to attack on the basis that it would cause excessive harm.[189]

The other controversial example concerns those involved in the manufacturing and storage of improvised explosive devices, also known as IEDs. According to the ICRC, "the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly".[190] Although it is generally recognised that persons working in an munitions factory generally do not lose their protection from direct attack, applying this approach to IED production is inappropriate. As Schmitt explains, "IEDs are often assembled and stored in close proximity to the battlefield by members of armed groups. Although the precise location and time at which they will be used may not be known in advance, they will likely be employed soon after their assembly".[191] In such cases their activities

187 ibid. See also Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 32, and Dinstein, *Conduct of Hostilities* (n 69) p. 184.

188 Schmitt and Widmar, 'The Law of Targeting' (n 169) p. 127.

189 Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 33. The presence of civilians near military objectives would could also cause the required approval level for carrying out the attack to be elevated, if the policy of zero civilian casualties is in force. Schmitt, 'Targeting and IHL in Afghanistan' (n 11) p. 322. For a different solution to this difficult question, see Boothby, *The Law of Targeting* (n 3) p. 139, where he argues that voluntary human shields should be regarded as protected and therefore count in the proportionality analysis, but that their weight is reduced due to their acceptance of the risk involved. This solution introduces the idea that civilians can have varying weight or importance in the proportionality analysis, which seems to be worryingly open to abuse.

190 Boddens Hosang, *Rules of Engagement* (n 6) p. 196.

191 Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 30. See also Boothby, '"And for such time as"' (n 132 p. 749).

would amount to DPH.[192] The contrary conclusion by the ICRC is a result of the "one causal step" criterion and illustrates the weakness of their proposed test.[193]

The disagreements on some of the ICRC examples may be the result of a more systematic disagreement: the ICRC appears to focus only on the tactical level when setting out actions that may constitute DPH.[194] For instance, many of the examples provided relate to the carrying of weapons.[195] This limitation on the scope of direct participation appears unwarranted. According to Watkin, "it has long been recognized that insurgent campaigns, like conventional warfare, are fought with strategic as well as tactical goals in mind. As a result, the exercise of command, planning, intelligence, and even logistics functions can involve DPH above the tactical level".[196] This focus on tactical actions is also reflected in the assessment of the duration of DPH; the direct participation ends for instance when a shooter lays down his weapon.[197]

5.2.3.3 Beginning and End of Participation

Apart from the 'direct causal link' criterion, the 'for such time' requirement is potentially the most controversial aspect of the definition of DPH set out in the Additional Protocols and Interpretive Guidance.[198] The criterion consists of two separate but interlinked considerations: when will the protection be lost, and for how long? This section will look at the beginning and end of specific acts or operations amounting to DPH, while the question whether the right to

192 See also Boddens Hosang, *Rules of Engagement* (n 6) p. 196: "practice has shown that the geographical and temporal proximity between their manufacture and their actual use is comparable to the delivery of ammunition to troops fighting on the frontline".

193 Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 30. See also Watkin, 'Opportunity Lost' (n 18) pp. 658–659.

194 Watkin, Kenneth, 'Opportunity Lost', ibid, p. 569. See also Henderson, *The Contemporary Law of Targeting* (n 6) p. 102, where he argues that tactical intelligence gathering amounts to DPH, whilst strategic intelligence gathering does not.

195 Watkin, Kenneth, 'Opportunity Lost', ibid, p. 660.

196 ibid, p. 690, footnote omitted.

197 ibid., p. 660.

198 Schmitt and Widmar, 'The Law of Targeting' (n 169) p. 128. See also *The Public Committee against Torture in Israel v. The Government of Israel,* Israel HCJ 769/02, Judgment of 13 December 2006, Israeli Supreme Court 57(6) 285, para. 38; and *Prosecutor v. Blaskic* (Judgement), Case No. IT-95-14-A, ICTY, Appeals Chamber, 29 July 2004, para. 157. Other controversial parts of the ICRC Interpretive Guidance are the requirement of a 'continuous combat function' within an organised armed group and its Section IX on 'Restraints on the use of force in direct attack', where it is proposed that there may sometimes be a duty to capture rather than kill. These issues are examined further in Sections 5.2.3.4 and 5.3.

civilian protection may be lost for a longer period of time will be considered in Section 5.2.3.4 below. The ICRC position will be presented first.

While it is clear that acts such as attacking will amount to DPH, certain preparatory measures to the act or operation involving DPH may also entail the loss of civilian protection if it is an integral part of that act or operation.[199] The ICRC proposes that in order to qualify as DPH, the preparatory measures must be "aiming to carry out a specific hostile act" rather than "aiming to establish the general capacity to carry out unspecified hostile acts".[200] It is neither necessary nor sufficient that the act is close to the execution of a specific hostile act in time or space, nor is it sufficient that the act is indispensable for its execution.[201] Thus while loading bombs onto a plane for a specific attack will amount to DPH even if the attack is carried out the next day and far away, the loading of bombs onto a truck to be transported to a storage unit for future use will not.[202] According to the ICRC, a distinction must be made between preparatory acts for the execution of a specific hostile act and general preparation. For example, although general training of personnel is considered insufficient to warrant a loss of civilian protection, instruction on how to carry out a specific act will amount to DPH.[203]

Civilian protection will be lost during the deployment to and return from the execution of a specific act or operation if and when this is considered an integral part of the act or operation that amounts to DPH. According to the ICRC, "[a] deployment amounting to DPH begins only once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation. The return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation, for example by laying down, storing or hiding the weapons or other equipment used and resuming activities distinct from that operation".[204]

The ICRC approach to the timing issue was not supported by many members of the group of experts participating in the development of the Interpretive Guidance. They considered it too restrictive.[205] It excludes, for instance, a finding that persons involved in assembly, smuggling or hiding weapons,

199 *ICRC Interpretive Guidance* (n 87) p. 65.
200 ibid.
201 ibid.
202 ibid.
203 ibid.
204 ibid, p. 67.
205 Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) pp. 36–37. See also Boothby, '"And for such time as"' (n 132) criticising the ICRC approach.

including acquiring materials and building an IED, could be directly participating in hostilities, a view which clearly departs from State practice over the past years. In view of the experts, "the period of participation should extend as far before and after a hostile action as a causal connection existed".[206] This approach will, to a greater extent, include preparatory acts that are an integral part of harmful act. Boothby goes so far as stating that the ICRC approach is simply wrong: "The ICRC is wrong to limit the notion to 'military operations preparatory to an attack', and is also wrong to limit it to preparation for a particular attack. The distinction is finer than that. It is between the generation of a general capacity to undertake military activity and preparation for combat or hostilities".[207]

The experts' criticism also concerned the question of when protection is regained. Boothby is especially critical of the proposal that physical separation from the operation, such as laying down weapons, is sufficient. He argues that such acts should instead be viewed as "preparatory to the next act of DPH".[208] The ICRC approach is clearly too restrictive, encouraging misuse of civilian protection by simply laying down weapons every time the opposing forces appear to be able to respond. A person who has attacked the opposing forces should not be able to claim civilian protection as soon as the weapons are hidden and prepared for the next attack.[209] However, not all acts physically separating the person from the operation should be assumed to be preparation for continued direct participation; it may be that the act actually constitutes the end of the direct participation. The better approach therefore seems to be to reassess whether the acts amount to preparation for further participation, or, as proposed below, whether the participation is sufficiently regular to warrant continued loss of protection.

The question of when civilians directly participating in hostilities regain protection is an integral aspect of the 'revolving door' debate. The issue is often referred to by the example 'farmer by day, warrior by night'[210] and has long been controversial.[211] According to the ICRC Interpretive Guidance, the revolving door is "an integral part, not a malfunction, of IHL. It prevents attacks on

206 Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) pp. 36–37. See also Dinstein, *Conduct of Hostilities* (n 69) p. 177.

207 Boothby, "'And for such time as"' (n 132) p. 750.

208 ibid, pp. 751 and 765.

209 See also Boddens Hosang, *Rules of Engagement* (n 6) pp. 202–203.

210 ibid, p. 204.

211 See e.g. Parks, 'Air War' (n 63) p. 119. See also Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 37, and Watkin, 'Opportunity Lost' (n 18) pp. 686–687.

civilians who do not, at the time, represent a military threat".[212] Schmitt points out two errors in this argument. First, persons taking a direct part in hostilities do not lose their protection because they are a threat but instead because they choose to take part in the hostilities.[213] The fact that they do not pose a threat between acts of DPH is therefore not decisive.[214] Second, it does not make sense from a military perspective. When insurgent warfare is based on surprise attacks, it becomes difficult to prepare for them. Instead, the opposing forces are dependent on targeting insurgents when they are preparing their next attack.

The restrictive approach taken by the ICRC, however, entails that the insurgents are protected again once the attack is carried out, unless they can be proved to have a continuous combat function in an organised armed group.[215] It will, in other words, function as a shield that those directly participating in hostilities can hide behind,[216] as the reference by the ICRC to "the revolving door of protection" suggests.[217] The result is to throw "the military necessity-humanitarian considerations balance wildly askew".[218] Boddens Hosang goes so far as to argue that "the restrictive approach taken by the ICRC seems unworkable in practice and eventually runs the risk of eroding, at least at the tactical level, the incentive and understanding for compliance with the principle of distinction as a fundamental component of IHL".[219] The ICRC position that the protection comes and goes with each individual act is arguably also at odds with the AP Commentary, which refers to protection being lost "for as long as his participation lasts".[220] According to Boothby, this phrase "implies a period of time and sits rather uncomfortably with the Interpretive Guidance".[221]

The 'revolving door' question is particularly challenging in the context of operational level or pre-planned operations where the purpose is to target

212 *ICRC Interpretive Guidance* (n 87) p. 70.

213 Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 38. See also Boothby, '"And for such time as"' (n 132) pp. 756–757, and Bagwell and Kovite, 'It is not self-defence' (n 89) p. 26.

214 Dinstein, *Conduct of Hostilities* (n 69) pp. 177–178. See also Boddens Hosang, *Rules of Engagement* (n 6) p. 203.

215 See further Section 5.2.3.4.

216 Watkin, 'Opportunity Lost' (n 18) p. 686.

217 *ICRC Interpretive Guidance* (n 87) p. 71, fn. 192.

218 Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 38.

219 Boddens Hosang, *Rules of Engagement* (n 6) p. 204. See also Boothby, '"And for such time as"' (n 132) p. 768.

220 Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 4789.

221 Boothby, '"And for such time as"' (n 132) p. 756. Boothby refers to the AP I Commentary, but the quote is taken from the commentary to Article 13.3 of AP II.

known persons, regardless of their current activity. On the tactical level, however, it is likely to pose fewer challenges. Bagwell and Kovite go as far as to argue that "for tactical level targeting, where typically the person is recognized as a direct participant by his commission of acts that fall well within the "measures preparatory" standard of the Interpretive Guidance", the proposal to start the period of participation earlier "is largely insignificant".[222] Similarly, unless the persons committing an act of DPH are identified, once visual contact is lost, they can no longer be attacked because it will be impossible to distinguish them from civilians.[223] However, where the person is identified and known, as is more likely the longer the armed conflict lasts, the revolving door problem will be equally relevant at the tactical level.

A potential alternative to the restrictive ICRC approach would be to consider a civilian who repeatedly takes direct part in hostilities "a valid military objective until he or she unambiguously opts out of hostilities through extended non-participation or an affirmative act of withdrawal".[224] The result would be that the stricter 'for such time' criterion, applicable to individual acts of direct participation, would only apply to 'true' civilians, rather than persons functioning as combatants.[225] It may, of course, be difficult at times to discern whether a person has opted out. LOAC requires that in cases of doubt, a person shall be presumed to be a protected civilian.[226] However, it could be argued that if "the civilian has decided to refrain from further participation in hostilities, but an attacker is unaware – and has no reason to be aware – of that fact", it will be a case of mistake of fact, which LOAC accepts may occur as a result of the fog of war.[227] Reducing the scope for repeatedly stepping in and out of civilian protection, and hence the scope for misusing the civilian protection to

222 Bagwell and Kovite, 'It is not self-defence' (n 89) p. 32. By contrast, the question when direct participation ends is "significantly more problematic for implementation at the tactical level", although it is not made clear whether the authors considers the challenge to be more significant at the tactical level than other levels of operation. ibid, p. 32.

223 ibid, p. 35.

224 Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 38. See, however, Henderson, *The Contemporary Law of Targeting* (n 6) p. 96, where he argues that Schmitt's view does not reflect current law. See also Robin Geiss and Michael Siegrist, 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?', 93(881) *International Review of the Red Cross* 11 (March 2011), pp. 22–26.

225 See also David Kretzmer, 'Targeted Killing of Suspected Terrorists', 16(2) *European Journal of International Law* 171 (2005), p. 199.

226 *ICRC Interpretive Guidance* (n 87) p. 74. As will be discussed below in Section 5.4, the U.S. disagrees with this being customary law.

227 Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 39. See also Boothby, '"And for such time as"' (n 132) pp. 759–761.

gain an operational advantage, also opens the possibility of treating all non-State actors as continuous DPH, rather than having to develop generally applicable legal criteria for membership in an organised armed group. The analysis will now turn to considering this issue in further detail.

5.2.3.4 Continuous Loss of Protection: a Third Category for Organised Armed Groups?

When a person directly participates in hostilities on a regular and continuous basis, the question becomes whether the protection will be regained in between those activities. As explained above, the 'revolving door' question has been a source of criticism of the 'for such time' criterion. In the ICRC Interpretive Guidance, it is argued that "it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war".[228] Requiring States to only attack the opposing forces when they are actually fighting would furthermore 'fudge' the difference between those forces and civilians, thereby weakening the protection of civilians.[229] The question is how best to approach the issue of continued loss of protection. Although it should be possible to target those who continue to take direct part in hostilities on a regular basis, it is important to find a way to distinguish those who participate continuously and those who do so sporadically. Furthermore, when the loss of protection is based on the expectations of future acts, how can persons considered to have lost their protection for a longer period communicate that they have no intention of doing so and regain their civilian protection?

There are two ways of approaching this problem. Either continuous loss of protection can be limited to those connected to an organised armed group, or the focus can be on the current and expected future acts, with membership in an organised armed groups as a useful, but not decisive, indicator.

In the ICRC Interpretive Guidance, it is suggested that persons who have a "continuous combat function" in an organised armed group lose their protection throughout the period of their membership in the group.[230] For targeting purposes, they are not civilians, but rather a form of armed forces to which the 'for such time' criterion does not apply.[231] The concept was initially developed

228 *ICRC Interpretive Guidance* (n 87) p. 22.

229 Kretzmer, 'Targeted Killing of Suspected Terrorists' (n 225) p. 198.

230 *ICRC Interpretive Guidance* (n 87) p. p. 33.

231 ibid, p. 71. Rather than not being applicable, it is perhaps more accurate to state that "insofar as they are members of a group that exists for the very purpose of engaging in

in the context of NIACs, but during the project was equally applied to IACs.[232] For the purposes of the Guidance, this category includes both dissident armed forces and other organised armed groups.[233]

To the extent dissident armed forces continue to wear uniforms or otherwise distinguish themselves from the civilian population, they present less of a challenge in relation to targeting. The main challenge to the principle of distinction and for targeting are organised armed groups that "recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities".[234] They often fail to distinguish themselves from the civilian population, and the membership is difficult to determine. Because membership is rarely formalised or visible, the ICRC Interpretive Guidance suggests that "the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her DPH".[235] Continuous combat function may be "openly expressed through the carrying of uniforms, distinctive signs, or certain weapons", or "be identified on the basis of conclusive behaviour, for example where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation".[236] Individuals whose function does not involve DPH are not considered members of the group and hence not targetable on the basis of their relationship with the group.[237]

In addition to being organised and armed, the Interpretive Guidance requires such groups to "conduct hostilities on behalf of a Party to the conflict".[238] While this is relevant for determining an armed group's status and associated rights if captured during an IAC, it is not clear how it has any implications in the context of targeting, whether in IACs or NIACs.[239] It does, however, serve as a useful reminder of the requirement that it is not sufficient to be organised

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hostilities, the 'for such time' criterion must be interpreted as extending throughout the duration of their membership". Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) pp. 16–17.

232 Schmitt, 'The Interpretive Guidance: A Critical Analysis', ibid, pp. 21–22.

233 *ICRC Interpretive Guidance* (n 87) p. 31.

234 ibid, p. 32.

235 ibid, p. 33.

236 ibid, p. 35.

237 ibid, p. 34.

238 ibid, p. 32 (re. NIACs). See also ibid, pp. 23–24 (re. IACs).

239 See also Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) pp. 17–20.

and armed: the acts carried out must also meet the criteria of DPH, thereby excluding armed gangs of criminals making use of the situation. Furthermore, it excludes groups involved in a parallel armed conflict taking place in the same area.

The ICRC proposal has the benefit of making the distinction between those who have lost their protection from attack and those who remain protected as civilians clearer. In particular, it acknowledges the possibility of status-based targeting in NIAC.[240] However, in order to reduce the risk of persons entitled to protection being mistaken for someone who has lost their protection, the ICRC has set the threshold of participation very high, making it difficult to apply in practice.[241] 'Continuous combat function' requires that the criteria for DPH be met, including the controversial 'one causal link' criterion, as well as that the person is a member of an organised armed group.[242] This is problematic for several reasons. First, as a starting point, the ICRC test excludes a significant number of supporting personnel who are an integral part of the group's combat effectiveness.[243] The ICRC contends that those who are involved in the preparation, execution or command of acts amounting to DPH are members of the organised group for the purpose of targeting, while recruiters, trainers, financiers and propagandists are not, even though they may actually be members of the armed group.[244] This is likely to be a result of the proposed and controversial high threshold for participation to be considered direct.

While it may make sense to have a high threshold for concluding that an act amounts to DPH when there is no connection to an organised armed group, the criteria should be applied differently in cases where such a connection exists. Supporting functions are both integral and essential for an organised armed group, whether State armed forces or non-State groups, to function. The

240 Francoise J. Hampson, 'Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law', 87 *International Law Studies* 187 (2011), pp. 199–200.

241 Boddens Hosang goes as far as arguing that "while the ICRC's Guidance contains a number of valuable and valid contributions to the overall understanding of the notion of DPH, its theoretical and at times idealistic approach may render many elements and subtleties of the Guidance nearly impossible to implement in the actual practice of modern military operations". Boddens Hosang, *Rules of Engagement* (n 6) p. 206.

242 See also Wolff Heintschel von Heinegg and Peter Dreist, 'The 2009 Kunduz Air Attack: The Decision of the Federal Prosecutor-General on the Dismissal of Criminal Proceedings Against Members of the German Armed Forces', 53 *German Yearbook of International Law* 833 (2010), p. 858, referring to it as a "double standard (...) that would not be operable in real life".

243 Watkin, 'Opportunity Lost' (n 18) p. 675.

244 *ICRC Interpretive Guidance* (n 87) p. 34.

ICRC excludes from its definition of members of organised armed groups persons who would have been a lawful target if they were members of the State armed forces. It is difficult to see why they should be able to carry out the same functions for an organised armed group and remain a protected civilian.[245] As Watkin explains, "there is a commonality to fighting wars that requires an organization to consist of commanders, planners, intelligence personnel, and fighters to carry out the military action. There is also a requirement to provide logistical support".[246] It does not make sense to claim that in the context of non-State organised armed groups, only those carrying out attacks will lose their protection as civilians. The function of a person within a group should only be relevant to the extent it distinguishes that person from those without a combat-related function, such as medical personnel or members of a political wing of the group. Admittedly it may be harder to ascertain whether persons with support functions such as trainers have lost their protection from attack, but this should not exclude the possibility of coming to that conclusion when their involvement in the hostilities is clear.

Second, although membership in an organised armed group is a useful indication that a person is taking direct part in hostilities on a regular basis, it cannot be an exhaustive requirement for continued loss of protection. It may sometimes not be possible to define the connection between a person of interest and the organised armed group, or it may be that the person is acting out of support for the group without their knowledge. However, there may still be sufficient information to warrant the conclusion that someone is taking direct part in hostilities on a regular basis.

In the last few years, there has been an increasing trend of individuals or small groups carrying out attacks on civilians. In order to avoid detection, they have little or no contact with the group they support. If such attacks are carried out in the context of an armed conflict and over a period of time, they could be considered to qualify as taking a direct part in hostilities such that their civilian protection is lost for a period extending beyond the immediate time before and after attacks. When a person is deemed to take direct part in hostilities over a longer period or on a regular basis, the lack of membership in an organised armed group should not be sufficient to shield that person from direct attack.[247]

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245 Watkin, 'Opportunity Lost' (n 18) p. 675.

246 ibid, p. 680. See also Dinstein, *NIAC* (n 119) pp. 58–59.

247 See also Boothby, '"And for such time as"' (n 132) p. 758, footnote omitted. This argument is further developed below.

When faced with a group of persons considered to be members of an organised armed group, it will be impossible in many cases to discern their function in that group, as the ICRC expects.[248] Some therefore argue that if the membership criterion is to remain central, it will only make practical sense if all members of an organised armed group are considered lawful targets, either by way of being armed forces or civilians continuously participating in hostilities.[249] The result is that for targeting purposes they will be treated as combatants, although like civilians, they have no right to directly participate in hostilities, and will therefore not benefit from the combatant privileges of prisoner of war status and prosecutorial immunity for lawful acts of war.[250]

This status-based approach to members of organised armed groups clearly appears less complicated from an operational perspective. However, in many cases organised armed groups do not distinguish themselves from civilians in such a way that they may be identified based on their appearance. As a result, their acts will remain central for determining whether they are lawful targets. Furthermore, certain members of an organised armed group should not be considered lawful targets, especially the medical personnel, provided they refrain from carrying out acts detrimental to the opposing forces. Because medical personnel are unlikely to bear distinguishing marks, their actions will again be important for the determination of their status. Membership in an organised armed group will therefore not be sufficient on its own as a basis for determining whether a person is a lawful target, and should consequently not be the central and conclusive criterion. This does mean that a distinction must be made between those with a fighting function and, *inter alia*, the cook.[251] However, if the distinction is impossible to make, as is commonly the case, the mistake is likely to be considered reasonable.[252]

The alternative approach to the ICRC 'continuous combat function' proposal is to apply the criteria for DPH and to interpret the temporal scope to mean loss

248 Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 24.

249 See e.g. ibid. See also Watkin, 'Opportunity Lost' (n 18) pp. 690–691.

250 See also U.S. DoD, *Law of War Manual* (n 24) pp. 100–101.

251 The cook is commonly used as an example of a function that will not be considered a lawful target if direct participation in hostilities is a requirement, but who may be considered a combatant and lawful target if a member of the State armed forces. See e.g. Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 23, and Watkin, 'Opportunity Lost' (n 18) p. 676.

252 On the LOAC standards for identifying a lawful target and precautions in attack in general, see Section 5.4.

of protection for as long as the person continues to directly participate in hostilities on a regular or recurrent basis.[253] As Boothby argues, "the correct approach is to distinguish between, first, isolated and sporadic acts by civilians and, second, repeated or persistent acts of DPH. Only the former would involve resumption of protected status after the act of DPH, while the latter would involve continuous loss of protected status while such persistent or repeated involvement in hostilities continues".[254] This approach enables the focus to remain on the test set out in LOAC, namely on DPH, rather than having to develop criteria for membership of an organised armed group as well.[255]

The focus on DPH rather than on membership does not, however, solve the question of how long the protection is lost. Information about membership or connection to an armed group will be useful in determining whether the acts amount to DPH and whether the participation is regular. The point is that while the lack of such information may make it harder to anticipate future actions, it does not make it impossible to conclude that a person is participating in hostilities on a regular basis. However, the requirements for information about the type of acts that have been carried out, the degree to which they are carried out on a continuous basis, and the quality of the source of the information, should be higher if the membership is unclear. A higher standard reduces the scope of targeting individuals on the basis of regular participation without a clear connection to an organised armed group, thereby ensuring protection of non-participating civilians, while at the same time enabling those known to be participating on a regular basis to be targeted.

The concept of continuous DPH without a requirement of membership in an organised armed group is expressly rejected by the ICRC Interpretive Guidance. It claims that "[i]n practice, confusing the distinct regimes by which governs the loss of protection for civilians and for members of State armed forces or organized armed groups would provoke insurmountable evidentiary problems." The Guidance goes on to claim that "[i]n operational reality, it would be

253 See also Dinstein, *NIAC* (n 119) p. 63, where he argues that a person who DPH in a recurrent manner may be considered to DPH on a continuous basis. See also Dinstein, *Conduct of Hostilities* (n 69) p. 177.

254 Boothby, "'And for such time as'" (n 132) p. 758, footnote omitted. See also the AP Commentary, which refers to "a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target", suggesting that it is possible to view members of organised armed groups as civilian directly participating in hostilities. Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 1942.

255 Watkin criticises the ICRC for creating a "third category with criteria for membership that are unique and are not found in existing treaty or customary law". Watkin, 'Opportunity Lost' (n 18) p. 643.

impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act have previously done so on a persistently recurrent basis and whether they have the continued intent to do so again. Basing continuous loss of protection on such speculative criteria would inevitably result in erroneous or arbitrary attacks against civilians".[256]

This seems harsh. LOAC has clear rules on the presumption on civilian status and requires those who plan and carry out attacks to do everything feasible to verify that the target is not a protected civilian or otherwise protected person.[257] If it is not possible to sufficiently distinguish between protected civilians and lawful targets, the attack may not be carried out. Furthermore, as Boothby points out, "decisions, including as to whether a targeted individual is a recurrent participator in hostilities, are based on information, not evidence".[258] The ICRC is, however, right in emphasising that the criteria for making the determination of continued loss cannot be "speculative". Proving recurring past participation to a sufficient degree to determine the likelihood of future participation may be difficult, especially where the connection to an organised armed group is unclear. Still, the ICRC appears to overestimate the complexity of this determination. According to Watkins, "it is not difficult logically, operationally, or factually to determine future activity from past conduct. This is an intelligence issue involving the same considerations as determining who is performing a 'continuous combat function'".[259] When explaining how to determine whether someone is having such a function, the ICRC also suggests that conclusive previous behaviour may be sufficient.[260]

Even if future activities are difficult to determine, this does not make it impossible. Furthermore, military operations are not driven by a focus on those who meet the criteria of being a lawful target, but rather on persons who are a threat or potential threat, and who can with reasonable certainty be considered a lawful target. As Prescott explains, "targets are not identified on the basis of their conformance with precise legal guidelines and perfect situational awareness and then recommended for engagement".[261] Instead, "ROE are

256 *ICRC Interpretive Guidance* (n 87) p. 45.

257 See Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 23, where he argues that: "it makes little sense to justify the continuous combat function criterion on the basis of concern about an inability to distinguish members of an organized armed group from civilians or civilian affiliates of the armed group, as IHL already deals with doubt through a presumption of civilian status". On the issue of doubt, see further Section 5.4 below.

258 Boothby, *The Law of Targeting* (n 3) p. 152.

259 Watkin, 'Opportunity Lost' (n 18) p. 688. See also Dinstein, *NIAC* (n 119) p. 62.

260 *ICRC Interpretive Guidance* (n 87) p. 35.

261 Prescott, 'Tactical Implementation of ROE' (n 89) p. 252.

applied to targets as a result of the target validation process and during the actual engagement, however deliberate or expedite these events might be".[262] The decision to use force against someone is based on the intelligence and experience, and whether it is reasonable to consider someone to be a lawful target. In cases where a person's involvement in activities amounting to DPH is very uncertain, it is therefore, first, unlikely that they will draw the attention of NATO forces in the first place, and second, it is unlikely that an attack is considered reasonable.

The fact that the law is difficult to apply should not exclude the potential for applying force in those situations where the criteria may reasonably be considered met. As Boothby stresses, "no decisions in war are ever based on certainties. (…) Decision makers thus inevitably have to base decision in part on inference".[263] They are, however, obliged to make such a decision in good faith.[264] Furthermore, in order to avoid 'erroneous or arbitrary attacks against civilians', States may decide to restrict or retain the authority to determine that a person who is not considered to be a 'member' of an organised armed group has lost the protection as civilian beyond the individual acts of DPH. By contrast, because targeting on the basis of membership in an organised armed group typically will be easier to apply in practice, the authority for making that determination may be released to a lower level in the chain of command. The relationship between the operational regulation of the use of force and LOAC is further examined in Chapters 11 and 12.

State practice clearly indicates that opposing forces are considered lawful targets at any time, not just while taking a direct part in hostilities.[265] The question is therefore how best to ensure that military forces only direct their attacks at persons who are considered to be lawful targets. Whether the approach to continuous loss of protection is a membership approach or continuous DPH or a combination thereof, the most important way to ensure accurate application in an ongoing operation is to provide the military forces with examples of what is considered to meet the tests and not. After all, as emphasised in the U.K. Manual of the Law of Armed Conflict, "[w]hether civilians are taking a direct part in hostilities is a question of fact".[266] And the interpretation of facts will always be context dependent. While it will be important to emphasise the legal criteria, in

262 ibid.

263 Boothby, '"And for such time as"' (n 132) p. 766.

264 ibid.

265 Parks, 'Air War' (n 63) p. 118. See also Melzer, 'The Principle of Distinction between Civilians and Combatants' (n 77) p. 312.

266 *UK LOAC Manual* (n 16) para. 5.3.3.

particular that direct participation must be distinguished from indirect participation, it must be remembered that concrete and relevant examples are more useful to military forces than complex criteria that require interpretation.

A final issue to be considered in the context of continuous loss of civilian protection is how to know whether it has ended. According to the ICRC, the disengagement from a continuous combat function "need not be openly declared; it can also be expressed through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an exclusively non-combat function".[267] The same will hold true for disengagement from continuous direct participation; the disengagement need not be expressed, but must somehow be affirmative, based on an objective and reasonable assessment of the facts.[268]

As pointed out above in Section 5.2.3.3, complete certainty is rarely possible during an armed conflict and LOAC therefore permits mistakes to be made. However, the decision that someone has lost their civilian protection must be based on a good faith assessment of the information reasonably available at the time. If the focus is on the acts of the person, rather than merely his or her 'membership' in an organised armed group, the information collected about the person's previous activity must be regularly updated in order to ensure that the person is still participating.

One way to operationalise this would be to require new information within a set time limit in order for the person to remain on the list of lawful targets.[269] Furthermore, since resources are generally limited both in the form of time and means of warfare, military forces will not direct them at persons to whom they do not expect to gain a military advantage by attacking. However, it will not be feasible to keep all such information updated on a daily or even weekly basis. A challenge may therefore arise where a person is attacked on the basis of previous regular participation, but has just decided to disengage from such activities. On the other hand, in such cases the wrongful determination of a person as a lawful target is likely to be an honest and reasonable mistake; it is not feasible to know that the person has recently disengaged. As is emphasised

267 ICRC *Interpretive Guidance* (n 87) p. 72.

268 Watkin, 'Opportunity Lost' (n 18) p. 693.

269 See also Bagwell and Kovite, 'It is not self-defence' (n 89) p. 36. In Bagwell's experience from Afghanistan, "To account for the fact that a person can indicate he is no longer a direct participant by not committing any acts of direct participation over a period of time, the person's inclusion on the list [of verified targets] was not permanent. United States forces were required to refresh his status with new intelligence evidencing a person's continued direct participation within a given timeframe". (Footnote omitted).

in the Commentary to the Geneva Conventions, "[t]hose who take part in the struggle while not belonging to the armed forces are acting deliberately outside the laws of warfare".[270] It is therefore not unreasonable to argue that "the direct participant should bear the risk of mistake, not his or her opponents, as IHL does not envision the participation of the former in the first place".[271]

5.3 What Does It Entail to Be a Lawful Target

5.3.1 *Lawful to Attack and Detain*

The most important implication of being a lawful target is that you may be attacked at anytime and anywhere, regardless of current activity. The only exceptions arise if the person becomes *hors de combat*, for example because of injuries, or indicates an intention to surrender. Persons who are lawful targets may be "pursued without warning or any other preliminaries."[272] There is no requirement of force only being used as a last resort.[273] Rather, the only limitation on the use of force lies in the explicit prohibitions on the use of certain means and methods such as biological and chemical weapons, denial of quarter and perfidy. It is also prohibited to employ "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering".[274]

The ICRC Interpretive Guidance suggests that "it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force".[275] It is therefore the ICRC's view that "the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances".[276] Although it is uncontroversial to

270 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Geneva Convention relative to the protection of civilian persons in time of war*, Vol. 4 (ICRC, Geneva, 1958) Article 5, p. 53.

271 Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 17, referring to differing views expressed in the development of the ICRC Interpretive Guidance.

272 Dinstein, *Conduct of Hostilities* (n 69) p. 42.

273 See also Corn, 'Public Authority to Use Force in Military Operations' (n 35) p. 42.

274 AP I (n 10) Article 35(2).

275 *ICRC Interpretive Guidance* (n 87) p. 82.

276 ibid. The ICRC position is influenced by the decision of the Israeli High Court of Justice in *The Public Committee against Torture in Israel v. The Government of Israel* (n 198) para. 40. The reliance on and application of this decision outside its unique context is criticised,

state that belligerents do not have unlimited rights to choose means and methods of warfare,[277] using this as an argument for an obligation to capture rather than kill seems unwarranted. In fact, Dinstein points out that it "would be utterly incompatible with the general practice of States".[278] To be fair, the Interpretive Guidance does state that the obligation to capture rather than kill is not necessarily a legal one; however, either there is an obligation or there is not, and such an obligation would be impossible both to apply and to assess compliance with.[279] Furthermore, the basis for the proposed restriction on the use of force is the principle of military necessity. Yet, this principle is already taken into consideration when creating the rules.[280] Unless explicitly cited as a factor to be considered, it should not be applied as "a separate restriction that constitutes an additional hurdle over which an attacker must pass before mounting an attack".[281] The opposite conclusion would have the undesirable side effect of permitting LOAC to be set aside if deemed sufficiently necessary.[282]

States may still decide to encourage military forces to capture rather than kill opposing forces where this is possible. However, this is most likely done on the basis of military considerations such as perception management among the civilian population and the desire to gather intelligence from captured persons.[283] In operations that require close interaction with the civilian

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inter alia, by Hays Parks, see Parks, 'No mandate, no expertise, and legally incorrect' (n 77) pp. 788–793.

277 This is set out clearly in both Article 22 of the 1907 Hague Regulations (n 28) and AP I (n 10) Article 35(1).

278 Dinstein, *Conduct of Hostilities* (n 69) p. 42. See also Dinstein, *NIAC* (n 119) p. 59. The notion is criticised by several international experts, see e.g. Parks, 'No mandate, no expertise, and legally incorrect' (n 77); Geoffrey S. Corn, Laurie R. Blank, Chris Jenks, and Eric Talbot Jensen, 'Belligerent Targeting and the Invalidity of a Least Harmful Means Rule', 89 *International Law Studies* 536 (2013); Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) pp. 41–43; Kleffner, 'Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities' (n 6); and Boddens Hosang, *Rules of Engagement* (n 6) pp. 206–214.

279 Corn *et al.,* 'Belligerent Targeting and the Invalidity of a Least Harmful Means Rule', ibid, pp. 540–541 and pp. 613–618.

280 Boddens Hosang, *Rules of Engagement* (n 6) p. 209. See also Section 5.1.1, note 13 and accompanying text.

281 Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 41.

282 Kleffner, 'Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities' (n 6) p. 41.

283 See also Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) p. 43, and Michael N. Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants', 24(3) *European Journal of International Law* 855 (2013), p. 861. However, in internal NIACs, where the State's human rights obligations will apply in full, subject to derogation, States may also consider such limitations to arise from their

population, such as counter insurgency (COIN) operations, States may also decide to impose general restrictions on the use of force, for instance through a requirement of 'minimum use of force'.[284] Such policy decisions should not be interpreted as State practice in the context of customary law development without the necessary indications of the required corresponding *opinio juris*.[285] In the case of NATO, it may even be a result of States having different views on whether or not the situation should be classified as a conflict. By imposing a requirement of 'minimum use of force' or limiting force to the degree, intensity, and duration necessary to achieve the objective, the concerns of NATO States that do not consider the operation to involve participation in an armed conflict will be respected.

Even if the capture versus kill debate appears to have favoured the conclusion that there is no new legal duty to capture, it has had the beneficial effect of clarifying the requirements for becoming *hors de combat* and, in particular, when a person should be deemed captured and thus no longer a lawful target. It is unlawful to attack a person who is *hors de combat*, but such persons may still be detained. Especially in the context of non-State actors, it has been argued that a person should be considered captured when clearly under the control of the opposing forces and unable to continue fighting.[286] This seems like a sound approach, and although it may be difficult to apply at the tactical level, he or she should be captured if it becomes apparent that the person has no means of resisting. Furthermore, as Schmitt points out, "In the case of the weaponless surrounded fighter, the fact that he is unwilling affirmatively to surrender does not preclude his having been captured. (…) But if a person who appears capable and ready to resist has not been captured; he may be killed even if resistance would be completely futile".[287]

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human rights obligations, in particular where the members of an organised armed group "pose no immediate danger and it might be feasible to apprehend them and place them on trial." Kretzmer, 'Targeted Killing of Suspected Terrorists' (n 225) p. 202.

284 See also discussion in Section 2.4.1.

285 Boddens Hosang, *Rules of Engagement* (n 6) p. 209.

286 Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants', 24(3) *European Journal of International Law* 819 (2013), pp. 830–836. According to Hessbruegge, there is increasing support for this view. Jan Arnold Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (Oxford University Press, New York, 2017) pp. 220–221. See also Kleffner, 'Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities' (n 6) p. 36.

287 Schmitt, 'Wound, Capture, or Kill' (n 283) p. 861. See also Goodman, 'The Power to Kill or Capture Enemy Combatants', ibid, and Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants: A Rejoinder to Michael N. Schmitt', 24(3) *European Journal of International Law* 863 (2013).

5.3.2 *No Protection against the Effects of Hostilities*

Being a lawful object of attack is not the only consequence of being a lawful target. The other consequence is that there is no protection against the effects of hostilities beyond the prohibition on unnecessary suffering and superfluous injury.[288] Most importantly, persons who are lawful targets are not required to be taken into account in a proportionality assessment, and there is no duty to minimise losses as generally required as precautions in attack.[289] This also means that in situations where the only persons or objects expected to be affected by an attack are lawful targets, there is no requirement to assess whether precautions in attack are required.

As previously explained,[290] an increased focus on reducing civilian casualties has resulted in an increased need for determining the status of those expected to be harmed by an attack. Because persons who are lawful targets are not required to be taken into account in the proportionality analysis, incidental loss of persons who are lawful targets are not violating the zero civilian casualty policy. This has resulted in an increased focus on and need for defining the limits of DPH, both with regards to the type of actions that may amount to direct participation and the degree of certainty required to make the determination that someone has lost civilian protection. After all, these are not necessarily persons who would have been attacked had they not been in the vicinity of the primary target, that is, a person or object subject to attack. Furthermore, the determination will often need to be made on the basis of the limited facts available at the time, and the decision on whether an attack should be continued, or cancelled or suspended because it is expected to cause excessive incidental loss to civilians, will in many cases have to be taken quickly.[291]

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288 AP I (n 10) Article 35(2).

289 This double effect of being a lawful target is confirmed by the AP Commentary on direct participation in hostilities: "Once he ceases to participate, the civilian regains his right to the protection under this Section, i.e., against the effects of hostilities, and he may no longer be attacked". Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 1944. See also Schmitt, 'The Interpretive Guidance: A Critical Analysis' (n 5) pp. 13–14; and International Law Association Study Group on the Conduct of Hostilities in the 21st Century (ILA), 'The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare', 93 *International Law Studies* 322 (2017), p. 357.

290 Section 5.2.3.1 and 5.2.3.2.

291 AP I (n 10) Article 57(2)(b): "an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated". See further Section 5.4.

Despite its important practical implications, this consequence of becoming a lawful target often seems forgotten. In the Interpretive Guidance, the ICRC, for instance, mainly focuses on protection against direct attack and the loss thereof. As a result, the organisation misunderstands why many States are sceptical of their restrictive approach to human shields. The concern is not the ability of military forces to direct their attacks at human shields, but rather the effect that the use of human shields have on the operation.[292] The issue of human shields is, however, particularly complex because it is in many cases impossible to determine with any degree of certainty whether the persons are there voluntarily or involuntarily.[293]

5.4 Identification of Lawful Targets: Precautions in Attack and the Issue of Doubt

5.4.1 *General Rule on Precautions in Attack*

LOAC requires that those who conduct military operations to take "constant care" (…) "to spare the civilian population, civilians and civilian objects".[294] This is commonly referred to as the requirement to take all feasible precautions. There are two aspects of this duty. First, as a general obligation to spare civilians in the conduct of all aspects of military operations, laid out in AP I Article 57(1). This will apply both to attack and to operations not involving attack, such as the movement or deployment of forces.[295] Second, Article 57(2)-(5) sets out the more specific duties, operationalising the general obligation in the context of attack.[296] These include requirements concerning verification of target, choice of means and methods of warfare, proportionality, and giving effective warnings. The most relevant aspects of precautions for the current

292 See also the discussion above in Section 5.2.3.2., and the comment on this issue by Schmitt and Widmar in Schmitt and Widmar, 'The Law of Targeting' (n 169) p. 127.

293 For instance, the UK position is that "even where human shields are being used, the proportionality rule must be considered." *UK LOAC Manual* (n 16) para. 2.7.2.

294 AP I (n 10) Article 57(1), considered to reflect customary law applicable in both IACs and NIACs. See *ICRC CIL Study* (n 11) Rule 15.

295 *UK LOAC Manual* (n 16) para. 5.32, fn. 187.

296 ILA, 'Challenges of 21st Century Warfare' (n 289) pp. 380–381. Note, however, that although Article 57(2)-(5) only relate to the attack aspect of military operations, the distinction between the wider general obligation and the more narrow focus on attack is not always made. See e.g. Schmitt and Widmar, 'The Law of Targeting' (n 169) p. 137; Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 2191, and Boothby, *The Law of Targeting* (n 3) p. 119.

book are verification of targets and proportionality, and these will be considered in further detail below. The duty to take all feasible precautions also extends to taking feasible precautions to reduce the risk of harm to protected persons and objects from the effects of enemy attacks.[297] However, this will not be examined in further detail here.

The term "feasible" is generally understood as meaning "that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations".[298] It is in other words clear that "[t]he obligation to do everything feasible is high but not absolute",[299] as was emphasised in the *OTP Report*. Examples of circumstances that may be taken into account are risk to own forces or other security risks; the expected humanitarian benefits from the precaution; and the availability of alternative approaches or weapon systems.[300] While some suggest that the financial cost of taking the precaution also may be taken into account,[301] this is controversial, although resource considerations, such as the availability of expensive weapon or ammunition, are generally accepted to be relevant for the feasibility consideration.[302]

It is not a requirement to take all precautions, but rather only those that are considered reasonable, that is, measures that a reasonable attacker in similar

297 AP I (n 10) Article 58, and *ICRC CIL Study* (n 11) Rules 22–24. See also *AMW Manual* (n 4) Section H. Dinstein makes the distinction between active and passive precautions, see Dinstein, *Conduct of Hostilities* (n 69) pp. 164–174, and *AMW Manual*, ibid, Section G, Commentary para. 1. See also U.S. DoD, *Law of War Manual* (n 24) pp. 271–276, and Boothby, *The Law of Targeting* (n 3) pp. 74–76.

298 UK, *Reservations to AP I* (n 101) §b. Similar or identical declarations or statements were made by several States, e.g. Canada, Germany, Netherlands, Algeria, Austria, Italy, Belgium, Ireland, and Spain. All reservations and declarations are available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last accessed 24.04.2019). The U.S. has made a similar statement in U.S. DoD, *Law of War Manual* (n 24) pp. 193–194. See also Certain Conventional Weapons Convention (1980): Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Geneva, 10 October 1980, UN Doc A/CONF.95/15, 27.10.1980, Annex I, Article 3(4); Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, Geneva, 10 October 1980, UN Doc A/CONF. 95/15, 27.10.1980, Annex I, Article 1(5); Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996, UN CCW/CONF.I/ 16, Article 3(10); and *ICRC CIL Study* (n 11) Commentary to Rule 15.

299 ICTY, *OTP Report* (n 9) para. 29.

300 U.S. DoD, *Law of War Manual* (n 24) p. 193, and Schmitt and Widmar, 'The Law of Targeting' (n 169) p. 137.

301 See e.g. U.S. DoD, *Law of war manual*, ibid, p. 193.

302 ILA, 'Challenges of 21st Century Warfare'(n 289) pp. 377–378.

circumstances would take based on the information reasonably available at the time.[303] It is accepted that the information available during an armed conflict may be imperfect or even lacking, as long as the assessment of the information and the decision made upon it is based on "common sense and good faith".[304] This combination of subjective honesty and objective reasonableness is commonly considered to originate from the *Hostage Case*.[305] In what is now known at the 'Rendulic rule', the Court held that:

> But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal.[306] (…) We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgement on the basis of the conditions prevailing at the time.[307]

5.4.2 *Verification of the Target before and During an Attack*

As was explained in Section 5.2 above, individuals or groups become lawful targets under LOAC on the basis of either their status or their conduct. When planning or conducting an attack, everything feasible must be done to verify

303 Schmitt and Widmar, 'The Law of Targeting' (n 169) p. 137. See also *AMW Manual* (n 4) Definition (q) and Commentary, pp. 28–29, and Merriam, 'Affirmative Target Identification' (n 16) pp. 118–123. On the relationship between feasible and reasonable, see ILA, 'Challenges of 21st Century Warfare', ibid, p. 375.

304 Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 2198. See also *AMW Manual,* ibid, Commentary to Definition (q), para.6, p. 39, and U.S. DoD, *Law of War Manual* (n 24) pp. 195–197.

305 See e.g. Merriam, 'Affirmative Target Identification' (n 16) pp. 109–111. See also Parks, 'Air war' (n 63) p. 3, and Brian J. Bill, 'The Rendulic 'Rule': Military Necessity, Commander's Knowledge, and Methods of Warfare', 12 *Yearbook of International Humanitarian Law* 136 (2009).

306 *United States vs. List et al.* ('The Hostages Trial') (Nuremberg, 1948) 11 *NMT* 1230, p. 1296. The focus of the case was on military necessity rather than distinction, but its notion that battlefield acts must be evaluated based on honesty judgement and objective reasonableness, based on the information available at the time, has been applied to all battlefield acts. See Merriam, 'Affirmative Target Identification' (n 16) p. 109. For a current example of a similar formulation, see U.S. DoD, *Law of War Manual* (n 24) p. 194: "In assessing whether the obligation to take feasible precautions has been satisfied after the fact, it will be important to assess the situation that the commander confronted at the time of the decision and not to rely on hindsight".

307 *United States vs. List et al* ('The Hostages Trial'), ibid, p. 1297.

that the objectives to be attacked are military objectives and not civilians or subject to special protection.[308] If it becomes apparent that the person is not a lawful target after all, the attack must be cancelled or suspended.[309] As the ILA Study Group on the Conduct of Hostilities in the 21st Century points out, "[t]he obligation to verify is crucial for two reasons: first, it functions to minimize the risk that a target will be mistakenly assessed as qualifying for deliberate attack; second, it functions to maximize the probability of that attacks will only be directed at targets that genuinely contribute to bringing the enemy into submission".[310]

Coupled with this duty to take precautions is the presumption of civilian status, dictating that if there is doubt whether a person is a civilian, that person shall be considered to be a civilian.[311] The same applies to doubt as to whether a civilian is taking a direct part in hostilities; if there is doubt, the person should be presumed to be protected.[312] Although the doubt rule and the precaution requirement are separate rules, they are in practice closely interlinked, and it may be hard to determine where the issue of doubt ends and becomes a question of what is reasonably expected based on the information available at the time.

The identification of lawful targets is made difficult by the enemy's failure to comply with the LOAC principle of distinction.[313] It is particularly challenging when the determination is based on a form of DPH, whether on a sporadic

308 AP I (n 10) Article 57(2)(a)(i). See also *ICRC CIL Study* (n 11) Rule 16. Article 57(2)(a)(i) also refers to objects, but this will not be examined further here.

309 AP I, ibid, Article 57(2)(b). See also *ICRC CIL Study*, ibid, Rule 19.

310 ILA, 'Challenges of 21st Century Warfare' (n 289) p. 382.

311 AP I (n 10) Article 50(1). According to the Commentary to AP I, the rule "concerns persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked." Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 1920. See also *ICRC Interpretive Guidance* (n 87) p. 35, where it is emphasised that the determination whether someone is a lawful target or not is "subject to all feasible precautions and to the presumption of protection in case of doubt".

312 *ICRC Interpretive Guidance,* ibid, pp. 75–76. Note that this presumption was met with some criticism during the expert meetings. Boothby points out that there is no such rule in LOAC, only a presumption of civilian status. Boothby, *The Law of Targeting* (n 3) p. 149. However, the presumption of civilian status only makes sense if it refers to protected civilians, that is, civilians who are not directly participating in hostilities.

313 Melzer, 'The Principle of Distinction between Civilians and Combatants' (n 77) pp. 297–298. See also Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 1921, and Laurie R. Blank, 'Extending Positive Identification from Persons to Places: Terrorism, Armed Conflict, and the Identification of Military Objectives', 2013 *Utah Law Review* 1227 (2013), pp. 1237–1239.

basis or in the form of membership in an organised armed group.[314] Unlike traditional armed conflicts between uniformed combatants, military forces involved in armed conflicts against groups that fail to distinguish themselves from the civilian population have to rely heavily on assessing the current conduct of the opposing forces and/or intelligence about their previous and expected future involvement in the armed conflict. In such cases, there will rarely be absolute certainty, which entails that there will be a degree of doubt. As Schmitt and Widmar explain: "doubt is a persistent and pervasive factor in combat".[315] Absolute certainty is therefore not possible, nor is it generally considered a requirement.[316] This issue is addressed, *inter alia*, in the UK LOAC Manual:

> In the practical application of the principle of civilian immunity and the rule of doubt, (a) commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time, (b) it is only in cases of substantial doubt, after this assessment about the status of the individual in question, that the latter should be given the benefit of the doubt and treated as a civilian, and (c) the rule of doubt does not override the commander's duty to protect the safety of troops under his command or to preserve the military situation.[317]

Rather than requiring a civilian presumption to be applied in any cases of doubt, the UK LOAC manual sets out a higher threshold of *substantial* doubt. The Norwegian manual similarly stresses that due to the fog of war, some degree of doubt must be tolerated. However, rather than focusing on the degree of doubt, it stipulates that if doubt remains after all feasible precautions have been taken to verify the target, attacks may only be carried out if it is considered highly probable or most likely that the person is a lawful target.[318] The U.S. has also objected to the rule that any doubt should result in presumption

314 See discussion above in Section 5.2.3. See also Corn, 'Public Authority to Use Force in Military Operations' (n 35) p. 44.

315 Schmitt and Widmar, 'The Law of Targeting' (n 169) pp. 128–129. See also Henderson, *The Contemporary Law of Targeting* (n 6) p. 163.

316 See e.g. *AMW Manual* (n 4) Rule 12(a), Commentary paras. 4 and 5; *Tallinn Manual 2.0* (n 68) p. 424; and Boothby, *The Law of Targeting* (n 3) p. 121.

317 *UK LOAC Manual* (n 16) para. 5.3.4. See also UK, *Reservations to AP I* (n 101) §h.

318 *Norwegian LOAC Manual* (n 101) p. 29. The requirement in Norwegian is "overveiende sannsynlig".

of civilian protection.[319] They emphasise that the determination cannot be based merely on "hypothetical or speculative considerations regarding their possible current status as a military objective",[320] but must be made "in good faith based on the information available to them in light of the circumstances ruling at the time".[321]

It is clear that States do not support the interpretation "even if there is only a slight doubt",[322] more information must be sought, as suggested in the ICRC Commentary. However, rather than defining the degree of doubt, the focus should be on what is expected of the Commander. As Henderson explains, "the level of verification required to reduce doubt, and the degree of acceptable doubt, will vary depending upon the likely adverse consequences of a wrong decision".[323] In practice, the test is therefore whether the attacker acted in honest belief and whether a reasonable attacker would have made the same decision.[324]

The first question when assessing the legality of targeting is therefore what the attacker honestly believed: Did he honestly believe he had sufficient information about the target and that the proposed target was a lawful one?[325] If not, he would be bound by the presumption of civilian protection, and must either cancel the attack or take further measures to gather information about the target and then reassess whether it is a military objective. Second, the targeting decision must be assessed on the basis of the objective standard of reasonableness: "whether a reasonable attacker, having employed all reasonably available means of verification under the circumstances, would initiate the attack".[326] There are two aspects to this question. Have the attackers employed all reasonable available means of verification under the circumstances? The attacker is required to take into account all reasonably available information; if information is ignored, this would undermine the reasonableness of the decision.[327]

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319 U.S. DoD, *Law of War Manual* (n 24) p. 200.

320 ibid, p. 201.

321 ibid.

322 Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 2195.

323 Henderson, *The Contemporary Law of Targeting* (n 6) p. 165.

324 Merriam, 'Affirmative Target Identification' (n 16) p. 126. See also Boothby, *The Law of Targeting* (n 3) p. 122. Despite the low threshold for the degree of doubt accepted in AP I, the ICRC Commentary recognises that the test for doing every feasible to verify the nature of the target is one of "common sense and good faith". Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 2198.

325 Merriam, 'Affirmative Target Identification' (n 16) p. 124.

326 Schmitt and Widmar, 'The Law of Targeting' (n 169) p. 138.

327 Boothby, *The Law of Targeting* (n 3) p. 172. See also Merriam, 'Affirmative Target Identification' (n 16) pp. 124–125.

Furthermore, would a reasonable attacker initiate the attack on that basis? It need not be the only possible conclusion to be drawn, but it must be a decision a reasonable attacker could have made.[328] As Merriam concludes, the decision to target will be lawful "[w]hen the attacker has taken all feasible measures to resolve his doubt and verify the character of the target, and he 'reasonably concludes' that it is military".[329] When assessing whether a decision to initiate an attack was reasonable, the question will therefore focus less on the degree of doubt and more on whether the attacker had done enough to gain information about the target, that is, whether sufficient precautions had been taken.[330]

In order to remove or at least reduce doubt concerning a person's status as a lawful target, or said differently, in order to make a good faith assessment of this issue, it is required to do 'everything feasible to verify' the status. As mentioned above,[331] the requirement is to do as much as possible in the circumstances, taking into consideration amongst others the risk to own forces, military advantage expected to be achieved, and available resources.[332] In other words, it is very context dependent. For instance, the situation will differ for those planning an attack from a distance and those with the opposing forces in sight. As the UK LOAC Manual explains, "[t]he former has more time to make up his mind; the latter is more easily able to verify the target".[333] Time sensitivity will in many cases be the main limitation on how much may be done to verify the target.[334] For instance, if a patrol is unable to remain for a longer period of time in the area without drawing fire from nearby opposing forces, this will limit the amount of information they have the opportunity to gather about a person of interest. Similarly, if a person known to be a lawful target is potentially located but may soon disappear again, the military forces tasked with attacking that person will only be able to do so much to verify his identity before it is too late.

Whether it is reasonable to carry out the attack based on the information available will depend, *inter alia*, on the importance of carrying out the

328 Merriam, 'Affirmative Target Identification', ibid, pp. 127–128, citing *Prosecutor v. Galic* (Judgement and Opinion), Case No. IT-98-25-T, ICTY, Trial Chamber, 5 December 2003, para. 55. See also *AMW Manual* (n 4) Rule 12(a), Commentary para 4: "The degree of doubt necessary to preclude an attack is that which would cause a reasonable attacker in the same or similar circumstances to abstain from ordering or executing an attack."

329 Merriam, 'Affirmative Target Identification', ibid, p. 127.

330 See also Johansen, *On military necessity* (n 8) pp. 134–135.

331 Section 5.4.1.

332 See also *AMW Manual* (n 4) Rules 1(q), Commentary para. 5.

333 *UK LOAC Manual* (n 16) para. 5.32.2.

334 See also Schmitt, 'Targeting and IHL in Afghanistan' (n 11) p. 313.

attack: if the person is a high value target or considered to be a considerable threat to the forces, it may be reasonable to carry out the attack even if uncertainty remains.[335] It is also suggested that the expected risk of incidental harm to civilian persons or objects resulting from attacking the target should influence what measures of verification may reasonably be expected to be carried out before determining that the target is a military objective.[336] If the target is less important or the situation less urgent, it would be feasible to take further measures to verify that the person is a lawful target. Still, there is a limit to the amount of resources military forces may be expected to employ in order to verify the target. If it is not feasible to do more or it is not reasonable to expect more to be done to ensure the verification, the question becomes what is reasonable to conclude based on the information available.

The requirement to take all feasible precautions differs depending on the stage of the targeting process. In the initial stages, when the attack is being planned or initiated, the requirement of taking all feasible measures in order to verify the status of the target applies in full. The attack should not be planned to be carried out unless the target is deemed lawful. This requires knowledge of what information is reasonably available and procedures that ensure that such information is collected and employed. For instance, Commanders, or those who plan and decide upon an attack on their behalf, must be expected to know what Information Surveillance and Reconnaissance (ISR) assets the forces have available and what they can provide.[337] Although the provision makes reference to 'those who plan or decide upon an attack',[338] this should not be interpreted as excluding others from having an obligation to stop the attack if they become aware that the target is not lawful.[339]

During the force execution phase, however, a different threshold is applied – the attack may be carried out unless it *becomes apparent* that the target is not lawful.[340] This makes operational sense. First, the forces carrying out the attack may not have access to all the information that the planners used to determine the legality of the attack.[341] Furthermore, once the attack has

335 *Norwegian LOAC Manual* (n 101) p. 29. See also Merriam, 'Affirmative Target Identification' (n 16) pp. 129–130.

336 Merriam, 'Affirmative Target Identification', ibid, p. 130, and Henderson, *The Contemporary Law of Targeting* (n 6) p. 164.

337 Johansen, *On military necessity* (n 8) p. 80.

338 AP I (n 10) Article 57(2)(a).

339 *Tallinn Manual 2.0* (n 68) pp. 478–479. See also Merriam, 'Affirmative Target Identification' (n 16) pp. 103–104.

340 AP I (n 10) Article 57(2)(b). See also See also *ICRC CIL Study* (n 11) Rule 19.

341 *Tallinn Manual 2.0* (n 68) p. 478.

begun, it will in most cases be difficult to continue to check that the target is lawful, and some degree of doubt is likely to continue to exist or even arise. This will apply equally to pre-planned or ordered attacks and targets selected by the person carrying out the attack. It should be emphasised that although 'becomes apparent' may appear to be a passive requirement, the attacker "has a duty to monitor the attack as long as it is feasible to do so".[342]

After the initial consideration and decision to carry out the attack are undertaken, the extent to which those carrying out the attack can practically carry out further assessments (and not just follow orders) is limited. At some stage the focus must turn to carrying out the attack in a manner that minimises the risk both to the civilian population and to their own forces. Additionally, when an attack has been ordered, military forces will generally not be expected to second-guess the assessment and the preparation done before ordering a target to be attacked. They generally have a duty to comply with that order, and this duty may only be set aside if they perceive it as manifestly unlawful, not merely potentially unlawful or uncertain.[343] Military forces executing an attack must also be able to trust the decisions made by their Commanders, unless they have a reason not to. The information provided by the Commanders will form an important part of the information available to those forces at the time of the attack, and if military forces rely on this information in good faith and doing so was reasonable, they have complied with the duty to distinguish between military objectives and protected persons and objects.[344] As stressed in an article written after the Second World War,

> The person who executes the order is responsible for the execution, but not anything else. He must be able to presume that the decision made by competent authorities within the organisation is correct. Even if it later became clear that the killing was based on incorrect information or the order was unreasonable, the person executing the order must be free from responsibility provided he did not know of the errors.[345]

However, if for some reason it becomes clear to those carrying out the attack that the initial assessment of the target was erroneous, the attack must be halted.

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342 ibid, p. 484.

343 On manifestly unlawful orders, see also Section 8.2.10.3.

344 See also Merriam, 'Affirmative Target Identification' (n 16) p. 131.

345 Andenæs, 'Okkupasjonstidens «likvidasjoner» i rettslig belysning' (n 64) p. 15, own translation.

The provision makes reference to either 'cancel or suspend'.[346] If it is expected that the status of the person as a lawful target will change, such as when the person is no longer *hors the combat* or resumes a direct part in hostilities, the attack may be temporarily suspended. In general, however, it is more appropriate to consider suspending rather than cancelling an attack if the target is deemed lawful but attacking it at a certain time is expected to cause excessive collateral damage. Although the duty to cancel or suspend an attack applies to all levels of the military chain of command, it should be noted that not all persons involved in the execution of an attack will have the authority to cancel or suspend an attack, or have the practical opportunity to do so.[347] This should be taken into consideration when assessing whether the duty to cancel or suspend attacks has been complied with.[348] This does not, however, mean that the absence of military authority to halt an attack in itself is sufficient reason not to prevent or attempt to prevent an unlawful attack.

5.4.3 *'Positive Identification'*

The process of identifying the target is commonly referred to as 'positive identification', or PID. 'Positive identification' is an operational concept intended to ensure that the proposed target is a legitimate target.[349] The concept was originally used by the U.S. Air Force in the aftermath of the 1991 Gulf War in Operations Provide Comfort (later Northern Watch) and Southern Watch to set the standard for identification when enforcing no-fly zones. It required an almost no-mistake standard.[350] When it was introduced to ground operations in Afghanistan and subsequently Iraq, it caused some confusion.[351] What did 'positive' entail? Did it require more than the LOAC standard for verification

346 AP I (n 10) Article 57(2)(b).

347 Boothby, *The Law of Targeting* (n 3) p. 176.

348 See UK, *Reservations to AP I* (n 101) §o. See also Boothby, *The Law of Targeting*, ibid, pp. 119–120, discussing the level of responsibility in the context of AP I Article 57(2) in general.

349 See also Merriam, 'Affirmative Target Identification' (n 16) p. 85: "[Positive identification] is, in effect, the phrase by which the U.S. military 'operationalizes' the law of armed conflict (LOAC) principle of distinction".

350 On the background of the concept, see ibid, pp. 132–134; Schmitt, 'Targeting and IHL in Afghanistan' (n 11) p. 316; and U.S. Army, *Legal Lessons Learned from Afghanistan and Iraq*, Volume 1 (U.S. Army Judge Advocate General's Legal Center and School, Center for Law and Military Operations, Charlottesville, Virginia, 2004, https://www.fas.org/irp/doddir/army/clamo-v1.pdf, last accessed 24.04.2019) p. 96.

351 Merriam, 'Affirmative Target Identification', ibid, p. 134, and Schmitt, 'Targeting and IHL in Afghanistan', ibid, p. 316.

of lawful targets?[352] The definition eventually agreed upon was that "PID is a reasonable certainty that the proposed target is a legitimate military target", which was met with similar questions and criticisms.[353]

Despite the initial confusion caused by the application introduction of an operational concept intended for the air to air context to other domains, it has now evolved into a useful tool for ensuring that the requirements of military necessity and distinction are met.[354] As such, 'positive identification' is nothing new. In fact, it has been argued that "PID has always been an implicit requirement before using force".[355] The added value in requiring PID is that it emphasises the need for both legal and operational assessment of the target and its so-called 'geospatial location';[356] the person must be assessed to be a lawful and approved target (also known as target validation),[357] and the

352 Schmitt, 'Targeting and IHL in Afghanistan', ibid, p. 319.

353 U.S. Army, *Legal Lessons Learned from Afghanistan and Iraq*, Vol. 1 (n 350) pp. 96–98. For a criticism of the concept, see Merriam, 'Affirmative Target Identification' (n 16) especially pp. 132–140. He suggests that the better concept would be one of "Affirmative Target Identification", which would require "an honest and reasonable belief – based on such affirmative evidence as is reasonable available at the time – that the object of attack is a lawful military target". ibid, p. 85, and pp. 140–145. However, rather than defining PID to require too high a standard and then criticise it on that basis, it appears more useful to recognise its potential utility and work to ensure it is interpreted to set the correct standard.

354 See also Aaron Pennekamp, 'Standards of Engagement: Rethinking Rules of Engagement to More Effectively Fight Counterinsurgency Campaigns', 101 *The Georgetown Law Journal* 1619 (2013), p. 1641. For a similar view, see Montalvo, 'When Did Imminent Stop Meaning Immediate?' (n 88) p. 31. He explains that "the presence of a hostile act and/or hostile intent satisfies the military necessity principle of LOAC, and the requirement to have PID of the enemy satisfies the distinction principle under LOAC". He goes on to explain that in short, PID is about recognising the military necessity to use force (in the form of hostile act and/or hostile intent). Note that he uses the terms 'hostile act' and 'hostile intent' as reference to conduct-based targeting.

355 U.S. Army, *Legal Lessons Learned from Afghanistan and Iraq*, Vol. 1 (n 350) p. 98, referring both to status-based and conduct-based use of force.

356 U.S. CJCS, *No-Strike and the Collateral Damage Estimation Methodology* (CJCSI 3160.01A, 13 February 2009, https://www.aclu.org/files/dronefoia/dod/drone_dod_3160_01.pdf, last accessed 24.04.2019) p. A-6. The U.S. doctrine is also applied by NATO. It was made available to ACLU under the Freedom of Information Act on 13 May 2011. See also James A. Burkart, 'Deadly Advice: Judge Advocates and Joint Targeting', 2016 *Army Lawyer* 10, p. 17. The process of accurately locating the target is also referred to as combat identification. See U.S. CJCS, *Joint Targeting* (Joint Publication (JP) 3–60, 31 January 2013, https://www.justsecurity.org/wp-content/uploads/2015/06/Joint_Chiefs-Joint_Targeting_20130131.pdf, last accessed 24.04.2019) p. II-21.

357 Burkart, 'Deadly Advice: Judge Advocates and Joint Targeting', ibid, p. 16: "target validation determines whether a potential target fits within the commander's targeting guidance and complies with the LOAC and ROE". Target validation may also include additional

location or presence of the lawful target must be verified. The distinction may appear artificial, but as will be explained below, it is an important distinction in operations where the legal status may be determined by other people than those who carry out the attack.[358] Furthermore, because PID integrates both the legal and operational requirements for target validation, it is a contextual operationalisation of the LOAC rules on distinction, rather than a restatement of the law. In addition to ensuring compliance with applicable law, the procedures and requirements for vetting and validation of targets may be subject to mission specific requirements that are stricter than the LOAC rules.[359] They will usually also be more detailed than the law requires, for instance in setting out requirements for type and quality of information, and number and forms of means of identification.

The first requirement in a PID analysis focuses on whether the person is a lawful target and hence whether it is militarily necessary to engage the target. The determination should also entail a clarification of whether the person is approved for targeting, that is, whether the person falls within a pre-approved target set or is subject to limitations, such as those set out in the Restricted Target Lists (RTL) or No Strike Lists (NSL), and the attack on the person is authorised by ROE and other targeting procedures.[360] Because these may vary from operation to operation, or even within an operation, the PID standard varies, in the same way that the ROE differ.[361] Second, the person or persons

considerations, such as the effect of the attack on the operation, whether the target is politically or culturally 'sensitive', and the risk and likely consequences of collateral damage. See Schmitt, 'Targeting and IHL in Afghanistan' (n 11) p. 310, citing U.S. Air Force Doctrine (AFDD 2-1.9 (2006), Targeting, p. 35).

358 Others view 'positive identification' as relating to the first aspect only, that is, the identification of someone as a lawful target. See e.g. Johansen, *On military necessity* (n 8) p. 327, where she argues that "[t]he "feasible to verify-rule" is often applied by the military as "positive identification", so-called PID. The jargon is a linguistic pleonasm and as such not ideal to describe a rule". (Footnote omitted).

359 Burkart, 'Deadly Advice: Judge Advocates and Joint Targeting' (n 356) p. 16: "Rules of engagement will set forth standards for the quantity, quality, timeliness, and duration of the intelligence necessary to establish positive identification".

360 This may, however, also be viewed as a separate ROE issue, rather than forming part of PID.

361 Merriam voices concern that if PID is intended to reflect not only law but also policy, continued application of that higher standard may make it difficult to retreat from. Merriam, 'Affirmative Target Identification' (n 16) pp. 137–139. Although this is a valid argument, it is not a challenge that is unique to PID. In fact, it is arguably equally valid for other 'use of force' concepts, such as the zero civilian casualty policy. However, this is not a reason to abandon the operational concepts or tools, but rather to better educate Commanders, military forces, and their legal advisers in the meaning of such concepts and tools.

deemed to be lawful (and approved) targets must be accurately located at the time of attack. Conversely, it is not sufficient to declare that a person of interest is located; that person must be assessed to be a lawful target.[362] By way of example, locating a person suspected of involvement in a previous attack may not be sufficient to warrant attack on that person. In some cases, it is also necessary to conclude that the person is a lawful target at the time of being located, for instance, due to DPH on a regular basis or membership in an organised armed group.

The emphasis on the two aspects of PID will vary depending on the operation. If the operation is based on pre-planned target sets, the assessment of whether the person may be attacked is already undertaken, and the focus is on locating that person. By way of example, if *person X* is approved for lethal targeting through a deliberate targeting process, the emphasis will be on locating that person in order to make sure he or she actually is *person X*. If the operation is dynamic, the military forces may come under attack or face other hostile acts in response to which they may use force in accordance with LOAC. In such cases, the focus will be on locating the origin of the threats.[363] As Pennekamp explains, 'positive identification' will require that the military forces get "a close enough look at the situation to be reasonably certain that the individual the soldier is about to engage is the actual source of hostility".[364] The focus during dynamic operations may also be on identifying persons of interest as lawful targets. For instance, military forces may come across persons perceived to be behaving in a suspicious manner, and will need to determine whether they are lawful targets.

In joint operations, where the forces identifying a person as a lawful target are not the ones carrying out the attack, both aspects of PID may play a central role. First, the determination must be made that a person is a lawful target. Second, the persons carrying out the attack must verify that the person they are about to attack is the same person. For instance, this situation may arise if ground forces have identified a person as a lawful target, but the attack is carried out by air forces. The person directing the Close Air Support may be able to provide the coordinates for the person to be attacked, or rely on accurate descriptions of the person's whereabouts and movements. Once established, PID must be maintained until the attack is carried out.[365] If a person who has been assessed to be a lawful target, whether by planners or by those about to

362 See also Montalvo, 'When Did Imminent Stop Meaning Immediate?' (n 88) p. 33.
363 Targeting is further examined in Sections 3.1 and 12.2.
364 Pennekamp, 'Standards of Engagement' (n 354) p. 1641.
365 Burkart, 'Deadly Advice: Judge Advocates and Joint Targeting' (n 356) p. 19.

execute an attack, has been located but then lost again, those carrying out the attack must relocate the target in order to re-establish PID and ensure that the attack is in fact directed at a lawful target.

Positively identifying a person is not, however, sufficient for carrying out an attack lawfully. In particular, it is necessary to assess and minimise the risk of harm to protected persons and objects, and to cancel or suspend the attack if this harm is expected to be excessive. This is further considered in the next section.

5.5 Carrying Out Attacks

The preceding sections have primarily focused on the categories of persons that are lawful targets and their identification. This final section will present a brief overview of the rules regarding how attacks should be carried out once it is established that the target is considered to be lawful. These requirements will usually not be reflected in the ROE themselves, beyond the reference to necessity and proportionality in the GENTEXT.[366] Instead, they will be set out in documents such as SOPs and Tactical Directives providing context specific guidance on the application of ROE. For instance, procedures on Collateral Damage Estimation will set out requirements for the proportionality assessment for use of force in the joint targeting process.[367]

Even when directing military operations at military objectives, LOAC makes it clear that "the right of the Parties to the conflict to choose methods or means of warfare is not unlimited".[368] For instance, it is prohibited to employ means or methods of warfare that are of a nature to cause unnecessary suffering or superfluous injury or which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.[369] Furthermore, those who plan and decide upon attacks are required

366 See Section 3.1.

367 On CDE, see further Section 12.2.

368 AP I (n 10) Article 35(1). This principle is also reflected in more historic LOAC texts, such as the 1861 Lieber Code (n 63) Article 14 ("Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war"); implicitly in the St. Petersburg Declaration 1868 (n 4) ("That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy"); and the 1907 Hague Regulations (n 28) Article 22 ("The right of belligerents to adopt means of injuring the enemy is not unlimited").

369 AP I (n 10), Article 35(2)-(3).

to take all feasible precautions to minimise the adverse effects on the civilian population and protected objects, and to refrain from carrying out attacks that are expected to cause excessive collateral damage.[370] Attacks that are expected to cause excessive collateral damage are considered indiscriminate and hence unlawful.[371] If it becomes apparent during the force execution phase that the attack, despite the initial assessment of legality, may be expected to cause excessive collateral damage, it must be cancelled or suspended.[372] In order to reduce the risk of collateral damage, it is required to give effective warning of the attack, provided the circumstances so permit;[373] and, if it is possible to choose between several military objectives for obtaining a similar military advantage, the Parties must choose the one that is expected to cause least collateral damage.[374]

The proportionality rule set out in LOAC is unique to this area of law and therefore deserves particular attention. While proportionality in the context of law enforcement and self-defence concerns the degree of force that may be used, requiring it not to cause more harm than is necessary to achieve its purpose, the LOAC principle prescribes an absolute limit on such harm.[375] Military forces are prohibited from:

> deciding to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[376]

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370 ibid, Article 57(2)(a)(ii-iii).

371 ibid, Article 51(5)(b). In addition to the general prohibitions on indiscriminate attacks and attacks causing unnecessary suffering or superfluous injury or which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment, there are specific treaty restrictions, such as the 1980 Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons which may be deemed to be Excessively injurious or to have Indiscriminate Effects [1980], printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 4) pp. 184ff, with various Protocols (see e.g. note 298), applicable to States party.

372 AP I, ibid, Article 57(2)(b).

373 ibid, Article 57(2)(c).

374 ibid, Article 57(3).

375 Schmitt and Widmar, 'The Law of Targeting' (n 169) p. 140: "Proportionality does not require a strict mathematical comparison, nor does it, as is often mistakenly believed, call for a balancing test". See also Laurent Gisel, 'Can the incidental killing of military doctors never be excessive?', 95(889) *International Review of the Red Cross* 215 (2013), p. 218.

376 AP I (n 10) Article 57(2)(a)(iii).

Rather than using to the phrase "injury to civilians, damage to civilian objects, or a combination thereof" when discussing LOAC proportionality, it is common to only make reference to collateral damage, as is done in this book. Strictly speaking, collateral damage refers to harm to civilian objects, while harm to civilians is labelled 'incidental injury'. However, this distinction is not usually made.[377] Collateral damage may amongst others be the result of: civilians working with military forces or living in military bases; civilians working or living in the vicinity of military objectives; or civilians temporarily being present on or near a military objective at the time it is being attacked.[378]

As mentioned in the introduction to this section, military forces are required to take all feasible precautions in the choice of means and methods of attack in order to minimise the risk of collateral damage, and must refrain from deciding to launch attacks expected to cause excessive collateral damage. Furthermore, 'feasible' is generally understood to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.[379] According to Schmitt and Widmar, this entails that "they need only select less harmful means or methods that do not involve sacrificing military advantage and that are feasible".[380] For example, while using Precision Guided Munitions (PGMS) in most cases will reduce the risk of collateral damage, military forces usually will not have unlimited access to such munitions, and it will therefore often not be feasible to use them for all attacks involving such a risk.[381] The decision may be made to only use such munitions for attacks on particularly important targets or attacks that would be expected to cause excessive collateral damage if executed with less precise means.[382] Similarly, while the use of ground forces may enable greater precision and more opportunity to verify both the presence

377 Schmitt and Widmar, 'The Law of Targeting' (n 169) p. 140. See also *AMW Manual* (n 4) Rule 1(l), Commentary para. 2. Although the focus in this book is on persons, it should be pointed out that objects are to some extent considered to weigh differently than persons in the proportionality count. See for instance U.S. DoD, *Law of War Manual* (n 24) p. 261, para. 5.12.1.1.: "the expected loss of civilian life and injury to civilians should be given greater consideration than the expected damage to civilian objects".

378 For a useful overview of instances that may cause collateral damage, see Dinstein, *Conduct of Hostilities* (n 69) pp. 150–152.

379 Section 5.4.1.

380 Schmitt and Widmar, 'The Law of Targeting' (n 169) p. 138.

381 ibid. See also Dinstein, *Conduct of Hostilities* (n 69) pp. 169–170, and ILA, 'Challenges of 21st Century Warfare' (n 289) pp. 383–384.

382 Boothby, *The Law of Targeting* (n 3) p. 93 and pp. 124–125.

of lawful targets and absence of protected persons and objects than using air assets, sending ground forces sufficiently close to the target may involve too great a risk to them.[383]

It is not sufficient to have taken all feasible precautions to minimise the risk of collateral damage; if the expected collateral damage is deemed excessive to the concrete and direct military advantage anticipated to be achieved, the attack cannot be carried out. According to Dinstein, "'excessive' means that disproportionality is not in doubt".[384] Excessive must not be confused with extensive; if the target is sufficiently important, extensive collateral damage need not be excessive.[385] Similarly, if the target is of minimal importance, even limited collateral damage could be excessive. Even if the attack was not initially expected to cause excessive collateral damage, it must be cancelled or suspended until the circumstances permit the attack to be carried out if it later becomes apparent that the attack nonetheless must be anticipated to cause excessive damage.[386] The distinction between the planning and force execution phases of an attack is examined in detail in the context of verification of targets above, and applies equally here.[387]

The proportionality rule refers to 'expected' collateral damage and 'anticipated' military advantage. Compliance with the rule is therefore not assessed on the actual outcome of the attack, but rather on the information reasonably available at the time.[388] This includes the planning, approval and force execution phases of the attack.[389] Although expectations or anticipation necessarily entail a subjective evaluation of the facts and the military advantage to be gained from the attack, it must nonetheless be a reasonable conclusion.[390] If the attack was expected not to cause excessive collateral damage, but the battle damage assessment (BDA) or other information reveals that the attack nonetheless did cause excessive collateral damage, this should be taken into

383 For a similar example, see Schmitt and Widmar, 'The Law of Targeting' (n 169) p. 139.

384 Dinstein, *Conduct of Hostilities* (n 69) p. 155.

385 ibid, pp. 156–157, criticising the position taken in the Commentary to AP I: "The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive." Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 1980.

386 AP I (n 10) Article 57(2)(a)(iii) and (b).

387 See Section 5.4.2.

388 Dinstein, *Conduct of Hostilities* (n 69) p. 157.

389 Schmitt and Widmar, 'The Law of Targeting' (n 169) pp. 140–140.

390 *Prosecutor v. Galic* (Judgement and Opinion) (n 328) para. 55. See also Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 2208; *AMW Manual* (n 4) Rule 14, Commentary para. 6; Dinstein, *Conduct of Hostilities* (n 69) p. 159; and Section 5.4.2 above.

consideration when assessing the expected collateral damage for future similar attacks.[391]

The military advantage anticipated must be concrete and direct, not merely hypothetical.[392] It does not need to be substantial, however.[393] It is also generally accepted that the military advantage of an attack may be based on an overall assessment of the operation or campaign as a whole rather than just the attack itself.[394] For instance, the military advantage expected from the NATO bombing campaign on the Serbian TV and Radio Station, radio and TV relay sites, and electricity grids, was the impact the attacks would have on the Serbian C3 (Communications, Command and Control) assets, not merely the effect on the respective targets.[395] As a result, it may be difficult for those who execute an attack to determine the proportionality of that attack; they may not have the overview of the entire attack needed to assess its overall advantage.[396] The inclusion of more than merely tactical or local gains in the assessment of military advantage must not, however, be interpreted to permit the armed conflict as a whole to be taken into account.[397]

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391 See also ILA, 'Challenges of 21st Century Warfare' (n 289) p. 369.

392 *AMW Manual* (n 4) Rule 14, Commentary para 9. See also Boothby, *The Law of Targeting* (n 3) p. 94, and ILA, 'Challenges of 21st Century Warfare', ibid, p. 354.

393 Dinstein, *Conduct of Hostilities* (n 69) pp. 160–161, criticising the Commentary to AP I for making reference to substantial military advantage. Sandoz *et al.* (eds.), *AP Commentary* (n 4) para. 2209: "The expression "concrete and direct" was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded." The term 'substantial' was included in the ICRC proposed draft of the provision but did not make it into the final version. See Draft Article 46, para. 3 (b), included in fn. 31 in Sandoz *et al.* (eds.), *AP Commentary*, ibid, para. 1976.

394 Several States made declarations upon the ratification of AP I similar to the UK's declaration that: "the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack." United Kingdom, D*eclarations made upon signature of the 1977 Additional Protocol 1*, §i. See also declarations made by Austria, Belgium, Canada, France, Germany, Italy, Netherlands, New Zealand, and Spain (available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470, last accessed 24.04.2019). This is also reflected in the Rome Statute (n 31) Article 8(2)(b)(iv). See also *AMW Manual* (n 4) Rule 1(w); Dinstein, *Conduct of Hostilities* (n 69) p. 161; and discussion in Johansen, *On military necessity* (n 8) pp. 287–291.

395 ICTY, *OTP Report* (n 9) para. 78. See also discussion in Johansen, *On Military Necessity,* ibid, pp. 289–291.

396 The U.S. Law of War Manual, however, stipulates that the strategic concerns may also be taken into account. U.S. DoD, *Law of War Manual* (n 24) para. 15.12.2.1, p. 264.

397 Dinstein, *Conduct of Hostilities* (n 69) pp. 108–109.

On the other side of the calculus, only loss of life, injury or damage is considered collateral damage; mere inconveniences are not taken into account.[398] Loss of economic income or temporary disruption to civilian life are not considered collateral damage.[399] There has been some debate regarding the inclusion of indirect or secondary harm to civilians and civilian objects.[400] In order to have the potential for being expected, the collateral damage must be foreseeable. If the harm is foreseeable, it is difficult to see how this could not be taken into account, even if it is indirect.[401] Rather than focusing on whether the effect is direct or indirect, the focus should be on whether it is reasonably foreseeable and should therefore be expected.[402] The issue of indirect or reverberating effects have been particularly emphasised in the context of explosive weapons being used in densely populated areas.[403]

Although LOAC the rules on proportionality only makes express reference to the avoidance of harm to civilians and civilian objects, attacks on military hospitals and medical personnel in the recent years have initiated a debate as to whether harm to them should be viewed as included in the proportionality assessment.[404] Similar discussions have been raised concerning the wounded,

398 Boothby, *The Law of Targeting* (n 3) p. 370.

399 U.S. DoD, *Law of War Manual* (n 24) para. 15.12.1.2, p. 261.

400 For a useful overview of the debate, see Johansen, *On military necessity* (n 8) pp. 257–262.

401 ILA, 'Challenges of 21st Century Warfare' (n 289) pp. 352–355. For an example of the contrary view, see Dinstein, *Conduct of Hostilities* (n 69) p. 159, stressing that "the only consequences that count are those that occur directly: remote effects need not be counted." See also U.S. DoD, *Law of War Manual* (n 24) p. 261, where it is stated that collateral damage is limited to "such immediate or direct harms foreseeably resulting from the attack. Remote harms that could result from the attack do not need to be considered in applying this prohibition." However, the manual goes on to provide the following example: "if the destruction of a power plant would be expected to cause the loss of civilian life or injury to civilians very soon after the attack due to the loss of power at a connected hospital, then such harm should be considered in assessing whether an attack is expected to cause excessive harm." It is difficult to see how this harm would be "immediate or direct". In fact, the Allied bombing of the Iraqi electricity grid during the First Gulf War (1991), resulting amongst others in devastating effects on the hospital in Bagdad, is the classic example of why remote harms must be taken into account when foreseeable. See e.g. Johansen, *On military necessity* (n 8) pp. 259–262.

402 ILA, 'Challenges of 21st Century Warfare' (n 289) p. 354. See also Johansen, *On military necessity,* ibid, pp. 260–261.

403 See e.g. ICRC, *Explosive Weapons in Populated Areas: Humanitarian, Legal, Technical and Military Aspects* (Report from Expert Meeting, Chavannes-de-Bogis, 24–25 February 2015, available at https://www.icrc.org/eng/assets/files/publications/icrc-002-4244.pdf, last acccessed 24.04.2019).

404 The debate is reflected in the revised Commentary to the First Geneva Convention: "It would be unreasonable to consider that direct or indiscriminate attacks against the

sick and injured military personnel,[405] and POW camps.[406] There are two approaches. Either the aforementioned persons and objects are civilians or civilian objects, or the rule is not limited to these categories. While the definition of military objects entails that all objects that are not targetable are civilian, it is harder to make the argument that military medical personnel or combatants *hors de combat* are civilians.[407] In order to include these categories of persons in the proportionality analysis, the argument must therefore be made that the reference to civilians should be read as referring to all protected persons, both civilians and those with special protection.[408]

In Corn's view, while the inclusion of specially protected persons and objects in the precautionary rules in general makes sense, expanding the proportionality rule beyond civilians and civilian objects would entail "an unrealistic constraint on tactical action".[409] It would in essence entail a reassessment of

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wounded and sick would be strictly prohibited and would amount to a grave breach, while incidental harm and even excessive incidental casualties would not be prohibited." ICRC, *Commentary on the First Geneva Convention – Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* [hereinafter: *GC I Commentary*] (second edition, 2016, available at https://ihl-databases.icrc.org/ihl/full/GCI-commentary, last accessed 24.04.2019) para. 1357. See also Gisel, 'Can the incidental killing of military doctors never be excessive?' (n 375); Geoffrey S. Corn and Andrew Culliver, 'Wounded Combatants, Military Medical Personnel, and the Dilemma of Collateral Risk' (published on SSRN December 13, 2016, available at https://ssrn.com/abstract=2884854); and ILA, 'Challenges of 21st Century Warfare' (n 289) pp. 357–359.

405 See for instance Jann Kleffner, 'Transatlantic Workshop on International Law And Armed Conflict: Wounded and Sick and the Proportionality Assessment' (ICRC Intercross blog, 12 October 2017, http://intercrossblog.icrc.org/blog/transatlantic-workshop-on-international-law-and-armed-conflict-wounded-and-sick-and-the-proportionality-assessment, last accessed 24.04.2019). This discussion is a consequence of the debate on whether non-state actors are civilians taking a direct part in hostilities or organised armed groups akin to combatants. If they are civilians, they will regain their protection once they seize to participate, for instance because they are wounded. Unlike combatants who become *hors de combat*, they will then have to be taken into account in a proportionality analysis, which would mean that they are afforded greater protection than combatants.

406 Dinstein, *Conduct of Hostilities* (n 69) p. 155.

407 Gisel, 'Can the incidental killing of military doctors never be excessive?' (n 375) pp. 220–221.

408 This is the argument made by Gisel. See ibid, p. 230: "the protection against incidental harm granted to civilians and civilian objects by the principles of proportionality and precautions must actually be understood as extending to other persons and objects protected against direct attack". See also ILA, 'Challenges of 21st Century Warfare', (n 289) p. 358.

409 Geoff Corn, 'Transatlantic Workshop on International Law and Armed Conflict Wounded and Sick, Proportionality, and Armaments' (*Lawfare*, 10 October 2017, https://www.lawfareblog.com/transatlantic-workshop-international-law-and-armed-conflict-wounded-and-sick-proportionality-and, last accessed 24.04.2019).

proportionality after every shot is fired. In the case of an attack on two soldiers, for instance, once the first is injured and therefore *hors de combat*, the attack on the remaining soldier could be deemed to cause excessive harm. Perhaps more important, however, is the fact that the violation of the prohibition on excessive collateral damage would be a war crime,[410] and the principle of legality in criminal law demands that the scope of a crime must be clearly defined and have a clear legal basis.[411] The crime cannot be expanded by way of an extension by analogy.[412] The non-application of the principle of proportionality does not, however, mean that such persons or objects should not be taken into account. Customary law, as reflected in the Marten's clause,[413] demands that constant care must be taken to spare them, and to mitigate harm to the extent feasible.[414]

Recent NATO operations such as Afghanistan and Libya have, as a result of the emphasis on reducing civilian casualties to an absolute minimum, resulted in the LOAC proportionality rule playing a less central role. As explained by

410 Rome Statute (n 31) Article 8(b)(iv).

411 The principle is commonly referred to as either *nullum crimen, nulla poena sine praevia lege poenali* (no crime can be committed, nor punishment imposed without a pre-existing penal law), *nulla poena sine lege* (no penalty without law) or *nullum crimen sine lege* (no crime without law). It is reflected in the Rome Statute, ibid, Article 22(1).

412 Rome Statute (n 31) Article 22(2) states that: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." According to Cassese, this reflects customary law and is a result of the principle of strict legality. Antonio Cassese *et al., International Criminal law* (Oxford University Press, Oxford, 2013) p. 33. See also Dinstein, *Conduct of Hostilities* (n 69) p. 155.

413 The Marten's clause first appeared in the Preamble to Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague [29 July 1899], printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 4) pp. 69ff: "In cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience". It has reappeared in various but similar versions in later treaties regulating armed conflicts, see e.g. 1907 Hague Convention (IV) (n 28) Preamble; GC I (n 79) Article 63; GC II (n 79) Article 62; GC III (n 29) Article 142; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (GC IV) [1949], printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 4) pp. 575ff., Article 158; AP I (n 10) Article 1(2); AP II (n 66) Preamble; and 1980 Convention Certain Conventional Weapons (n 371) Preamble.

414 Corn and Culliver, 'Wounded Combatants, Military Medical Personnel, and the Dilemma of Collateral Risk' (n 404) pp. 14–16.

Schmitt, "in Afghanistan the operational concern was the mere fact of collateral damage, not whether that damage expected to be caused was excessive relative to military advantage. Rules of engagement so embraced this casualty aversion that the legal principle of proportionality never loomed large".[415] For ISAF, the policy on avoiding civilian casualties was set out in the previously mentioned CIVCAS Directives.[416] Although the CIVCAS Directives were a reflection of policy rather than an expression of *opinio juris*, it may still be viewed as an example of precautions the Commander considered feasible to carry out, especially in an operation where the protection of civilians and civilian support were central to the mission. As Johansen explains, "[p]recautionary measures in order to reduce collateral damage therefore simultaneously enhance mission accomplishment. Consequently, the threshold for feasibility becomes lower. When precautionary measures align with mission accomplishment, these measures are also more easily assessed as feasible".[417]

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415 Schmitt, 'Targeting and IHL in Afghanistan' (n 11) p. 322.

416 See Section 2.4.1. From 2007–2011, various ISAF commanders issued Tactical Directives on the avoidance of civilian casualties (so-called CIVCAS directives). Some of these are available to the public, see e.g.:2008: https://www.nato.int/isaf/docu/official_texts/Tactical%20Directive_090114.pdf 2009: https://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf. Both last accessed 24.04.2019.

417 Johansen, *On military necessity* (n 8) pp. 332–333.

CHAPTER 6

Self-Defence

6.1 Introduction

Self-defence is one of the longest established authorities for using force, as illustrated by the medieval maxim "all laws, written and unwritten, permit force to be repelled by force" (*Vim vi repellere omnes leges omniaque iura permittant*).[1] Self-defence also plays an important role for military forces for whom the risk of being attacked is an occupational hazard. As explained in Section 3.2, ROE commonly include a reference to the 'inherent right of self-defence' which may never be limited by ROE. The phrase is included for all types of operations, including those involving participation in armed conflict. However, despite the general agreement that military forces participating in an armed conflict have a right to defend themselves, the legal basis for this right is unclear. One commentator goes so far as arguing that "there is significant ambiguity – if not outright legal lacunae – as to the origin and limits of this right".[2] What is clear, however, is that military forces have a right not to be arbitrarily deprived of their lives, and as a result, retain a right to use defensive force in exceptional circumstances.[3]

The use of force by military forces will need to comply with applicable law in order not to be arbitrary. Because military forces generally are not tasked with law enforcement, the use of force must either comply with LOAC or amount to self-defence.[4] As explained in Chapter 5, LOAC regulates the use of force in both offence and defence.[5] This begs the question whether the legal concept

1 Pope Gregory IX, *Liber quintus* (*Decretal V*), Titulus XXXIX, Cap. III (available at http://www.columbia.edu/cu/lweb/digital/collections/cul/texts/ldpd_6029936_002/pages/ldpd_6029936_002_00000487.html). See also Marcus Tullius Cicero, 'Pro Milone', §§10–11, in *Defence Speeches – A new translation by D.H.Berry* (Oxford University Press, Oxford, 2008) p. 186 (page number omitted in quote).

2 Erica L. Gaston, 'Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege', 8(2) *Harvard National Security Journal* 283 (2017), p. 295.

3 On the right to life, see Section 4.2.

4 See Section 4.1.

5 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) (1977), printed in Schindler, Dietrich and Jiri Toman, *The Laws of Armed Conflicts,* Martinus Nijhoff Publisher, 1988, pp. 711ff, Article 49(1).

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of self-defence has any role to play at all in the context of armed conflicts, and if so, how it applies. In addition, it is necessary determine which form of self-defence applies.

There appears to be a military trend, at least in recent years, to refer to self-defence in a wide variety of situations.[6] For instance, a NATO attack on Pakistani forces near the Afghan border in 2011, killing 28 soldiers, was alleged to have been an act of self-defence.[7] Similarly, the 2015 U.S. airstrike on the Doctors Without Borders Hospital in Kabul, killing 22 civilians, was called in by U.S. Special Forces in self-defence of U.S. and Afghan forces.[8] When acting in self-defence in military operations, will military forces be applying *jus ad bellum* self-defence or personal self-defence as set out in national criminal law? Do the references commonly found in military doctrine to a universal right of self-defence suggest that there is a right of self-defence for individuals set out in international law? As will be further explained in Chapter 8, it appears that references to self-defence in military doctrine and practice focus on the ability to use defensive force, rather than its legal basis. Self-defence is cited in situations where it is difficult to see how a legal concept of self-defence could apply and where the defensive force would be permitted by LOAC. Such references should in other words not necessarily be considered determinative of the legal authority for the use of force.

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6 See also Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 2) p. 288, and Erica L. Gaston, *When Looks Could Kill: Emerging State Practice on Self-Defense and Hostile Intent* (Global Public Policy Institute, 2017, http://www.gppi.net/fileadmin/user_upload/media/pub/2017/gaston_2017_hostile-intent_web.pdf, last accessed 24.04.2019) p. 15, where she explains that a cause for the expanded use and scope of self-defence, is "[t]he tendency toward asymmetrical conflict and insurgent tactics [which] increases the likelihood that soldiers will respond in reactive, or defensive situations." Another reason is the tendency to delegate offensive operations to special forces and drone operations with the result that the soldiers in general mainly use force in response to an attack or threat of attack. ibid, p. 15. See further, Gloria Gaggioli, 'Human Rights and Personal Self-defence in International Law', 18 *Melbourne Journal of International Law* 460 (2017), pp. 460–461.

7 Jon Boone, 'Nato air attack on Pakistani troops was self-defence, says senior western official', *The Guardian* (27 November 2011, https://www.theguardian.com/world/2011/nov/26/nato-air-attack-pakistan-soldiers, last accessed 24.04.2019).

8 Shashank Bengali, W.J. Hennigan, and Ali M. Latifi, 'U.S. changes its account of hospital bombing, says Afghans requested attack', *Los Angeles Times* (05 October 2015, http://www.latimes.com/world/afghanistan-pakistan/la-fg-afghanistan-hospital-airstrike-20151005-story.html, last accessed 24.04.2019). For another example of self-defence being used to justify airstrikes, see Alexander Smith and Ahmed Mengli, 'U.S. Military Bombed Afghan Homes in 'Self-Defense' Against Taliban', *NBC News* (12 January 2017, https://www.nbcnews.com/news/world/u-s-military-bombed-afghan-homes-self-defense-against-taliban-n706016, last accessed 24.04.2019).

Traditionally, self-defence is viewed as applying to States and persons, and ROE may regulate the use of force in both cases. According to the ICJ, the right of States to act in self-defence is a "fundamental right of every State".[9] The relevance of State self-defence to an ongoing armed conflict depends on the approach taken to the relationship between the *jus in bello* and *jus ad bellum*. As explained in Chapter 4, the use of force during an ongoing armed conflict must comply with the *jus in bello,* unless it is an exercise of self-defence. State self-defence does not authorise force against an adversary which is not permitted by LOAC, or phrased differently, the *jus ad bellum* cannot be relied upon to as a defence to a violation of the *jus in bello.* As Hessbruegge explains, "Article 51 can only justify the infringement of another state's territorial integrity or sovereignty, but it has nothing to say about whether the killing itself is justified or not".[10] As a result, the reference to self-defence in ROE for armed conflict operations must be to a personal right of self-defence.

State self-defence nonetheless continues to be relevant for the understanding of 'use of force' categories in armed conflict operations. First, as will be further explained, it appears that the reference to 'inherent right of self-defence' in ROE originates from U.S. Peacetime ROE (PROE), where it was a reference to State self-defence.[11] State self-defence will therefore have influenced the understanding of the ROE reference among U.S. forces who in turn will have influenced other NATO States. Second, the legal self-defence concepts are closely connected and sometimes confused, in particular with regard to the use of force in self-defence by military forces.[12] For instance, the criteria set out in the famous Caroline incident on State self-defence[13] are sometimes

9 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports* [1996] 226, para. 96.

10 Jan Arnold Hessbruegge, *Human Rights and Personal Self-Defense in International Law,* Oxford University Press, New York, 2017, p. 232.

11 J.F.R. Boddens Hosang, 'Self-Defence in Military Operations: The Interaction between the Legal Bases for Military Self-Defence and Rules of Engagement', 47 *Military Law and Law of War Review* 25 (2008), pp. 75–77. See also Ian Henderson and Bryan Cavanagh, 'Military members claiming self-defence during armed conflict – Often misguided and unhelpful' [hereinafter: 'Claiming self-defence on the battlefield'], in Jadranka Petrovic (ed.), *Accountability for Violations of International Humanitarian Law – Essays in honour of Tom McCormack* (Routledge, London/New York, 2016) p. 75.

12 See also Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 2) pp. 288–289 and 295. According to Dinstein, "[t]he legal notion of [State] self-defence has its roots in interpersonal relations, and has been sanctified in domestic legal systems since time immemorial." Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, Cambridge, 2011) p. 188.

13 See Section 6.2.2 below.

used to describe all types of self-defence, as is done in the MC 362/1 on NATO Rules of Engagement.[14] Finally, not all agree with this exclusion of *ad bellum* self-defence in the context of armed conflicts,[15] and may argue that *jus ad bellum* is relevant amongst others for military self-defence concepts such as 'unit self-defence', further discussed in Section 8.3. As a result, it is useful to begin with an overview of the concept of State self-defence in its various forms (Section 6.2).[16]

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14 NATO, *Military Decision on MC 362/1 – NATO Rules of Engagement* [hereinafter *MC 362/1*], 30 June 2003, p. 4. The MC 362/1 is NATO UNCLASSIFIED, however, permission to use parts of the document for the purposes of this research is granted by the NATO Military Commission in document IMSTAM(O&P)-0006-2018 (copy on file with the author). In particular, it is explained that all use of force in self-defence, without specifying the type of self-defence, must comply with the requirement that "the need to defend is manifest, instant and overwhelming". See also NATO, *STANAG 2597: Training in Rules of Engagement*, ATrainP-4 [hereinafter: *STANAG 2597*], 4 May 2015 (available at http://nso.nato.int/nso/zPublic/ap/ATrainP-4%20EDA%20V1%20E.pdf) p. B-18. The STANAG main document is available at https://nso.nato.int/nso/zPublic/stanags/CURRENT/2597EFed01.pdf, both last accessed 24.04.2019.

15 See e.g. Hans F.R. Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence: Their Relationship to Rules of Engagement', Chapter 24 in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford, 2015) pp. 483–484, §24.08, paragraphs 4–7 and §24.09 with commentaries; and the U.S. position as discussed e.g. in Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 2) pp. 296–297.

16 State self-defence has for centuries been the subject of considerable debate and study, and numerous important works deal with the topic in extensive detail. For a selection of writings, see Derek W. Bowett, *Self-Defence in International Law* (Oxford University Press, Oxford, 1958); Ian Brownlie, *International law and the use of force by States* (Oxford University Press, Suffolk, 1963 (1991 reprint)), especially Chapter XIII; Dinstein, *War, Aggression and Self-Defence* (n 12); Arthur Eyffinger, Sam Muller; and Alan Stephens (eds.), *Self-defence as a Fundamental Principle* (Hague Colloquium in Fundamental Principles of Law, Hague Academic Press, 2009); Terry D. Gill, 'Legal basis of the right of self-defence under the UN Charter and under customary international law', Chapter 8 in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford, 2012 reprint); Terry Gill, Carl Marchand, Hans Boddens Hosang, and Paul Ducheine, 'General Report', in Stanislav Horvat and Marco Benatar (eds.), *Legal Interoperability and Ensuring Observance of the Law Applicable in Multinational Deployments* (Proceedings of the 19th International Congress, Quebec, XIX Recueil of the International Society of Military Law and Law of War, Brussels, 2013) pp. 126–140; Christine Gray, *International law and the Use of Force* (Oxford University Press, NY, 2008) Chapters 4–6; Institut droit international, 'Present Problems of the Use of Force in International Law: Sub-group on Self-defence', *Annuaire de l'Institut de droit international – Session de Santiago du Chili,* Volume 72, 2007; Albrecht Randelzhofer and Georg Nolte, 'Article 51', in Bruno Simma *et al.* (eds.), T*he Charter of the United Nations – A Commentary* (Oxford University Press, Oxford, 2012) Volume II, pp. 1397–1428; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge

The concept of personal[17] self-defence has existed for thousands of years.[18] It recognises the right of individual persons to use force to defend themselves and, to some extent, others. The issue in the current context is the extent to which military forces have a right to use force in personal self-defence during armed conflict. Furthermore, is it the same self-defence rule that applies to citizens during peacetime or is it a different form of self-defence? According to Gary Corn, "few issues generate greater emotional debate, both within and outside the armed forces, than the question of whether, and to what degree, servicemembers may use lethal force in the exercise of self-defense".[19]

The discussion on personal self-defence (Section 6.3) is divided into two parts. First, it is explored whether the references to a universal right of self-defence or inherent right recognised in international law entails that there are any international forms of personal self-defence (Section 6.3.1). Second, personal self-defence is considered from the perspective of domestic legislation, both in general and as found in a selection of NATO States. Because the focus of this part of the book is on the applicable legal bases for the use of force by military forces during armed conflict, *non-legal* concepts of self-defence will be dealt with in Part III (Section 8.3), where the relationships between the legal concepts and the operational 'use of force' concepts are examined.

As explained in Section 3.2, self-defence plays a central role in the analysis and understanding of NATO ROE 'use of force' categories in several ways. Because NATO States have different approaches to self-defence, the meaning

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University Press, Cambridge, 2010); C.H.M. Waldock, 'The Regulation of the Use of Force by Individual States in International Law', 81 *Recueil des cours de l'Academie de droit international de La Haye*, 1952; and Elizabeth Wilmshurst, 'The Chatham House principles of international law on the use of force in self-defence', 55(4) *International and Comparative Law Quarterly* 963 (2006).

17 In order to distinguish the interpersonal form of self-defence from the State form of self-defence (regulated by the jus as bellum), the phrase personal self-defence will be used to describe the use of force by a person in protection of self, others and, where applicable, property.

18 George P. Fletcher and Jens David Ohlin, *Defending Humanity: When force is justified and why* (Oxford University Press, Oxford, 2008) p. 26. See pp. 26–29 for a brief overview of the historic origins of self-defence, and for instance Christopher D. Amore, 'Rules of Engagement: Balancing the (Inherent) Right and Obligation of Self-Defense with the Prevention of Civilian Casualties', 1 *National Security Law Journal* 39 (spring 2013), pp. 44–46.

19 Gary P. Corn, 'Should the Best Offense Ever be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force rules in the Standing Rules of Engagement', *49 Vanderbilt Journal of Transnational Law* 1 (2016), p. 3.

and interpretation of self-defence is nationally defined, and the use of force in self-defence is not affected by NATO ROE.[20] While this means that self-defence is not regulated by NATO ROE, it also means that self-defence is a particularly important 'use of force' category because it is the only authority for using force that may not be retained through ROE. Furthermore, in order to prevent NATO ROE from regulating the use of force in self-defence, the NATO concepts of 'hostile act' and 'hostile intent' are defined as regulating the use of force in response to threats *not* giving rise to a right of self-defence.[21] Self-defence is therefore indirectly defining the potential scope of application for these ROE. Finally, understanding self-defence is also important for military forces because the use of force in self-defence does not amount to direct participation in hostilities,[22] even if it may in practice be difficult to distinguish one from the other.

Before examining the respective self-defence concepts of self-defence in further detail, some general observations will be made. Despite their differences, all forms of self-defence are developed from the same central principles. As Gill *et al.* explain, "[t]he essence of self-defence at whatever level is that it is a form of lawfully sanctioned force which can be employed to repel or if necessary overcome unlawful force in the form of an unlawful armed attack or criminal assault".[23] Furthermore, in order for self-defence to be relevant, the defensive force required must be otherwise prohibited, thereby creating a need for a legal justification. This is emphasised for instance by the International Law Commission with respect to self-defence as a ground for precluding the wrongfulness of a State's otherwise unlawful act. In the 1980 Report on its work on the Draft Articles on State Responsibility, which is the main account of self-defence,[24] the ILC noted:

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20 See further Section 2.2.1.4. However, as will be discussed in Section 8.2.10, States may agree to ROE imposing limitations, in particular on the use of force in defence of others or property.

21 See further Section 3.5.

22 ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law [hereinafter ICRC Interpretive Guidance] (May 2009, prepared by Nils Melzer, available at https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, last accessed 24.04.2019) p. 61, and Hessbruegge, Human Rights and Personal Self-Defense (n 10) p. 69.

23 Gill *et al.* 'General Report' (n 16) p. 123.

24 See UN ILC, 'State responsibility', in *Analytical Guide to the Work of the International Law Commission* (available at http://legal.un.org/ilc/guide/9_6.shtml, last accessed 24.04.2019).

> [t]he absolutely indispensable premise for the admission of a self-contained concept of self-defence, with its intrinsic meaning, into a particular system of law is that the system must have contemplated as a general rule the general prohibition of the use of force by private subjects and hence admits the use of force only in cases where it would have purely and strictly defensive objectives, in other words, in cases where the use of force would take the form of resistance to a violent attack by another.[25]

Any concept of self-defence should therefore be interpreted in light of the corresponding prohibition on the use of force. Whereas for States, the prohibition is that on the threat or use force against another State, with respect to personal self-defence, the corresponding rules are national criminal law rules on crimes of violence, including murder.[26] In the exceptional circumstances when there is a threat or use of unlawful force and the entity authorised to deal with such situations is unable to do so, a right of self-defence arises.[27] The entity forced into taking defensive actions should not be held legally responsible for violating the applicable prohibition on the use of force. Self-defence may therefore be viewed as "a 'privilege' or 'liberty' that justifies conduct otherwise illegal".[28]

The differences between the various concepts of self-defence lie in the details: What may be protected? How may it be protected? And from what? Phrased another way, the differences lie in "the constituent requirements of the obligation, i.e. those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself".[29] Resultantly, as will be shown below, while the idea of permitting the

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25 UN ILC, 'Report of the International Law Commission on the work of its thirty-second session (5 May-25 July 1980)', Document A/35/10, *Yearbook of the International Law Commission*, 1980, Vol. II, Part two, p. 26, at p. 52. The 1980 report represents the main discussion on circumstances precluding wrongfulness, namely state of necessity and self-defense, in preparation for the Articles on State Responsibility. The ILC report was based on the preparations of Special Rapporteur Roberto Ago: Roberto Ago, 'Addendum to the Eight Report on State Responsibility' (1980), Document A/CN.4/318/Add.5–7, *Yearbook of the International Law Commission* 1980, Vol. II, Part one, p. 52.

26 Fiona Leverick, *Killing in Self-Defence* (Oxford Monographs on Criminal Law and Justice, Oxford University Press, Oxford, 2006) p. 1.

27 Hans Boddens Hosang, *Rules of Engagement* (PhD thesis, University of Amsterdam 2017, available at https://pure.uva.nl/ws/files/7940990/Boddens_Hosang_Thesis_complete.pdf, last accessed 24.04.2019) pp. 118–119.

28 Bowett, *Self-Defence in International Law* (n 16) p. 8. On the nature of self-defence as a right, see further Section 6.3.2.1.2.

29 UN ILC, 'Draft Articles on State Responsibility with Commentaries', *Yearbook of the International Law Commission,* 2001, Vol. II, Part Two, p. 30, p. 72.

use of force in response to unlawful force is the same for the differing concepts of self-defence, the entity to which the prohibition on the use of force and corresponding exception of self-defence apply differs, as does the application of the requirements of necessity and proportionality.

In addition to the legal questions surrounding self-defence, there are several interesting ethical and philosophical questions bearing on self-defence, such as the rationale for permitting the sacrifice of one life to preserve another, or for a State to wage a war against another.[30] These are not, however, directly relevant to the question at hand and therefore will not be dealt with.

6.2 State Self-Defence

6.2.1 *Treaty Law*

As explained above, self-defence is an international legal concept providing an exception from the prohibition on the use of force when faced with an unlawful armed attack. In order to understand the development of self-defence, it is therefore necessary to examine the associated regulation of the use of force. The first multinational prohibition on the use of inter-State force was the the 1928 General Treaty for Renunciation of War as an Instrument of National Policy, also known as the Kellogg-Briand Pact or Pact of Paris.[31] Previous attempts to regulate the use of force had sought to merely limit rather than prohibit the use of force altogether. The most noteworthy in this regard was the 1919 League of Nations Covenant, which imposed express obligations to employ pacific means of settling disputes and not to resort to war before exhausting such means. [32] Some instruments adopted in the inter-war period went so far

30 See e.g. Seumas Miller, *Shooting to Kill: The Ethics of Police and Military Use of Lethal Force* (Oxford University Press, 2016); Michael Walzer, *Just and unjust wars* (Basic Books, New York, 5th ed, 2015); David Rodin, *War and Self-Defence* (Oxford University Press, 2002); Fletcher and Ohlin, *Defending Humanity* (n 18) p. 26; Leverick, *Killing in Self-Defence* (n 26) Chapter 3 (pp. 43–68).

31 General treaty for the Renunciation of War as an Instrument of National Policy, 94 *League of Nations Treaty Series* 57 (1928). See Dinstein, *War, Aggression and Self-Defence* (n 12) p. 85; J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Sir Humphrey Waldock (ed.), Oxford, Oxford University Press, 1963) pp. 403–410, and Brownlie, *International Law and the Use of Force by States* (n 16) pp. 74–92.

32 Covenant of the League of Nations, 28 April 1919 (available at http://www.refworld.org/docid/3dd8b9854.html, last accessed 24.04.2019) Articles 12–16. See Waldock, 'The Regulation of the Use of Force' (n 16) pp. 455–68. For a comparison of the League of Nations Covenant and Article 51 of the UN Charter, see Hans Kelsen, 'Collective security and collective self-defense under the Charter of the United Nations', 42(4) *American*

as to prohibit the use of force except when used in self-defence.[33] However, the Kellogg-Briand Pact was unique in that a record number of States ratified the treaty.[34] According to Brierly, the Pact was "the culmination of a strong movement in the early days of the League to outlaw any recourse to force otherwise than in self-defence".[35]

Article I stated that "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another".[36] The Pact did not expressly deal with self-defence as an exception to Article I because it was considered unnecessary; the right of self-defence was viewed as "inherent in every sovereign State and it is implicit in every treaty".[37] However, the Preamble

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Journal of International Law 783 (October 1948). Other examples of treaties regulating the use of force include the Hague Convention (I) of 1899 and 1907 for the Pacific Settlement of International Disputes (https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0230.pdf, last accessed 24.04.2019) and the Hague Convention (II) of 1907 Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (also known as the Porter Convention, https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0607.pdf, last accessed 24.04.2019). For an overview of the developments of relevant law prior to the Kellogg-Briand Pact, see Bowett, *Self-Defence in International Law* (n 16) pp. 120–131; Brierly, *The Law of Nations* (n 31) pp. 397–403; and Brownlie, *International Law and the Use of Force by States* (n 16) especially pp. 66–74.

33 For instance the Geneva Protocol for the Pacific Settlement of International Disputes, adopted by the Fifth Assembly of the League of Nations on 2 October 1924 (but never entered into force), available at http://www.refworld.org/docid/40421a204.html (last accessed 24.04.2019); the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, which constitutes annex A to the Final Protocol signed at Locarno on 16 October 1925 (also known as the Rhine Pact), LIV *League of Nations Treaty Series* 290 (1926); several bilateral treaties signed between 1926 and 1929, among others between France and Romania (1926), France and the Kingdom of the Serbs, Croats and Slovenes (1927), and Greece and Romania (1928); and the model treaties of reciprocal assistance and non-aggression prepared in 1928 by the League of Nations Committee on Arbitration and Security. See UN ILC, 'Report of the International Law Commission on the work of its thirty-second session' (n 25) p. 55.

34 Dinstein, *War, Aggression and Self-Defence* (n 12) p. 85. According to Ian Brownlie, it was ratified or adhered to by sixty-three States which mean that it was of "almost universal obligation since only four States in international society as it existed before the Second World War were not bound by its provisions". Brownlie, *International Law and the Use of Force by States* (n 16) p. 75.

35 Brierly, *The Law of Nations* (n 31) p. 409.

36 Kellogg-Briand Pact (n 31) p. 63.

37 Statement by the American Government made before the conclusion of the Pact, cited in: Ago, 'Addendum to the Eight Report on State Responsibility' (n 25) p. 59 and UN ILC, 'Report of the International Law Commission on the work of its thirty-second session' (n

emphasised that "any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty".[38] As a result, the prohibition on the use of force did not apply to States that responded to an initial unlawful attack, an exception that resembles a right of self-defence. However, as Dinstein points out, this implicit reference to self-defence did not set out any requirements for the use of force in self-defence, and no competent body was established that could assess the legality of the use of force.[39]

The right of States to act in self-defence was confirmed in the 1945 UN Charter.[40] A clear expression of self-defence was made necessary by the inclusion of a stricter limitation on the use of force. Unlike the League of Nations Covenant, which only 'condemned' the use of force, Article 2(4) the UN Charter sets out a clear prohibition on both the threat and use of force: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".[41] If a situation is considered to amount to a threat to international peace and security, the UN Security Council has in Chapter VII of the Charter been given the power decide what measures shall be taken "to maintain or restore international peace and security",[42] including authorising the use of force.[43] However, these collective measures may not be sufficient, or more importantly, may be too late, with the result that States continue to be dependent on the possibility for using force in self-defence. This is reflected in Article 51, where it is made clear that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security".[44] The application of Article 51 will be discussed further in Section 6.2.3.

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25) p. 56, footnote 195. The American Secretary of State insisted that it was important to keep the treaty simple, and that inclusion of an exception for self-defence was superfluous. Instead, many States referred to the American Statement when signing and acceding to the Pact.

38 Kellogg-Briand Pact (n 31) pp. 59–61.

39 Dinstein, *War, Aggression and Self-Defence* (n 12) p. 86.

40 Charter of the United Nations (UN Charter), 24 October 1945, 1 *UNTS* XVI.

41 ibid, Article 2(4).

42 ibid, Article 39.

43 ibid, Article 42.

44 ibid, Article 51.

6.2.2 *Custom and Practice*

As explained above, one of the reasons that self-defence had not been included in previous treaties was that it was considered unnecessary. It almost did not make it into the UN Charter either. According to Gill, "[i]t was only included relatively late in the *travaux* leading to the Charter's adoption at the behest of Latin American States seeking a guarantee of the legality of regional collective self-defence arrangements, such as the Act of Chapaltupec".[45] Rather than merely setting out a right of self-defence, Article 51 specifies that the UN Charter does not impair an existing right of self-defence. While it has been contended that the last-minute inclusion of Article 51 limits its impact on international law,[46] this assertion seem untenable in light of the repeated reliance on the Article by the International Court of Justice.

The historic recognition of self-defence is reflected in the reference in Article 51 to the pre-existing or 'inherent' right of self-defence, or 'droit naturel' in the French version.[47] It was for instance much debated by classic writers on international law who discussed the limits on States' prerogative to use force. For instance, according to Grotius (1583–1645), "[t]his right of self-defence, it should be observed, has its origin directly, and chiefly, in the fact that nature commits to each his own protection".[48]

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45 Terry D. Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy', in Michael N. Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (BRILL, 2007) p. 116. See also Bowett, *Self-Defence in International Law* (n 16) pp. 182–183.

46 Nigel D. White, 'Defending Humanity: When Force is Justified and Why by George P. Fletcher and Jens David Ohlin (book review)', 10 *Melbourne Journal of International Law* 379 (2009), p. 381.

47 On State self-defence and natural law, see for instance John J. Merriam, 'Natural Law and Self-Defense', 206 *Military Law Review* 43 (2010), pp. 43–87 and Jens David Ohlin, 'The Doctrine of Legitimate Defense', 91 *International Law Studies* 119 (2015).

48 Hugo Grotius *De jure belli ac pacis libri tres* (*On the Law on War and Peace*)(first published 1625, translated by Francis W. Kelsey, *The Classics of International Law,* No. 3 vol. II, Carnegie Endowment for International Peace, Oxford/ Clarendon, 1925) Book II, Chapter I, Section III, p. 172. See also ibid, Section XVI, p. 184; Balthazar Ayala, *De Jure et Officiis Bellicis et Disciplina Militari* (*On the Law of War And on the Duties Connected with War And on Military Discipline*) (first published 1582, translated by John Pawley Bate, *The Classics of International Law,* No.2 Vol II, Carnegie Institution of Washington, Washington D.C., 1912) p. 11, Book I, Chapter II, §11; Alberico Gentili, *De Jure Belli Libri Tres* (*The Three Books on the Law of War*)(first published 1612, translated by John C. Rolfe, *The Classics of International Law* No 16 Vol II, Oxford University Press, Oxford, 1933) Book I, Chapter XIII, pp. 58–59 [94]; Fransisco Suarez, *De Legibus, Ac Deo Legislatore* (*A Treatise on Laws and God the Lawgiver*)(first published 1612, translated by Gwladys L. Williams and Ammi Brown, *The Classics of International Law* No. 20 Vol 2, Oxford University Press, Oxford, 1944) Book II, Chapter XVII, §6, p 329 [182]; Emer de Vattel, *Le droit des gens;*

The transformation of the naturalist ideas of self-preservation and just war theory into a more specific legal concept of self-defence is commonly accredited to the 'Caroline' incident of 1837 and the subsequent debate between the U.S. and Great Britain.[49] The Caroline was a U.S. vessel being used by U.S. nationals to support rebels in Canada during the Mackenzie Rebellion by transporting persons and equipment. Canada was at the time a British colony, and British forces attacked and destroyed the vessel while it was on the U.S. side of the Niagara River. The vessel was attacked at night, while moored to the shore of Navy Island and with people sleeping on board. It was then drawn into the current, set on fire, and cast adrift over Niagara Falls. Two U.S. nationals died. Alexander McLeod was later arrested in New York by U.S. authorities for his participation in the attack.[50] The incident led to an exchange of letters between U.S. Secretary of State Webster, the representative of the British Crown, Lord Ashburton, and the British Minister in Washington, Mr. Fox. The British demanded the release of McLeod on the basis that he was acting on behalf of the British government and should therefore not be held individually responsible,[51] while the U.S. sought an apology for the incident. The communications concluded in 1842.

The main disagreement concerned the facts, including whether it was necessary to attack at night while people slept, to set fire to the vessel, and then to cut the moorings. However, both States agreed on the legal principles to be applied, including the "inviolable character of the territory of independent nations".[52] They also agreed that a violation of this principle would be defendable

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ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains (*The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*)(first published 1758, translated by Charles G. Fenwick, *The Classics of International Law*, No. 4 vol. III. Carnegie Institution of Washington, Washington D.C., 1916) Book III, Chapter III, pp.243–244, §§ 26–27, and p. 246, § 35, and Book III Chapter I, p. 233, § 3; and Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (*The Law of Nations Treated According to a Scientific Method*) (first published 1764, translation by Joseph H. Drake, *The Classics of International Law* No 13 Vol 2, Oxford University Press, Oxford, 1934) Book I, Chapter II, pp. 129–130, §§252–253.

49 According to Jennings, self-defence "was rescued from the Naturalist notions of an absolute primordial right of self-preservation, which still vitiated the doctrine of the writers, and was subjected to the limiting condition of necessity". R.Y. Jennings, 'The Caroline and McLeod Cases', 32 *American Journal of International Law* 82 (1938), p. 92. For examples of early writings on state self-defence from a naturalist perspective, see note 48 above.

50 For further information on the facts, see ibid, especially pp. 82–84.

51 In regard to this distinction between individual responsibility and state responsibility, see Chapter 4, note 132 and accompanying text.

52 *Caroline Incident Letters*, published British and Foreign State Papers, 1841–1842 (London, Ridgeway, 1858), vol. 30, p. 193, available at http://hdl.handle.net/2027/mdp.35112103940203, p. 195 (Lord Ashburton to Mr. Webster).

if based on "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[53] The importance of the Caroline affair is therefore that it shifted self-defence "from a political excuse to a legal doctrine",[54] and set out the requirements for lawful self-defence.

State practice in the years before the UN Charter was drafted confirms the existence of a right of self-defence in customary international law. For instance, in 1929, States were asked by the Preparatory Committee of the Hague Conference of 1930 on the Responsibility of States for Damage Caused to the Person or Property of Foreigners to respond to the following question: "*Circumstances in which a State is entitled to disclaim responsibility. What are the conditions which must be fulfilled: 'When the State claims to have acted in self-defence'?*".[55] Although not the topic for the conference, some of the replies of the States confirmed their belief in a legal right of self-defence when faced with an unlawful attack by another State.[56] Similar statements were made by States in 1931 regarding the potential amendment of the League of Nations Covenant in light of the Kellogg-Briand Pact, both in response to a questionnaire sent out by the Secretariat and in debate in the First Committee of the League of Nations Assembly.[57]

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53 *Caroline Incident Letters*, published in British and Foreign State Papers, 1840–1841 (London, Ridgeway, 1857, vol. 29, p. 1126, http://hdl.handle.net/2027/mdp.39015019751299., last accessed 24.04.2019) p. 1138 (Mr. Webster to Mr. Fox).

54 "It was in the *Carline case* that self-defence was changed from a political excuse to a legal doctrine". Jennings, 'The Caroline and McLeod Cases' (n 49) p. 82.

55 League of Nations, *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners,* Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, vol. Ill, League of Nations Doc C. 75. M. 69.1929 V, p. 125.

56 See e.g., the responses by Belgium: "In the case of legtimate self-defence against an aggressor State, for damage caused to the nationals of that State or damage caused to nationals of third States necessitated by the state of war" (ibid, p. 125); and Denmark: "Only in exceptional cases when, for instance, from a vessel outside territorial waters acts are committed which constitute an unlawful attack and a danger to the security of the coastal State, would it be possible, in the relations between a State and private individuals, to adopt the particular plea of self-defence" (ibid, p. 126).

57 "[A] total prohibition without 'loopholes' on recourse to war would not affect the right to resort to war in cases where the conditions of a situation of self-defence were fulfilled". UN ILC, 'Report of the International Law Commission on the work of its thirty-second session' (n 25) p. 56, referencing the reply of the Italian Government (League of Nations, Official Journal, 12th year, No. 8 (August 1931), p. 1602; the statement by the representative of Germany in League of Nations, Official Journal, Special Supplement No. 94 (1931), p. 41; and the report prepared in the close of the proceedings of the First Committee and submitted to the twelfth session of the Assembly, in League of Nations, Official Journal, Special Supplement No. 93 (1931), pp. 221ff.

A customary right of self-defence was also considered by the International Military Tribunals of Nuremberg and Tokyo and at the trials conducted pursuant to Control Council Law No.10. For instance, the German defence counsel attempted to rely on self-defence in relation to the invasion by Nazi Germany of Norway, claiming that Germany was "compelled to attack Norway to forestall an Allied invasion".[58] The Nuremberg Tribunal acknowledged that such a right existed, and emphasised that it is subject to the test set out in the Caroline incident.[59] However, the Tribunal concluded that the invasion was not defensive, but rather an act of aggressive war:[60]

> [i]t is clear that when the plans for an attack on Norway were being made, they were not made for the purpose of forestalling an imminent Allied landing, but, at the most, that they might prevent an Allied occupation at some future date. (…) Norway was occupied by Germany to afford her bases from which a more effective attack on England and France might be made, pursuant to plans prepared long in advance of the Allied plans which are now relied on to support the argument of self-defense.[61]

The right of self-defence was also confirmed in the so-called Ministries Case, where the Nuremberg Tribunal stressed that "he who initiates aggressive war loses the right to claim self-defense".[62]

In the trials before the Tokyo tribunal, Japan also relied on self-defence as a defence against the charge of waging a declared or undeclared aggressive war against France, the Netherlands, Great Britain and the United States of America.[63] The Tribunal emphasised that "[a]ny law, international or

58 Nuremberg Tribunal Judgement of 1 October 1946, reproduced in *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945–1 October 1946 (Nuremberg, 1947), vol. 1 (https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf, last accessed 24.04.2019) Judgement, p. 206.

59 ibid, p. 207.

60 ibid, p. 209.

61 ibid, pp. 207–208.

62 *United States v. Von Weizsaecker et al,* ('Ministries Case') Trials of War Criminals before the International Military Tribunal Under Control Council Law No. 10, Nuremberg, October 1946-April 1947 (Nuremberg, 1947), vol. XIV (http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XIV.pdf, last accessed 24.04.2019) p. 329.

63 International Military Tribunal for the Far East, Judgement of 12 November 1948, in John Pritchard and Sonia M. Zaide (eds.), *The Tokyo War Crimes Trial*, Garland (London/New York, 1981) Vol. 22, pp. 421–422 (charges), and pp. 581 and 762–770 (regarding the claim of and non-application of self-defence).

municipal, which prohibits recourse to force is necessarily limited by the right of self-defence",[64] but held that the facts did not satisfy its requirements. In relation to the Netherlands, for instance, the Japanese self-defence claim was based on the declaration of war by the Netherlands on Japan, but the Tokyo Tribunal held instead that the Dutch declaration was a form of anticipatory self-defence to protect Dutch colonies in the East Indies.[65] Japan had been subjected to an oil embargo by the U.S. and Netherlands after its invasion of China, and the Dutch East Indies would provide an alternative source for oil. The Japanese attack was therefore considered imminent.

As these examples illustrate, sometime between the 1920s and the end of the Second World War the right of State self-defence as it is known today had crystallised in customary international law.[66] The crystallisation took place despite the absence of an international agreement regarding the corresponding definition of aggression or prohibition on the use of force.[67] Although the current customary rule for State self-defence has evolved and become more explicit with the development of the UN Charter and the prohibition and exception set out in Articles 2(4) and 51, the basic principles of necessity, proportionality and immediacy are still adhered to. In particular, where the application of Article 51 is not clear, it is interpreted in light of the customary rule.[68]

In the *Nicaragua case*, the International Court of Justice explained the relationship between Article 51 and the customary right of self-defence in the following way:

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64 ibid, p. 494.

65 ibid, pp. 443–444 and 585–586. For more information on *jus ad bellum* self-defence cases arising out of the Second World War, see Timothy L.H. McCormack, 'Self-Defence in International Criminal Law', in Hirad Abtahi and Gideon Boas (eds.), *The Dynamics of International Criminal Justice: Essays in the honour of Sir Richard May* (BRILL, 2005) pp. 245–251.

66 See Ago, 'Addendum to the Eight Report on State Responsibility' (n 25) pp. 62–63.

67 In the response to question XI (a) of the questionnaire prepared for the Hague Conference of 1930 on the Responsibility of States for Damage Caused to the Person or Property of Foreigners, Switzerland emphasises that: "Although conditions of legitimate defence must exist directly the State becomes the victim of an "unjust aggression contrary to law", it has not yet been possible internationally to obtain a satisfactory definition of aggression". League of Nations, *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (n 55) p. 127.

68 See e.g. Gill, 'The Temporal Dimension of Self-Defence' (n 45) p. 117. See also *Case Concerning Oil Platforms* (Iran v United States), *I.C.J. Reports* [2003] 161, Judgement, para. 76–77, and *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda), Judgment, *I.C.J. Rep* 2005, p. 168, para. 147.

> The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law.[69]

As the ICJ quote above emphasises, the content of the customary rule has evolved under the influence of Article 51. The details of the current right of States to use force in self-defence are, however, still subject to debate.[70] One of the causes for debate is the question whether the two rights of self-defence, namely the customary right and Article 51, exist in parallel.[71] While some argue that Article 51 set aside the pre-existing rule, so that any use of self-defence by States must be in accordance with the requirements set out in the UN Charter, others argue that the inherent customary right remains, with the result that self-defence for instance is not limited to armed attacks.[72] Other major debates concern the questions of anticipatory self-defence and the use of force in self-defence in response to attacks by non-state actors. It is, however, difficult to perceive that a customary right of self-defence could be applied if it is incompatible with Article 51. The current relevance of the customary right is

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69 *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), Merits, Judgement, I.C.J. Reports [1986] 14, para. 176.

70 See e.g. an overview over topics that have been subject to academic debate in Gray, *International Law and the Use of Force* (n 16) pp. 117–119.

71 For a brief overview of this debate, see Randelzhofer and Nolte, 'Article 51' (n 16), pp. 1403–1406 and Brownlie, *International Law and the Use of Force by States* (n 16) pp. 272–275. See also *ICJ Nicaragua Case* (n 69) Merits, para. 211, reaffirmed in the *ICJ Oil Platforms Case* (n 68) Judgement para 51, where the customary rule of self-defence is treated as being the same as Article 51, with the exception of the requirement to report to the Security Council (*ICJ Nicaragua Case*, Merits, para 200).

72 See note 74 below and accompanying text.

therefore the additional clarifications provided by the Caroline principles of necessity, proportionality, and immediacy.[73]

Because the relevance of State self-defence to this book is primarily contextual, the following presentation of current criteria for State self-defence is merely intended to be an overview of central issues.

6.2.3 *Current Criteria for State Self-Defence*

The use of force in State self-defence will first of all require that there be an ongoing or imminent *armed attack* against the State in question.[74] There has been some debate on the threshold of armed attack, and whether armed attack must be distinguished from lesser forms of use of force. According to the ICJ, however, "Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters".[75] Furthermore, the ICJ has expressed that a distinction must be made between an armed attack and for instance mere frontier incidents.[76]

Another topic that has been hotly debated by both States and scholars, especially in the aftermath of 9/11 attacks, is whether an attack must have been initiated before the State may use force in self-defence, or whether so-called preventive, anticipatory or pre-emptive self-defence (terms to which different commentators attribute different meanings) is permissible.[77] Even though

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73 Gill, 'Legal basis of the right of self-defence under the UN Charter and under customary international law' (n 16) p. 215.

74 Ago, 'Addendum to the Eight Report on State Responsibility' (n 25) p. 15 and pp. 64–65; Dinstein, *War, Aggression and Self-Defence* (n 12) pp. 193ff and 231; Gray, *International Law and the Use of Force* (n 16) pp. 128–148; Ruys, *'Armed Attack' and Article 51 of the UN Charter* (n 16) in particular Chapter 3; Randelzhofer and Nolte, 'Article 51' (n 16) pp. 1406ff; Michael N. Schmitt, 'Responding to Transnational Terrorism under the Jus Ad Bellum: A Normative Framework', 56 *Naval Law Review* 1 (2008), pp 13–15; Brownlie, *International Law and the Use of Force by States* (n 16) pp. 278–279. Some, however, argue that force may also be used in response to acts other than armed attack under a parallel customary rule of self-defence, see e.g., Bowett, *Self-Defence in International Law* (n 16) pp. 192–193; and Waldock, 'The Regulation of the Use of Force' (n 16) pp. 496–499.

75 ICJ *Armed Activities Case* (n 68) para. 148.

76 See *ICJ Nicaragua Case* (n 69) Merits, para. 195 and *ICJ Oil Platforms Case* (n 68) para 51. See also Ruys, '*Armed Attack' and Article 51 of the UN Charter* (n 16) pp. 139–15, and Dinstein, *War, Aggression and Self-Defence* (n 12) pp. 207–212. This distinction between armed attack and lesser forms of use of force entails that there are instances that violate Article 2(4) of the UN Charter that may not be responded to with armed self-defence.

77 For instance, the intervention in Afghanistan in 2001 (Operation Enduring Freedom) was categorised by the U.S. and the UK as the exercise of the right of anticipatory self-defence. See UNSC, 'Letter dated 2001/10/07 from the Permanent Representative of the United

Article 51 makes reference to "if an armed attack *occurs"* (emphasis added), few would require a State to take the first blow before defending itself. As Dinstein points out, "'if' does not mean 'after'".[78] Nonetheless, there are limits to how far in advance a threat may be averted by using force. To continue Dinstein's clear distinction; "it also does not mean 'before'".[79] The attack must be imminent, meaning that the threat of attack must be credible and there are no realistic alternatives to using force to avert the attack.[80] According to the Caroline test, in order for force in self-defence to be permissible, there must be "no choice of means and no moment for deliberation".[81] This imminence requirement has particularly been challenged in the context of transnational terrorism. The use of unconventional methods means that the concrete attacks are rarely foreseeable. If an attack is considered highly likely, non-forceful means are exhausted or unavailable, and the use of force is the last chance to effectively defend against it, it is argues that self-defence should be permissible, even if it may be deemed anticipatory.[82]

It has also been debated whether the attack must be launched by a State, as opposed to a non-State actor, such as a terrorist group acting transnationally.

States of America to the United Nations addressed to the President of the Security Council' [7 October 2001] U.N. Doc. S/2001/946: "United States armed forces have initiated actions designed to prevent and deter further attacks on the United States", and UNSC, 'Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council' [7 October 2001] UN Doc S/2001/947. More controversially, one of the legal bases offered by the U.S. for invading Iraq in 2003 (Operation Iraqi Freedom) was a pre-emptive form of self-defence, also referred to as the 'Bush-doctrine'. See summary of the debate in Gray, *International Law and the Use of Force* (n 16) pp. 181–184. There are extensive writings on these issues. See e.g.: Dinstein, *War, Aggression and Self-Defence* (n 12) pp. 194–200; Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', 4 *San Diego International Law Journal* 7 (2003); Gill, 'The Temporal Dimension of Self-Defence' (n 45) pp. 113–155; Harold Hongju Koh, 'On American Exceptionalism', 55 *Stanford Law Review* 1479 (2002–2003); Ruys, *'Armed Attack' and Article 51 of the UN Charter* (n 16) pp. 250–342; and Schmitt, 'Responding to Transnational Terrorism' (n 74) pp. 16–20 and 35–40.

78 Dinstein, *War, Aggression and Self-Defence* (n 12) p. 206.

79 ibid.

80 For a detailed examination of the temporal requirement of the existence of an armed attack, including the issue of imminence, see Gill, 'The Temporal Dimension of Self-Defence' (n 45) pp. 128–150.

81 Letter from Mr. Webster to Mr. Fox, *Caroline Incident Letters* (n 53) p. 1138.

82 Michael N. Schmitt, 'Targeted Killings and International Law: Law Enforcement, Self-defense and Armed Conflict', Chapter XX in Roberta Arnold and Noëlle Quénivet, *International Humanitarian Law and Human Rights Law – Towards a New Merger in International Law* (Martinus Nijhoff Publishers, Boston, 2008) pp. 536–537.

Traditionally, the *jus ad bellum* right of self-defence has been viewed as permitting forceful response to attacks by another State.[83] However, in the aftermath of the 9/11 2001 attacks on the United States, the immediate response from the UN Security Council (Resolution 1368 of 12 September 2001) was to condemn the attacks and recognise the inherent right of self-defence.[84] The United States declared in October that they would take measures in self-defence against Al-Qaeda in Afghanistan,[85] and other States made declarations of the intention to act in collective self-defence.[86] When the Security Council in November of 2001 encouraged Member States to contribute to the efforts to fight terrorism in Afghanistan,[87] States responded by declaring that they would support the United States in collective self-defence.[88] Subsequent Security Council resolutions continued to make reference to self-defence. Although some claim that responsibility for the attacks could be attributed to the Taliban government of Afghanistan, there was limited evidence to support this claim.[89] As a result, State practice appears to recognise the ability to act in self-defence against non-State actors.[90]

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83 ibid, p. 532. See e.g. UN General Assembly, Resolution 3314: 'Definition of Aggression' (4 December 1974) U.N. Doc. A/RES/3314, Articles 1 and 3.

84 UN SC Resolution 1368 (Condemnation of 11 September attacks against United States) (12 September 2001) U.N. Doc. S/RES/1368.

85 U.N. Doc. S/2001/946 (Letter from USA to UNSC) (n 77).

86 U.N. Doc. S/2001/947 (Letter from UK to UNSC) (n 77); UNSC, 'Letter dated 24 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council (24 October 2001) U.N. Doc. S/2001/1005.

87 UN SC Resolution 1378 (on the situation in Afghanistan) (14 November 2001) U.N. Doc. S/RES/1378, para. 5.

88 See for instance UNSC, 'Letter dated 23 November 2001 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council', [23 November 2001] U.N. Doc. S/2001/1104; UNSC, 'Letter dated 23 November 2001 from the Permanent Representative of France to the United Nations addressed to the President of the Security Council' [23 November 2001] U.N. Doc. S/2001/1103; and UNSC, 'Letter dated 29 November 2001 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council' [29 November 2001] UN Doc S/2001/1127.

89 See Michael N. Schmitt, *Counter-Terrorism and the Use of Force in International Law* (Marshall Center Papers, no 5, 2002) p. 48, and Ruys, *'Armed Attack' and Article 51 of the UN Charter* (n 16) p. 440 ("it was generally accepted that the 9/11 attacks were not attributable to the Taleban within the meaning of the ILC DASR [Draft Articles on State Responsibility]"). See, however, Dinstein, *War, Aggression and Self-Defence* (n 12) p. 261, and Boddens Hosang, 'Self-Defence in Military Operations' (n 11) pp. 39–40.

90 See also Gill, 'The Temporal Dimension of Self-Defence' (n 45) p. 118.

Nonetheless, in 2004, the ICJ took a very different approach. In its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court stated that Article 51 "recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State".[91] This apparent limitation to attacks by States was, however, criticised in the Separate Opinions of Judge Higgins[92] and Judge Koojimans,[93] and in the Declaration by Judge Buergenthal.[94] It was also criticised in the Separate Opinion by Judge Simma in the case of Congo v. Uganda,[95] and is considered to have "wrongly ignored the effect of recent state practice on the law of self-defense".[96]

Despite the position of the ICJ, States continue to apply self-defence in response to non-State actors, as illustrated by the response to the terrorist attacks by the non-State actor the 'Islamic State in Iraq and the Levant' (ISIL, also known as Da'esh).[97] Several States have fought against ISIL on Syrian territory, and have notified the UN Security Council of their collective self-defence actions in support of Iraq, pursuant to the requirements set out in Article 51.[98] Interestingly, while the United States explained that Syria was considered

91 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Rep 2004, p. 136, para 139.

92 ibid, Separate Opinion of Judge Higgins, para. 33.

93 ibid, Separate Opinion of Judge Koojimans, para. 35.

94 ibid, Declaration by Judge Buergenthal, para. 6.

95 *ICJ Armed Activities Case* (n 68) Separate Opinion of Judge Simma, para 11. In this case, the Court concluded that the preconditions for self-defence were not met, and therefore that it did not need to consider the issue of self-defence against non-state actors. ibid, Judgement, para. 147.

96 Schmitt, 'Targeted Killings and International Law' (n 82) p. 533.

97 Reflecting this new State practice, former UK Foreign and Commonwealth Office Legal Adviser Daniel Bethlehem has proposed 16 principles for the use of force against non-State actors. See Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack By Nonstate Actors', 106(4) *American Journal of International Law* 770 (October 2012). Several books and articles have been written on the topic. See e.g. Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play', 91 *International Law Studies* 1 (2015), and Louise Arimatsu and Michael N. Schmitt, 'Attacking "Islamic State" and the Khorasan Group: Surveying the International Law Landscape', 53 *Columbia Journal of Transnational Law Bulletin* 1 (2014).

98 See e.g. UNSC, Letter dated 11 January 2016 from the Permanent Representative of Denmark to the UNSC, 'Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council' [3 June 2016] UN Doc S/2016/513.

"unwilling or unable to prevent the use of its territory for such attacks",[99] not all States have expressly dealt with the fact that they are operating within another State's territory without the consent of that State.[100] The "unwilling or unable" doctrine is, however, outside the scope of this book.[101] Lastly, it should be noted that the use of force in self-defence is limited to attacks originating from outside the territory of the attacked State. Domestic terrorism is a matter of law enforcement, unless the actions of the terrorist group may be imputed to another State.[102]

A final issue regarding armed attack is whether self-defence permits States to rescue nationals under threat in another State when the latter State does not consent to a rescue operation. The main question here is whether it is sufficient that the armed attack is directed against nationals abroad rather than the territory of the State.[103] While it could be contended that a right of intervention to protect nationals derives from customary international law independently of self-defence, the typical view is that such an approach would be less satisfactory than invoking self-defence.[104]

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99 UNSC, 'Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General' [23 September 2014] UN Doc S/2014/695. See also Brian Egan (Legal Adviser, U.S. Department of State), 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations' (speech prepared for delivery on the 110th Annual Meeting of the American Society of International Law, Washington, DC, April 1, 2016) published in 92 *International Law Studies* 235 (2016).

100 See examples provided in Elena Chachko and Ashley Deeks, 'Who is onboard with "unwilling or unable"?', *Lawfare* (10 October 2016, https://www.lawfareblog.com/who-board-unwilling-or-unable, last accessed 24.04.2019).

101 The test is set out e.g. in Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack By Nonstate Actors' (n 97) principles 11 and 12. For an overview of States' justifications for their operations against non-State actors on the territory of a non-consenting State, see Chachko and Deeks, 'Who is onboard with "unwilling or unable"?', ibid.

102 Schmitt, 'Targeted Killings and International Law' (n 82) p. 533.

103 According to Christine Gray, "The use of force to rescue nationals in a foreign state without the consent of that state is uncommon and has been practices by only a few states since the Second World War". Gray, *International Law and the Use of Force* (n 16) p. 156. See also, Dinstein, *War, Aggression and Self-Defence* (n 12) pp. 255–259; and Ruys, *'Armed Attack' and Article 51 of the UN Charter* (n 16) pp. 213–249. This question is also relevant to the potential application of force by peacekeeping forces, however, as explained in Chapter 1, this will not be dealt with in this book. For information on this matter, see e.g. Geert-Jan Alexander Knoops, 'The transposition of inter-state self-defense and use of force onto operational mandates for peace support operations', in Roberta Arnold (ed): *Law Enforcement Within the Framework of Peace Support Operations* (BRILL, 2008) pp. 3–21.

104 Gray, International Law and the Use of Force, ibid, p. 157.

When the requirement of armed attack has been met, the attacked State may consider the appropriate way to deal with the attack. States can act in self-defence individually or with the support of other States in *collective* self-defence, as the case of ISIL illustrates. If States are acting in collective self-defence, as in the case of NATO pursuant to Article 5 of the North Atlantic Treaty, the attacked State must have requested the support of other States.[105]

Whether the defensive action is undertaken unilaterally or in cooperation with other States, the first requirements that must be bet to qualify the action as self-defence is whether the use of force to counter the attack is *necessary*. The use of force is a measure of last resort and it is therefore required that it would not be possible to defeat an ongoing, or deter an imminent, armed attack by other means.[106] Necessity thus demands that non-forceful alternatives are exhausted or unavailable.[107]

Some have argued that the principle of necessity requires verification that the attack in question is intentional.[108] Although it is unlikely that a single missile accidentally fired across a border or armed troops unintentionally crossing an international border will make the use of force in response necessary, it will in many cases be difficult to ascertain whether an attack was intentional or not. It would therefore be problematic to require the verification of intention before acting in self-defence. Furthermore, even if the armed attack is not intentional, it should still be legitimate for the attacked State to defend against it if the use of force is otherwise considered necessary.[109] In practice, however,

105 See e.g. *ICJ Nicaragua Case* (n 69) Merits, paras. 193–195 and 199 stating the customary rule of collective self-defence, and para 233, where it is stated that: "So far as El Salvador is concerned, it appears to the Court that while El Salvador did in fact officially declare itself the victim of an armed attack, and did ask for the United States to exercise its right of collective self-defence, this occurred only on a date much later than the commencement of the United States activities which were allegedly justified by this request".

106 Ago, 'Addendum to the Eight Report on State Responsibility' (n 25) p. 69. See also Ruys, *'Armed Attack' and Article 51 of the UN Charter* (n 16) pp. 95ff.

107 Wilmshurst, 'The Chatham House principles of international law on the use of force in self-defence' (n 16) Principle C, p. 967.

108 See e.g. Dinstein, *War, Aggression and Self-Defence* (n 12) p. 231; and Brownlie, *International Law and the Use of Force by States* (n 16) pp. 377–378. See also Ruys, *'Armed Attack' and Article 51 of the UN Charter* (n 16) pp. 158–168, debating the existence of a requirement of an "animus aggressionis", and Waldock, 'The Regulation of the Use of Force' (n 16) p. 493.

109 If the attack is unintentional and those attacking are lacking the necessary mental element for a crime of aggression, the attack itself still lacks lawful authority and remains unlawful. The attacked State may therefore still respond in self-defence. See also Chapter 8, note 23, where in the context of domestic criminal law it is noted that the force may be used in

it is likely that an unintended attack is quickly brought to an end when the mistake is uncovered, making further use of force in self-defence superfluous and unnecessary.

Once it is established that the use of force is necessary, the question of *how much* force may be used is a matter of proportionality.[110] Proportionality does not require equality in size, duration or form between the defensive action and the initial armed attack.[111] Instead, the defence must be in proportion to the purpose of the use of force, namely to halt and repel the armed attack.[112] In other words, it must be reasonable.[113] If the defensive action is more extensive or harmful than the armed attack that provoked it, it could be perceived as unreasonable, and would therefore require careful justification.[114] This *jus ad bellum* principle of proportionality must be distinguished from the *jus in bello* or LOAC principle (dealt with in Section 4.3). In the latter case, the principle refers to the correlation between expected incidental civilian losses ('collateral

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self-defence even when the attacker may not be criminally responsible for instance due to insanity or low age.

110 Some commentators, however, view this issue as an aspect of necessity: namely that the defensive measures must be limited to what is necessary to stop the ongoing attack. See e.g. Wilmshurst, 'The Chatham House principles of international law on the use of force in self-defence' (n 16) Principle C, p. 967.

111 For an example of the contrary view, see Gray, *International Law and the Use of Force* (n 16) p. 150. She also argues that "the different views on the scope of the right of self-defence will affect the scope of proportionality" (ibid, p. 150), and mentions anticipatory self-defence and the accumulation of events doctrine as examples which may result in a wider interpretation of proportionality. However, whether anticipatory self-defence is permitted is question of necessity, not proportionality, and if the proportionality relates to the intended result rather than the previous attack, it will not be affected by the accumulation of events debate.

112 As Ago explains: "What matters in this respect is the result to be achieved by the "defensive" action, and not the forms, substance and strength of the action itself. A limited use of armed force may sometimes be sufficient for the victim State to resist a likewise limited use of armed force by the attacking State, but this is not always certain." Ago, 'Addendum to the Eight Report on State Responsibility' (n 25) p. 69. Not all agree that this functional approach should be applied, but contend instead that the defensive measures should be similar to the initial attack. See discussion in Ruys, *'Armed Attack' and Article 51 of the UN Charter* (n 16) pp. 110–116.

113 Dinstein, *War, Aggression and Self-Defence* (n 12) p. 233.

114 Ruys, *'Armed Attack' and Article 51 of the UN Charter* (n 16) pp. 114 and 116. For instance, Israel was criticised for using disproportionate force against Lebanese territory in response to several attacks by Hizbollah. See the UN Secretary General's Press Release of 20 July 2006, 'Secretary-General says 'immediate cessation of hostilities' needed in Lebanon, describes package aimed at lasting solution, in Security Council briefing', U.N. Doc. SG/SM/10570-SC/8781, and Gray, *International Law and the Use of Force* (n 16) pp. 241–244.

damage') and the anticipated concrete and direct military advantage arising from an attack.[115]

Although closely linked to necessity, *immediacy* is commonly listed as a separate criterion. While the imminence requirement referred to above describes the threat of attack and the ability to act in anticipation of a future attack, immediacy entails a temporal limitation on the defensive action. It must not be punitive in character.[116] As a result, the use of force in self-defence must be "neither too soon nor too late".[117] In the *Nicaragua case*, for example, the ICJ explained that the U.S. actions against Nicaragua could not be seen fulfilling the necessity requirement when they took place several months after the major offensive against El Salvador on whose behalf U.S. contended to act in collective self-defence.[118] Importantly, this standard does not appear to be applied in an overly literal manner.[119] It is, for instance, accepted that it may take time to prepare the response, as was the case in the Falkland Island Wars of 1982.[120] Furthermore, in the context of terrorist attacks, the fact that they had the capability and intention to attack once will in many cases be a strong indication of future attacks being likely as well, with the result that the use of force in self-defence will be both in reaction to a previous or ongoing attack and in anticipation of future attacks.[121]

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115 As expressed in e.g. AP I (n 5) Articles 51(5)(b) and 57(2)(b).

116 Ago, 'Addendum to the Eight Report on State Responsibility' (n 25) p. 70. On the distinction between immediacy as in imminent threat and as a requirement intended to distinguish self-defence from armed reprisals, see further Gill, 'The Temporal Dimension of Self-Defence' (n 45) pp. 151–154, and Dinstein, *War, Aggression and Self-Defence* (n 12) pp. 205–206 (imminence) and 233–234 (immediacy). Not all adhere to this distinction. See for instance Schmitt, 'Targeted Killings and International Law' (n 82) pp. 535–538.

117 George P. Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press, Oxford, 1998) p. 134. It was originally expressed in the context of criminal law, but is perceived as applicable in international law. See Fletcher and Ohlin, *Defending Humanity* (n 18) p. 90.

118 *ICJ Nicaragua case* (n 69) para 237: "these measures were only taken, and began to produce their effects several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed (January 1981) and the actions of the opposition considerably reduced in consequence. Thus it was possible to eliminate the main danger to the Salvadorian Government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity".

119 See e.g. Maria Benvenuta Occelli, 'Sinking the Caroline: Why the Caroline Doctrine's Restrictions on Self-Defense Should Not Be Regarded as Customary International Law', 4 *San Diego International Law Journal* 482 (2003), p. 482.

120 Dinstein, *War, Aggression and Self-Defence* (n 12) p. 268.

121 Schmitt, 'Targeted Killings and International Law' (n 82) p. 538.

Finally, when acting under UN Charter Article 51, there is a requirement to report immediately to the UN Security Council, as the abovementioned letters from States to the UN Security Council in relation to Al-Qaeda and ISIL illustrate. In addition, States must cease to use force when the Security Council has taken measures to maintain international peace and security. However, as Aust points out, "[a] measure which may look good on paper, but does not protect the State attacked, cannot legally stop the State using force in self-defence."[122] The measures taken by the Security Council must actually have the effect of restoring or maintaining international peace and security for a State to lose its right to use force in self-defence. If a State fails to report to the Security Council, this may be taken as an indication that it did not at the time consider its use of force to be in self-defence.[123]

6.2.4 *The Distinction between State and Personal Self-Defence in Practice*

For military forces, State self-defence is mainly relevant in situations not already amounting to an armed conflict or in relation to actors not party to the ongoing conflict. As explained in Section 4.3, while the *jus ad bellum*, including State self-defence, regulates the use of force that initiates an armed conflict, once an armed conflict has begun, the continued use of force is primarily regulated by the law of armed conflict, with personal self-defence as an additional option in exceptional circumstances. The use of force in State self-defence is, and should be, a political decision. As emphasised by Boddens, "it is not up to the individual serviceman, regardless of his or her rank, to determine whether actions taken by the armed forces or agents of another State necessitate a response on the basis of national self-defence unless he or she has been explicitly and clearly authorized or ordered to do so by the national (political) command authorities".[124] Furthermore, it is important that the public international law concept of self-defence is distinguished from the criminal law concept.[125]

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122 Anthony Aust, *Handbook of International Law* (Cambridge University Press, NY, 2010) p. 211. See also Ruys, *'Armed Attack' and Article 51 of the UN Charter* (n 16) pp. 74–83; and Dinstein, *War, Aggression and Self-Defence* (n 12) pp. 237–241.

123 See e.g., *ICJ Armed Activities Case* (n 68) paras 145 and 147.

124 Boddens Hosang, 'Self-Defence in Military Operations' (n 11) p. 43.

125 Albin Eser, 'Article 31. Grounds for excluding criminal responsibility,' in Otto Triffterer, *Comments on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article* (2nd ed, Beck/Hart, München, 2008) p. 879. According to Gill, "the right of States to exercise self-defence under international law cannot be compared to the domestic rights of individuals. Despite the common roots of the two variants in natural law doctrine, they are completely distinct, operating within totally different contexts and environments". Gill, 'The Temporal Dimension of Self-Defence' (n 45) p. 152.

If military forces are operating in the vicinity of a hostile State, for instance due to the position of their aircraft or vessel, or if land forces are operating on or near a border of a hostile neighbouring country, they should be given the instructions on how to respond to an attack or threat of attack, including use of force. The use of force may be justified on the basis of self-defence; the question is which self-defence type they apply. Because the threat is both to the troops and to the State they represent, their right of personal self-defence will be closely related to the authority to defend their State and the State's right to use force under Article 51. Although both legal bases will permit some form of defensive actions to be taken, the purpose for the use of force will differ and thus affect how they respond. It may be possible to avoid the threat to the troops concerned without using force; however, this would not necessarily remove the threat to the State. Furthermore, the amount of force would be defined not only by what would halt and repel an attack on the troops in question, but if necessary also an attack on their State. It is therefore likely that the force they would be permitted to use in State self-defence would be more significant than in personal self-defence: the object intended to be protected will affect the assessment of what is necessary and proportionate use of force.

The two forms of self-defence are unlikely to be assessed simultaneously. Their personal right of self-defence would be relevant in a criminal case concerning the death or injury the military forces caused when defending themselves. As will be explained in Section 6.3, it is a defence that relieves an individual of responsibility for an act that would otherwise constitute a crime of murder. The exercise of State self-defence, on the other hand, would only be examined if the State is accused of violating Article 2(4), and the military forces may be tried for their involvement in and individual criminal responsibility for this crime.[126] It is, in other words, a defence relevant to the crime of aggression, a crime that will likely only be tried by an international tribunal, and the accused would probably be political and military leaders. These would be tried as individuals for acts performed in their official capacity.[127] The practical importance of the distinction therefore lies in the need to know

126 McCormack, 'Self-Defence in International Criminal Law' (n 65) pp. 244–245.

127 Massimo Scaliotti, 'Defences before the international criminal court: Substantive grounds for excluding criminal responsibility – Part 1', 1 *International Criminal Law Review* 111 (2001), p. 171; Kai Ambos, 'Other grounds for excluding criminal responsibility,' in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court – A commentary*, Volume I (Oxford University Press, Oxford, 2002) pp. 158–159.

what is being defended and as a result, what type and amount of force may be used.[128]

6.3 Personal Self-Defence

6.3.1 *Personal Self-Defence in International Law: an Inherent Right?*

6.3.1.1 Introduction

Is there an international law concept of personal self-defence common to all (NATO) States? Because national approaches to self-defence are similar but nonetheless differ, such an international concept would promote a common understanding of self-defence and therefore improve interoperability. In order for personal self-defence to exist in international law, it must according to Article 38(1) of the ICJ Statue be derived from either treaty law, customary law or be a general principle of international law.[129] There are no international treaties explicitly recognising a general right to personal self-defence.[130] The only implicit recognition of such a right is found in Article 31 of the Rome Statute to the International Criminal Court and Article 2(2) of the ECHR.[131] These will therefore be considered first, before examining whether there is a concept of personal self-defence in international customary law or as a general principle of international law. The only reference to self-defence in LOAC is in relation to acts not causing protected persons to lose their protected status,[132] and

128 On the distinction between these two forms of self-defence, see McCormack, 'Self-Defence in International Criminal Law' (n 65) pp. 232–235.

129 See also Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) p. 17.

130 ibid.

131 ibid, pp. 17–18.

132 See AP I (n 5) Articles 13(2), 65(3) and 67(1)(d) and Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) [1949], Laws of Armed Conflict, printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 5) pp. 459ff., Article 21(1), where it is set out that civil defence personnel and medical personnel may carry light individual weapons for self-defence purposes without losing their protected status. See also Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 11) p. 76. Furthermore, according to Geneva Convention (III) relative to the Treatment of Prisoners of War (GC III) [1949], printed in Schindler and Toman, *The Laws of Armed Conflicts,* ibid, pp. 507ff., Article 42, in the case of a prisoner of war (POW) who attacks a guard, the use of weapons in response "must constitute an extreme measure", resembling self-defence requirements. The relevance of self-defence to attacks by prisoners on their guards was confirmed e.g. in *United States v. Erich Weiss and Wilhelm Mundo*, pp. 149–150 (see also Section 6.3.1.2), and *Prosecutor v. Radomir Vukovic and Zoran Tomic*, Court of Bosnia and Herzegovina, Section I for War Crimes, Case no. X-KR-06/180–2, Judgement of 22 April 2010, § 435. For further discussion, see

self-defence is generally not considered to be regulated by LOAC.[133] LOAC will therefore not be considered in this section.

6.3.1.2 International Criminal Law

With the negotiation and subsequent ratification of the Rome Statute to the International Criminal Court, the first multilateral treaty definition of the criminal law defence of self-defence appeared.[134] Article 31, which regulates grounds for excluding criminal responsibility, makes it clear that a concept of personal self-defence, similar to that found in national legal systems, also applies in the context of international crimes:

> a person shall not be criminally responsible if, at the time of that person's conduct (…):
>
> (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.[135]

The Rome Statute has not achieved universal ratification, even among NATO States. However, the concept of self-defence codified in the Rome Statute was not new.[136] The significance of the provision is that it confirms the existence

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Gloria Gaggioli, *Expert Meeting on the Use of Force in Armed Conflict: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (ICRC, Geneva, 2013, https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf, last accessed 24.04.2019) pp. 59–60, and Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 69 and 223–224.

133 See e.g. Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 2) p. 287. For a rare example of the contrary view, see Elies Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, Oxford, 2012) p. 234, referring to "self-defence in the context of the laws of war", that is, "self-defence by acts that are *lawful* under the rules of war". See also p. 238.

134 McCormack, 'Self-Defence in International Criminal Law' (n 65) p. 236.

135 Rome Statute of the International Criminal Court [hereinafter: *Rome Statute*], opened for signature 17 July 1998, 2187 *UNTS* 3 (entered into force 1 July 2002), Article 31: 'Grounds for excluding criminal responsibility', Section 1(c).

136 See e.g. William A. Schabas, 'General principles of criminal law in the International Criminal Court statute (Part III)', 6 *European Journal of Crime, Criminal Law and Criminal*

and applicability of the defence to international criminal law (ICL), and most importantly provides the applicable criteria. It is thus a useful starting point when examining personal self-defence in an international context.

Before the Rome Statute came into force, courts considering self-defence in an ICL context looked to domestic criminal law for guidance.[137] Self-defence was, for instance, raised as a defence in some of the post-Second World War trials. The respective tribunals accepted the legal applicability of the defence, but in most cases the defence was denied on the basis of the attendant facts.[138] A rare example of self-defence being pleaded successfully was in the trial of Erich Weiss and Wilhelm Mundo. The accused were German policemen who had shot and killed a prisoner of war because they thought he was about to shoot them. They were believed and acquitted.[139] There is no written rationale for the Court's judgement, but the UN War Crimes Commission commented that "[t]he finding of the Court is evidence that self-defence which, according to general principles of penal law is an exonerating circumstance in the field of common penal law offences when properly established, is also relevant, on similar grounds, in the sphere of war crimes".[140]

Self-defence was also pleaded before the ICTY in *Prosecutor v Kordic and Cerkez*, but was rejected.[141] The importance of the case is the willingness of the ICTY Trial Chamber to consider the defence, even though the Statute of the International Tribunal does not provide for self-defence as a ground for excluding criminal responsibility. It was the view of the judges that defences, even though not contained in its Statute, "form part of the general principles

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Justice 84 (1998), p. 105, and McCormack, 'Self-Defence in International Criminal Law' (n 65) p. 236.

137 Ilias Bantekas, 'Mundo and Weiss (case commentary)', Part C: Cases, in Cassese, Antonio (ed), *Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009) p. 828. See also Ambos, 'Other grounds for excluding criminal responsibility' (n 127) p. 1034, referring to "emerging rules of international criminal law based on comparative criminal law".

138 Scaliotti, 'Defences before the international criminal court' (n 127) pp. 162–163. For examples of self-defence being considered in criminal law cases arising after the Second World War, such as the Chusaboro case, see also McCormack, *Self-Defence in International Criminal Law* (n 65) pp. 239–242 and Ambos, 'Other grounds for excluding criminal responsibility' (n 127) pp. 1004–1005.

139 *United States vs. Erich Weiss and Wilhelm Mundo*, Case No. 81 (United States General Military Government Court at Ludwigsburg, Germany, 9th-10th November, *Law Reports of Trials of War Criminals,* published for the United Nations War Crimes Commission by His Majesty's Stationary Office, London, 1949) Vol. XIII, pp. 149–150.

140 ibid, p. 150.

141 *Prosecutor v. Kordic and Cerkez* (Judgement), Case No IT-95-14/2-T, ICTY, Trial Chamber, 26 Feb 2001, §827. See also discussion in §§576, 621, and 642.

of criminal law which the International Tribunal must take into account in deciding the cases before it".[142] The Trial Chamber went on to cite Article 31(1)(c) of the Rome Statute, which was viewed as reflecting "provisions found in most national criminal codes and may be regarded as constituting a rule of customary law".[143]

Article 31(1)(c) sets out several criteria for when and how force may lawfully be used in self-defence. First, it requires the existence of an imminent and unlawful use of force. This has been interpreted by Albin Eser to mean "immediately antecedent, presently exercised or still enduring",[144] and may according to Kai Ambos include both "physical coercion and psychological threats".[145] Furthermore, this threat or use of force must itself be unlawful. This excludes the possibility of relying on self-defence in response to the use of force by persons authorised to use that force, such as police officers carrying out a lawful arrest or combatants attacking a lawful target as defined by LOAC.[146] The impact of the requirement of the initial use of force being unlawful is further elaborated on in Section 8.2.3, but it should be emphasised here that it only excludes the application of self-defence. Other legal authorities for using force may still apply, particularly the combatant privilege to participate in hostilities and carry out lawful acts of war.[147]

There was some debate during the negotiations of Article 31 of whether it would be sufficient that the actor 'reasonably believed' there to be an imminent danger, but this approach was not adopted. Instead, the objective standard of 'acting reasonable' was applied. According to McCormack, a consequence of choosing this test is that "[i]f the objective test of reasonableness is not satisfied on the facts of a particular case but the accused held a genuine belief that

142 ibid, §449.

143 ibid, paras. 449–451, confirmed in the *Prosecutor v Kordic and Cerkez* (Judgement), Case No. IT-95-14/2-A, ICTY, Appeals Chamber, 17 December 2004, para. 837.

144 Eser, 'Article 31' (n 125) p. 881. See also McCormack, 'Self-Defence in International Criminal Law' (n 65) p. 237 and Ambos, 'Other grounds for excluding criminal responsibility' (n 127) p. 1032.

145 "Psychological threats" presumably refers to oral threats, as opposed to physical. Ambos, 'Other grounds for excluding criminal responsibility,' ibid, p. 1032. See also Eser, 'Article 31', ibid, p. 880.

146 See also McCormack, 'Self-Defence in International Criminal Law' (n 65) pp. 237–238, and Hannah Tonkin, 'Defensive Force Under the Rome Statute' 6(1) *Melbourne Journal of International Law* 86 (2005), pp. 98–99.

147 For those not so entitled, for instance civilian who are going to be collateral damage, the criminal defence of necessity may apply, to the extent the applicable domestic legislation permits the use of force under that defence.

it was necessary to act as he/she did in self-defence, the appropriate defence may well be mistake of fact rather than self-defence".[148]

In other words, the objective test makes it more difficult to make a successful plea of self-defence. Meeting the objective standard is, however, not sufficient. Although it is not specified in the statute, the generally recognised requirement of defensive intent is also considered applicable to an assessment of the legality of use of force in self-defence pursuant to Article 31(1)(c).[149] According to Eser, this is implied by the formulation '*to* defend'.[150] This entails that the force must be used with the intention of repelling the attack, if not exclusively then at least partially.[151] Phrased differently, the defender must be acting in good faith, believing him – or herself to be entitled to use force in self-defence.[152]

Pursuant to Article 31(1)(c), self-defence may be relied upon in defence of three categories: the accused person; another person; or, in the case of war crimes, "property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission".[153] With regards to persons, force may be used to protect life, physical integrity and liberty.[154] The inclusion of defence of property was perhaps the most controversial aspect of the provision. The concern appears to have been two-pronged. First, some States have national legal systems that do not permit the use of lethal force in self-defence to protect property. Second, there is concern that the justification for using lethal force in order to protect property goes too far. Therefore, although property was included as an object of protection on the basis of proposals by the United States and Israel, the protection was limited to "property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission" and is only a defence to war crimes.[155] Among those critical of this aspect of Article 31(1)(c) was Cassese, who claims "it unjustifiably departs from customary international

148 McCormack, 'Self-Defence in International Criminal Law' (n 65 p). 238. See also Eser, 'Article 31' (n 125) p. 882; Ambos, 'Other grounds for excluding criminal responsibility' (n 127) p. 1032; and George P. Fletcher, 'The Influence of the Common Law and Civil Law Traditions on International Criminal Law', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009) pp. 106–107.

149 See also Tonkin, 'Defensive Force Under the Rome Statute' (n 146) p. 106.

150 Eser, 'Article 31' (n 125) p. 883.

151 ibid, p. 883.

152 Ambos, 'Other grounds for excluding criminal responsibility' (n 127) p. 1035.

153 Rome Statute (n 135) Article 31(1)(c).

154 Eser, 'Article 31' (n 125) p. 881.

155 Scaliotti, 'Defences before the international criminal court' (n 127) pp. 160, 166, 169–170.

law, which (…) only affords self-defence as a justification for saving *life and limb* of the person acting in self-defence or other persons whose life and limb was in imminent danger".[156] As a result, while protection of property essential for a person's survival may be generally recognised as an aspect of self-defence of persons, the use of self-defence to protect mission essential property probably remains controversial.[157]

In reality, the potential for claiming a defence of property is very limited. First, the objective must not only contribute to the accomplishment of the mission, it must indispensable ("essential").[158] Furthermore, it is only available in the context of war crimes, and there is no general prohibition on attacking "property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission", unless it amounts to an attack on objects indispensable to the survival of the civilian population.[159] The attack would therefore have to be otherwise unlawful, for instance because it involves the use of unlawful means, or it causes excessive incidental loss of civilian life, injury to civilians, damage to civilian objects.[160] Proportionality (i.e. LOAC type) is, however, difficult to assess without having further knowledge of the military advantage sought to be achieved.[161] The scope for using self-defence to defend property is also limited by the self-defence requirement of proportionality. As will be further explained in the next paragraph, self-defence proportionality requires the damage to the aggressor not to exceed the danger to be averted, and the object protected will need to particularly important in order to justify killing an aggressor to defend

156 Antonio Cassese *et al., International Criminal law* (Oxford University Press, Oxford, 2013) p. 212. See, however, Cryer, who contends that the practice of States and the UN ROE is to permit defence of mission essential property, and that Cassese's criticism is therefore "a little harsh". Robert Cryer, 'Defences/Grounds for Excluding Criminal Responsibility', in Robert Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2010) pp. 409–410.

157 Eser, 'Article 31' (n 125) p. 881.

158 ibid, p. 882.

159 AP I (n 5) Article 54: "It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive".

160 Cassese *et al.*, *International Criminal Law* (n 156) p. 213.

161 AP I (n 5) Articles 51(5)(b) and 57(2)(b).

it.[162] Finally, the reference to "essential for accomplishing a military mission" may be read as a reference to military necessity in LOAC. However, unlike the use of force permitted on the basis of military necessity in LOAC, defence of objects under article 31(1)(c) is limited to those that are under threat of *unlawful* attack.[163]

Irrespective of which of the above categories is defended, the use of force in response to the threat must be reasonable. The requirement of reasonableness entails that it must be both necessary and suitable, in that it must be needed to divert the attack and must not be "inapt by implying ineffective or otherwise futile means".[164] In addition, the degree of force used must be proportionate to the danger faced. For instance, it will only be admissible to kill the aggressor in order to avoid death or serious bodily harm.[165] This was emphasised in three cases considered by the ICTY in *Gotovina and others*. The Trial Chamber rejected the claim that the perpetrators responded to an imminent unlawful attack, but went on to stress that even if there had been such an attack, the response would have been disproportionate, as there were "other ways of thwarting any possible danger instead of firing lethal shots".[166]

Finally, Article 31(1)(c) emphasises that involvement in a defensive operation conducted by forces is not in itself a ground for excluding criminal responsibility as lawful self-defence. The sentence of the provision started off as a footnote to register the concerns of some delegations that the definition of self-defence could be interpreted too widely.[167] Unfortunately, it is not entirely clear what is meant by this final sentence. A potential source of confusion is the reference to 'defensive operations', which may have different meanings depending on the context.[168] It may both be a reference to State self-defence

162 See also Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 179–180, where he argues that the provision must be interpreted in light of applicable human rights law, with the result that property may only be defended with lethal force in cases involving a real risk of death or serious bodily harm as a result of the attack on the property.

163 Eser, 'Article 31' (n 125) p. 882, criticising the ICTY Trial Chamber's contention that "the provision takes into account the principle of military necessity", in *Prosecutor v Kordic and Cerkez* (Judgement), Trial Chamber (n 141) §451.

164 Eser, 'Article 31', ibid, p. 882. See also Ambos, 'Other grounds for excluding criminal responsibility' (n 127) p. 1034, and Sliedregt, *Individual Criminal Responsibility in International Law* (n 133) p. 236.

165 Eser, 'Article 31', ibid, p. 883. See also Tonkin, 'Defensive Force Under the Rome Statute' (n 146) pp. 102–106.

166 *Prosecutor v. Gotovina and others* (Judgement Vol II), Case no. IT-06-90-T, ICTY, Trial Chamber, 15 April 2011, § 1730.

167 Scaliotti, 'Defences before the international criminal court' (n 127) p. 166.

168 A similar concern was voiced by the South African delegation, according to Scaliotti, ibid, p. 167.

and to forces involved in an ongoing armed conflict undertaking a defensive operation regulated by LOAC.[169] However, it is clear from the commentaries to Article 31 that the intention behind the reference is to emphasise that the use of force in self-defence by individual soldiers against an unlawful attack on themselves, others or certain objects, is not regulated by or affected by the application of State self-defence.[170] The last sentence of Article 31(1)(c) is therefore a reminder that Article 31 remains the applicable legal framework for assessing self-defence regardless of the general nature of the operation.[171] As Eser explains, it makes it clear that "'private self-defence' (…) is not privileged only because its operational framework is legal [according to public international law], nor is it is it foreclosed only because the operational context is illegal".[172] It is an important reminder that the "*ius ad bellum* and *actio in bello* are to be kept distinct", rather than be conflated.[173]

The negotiations over Article 31(1)(c) also raised the issue of voluntary exposure, that is, when the person claiming to have acted in self-defence voluntarily exposed him – or herself to the threat or attack. A footnote in a draft version of the article emphasised that "voluntary exposure is not understood to constitute a basis for applying the provisions concerning self-defence", but in the end it was determined to be an issue for the Court to consider under Article 31(2).[174] The effect of self-exposure on the application of self-defence in general is considered further in Section 8.2.4.

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169 AP I (n 5) Article 49(1) makes it clear that LOAC regulated all "acts of violence against the adversary, whether in offence or in defence".

170 See e.g. Scaliotti, 'Defences before the international criminal court' (n 127) p. 171, Ambos, 'Other grounds for excluding criminal responsibility' (n 127) pp. 1033 and 1034; Cassese *et al.*, *International Criminal Law* (n 156) p. 211, Eser, 'Article 31' (n 125) pp. 879–880, Mark Klamber, 'Article 31(1)(b)', *Commentary on the Law of the International Criminal Court* (CLICC) (updated 30 June 2016, https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/, last accessed 24.04.2019).

171 The formulation in Article 31(1)(c) may also, as Cassese points out, be misread to imply that "the defensive character of the operation is at least a relevant, though not decisive, consideration". However, this potential interpretation is rejected by Cassese and Eser. Cassese *et al.*, *International Criminal law*, ibid, p. 211, and Eser, 'Article 31', ibid, pp. 879–880.

172 ibid, p. 880, footnote omitted.

173 ibid, p. 880. See also above, Section 1.3.2.2. The relationship between the two forms of self-defence is briefly presented in Section 6.2.4, while the tendency of overreliance on self-defence during military operations is discussed in Section 8.3.2.

174 Scaliotti, 'Defences before the international criminal court' (n 127) p. 171, referring to Report of the Working Group on General Principles of Criminal Law, U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1, 2 July 1998, footnote 12 to Article 31(1)(c). See also Eser, 'Article 31' (n 125) p. 882.

The purpose of the ICC is to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished".[175] The ICC therefore only has jurisdiction over war crimes, crimes against humanity, genocide and as of 17 July 2018, aggression.[176] As many commentators have pointed out, the relevance of self-defence is therefore likely to be minimal.[177] In particular, it seems unlikely that a crime against humanity or genocide can be justified by reference to self-defence. According to McCormack, "[i]t is the nature of these two offences that raises scepticism as to the possibility of exclusion of criminal responsibility on grounds of self-defence. Both categories of crimes require a quantitative threshold for multiple victims and involve the wilful targeting of civilians. War crimes, in contrast, require no quantitative threshold – they can involve single isolated acts with single victims".[178] For the crime of aggression, the relevant self-defence concept will be State self-defence, not personal.

Despite the potentially narrow scope of application of both ICC jurisdiction in general and the ICC self-defence provision in particular, Article 31(1)(c) likely reflects the general international understanding of the concept of personal self-defence. It accordingly seems safe to conclude that in the context of ICL, personal self-defence is a general principle of law which an international criminal court may take into consideration.[179] As a result, if a case of ICL arises before an international court or tribunal other than the ICC, and self-defence is not regulated in the instrument outlining the court's competence, then that court may rely still rely on self-defence as a ground for excluding criminal responsibility.[180] Furthermore, it is likely that it will look to Article 31(1)(c) and any relevant ICC case law as the only formalised international expression of this rule, as was done by the ICTY in the *Kordic and Cerkez* case.

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175 Rome Statute (n 135) Preamble.

176 ICC, *Activation of the jurisdiction of the Court over the crime of aggression*, Resolution ICC-ASP/16/Res.5, adopted at the 13th plenary meeting, on 14 December 2017, by consensus.

177 See e.g. Schabas, 'General Principles of Criminal Law' (n 136) p. 108: "Its relevance (…) seems remote, at best, at least with respect to those large-scale crimes committed by planners and organizers that are at the heart of the Court's raison d'être." See also Scaliotti, 'Defences before the international criminal court' (n 127) pp. 170 and 172, and Sliedregt, *Individual Criminal Responsibility in International Law* (n 133) pp. 235 and 237–238.

178 McCormack, 'Self-Defence in International Criminal Law' (n 65) p. 234. See also Sliedregt, *Individual Criminal Responsibility in International Law*, ibid, pp. 236–237.

179 See also John Cerone, 'Is there a human right of self-defense?', 2 *Journal of Law, Economy and Policy* 319 (2006), p. 327.

180 ibid, p. 328.

6.3.1.3 International Human Rights Law

As mentioned above, personal self-defence is only implicitly recognised in human rights legislation. In Article 2(2) of ECHR, the concept of self-defence is referred to as a lawful exception to the prohibition: "Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence".[181] The use of force in self-defence is in other words not arbitrary and hence not prohibited. The prohibition on arbitrary deprivation of life in Article 6 of ICCPR is interpreted to also permit the use of force in self-defence.[182]

Self-defence appears to challenge IHRL. On its face, it violates one person's right to life in order to protect another's right to life. Because self-defence is an important instrument in protecting life, some have claimed that it is itself a human right.[183] This argument has, *inter alia*, been made by proponents of a right to keep and bear arms.[184] The question whether self-defence is a human right was therefore addressed in the UN report on 'Prevention of human rights violations committed with small arms and light weapons'.[185] The conclusion is that self-defence is not a human right but rather a means of protecting

181 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[1950], as amended by Protocols Nos. 11 and 14, *ETS* 5, Article 2(2). Other human rights instruments recognise the right to use defensive force to protect their right to self-determination, which is akin to self-defence, but a much more narrow right. See Article 20(2) of the African Charter on Human and Peoples' Rights ("Banjul Charter"), Organization of African Unity, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 *I.L.M.* 58 (1982), and Article 2(4) of the Arab Charter on Human Rights, League of Arab States, 15 September 1994. Similarly, the Preamble to the Universal Declaration of Human Rights, Adopted by General Assembly Resolution 217 A(III) of 10 December 1948 (http://www.un.org/en/universal-declaration-human-rights/, last accessed 24.04.2019) recognises a right to use force in response to serious State human rights violations. See further Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 80–81.

182 See Section 4.2.2.

183 See e.g. Stephens, 'ROE and the Concept of Unit Self-Defense' (n 79) p. 128; Mark David Maxwell, 'Individual Self-Defense and the Rules of Engagement: Are the Two Mutually Exclusive?', 41 *Mil. L. & L. War Rev.* 39 (2002), p. 46; David B. Kopel, Paul Gallant, and Joanne D. Eisen, 'The Human Right of Self-Defense', 22 *Brigham Young University Journal of Public Law* 43 (2007), p. 44; and Cerone, 'Is there a human right of self-defense?'(n 179).

184 See e.g. Kopel, Gallant and Eisen, 'The Human Right of Self-Defense', ibid, pp. 174–177. The issue is particularly debated in the USA, both in academic literature, in courts and in the media. See e.g. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008) ("There seems to us no doubt … that the Second Amendment conferred an individual right to keep and bear arms").

185 UN Special Rapporteur Barbara Frey, *Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, Final Report Submitted to the UN Sub-Commission on the Promotion and Protection of Human Rights, UN Doc A/HRC/Sub.1/58/27 (27

the right to life and, as such, a basis for avoiding responsibility for violating the rights of another.[186] This seems to be the correct conclusion. As Boddens-Hosang points out, the right to life no more creates a corollary right to use force in self-defence than the right to freedom of speech grants a right to force the media to publish one's views.[187] Furthermore, neither international treaties nor national practice suggest that States view personal self-defence as a human right.[188]

The better approach is therefore that the right to life is a human right, while self-defence is 'merely' a permissible exception to this right vis-à-vis others and a way of protecting the right to life of the person acting in self-defence. According to Hessbruegge, "[h]uman rights shape the right to self-defense because they prohibit denying or unduly curtailing the right to personal self-defense. In this sense, the right to personal self-defense is a derivative of human rights, even if it is not a human right itself".[189] This means that it obliges States through their courts to take into consideration whether there are extenuating circumstances such as self-defence when a person is accused of homicide.[190] In addition, IHRL impose procedural and substantive restrictions on the use of force, in particular by State actors such as law enforcement officials and military forces.[191] By contrast, because it is not human right, States are not obliged to secure the right to use force in self-defence for instance by providing the means to engage in it or by refraining from imposing excessive restrictions on access to such means, such civilian access to weapons.[192]

In the context of military forces using force in self-defence, the responsibility of the State is to ensure that extenuating circumstances such as self-defence are considered if a soldier is accused of and tried for murder. The details of

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July 2006), available at (http://www.refworld.org/docid/45c30b560.html, last accessed 24.04.2019).

186 ibid, pp. 8 and 14. For a critique of the report, see Kopel, Gallant and Eisen, 'The Human Right of Self-Defense', (n 183).

187 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 15) p. 483, §24.08.

188 See discussion in Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 78–83. He cites an Australian Defence Force Publication as a rare example of domestic norms referring to self-defence as an inherent right.

189 ibid, p. 89.

190 Frey, *Prevention of Human Rights Violations Committed with Small Arms and Light Weapons* (n 185) p. 10.

191 See discussions in Section 4.2 on the right to life and Section 8.2 on the use of force in self-defence by military forces.

192 Cerone, 'Is there a human right of self-defense?' (n 179) p. 322.

self-defence are set out in domestic legislation,[193] but must not be construed more widely than the exception in Article 2(2) of the ECHR,[194] or in the case of other human rights conventions, the interpretation of accepted exceptions to the right to life. Furthermore, as will be discussed in Section 8.2.10.2, the fact that personal self-defence is not a human right also entail that States may impose limitations on that right, for instance through ROE or other forms of military orders.

A final issue that should be mentioned is that protection of property is not included in the exceptions listed in Article 2(2) of the ECHR. Similarly, property is not considered an acceptable object of protection by lethal means under the ICCPR.[195] This means that States whose domestic legislation permits the use of force in defence of property ought to limit this to situations in which a threat to life or limb is involved.[196]

6.3.1.4 Customary International Law and General Principles of International Law

Personal self-defence is also argued to be part of customary law, perhaps most notably by the ICTY in the *Kordic and Cerkez* case,[197] as cited above in Section 6.3.1.2. As explained in Section 1.4, customary international law development requires the existence of State practice accompanied by an acceptance that the practice is required by international law (*opinio juris sive necessitatis*).[198]

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193 Except when a case is tried before the International Criminal Court, in which case the self-defence provision would be found in the Rome Statute, or in the case of ICTY and ICTR, customary law as set out in previous decisions by their tribunals.

194 *McCann and others v. the UK*, App. No. 18984/91 (ECtHR, 27 September 1995), paras. 153–155.

195 UN HRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns', UN Doc. A/HRC/26/36 [1 April 2014] para. 72; and UN Human Rights Committee (HRC), *Draft General Comment No. 36 – Article 6: Right to Life* [hereinafter *Draft General Comment 36*], [19 October–6 November 2015], UN Doc CCPR/C/GC/R.36/Rev.2, para. 18. See also Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 178–180.

196 See e.g. Leverick, *Killing in Self-Defence* (n 26) p. 183; David Harris, 'The Right to Life under the European Convention on Human Rights', 1 *Maastricht Journal of European and Comparative Law* 122 (1994), p. 133, and Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 175–178 and 255–257.

197 *Prosecutor v. Kordic and Cerkez* (Judgement), Trial Chamber (n 143) §451.

198 Statute of the International Court of Justice, 18 April 1946 [hereinafter: ICJ Statute], accessed at http://www.icj-cij.org/en/statute, Article 38(b). For a detailed commentary on the article, see Pellet, 'Article 38' (n 69) pp. 812–832, and the International Law Association, *Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles applicable to the Formation of Customary General International Law* (Report of the Sixty-Ninth Conference, London 2000,

The concept of lawfully defending oneself is clearly historic, thoroughly entrenched, and seemingly universal in its inclusion in domestic legislation. In fact, comparative studies have not identified a single domestic legal system not recognising self-defence.[199] However, this does not necessarily mean that States view it as anything more than a national rule they may change if they see fit.

Although the universal recognition of self-defense in domestic law could amount to state practice for the development of a customary rule, this has been convincingly rejected on the basis that the prerequisite *opinio juris* is lacking. Hessbruegge, for instance, has asserted that "[i]n many cases, legal recognition of the right to self-defense even predates the existence of the states applying them. It would therefore amount to pure fiction to presume that states have recognized the right to personal self-defense in their domestic legal orders out of a sense of being required to do so by international law".[200] The same conclusion is reached by one of the few other commentators on the topic, Cerone.[201] If the State practice of recognising personal self-defence is not influenced by the belief that it was required by international law, it appears to be an unlikely candidate for a general customary international law rule, that is, beyond the context of ICL.[202]

The general recognition of self-defence in domestic law does, however, suggest that it may be a general principle of international law. Recognition of a right to self-defence may be found across regions, cultures, and religions. Early writings reflect that the right was considered part of natural law. Cicero (106BC-43BC), for instance, contended in *Pro Milone* that:[203]

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http://www.ila-hq.org/en/committees/index.cfm/cid/30, last accessed 24.04.2019). See also ICJ *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands), Judgment 20 February 1969, *I.C.J. Reports* [1969] 3, at paras. 73 and 77.

199 Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 58–59.

200 ibid, pp. 19–20.

201 Cerone, 'Is there a human right of self-defense?' (n 179) pp. 326–327, where the issue is raised in relation to a customary human right of self-defence. He concludes that there is insufficient opinion juris to support the existence of such a customary rule. For an example of the contrary position, see Geert-Jan Alexander Knoops, *Defenses in Contemporary International Criminal Law* (Martinus Nijhoff Publishers, Leiden, 2008) pp. 73–74.

202 The inclusion of the use of force to protect property not essential for a person's survival was, as explained above, quite controversial, and this aspect is therefore less likely to reflect a customary rule on self-defence.

203 Haggenmacher, for instance, refers to the passage as "the fountainhead of this whole tradition of self-defence as a natural right". Peter Haggenmacher, 'Self-defence as a general principle of law and its relation to war', in Arthur Eyffinger, Sam Muller, and Alan Stephens (eds.), *Self-defence as a Fundamental Principle* (Hague Colloquium in Fundamental

> There is therefore a law, gentlemen, not one written down anywhere but a natural law, not one that we have learned, inherited, and read, but one that we have seized, imbibed, and extracted from nature herself, a law for which we were not taught, but made, which we know not from instruction but from intuition, the law which states that, if any attempt is made upon our lives, if we encounter violence and weapons, whether of brigands or enemies, then every method of saving ourselves is morally justifiable. When swords are drawn the laws fall silent; they do not require you to wait for them, because the man who chooses to wait will have to pay an undeserved penalty before he can exact a deserved one.[204]

Similar views on self-defence are also presented by subsequent writers. Aquinas (1224–1275), for instance, explained that "since one's intention is to save one's own life, [self-defence] is not unlawful, seeing that it is natural to everything to keep itself in 'being', as far as possible".[205] Gentili (1552–1608) declared that "one who is attacked by an armed enemy makes a necessary defence, and his action is that of necessary defence; and so also does one against whom an enemy has been making preparations" (…) "for to kill in self-defence is just".[206] According to Pufendorf (1632–1694), "nature at times allows the recourse to violence, when we cannot in any other way preserve our safety because of the aggression of another".[207] He goes on to explain that "when a man, contrary to the laws of peace, undertake against me such things as tend to my destruction, it would be a most impudent thing for him to demand of me that I should thereupon hold his person inviolate, that is, that I should sacrifice my own safety so that his villainy may have free play".[208] Of particular interest to the current topic is the contention by Vattel (1714–1767) that because self-defence

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Principles of Law, Hague Academic Press, 2009) p. 5. See also Gentili, *De Jure Belli Libri Tres* (n 48) p. 59 [94].

204 Cicero, 'Pro Milone' (n 1) p. 186, §§10–11 (page number omitted). This passage has been referred to as "the fountainhead of this whole tradition of self-defence as a natural right." Haggenmacher, 'Self-defence as a general principle of law and its relation to war', ibid, p. 5.

205 Thomas Aquinas, *Summa Theologica – The Complete Edition* (first published 1265–1274, translation published by Catholic Way Publishing, 2014, available at http://www.newadvent.org/summa/3064.htm, last accessed 24.04.2019) Part II.2 Question 64, Article 7.

206 Gentili, *De Jure Belli Libri Tres* (n 48) Book I, Chapter XIII, p. 58 [94].

207 Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (*On The Law of Nature and Nations: Eight Books*) (first published 1688, translation by C.H Oldfather and W. A. Oldfather, *The Classics of International Law* No 17 Vol 2, Oxford University Press, Oxford, 1934) Book II, Chapter V, §1, pp. 264–265 [182].

208 ibid.

"belongs naturally to every man" and therefore does not require permission, it is the only basis for the use of force by military forces in the absence of express orders.[209] Blackstone's 1769 Commentaries on the Laws of England similarly emphasised that because self-defence "is justly called the primary law of nature, so it is not, neither can it be in fact taken away by the law of society".[210] All major cultures and religions contain similar references to self-defence, even if they differ in how this right to use force is reconciled with the general prohibition on the use of force.[211] For instance, while Islam views self-defence as a duty to prevent one's own destruction, Buddhism views it as an act of compassion, both towards the victim and the aggressor who is prevented from killing another, which would have been an act of bad karma.[212]

The concept of self-defence referred to by these writers closely resembles that which we know today. For instance, Aquinas explained that lawful self-defence required defensive intent, proportionate use of force, and necessity. As the quote above indicates, the use of force with the intention to save one's own life is not unlawful. He also explained that "though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defense, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defense will be lawful, because according to the jurists, 'it is lawful to repel force by force, provided one does not exceed the limits of a blameless defense'".[213] Furthermore, Grotius proclaimed that in order for the use of force in self-defence to be lawful, "[t]he danger (…) must be immediate and imminent in point of time".[214] He elaborates by explaining that "if a man is not planning an immediate attack (…) he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise avoided".[215]

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209 Vattel, *Le droit des gens* (n 48) Book III, Chapter XV, § 231, at p. 230.

210 William Blackstone, *Commentaries on the Laws of England, Oxford 1765–1769*, Book III, Chapter 1, 1, p.4, cited in Haggenmacher, 'Self-defence as a general principle of law and its relation to war' (n 203) p. 4.

211 For a useful overview, see Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 31–34 and 40–47, considering Judo-Christian Tradition; Islam and the Sharia; African customary or 'traditional' legal systems; Confucianism, Taoism and traditional Chinese law; Hinduism; and Buddhism.

212 ibid, pp. 41 and 46.

213 Aquinas, *Summa Theologica* (n 205) Part II.2 Question 64, Article 7, Objection 5, citing "Cap. Significasti, De Homicid. volunt. vel casual."

214 Grotius, *De jure belli ac pacis libri tres* (n 48) p. 173.

215 ibid, p. 175.

European practice in the Middle Ages and early modern period was to suppress forms of self-help in order to consolidate the power of the sovereign rulers and establish a state monopoly on the use of force.[216] It is therefore not surprising that those seeking to set out a right of self-defence during that period looked to natural law. For instance, the first recognition of self-defence in English common law was in a law passed in 1532, while the right was not incorporated in France until 1791.[217] Although the question whether self-defence originates from and is currently based on natural law or positive law in the form of domestic law is interesting, the more relevant question in the current context is whether the universal recognition of self-defence illustrated by these quotes indicates that personal self-defence is a general principle of international law.[218]

General principles of international law were intended to avoid a *non liquet*, (a situation where there is no applicable law) without having to allow the International Court of Justice (ICJ)[219] to legislate.[220] According to Cassese, however, it is more realistic that general principles are applied to solve a conflict between two or more applicable conventional or customary rules.[221] Article 38(1)(c) allows the ICJ to deal with a situation not regulated by treaty or custom by looking to "rules accepted in domestic law of all civilized states"[222] for guidance. Although it has been suggested that Article 38(1)(c) contains natural law elements,[223] the ICJ is bound by Article 38, and is therefore unable to rely on natural law as an independent source of general principles of international law. As Pellet explains, "the existence of a 'natural law' principle of this kind cannot be appreciated subjectively by the Court, it must be attested by its recognition in domestic laws".[224]

It is sufficient that a general principle provides "*general* guidelines which then have to be applied by the Court".[225] Personal self-defence is clearly an

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216 Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) p. 34.

217 ibid, p. 35.

218 See also ibid, p. 27.

219 Or its predecessor, the Permanent Court of International Justice.

220 Pellet, 'Article 38' (n 69) p. 832.

221 Antonio Cassese, *International Law* (2. ed., Oxford University Press, Oxford, 2005) p. 189, at footnote 3.

222 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, Oxford, 2012) p. 34. The term 'civilized nations' should be read as all States; even at the time of drafting all nations were considered civilised. Pellet, 'Article 38' (n 69) pp. 836–837.

223 *South West Africa*, Second Phase, Judgment, *I.C.J. Reports* [1966] 6, Dissenting opinion of Judge Tanaka p. 250, at p. 298.

224 Pellet, 'Article 38' (n 69) p. 834, fn. 725.

225 ibid, p. 837, original emphasis.

accepted rule in domestic law, and although some of the details vary, the idea is the same. It should therefore be capable of providing general guidance. However, in addition to being "unwritten legal norms of a wide-ranging character" and "recognized in the municipal laws of States", the general principles referred to in Article 38(1)(c) must be "transposable at the international level".[226] With the exception of ICL, it is not clear whether personal self-defence fulfils these requirements.

While the ICJ rarely has relied expressly on general principles, they have been applied both by individual judges and by States.[227] Examples of principles that have been considered as general principles include consent, good faith, equality, reciprocity, finality of awards and settlements, and the legal validity of agreements.[228] In the context of ICL, the ICTY has applied respect for human dignity as a general principle.[229] As these examples illustrate, general principles tend to be of a significantly different character than personal self-defence; they are general in the sense that they apply to a wide range of legal issues. As Cerone explains, general principles "tend to be formulated in extremely general terms and as such operate in a residual fashion". They "tend to be employed as gap-fillers and interpretational aids".[230] These are not descriptions that fit well with a right of personal self-defence.

Nonetheless, it is common to claim that personal self-defence is a general principle of international law. According to Ohlin, it is "uncontroversial that as a matter of comparative law all civilized nations allow defendants to plead self-defence in some form in domestic criminal prosecutions and that it is therefore a general principle of criminal law".[231] Hessbruegge similarly concludes that "[r]egardless of whether general principles of law under Article 38(1)(c) of the ICJ Statute derive from natural law or from universally shared features of domestic legal orders, the right to personal self-defense forms part of the corpus of these general principles".[232] In the aforementioned final report submitted by the Special Rapporteur on Prevention of Human Rights Violations Committed with Small Arms and Light Weapon, it is contended that "[t]he presence of the principle of self-defence in emerging international criminal

226 ibid, p. 834.
227 ibid, pp. 833–834.
228 Crawford, *Brownlie's Principles of Public International Law* (n 222) p. 37.
229 *Prosecutor vs. Furundžija* (Judgement), Case No. IT-95-17/1-T, ICTY, Trial Chamber, 10 December 1998, p. 72, § 183, discussed in Cassese, *International law* (n 221) p. 189, fn. 3.
230 Cerone, 'Is there a human right of self-defense?' (n 179) p. 327.
231 Jens Ohlin, 'Self-Defence', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009) p. 507.
232 Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) p. 73.

law reflects the global uniformity of the principle of self-defence and its elements".[233]

The universal and historic recognition of self-defence makes it unique. The fact that the criteria have not changed much since the time of Grotius or even Aquinas underlines the fundamental nature of the right. As Hessbruegge concludes, "[t]he right to self-defense is a genuinely pre-social right that evolved in the *absence* of the state. It survived the formation of the state because no state will ever have *enough power* to perfectly protect individuals".[234] The arguments that personal self-defence does amount to a general principle of international law are therefore not without merit, and are for instance supported by the recognition of self-defence as an exception to the personal inviolability of diplomatic agents.[235]

What, then, would the recognition of personal self-defence as a general principle of international law entail? If the recognition is going to have any meaningful impact, it must be enforceable. However, the use of force by individuals, including members of military forces, is most likely to be considered by national courts, on the basis of both domestic legislation and legal traditions. It seems unlikely that national judges would look to general principles of international law in cases under domestic criminal law. If the use of force during an armed conflict is examined by an international criminal court, the applicable self-defence rule will either be set out in the statute of that court, or be based on the abovementioned customary international law self-defence concept applicable to ICL. Beyond this, there is limited scope of application of a general international law principle of personal self-defence. As a result, and as Hessbruegge admits, the recognition of personal self-defence under international law "may not make much of a difference in strictly legal terms".[236]

The approach taken by NATO Member States to self-defence in the context of ROE further supports the prevalence of personal self-defence as domestic legal concept rather than a rule of international law. As explained in Section 2.2.1, NATO ROE does not regulate the use of force in self-defence because this is left for member States to define. The MC 362/1 NATO Rules of Engagement

233 Frey, *Prevention of Human Rights Violations Committed with Small Arms and Light Weapons* (n 185) p. 17, endnote 22.

234 Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) p. 89.

235 See UN ILC, 'Document A/3623: Report of the International Law Commission covering the work of its ninth session, 23 April-28 June 1957', UN Doc. A/CN.4/SER.A/1957/Add.1 (1957), *Yearbook of the International Law Commission* 1957, Vol. II, Part Two, p. 131, at p. 138, commentary to Article 22. See further Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 71–73.

236 Hessbruegge, Human Rights and Personal Self-Defense, ibid, p. 76.

states that "it is universally recognised that individuals [...] have a right to defend themselves against attack or imminent attack".[237] However, it goes on to emphasise that in exercising the right of self-defence, "individuals and units will act in accordance with national law".[238] If a general principle of international law existed with regard to personal self-defence, it is likely that this would have been applied instead of domestic legislation. In fact, as a result of the different national approaches to self-defence, there are NATO ROE specifically developed to harmonise the ability of NATO forces to use force in response to threats.[239]

6.3.1.5 The Existence and Relevance of an Inherent Right to Personal Self-Defence in International Law

Self-defence as a concept clearly exists in international law as a customary rule of State self-defence, codified in Article 51 of the UN Charter. Individuals, on the other hand, do generally not have legal personality under international law, and it is difficult to see how a general principle of personal self-defence could exist in a meaningful manner, that is, beyond the areas of international law that applies to individuals. Self-defence is referenced in IHRL, but only in connection with the primary rule of right to life. In ICL, there is arguably a general principle of international law, or perhaps even a customary international law rule on self-defence. However, the application of that rule is limited to international criminal tribunals or courts. It would therefore only be relevant to NATO forces in the case of a war crimes trial before an international tribunal.

In the context of international law, it may therefore be concluded that characterisation of personal self-defence as 'inherent' does not have independent legal implications. The application and the details of personal self-defence are defined nationally by domestic legislation, and there is therefore no unitary concept. As Henderson and Cavanagh explain, "it is the legislation and case law of a particular jurisdiction that gives meaning to the language and concepts within that jurisdiction, not the asserted legal basis".[240] Similarly, Nigel White concludes that "the detail [or] the framing of this natural right, is an

237 NATO, *MC 362/1* (n 14) p. 4.

238 ibid.

239 See further Section 3.5 and Chapter 11 on the NATO hostile act and hostile intent ROE.

240 Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 11) p. 76. See also Gary P. Corn, 'Developing Rules of Engagement: Operationalizing law, policy and military imperatives at the strategic level', in Geoffrey S. Corn, Rachel E. VanLandingham and Shane R. Reeves (eds.), *U.S. Military Operations – Law, Policy and Practice* (Oxford University Press, Oxford, 2016) p. 227, fn. 91.

issue for man-made law".[241] The only influence of international law on domestic self-defence rules is the obligations of States to ensure respect for the human right to life in the framing and enforcement of such rules.

Military forces must therefore expect any use of force in personal self-defence to be assessed on the basis of the applicable domestic legislation, primarily military justice codes, or criminal law such as the one set out in Section 6.3.2.3. If they are operating in another State with their consent, it is common to regulate questions concerning jurisdiction in a Status of Forces Agreement (SOFA).[242] As a result, if forces from State A are operating in State B, and a case arises where self-defence is asserted, it will be assessed on the basis of State A's legislation, provided the matter is covered by the SOFA. However, if they are not exempt from host nation jurisdiction, either because the act in question or the operation in general is not regulated by such a SOFA, the self-defence applicable is that defined by the legislation of State B. Self-defence in State B may be defined differently than what forces from State A is familiar with from their domestic legislation. If a legally enforceable inherent right of self-defence applicable to all were to exist, State A could insist on a certain standard being applied. However, it is unlikely that State B would accept such interference with matters essentially within domestic jurisdiction.

If both the existence and application of an international principle of personal self-defence is unclear, why do ROE tend to refer to 'the inherent right of self-defence'? There appears to be two reasons: the historic or natural law origins of the right; and the influence of the formulation of State self-defence.

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241 Nigel D. White, 'Defending Humanity: When Force is Justified and Why by George P. Fletcher and Jens David Ohlin' (n 46) p. 385.

242 Status of Forces Agreement is an agreement between two or more States, usually one or more sending State and a receiving State, that among others regulate the question of jurisdiction over the troops if they commit an offence. Naturally such agreements are only possible to reach such agreements if the States are cooperating, and are thus unlikely to exist between States involved in an armed conflict. Also, SOFAs may be time consuming to negotiate, and may therefore not be available for rapid deployments. For information on NATO SOFA, see Sherrod Lewis Bumgardner *et al., NATO Legal Deskbook* (ACT Staff Element Europe, Belgium, 2010, available at https://info.publicintelligence.net/NATO-LegalDeskbook.pdf, last accessed 24.04.2019) Part IV.B; Sylvain Fournier, 'NATO Intervention Abroad: How Roe Are Adopted and Jurisdictional Rights Negotiated', in Stefano Manacorda and Adán Nieto Martin (eds.), *Criminal Law between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions: Proceedings of the XVth International Congress on Social Defense* (Ministerio de Justicia, Spain, 2009) pp. 118–121; and Mette Prassé Hartov, 'NATO Status of Forces Agreement: Background and Suggestion for the Scope of Application', 10(2) *Baltic Defence Review* 45 (2003).

First, the historic and customary origins of the right has caused common law countries in particular to formulate the domestic concepts as an inherent right (see e.g. self-defence in laws of England and Wales below). British, U.S. and Canadian traditions are likely have had a considerable influence the development of NATO doctrines due to their sizeable contribution to NATO and the language influence. In modern law, the perception of self-defence as inherent may also be influenced by the role of self-defence as a means of protecting the human right to life, which is considered one of the most fundamental human rights.[243]

Second, as alluded to in the introduction to this chapter, it may also seem that the reference to inherent in Article 51 made its way via *jus ad bellum* U.S. ROE (PROE) through the concept of 'unit self-defence' into personal self-defence regulated in ROE for operations involving participating in armed conflict.[244] As a result, the 2000 version and now current (2005) version of the U.S. SROE appears to rest its basis for both national and personal self-defence exclusively on the U.N. Charter. This reliance on the UN Charter for personal self-defence has correctly been deemed "misplaced"[245] and "unsound".[246] When the NATO ROE were initially drafted, the U.S. ROE were an important source of inspiration, and the reference to inherent right of self-defence may simply have been carried on. Finally, it has also been suggested that the reference to *individual* self-defence *ad bellum* self-defence, as defined in Article 51, may be a cause for confusion; when read out of context, 'individual' may be viewed as referring to persons, rather than individual states.[247]

6.3.2 *Personal Self-Defence in Domestic Legislation*

6.3.2.1 General Remarks

6.3.2.1.1 *Applicable Law and Legal Requirements*

NATO has left it to the States participating in NATO operations to define and regulate self-defence for their respective troops (as explained in Section 2.2.1.4). Although the reference to 'inherent right' may arise from natural law,

243 See Section 4.2.1.

244 On the *ad bellum* roots of the SROE self-defence construct, see Corn, 'Public Authority to Use Force in Military Operations' (n 19) pp. 17–20. See also Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 11) p. 75. Unit self-defence is examined in Section 8.3.3.

245 Maxwell, 'Individual Self-Defense and the Rules of Engagement' (n 183) p. 44. See also Corn, 'Public Authority to Use Force in Military Operations' (n 19) pp. 4 and 6.

246 Corn, 'Public Authority to Use Force in Military Operations' (n 19) p. 19.

247 McCormack, 'Self-Defence in International Criminal Law' (n 65) p. 235 and Eser, 'Article 31' (n 125) p. 879.

which combined with the universal recognition of self-defence in domestic law may suggest that a general principle of international law pertaining to a right of personal self-defence exists, the conclusion in the previous section on personal self-defence in international law was that such a right is unlikely to be enforceable outside of ICL.[248] If the use of force in self-defence by a member of a NATO force is subject to an investigation into individual responsibility for that act, this will be conducted by the troop contributing nation. As explained in Section 2.5, nations do not transfer disciplinary or penal jurisdiction over their forces, and only the most heinous crimes are considered by international criminal tribunals.

As a result, the domestic legislations of troop-contributing nations play a key part in defining when military forces detached to NATO for a NATO operation may use force in self-defence.[249] Section 6.3.2.3 will therefore provide examples of how personal self-defence is regulated in a selection of NATO Member States.[250] As will be seen, most NATO Member States do not have a separate military self-defence provision, with the result that the civilian criminal law concept is applied.[251] Although there are differences in how States define and apply self-defence, the basic criteria are universally recognised.[252]

All domestic legal systems exclude criminal responsibility of individuals in the case of defence against an unlawful attack by another human being.[253] The requirement that the initial attack is unlawful is particularly important in the current context because the use of force by combatants during armed conflicts

248 As mentioned in Section 6.3.1.5, personal self-defence may also exist in the international law of the sea and of diplomatic relations, however, these are less relevant to the current context due to the focus on armed conflict operations.

249 See also Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 2) p. 305: "the root of European soldiers' self-defense rights is the extraterritorial application of domestic law".

250 For a useful and detailed comparative analysis of the U.S. French, German and British approaches to self-defence, see ibid, pp. 295–318, and Gaston, Erica L., *When Looks Could Kill* (n 6) pp. 22–50.

251 The main exception to this is the U.S. See also Gill *et al.* 'General Report' (n 16) pp. 151–152.

252 See also Hessbruegge, *Human Rights and Personal Self-Defense* (n 10). 67.

253 See e.g. Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 15) p. 489, §24.14; Knoops, *Defenses in contemporary international criminal law* (n 201) p. 63; Ohlin, 'Self-defence' (n 231) p. 506; Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) p. 63; and Victoria Nourse, 'Self-defence', in Markus D. Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal law* (Oxford University Press, Oxford, 2014) p. 616.

is considered lawful acts of war.[254] As a result, and as will be explained further in 8.2.3.2, where NATO forces are faced with threats that originate from a lawful combatant, self-defence is not relevant because the attack is not unlawful.[255] Otherwise unlawful acts in response to threats that are lawful will in peacetime or under domestic legislations generally be assessed on the basis of necessity considerations. This would for instance include breaking an entry into another's house or steal a vehicle in order to escape from an aggressor. During armed conflict, however, necessity is exhaustively regulated by LOAC; LOAC is a particular form of necessity, especially developed for the unique situations that arise during an armed conflict.[256] Necessity in the more general sense may therefore not be used as a justification for violating LOAC, and will not be dealt with further here.[257]

While some jurisdictions deal with all such defensive force, regardless of whom or what is attacked, as a single concept, others distinguish between defence of self, of others, and of objects. Common law countries have a tendency to have separate rules on the different subjects to be defended.[258] Although the focus has traditionally been on the protection of self and others closely related to or under protection of the person using defensive force, it has expanded to include others more in general and to some extent objects.[259] This distinction between the objects of protection is also reflected in the terminology used; the common law concept of self-defence only covers defence of self and to some extent defence of others.[260] By contrast, civil law countries have traditionally been permitted to protect a wider range of interests, including

254 For IACs, the right to participate in hostilities is set out in treaty law, but there is no similar treaty rule in NIACs. Still, State practice indicates that States consider the acts of their forces lawful also under NIACs. See further 5.1.2.

255 See also Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) p. 101. Note, however, that defensive force under LOAC is sometimes referred to as self-defence, although this is not the legal concept of self-defence but rather a separate operational concept. See further 8.3.

256 See further Section 5.1.

257 See e.g. *Krupp et al.*, Judgment of 31 July 1948, U.S. Military Tribunal Nuremberg, in T*rials of War Criminals Before the Nuremberg Military Tribunals,* Vol. IX, available at http://werle.rewi.hu-berlin.de/KRUPP-Case%20Judgment.pdf, p. 1346.

258 Ohlin, 'The Doctrine of Legitimate Defense' (n 47) p. 138. See also Ohlin, 'Self-defence' (n 231) p. 506.

259 Fletcher, *Basic Concepts of Criminal Law* (n 117) p. 133.

260 Ohlin, 'The Doctrine of Legitimate Defense' (n 47) p. 138, and Fletcher, *Basic Concepts of Criminal Law*, ibid, p. 133. Note, however, that the UK Criminal Justice and Immigration Act of 2008 (https://www.legislation.gov.uk/ukpga/2008/4/section/76, last accessed 24.04.2019) Section 76(10)(b) makes it clear that the use of force in self-defence includes the defence of another person. On self-defence in UK law, see further Section 6.3.2.3.6.

property, and the challenge has instead been "to curtail the range of protected rights".[261] Rather than focusing on the interest protected, many civil law countries deal with self-defence as a general concept of necessary or legitimate defence.[262] As the examples below illustrate, in many civil law countries, the term for self-defence is made up from the combination of two concepts: one entailing distress, emergency, or danger; and the other meaning to protect or defend. In practice, however, there is little divergence between States as to the core of the interests that may be protected; it is either life, physical integrity, physical liberty, or property.[263]

Domestic self-defence rules all require the defensive measure to be the least harmful way to prevent or stop the unlawful attack.[264] Self-defence, therefore, is not only a justification applicable to the use of force; other defensive acts also need to be included, and will be required if lethal force can be avoided. The necessity requirement also affects the temporal scope of response; as mentioned in relation to State self-defence, it is generally recognised that the defensive act should be conducted "neither too soon nor too late".[265] Finally, all legal systems require the defensive act to be proportionate, meaning that it must not be grossly disproportionate to the harmful act.[266] This is either formulated as a separate requirement or as part of the assessment of whether the use of force is reasonable or justifiable.

In addition to the objective criteria, self-defence is commonly considered to require "a particular mindset on the part of the person exercising it".[267] This requirement of defensive intent is intended to prevent the misuse of self-defence. Most jurisdictions apply a combination of a subjective and objective standard; the defendant's acts are assessed on the basis of how he/she perceived the circumstances to be, but the defendant must, for instance, not have been reckless or negligent.[268] This is sometimes formulated as a 'reasonable

261 Fletcher, Basic Concepts of Criminal Law, ibid, p. 133.

262 ibid, and Ohlin, 'Self-defence' (n 231) p. 506.

263 Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) p. 63.

264 ibid, p. 65.

265 Fletcher, *Basic Concepts of Criminal Law* (n 117) p. 134.

266 Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) p. 66.

267 ibid.

268 ibid, pp. 64, 133–139 and 198. See also Nourse, 'Self-defence' (n 253) p. 617; and Sliedregt, *Individual Criminal Responsibility in International Law* (n 133) p. 239. For national examples, see e.g. the American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes,* Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962, The Institute, Philadelphia, 1985, Section 3.04(1) cf. Section 3.09(2); United States Manual for Courts-Martial (MCM),

man test': would another person in similar circumstances have acted the same or similar way? Although there is a limit to the extent to which the reasonable man test should be adapted to the specific circumstances and the characteristics of the defendant, the unique circumstances of military forces, who are trained to kill and deal with high levels of threat, must be taken into consideration. This issue is examined further in 8.2.2. If the requirements of self-defence as not met, the defensive measure may still be fully or partially excused as a reasonable mistake.[269]

The reliance on personal self-defence as set out in domestic legislation during military operations also begs questions regarding jurisdiction and area of application. For operations that take place on the territory of the forces in question, the application of domestic criminal law will be unproblematic. However, although the military forces remain under the jurisdiction of their State even when operating in a different country, their criminal law may be subject to territorial limitations. Under the Norwegian Penal Code, for instance, Norwegian citizens not on Norwegian territory are only subject to Norwegian jurisdiction in relation to certain crimes.[270] This includes, *inter alia*, serious crimes such as war crimes and other violations of LOAC. In addition, Norwegian authorities are able to prosecute acts that are criminalised by domestic legislation of the country in which they take place. As a result, if Norwegian authorities retain (for instance through a Status of Forces Agreement) or gain jurisdiction over a case arising abroad, a Norwegian soldier would be able to rely on self-defence as set out in Norwegian law. However, if Norwegian authorities do not have jurisdiction over the case and the prosecution takes place before the national courts in the State where the alleged crime was committed, the rules set out in the laws of the sending State will not apply.

6.3.2.1.2 *Self-Defence as a Right*

Self-defence is also commonly referred to both as a right and as a (criminal) defence.[271] Although 'criminal defence' and 'right' may appear to be mutually

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2016 Edition (available at https://jsc.defense.gov/Portals/99/Documents/MCM2016.pdf?ver=2016-12-08-181411-957, last accessed 24.04.2019) RCM 916(e)(1)(A) with commentaries; and UK Criminal Justice and Immigration Act of 2008 (n 260) Section 76(3) cf. (6).

269 Unfortunately, the defence of mistake is beyond the scope of this book. For a useful discussion, see e.g. Fletcher, *Basic Concepts of Criminal Law* (n 117) pp. 148–167, and Leverick, *Killing in Self-Defence* (n 26) pp. 159–176.

270 Lov om straff (Straffeloven) (Norwegian Penal Code of 1905), LOV-2005-05-20-28, §5.

271 Criminal defences are categorised as either justification and excuse. According to Cassese, they are "distinguished by their rationales and consequences". Cassese *et al.*, *International Criminal Law* (n 156) p. 210. Because this is of limited impact on the current discussion

exclusive characteristics,[272] this does not necessarily need to be the case. According to Hessbruegge, rights (as opposed to liberties) are characterised as giving rise to a corresponding duty. Unlike other criminal defences such as duress, self-defence entails a duty on the receiver (attacker) to tolerate the defensive actions.[273] For instance, a person who is inflicted injury or financial loss as the result of an act of duress may claim compensation, while an attacker has no right of self-defence against the defensive action. Personal self-defence may in other words be argued to operate both as a justificatory defence and as a right. According to comparative analyses of domestic law conducted by other scholars, most domestic legal systems consider self-defence to be a justification, and even where self-defence is not formulated as a justification, legislative bodies refer to it as a right.[274]

However, in order for the use of force in self-defence to be lawful, it must still fulfil the applicable requirements. Unless there is a domestic self-defence rule permitting the use of force in circumstances other than those set out in criminal law,[275] the result of applying the two forms of self-defence, namely self-defence as a positive right or as a criminal defence, is likely to be the same. According to Gill *et al.*, they may therefore be viewed as mirror images of each other.[276]

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of application of personal self-defence in the context of military operations during armed conflict, the question whether self-defence is a justification or an excuse will not be examined. The issue is extensively dealt with in academic writing. For a selection, see e.g. Leverick, *Killing in Self-Defence* (n 26) pp. 13–41; Albin Eser, 'Justification and Excuse', 24 *American Journal of Comparative Law* 621 (1976); Krebs, Beatrice, 'Justification and Excuse in Article 31(1) of the Rome Statute', 2(3) *Cambridge Journal of International and Comparative Law* 382, (2013); and Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 59–63.

The distinction is also extensively discussed in relation to the Rome Statute of the ICC. For instance, Fletcher has criticised Article 31 for failing to make a distinction between justification and excuse. Fletcher, 'The Influence of the Common Law and Civil Law Traditions on International Criminal Law' (n 148) p. 105. Others argue that the Article "contains classic elements of self-defence as a *justification.*" See e.g. Krebs, 'Justification and Excuse in Article 31(1) of the Rome Statute', ibid, p. 397.

272 See e.g. Gill *et al.* 'General Report' (n 16) p. 157.

273 Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 60–61.

274 ibid, pp. 59–60.

275 According to Barbra Frey, no such right exists: "There is not [sic] evidence however that States have enacted self-defence as a freestanding right under their domestic laws, nor is there evidence of opinio juris that would compel States to recognize an independent, supervening right to self-defence that they must enforce in the context of their domestic jurisdictions as a supervening right." Frey, *Prevention of Human Rights Violations Committed with Small Arms and Light Weapons* (n 185) p. 9.

276 Gill *et al.* 'General Report' (n 16) p. 157.

Self-defence will therefore be treated as a right and a legal basis for the use of force, founded on domestic (criminal) law.[277] The reference to self-defence as a right should in other words not be read as entailing additional rights beyond those set out in the criminal law concept referring to a circumstance precluding wrongfulness. It is not a general right to use force, but one defined by its exceptional function as an officially sanctioned exception to the State monopoly on the use of force.[278]

6.3.2.1.3 *Self-Defence as a Duty*

Another area of discussion concerns the existence not only of a right of self-defence, but also of a duty or obligation to use force in self-defence. Although there may be a clear moral duty to help or to guard life,[279] the question is whether and to what extent there is a legal duty to do so. It is not uncommon to have a legal duty to rescue someone in danger, especially if there is a relationship of trust or responsibility between the person in danger and those able to assist. This would be the case in the context of a school teacher and the school children, or of a health care worker and the patients. Similarly, in the case of traffic accidents, those who caused the accident and those who are first at the scene will, in accordance with some domestic legislation, have a duty to help. Furthermore, national law may require a person to try to stop a crime, including an unlawful attack, if doing so does not result in a risk of harm to the person helping or others.[280] A duty to use force in self-defence would,

277 See also e.g. Haggenmacher, 'Self-defence as a general principle of law and its relation to war' (n 203) pp. 15–16. Although he states that it is an absolute right, the concept referred to is that of *notwehr* or *légitimate défense*.

278 See also Boddens Hosang, *Rules of Engagement* (n 27) pp. 118–119 and Gill *et al.* 'General Report' (n 16) p. 157. The exceptional nature of self-defence in a more general context is also discussed in Fletcher and Ohlin, *Defending Humanity* (n 18) pp. 30–45.

279 See e.g. Daniel D. Nsereko, 'Arbitrary Deprivation of Life: Controls of Permissible Deprivations', in B. G. Ramcharan (ed.), *The Right to Life in International Law* (Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster, 1985) p. 245.

280 See e.g. Norwegian Penal Code (n 270) §196, which also provide as an exception the risk of being charged with acting unlawfully: "§ 196. Plikt til å avverge et straffbart forhold.\ Med bot eller fengsel inntil 1 år straffes den som unnlater gjennom anmeldelse eller på annen måte å søke å avverge en straffbar handling eller følgene av den, på et tidspunkt da dette fortsatt er mulig og det fremstår som sikkert eller mest sannsynlig at handlingen er eller vil bli begått. Avvergingsplikten gjelder uten hensyn til taushetsplikt og gjelder straffbare handlinger som nevnt i\§§ 111, 113, 115, 117, 119, 121, 123, 128, 129, 138, 139, 140, 141, 142, 143, 144, 192, 193, 194, 223, 239, 255, 256, 259, 274, 275, 279, 282, 283, 288, 291, 295, 299, 312, 314, 327, 329, 355 og 357,\militær straffelov §§ 50, 52 eller 96, eller\sikkerhetsloven § 18 a, jf. § 31 fjerde led\Ved overtredelse av §§ 312 eller 314 gjelder avvergingsplikten bare når den fornærmede er under 16 år.\Brudd på avvergingsplikten

however, in many circumstances involve a risk of harm for the intervening party. It seems therefore unlikely that there would be a *general* duty to use force in self-defence.

As explained in Section 4.2, IHRL require the State to respect and protect persons under its authority or control. As a result, even if there is no general duty to use force in self-defence, military forces have, because of their status as State agents, a duty to protect the lives of those subject to their State's human rights jurisdiction and obligations, most importantly here the obligation to protect the right to life.[281] Using force in defence of others, which in some jurisdictions is an aspect of self-defence,[282] may be one way this duty is complied with. It is, for instance, clear that law enforcement officials have a duty to defend others, unless it would cause an unreasonable risk for those intervening,[283] and this will arguably also apply to military forces in relation to persons under their State's human rights jurisdiction. Furthermore, both law enforcement officials and military forces have a right to life and physical integrity, and the State will therefore have a duty to allow its agents to defend themselves.[284] As a result, if a situation of self-defence arises in the context of operations involving participation in an armed conflict, the military commander will be obliged to do what is reasonable to effectuate such a defence.[285]

It may also be that military commanders have a duty to protect those under their command, beyond the scope of using force in self-defence. Such a duty is set out in the U.S. SROE, under the heading of "Inherent right of self-defense", but only in the context of 'unit self-defence': "Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent".[286] 'Unit self-defence' is defined as allowing defence of other U.S. military forces in the vicinity. The emphasis

straffes ikke når\handlingen det er tale om å avverge ikke har kommet så langt som til straffbart forsøk, jf. § 16, eller\plikten ikke kunne oppfylles uten å utsette ham selv, hans nærmeste eller noen uskyldig for siktelse eller tiltale eller fare for liv, helse eller velferd."

281 On the question of extraterritorial application of human rights, see Section 4.2.3.

282 See examples in Section 6.3.2.3.

283 Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 102–103.

284 ibid, p. 100.

285 See also ibid, pp. 100–102. Not all States recognise the existence of such a duty. The Use of Force in Canadian Forces Operations, for instance, declares on p.2–2 that "there is no obligation to use force in self-defence". Canadian Forces, *Use of Force for CF Operations* (Joint Publication 5.1, Document B-GJ-005-501/FP-001, issued under the authority of the Chief of the Defence Staff, 2008).

286 U.S. Chairman of the Joint Chiefs of Staff (CJCS), *Standing Rules of Engagement* (*SROE*)/*Standing rules for the use of force* (*SRUF*) *for U.S. Forces* [hereinafter: *SROE/SRUF*] (CJCS Instruction 3121.01B, 13 June 2005) p. A-3.

on 'unit self-defence' as both a right and obligation is the result of incidents where it was perceived that the commanders could have done more to protect U.S. forces.[287] However, as will be explained below in Section 8.3.3, 'unit self-defence' is more an operational concept or ROE concept than a legal concept, and must therefore be distinguished from personal self-defence. A duty to use force in 'unit self-defence', if imposed on commanders, is thus based on the requirement to comply with the order to defend own forces rather than an obligation arising from the legal concept of self-defence. [288]

6.3.2.2 Military Forces as Individuals and State Agents

Military forces are agents of the State, and will in that capacity have the authority to use force beyond what ordinary citizens are permitted to use.[289] At the same time, military forces are also individuals with rights as citizens, and military forces retain certain rights as individual private persons even while they are State agents.[290] They will be given the authority to use force to accomplish the mission, for instance within the framework of LOAC, but will always be able to use force in self-defence, provided the requirements are met. Although this scope for applying self-defence in practice differs for forces participating in an armed conflict, as compared to that applicable to private citizens,[291] it nonetheless continues to exist.

Commentators differ in whether soldiers retain their rights as individuals when they become military forces and hence State agents, or whether the authorities provided by the State to use force replace the individual rights. For example, some argue that the use of force by military forces as part of their duties will be regulated by a form of 'public authority' doctrine, which will include LOAC and self-defence where applicable.[292] Self-defence has also been argued to be part of the law enforcement paradigm,[293] which may make it inapplicable to military forces participating in an armed conflict, unless they are

287 Corn, 'Developing Rules of Engagement' (n 240) p. 216, and Stephens, 'ROE and the Concept of Unit Self-Defense' (n 79) pp. 128–129.

288 See also Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 11) pp. 75–76, and Corn, 'Public Authority to Use Force in Military Operations' (n 19) pp. 20–23 and 50.

289 On the use of defensive force by law enforcement officials, see the detailed examination in Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 91–216.

290 See discussion on the right to life of military forces in Section 4.2. See also ibid, p. 68.

291 See Section 8.2.

292 See e.g. Corn, 'Public Authority to Use Force in Military Operations' (n 19) especially pp. 25–31.

293 Gaggioli, *The use of force in armed conflict* (n 132) pp. 11–12.

specifically tasked with law enforcement duties in addition to their traditional military duties.

If the 'public authority' doctrine or equivalent authorities are subject to the peacetime use of force principles and limitations,[294] including necessity, imminence, and proportionality, thereby restricting the ability to use force when there are less harmful alternatives and imposing a duty to use the least destructive or damaging means or method of defence,[295] the result of applying such a doctrine will in practice be very similar to personal self-defence. However, there appears to be three main potential differences. First, the use of force will either be authorised or it is an otherwise unlawful act justified by way of being self-defence. Interestingly, Corn refers to his 'public authority' doctrine as a defence, implying that a defence remains necessary.[296] In that regard, his 'public authority' doctrine does not differ from self-defence. Second, a justification for the use of force may relate to the private individual or to an act of State. As Corn explains, military forces are State actors, not private actors, and "[a]ligning self-defense authorities with public authority justification principles would (…) reduce servicemembers' exposure to potential criminal jeopardy for their uses of force".[297] A 'public authority' defence would therefore remedy the concern that the use of force by military forces in situations arising from their duties have to be based on an individual or private right or responsibility, rather than being part of the authority to carry out their duties. Finally, while self-defence is a right that applies in exceptional circumstances and may only be used where there are no other alternatives, the use of force on behalf of the State under some form of 'public authority' doctrine could be pre-planned.

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294 ECHR (n 181) Article 2(2) sets out three situations where the use of force may be lawful if absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection. The contention by Corn, that "the law is not so rigid as to exclude other state interests as equally legitimate" (Corn, 'Public Authority to Use Force in Military Operations' (n 19) p. 51) will therefore not apply to those NATO States that are party to the ECHR.

295 According to Hessbruegge, " [t]he basic tenets for law enforcement agent's use of defensive force appear to be essentially the same as those found in domestic self-defense provisions across the world", although international human rights law may assign "particular features to each of these requirements". Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) p. 124. These additional features arise from the role of law enforcement personnel as State agents, and will therefore also apply to the use of force by military personnel.

296 Corn, 'Public Authority to Use Force in Military Operations' (n 19) e.g. p. 27.

297 ibid, p. 50.

There are, in other words, advantages in applying a 'public authority' doctrine rather than personal self-defence to deal with threats arising outside the ambit of LOAC. However, although there perhaps ought to be the authority to use force in furtherance of official duties in all national legislation, this is not the case. A common approach is instead to declare that the use of force in accordance with international legal obligations such as LOAC will not entail a violation of national criminal law prohibiting those acts. If the use of force is not authorised by international law, it will be unlawful unless it is justified as self-defence.[298] The approach taken in the current book is therefore that the use of force in self-defence must be based on the private criminal law concept. Admittedly, it would have been preferable if a 'public authority' concept, covering the use of force in those circumstances as well as for instance LOAC, existed and could be applied. However, this does not appear to be the current *lex lata*.

Finally, the status of military forces as State actors also introduces State responsibility for the force used. As explained in Section 4.2.2, the use of force not permitted by LOAC must be a measure of last resort. This requires training and planning to avoid unnecessary use of force and the availability of the means required to enable force escalation, obligations which rest upon the State.[299] In addition, the State is obliged to investigate deaths resulting from the use of force by its representatives.[300] Failure to comply with these obligations could give rise to State responsibility for the violation of the human rights of the victims, provided the use of force occurred on the territory of the State or the situation otherwise give rise to human rights obligations.[301]

6.3.2.3 Examples of National Rules on Personal Self-Defence

6.3.2.3.1 *Danish Law*

In §13 of the Danish Penal Code, self-defence or 'nødværge' is defined in the following terms:

> 1) Acts committed in self-defence are not punishable if they were necessary to resist or avert an unlawful attack that has begun or is imminent, provided that such acts do not manifestly exceed what is reasonable

298 See also Section 5.1.2 regarding the concept 'lawful acts of war'.

299 See e.g. *McCann and Others v. the UK* (n 194) para. 294. See further discussion in Section 4.2.2

300 For a detailed analysis, see Hessbruegge, *Human Rights and Personal Self-Defense* (n 10) pp. 202–215.

301 On the question of extraterritorial application of human rights, see Section 4.2.3.

with regard to the danger inherent in the attack, the aggressor and the importance of the interests endangered by the attack.

2) Any person who exceeds the limits of lawful self-defence shall not be liable to punishment if his act could reasonably be attributed to the fear or excitement produced by the attack.[302]

As mentioned in the introduction (Section 6.3.2.1), the term for self-defence found in many civil law countries combines two concepts, one entailing distress, emergency, or danger, and the other meaning to protect or defend. This is the case in Danish law, where 'nød' refers to the former and 'værge' the latter. It is therefore more appropriately referred to as necessary or legitimate defence, rather than self-defence. In order to be lawful self-defence, the initial attack must entail an unlawful use of force, and the response must be necessary and proportionate.[303] According to the Danish Military Manual, the right of self-defence may not be used as a justification for failure to comply with for instance hold fire orders or for carrying certain weapons.[304]

6.3.2.3.2 *Dutch Law*

Article 41 Criminal Code of the Netherlands reads as follows:

1. A person who commits an offense where this is necessary in defense of his person or the person of another, his or another person's integrity or property, against immediate, unlawful attack is not criminally liable [justification].

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302 §13 of the Danish Criminal Code Order No. 909 of September 27, 2005, as amended by Act Nos. 1389 and 1400 of December 21, 2005 (translation available at http://www.legislationline.org/download/action/download/id/6372/file/Denmark_Criminal_Code_am2005_en.pdf, last accessed 24.04.2019). Original text: "§ 13. Handlinger foretagne i nødværge er straffri, for så vidt de har været nødvendige for at modstå eller afværge et påbegyndt eller overhængende uretmæssigt angreb og ikke åbenbart går ud over, hvad der under hensyn til angrebets farlighed, angriberens person og det angrebne retsgodes betydning er forsvarligt. \Stk. 2. Overskrider nogen grænserne for lovligt nødværge, bliver han dog straffri, hvis overskridelsen er rimeligt begrundet i den ved angrebet fremkaldte skræk eller ophidselse." According to paragraph 3, similar rules apply to measures taken to enforce lawful orders in a lawful manner, to carry out a lawful arrest or to prevent the escape of a prisoner or a person committed to an institution.

303 See also Danish Ministry of Defence/Defence Command Denmark, *Military Manual on international law relevant to Danish armed forces in international operations* [hereinafter: *Danish Military Manual*] (Rosendahls, København, 2016, https://fmn.dk/eng/allabout/Documents/Danish-Military-Manual-MoD-defence-2016.pdf, last accessed 24.04.2019) p. 649.

304 ibid, p. 130.

2. A person exceeding the limits of necessary defense, where such excess has been the direct result of a strong emotion brought about by the attack, is not criminally liable [excuse].[305]

Thus, in Dutch law, self-defence functions as a ground for excluding criminal responsibility, and will operate as a justification, unless the force is excessive, in which case it may be an excuse. The term used for self-defence in Dutch law is "noodweer", which is another example of the civil law tendency to combine distress, emergency, or danger, and protect or defend ('nood' and 'weer') into a concept of necessary or legitimate defence. Like the legislation in other civil law counties, force may be used in self-defence of oneself, another and objects, and there is a requirement that the initial attack is unlawful. Although there is no reference to a duty to retreat in the legislation, this has been applied in case law.[306]

6.3.2.3.3 *French Law*

In French criminal law, self-defence is dealt with as 'legitimate defence', which operates as a justification.[307] Article 122–5 of the French Penal Code permits the defence of oneself or another where such force is necessary and proportionate: "A person is not criminally liable if, confronted with an unjustified attack upon himself or upon another, he performs at that moment an action compelled by the necessity of self-defence or the defence of another person, except where the means of defence used are not proportionate to the seriousness of the attack".[308] As the reference to "at that moment" suggests, the response must be taken immediately.[309]

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305 Frits Kalshoven and Thyla Fontein, 'Some Reflections on Self-Defence as an Element in Rules of Engagement' in Mariëlle Matthee etc. (eds.), *Armed Conflict and International Law: In Search of the Human Face* (TMC Asser Press, The Hague, 2013) p. 108.

306 Horvat and Benatar (eds.), *Legal Interoperability* (n 23) 'National Reports: Pays-Bas/Netherlands', p. 207.

307 Catherine Elliot, 'France', in Markus Dirk Dubber and Kevin Jon. Heller, *The Handbook of Comparative Criminal Law* (Stanford University Press, 2010) pp. 223–224. The application of the French Criminal Code as the standard for individual or unit self-defence by military forces is confirmed by the Centre Interarmees de Concepts, de Doctrines et d'Experimentations, Ministere de la Defense, *DIA – 5.2: L'Usage de la Force en Operation Militaire se Deroulant a l'Exterieur du Territoire National* [25 July 2006] p. 14, and État-Major des Armees, Division Emploi 1, *PIA – 5.2: Directive Interarmees Sur l'Usage de la Force en Operation Militaire se Deroulant a l'Exterieur du Territoire National* [25 July 2006] p. 34.

308 Article 122–5, first para, of the French Penal Code (translation available at https://www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code_33.pdf, last accessed 24.04.2019).

309 See also Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 2) p. 298, citing Centre Interarmees de Concepts, de Doctrines et d'Experimentations, Ministere de la

Protection of property is dealt with in a separate paragraph where it is made clear that wilful murder never will be necessary or proportionate use of force to defend property: "A person is not criminally liable if, to interrupt the commission of a felony or a misdemeanour against property, he performs an act of defence other than wilful murder, where the act is strictly necessary for the intended objective the means used are proportionate to the gravity of the offence".[310]

The French self-defence provision also makes it clear that the initial attack must be unlawful, or as it is phrased, unjustified. According to Elliot, if defendants misunderstand the situation and mistakenly believe they are about to be attacked, they may be able to rely on the defence if the mistake was reasonable.[311] Finally, self-defence may be relied upon in response to both actual and imminent attacks.[312]

Due to challenges arising from French military forces having to rely on self-defence during military operations, a new legal basis was introduced in 2005 for the use of force to accomplish the mission, when doing so is in accordance with international law.[313] The provision applies to operations outside of French territory and territorial waters. Although some consider it to be an exception to self-defence,[314] it should principally be viewed as an alternative legal basis for the use of force, and the framework for rules of engagement implementation (see also Section 5.1.2 on lawful acts of war).

As a result of increased terrorist attacks, a recent law aligned self-defence standards of national and local police and military units deployed on French territory to that of the French gendarmerie.[315] Security forces may now rely on self-defence to use force in a broader set of circumstances, for example to prevent a murder where they have a real reason to believe that this is about to happen.

Defense, *DIA – 5.2: L'Usage de la Force en Operation Militaire se Deroulant a l'Exterieur du Territoire National* [25 July 2006] p. 14.

310 Article 122–5, second para, of the French Penal Code (n 308).

311 Elliot, 'France' (n 307) p. 225, citing "Raisonnablement croire": Crim. 21 février 1996, *Bulletin des Arrets de la Cour de Cassation*, 84, observations Bouloc; *Revue de Science Criminelle*, 1996, 849.

312 Article 122–7 of the French Penal Code (n 308).

313 Article L4123-12 of the French Code of Defense (available at https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006071307&idArticle=LEGIARTI000006540266&dateTexte=&categorieLien=cid, last accessed 24.04.2019).

314 See e.g. Giles Castel, 'Self-defence: A French perspective', in 36 *NATO Legal Gazette* 41 (2005).

315 Article L. 435-1, French Law on Public Security, 28 February 2017 (available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034104023&dateTexte=20180623, last accessed 24.04.2019).

6.3.2.3.4 *German Law*

In German law, self-defence is a justification that may be considered in relation to a criminal case, as opposed to an independent right.[316] According to the German Criminal Code Section 32, a person who "commits an act in self-defence does not act unlawfully". Furthermore, "[s]elf-defence means any defensive action that is necessary to avert an imminent unlawful attack on oneself or another".[317] Like many other European self-defence rules, German self-defence includes the defence of others and is not limited to the use of force ('any defensive action'). This is reflected in the terminology: rather than being termed self-defence or defence of self, it is called 'notwehr'.[318] This term combines two concepts, one entailing distress, emergency, or danger ('not'), and the other ('wehr') meaning to protect or defend. A better translation of this concept is therefore necessary or legitimate defence.[319]

The German self-defence rule has been described as traditionally being "'strong' and aggressive in Germany",[320] in that it does not require retreat except where the threat originates from, for instance, a child or insane person, and permits the use of means that "averts the attack reliably and permanently".[321] Furthermore, according to Section 33, excessive self-defence may be excused, provided the use of force in self-defence is still necessary: "a person who exceeds the limits of self-defence out of confusion, fear or terror shall not be held criminally liable".[322]

There is no mention of a proportionality requirement in the German self-defence provision; however, this does not mean that the right to defend is unlimited.[323] The requirement of necessity is interpreted to require that the force used is proportional. According to Lencker and Perron, courts have imposed

316 Thomas Weigend, 'Germany', in Markus Dirk Dubber and Kevin Jon Heller, *The Handbook of Comparative Criminal Law* (Stanford University Press, 2010) p. 268.

317 Section 32 of the German Criminal Code, translated by Prof. Dr. Michael Bohlander, 2016 juris GmbH, Saarbrücken (available at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html, last accessed 24.04.2019).

318 Defence of others may also be referred to as 'nothilfe', as is emphasised e.g. in the presentation of German self-defence law in Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 2) pp. 298–299, however, there is no separate legal authority for this concept and it may also be considered a subset of 'notwehr'. The concept of 'nothilfe' will therefore not be treated separately.

319 See e.g. Ambos, 'Other grounds for excluding criminal responsibility' (n 127) p. 1034, fn. 180.

320 Weigend, 'Germany' (n 316) p. 270.

321 ibid.

322 Section 33 of the German Criminal Code (n 317). See also Krebs, 'Justification and Excuse in Article 31(1) of the Rome Statute' (n 271) pp. 394–395.

323 Ambos, 'Other grounds for excluding criminal responsibility' (n 127) pp. 1034–1035.

limitations for reasons of "social ethics".[324] One of these is the doctrine of 'abuse of rights': self-defence must not be exercised in an abusive way.[325]

6.3.2.3.5 *Norwegian Law*

The Norwegian self-defence provision is found in Section 18 of the Norwegian Penal Code of 2005, entitled 'nødverge'. According to the Military Penal Code of 1902[326] states in Section 1, the basic conditions for criminal liability set out in the (General) Penal Code, including the rules on self-defence and necessity, apply to military criminal cases as well. As is the case in many other civil law systems, the term reflects two concepts, 'nød' and 'verge', permitting defence or protection in certain cases of emergency or danger. The provision may be translated as follows:

> An act which would otherwise be punishable, is lawful when it
> a. is committed to avert an unlawful attack,
> b. does not exceed what is necessary, and
> c. does not clearly go beyond what is justifiable, taking into account the dangerousness of the attack, the type of interest the attack violates, and the culpability of the assailant.[327]

The provision requires that the initial threat be unlawful,[328] which has been interpreted to mean "not within the ordinary freedom of action",[329] and that

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324 Theodor Lencker and Walter Perron, '§32', notes 43-61b, in Adolf Schönke and Horst Schröder (eds.), *Strafgesetzbuch Kommentar* (Beck, Munich, 2006, 27th ed.), cited in Weigend, 'Germany' (n 316) p. 271.

325 Fletcher, *Basic Concepts of Criminal Law* (n 117) p. 136.

326 The Norwegian Military Penal Code (Militær Straffelov), LOV-2016-04-22-3.

327 Section 18, first paragraph, Norwegian Penal Code (n 270). Original text: "§ 18. Nødverge\ En handling som ellers ville være straffbar, er lovlig når den\blir foretatt for å avverge et ulovlig angrep,\ikke går lenger enn nødvendig, og\ikke går åpenbart ut over hva som er forsvarlig under hensyn til hvor farlig angrepet er, hva slags interesse som angrepet krenker, og angriperens skyld."

The rule applies equally to situations of self-defence, to effect a lawful arrest or to prevent the escape of a person lawfully remanded or detained, see Section18, second paragraph, Norwegian Penal Code.

328 This requirement was emphasised in a post-WW2 trial against the owner of a garage who was the victim of saboteurs from the Norwegian resistance movement. The court concluded that he did not have a right to act in self-defence because the saboteurs were acting in accordance with Norwegian interests and were therefore considered to be acting lawfully, something the garage owner knew. Rt. 1948 s. 75, cited in Johs Andenæs, *Alminnelig strafferett* (5.ed, Universitetsforlaget, Oslo, 2004) p. 163.

329 Ståle Eskeland, *Strafferett* (5. ed. by Alf Petter Høgberg, Cappelen Damm Akademiske, Oslo, 2017) p. 264.

the response be limited to what is necessary and justifiable. The initial attack may have been directed at a person or object, and the defensive measure can taken both by the attacked person and a third party. This means that Norwegian soldiers may use force in self-defence to protect property, although the use of lethal force is only likely to be considered necessary and justifiable if the damage to the property will also entail a serious risk of harm to persons. This may, for instance, be the case with mission-essential property. Furthermore, the defensive measure may be taken both by the attacked person and a third party, and may therefore be used as the basis for defending both the unit, other coalition forces and civilians.

There is no requirement that the attack has started or even that it is imminent. However, in such cases, it is less likely that the defensive use of otherwise unlawful measures meet the necessity requirement.[330] The issues of retreat and provocation are not explicitly dealt with, but are nevertheless considered relevant for the assessment of whether the force used was necessary and justifiable.[331] If the defensive response is excessive, thereby failing the self-defence requirements, it may nonetheless result in a reduction of penalty, or in certain circumstances, the act being excused.[332] Finally, it is also required that the defensive measure be directed at the source of the threat, thereby excluding the possibility relying on self-defence to justify harm to innocent bystanders.[333]

The Norwegian Manual on the Law of Armed Conflict makes it clear that while the defence of self may not be limited, defence of others and objects may be subjected to limitations, for instance through ROE.[334]

6.3.2.3.6 *UK Law*[335]

In the United Kingdom, self-defence, or private defence as it is also referred to, is a common law defence,[336] but elements of the defence have been clarified in

330 Ot.prp.nr.90 (2003–2004) *Om lov om straff* (*straffeloven*) (Proposition Concerning the law on penalties (penal code)), p. 420.

331 ibid, pp. 420–421.

332 Sections 80(d) and 81(b) of the Norwegian Penal Code (n 270).

333 The effects caused by the self-defence act on innocent bystanders will be assessed under the principle of necessity, as regulated in Section 17 of the Norwegian Penal Code (n 270). Thomas Frøberg, *Alminnelig strafferett i et nøtteskall* (Gyldendal Juridisk, Oslo, 2016) p. 104.

334 Norwegian Armed Forces, *Manual i krigens folkerett* (*Trans: Manual of the Law of Armed Conflict*), issued under the authority of the Chief of the Defence, [2013] p. 281.

335 Note that the laws considered only apply to England, Wales and Northern Ireland.

336 See *Palmer v R* [1971] AC 814 (approved in *R v McInnes*, 55 Cr App R 551) at pp. 831–832 where Lord Morris stated that "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary".

the 2008 Criminal Justice and Immigration Act. Section 76 sets out the requirements for when a person may rely on self-defence, in particular as to whether the degree of force used was reasonable.[337] Defence of property is not considered part of self-defence, but the use of force against another person to protect property may be justified as prevention of crime.[338] Section 76 applies to: self-defence, including the defence of others; defence of property; and the use of force in prevention of crime or making arrest.[339]

The use of force in self-defence must be considered reasonable or necessary by the defendant and must be proportionate to the threat he or she believes is being faced.[340] The question of reasonableness is elaborated on in Section 76:

> (3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be (…)
> (4) If D claims to have held a particular belief as regards the existence of any circumstances –
> (a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
> (b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not –
> (i) it was mistaken, or
> (ii) (if it was mistaken) the mistake was a reasonable one to have made.
> (5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.
> (5A) In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.
> (6) In a case other than a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances

337 Section 76(1) of the Criminal Justice and Immigration Act of 2008 (n 260). Section 76 also applies to the use of force in the prevention of crime or making arrest.

338 Section 3(1) of the Criminal Law Act 1967 (https://www.legislation.gov.uk/ukpga/1967/58/Section/3, last accessed 24.04.2019) reads: "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large". If the force used to defend the property is not directed at a person, the Criminal Damage Act 1971 may apply. Ormerod *et al., Smith and Hogan's Criminal Law* (n 56) pp. 449–450.

339 Section 76(2) of the Criminal Justice and Immigration Act of 2008 (n 260).

340 Ormerod *et al., Smith and Hogan's Criminal Law* (n 56) p. 429.

as D believed them to be if it was disproportionate in those circumstances.

(6A) In deciding the question mentioned in subsection (3), a possibility that D could have retreated is to be considered (so far as relevant) as a factor to be taken into account, rather than as giving rise to a duty to retreat.

(7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case) –

(a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and

(b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.[341]

The initial test of necessity is subjective, primarily requiring that the belief be genuinely held.[342] It is emphasised that a person who honestly believes that the defensive force is necessary should be considered to have acted reasonably, even if this is based on a reasonable mistake. Defensive force may be used in response to both actual and imminent attacks, but the imminence requirement is strictly construed.[343] The degree of force used will not be considered reasonable if it is disproportionate. This test is in other words more objective, although reasonableness must be assessed in light of the defendant's perception of the circumstances. Furthermore, it is recognised that it may be difficult for the defendant to "weigh to a nicety" the amount of force used in order to ensure it is proportionate and hence reasonable.[344] If the defendant could

341 Section 76(3–7) of the Criminal Justice and Immigration Act of 2008 (n 260) as updated by Legal Aid, Sentencing and Punishment of Offenders Act 2012 Section 148 and the Crime and Courts Act 2013 Section 43.

342 There is no requirement that genuine belief in the need to use force is reasonable. This has been argued to be contrary to ECHR Article 2 (n 181), for instance by Leverick, *Killing in Self-Defence* (n 26) pp. 183–190. Others argue that the ECHR does not demand a change to this test, see for instance Ormerod *et al., Smith and Hogan's Criminal Law* (n 56) pp. 437–440.

343 Ormerod, et al., Smith and Hogan's Criminal Law, ibid, pp. 444–445.

344 See also ibid, pp. 430–432 on the subjective and objective elements of self-defence. Note that the use of defensive force in the so-called householder case in specifically dealt with in the Crime and Courts Act 2013 Section 43 (https://www.legislation.gov.uk/ukpga/2013/22/section/43, last accessed 24.04.2019) Subsection 2 makes it clear that "the degree of force used by D is not to be regarded as having been reasonable in the

have retreated, this will affect the assessment of whether the degree of force used was reasonable.[345] The defendant will generally not be able to rely on self-defence if the attack was provoked.[346]

Common law self-defence permits the use of force against an unjustified attack, which includes unlawful attacks.[347] This rule has been supplemented by Section 3(1) of the Criminal Law Act of 1967, which permits the use of force specifically in the prevention of crime. The 1967 Act modifies, rather than replaces, the common-law rule,[348] and, as explained above, the determination of reasonableness under both legal bases is made by reference to the same test under Section 76.[349] Because most instances of force being used in self-defence involve prevention of crime, they will fall under the 1967 Act rather than common law self-defence. However, the common law defence will also be applicable where force is used against an unjustified attack that is not criminal under British law. For example, the act may be unjustified because it is unlawful in international law.[350] Furthermore, common law self-defence will be available as a defence even if the attacker for instance is a minor and therefore not criminally liable.[351] In the proposed Criminal Law Bill, a distinction is made between self-defence, which is the protection against an unlawful attack; the termination of commission of a crime; and termination of interference with property.[352]

Although British courts have been presented with self-defence claims from military forces accused of unlawful use of force, few if none have been accepted.[353] One of the few cases where it was accepted was in the 1975 case of

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circumstances as D believed them to be if it was *grossly* disproportionate in those circumstances" (emphasis added). See Ormerod *et al.*, *Smith and Hogan's Criminal Law*, ibid, pp. 435–437.

345 Section 76(6A) of the Criminal Justice and Immigration Act of 2008 (n 260). See also Ormerod *et al.*, *Smith and Hogan's Criminal Law*, ibid, p. 444.

346 Ormerod et al., Smith and Hogan's Criminal Law, ibid, pp. 445–446.

347 See e.g. *Kenlin and Another v Gardiner and Another*, Divisional Court, 1 November 1966, [1967] 2 W.L.R. 129, [1967] 2 Q.B. 510, p. 518. See also Law Commission Report No.218, *Legislating the Criminal Code: Offences Against the Person and General Principles*, 1993 (http://www.lawcom.gov.uk/wp-content/uploads/2015/06/lc218.pdf, last accessed 24.04.2019) para 36.3, p. 65.

348 Ormerod *et al., Smith and Hogan's Criminal Law* (n 56) pp. 443–444.

349 Section 76(2) of the Criminal Justice and Immigration Act of 2008 (n 260).

350 Ormerod *et al., Smith and Hogan's Criminal Law* (n 56) p. 444.

351 ibid, p. 447.

352 Law Commission Report No.218 (n 347) para 33.6, p. 60, and Clause 27(1) of the proposed Criminal Law Bill in the report.

353 See e.g. *Bici v. Ministry of Defence* [2004], EWHC 786 (QB), ILDC 100.

Attorney-General for Northern Ireland's Reference;[354] however, because the UK did not consider the situation in Northern Ireland to be a NIAC, the case is less relevant here.

6.3.2.3.7 *U.S. Uniform Code of Military Justice and Rules for Courts-Martial*
In the United States, there is no common self-defence rule. Instead, the rules differ from state to state.[355] With regard to a general self-defence rule, a useful guide is the Model Penal Code, developed by the American Law Institute in 1962, which, although it is not law in any U.S. jurisdictions, has influenced the legislation of many American States.[356] For U.S. forces, however, the relevant articulation of self-defence is found in the Manual for Courts-Martial, Rule 916(e),[357] setting out defences applicable to the Uniform Code of Military Justice.[358] Once the defence is raised, it must be disproven beyond a reasonable doubt.[359] Rule 916(e) deals separately with self-defence in relation to cases of homicide and assault involving deadly force, aggravated assault, other assaults, loss of self-defence, and defence of others:

> (1) Homicide or assault cases involving deadly force. It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused:
>
> A. Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and
>
> B. Believed that the force the accused used was necessary for protection against death or grievous bodily harm.

354 Attorney-General for Northern Ireland's Reference (No. 1 of 1975) (1977) AC 105.

355 For instance, while the Connecticut defence of person rule states that self-defence is justified if the use of force could be avoided by retreating, the Florida rule stresses that there is no duty to retreat. See Connecticut General Statutes § 53a-19(b)(1) (https://www.cga.ct.gov/current/pub/chap_951.htm, last accessed 24.04.2019) and Florida Statutes § 776.012, (http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0700-0799/0776/Sections/0776.012.html, last accessed 24.04.2019).

356 Self-defence is regulated in Sections 3.04 (self), 3.05 (others), and 3.06 (property). *U.S. Model Penal Code* (n 268). For a commentary on the MPC defences, see e.g. Paul H. Robinson, 'United States', in, Markus Dirk Dubber and Kevin Jon. Heller, *The Handbook of Comparative Criminal Law* (Stanford University Press, 2010) especially pp. 582–583.

357 Merriam, 'Natural Law and Self-Defense' (n 47) p. 72. See also Horvat and Benatar (eds.), *Legal Interoperability* (n 23) 'National Reports: United States', p. 195.

358 Uniform Code of Military Justice (UCMJ), 64 Stat. 109, 10 U.S.C. Chapter 47 (http://www.ucmj.us/, last accessed 24.04.2019).

359 U.S. Manual for Courts-Martial, RCM 916(b)(1) (n 268) p. II-115: "the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist".

(2) Certain aggravated assault cases. It is a defense to assault with a dangerous weapon or means likely to produce death or grievous bodily harm that the accused:
   A. A. Apprehended, on reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and
   B. In order to deter the assailant, offered but did not actually apply or attempt to apply such means or force as would be likely to cause death or grievous bodily harm.

(3) Other assaults. It is a defense to any assault punishable under Article 90, 91, or 128 and not listed in subsections (e)(1) or (2) of this rule that the accused:
   A. Apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and
   B. Believed that the force that accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm.

(4) Loss of right to self-defense. The right to self-defense is lost and the defenses described in subsections (e)(1), (2), and (3) of this rule shall not apply if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.

(5) Defense of another. The principles of self-defense under subsection (e)(1) through (4) of this rule apply to defense of another. It is a defense to homicide, attempted homicide, assault with intent to kill, or any assault under Article 90, 91, or 128 that the accused acted in defense of another, provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances.[360]

The first requirement in Sections 1(A), 2(A) and 3(A) is objective, requiring the apprehension of harm; hence, the need for using force must be reasonable. According to the commentary provided in the UCMJ to Section 1, "such matters as the relative height, weight, and general build of the accused and the alleged victim, and the possibility of safe retreat are ordinarily among the circumstances which should be considered in determining the reasonableness of the apprehension of death or grievous bodily harm".[361] The second element

360 U.S. Manual for Courts-Martial, ibid, RCM, pp. II-116–117.
361 ibid, RCM, p. II-116.

is subjective, and concerns the degree and amount of force used (proportionality); the accused must have actually believed that the degree and amount of force used was necessary.[362] In the case of homicide, it will not matter if the force used is excessive as long as the belief that the degree or amount of force used was necessary is actually held.[363]

The ability to rely on self-defence is extensively set out in the Military Judges' Benchbook. The Benchbook is a non-binding guide that serves as a restatement of the law for use by military judges in instructing members of courts-martial.[364] Only the most relevant aspects will be commented on here. First, the threat must be immediate, or "about to be inflicted", which is interpreted to mean immediate.[365] Furthermore, as in most other formulations of personal self-defence, there is a requirement that the initial attack be wrongfully inflicted (see Sections 1(A), 2(A) and 3(A) above). Interestingly, this requirement is not mentioned in the Military Judges Benchbook. It is not clear whether this is because the requirement of unlawful attack is not applied, or more likely, whether it is applied at a different stage in the process, such as the decision to prosecute and on what grounds, thereby preventing cases of defence against an unlawful attack from going to trial. The RCM also makes it clear that self-defence may not be claimed if the assault is intentionally provoked (Section 4 above).[366] With regards to retreat, there is no requirement of retreat from a place that the accused has a right to be, but it may be a factor in deciding whether or not the accused acted in self-defence.[367]

The application of self-defence by military forces is also dealt with in the U.S. SROE. Although it is emphasised that all forces retain the right of self-defence, it is also made clear that "[w]hen individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense".[368] The SROE has been criticised for including a very expansive definition of imminence, declaring that "imminent does not necessarily mean immediate or

362 See also U.S. Department of Army Pamphlet 27–9, *Military Judges' Benchbook,* Headquarters, Department of the Army, Washington, DC, 10 September 2014, pp. 965–974.

363 ibid, p. 966.

364 Merriam, 'Natural Law and Self-Defense' (n 47) p. 74.

365 See e.g. U.S. Manual for Courts-Martial (n 268) RCM 916(e)(1)(A), p. II-116, and *U.S. Military Judges' Benchbook* (n 362) p. 965.

366 U.S. Military Judges' Benchbook, ibid, p. 978.

367 ibid, p. 977.

368 U.S. CJCS, *SROE/SRUF* (n 286) p. A-3.

instantaneous".[369] It also appears to be a departure from the requirement set out in the U.S. RCM and the relevant Military Judges' Benchbook guidance, where, as mentioned above, the requirement is that the threat is "about to" occur, meaning it is immediate. The reason for the departure is likely due to the reliance on *jus ad bellum* as the legal basis for the use of force in self-defence during armed conflict.[370] Not surprisingly, however, in trials arising from military forces participating in an armed conflict where self-defence has been accepted, the courts apply the provision in the UCMJ.[371] According to Gaston, "[a]s a result, although the U.S. in many ways has the greatest guidance on his issue, (…) substantial ambiguity remains over how exactly standards will be applies to soldiers relying on self-defense in different armed conflict situations".[372]

6.4 Conclusion

One of the few commentators on the application of self-defence by State officials, including military forces, Gloria Gaggioli, recently raised concerns about "the challenges pertaining to the multifaceted concept of self-defence in military operations (*jus ad bellum* self-defence, 'unit self-defence', personal self-defence, defence of others) and overlapping legal regimes (notably domestic/operational law, international humanitarian law, human rights law, *jus ad bellum*)".[373] Contributing towards much needed clarity on the applicable law and how it applies in the unique context of military operations involving participation in an armed conflict is one of the aims of this book. This chapter has sought to answer the first question, namely what does the reference to inherent right of self-defence in ROE actually refer to?

First, it is argued that personal self-defence and the use of defensive force by military forces involved in an armed conflict must be distinguished from the concept of State self-defence. Except in the case of a third State or non-State

369 ibid. See for instance Merriam, 'Natural Law and Self-Defense' (n 47) pp. 76–87; Eric D. Montalvo, 'When Did Imminent Stop Meaning Immediate? *Jus in bello* Hostile Intent, Imminence and Self-Defense in Counterinsurgency', *Army Lawyer,* August 2013, p. 24, pp. 24–34, and Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 2) pp. 310–314.

370 See e.g. a presentation of this view in Gaston, 'Reconceptualizing Individual or Unit Self-Defense', ibid, pp. 296–297.

371 ibid, p. 303, citing *United States v. Behenna*, 71 M.J. 228 (2012) and *United States v. Holmes*, 2010 CCA Lexis 497 (2910).

372 ibid, pp. 303–304.

373 Gaggioli, *The use of force in armed conflict* (n 132) p. 468.

party becoming involved in an ongoing armed conflict, State self-defence will not provide authorities to use force. Instead, the only relevant legal self-defence concept is personal self-defence.[374]

A general concept of personal self-defence, beyond the narrow concept found in ICL, is implicitly recognised in international law such as IHRL. However, neither a human right to self-defence nor a customary rule of personal self-defence could be found to exist. Furthermore, while good arguments can be made for the existence of a general principle of international law, it is unclear what the practical implications are of such an assertion. Except in the rare cases of military forces being tried before an international criminal court or tribunal, the use of force by military forces is usually assessed by a domestic court. Such courts are most likely to apply the concept of self-defence found within their domestic legislation. Personal self-defence is, after all, a right originating in the domestic context, from which it has expanded to international law, not vice versa. Military forces should therefore not interpret the reference to 'inherent right of self-defence' to mean that there is a legal concept of self-defence beyond the criminal law concept. The historic and universal nature of the right does, however, entail that same criteria are applied in all jurisdictions, albeit in slightly different ways. These are: unlawfulness, necessity/imminence, and proportionality; that the assessment of the situation is perceived as reasonable; and that force was used with an intention to repel the attack.[375]

The second half of the question raised above will be examined in the Part 3 of this book, in Chapter 8: how does self-defence apply during armed conflict operations? First, the scope of relying on the legal concept of personal self-defence will be examined in detail. Because this is considerably more narrow than the references to self-defence by military forces would suggest, the existence of operational concepts of self-defence will also be examined. Whereas the legal concept of self-defence provide an exception from the prohibition on arbitrary deprivation of life, such operational self-defence concepts provide use of force authorities as exceptions to the general rule that all use of force must be authorised by ROE. To the extent the use of force not authorised by ROE does not meet the requirement of self-defence, it must be based on a different legal authority, which during armed conflict operations is most likely to be LOAC.

374 Other, non-legal, concepts such as unit self-defence are dealt with in Chapter 8.

375 The commonalities of national self-defence rules are summarised differently by different experts. Fletcher claims that most legal systems share four common characteristic: imminence, necessity, proportionality and the intention to repel an attack. Fletcher, *Basic Concepts of Criminal Law* (n 117) p. 133. Ohlin argues there are three generally recognised criteria: imminence, proportionality and unlawfulness. Ohlin, 'Self-defence' (n 231) p. 507.

PART 3

Operational 'Use of Force' Categories and Their Corresponding Legal Bases: What May Legally Be Authorised?

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CHAPTER 7

Introduction to Part 3

Part 3 will combine the previous chapters on the 'use of force' categories in NATO ROE and the relevant legal authorities for the use of force. The purpose is to examine which legal authorities the use of force under the respective ROE categories must comply with, how this influences the ROE application, and the degree to which the ROE and the corresponding legal bases overlap. By knowing the true extent of the legal room for manoeuvre, Commanders and their planners will be better able to exploit this potential and make a more informed determination of how to achieve the political and operational aims of the mission, within the applicable legal framework. When policy-driven State practice is misconstrued as law, the applicable law is perceived as more restrictive than it truly is. Because the limitation may be unsuited to a different operational reality, such misconception should be avoided. Because this analysis is generic rather than mission specific, it does not take into account limitations imposed by for instance a UN Security Council resolution setting out the mandate for the operation,[1] or mission specific political and operational considerations.

As previously explained, military forces commonly view the right of self-defence as a key 'use of force' concept, and NATO ROE provide that self-defence is the only basis for the use of force beyond ROE. It is therefore important that military forces understand when they can rely on this exception. However, it is an area fraught with confusion and misunderstanding, and it is referred to in situations very different from the traditional self-defence concepts. The role of self-defence as a 'use of force' concept is particularly complicated in multinational operations, especially those involving participation in an armed conflict. As a result, it is prudent to examine in detail how the legal concept of self-defence may be applied by military forces during armed conflict (see Section 8.2). It is also necessary to identify the legal authority for acts perceived as self-defence, but not justified by the legal concepts, and to further define these concepts (see Section 8.3).

The focus in Chapter 9 is on what should have been a clear and distinct 'use of force' concept, but which unfortunately tends to be mixed into the others, namely the use of force in response to an attack or imminent attack by opposing forces in an ongoing armed conflict. The use of force against persons who

1 On the relationship between the *jus ad bellum* and the *jus in bello,* see Section 4.3.

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are lawful targets under LOAC would usually be expected to be based on LOAC. However, this form of defensive or reactive force is too often considered a form of self-defence. It is therefore also discussed in Section 8.3 on operational concepts of self-defence. Even though this practice of relying on an operational concept of self-defence is accepted as a current reality, the better approach would be to separate the use of force in response to an attack or imminent attack during an armed conflict, based on LOAC, from the legal concepts of use of force in self-defence. Dealing with such use of force as a separate category is one way of enhancing this distinction.

In addition to using force in response to threats or attacks, either under LOAC or in self-defence, military forces will also use force as part of their mission. Military forces will use force to fight the opposing forces, either because of their current conduct or intentions, or on the basis of their status as lawful targets. Furthermore, they may be required to use force when conducting activities such as house searches, inspection of vehicles, or movement of NATO forces, or to prevent the destruction of property or commission of serious crimes. The ROE regulating use of force to accomplish designated tasks raise unique challenges in the current context; it has the potential for authorising force which causes harm to persons who neither are necessarily lawful targets nor pose a threat giving rise to a right of self-defence. This begs the question of whether, and if so when, harm may knowingly be caused to civilians not directly participating in hostilities. This is examined in Chapter 10.

The next two chapters examine the use of force, or attack, on opposing forces. The first 'use of force' categories dealt with are the NATO 'hostile act' and 'hostile intent' concepts, and Chapter 11 explores the relationship between these ROE and LOAC. Because the NATO hostile act and hostile intent ROE authorise attack in response to conduct or expected future conduct (intent), the most relevant part of LOAC is the concept of 'direct participation in hostilities' (DPH). As explained in Section 5.2.3, this concept is applied both to the question of when civilians lose their protection from direct attack and to the issue of organised armed groups. As a result, this chapter will aim to connect one of the most complex rules in LOAC with what are arguably the most complex NATO ROE concepts. The examination of this relationship is intended to add further clarity to NATO 'hostile act' and 'hostile intent' ROE concepts.

The topic of the final chapter of Part 3, Chapter 12, is perhaps the least complicated one: the attack on forces 'declared hostile' on the basis that they are lawful targets under LOAC. This is commonly viewed as status-based targeting. This category does, however, raise the question whether status-based targeting

is possible in all forms of armed conflict, especially where the legal authority for attacking the opposing forces is deemed to be the concept of DPH. Phrased differently, can conduct be used to determine status, and if so, how? This chapter will also explain how the LOAC rules on conducting attacks are operationalised through the joint targeting process.

CHAPTER 8

The Use of Force in Self-Defence during Armed Conflict: a Legal Analysis of the Various Concepts of Self-Defence

8.1 Overview

The purpose of this chapter is to examine the application of self-defence by military forces during armed conflict operations. While it may have been acceptable in the past to view soldiers as cannon fodder, it is now clear that "military lives are not simply expendable".[1] As has been pointed out in this book, there is not only a tendency to rely more heavily on the application of self-defence, the ability of military forces to do so during armed conflicts may seem exaggerated. Although members of military forces are individuals with individual rights, they are also State agents or tools for the use of force, and a balance must be found between these two roles. Military forces' (over)reliance on self-defence as an exception to the requirement for ROE authorisation directly challenges the need to control the use of force by State actors equipped and trained to kill. The question of when military forces may rely on self-defence is therefore central to this balance.

This chapter is divided into two parts. The first part focuses on the legal concept of personal self-defence as found in national criminal law, and applies the common principles of criminal law self-defence to the unique circumstances military forces may find themselves in during armed conflict. What is the realistic scope of application of self-defence during armed conflict? When and how may military forces use force in self-defence? Because reliance on self-defence by military forces appears to be more extensive than what the legal concept of self-defence would be expected to permit, the third part of this chapter will examine the existence of operational concepts of self-defence and the legal authorities for using forces under these concepts. This will include an assessment of whether an 'operational self-defence' concept has evolved, in addition to examining the better-known operational concepts of 'unit self-defence', 'extended self-defence', and 'force protection'.

1 Dale Stephens, 'Rules of Engagement and the Concept of Unit Self-Defense', 45 *Naval Law Review* 126 (1998), p. 22.

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8.2 The Use of Force in Personal Self-Defence by Military Forces during Armed Conflict

8.2.1 *Clarifications*

Before examining the scope military forces have of using force in self-defence during armed conflict, some clarifications are in order.

First, this section is not intended as an argument in favour of applying self-defence in situations where LOAC applies. Admittedly, LOAC is likely to provide sufficient room to act in most cases;[2] however, in those limited circumstances where LOAC does not provide proper room to act, self-defence becomes essential.[3] If we accept the fact that soldiers also have a right to life and may use force in self-defence, it is important to define the parameters of this option.

Second, because the current focus is on the application of personal self-defence during armed conflict, the discussion will concentrate on the aspects that are most relevant to understanding the relationship between self-defence and LOAC. It is not intended to provide a complete overview of when and how self-defence may be relied upon by military forces.

Although most if not all States apply the same requirements for lawful self-defence, the interpretation and practical application of the principles vary. It

2 For instance, it has been argued that the application of personal self-defence by soldiers during armed conflict if merely theoretical because the ROE should provide for the necessary authorisations in most situations requiring the use of force. J.F.R. Boddens Hosang, 'Self-Defence in Military Operations: The Interaction between the Legal Bases for Military Self-Defence and Rules of Engagement', 47 *Military Law and Law of War Review* 25 (2008), p. 84. However, the same author emphasises elsewhere that "this does not mean that the right itself is never applicable and that there is no right to defend one's life". Hans F. R. Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence: Their Relationship to Rules of Engagement', Chapter 24 in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford, 2015) p. 499, §24.25 with commentaries. See also Jens Ohlin, 'Self-defence', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009) p. 507.

3 The following example, provided by Bagwell and Kovite, is useful in illustrating the need for self-defence, even during armed conflict: "A U.S. armor unit is involved in combat operations overseas. While returning from a mounted patrol, a tracked vehicle swerves to avoid debris on the road and accidentally crushes a young boy who was waiting on the shoulder for the column to pass. When the convoy stops to render aid, a small group of local men gathers to see what happened. One man pushes through the crowd to see the boy, who he recognizes as his son. The soldiers recognize the man as a local farmer who has always been friendly toward U.S. and coalition forces. Inconsolable, the man runs back to his house, and moments later reappears running toward the soldiers with what appears to be an Ak-47." Randall Bagwell and Molly Kovite, 'It is Not Self-Defence: Direct Participation in Hostilities Authority at the Tactical Level', 224(1) *Military Law Review* 1 (2016), p. 12.

should therefore be kept in mind that the following limitations on the use of force in self-defence may not apply to the same extent in all domestic systems. Finally, it should be emphasised that if the requirements of self-defence are not met, the use of force by military forces during an armed conflict will only be lawful when authorised by ROE and in accordance with applicable law, primarily LOAC.[4]

8.2.2 *Subjective Considerations*

The use of force in self-defence is assessed on the basis of subjective and objective standards.[5] The subjective aspect of self-defence is relevant both to how the threat is perceived and the requirement of a defensive intent. While the subjective intent may be sufficient to find that a person acted in self-defence even if the objective criteria are not met, the lack of defensive intent may prevent such a finding, even if, by coincidence, the objective criteria appear to be fulfilled.[6]

Both the necessity and proportionality requirements will be assessed in light of how an individual arguing self-defence perceived the situation. For instance, if a person truly believes that another is about to attack him and therefore defends himself, it may be accepted as self-defence even if the 'attacker' was only joking. Similarly, if a person being attacked thinks that her only way out is to shoot the attacker, the defensive act may be deemed proportionate even if the result is to kill the attacker who had no intention of killing, but only injuring the victim. However, in most jurisdictions there is an objective limit to what is acceptable; the perception must be reasonable.[7]

What is reasonable will depend on the circumstances, but it is clear that the unique training military forces are given, especially in the use of force, will affect the expectations of how they perceive and deal with threats.[8] The relevance of military forces' unique skill set is also emphasised by Boddens Hosang, who argues that "[t]he level of training and expertise that may be expected of

4 In exceptional circumstances, military forces may also be authorised to use force for law enforcement purposes.

5 See further Section 6.3.2.1.

6 Jan Arnold Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (Oxford University Press, New York, 2017) p. 198.

7 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 495, §24.21 with commentaries.

8 On the limits of adapting the reasonable man standard in accordance with the person's characteristics, see e.g. Victoria Nourse, 'Self-Defence', in Markus D. Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal law* (Oxford University Press, Oxford, 2014) pp. 617–619.

military personnel increases the level of care and diligence expected from military personnel and may impose restrictions on the applicability of the criminal law concept of personal self-defence in an operational context".[9] Military forces are in other words likely to be assessed to a higher standard than civilians with little or no experience in being attacked. This higher standard may be applied in relation to the assessment of the initial threat, including whether it is imminent and whether it is possible to avoid the use of force. It may also affect how the choice of defensive measure is perceived and whether it meets the requirement to use no more force than necessary. Because of the training and experience military forces commonly have, it will be less likely that they become so stressed or panic-stricken that they misinterpret the situation or overreact and use disproportionate force in response to the threat.[10]

Military forces do not only have unique training and experience with dealing with threats in general, they are often provided with theatre-specific training to improve situational awareness and better enable them correctly analyse a situation.[11] The classic example is the presence of weapons: the fact that someone is carrying a weapon should not be considered conclusive that the person is a threat if it is common for civilians to carry weapons for their own protection. This may affect the assessment of whether it was reasonable to mistake a harmless situation to be a threat.

Another aspect of the mind-set of the person using force in defence is his or her motive for doing so. As explained in Section 6.3.2.1, most jurisdictions require that the person acting in self-defence has a defensive intent or at least be aware of the circumstances that entitle him or her to act in self-defence.[12] As Scaliotti explains, a person who raises a defence such as self-defence "usually claims that the actus reus was indeed committed, but for a good, or at least an

9 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 495, §24.21.

10 The same consideration applies to law enforcement officers, although perhaps to a lesser extent, seen as they are less likely to have to use lethal means in their work than military forces. On the reasonable law enforcement officer, see Hessbruegge, *Human Rights and Personal Self-defense* (n 6) pp. 143–146.

11 See also Erica L. Gaston, 'Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege', 8(2) *Harvard National Security Journal* 283 (2017), p. 309, where she explains that in her experience, military forces faced with case studies on self-defence would often add information regarding contextual factors that would influence their response on the case studies.

12 Hessbruegge, *Human Rights and Personal Self-defense* (n 6) pp. 66–67. See also George P. Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press, Oxford, 1998) p. 137.

acceptable, purpose".[13] The requirement of defensive intent is arguably central to self-defence as a justification for the use of force because it eliminates the possibility that self-defence may be relied upon to justify an offensive attack that happened to coincide with the opponent's attack.[14] Military forces will, however, commonly use force not only to stop an attack but also to 'defeat the enemy', and the use of force may be pre-planned rather than merely a response to a threatening situation.

The defensive intent must be honestly held, and if there is a mistake about the existence of the attack, that mistake must be genuine.[15] Whether the mistake is also required to be reasonable, depends on the jurisdiction.[16] However, human rights law requires the prosecution of state officials who cause death due to recklessness or gross negligence.[17]

8.2.3 *The Impact of the Requirement of Unlawful Act*

The requirement of unlawful act is relevant to the application of self-defence in two respects. First, the use of force causing the self-defence situation must be unlawful. Furthermore, the use of force in response to this initial threat must also be otherwise unlawful, that is, it would be unlawful if the criteria for lawful self-defence are not met.[18] These requirements will be dealt with

13 Massimo Scaliotti, 'Defences before the international criminal court: Substantive grounds for excluding criminal responsibility – Part 1', 1 *International Criminal Law Review* 111 (2001), p. 171; Kai Ambos, 'Other grounds for excluding criminal responsibility,' in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court – A commentary*, Volume I (Oxford University Press, Oxford, 2002) p. 112.

14 Ohlin, 'Self-Defence' (n 2) p. 507.

15 Fiona Leverick, *Killing in Self-Defence* (Oxford Monographs on Criminal Law and Justice, Oxford University Press, Oxford, 2006) p. 160–161. See also Hessbruegge, *Human Rights and Personal Self-defense* (n 6) pp. 137 and 210, and Ohlin, 'Self-Defence' (n 2) p. 507.

16 The UK Criminal Justice and Immigration Act of 2008, for instance, only requires a genuine belief, even if this is not reasonable (Section 76(4), UK Criminal Justice and Immigration Act of 2008, available at https://www.legislation.gov.uk/ukpga/2008/4/section/76). For a critique of this approach, see Claire de Than and Jesse Elvin, 'Mistaken Private Defence: The Case for Reform', in Alan Reed and Michael Bohlander (eds.), *General Defences in Criminal Law* (Ashgate, 2014) pp. 133–144.

17 Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 211, citing *Öneryildiz v. Turkey* [GC] (Judgement), App. No. 48939/99, ICTY, 30 November 2004, para. 93.

18 See also Ian Henderson and Bryan Cavanagh, 'Military members claiming self-defence during armed conflict – Often misguided and unhelpful' [hereinafter: 'Claiming self-defence on the battlefield'], in Jadranka Petrovic (ed.), *Accountability for Violations of International Humanitarian Law – Essays in honour of Tom McCormack* (Routledge, London/New York, 2016) p. 77.

separately. If military forces have a legal right or authority to use force in domestic legislation, the use of force in response to an attack will normally not require any justification under criminal law. This issue will therefore be considered first.

8.2.3.1 'Lawful Acts of War' and the Authority to Use Force

Due to the nature of personal self-defence as a defence in criminal law, it is a prerequisite that the use of force in self-defence would have been unlawful had the requirements for self-defence not been met. The application of personal self-defence during armed conflict therefore depends on how the respective States have integrated the concept of 'lawful acts of war' or 'combatant immunity' into their domestic legislation. As explained above in Section 5.1.2, there are different approaches to this. It may, *inter alia*, be included in an authority to use force on behalf of the state, or it may be included as a criminal law defence, justifying the use of force.

Where the authority of military forces to use force is provided independently, soldiers will not need to rely on personal self-defence to justify the use of force as personal self-defence. The use of force is per se lawful, provided it meets applicable criteria. As one commentator has explained: where the attacker is a lawful target according to LOAC, it is unnecessary to rely on self-defence, "as the case-in-chief would lack an essential element".[19] Soldiers from countries with this approach to combatant immunity will therefore primarily need to rely on personal self-defence in situations not covered by the authority, such as when the threat is unrelated to the conflict.[20] If military forces use force beyond what is authorised by their Commander, for instance through ROE, the use of force itself does not necessarily become unlawful, thereby making self-defence relevant. Instead it will be a case of failure to comply with lawful orders, which is a separate offence. The relationship between self-defence and military orders is examined in Section 8.2.10.

If 'lawful acts of war' is a criminal law exculpatory ground that justifies the use of force, whether as a separate concept or as part of a 'public authority'

19 Hannah Tonkin, 'Defensive Force Under the Rome Statute' 6(1) *Melbourne Journal of International Law* 86 (2005), p. 93. See also Gary P. Corn, 'Should the Best Offense Ever be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force rules in the Standing Rules of Engagement', *49 Vanderbilt Journal of Transnational Law* 1 (2016), p. 28.

20 See e.g. the Norwegian Armed Forces, *Manual i krigens folkerett* (*Trans: Manual of the Law of Armed Conflict*), issued under the authority of the Chief of the Defence, [2013] [hereinafter referred to as *Norwegian LOAC Manual*], pp. 24–26.

defence, it may apply in parallel to other exculpatory criminal law defences, including personal self-defence. Though the use of force in accordance with LOAC is perceived as lawful, in States where combatant immunity is incorporated as a criminal law defence, it is strictly speaking only lawful because it is justified, as is the case with self-defence. Combatant immunity and personal self-defence will be equally applicable in the same situation, even though the result will be different due to their different requirements and purposes. The existence or application of one exculpatory ground does not negate the application of another; they are not mutually exclusive. The question will then be which is most appropriate, an issue that will be examined further in this chapter.

The approach of including combatant immunity as a personal defence rather than a State's positive right is unfortunate for several reasons. It departs from the general principle of State monopoly on the use of force, which implies that the State has the *right* to use force and that this use of force is in itself lawful. As will be further elaborated on in Section 8.3.2 when discussing the existence of an 'operational self-defence' concept, it shifts the responsibility for the use of force from the State onto the individual soldiers, who may have to prove before a court that force used during a military operation was justified and hence lawful. Finally, it also departs from the approach taken in the ECHR whereby lawful acts of war are treated as distinct from the list of exceptions to the right to life, permitted only when absolutely necessary.[21]

8.2.3.2 Illegality of Initial Threat or Attack

National rules on self-defence commonly require the initial threat or use of force that causes the self-defence situation to be unlawful.[22] The use of force is unlawful when it lacks lawful authority; it does not need to be criminal.[23] As Gill *et al.* explain, "[t]he right of self-defence is by definition limited to repelling

21 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[1950], as amended by Protocols Nos. 11 and 14, *ETS* 5, Articles 2(2) and 15(2).

22 See Section 6.3.2.1. See also Hessbruegge, *Human Rights and Personal Self-defense* (n 6) pp. 63–64; Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 497, §24.23 with commentaries.

23 The requirement that the initial attack is unlawful should not be interpreted to mean that the act must be criminal. It will remain a self-defence situation even if the perpetrator may not be held criminally responsible, for instance due to insanity or being below the age of criminal responsibility. See Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 63 and pp. 129–131, and Robert Cryer, 'Defences/Grounds for Excluding Criminal Responsibility', in Robert Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2010) p. 405.

illegal prior or impending use of force. It has no bearing upon responding to force which is legally sanctioned".[24] In a peacetime context, this means that it is not permissible to use force in self-defence against law enforcers when carrying out their official duties, provided the law enforcers are acting within the applicable law. Similarly, there is no self-defence against lawful self-defence.[25] In the context of military personnel participating in an armed conflict, the requirement of the initial threat or act being unlawful has even wider practical implications. Attacks by the enemy's military forces are lawful if directed at military objectives in accordance with LOAC, and the response to such attacks will be part of the conduct of hostilities.[26] As a result, the requirement that the threat or attack is unlawful renders personal self-defence "mostly inapplicable or irrelevant"[27] to military operations during armed conflict.

Since only combatants have a right to participate in hostilities and carry out lawful acts of war, and only State forces are combatants, the requirement that the threat or attack is unlawful will yield different results for IACs and NIACs.[28] Unlike civilians directly participating in hostilities or organised armed groups, combatants may lawfully use force against persons who are lawful targets, and

24 Terry Gill, Carl Marchand, Hans Boddens Hosang, and Paul Ducheine: 'General Report', in Stanislav Horvat and Marco Benatar (eds.), *Legal Interoperability and Ensuring Observance of the Law Applicable in Multinational Deployments* (Proceedings of the 19th International Congress, Quebec, XIX Recueil of the International Society of Military Law and Law of War, Brussels, 2013) p. 123, fn. 2.

25 This was first expressed in the context of *jus ad bellum* in the 'Ministries case' and has become a much cited maxim. *United States v. Von Weizsaecker et al,* Trials of War Criminals before the International Military Tribunal Under Control Council Law No. 10, Nuremberg, October 1946-April 1947 (Nuremberg, 1947), vol. XIV ('Ministries Case'), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-xiv.pdf, p. 329. It is considered equally applicable to personal self-defence, see e.g. Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 127.

26 See also Hessbruegge, *Human Rights and Personal Self-defense,* ibid, p. 101, especially fn. 41. However, rather than concluding that the use of defensive force is allowed by LOAC, he argues that the right to use force is derived from the soldiers' right to life and physical integrity.

27 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 497, §24.23 with commentaries. See also Timothy L.H. McCormack, 'Self-Defence in International Criminal Law', in Hirad Abtahi and Gideon Boas (eds.), *The Dynamics of International Criminal Justice: Essays in the honour of Sir Richard May* (BRILL, 2005) pp. 237–238, emphasising that "individual combatants do not need to be excused for killing enemy combatants by lawful means".

28 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) [1977], printed in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988) pp. 711ff, Article 43(2). See further Section 5.1.2.

because they themselves are lawful targets, an attack upon them by another combatant is also lawful. Although 'combatant immunity' is only included in the law governing IACs, State practice seem to be to afford the State's own forces such immunity also during and after their participation in a NIAC. By contrast, although there is no prohibition under international law for non-combatants to use force, there is no requirement to provide immunity for such acts either. Attacks by persons taking direct part in hostilities without being a combatant, either because the requirements are not met or because it is a NIAC, will therefore rarely be considered lawful under domestic law.[29] As a result, the potential for relying on self-defence is therefore greater in NIACs and in relation to persons taking a direct part in hostilities.

The application of personal self-defence by a soldier during an armed conflict will primarily be limited to two instances: where the threat or attack is unrelated to the armed conflict (i.e. lacks belligerent nexus) or the connection is not sufficiently clear;[30] and where the attack is unlawful under domestic law or international law. This will primarily apply in the case of a person using force without having the right to participate in hostilities, thereby violating domestic law. Alternatively, the use of force may violate LOAC, for instance because the attacker (combatant or non-combatant) uses unlawful means of warfare.[31]

In the first category, LOAC will not provide the legal authority to use force, and soldiers will in most cases have to rely on self-defence.[32] Examples of

29 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) [1977], printed in Schindler and Toman, *The Laws of Armed Conflicts*, ibid, pp. 775ff., encourages States, at the end of hostilities, to grant amnesty to persons who have participated in the armed conflict (Article 6.6), thereby acknowledging the State practice to sanction those persons. See also Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) p. 81.

30 See also, Michael N. Schmitt, 'Targeting and International Humanitarian Law in Afghanistan', 85 *International Law Studies* 307 (2009), p. 327.

31 Kalshoven and Fontein propose an alternative scope of application for self-defence during armed conflict: "when a soldier carries out an act which, whether or not part of the tack he was ordered to perform, appears to have resulted in a violation of the applicable law of armed conflict". Although self-defence may be applicable in a case of LOAC violation, they choose an unfortunate example. They refer to the case of a soldier who "kills an unidentified person who turns out to have been an unarmed civilian". Frits Kalshoven and Thyla Fontein, 'Some Reflections on Self-Defence as an Element in Rules of Engagement' in Mariëlle Matthee etc. (eds.), *Armed Conflict and International Law: In Search of the Human Face* (TMC Asser Press, The Hague, 2013) p. 106. This argument appears erroneous: if the unidentified person was believed to have been a lawful target, and the necessary precautions had been taken to support that determination, the fact that it later was revealed to be wrong will not make it a violation of LOAC (see Section 5.4).

32 Except for the exceptional circumstances where soldiers are given law enforcement authority and may use force under this authority. See also ICRC, *Interpretive Guidance*

situations that may fall within this category are attack by an angry farmer on soldiers marching through a field thereby destroying the farmer's crops; violence by participants in a civilian demonstration, for instance, against the soldiers' use of land or in response to a cultural or religious insult; and hostile acts by persons involved in other civilian violence, such as armed robbery or pirates interfering with a maritime mission.[33] A self-defence situation may also arise when civilians violently try to breach a naval blockade.[34] According to LOAC, if there is doubt as to whether a person is a lawful target or not, he or she should be dealt with as a protected person.[35] This category will therefore also include situations where the nexus between the threat and the armed conflict may not be sufficiently clear to allow the soldiers to conclude that the person is a lawful target. This issue is particularly relevant in relation to civilians directly participating in hostilities without uniforms or other distinctive signs that enable them to be distinguished from protected civilians. As a result, self-defence is likely to play a greater role in NIACs where the opposing forces fail to distinguish themselves from the civilian population.[36]

Second, self-defence may be relevant if the attack is related to the armed conflict, but the person carrying out the attack is not permitted to use force, and is for instance taking a direct part in hostilities. Self-defence may also be relevant if the force used is otherwise unlawful, as in the case of a combatant using unlawful means. In both cases, an authority for the use of force in response to the initial attack would be found in LOAC. However, the requirement for using force in self-defence may also be met, and where the facts leading to a loss of protection are unclear, self-defence may provide a sounder legal basis. This will be the case if the person attacking is entitled to special protection, such as medical or religious personnel, with the result that use of force against him will not be a lawful act of war unless that protection is lost.[37] If the attack

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on the Notion of Direct Participation in Hostilities under International Humanitarian Law [hereinafter *ICRC Interpretive Guidance*] (May 2009, prepared by Nils Melzer, available at https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, last accessed 24.04.2019) p. 76, and Nils Melzer, *Third Expert Meeting on the Notion of Direct Participation in Hostilities* (Geneva, 23 – 25 October 2005, Summary Report, Co-organized by the International Committee of the Red Cross and the TMC Asser Institute, available at https://www.icrc.org/eng/assets/files/other/2005-09-report-DPH-2005-icrc.pdf) pp. 11–12.

33 See also Hessbruegge, *Human Rights and Personal Self-defense* (n 6) pp. 221–223.

34 ibid, pp. 224–225.

35 The requirements for becoming a lawful target and the issue of doubt are dealt with in more detail in Sections 5.2 and 5.4.

36 See also Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 11) p. 293.

37 The protection may be lost if medical or religious personnel carry out acts harmful to the enemy, cf. Geneva Convention (I) for the Amelioration of the Condition of the Wounded

is to be carried out by a combatant using unlawful means or methods, such as using poison or poisoned weapons,[38] feigning surrender,[39] or misusing a protective emblem,[40] the attacker will still be a lawful target and the use of force authorised by LOAC may be applied; however, the requirement for using force in self-defence may also be met and could be easier to fulfil. Despite this narrow potential for applying self-defence, it should be emphasised that, in most cases, LOAC will provide the troops with a more robust and suitable legal room of manoeuvre. As a result, unless the option of relying on LOAC is restricted by ROE, self-defence will be superfluous.

A consequence of the requirement of unlawful attack is that the soldier must make an assessment of the legality of the act in order to know which law to apply: self-defence or LOAC. This is problematic because it is difficult to do under the circumstances and requires the soldiers to have extensive legal knowledge. There is therefore a need for clear instructions for how to deal with these issues, in ROE or other places, especially during operations in which the soldiers are expected to face situations where LOAC will not provide sufficient authorities for dealing with such threats.

8.2.4 *When May Force Be Used? The Limitations Imposed by the Principles of Necessity and Imminence*

All legal systems require that the use of force in self-defence be necessary and that the threat be imminent. The principle of necessity requires the use of forceful means to defend against the threat or attack to be necessary, and that it be necessary to choose the particular means used to defend.[41] As a means of ensuring that the use of force is 'genuinely necessary', some systems also

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and Sick in Armed Forces in the Field (GC I) [1949] printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 28) pp. 459ff., Article 21, and AP II (n 29) Article 11(2). See also Chapter 5, footnote 79.

38 U.S., 'Instructions for the Government of Armies of the United States in the Field' (Lieber Code) [1863], printed in ibid pp. 3ff, Article 70, and Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its Annex: Regulations Respecting the Laws and Customs of War on Land ('1907 Hague Regulations'), printed in ibid, 1988, pp.66ff, Article 23(a). See also Rome Statute of the International Criminal Court [hereinafter: *Rome Statute*], opened for signature 17 July 1998, 2187 *UNTS* 3 (entered into force 1 July 2002), Article 8(2)(b)(xvii).

39 According to AP I (n 28) Article 37, this would be perfidy if the intent is to kill, injure or capture an adversary.

40 AP I, ibid, Article 28. See also McCormack, 'Self-Defence in International Criminal Law' (n 27) p. 238.

41 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 491, §24.16 with commentaries.

emphasise that the threat must be imminent.[42] Furthermore, if the threat or attack has passed, the need to defend is no longer present. Although some argue that the question of the degree or amount of force used is also an aspect of necessity in that it should be no more than necessary,[43] this question will be dealt with as an aspect of proportionality.

8.2.4.1 Creating the Necessity: to Incite the Self-Defence Situation

If the person who is attacked caused the self-defence situation to arise, this can undermine an individual's ability to rely on self-defence as a justification for the use of force. The role of the attacked person may be divided into two categories: active incitement (provocation) and passive incitement (to knowingly or deliberately place oneself in harm's way).[44] The issue is sometimes referred to as *dolus* and *culpa in causa.*[45]

Prior provocation of the defending party, to the extent that the use of force would not have been necessary had it not been for the defending party's behaviour, will in many cases negate the ability to justify that the use of force was in self-defence.[46] As Eser explains, self-defence may not be available if the defendant "provoked the attack for the purpose of getting a chance to counteract" since the defendant would be "predominantly motivated by other that [sic]

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42 Leverick, *Killing in Self-Defence* (n 15) pp. 87–89. See also Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare* (2013, European Parliament, EXPO/B/DROI/2012/12) p. 31. For an example of a different approach, see e.g. Nourse, 'Self-Defence' (n 8) pp. 611 – 614, arguing that necessity should not be viewed as a separate element of self-defence, but rather as an aspect of imminence and proportionality.

43 See e.g. Amnesty International, *Guidelines for implementation of the UN basic principles on the use of force and firearms by law enforcement officials* (August 2015, available at https://www.amnestyusa.org/files/amnesty_international_guidelines_on_use_of_force-2.pdf) pp. 18–19. See also Hessbruegge, *Human Rights and Personal Self-defense* (n 6) pp. 146–148.

44 See e.g. American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes* (Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962, The Institute, Philadelphia, 1985) Section 3.04(2)(b)(i), and United States Manual for Courts-Martial (MCM), 2016 Edition, available at https://jsc.defense.gov/Portals/99/Documents/MCM2016.pdf?ver=2016-12-08-181411-957, RCM Rule 916(e)(4). See also Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) pp. 492–483, §§24.17–18 with commentaries.

45 See e.g. Elies Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, Oxford, 2012) pp. 238–239, and Gill *et al.,* 'General Report' (n 24) p. 164.

46 Nourse, 'Self-Defence' (n 8) pp. 611–612 and Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 492, §24.17 with commentaries.

defensive ends".[47] The challenge for military forces is that much of their activity is intended to provoke or must be expected to provoke. In fact, as explained in Chapter 2, NATO ROE regulate both the use of force and measures that may be construed as provocative. Whether the provocation is of a kind that should negate the defender's ability to justify the use of force by reliance on personal self-defence will be context-dependent. This is emphasised by Boddens Hosang, who explains that the assessment will require "extensive interpretation and situational awareness on the part of the court in trials involving military personnel invoking the right of self-defence".[48] It has been argued, however, that courts will only deny an application of self-defence where "a person *intentionally* put himself in a state in which he could claim self-defence".[49] Where the need to use force to defend arises as a result of such provocation, either due to application of provocative ROE or otherwise, soldiers may not be able to rely on self-defence to justify their use of force.[50] The ability to use force in such situations will primarily be determined by LOAC. If LOAC does not permit soldiers to use force in the circumstances, they may rely on self-defence if the attack is disproportionate to the provocation.

The second form of incitement, passive incitement, is described by Boddens Hosang as "knowingly and willingly seeking out specific situations or deliberately placing oneself in harm's way in order that a need for the use of force in self-defence will ultimately arise".[51] He concludes that because many ordinary tasks of military forces during armed conflict involve placing oneself in harm's way or seeking out situations of danger, it will be difficult to rely on personal self-defence to use force in such situations.[52] However, a distinction must be drawn between passive incitements and continuing a behaviour or continue to move in a certain direction despite knowing that it involves a risk of attack where the potential incitement is not intended. The freedom of movement

47 Albin Eser, 'Article 31. Grounds for excluding criminal responsibility', in Otto Triffterer, *Comments on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article* (2nd ed, Beck/Hart, München, 2008) p. 883, fn. 128. The requirement of defensive intent is dealt with further above, in Sections 6.3.2.1.1 and 8.2.2.

48 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 492, §24.17 with commentaries.

49 Sliedregt, *Individual Criminal Responsibility in International Law* (n 45) p. 240, citing Gur-Arye, Miriam, *Actio libera in causa in criminal law* (Hebrew University, Jerusalem, 1984) pp. 82–91.

50 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 492, §24.17 with commentaries.

51 ibid, pp. 492–493, §24.18 with commentaries.

52 ibid.

of the person who is at risk of attack must also be taken into consideration and be protected. This was emphasised for instance in the American case of *State v. Bristol* (1938): "the question [is] whether or not the law can afford to encourage bullies to stalk about the land and terrorize citizens by their mere threats".[53]

In the context of military operations, this is particularly important in relation to military forces' interaction with the civilian population. Unless civilians directly participate in hostilities, it is prohibited to attack them. However, threats or attacks may occur that do not have the necessary belligerent nexus to render the civilian in question a lawful target. A merchant may for instance be angry because the military forces accidentally damaged his market stall when driving past. Where the risk of incitement is known, but not intended, it should not negate the ability to rely on self-defence should the need actually arise. As mentioned above, a case of *culpa in causa* will primarily be found where the incitement is intentional. Where the person attacking military forces is not a lawful target, soldiers may need to rely on self-defence to justify their use of force to defend themselves, and the fact that they somehow incited the attack does not necessary preclude that option. By way of conclusion, soldiers are unlikely to be able to rely on self-defence if they actively provoked the self-defence situation or intended to incite it. However, they may still be able to resort to self-defence where the risk was known but coincidental to their operations. This is likely to be particularly relevant where the source of the threat is a protected person.

As will be further discussed in Section 8.3.2, a trend appears to have developed whereby forces provoke or incite an attack that enables them to respond in self-defence because they lack the ROE to carry out an attack. According to Husby, for example, "some patrol missions in Afghanistan have been designed to draw out adversaries, thereby triggering TIC and self-defense authorities under the ROE".[54] Corn refers to this "improper" practice as "baited self-defense".[55] The use of force outside the ROE undermines the Commander's decision not to authorise such use of force. The severity of such practice will

53 (1938) 53 Wyo. 304, cited in A. J. Ashworth, 'Self-defence and the right to life', 34(2) *Cambridge Law Journal* 282 (November 1975), p. 295.

54 Eric C. Husby, 'A Balancing act: In Pursuit of Proportionality in Self-defense for On-Scene Commanders', *Army Law* 11 (May 2012), p. 11.

55 Corn, 'Public Authority to Use Force in Military Operations' (n 19) p. 11. See also Jonathan Owen, 'British Soldiers Resort to 'Baiting' Taliban to Beat Rules of Engagement', *The Independent* (27 August 2012, https://www.independent.co.uk/news/uk/home-news/british-soldiers-resort-to-baiting-taliban-to-beat-rules-of-engagement-8082165.html, last accessed 24.04.2019).

depend on mission. For instance, a distinction may be drawn between operations designed to defeat as many members of the opposing forces as possible, and operations in which the mission is to enhance governance and foster a safe and secure environment. In the latter case, 'trailing' for TIC without the ROE to do so or using force in response to the threat it creates is likely to undermine the mission. Additionally, it is a misuse of self-defence that is unlikely to be accepted.

8.2.4.2 Duty to Retreat? The Use of Lethal Force as a Last Resort

The approach to whether retreat is required differs between legislation and has been subject to considerable change within the respective jurisdictions.[56] For instance, the U.S. Supreme Court announced in 1895 that true men are not obliged to flee,[57] while the Model Penal Code requires the victim to avoid the necessity of using force by retreating, when this may be done with complete safety.[58] The question of retreat is one of the more controversial aspects of self-defence law.[59] On the one hand, it may be argued that the culpable aggressor has forfeited his/her right to life, and that the victim is entitled to stand his/her ground.[60] Furthermore, the emphasis on retreat has been criticised in the context of attacks in the home or work-place (the so-called 'castle doctrine'). Even where there is such a duty, the castle-doctrine is generally accepted as an exception.[61] On the other hand, the question is influenced by the development of IHRL. For parties to the ECHR, for instance, the use of lethal force in self-defence must be "absolutely necessary".[62] Ashworth has noted that the human

56 See e.g. Leverick, *Killing in Self-Defence* (n 15) pp. 69–76. She sets out four approaches to retreat: an absolute retreat rule, a strong retreat rule, a weak retreat rule and no retreat rule. See also Nourse, 'Self-Defence' (n 8) pp. 614–615.

57 *Beard v. the U.S.*, 158 U.S. 550 (1895), p. 561.

58 *U.S. Model Penal Code* (n 44) Section 3.04(2)(b)(ii), with the exceptions of retreat not being required from the victim's dwelling or work, or by police officers (or equivalent) performing their duty (Subsections 1 and 2).

59 Nourse, 'Self-Defence' (n 8) p. 614 and pp. 619–621.

60 Leverick, *Killing in Self-Defence* (n 15) pp. 76 and 79, citing the German Criminal Code Section 32 as an example.

61 See e.g. Steven P. Aggergaard, 'Criminal Law–Retreat from Reason: How Minnesota's New No-Retreat Rule Confuses the Law and Cries for Alteration–State v. Glowacki', 29(2) *William Mitchell Law Review* 657 (2002), Article 5, especially pp. 664–666; Criminal Justice and Immigration Act of 2008 (n 16) Section 76 as amended by the Crime and Courts Act 2013 Section 43 (UK); David Ormerod *et al., Smith and Hogan's Criminal Law* (University Press, Oxford, 2015) pp. 435–437; Leverick, *Killing in Self-Defence* (n 15) pp. 83–85; and Ashworth, 'Self-defence and the right to life' (n 53) p. 294.

62 ECHR (n 21) Article 2(2).

rights approach to self-defence entails the maximum protection of all citizens, rather than "the law abiding citizen's feelings of honour and self-respect at the expense of the criminal's right to life or physical security".[63]

It appears that the general trend is to consider retreat as an aspect of the necessity analysis.[64] Force may only be used if necessary; if reasonably possible to retreat, this would negate the necessity of using force.[65] The focus on the culpability of the aggressor and the view that the aggressor forfeits his or her right to life by causing the self-defence situation is less common. At the same time, the aggressor's culpability may still be relevant to the question of retreat. Where it is known that the aggressor lacks culpability, for example when he or she is a child, an increased emphasis on the use of force only as a last resort is to be expected, if not for legal reasons then certainly for moral ones.

The application of this rule to military forces as well as civilians was emphasised by the Judge Advocate acting in the trial of *Willi Tessmann and others* before a British Military Court in Hamburg, 1947: "The law permits a man to save his own life by despatching that of another, but it must be in the last resort. He is expected to retreat to the uttermost before turning and killing his assailant; and, of course, such considerations as the nature of the weapon in the hands of the accused, the question whether the assailant had any weapon and so forth, have to be considered. In other words, was it a last resort? Had he retreated to the uttermost before ending the life of another human being?".[66] Similarly, in the U.S. SROE, it is stressed that when time and circumstances permit, the attacker should be warned and given the opportunity to withdraw or cease the

63 Ashworth, 'Self-defence and the right to life' (n 53) p. 290. See also Leverick, *Killing in Self-Defence* (n 15) p. 76.

64 See e.g. Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) p. 92; Tonkin, 'Defensive Force Under the Rome Statute' (n 19) p. 103; and Ashworth, 'Self-defence and the right to life' (n 53) pp. 289–290 and 293–294. For a detailed discussion of the different approaches taken by U.S. States to retreat in the context of self-defence, see Aggergaard, 'Criminal Law–Retreat from Reason' (n 61) pp. 659–673. By contrast, Geert-Jan Alexander Knoops, *Defenses in Contemporary International Criminal Law* (Martinus Nijhoff Publishers, Leiden, 2008) pp. 69–71, claims that American law endorses the no retreat rule.

65 Note, however, that the Criminal Justice and Immigration Act of 2008 (n 16) Section 76(6A) deals with retreat as an aspect of proportionality, stating that rather than retreat being a duty, it is a factor to be taken into account when deciding whether the degree of force was reasonable in the circumstances.

66 *Willi Tessmann and others*, British Military Court in Hamburg, 1–24 Sept. 1947, cited Law Reports of Trials of War Criminals, Vol. XV (published for the United Nations War Crimes Commission by His Majesty's Stationary Office, Digest of Laws and Cases, London, 1949) p. 177.

threatening actions.[67] These requirements clearly do not fit well with military operations, or as Boddens Hosang observes: "It is self-evident that this doctrine has no real use in making personal self-defence any more readily suitable as a basis for the use of force in the context of achieving military objectives".[68] There is no such duty to retreat or even deescalate the situation in LOAC, although those who do not participate in the hostilities, such as civilians and persons hors de combat, are entitled to protection against the dangers arising from military operations.[69]

8.2.4.3 Imminence

As explained above, imminence may be viewed as an aspect of necessity, serveing the function of ensuring that the use of force is truly necessary. The criterion that the threat of attack be imminent ensures that defensive force is not used too soon, before it is strictly necessary.[70] As explained in the context of *jus ad bellum* self-defence,[71] imminence should be distinguished from immediacy, which requires that the response not be too late, and thereby amount to revenge rather than defence.[72]

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67 U.S. Chairman of the Joint Chiefs of Staff (CJCS), *Standing Rules of Engagement* (*SROE*)/*Standing rules for the use of force* (*SRUF*) *for U.S. Forces* [hereinafter: *SROE/SRUF*] (CJCS Instruction 3121.01B, 13 June 2005) p. A-3. In the U.S. Code of Military Justice, there is no requirement of retreat from a place that the accused has a right to be, but it may according to the Military Judges Benchbook be a factor in deciding whether or not the accused acted in self-defence. See U.S. Department of Army Pamphlet 27–9: *Military Judges' Benchbook,* Headquarters, Department of the Army, Washington, DC, 10 September 2014, p. 977. Note, however, that the SROE also stress that self-defence "includes the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent" (U.S. CJCS, *SROE/SRUF,* ibid, p. A-4). To some extent, these are conflicting guidelines, especially in the context of threats that have not yet amounted to an attack (U.S. hostile intent).

68 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 493, §24.19, fn. 46. See also Corn, 'Public Authority to Use Force in Military Operations' (n 19) p. 41, and Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 11) pp. 314–315.

69 See e.g. AP I (n 28) Articles 48 and 51(1) (civilians), and Articles 41 and 42 (hors de combat). By contrast, the duties of law enforcement officers is to protect civilians from other civilians, and they will therefore only have a duty to retreat in exceptional circumstances. Hessbruegge, *Human Rights and Personal Self-defense* (n 6) pp.148–150.

70 See also Fletcher, *Basic Concepts of Criminal Law* (n 12) p. 134.

71 See Section 6.2.3.

72 Not all adhere to this distinction. See e.g. Nourse, 'Self-Defence' (n 8) pp. 613–614. Note that in the U.S. Model Penal Code, the imminence requirement is substituted for a test of immediately necessary. See Fletcher, *Basic Concepts of Criminal Law* (n 12) p. 134. The U.S. SROE (CJCS, *SROE/SRUF* (n 67) p. A-3), on the other hand, state that imminent "does

The imminence requirement raises particular challenges in relation to threats that are inevitable but not imminent, and where the victim will struggle to defend him/herself when the attack occurs. Imminence as an independent criterion, as opposed to an aspect of necessity, has therefore been criticised, especially in the context of domestic violence.[73] In the context of military forces participating in an armed conflict, if military forces were to rely on self-defence, the requirement that they only use force when the threat is imminent would clearly hamper their ability to pre-plan operations and to carry out offensive operations. In many cases it is desirable and even necessary to deal with known threats before they become imminent. This is probably why, according to Bagwell and Kovite, "[t]he most constraining requirement, and perhaps the most systematically abused, is that U.S. soldiers may exercise self-defense only when a threat is imminent".[74]

8.2.5 *Limitations on the Defensive Act: Proportionality*

8.2.5.1 Introduction

When the initial test of necessity has been met, the force used in defence must meet the further test of proportionality; it must not be disproportionate to its defensive purpose. Proportionality in the context of self-defence concerns in other words the relationship between the threat and the response, and must be distinguished from the separate concept, identically coined, in LOAC. As explained in Section 5.1.1, proportionality in LOAC deals with the relationship between the concrete and direct military advantage anticipated and expected (unavoidable) harm to civilians and civilian objects. The question relating to the use of force in self-defence and harm to innocent bystanders is, strictly

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not necessarily mean immediate or instantaneous", but it fails to provide further clarification or explanation for its departure from the U.S. RCM requirement of the threat being "about to" occur, which in the Military Judges' Benchbook is interpreted as meaning immediate (see e.g. U.S. Manual for Courts-Martial (n 44) RCM 916(e)(1)(A), p. II-111, and *U.S. Military Judges' Benchbook* (n 67) p. 965). For further discussion on the SROE requirement of imminent, see references in Chapter 6, footnote 369.

73 See e.g. Leverick, *Killing in Self-Defence* (n 15) pp. 89–108. For a defence of the imminence criteria, see Kimberly Kessler Ferzan, 'Defending imminence: from battered women to Iraq', 46 *Arizona Law Review* 213 (2004).

74 Bagwell and Kovite, 'It is not self-defence' (n 3) p. 13. Note that the statement in the U.S. SROE that immediacy does not need to mean imminent has been met with much criticism. See e.g. John J. Merriam, 'Natural Law and Self-Defense', 206 *Military Law Review* 43 (2010), pp. 76–87, and Eric D. Montalvo, 'When Did Imminent Stop Meaning Immediate? *Jus in bello* Hostile Intent, Imminence and Self-Defense in Counterinsurgency', *Army Lawyer,* August 2013, p. 24, pp. 24–34.

speaking, not a question of the relationship between the threat and the response, and is therefore dealt with separately below (Section 8.2.7).[75]

8.2.5.2 Escalation of Force Procedures

One tool for ensuring that the force used is no more than necessary is the so-called escalation of force procedures (EoF).[76] A graduated response enables the person attacked to a certain degree to tailor the response to the threat, thereby ensuring that it is not excessive. Examples of means that may be employed include oral warning, non-lethal force, warning shots,[77] and disabling fire, before the final option, lethal use of force.[78] The defender is only expected to take those measures that are reasonable, that is, the measure should be expected to effectively counter the attack and should not endanger the defender.[79] The ability to adapt the response to the threat will depend on several factors, in particular the means available and, perhaps more importantly, training. This is an area where military personnel may be assessed differently than ordinary civilians, even when the force is used in personal self-defence. A person with no training in the use of force or in handling attacks is more likely to panic than those with such training. Furthermore, the training military personnel are given in handling such threats will provide them with knowledge of, and experience in, different ways of dealing with a threat. They should therefore have more options to exploit before having to resort to lethal force.[80] Finally, they may be trained in de-escalatory techniques, thereby reducing the need to use defensive force, although this is more likely part of the training of law enforcement officials than military personnel.[81]

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75 Hessbruegge, however, deals with it under the heading of proportionality, though emphasizes that it is a separate proportionality analysis. Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 180.

76 See also Section 3.5.3.3 on the use of escalation of force procedures to identify hostile act and hostile intent.

77 The use of warning shots by law enforcement agents is limited in many States due to the risk to innocent bystanders and because it may be misinterpreted as an attack. See e.g. Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 159.

78 An example of an EoF is "shout, show, shove, shoot". Bagwell and Kovite, 'It is not self-defence' (n 3) p. 17.

79 See e.g. Douglas Guilfoyle, *International Criminal Law* (Oxford University Press, Oxford, 2016) pp. 371–372, and Hessbruegge, *Human Rights and Personal Self-defense* (n 6) pp. 154–155 (in the context of law enforcement where such graduated response is formally required, but still only if it is expected to counter the attack).

80 See also Section 8.2.2 concerning how military training may affect what is considered reasonable self-defence.

81 Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 167.

Although EoF procedures are clearly a useful tool for identifying the appropriate and proportionate response to a threat, it is important that they do not replace the good judgement of soldiers. The decision to use lethal force should not merely be based on the failure of person perceived as a threat to comply with certain procedures. As one commentator has explained, there is a risk that such procedures are "sanctioning violence based solely on a civilian's (or insurgent's) unlucky decision to cross an arbitrary line in the sand" such as "distance from the potential threat and the potential threat's response to verbal, visual, and other warnings".[82] The application of EoF during armed conflict has also raised the concern that the soldiers may become too hesitant, thereby providing ineffective protection to their own forces or to civilians.

8.2.5.3 The Least Destructive or Damaging Choice of Defence

The proportionality requirement in self-defence is sometimes expressed as "minimum use of force", which is further explained as requiring the response to be 'no more than necessary'.[83] The distinction between proportionality and necessity is complicated, something which is evidenced by how commentators characterise the choice of means of methods: as an issue of necessity; [84] both proportionality and necessity,[85] or as an aspect of proportionality.[86] Provided that all aspects are taken into consideration in the examination of legality of the use of force, what matters less is under which principle an issue is considered to fall. The current approach is to consider the choice of means and methods as related to the principle of proportionality. If a less destructive or

82 Aaron Pennekamp, 'Standards of Engagement: Rethinking Rules of Engagement to More Effectively Fight Counterinsurgency Campaigns', 101 *The Georgetown Law Journal* 1619 (2013), p. 1635. The argument is made in the context of military operations involving participation in armed conflict where EoF procedures have been included to identify threats and persons directly participating in hostilities, however, the concern is equally applicable to self-defence situations.

83 See e.g. Bagwell and Kovite, 'It is not self-defence' (n 3) p. 16.

84 The question of how self-defence is carried out when there is a need to use force is also argued to be an aspect of necessity. See for instance Fletcher, who argues that "necessity speaks to the question whether some less costly means of defense, such as merely showing the gun or firing a warning shot into the air, might be sufficient to ward off the attack. The requirement of proportionality addresses the ratio of interest threatened both on the side of the aggressor and of the defender." Fletcher, *Basic Concepts of Criminal Law* (n 12) p. 135. Hessbruegge, *Human Rights and Personal Self-defense* (n 6) pp. 65–66, views the requirement of least harmful means as an aspect of necessity.

85 See e.g. Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) pp. 490–491, §§24.15–16 with commentaries.

86 See e.g. McCormack, 'Self-Defence in International Criminal Law' (n 27) p. 238.

damaging option of dealing with a threat is available, then the option chosen is excessive and hence unlawful. The same approach is taken by the ICTY Trial Chamber in the Gotovina case: "The Trial Chamber further considered the perpetrators' conduct, even if an immediate illegitimate attack could be assumed, to be disproportionate, where other ways of thwarting any possible danger instead of firing lethal shots were available".[87] This does not mean that there is a requirement of equality of arms, so that firearms could only be used in response to firearms, for instance; it only means that it is not disproportionate to the threat.

The choice of means or methods will be assessed on the basis of the reasonable means and methods available at the time. In many States be prohibited to carry lethal weapons during peacetime. By contrast, military forces are likely to have at least one if not more lethal means at their disposal, and, depending on the mission, few if any non-lethal means. As a result, the level of force in response to a threat may be higher than during most peacetime situations.[88] This is reasonable considering that military forces are primarily expected to use force in accordance with LOAC. However, if it is expected that they will need to rely on self-defence as a basis for the use of force, they should be provided the adequate equipment to apply graduated force. Failure to do so may result in State responsibility for human rights violations in relation to deaths resulting from the lack of adequate equipment.[89] As emphasised by Hessbruegge: "[i]f state agents have to defend themselves with lethal force because the state failed to provide them with less lethal weapons or protective equipment, such force is not absolutely necessary and hence unlawful". [90]

The requirement of not using more force than necessary will also affect how the available equipment is used. In relation to escalation of force procedures as mentioned above, a firearm may be used to fire warning shots or disabling fire, in addition to lethal force. It may also be an option to shoot to wound rather than to aim to kill, depending on the circumstances and whether shoot to wound is permitted by national rules.[91] Finally, proportionality will affect

87 *Prosecutor v. Gotovina and others* (Judgement Vol II), Case no. IT-06-90-T, ICTY, Trial Chamber, 15 April 2011, §1730.

88 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 490, §24.15 with commentaries.

89 See e.g. *Gülec v. Turkey* (Judgement), App. No. 21593/93 (ECtHR, 27 July 1998), para. 71.

90 Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 169.

91 For a summary of the debate on 'shoot to wound' versus 'shoot to kill', see e.g., Jonathan P. Edwards, 'The Law and Rules of Engagement against Suicide Attack', in Center of Excellence Defence Against Terrorism (ed), *Suicide as a Weapon* (Amsterdam, IOS Press, 2007) pp. 144–145.

the amount of force used. As an example, although it may be proportionate to shoot back at someone having taken a shot at a soldier, even if he missed, it is likely to be disproportionate if the whole unit fires hundreds of rounds each in return.[92] Similarly, it may be sufficient to set automatic weapons to single shot mode rather than constant fire mode.[93]

8.2.5.4 The Limits of Proportionality

There are differing approaches to what exactly should be taken into account as part of the proportionality analysis. For instance, while the approach taken here is that it concerns the degree of force used to avert the danger,[94] others also include an assessment of the nature and duration of the force.[95] Hessbruegge sets out four elements that have to be factored in: "the intensity and the extent of the harm inflicted versus that defended against; the probability of harm if the defensive measure is taken or not taken; the number of victims versus the number of aggressors harmed; and the culpability or non-culpability of the aggressor".[96] The question of probability of harm is arguably an aspect of necessity, and is dealt with above. Similarly, the question of whether the aggressor is culpable or not is arguably not a question of proportionality, but whether the person responsible may be held criminally responsible for the act.[97] Although moral arguments may be made for limiting the degree of force used in situations where it is known that the person is for instance a child or mentally ill, the threat necessitating the use of a certain degree of force in self-defence remains the same. However, as mentioned above, the culpability of the aggressor, or at least known non-culpability, may be a factor to consider under necessity and whether all non-forceful or less forceful means were sufficiently exploited.

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92 Gaston provides the following example of disproportionate use of force in self-defence, taken from an interview with a U.S. military adviser: "We're on patrol and get a pop shot at us. No one's hit, but 30 people are suddenly on line and they fire like 1,000 rounds each". She also suggests that the so-called '*Haditha case*' may be another example of disproportionate force. Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 11) p. 323.

93 The use of automatic constant fire in the context of law enforcement was hotly debated at the Sanremo Round Table 'Weapons and international rule of law' after the presentation by Laurent Gisel (ICRC) on the panel "Case study: Law enforcement by military personnel", on Friday 9th September 2016. See also Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 158.

94 See also Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) p. 89.

95 See e.g. U.S. CJCS, *SROE/SRUF* (n 67) p. A-5.

96 Hessbruegge, *Human Rights and Personal Self-defense* (n 6) pp. 170–171, bullets and reference omitted.

97 This issue is briefly covered in 8.2.2 on the requirement of an unlawful attack.

The requirement of proportionality for the use of force in self-defence indicates that excessive use of force will be excluded from legitimate self-defence. The consequences of disproportionate use of force are dealt with differently in different jurisdictions. If self-defence is rejected, the initial attack may function as a partial defence, that is, as a ground for reduction of sentence or reduction of the charge from for instance murder to manslaughter.[98] The effect of excessive self-defence depends on the cause of the disproportionate use of force.

There are three likely causes of excessive self-defence: aggression; a mistaken belief; and fear and/or panic. If the use of force in self-defence is excessive because the purpose is not (or is no longer) to defend against the unlawful attack, it lacks the defensive or legitimate purpose,[99] and is therefore unjustified. By contrast, if the force is excessive due to a mistake made as to the degree or amount of force necessary to repel the attack, the use of force will be justified provided the mistake was reasonable.[100] Finally, a number of countries permit a person acting in self-defence to use excessive force if this is due to fear or panic. For instance, as mentioned in Chapter 6, the German Criminal Code states that "A person who exceeds the limits of self-defence out of confusion, fear or terror shall not be held criminally liable".[101] The inclusion of fear and panic as justification for excessive use of force has been criticised as being contrary to human rights obligations, especially in the context of State officials using force in self-defence.[102]

As discussed in Section 8.2.2, as a result of their training and experience, military forces are expected not to let fear or panic cause them to use excessive force. As Hessbruegge argues, they "must have the appropriate moral, psychological, and physical qualities for the effective exercise of their functions. They should therefore be particularly resistant to letting fear determine their actions".[103] He goes on to assert that in order for the fear to be justified, the situation must be so threatening that a reasonable officer would have responded

98 Scaliotti, 'Defences before the international criminal court' (n 13) p. 161, and Leverick, *Killing in Self-Defence* (n 15) p. 169.

99 On the requirement of defensive purpose, see Sections 6.3.2.1.1 and 8.2.2.

100 Leverick, *Killing in Self-Defence* (n 15) p. 169.

101 Section 33 of the German Criminal Code (translated by Prof. Dr. Michael Bohlander, 2016 juris GmbH, Saarbrücken, available at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html, last accessed 24.04.2019).

102 See e.g. *Aydan v. Turkey* (Judgement), App. No. 16281/10 (ECtHR, 12 March 2013), para. 101. See also Hessbruegge, *Human Rights and Personal Self-defense* (n 6) pp. 211–212.

103 Hessbruegge, *Human Rights and Personal Self-defense,* ibid, p. 212, making reference to *Aydan v. Turkey*, ibid, para. 99.

in a similar manner. This seems a sound conclusion; military forces may only be able to rely on self-defence to justify excessive use of force caused by fear or panic in situations where other military personnel would also be expected to react disproportionately. However, the extensive training military forces are given in handling extreme situations of danger, beyond the training generally given to law enforcement officers, for instance, will in practice leave a very limited scope for excessive self-defence being justified.

8.2.6 *The Use of Otherwise Unlawful Means and Methods in Self-Defence*

The extent to which otherwise unlawful means and methods may be used in self-defence is particularly pertinent to situations of armed conflict because LOAC contains both prohibitions of and limitations on means and methods. The violations of some of these rules are considered grave breaches of LOAC and may therefore amount to a war crime.[104] As explained above (Section 6.3.1.2), it is possible to plead self-defence as a defence to a war crimes indictment, provided it meets the requirements set out in Article 31(c). States party to the Rome Statute of the ICC will therefore be expected to make their self-defence rules applicable to war crimes cases.[105]

Certain means, such as torture and inhuman treatment,[106] are absolutely prohibited and will therefore not be available even in self-defence because they are per se disproportionate. As Hessbruegge points out, certain means are "categorically outlawed under international law and thus per se disproportionate".[107] Other means are either completely prohibited during armed conflict, or their use in a certain manner is prohibited. This distinction appears relevant also with regard to the question of whether they may be used in self-defence. If a particular weapon or ammunition is not lawful to use in any circumstances during the operation to which the military forces are deployed, it should not be present and available to the troops. For example, for States that have ratified the Ottawa Convention, anti-personnel mines should not be an available

104 See e.g. Rome Statute (n 38) Article 8(2)(b) xvii-xx.

105 Curiously, Albin Eser only consider the application of *jus ad bellum* self-defence in his chapter on defences in war crime trials. Although state actors may to some extent rely on Article 51 of the UN Charter, the more relevant form of self-defence in an ongoing operation involving participation in an armed conflict is personal self-defence. Albin Eser, '"Defences" in War Crime Trials', in Yoram Dinstein and Mala Tabory (eds.), *War Crimes in International Law* (Martinus Nijhoff Publishers, The Hague, 1996) p. 263. On the importance of upholding the separation between *jus ad bellum* and *jus in bello*, see Section 4.3.

106 Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 189.

107 See also ibid, p. 314.

option, even in self-defence.[108] Other examples of prohibited means include chemical weapons,[109] biological weapons,[110] poison or poisoned weapons,[111] and for certain States, certain cluster munitions.[112]

If prohibited means are deployed in order to be available in cases of self-defence, the fact that they were only used in self-defence is unlikely to be accepted as a justification for using unlawful means if the person using it knew it was unlawful.[113] The availability of such unlawful means would not be reasonable, and the deliberate attempt to circumvent the prohibition would likely undermine the requirement of defensive intent. The only potential exception is in relation to means that are not absolutely prohibited, but prohibited for certain States or certain circumstances. If a partner State has not ratified the same prohibition and have therefore deployed them, the means may become available even for military forces from States subject to the prohibition. In such cases, the question will be whether its use was proportionate and would be perceived as such by a reasonable person in a similar position.

The same test will have to be applied in the context of means that may only be used for certain purposes. Examples of such means include: white phosphor intended for illumination;[114] exploding ammunition under 400 grams such as certain multipurpose ammunitions intended for anti-vehicle use;[115] and tear gas deployed for riot control purposes.[116] Would a reasonable person

108 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction [18 September 1997] in Schindler and Toman, *The Laws of Armed Conflicts* (n 28) pp. 285ff.

109 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction [13 January 1993] in ibid, pp. 239ff.

110 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction [10 April 1972] in ibid, pp. 135ff.

111 Lieber Code (n 38) Article 70, and 1907 Hague Regulations (n 38) Article 23(a). See also Rome Statute (n 38) Article 8(2)(b)(xvii).

112 Convention on Cluster Munitions [30 May 2008] (available at https://treaties.un.org/doc/Publication/CTC/26-6.pdf, last accessed 24.04.2019).

113 In any case, the State may be held responsible for deaths resulting from the use of an inappropriate weapon. See *Gülec v. Turkey* (n 89) para. 71.

114 CCW Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, Geneva [10 October 1980] U.N. Doc. A/CONF. 95/15, 27.10.1980, Article 1(1)(i).

115 St. Petersburg Declaration (n 20) Although generally considered to reflect customary law, the U.S. have objected this and do not consider herself bound by the prohibition. See U.S. Department of Defense (DoD), *Law of War Manual* (December 2016 update, Office of the General Counsel of the Department of Defense, Washington, 2016, available at https://www.hsdl.org/?abstract&did=797480, last accessed 24.04.2019) pp. 346–347.

116 Article I(5) of the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction [13 January 1993] in

in a similar situation consider it proportionate to use such means to defend if the use is prohibited by LOAC? While the assessment will depend on the facts and how the defender perceived the situation, certain weapons are so damaging that they are unlikely to be accepted even in self-defence.

The use of incendiary weapons against combatants could have been expected to fall into this category. However, according to the ICRC Customary International Law Study, the anti-personnel use of incendiary weapons is only prohibited if it is not feasible to use a less harmful weapon to render a person *hors de combat*.[117] Presumably this also means that there is a potential for the use of incendiary weapons to be permitted in self-defence. The use of exploding ammunition against persons may also be accepted in self-defence, especially if there is insufficient time to reload reasonably available weapons with alternative ammunition. The use of tear gas is trickier to assess because, when it is available, it is likely to be the least harmful alternative and therefore proportionate. At the same time, the prohibition against its use as a method of warfare has become so entrenched after the First World War that it may be argued that it is absolute. Furthermore, while the prohibition is only on using it as a method of warfare and not in self-defence, the prohibition is an aspect of the proportionality assessment where the attacker is a lawful target in accordance with LOAC, such as a person taking direct part in hostilities during a NIAC.

The legality of use of prohibited methods in self-defence raises different questions. As illustrated by the examples in Section 6.3.2.3, self-defence rules may potentially be applied to all prohibited actions, not just use of force. [118] This means that self-defence may theoretically justify the use of prohibited methods, provided the requirements of necessity and proportionality are met. For instance, LOAC prohibits the improper use of a flag of truce, or the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions.[119] It is also unlawful to feign *hors de combat* status or civilian status with the intent to abuse the status

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Schindler and Toman, *The Laws of Armed Conflicts* (n 28) pp. 239ff, states: "Each State Party undertakes not to use riot control agents as a method of warfare". The list of purposes not prohibited under this Convention includes law enforcement including domestic riot control purposes (Article II(9)(d)).

117 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* [hereinafter: *ICRC CIL Study*] (Cambridge University Press, Cambridge, 2005 available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul, last accessed 24.04.2019) Rule 85.

118 See also Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) p. 91.

119 AP I (n 28) Articles 38 and 39.

in order to kill or injure the adversary.[120] If a soldier is under an imminent threat of attack, and the only way to survive is to give the attacker the false impression that the soldier is a person entitled to protection, such as by pretending to be injured or by putting on a white medical coat, doing so is clearly necessary and would probably also be considered proportionate. If the soldier decides to use the impression that he is protected to enable him to use force against the attackers, this would amount to a war crime.[121] Whether the use of force was necessary would depend on the availability of other means, such as escape and, even if necessary, the force must of course be proportionate.

Most prohibited methods of warfare will, however, never meet the requirements of self-defence. For instance, prohibited methods such as starvation as a method of warfare,[122] pillage,[123] or orders that no quarters will be given[124] are not individual acts suitable to deal with concrete and imminent threats; they will fail the necessity requirement. Furthermore, it is difficult to see how they would be carried out with a defensive intent.

In conclusion, there appears to be some scope for employing means and methods that are prohibited by LOAC in self-defence. However, this scope is narrow.

8.2.7 *Self-Defence and Innocent Bystanders: Is 'Collateral Damage' Acceptable?*

While there are clear requirements in LOAC to avoid harm to protected civilians when using force,[125] the self-defence rules on the issue are less clear.

120 AP I, ibid, Article 37.

121 Rome Statute (n 38) Article 8(2)(b)(vii) (IACs) (misuse of emblem etc.) and Article 8(2)(b)(xi) (IACs) and Article 8(2)(e)(ix) (NIACs) (treacherous killing).

122 AP I (n 28) Article 54(1) and AP II (n 29) article 14.

123 1907 Hague Regulations (n 38) Article 28 and Article 47; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (GC IV) [1949], printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 28) pp. 575ff., Article 33, second para; and AP II (n 29) Article 4(2)(g).

124 1907 Hague Regulations (n 38) Article 23(d); AP I (n 28) Article 40; and II (n 29) Article 4(1).

125 See e.g. AP I (n 28) Article 57(2)(a)(ii) ("take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects"), Article 57(2)(a)(iii) ("refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"), and Article 57(2)(b) ("an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be

As explained above, the threat to innocent bystanders is not part of the self-defence proportionality analysis as it is not related to the assessment of the relationship between the threat and its response. Instead, it requires a separate proportionality assessment. Strictly speaking, it is more a question of necessity than self-defence, as the innocent bystanders represent no unlawful threat.[126] As explained in Section 6.3.2.1, during armed conflict, the only form of necessity that applies is LOAC and the principle of military necessity therein. The general principle of necessity may therefore not be applied as a justification for violating LOAC. In practice, however, there appears to be a tendency to assess the two effects of the defensive act together, as part of the self-defence assessment.[127] Whether this is due to the limitations imposed on necessity by LOAC during armed conflicts, or perhaps done merely to simplify the analysis, is not clear, and will not be speculated on here.[128]

Even if the effects on the target and on innocent bystanders are considered as part of self-defence, the proportionality assessment remains different. According to Hessbruegge, "[w]hile defensive force against attackers need only be not disproportionate, a stricter standard applies vis-à-vis innocent bystanders. The risk of harm for the innocent bystanders must be outweighed by the harm the defensive force is expected to prevent".[129] If the use of force in self-defence results in harm to innocent bystanders, the lawfulness of that use of force must be assessed as part of the proportionality and reasonableness standards. What is clear, however, is that less incidental harm to peaceful bystanders is tolerated under self-defence than under LOAC.[130]

LOAC requires that those who plan or decide upon an attack take all feasible precautions to minimise the risk to civilians.[131] The requirement of minimising the risk to civilians before using force reflects the unique character of military force as planned, decided and in many cases intentionally lethal. Self-defence, on the other hand, should be a measure of last resort in response to

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excessive in relation to the concrete and direct military advantage anticipated"). See further Sections 5.4.1 and 5.5.

126 Note that not all jurisdictions accept necessity as defence against the killing of another. Shlomit Wallerstein, 'Justifying the right of self-defense: A theory of force consequences', 97 *Virginia Law Review* 999 (2005), p. 1010.

127 Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 180.

128 Although it is relevant, this issue is not sufficiently central to the topic of the present research to warrant the space required to go beyond mere speculation.

129 Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 180.

130 Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare* (n 42) p. 32.

131 AP I (n 28) Article 57(2)(a)(ii). See also Sections 5.4.1 and 5.5.

an imminent threat, and there is arguably less time and opportunity to assess and minimise harm to third persons prior to using force than what is required by LOAC.[132] However, certain precautionary measures are still required, in particular when the defensive measure is carried out by State actors. According to Hessbruegge, the State is required "to factor in and take appropriate precautions covering all foreseeable risks of its defensive actions, including the possibility that innocent bystanders will be harmed by the aggressors".[133] The precautionary requirements for the use of force under self-defence are therefore more extensive. It includes all who are affected by the use of force and not merely bystanders. However, due to the imminence of the threat, it is likely that fewer precautionary measures are expected in a self-defence situation than under LOAC.[134]

If innocent bystanders have been harmed as a result of self-defence, a distinction should be made between unintended harm and harmed caused knowingly or recklessly. If the person using force in self-defence does not know of the risk of harm to bystanders and unintentionally causes them injury or death, the use of force is likely to be considered reasonable.[135] For instance, in the *Bakan* case, a police officer accidentally killed an innocent bystander with a warning shot that ricocheted. The ECtHR concluded that this was not a violation of Article 2 as it was mere bad luck.[136] The use of force may also be reasonable if there is potential for harm, but the alternative if no defensive measure is taken is foreseeable harm.[137] This was established by the ECtHR in the *Finogenov* case, which dealt with the use of gas in the Moscow theatre hostage crisis, resulting in the incidental killing of 125 hostages. The ECtHR

132 See further Section 4.2 on the human right to life and the prohibition on arbitrary deprivation.

133 Hessbruegge, Human Rights and Personal Self-defense (n 6) pp. 182–183. See also Gloria Gaggioli, *Expert Meeting on the Use of Force in Armed Conflict: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (ICRC, Geneva, 2013, https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf, last accessed 24.04.2019) p. 9.

134 See also Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) p. 90.

135 By contrast, others argue that the killing of innocent bystanders is never permitted in self-defence. See e.g. Wallerstein, 'Justifying the right of self-defense' (n 126) p. 1002.

136 *Bakan v Turkey* (Judgement), App. No. 50939/99 (ECtHR, 12 June 2007), para. 55.

137 In the Tagayeva case, the Court stated that "after the first explosions in the gymnasium and the terrorists had opened fire upon the escaping hostages, the risk of massive human loss became a reality, and the authorities had no choice but to intervene by force. Accordingly, the Court accepts that the decision to resort to the use of force by the State agents was justified in the circumstances, under Article 2 § 2 (a) of the Convention." *Tagayeva and Others v. Russia* (n 68) para. 591.

concluded that the use of gas "was not in the circumstances a disproportionate measure, and, as such, did not breach Article 2 [the right to life]".[138] Importantly, the Court made a distinction between means or methods that are supposed to kill, such as bombs and missile, and the gas used, which was dangerous but "left the hostages a high chance of survival".[139]

By contrast, if the defender knowingly or recklessly injures or kills a bystander, the use of force is more likely to be considered excessive.[140] For instance, it may be reckless to use automatic weapons in a constant fire mode where there are innocent bystanders nearby who are likely to be harmed.[141] In the *Tagayeva* case, the ECtHR held that the massive use of indiscriminate weapons to fight 30 terrorists holding over a thousand civilians hostage in a Beslan school violated Article 2.[142] In certain circumstances, however, it may be reasonable to knowingly use lethal force against innocent bystanders, such as when the killing of one innocent bystander is expected to save the lives of others. For instance, it may be reasonable and proportionate to shoot down a civilian

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According to Hessbruegge, three factors must be considered in making this assessment:
- The intensity and extent of harm innocent bystanders may suffer as the result of the envisaged defensive action versus the expected harm for the defender or innocent bystander resulting from the non-action or other defensive action;
- The number of innocent bystanders endangered by the envisaged defensive action versus the number endangered by non-action or other defensive action;
- The probability of the harm risked by the defensive action becoming reality versus the probability of such harm in case no action or other defensive action is taken.

Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 181.

138 *Finogenov and Others v. Russia* (Judgement), App. Nos. 18299/03 and 27311/03, (ECtHR, 20 December 2011), para. 236.

139 ibid, para. 232. See also *Andronicou and Constantinou v. Cyprus* (Judgement), App. No. 86/1996/705/897 (ECtHR, 9 October 1997), para. 184–188, and Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare* (n 42) p. 32.

140 See e.g. *Isayeva v. Russia* (Judgement), App. No. 57950/00, Former First Section (ECtHR, 24 February 2005), paras. 181–191. See also Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) pp. 90–91, citing U.S. domestic case law: *People v Adams*, 9 Ill App 3d 61 (1972); *Henwood v. People*, 54 Colo 188 (1913) [8]; *Annot*, 18 ALR 917 (1922) 928; *Ringer v. State* (1905) 74 Ark. 262, 85 S. W. 410; and *Scott v. State* (1905) 75 Ark. 142, 86 S.W. 1004.

141 Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 158.

142 *Tagayeva and Others v. Russia*, App. No(s) 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11, 37096/11, Judgment (Merits and Just Satisfaction) (ECtHR, 13 April 2017), para. 609, confirming the position in *Isayeva v. Russia* that "the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents." *Isayeva v. Russia* (n 140) para. 191.

airliner that has been hijacked and is expected to be crashed into a building killing both the passengers and crew and those on the ground. Because these are complex scenarios challenging the right to life of the person or persons sacrificed for some greater good, national jurisdictions can be expected to take different approaches. A distinction may be made, for example, between sacrificing the life of someone who has a chance of survival and someone who is expected to be killed if no defensive measure is taken.[143]

In conclusion, there may be scope for allowing injury to innocent bystanders as a result of use of force in self-defence, even when the risk is known. However, such harm will only in very rare and extreme circumstances be considered proportionate and reasonable. As Henderson and Cavanagh emphasise, "it is highly likely that reasonableness under the law of self-defence imposes a higher standard of care on a military member to avoid causing *any* injury or death to civilians".[144]

8.2.8 *Protection of Others*

Many national self-defence rules permit the use of force in defence of others. Common law countries have a tendency to limit this to persons with a close connection to the defending party, while civil law countries are more likely to permit the use of force in self-defence of any person.[145] When military forces operate in an armed conflict environment, both civilians and military personnel may find themselves in a situation of imminent threat and in need of help. At the same time, the State or NATO mission has a need to control when and how military forces use force. For this reason there are ROE regulating the use of force on behalf of others, and a distinction is made between one's own forces, partner forces and organisations, and others. If military forces defend others in situations that are not authorised by ROE, either because the ROE is not approved or it is retained and thereby requiring authorisation from a higher authority, this would run the risk of undermining the mission.

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143 For an interesting and detailed discussion of these issues, see Hessbruegge, *Human Rights and Personal Self-defense* (n 6) pp. 183–189.

144 Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) p. 90.

145 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) pp. 497–498, §24.24 with commentaries, especially fn. 53. For instance, in the Canadian publication 'Use of Force for CF Operations', it is made clear that Canadian forces are permitted to use force in self-defence to protect oneself, other members of the Canadian forces, and "non-Canadian military personnel who are attached or seconded to a Canadian force". Canadian Forces, *Use of Force for CF Operations* (Joint Publication 5.1, Document B-GJ-005-501/FP-001, issued under the authority of the Chief of the Defence Staff, 2008) p. 2–2.

As will be explained below, this is therefore an area where it is more likely that military orders will be accepted as a limitation on the use of force in self-defence.

Acknowledging this challenge, Boddens Hosang proposes that the necessity consideration should include an assessment of proximity between the person attacked and the person carrying out the defence. In his view, "the geographical relationship between those to be defended and those coming to their rescue may be taken into consideration to determine whether the force used was part of the right of personal self-defence or part of a military engagement in the context of operational ROE".[146] This entails that the further away the forces in need of help are, the less likely it is possible for other forces to rely on personal self-defence as a justification to help them. The deployment to defend other forces must instead be planned and executed on the basis of applicable ROE and other operational orders. He emphasises that as a result, stand-by units such as close air support (CAS) units will not be able to rely on personal self-defence but are bound by applicable ROE.

This approach makes legal sense, even if it leaves a gap in the protection of one's own forces where the ROE are restrictive and the forces able to come to their rescue are not nearby. Because such situations are not uncommon, the ability to apply defensive force should not depend on the limited scope for relying on personal self-defence. The more appropriate authority for the use of defensive force on behalf of other forces is the operational concept of 'unit self-defence' (see below, Section 8.3.3). What Boddens Hosang's solution fails to deal with, however, is the use of force in defence of third persons, for instance the local population or representatives of NGOs. There may be several reasons for military forces not to get involved even if they are in close geographical proximity, especially with regards to the local population. The most important reason is that the use of force against a civilian may lead to increased tensions and undesired escalation of the conflict. This may be the case where the use of force to defend a person from one civilian group may cause NATO forces to be perceived as impartial.[147] Similarly, if the violence is culturally acceptable in the area, but not where the military forces come from, as could be the case with domestic violence, it may be perceived as inappropriate interference. At the same time, military forces should not stand by and watch atrocities or

146 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) pp. 497–498, §24.24 with commentaries.

147 Todd C. Huntley, 'Balancing Self-Defense and Mission Accomplishment in International Intervention: Challenges in Drafting and Implementing Rules of Engagement', 29 *Maryland Journal of International Law* 83 (2014), p. 115.

serious harm being inflicted, and ROE will commonly include authorisations to use force to prevent the commission of serious crimes such as murder, rape, or aggravated result, or to defend civilians from acts that endanger life or are likely to cause serious bodily harm.

If the ROE is retained and there is insufficient time to release it, the question becomes whether the military forces may still be permitted to intervene, and whether they are obliged to do so. As was explained above in Section 6.3.2.1, the legal question of self-defence as a duty is a question of the scope of the obligation to protect the human right to life. It is not a question of *whether* there is a duty to defend others, but rather *when* and *whom*.[148] The State has a duty to protect the lives of those under its human rights jurisdiction. This clearly includes its own military forces and citizens. The question is less clear with regards to citizens of other countries. This is a question of extraterritorial application of human rights, and will depend on the extent to which the persons in question are under an effective control of the State agents who could act in their defence.[149]

The duty to protect others is, however, not absolute. According to Hessbruegge, a balance must be sought between the right to life of others and the risk to the lives of those intervening: "In deciding how best to defend others, the state and its agents may factor in whether a particular defensive measure would cause unreasonable risks for the intervening police officers".[150] Although the State agents should not be required to expose themselves to unreasonable risks, it is clear as Hessbruegge emphasises that "police officers in the line of duty can be expected to incur a certain level of risk to save that life".[151] This will apply to military forces as well, and the level of risk military forces should be expected to accept is arguably higher than for police officers, especially for operations involving armed conflict.

In military operations, it may also be that the military forces are ordered to protect certain groups or persons, beyond those subject to the human rights obligation of the soldiers' State; in that case they have an obligation to comply with that order. For instance, and as will be explained in Section 8.3.4, NATO States have agreed that under the concept of 'extended self-defence' their forces will protect forces from other NATO States as well.

148 See also Hessbruegge, *Human Rights and Personal Self-defense* (n 6) pp. 102–103.
149 The question of extraterritorial human rights application is examined in Section 4.2.3.
150 Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 103.
151 ibid.

8.2.9 *Protection of Objects*

States have taken different approaches in their domestic legislation on the issue of using force in self-defence to protect objects. This topic is therefore usually regulated by ROE. Where the use of lethal force in defence of objects is possible under self-defence, it is likely to only be permitted where the attack on the object is expected to result in an imminent risk of death or serious injury.[152] As a result, the discussion above and below with regards to application and possible limitation of the use of force in defence of persons will apply equally to the protection of objects.

8.2.10 *Self-Defence and Limitations Imposed by Military Orders*

8.2.10.1 Introduction

The final issue to be considered in the context of the application of personal self-defence by military forces participating in armed conflict operations is the question of whether, and if so, when personal self-defence may be limited by military orders such as ROE. While the common reference to self-defence as inherent and not limited by ROE gives the impression that self-defence may never be limited, as the discussion above has indicated, this does not hold true for all aspects of self-defence. The possibility of ROE limiting the right of self-defence is reflected both in ROE doctrine[153] and state practice. For instance, Admiral Woodward, Commander of the UK forces during the Falklands War, has stated in his account of that conflict that "I had, in effect, taken away some of my Commanders' right of self-defence, further restricting the rules from home which allowed them to fire back. But I did not want this war to go off at half-cock, because that would likely cause disastrous confusion and

152 The use of force to protect objects, the destruction or damage to which will not result in threat to life or limb, is likely violate human rights. See above, Sections 4.2.2 and 6.3.1.3.

153 See e.g. U.S. CJCS, *SROE/SRUF* (n 67) p. A-3: "When individuals are assigned and acting as part of a unit, individual self-defense should be considered a sub-set of unit self-defence. As such, unit commanders may limit individual self-defense by members of their unit." See also p. I-1, quoted in Christopher D. Amore, 'Rules of Engagement: Balancing the (Inherent) Right and Obligation of Self-Defense with the Prevention of Civilian Casualties', 1 *National Security Law Journal* 39 (spring 2013), p. 50: "[U]nit commanders may issue supplemental measures to limit self-defense by members of their units. The use of force for mission accomplishment may sometimes be restricted by specific political and military goals that are often unique to the situation". See also the Norwegian Manual of the Law of Armed Conflict, which makes it clear that the ability to defend others or objects may be subject to limitations due to political or operational considerations, while the ability to defend oneself in self-defence may not limited. *Norwegian LOAC Manual* (n 20) pp. 24–25 and 281.

loss of control".[154] The following discussion will examine the extent to which self-defence may lawfully be imposed limitations, and subsequently, the relationship between orders imposing such limitations and the application of self-defence.

8.2.10.2 When May Self-Defence Lawfully Be Limited?

When examining the question of when self-defence may be limited, a distinction must be drawn between the protection of others or objects, and the protection of self. The use of force, especially lethal force, to protect objects is normally dependant on whether it involves a risk of injury or death to persons, and limitations on the ability to defend objects beyond this are likely to be uncontroversial. The focus here will therefore be on the protection of persons.

The question of protection of others depends on whether the soldiers have a right or duty to protect them, while the ability to protect oneself relates to the soldiers' right to life and the State's duty to protect this right. A further distinction must therefore be made between situations where the military forces have a duty to protect because they are State agents, and where they would be legally justified to act but are not obliged to do so. Where there is no duty to defend, a decision based on operational or force-protection considerations to limit the ability of military forces to defensively use force would presumably be legally unproblematic.[155] Such a limitation may, however, still be ethically or politically problematic, especially when those involved are likely to be innocent civilians in a war-torn area. Where there is a duty to protect others, this may only be restricted if the defensive act is expected to cause unreasonable risk to the military forces, bearing in mind that they must accept a certain level of risk due to their occupation.[156] The same test should be applied to the defence of other members of the military forces, both their own forces and those covered by the NATO concept of 'extended self-defence'.[157] The State may only

154 Sandy Woodward, *One hundred days: The memoirs of the Falklands Battle Group Commander*. (*HarperCollins* Publishers, 1992) pp. 107–108, cited in Guy R. Phillips, 'Rules of Engagement: A Primer', *The Army Lawyer*, Department of Army Pamphlet 27-50-248 (July 1993), p. 16.

155 See also Peter Dreist, 'Rules of engagement in NATO operations – application in Germany's legal system', in Barbara Janusz-Pawletta (ed.), *Zasady użycia siły* (*ang. Rules of Engagement*) – *wybrane problem* prawne [Rules of Engagement – legal problems] (Towarzystwo Wiedzy Obronnej, Warsaw, 2011) p. 127, arguing that "the right to defense in aid of a third person can be restricted in scope up to complete prohibition".

156 See above, Section 8.2.8.

157 'Extended self-defence' is further examined in Section 8.3.4.

limit their ability to use force to defend other NATO forces where it would result in unreasonable risk to the military forces carrying out the defence.

This leaves the question of whether military forces retain the ability to use force to save *their own* lives, regardless of the risk to the mission or to uninvolved forces, or whether this also may be limited to where the State or Commander considers it reasonable. As Hessbruegge explains, "a balance has to be struck between legitimate interests regarding the command and control of military operations and soldiers' right to life and physical security that underpin their right to personal self-defence".[158] Limitations may be imposed, but they may not be unreasonable. At the core of the issue is the question of how much risk military forces reasonably must accept due to their occupation. Because military forces also have a right to life,[159] it is clear that they should not be ordered to commit suicide; however, it is also important that they do not use force that is not authorised by the ROE and therefore subject to command and control unless it is absolutely necessary. They may be placed at risk, and even be ordered to show "courageous restraint",[160] but they cannot be ordered to not defend their lives in situations of risk, as this would violate their right to life.[161]

Commanders are therefore to some extent entitled to prohibit soldiers from using force in self-defence, such as to gain a tactical advantage or to enhance the protection of the civilian population.[162] Operationally, limitations on the

158 Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 102. See also Corn, 'Public Authority to Use Force in Military Operations' (n 19) p. 55, emphasising that the moral duty to protect has to be considered in light of the legal duty to control the use of force, and Gill *et al.,* 'General Report' (n 24) p. 163.

159 This is examined in Section 4.2.

160 "Courageous restraint" was an ISAF doctrine introduced by Gen Stanley McChrystal, the former American commander, to reduce the number of civilian casualties. The concept has been much criticised, see e.g. Amore, 'Rules of Engagement' (n 153) especially pp. 59–74. He concludes that "[w]hile the strict ROE and the concept of "courageous restraint" were initially successful at reducing civilian casualties caused by U.S. and NATO forces, the total number of civilian casualties actually increased due to greater insurgent activity". ibid, p. 75. The policy was also much debated and criticised in the media for putting the lives of military forces at risk. See e.g. Thomas Harding, "Courageous restraint' putting troops lives at risk', *The Telegraph* (6 July 2010, http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/7874950/Courageous-restraint-putting-troops-lives-at-risk.html, last accessed 24.04.2019).

161 Stephens, 'ROE and the Concept of Unit Self-Defense' (n 1) pp. 147–148. The right to life is examined in Section 4.2.

162 See also Danish Ministry of Defence/Defence Command Denmark, *Military Manual on international law relevant to Danish armed forces in international operations* [hereinafter: *Danish Military Manual*], Rosendahls, København, 2016, available at https://fmn.dk/eng/allabout/Documents/Danish-Military-Manual-MoD-defence-2016.pdf, p. 150. For

use of force in self-defence are more likely to be imposed for naval and air forces than ground forces. This is because the former forces are more likely to have direct communications with the Commander, and they have access to larger weapon systems which individual soldiers or sailors are less likely to be permitted to use without higher authorisations. Finally, it should be emphasised that the ability of Commanders to restrict the use of self-defence will, to some extent, shift the responsibility for ensuring that self-defence measures are appropriately exercised from the individual soldiers onto the Commanders.[163]

Two distinctions may be made to support the determination of when personal self-defence, in the form of defence of self, may be limited. The first distinction is between imminent threats and actual attacks. In the Canadian Use of Force Manual, for instance, it is stated that a Commander may order forces not to respond to an imminent attack, but no such authority to impose limitations is mentioned with regards to actual attacks.[164] According to Cathcart, the authority to restrict the response to threats of attack is limited to exceptional circumstances "when there is a clear need to de-escalate a situation with no other alternative".[165] Although self-defence allows the use of force in response to imminent threats and not just actual attacks, military forces must accept a high level of risk. It is therefore logical that the threshold of necessity for the use of force in self-defence is higher for military forces participating in an armed conflict than for persons not having accepted that risk. It may also be that the Commander limiting the right of self-defence is not aware of the severity of the threat his or her forces are faced with. If the forces, unbeknownst

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an example of the contrary view, that a military member cannot be prevented or lawfully ordered to resist from acting in self-defence, see Stephens, 'ROE and the Concept of Unit Self-Defense', ibid, p. 147 and Stephens, Dale, 'Human Rights and Armed Conflict – The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case', 4 *Yale Human Rights and Development Journal* 1 (2001), Article 1, p. 22 ("Consistent with the application of Article 6 of the ICCPR, a military member cannot lawfully be ordered to resist acting in individual or unit self-defense and a Government cannot lawfully prevent a military member or unit from exercising such a right.").

163 Amore, 'Rules of Engagement' (n 153) p. 50.

164 Canadian Forces, *Use of Force for CF Operations* (n 145) p. 2–2: "commanders may legitimately order individuals or units under their command not to respond to hostile intent. Such an order would be based on that commander's responsibility, in certain circumstances, to control the escalation of force." Note that hostile intent in this context refers to the requirements for self-defence and is therefore different to the NATO concept of 'hostile intent (not constituting imminent attack)'. See also Blaise Cathcart, 'Enforcement and Peace Enforcement Operations', Chapter 11 in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford, 2015) pp. 144–145, para. 26.

165 Cathcart, 'Enforcement and Peace Enforcement Operations', ibid, p. 144, para. 20.

to be Commander, are faced with a lethal threat, they are not obliged to comply with the order not to use force.

The second distinction that should be made is between a risk of light injuries and a serious risk of death or serious injury. This is also related to the assessment of the necessity to use force in self-defence. A certain degree of injury must be accepted as part of a military occupation. However, denying military forces the right to defend themselves when there is a risk of death or serious injury, and that risk is serious would, as Hessbruegge points out, be "tantamount to expecting them to commit suicide or self-mutilation".[166] This would clearly violate the military forces' right to life.[167]

Finally, it may be that a State decides that the interests of the State outweigh the individual soldier's human rights, even where the use of force in self-defence is lawful, and an order restricting that use of force would be unlawful. As Boddens Hosang explains, "an individual serviceman's reactions in a self-defence situation may trigger military reactions or political reactions in or around the theatre of operations which change the entire context of the operation".[168] By way of illustration, he suggests a scenario where a soldier, who is patrolling the demarcation line between North Korea and South Korea, is fired upon from North Korea, and the response in self-defence has the potential for triggering a full-scale armed conflict.[169] A similar situation could have arised in Syria in 2017, where forces from NATO States and Russian forces were supporting either local groups or the Syrian government, and were therefore at risk of becoming an imminent threat to each other. A State may in other words determine that avoiding a full-scale armed conflict is more important than the life of individual soldiers, and therefore restrict the ability to use force in self-defence in violation of their human right to life. Although the denial of the right of self-defence would, as discussed above, generally be unlawful, it is clear that "the national interest requires that the law should accord the widest measure of appreciation to commanders on the ground who have the responsibility of planning for and conducting operations there".[170] Furthermore, the State could argue that any wrongfulness arising from limitations on

166 Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 102. See also Stephens, 'ROE and the Concept of Unit Self-Defense' (n 1) p. 147, although he argues that for this reason, self-defence may never be limited.

167 On the right to life, see further Section 4.2.

168 Boddens Hosang, 'Self-Defence in Military Operations' (n 2) p. 32.

169 ibid, fn. 10.

170 *Smith and others* (*FC*) (*Appellants*) *v The Ministry of Defence* (*Respondent*) [2013] UKSC 41, para. 71. The case concerned the application of ECHR Article 2 (n 21) to military forces participating in an armed conflict.

military forces' right to life is precluded by the demands of national security. The legality of such limitations would therefore be a question of the scope and application of constitutional necessity. This is, however, beyond the scope of this book.

8.2.10.3 Restrictive Orders and Self-Defence

It is important to distinguish between the legality of the use of force and the legality of the failure to comply with orders. As mentioned above in Section 8.2.3.1, the use of force may itself be justified in self-defence and at the same time involve a dereliction of duty.[171] This is because military forces have a duty to comply with orders, unless they are manifestly unlawful.[172] The use of force to defend third persons may be lawful under criminal law, but if it is done in disregard of an order to not intervene, there is a dereliction of duty. Furthermore, although many if not most unreasonable limitations on the ability to use force in self-defence will be manifestly unlawful, borderline cases will most likely not be considered unlawul. For instance, while so-called 'hold-fire' orders are mentioned by some as an example of a limitation on self-defence that may be permitted in some circumstances,[173] others contend that such orders are not to be considered a limitation on self-defence.[174] Furthermore, the person using force may perceive the situation as more threatening than his or her on-scene Commander, with the result that both the order and the use of force in self-defence may be lawful.

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171 Johs. Andenæs, 'Okkupasjonstidens «likvidasjoner» i rettslig belysning', *Tidsskrift for rettsvitenskap* (*TFR*) 1948, 1–31, p. 15: "Det kan tenkes at en likvidasjon er utført av underordnede i organisasjonen på egen hånd i strid med de regler som ble fulgt. En slik ordreoverskridelse kan ikke i og for seg gjøre likvidasjonen rettsstridig overfor den drepte." See also the *Danish Military Manual* (n 162) pp. 150 and 152 where it is made clear that if an ROE limits the ability to use force in self-defence, the ROE must be complied with even if the force would be lawful, and failure to do so would be a dereliction of duty.

172 See e.g. the Norwegian Military Penal Code (Militær Straffelov), LOV-2016-04-22-3, §24 and *Norwegian LOAC manual* (n 20) p. 271, where it is explained that military forces have a duty to follow orders unless they know the order to be unlawful or the order is manifestly unlawful. Similarly, the Uniform Code of Military Justice (UCMJ), 64 Stat. 109, 10 U.S.C. Chapter 47 (http://www.ucmj.us/, last accessed 24.04.2019) Articles 90–92, emphasises that the duty to follow orders relate to lawful orders. This idea is also reflected in the Rome Statute (n 38) Article 33(1)(c): there is no defence of superior orders for orders that are manifestly unlawful.

173 Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 102; and *Danish Military Manual* (n 162) p. 151.

174 Cathcart, 'Enforcement and Peace Enforcement Operations' (n 164) p. 144, para. 21.

The relationship between military orders and self-defence is therefore not straight forward, and it is influenced by the requirement of an initial illegality for self-defence to apply. If a soldier uses force in lawful self-defence in violation of a lawful order restricting the use of force, the defence against the dereliction of duty cannot be self-defence because the order is not an unlawful act. The relevant defence is instead likely to be a form of necessity, with self-defence acting indirectly to explain why the use of force was necessary and reasonable.[175] Necessity to defend oneself may also be relevant if a soldier is ordered not to use force in accordance with LOAC, but the consequence of that order is to place the person at imminent risk of death or serious injury, and the soldier therefore disregards the order. If the order not to use force is unlawful, but not manifestly unlawful, and the use of force is also lawful, self-defence may be relied upon to justify why the soldier did not comply with the order not to use force. Finally, if the order is manifestly unlawful because it clearly violates the soldier's right to life, there is no duty to comply with the order, and no defence is required for disregarding it by acting in lawful self-defence.

As a result, it is arguably an oversimplification of the issue when Henderson and Cavanagh state that the question, "can a commander issue an enforceable order to a soldier not to shoot in situations where the soldier would otherwise be able to shoot in self-defence?" may be rephrased as "can a soldier rely on the defence of self-defence when charged with the offence of failing to comply with an order?".[176] Still, their conclusion is still sound, that it should be permissible to disobey the order when it is necessary and reasonable, even if the applicable defence is not always self-defence.[177]

8.3 Operational Concepts of Self-Defence

8.3.1 *Introduction*

This Section deals with operational 'use of force' concepts that are referred to as a form of self-defence, but do not necessarily meet the requirements of personal self-defence set out above in Section 8.2. During NATO operations, the use of force or other provocative means must be authorised by ROE. The only exception to this is 'self-defence'. As a result of the relatively restrictive ROE and other applicable procedures and orders applied in recent operations,

175 An examination of the defence of necessity is unfortunately beyond the scope of this book.

176 Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) p. 92.

177 ibid.

in particularly ISAF, the role of this self-defence exception has become more significant, and appears to have evolved into a term for all defensive force, regardless of its legal basis.[178]

Restrictive ROE entail that the military forces involved in the operation are unable to apply all of LOAC. As a result, the use of force not authorised by ROE may still be lawful under LOAC. LOAC regulates both offensive and defensive operations as forms of attack,[179] which means that LOAC also applies to defensive operations. Calling something self-defence does not necessarily make it self-defence in a legal sense, and the law applicable to defensive force during an armed conflict is more likely to be LOAC than the legal concept of self-defence.[180] In cases where LOAC does not apply, the relevant legal basis for the use of force in self-defence is most likely to be that of personal self-defence, as explained in Chapter 6. This is because the reliance on State self-defence during an ongoing armed conflict would in most cases entail an undesirable and unwarranted conflation of the *jus ad bellum* and *jus in bello*.[181] As will be further discussed in Section 8.3.3, there appears to be little support for the existence of a separate legal concept of 'unit self-defence'.

Ideally, there should be a legal authority for using defensive force not authorised by LOAC, distinct from self-defence.[182] It may for instance be that the

178 See e.g. Brian Bengs (Lt Col, then of NATO School), 'NATO Rules of Engagement and Use of Force', presentation available at https://www.scribd.com/document/214365856/Use-of-Force-Nato-Roe, slides 33 and 34. See also Merriam, 'Natural Law and Self-Defense' (n 47) p. 85, where he comments on the tendency to rely on self-defence as a justification for any use of force, and Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 11) p. 288, also voicing the concern that self-defence is "increasingly used to justify and explain a large proportion of incidents involving the use of force in modern conflicts". See further Erica L. Gaston, *When Looks Could Kill: Emerging State Practice on Self-Defense and Hostile Intent* (Global Public Policy Institute, 2017, available at http://www.gppi.net/fileadmin/user_upload/media/pub/2017/gaston_2017_hostile-intent_web.pdf, last accessed 24.04.2019) pp. 58 and 59–60.

179 AP I (n 28) Article 49(1). See also Section 5.1.3.

180 During operations below the threshold of armed conflict, the legal base for such defensive actions cannot be LOAC, and is more likely to be a legal concept of self-defence, either in the form of personal self-defence or State self-defence. Due to the limitations of the book, however, this will not be examined further here. See for instance Boddens Hosang, 'Self-Defence in Military Operations' (n 2) pp. 46–47.

181 On the relationship between the *jus ad bellum* and *jus in bello,* see also 4.3. See also Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 11) pp. 289 and 330.

182 The existence of such a concept is argued by Corn. In his view, "while universally accepted principles of self-defense are useful to understanding the law's tolerance of self-help uses of force generally, it is the public authority justification more broadly, interpreted through the lens of domestic and human rights law governing the use of force by state actors, which should form the basis of formulating defensive use-of-force rules for the military".

degree of belligerent nexus required to conclude that the person is taking direct part in hostilities is insufficient, but the threat is nonetheless imminent and requiring a response. Where force is used in relation to mission accomplishment, the military forces are acting as State actors rather than private individuals. They should therefore be able to rely on a legal authority authorising the use of force necessary to carry out their duties in such cases, rather than it being otherwise unlawful but justified due to the requirements of personal self-defence being met. However, this does not appear to be the general approach, at least not among the States studied in this book, nor is the existence of such authorities reflected in academic writing. Unless there is a clear national provision authorising the use of force in situations where there is a need to use defensive force beyond what is authorised by LOAC, courts are likely to consider those acts in the context of personal self-defence. It will therefore be misleading and unhelpful to military forces to construe a new customary international legal basis for the use of force in these situations, unless it is followed up by formalisation in either national or international law that enables its application by a court. As a result, the use of defensive force by military forces during an armed conflict must either be authorised by LOAC or be accepted as self-defence.

8.3.2 *'Operational Self-Defence'*[183]

8.3.2.1 The Existence of an Operational Concept of Self-Defence

As mentioned above, the combination of the NATO policy to require all use of force to be authorised either by ROE or self-defence and the existence of relatively restrictive ROE and other 'use of force' procedures, has resulted in 'self-defence' as a ROE exception becoming particularly important. Like the legal concept, this operational concept focuses on the defensive use of force. However, the legal basis will in many cases be LOAC, such as the notion of direct participation in hostilities,[184] rather than self-defence. For example, the operational concept covers defensive force both in response to civilians not participating in the armed conflict, but nonetheless posing an imminent threat, and opposing forces who are lawful targets under LOAC. In other words,

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Corn, 'Public Authority to Use Force in Military Operations' (n 19) p. 48. He goes on to state that the "public authority self defense" is a general principle of international law and that it overlaps with or replaces the individual right of self-defence of the service members. See ibid, pp. 48–49.

183 The term "operational self-defence" as used in the current context must be distinguished from the use of the same term by Albin Eser to describe defensive operations under the *jus ad bellum*. Eser, 'Article 31' (n 47) pp. 879–880.

184 On direct participation in hostilities, see further Section 5.2.3.

the operational concept of self-defence is wider than the legal concept, and is consequently a great cause for confusion. This section will further explain what this operational concept of self-defence is and how it relates to the legal concept of self-defence.

In complex conflicts such as counter-insurgency (COIN) operations or otherwise politically sensitive operations, the use of force has been subject to extensive and detailed control. For example, in conflicts where the opposing forces fail to distinguish themselves from the civilian population, one way of reducing the risk of harm to innocent civilians may be to restrict the use of force to situations where there is a clear threat. In addition to the ROE being restrictive, further limitations on the use of force are imposed, *inter alia*, in directives and standard operating procedures. For example, due to a very low tolerance for civilian casualties, the use of force in situations that involve a high risk to civilians, such as indirect fire in civilian populated areas and the search of civilian compounds, has been subjected to strict regulations.[185] Limitations may also be imposed on the geographical area in which military forces are permitted to operate, especially in multinational operations where such limitations are important to de-conflict simultaneously ongoing operations.[186]

Although retained ROE or target engagement authorities may be released upon request if the use of force is justified, obtaining such a release may be a time-consuming process. This has created a need to assure military force that they are still permitted to save their own lives or the lives of other members of their force in extreme situations. The result is arguably an overemphasis on the importance of the right to use defensive force, even for operations involving participation in an armed conflict.[187] Whether the use of force needed to save their lives is based on a legal concept of self-defence or LOAC is probably not something military forces will take the time to contemplate.

185 See, for instance, the 2007–2011 ISAF Tactical Directives on the avoidance of civilian casualties (so-called CIVCAS directives), commented on in Sections 2.4.1 and 5.5.

186 In ISAF for example, the military forces assigned to a particular Regional Command would not have the authority to enter another Regional Command area.

187 See e.g. Bagwell and Kovite, 'It is not self-defence' (n 3) especially pp. 4–5, 8 and 11, explaining how failure to adapt the SROE application in Afghanistan to provide authority to deal with persons directly participating in hostilities resulted in confusing 'use of force' guidance and self-defence becoming the default 'use of force' authority in many tactical situations. See also Gaston, *When Looks Could Kill* (n178) p. 23, arguing that the tactical directives introduced to reduce civilian casualties "may have had the additional side effect of increasing reliance on self-defense, where other types of force were more limited".

As a result of this practice, a military concept of self-defence appears to have developed, a concept focused on the act of defending lives rather than on the legal basis for this use of force.[188] In their report from an expert meeting on "The use of force in armed conflicts", the ICRC made the following observation: "The concept of self-defence as embodied in RoE was not understood as domestic self-defence or human rights-based self-defence, but rather as an autonomous military concept, which is more permissive. The extent of this notion of military self-defence varies however from one State to another (in the same way as the concept of domestic self-defence)".[189] This confusion of self-defence and warfighting is also evidenced in how States review defensive force incidents. For instance, in a U.S. investigation into alleged civilian casualties caused in Boz Village, Kunduz, on November 2–3, 2016, it was concluded that "U.S. forces acted in self-defense, in accordance with the Law of Armed Conflict".[190]

In the context of NATO operations, the application of self-defence as an exception to ROE is emphasised in the introductory general text (GENTEXT) of the ROE for a NATO operation: 'nothing in these ROE should be read as limiting the inherent right of self-defence'. As explained previously,[191] it seems that the reference to an inherent right of self-defence not limited by ROE (even in ROE for operations involving armed conflict) is included for historical reasons rather than on the basis of a carefully considered legal analysis.[192] Although the reference to 'inherent' and the heavy reliance on self-defence during military

188 See also Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) p. 73, where they explain that there is "an apparent trend towards relying on self-defence under criminal law as a justification for the use of force during armed conflicts. One possible cause for this trend is a combination of restrictive rules relating to the use of offensive force in counter-insurgency operations, combined with an emphasis on the paramount nature of the 'inherent right of self-defence' in the military training and doctrine of some States." (footnote omitted).

189 Gaggioli, *The use of force in armed conflict* (n 133) p. 27.

190 NATO Resolute Support Press Release of 12.01.2017, *Civilian casualties confirmed in Boz village, Kunduz*, available at https://rs.nato.int/news-center/press-releases/2017/civilian-casualties-confirmed-in-boz-village--kunduz.aspx. The SROE permission to use self-defence "to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent" also appear to go beyond a legal concept of self-defence. U.S. CJCS, *SROE/SRUF* (n 67) p. A-4.

See further Sliedregt, *Individual Criminal Responsibility in International Law* (n 45) p. 234, where she refers to defensive LOAC force as self-defence.

191 See Section 6.3.1.

192 See also Corn, 'Public Authority to Use Force in Military Operations' (n 19) pp. 6–7 and p. 19.

operations may have been legally sound when initially included in ROE for a peacetime context, i.e., as a reference to the *jus ad bellum*, the continued reliance on the phrase for all NATO operations and seemingly to all forms of self-defence is erroneous.[193] As explained by Boddens Hosang: it "suggests that the concept has a significance and meaning beyond its legal limits, which can lead to the erroneous assumption that it confers upon NATO military personnel a right to use force that applies at any time and under any circumstance. It does not".[194] A similar concern is voiced by Gary Corn, who in the context of the U.S. SROE explains that "the continued inclusion of 'inherent right' language (…), language lifted directly from Article 51 of the UN Charter – has generated an entrenched misunderstanding among many that individual servicemembers and unit commanders possess an inviolate 'natural law' right of self-preservation independent of their status as members of the military, a right that ultimately prevails over any command-imposed restraints on the use of force".[195]

The challenge is, as explained in Section 8.2, that the application of the legal concept of self-defence by military forces during armed conflict is relatively narrow; it is considerably more limited than the impression given by the inclusion of and especially the emphasis on the declaration on inherent self-defence in the ROE GENTEXT. Even if the right of personal self-defence is inherent, its characteristics make it unsuitable as a legal basis for the use of force during warfare, and it would not permit the use of force required in the circumstances it is relied upon. Rather than being an indication of the legal basis for the use of force, the reference to self-defence as an exception to the requirement of ROE authorisation for the use of force should therefore be understood as referring to a general concept of defending oneself and other members of the force, albeit in self-defence-like situations. The ROE in general do not specify the legal bases for the various authorisations for using force, and there may be more than one relevant legal basis for the respective ROE, depending on the circumstances. This has also become true for 'self-defence' as a ROE exception.[196]

193 See also Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) pp. 485–486, §24.11.

194 ibid, p. 477, §24.02. Although the comment concerns NATO 'extended self-defence' (see Section 8.3.4), it is equally applicable to the reference to and reliance on self-defence in the NATO ROE context.

195 Corn, 'Public Authority to Use Force in Military Operations' (n 19) p. 7.

196 Gaston also voices the concern that military manuals, guidance, and other legal documents tend to treat self-defence as "an assumed and inalienable right" but that its "scope and outer bounds is not discussed in guidance or legal literature". See Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 11) pp. 290–291.

The importance of the declaration that ROE will not limit the right of self-defence is therefore not the reference to the legal basis for the use of such force, but rather the permission it provides to defend oneself. It is being used to activate some emergency procedures that enable a use of force that would otherwise not be permitted by ROE and other operational orders or regulations. As Corn explains, "self-defense is often cited as an exception to restrictive (…) ROE and a basis to conduct hasty, tactical targeting whenever troops are engaged by insurgents (i.e. situations of troops in contact [TIC])".[197] As a result of the term self-defence being used, the authority to use force beyond ROE is understood as being limited to exceptional circumstances, and subject to the limitations of necessity and proportionality. During armed conflict, where the use of force by military forces will in most cases be authorised by LOAC, the limitations on the use of force to situations that are similar to self-defence are imposed for political and military reasons. The result is, as Henderson and Cavanagh also conclude, that self-defence is used "as a label (albeit a potentially confusing one) by command to impose an operational constraint on the use of force. In such cases 'self-defence' does not operate as a criminal defence but rather as an ROE trigger".[198]

Perhaps the biggest challenge with this approach is that no distinction is made between the operational self-defence concept and the criminal law concept. Although defensive force during armed conflict mostly will be based on LOAC, situations may also arise where the criminal law concept of self-defence must be relied upon. The ability to rely on the legal concept of self-defence to use force not authorised by ROE is also included in the GENTEXT reference to ROE not limiting the right of self-defence. It seems, in other words, that the ROE concept of self-defence refers to two forms of self-defence: a (limited) legal right; and a wider operational or military concept. The distinction between these concepts and the relationship between them will therefore be further examined.

8.3.2.2 Distinguishing the Operational Concept of Self-Defence from the Legal Concept

The following example may be used to explain how the operational concept of self-defence can be distinguished from the legal concept of self-defence.

197 Corn, 'Public Authority to Use Force in Military Operations' (n 19) p. 11. The reference to the U.S. concept of mission-accomplishment ROE is removed to avoid confusion with the slightly different application of the same term in the context of NATO ROE. See further Section 3.3.

198 Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) p. 77.

During an armed conflict, a military unit becomes surrounded by opposing forces, and is fighting to survive. The unit requests close air support (CAS) to defeat opposing forces and enable it to pull out of the situation. However, because there is a risk of collateral damage involved in using indirect fire, the use of CAS is strictly regulated. The Commander has decided that, due to the importance of protecting civilians and maintaining their support, CAS or other forms of indirect fire may not be used if there is a risk of civilian casualties – even if this risk is proportionate to the military advantage anticipated to be achieved and therefore lawful in accordance with LOAC. The only exception would be in extreme situations where CAS would be the only way to save soldiers' lives. In the current example, there are no units on stand-by for CAS for the operation, and the necessary approvals for CAS had not been sought in advance. Furthermore, there is no Forward Air Controller (FAC) on the ground, that is, a person specialised in giving the necessary information to ensure the munition is dropped in the appropriate place and assessing potential collateral damage. The use of CAS usually requires a FAC.

The forces requesting support are emphasising that they are under overwhelming attack and it is therefore a case of 'self-defence'. As a result, emergency CAS (also known as CAS in extremis, CASiE) is authorised. The opposing forces are hit with a 500 lb. bomb, the smallest ammunition available on the plane that was sufficiently near to arrive in the area in time to rescue the unit. The attack results in a small number of civilians being killed and causes extensive damage to neighbouring civilian buildings and infrastructure.

The forces behind the attack have been identified as the opposing forces and are therefore lawful targets. Assuming that the pilot took the required precautions to minimise the risk to civilians and that the collateral damage expected was proportionate to the anticipated military advantage, the attack would be in accordance with LOAC. Although the use of CAS was generally not permitted if it was expected to injure or kill innocent civilians, it could nonetheless be authorised because the operation may be perceived as a 'self-defence' operation.

It would not, however, be a case of self-defence as a matter of law. First of all, because LOAC is specifically designed to regulate the use of force during armed conflict, it would be natural to seek legal authority in this legal regime if possible. Furthermore, if it is an IAC, there is no initial unlawful attack because the military forces are lawful targets and the opposing forces are entitled to attack them. If it is a NIAC, where the opposing forces are not combatants and are therefore considered not to have the right to participate in the hostilities, it may be argued that their attack is unlawful, thereby meeting this initial threshold for self-defence. However, even if the requirement of unlawful attack was

met, the use of force in response to that attack would also be regulated by LOAC, making self-defence superfluous.[199] Furthermore, self-defence will usually not permit killing innocent bystanders where the likelihood of that result is foreseen. Self-defence will, in other words, usually not be an appropriate legal basis for an emergency CAS (or other forms of war fighting). Because the use of force is permitted by LOAC, the reference to 'self-defence' functions a trigger for authorising the use of force beyond ROE or procedures imposing limitations on the use of indirect fire, rather than suggesting that the use of force is legally founded on the criminal law concept of self-defence.

From a legal perspective, it would be preferable if the reference to self-defence in ROE, and the instruction that the ROE do not limit or restrict the right of self-defence, only referred to the legal concept of self-defence.[200] However, this does not reflect the practice of military forces which, as explained above, is to rely on the declaration regarding 'inherent right of self-defence' in a wider range of defensive operations involving risk to soldiers' lives.[201] Even if this practice is based on a misinterpretation of the application of the legal principle of self-defence, it has now become so entrenched in military practice that it may be difficult to explain to troops that the actions, which to the soldier appear similar and which they know by the same term, should be differentiated because the legal basis for the use of force differs. As Gary Solis points out, "It is unrealistic to expect that the term 'self-defense' not be used colloquially in instances where one combatant returns the fire of another".[202] As a result, rather than attempting to limit the content of the well-established military concept of self-defence referred to in ROE, the better approach may be to accept the unfortunate reality of a legal term being used in a different and non-legal sense. It is basically necessary to accept, as Henderson and Cavanagh argues, that "[s]elf-defence is not a unitary concept, but rather has different legal and operational meaning".[203] Not insisting that the reference to self-defence in ROE be read only as self-defence in a legal sense removes any

199 See also Charles Garraway, 'The 'War on Terror': Do the Rules Need Changing?', *Chatham House International Law Briefing Paper* 06/02, September 2006, p. 7.

200 Boddens Hosang, for instance, argues that the statement can only apply to unit self-defence and personal self-defence, not other forms such as extended self-defence or force protection. Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 485, §24.11.

201 See also Gary D. Solis, *The Law of Armed Conflict: International humanitarian law in war* (Cambridge University Press, Cambridge) 2016, pp. 487–488.

202 ibid, p. 488.

203 Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) p. 74.

need to change the terminology from 'self-defence' to, for instance, emergency defensive operations or words to that extent.

Maintaining an operational self-defence concept may also reinforce the perception of the use of force contrary to general orders as only being permitted in extreme circumstances akin to those giving rise to a right of self-defence. Because the application of this concept entails that force is being used in situations not subject to the Commander's command and control, it is appropriate to limit such use of force to that which is necessary and proportionate to defend the forces under threat. A Commander may also choose to impose limitations on the weapons permitted in the use of 'operational self-defence'. Provided the force used is in accordance with LOAC, the application of the self-defence requirements amount to self-imposed limitations. Such additional limitations on the use of force are important because they prevent the application of 'operational self-defence' from becoming too extensive. As Boddens Hosang points out, it could potentially include "the use of all measures which are considered necessary to protect the (international) military force".[204] Limiting the use of force beyond ROE to that which is necessary and proportionate to deal with an imminent threat, should prevent the use of force which has undesirable effects on the operation, or worse, not justified by either LOAC or self-defence.

Finally, because 'operational self-defence' permits the use of force outside the general command and control framework, a broad interpretation and application of the concept would undermine the Commander's ability to exercise effective command and control over the forces. This is undesirable both with regard to the ability to ensure mission success and because it reduces the Commander's ability to influence how and when force is used in those circumstances that are perceived as self-defence, either in the operational or legal sense of the term.[205] Furthermore, concerns have been raised that "incidents justified under self-defense are more difficult to scrutinize, and may frequently not be held to account. This is in part due to the nature of these incidents, in part due to the inherent or inalienable character of this right, and in part due

204 Boddens Hosang, 'Self-Defence in Military Operations' (n 2) p. 84, in the context of 'extended self-defence'.

205 The use of force in self-defence is for instance reported to have been the main cause of civilian casualties caused by U.S. forces in Afghanistan, begging the question whether the rate of civilian casualties could have been reduced if the use of force had been subject to further control and regulation. See U.S. Joint and Coalition Operational Analysis, *Reducing and Mitigating Civilian Casualties: Enduring Lessons* (2013, Suffolk, Virginia, available at http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA579024, last accessed 24.04.2019) p. 10.

to the ambiguity over what the standards are".[206] Narrowing the scope for relying on a form of 'self-defence' during armed conflict in situations that are legally premised on LOAC, preferably by incorporating and authorising the force necessary within the ROE set itself, could therefore reduce the risk of and even enhance accountability for potential LOAC violations.[207]

8.3.2.3 The Relationship between the Operational and Legal Concepts of Self-Defence

This operational, or non-legal, concept of 'self-defence' would of course not affect the application or relevance of the legal concept of self-defence. This may still be applicable if the alternative legal bases are not sufficient or not applicable.[208] However, personal self-defence should be perceived as "a safety net, a measure of last resort in the event that the mission-specific authorizations to use force, as set forth in the ROE, and the 'military' types of self-defence (…) are somehow insufficient to save one's life".[209] Although this safety net is important and comforting, its role in military operations should be downplayed. As explained in Section 8.2, when applying the requirements of unlawful attack, necessity and proportionality to the unique situation that military forces find themselves in during an armed conflict, the right of personal self-defence becomes very different from the one military personnel are familiar with in a civilian or peacetime context.[210] As a result, although self-defence may be perceived as a broader legal authority than LOAC because there is no requirement

206 Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 11) p. 325. She suggests that "It may be that many, perhaps even the majority, of incidents involving unnecessary or excessive responses are simply violations of the U.S. self-defense standards and ROEs" (p. 325). However, because they were reported as self-defence incidents, they are less likely to be investigated, and soldiers "tend to be given the benefit of the doubt" (p. 326).

207 See also ibid, pp. 325–327. See further Chapter 9 below, where it is argued that ideally, the use of force in combat operations should be dealt with as a ROE 'use of force' category rather than self-defence.

208 As a result, although it is less complicated and hence clearer, the solution proposed by Gaston, whereby all force a soldier uses to defend himself during an armed conflict should be viewed as legally premised on LOAC and hence a form of "combatant self-defence", would fail to take into account all the situations military forces may be faced with, giving rise to a need for defensive force, that are not regulated by LOAC. ibid, pp. 329–332.

209 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 499, §24.25. See also Scaliotti, 'Defences before the international criminal court' (n 13) p. 161, fn. 330.

210 See also Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 11) p. 321, where she emphasises that "the very narrow conception of self-defense held by European soldiers may not be sufficient to deal with the full panoply of ambiguous or indirect threats that present themselves" for instance in conflicts like Afghanistan.

of a nexus to an armed conflict or that the attacker is a lawful target, its actual application is generally more restrictive than LOAC. This broad yet restrictive scope of the application of self-defence is emphasised by Bagwell and Kovite: "[Self-defence] is broad because, when acting in self-defence, a soldier may use force against anyone, including a civilian, who presents an imminent threat. It is restrictive because once force is authorised, only as much force as is necessary to neutralize the threat may be used. Additionally, force may only be used where it is not possible to mitigate the threat by other means".[211]

While self-defence will generally permit less use of force than LOAC, the situations in which force may be used differ. It is therefore important to clarify the difference between the legal concept of self-defence and the use of force under the operational self-defence concept, based on LOAC. It is particularly important that Commanders and their legal advisers are aware of the applicable law and its implications, and that they make certain that the regulations and guidance provided to troops ensures the use of force which complies with the applicable law.[212] The distinction between self-defence and use of force based on LOAC relates both to when force may be used and how.

First, the legal concept of self-defence does not require the identification of the opposing force as lawful targets, but depends instead on the necessity of using force. As a result, the use of force will no longer be lawful under self-defence if the person no longer poses a threat. Under LOAC, a person who a lawful target continues to be so either at all times (combatants and members of organised armed groups) or at least for a period after taking a direct part in hostilities (civilians).[213] Second, although the use of force permitted in self-defence generally is more restrictive than LOAC, it may also permit the use of force that would not be lawful under LOAC. For instance, there is no equivalent to the LOAC requirements of precautions in attack for the use of force in self-defence. As a result, where LOAC would require the forces to do everything feasible in their planning of operations to minimise the risk to civilians and civilian objects, the use of force in self-defence is assumed not to be pre-planned

211 Bagwell and Kovite, 'It is not self-defence' (n 3) p. 3 (footnotes omitted). See also U.S. DoD, *Law of War Manual* (n 115) pp. 2233–234.

212 For an example of confusion of the two areas of law, see e.g. Husby, 'A Balancing act: In Pursuit of Proportionality in Self-defense for On-Scene Commanders' (n 54) p. 6. For instance, at p. 10, he states that "[t]he *jus ad bellum* focus in the SROE regarding IHL principles related to self-defense does not obviate the need to apply *jus in bello* IHL [*sic*] principles, including military necessity, distinction, and humanity, once a self-defense engagement is initiated", and further that "proportionality balancing is one of the core *jus in bello* principles that determines whether a self-defense action is 'appropriate'".

213 On the loss of protection due to DPH, see further Section 5.2.3.

and the expectations of such precautions being taken are considerably more limited. Furthermore, certain means which are prohibited in warfare, such as expanding bullets and tear gas, may be permitted in self-defence.

Imposing the self-defence principles of necessity and proportionality as limitations on the use of force during armed conflict is therefore not sufficient in and of itself to ensure compliance both with LOAC and ROE limitations. This is particularly the case for forces from States with a relatively wide right of self-defence.[214] When applicable, LOAC principles that are more restrictive than self-defence rules must be complied with as well. Furthermore, a lack of awareness about the existence of two self-defence concepts may lead to the development of a 'self-defence plus' concept applicable in both instances. If soldiers are permitted to use more force than the legal concept of self-defence would permit in some 'self-defence' situations, because the use of force is actually regulated by LOAC, they may be misled to believe that they can use the same amount of force in 'proper' self-defence situations as well.[215] The result could be the unlawful use of force.

Another reason the difference between the legal and operational concepts of self-defence needs to be clarified, is the question of responsibility. As explained in Section 4.3 in the context of the relationship between the *jus in bello* and *jus ad bellum*, one of the underlying principles of LOAC is the idea that the soldiers are acting on behalf of the State, and do not incur individual liability for those acts, provided they comply with LOAC (so-called 'lawful acts of war'), other applicable legislation, and military orders. This is why there is a requirement for armed forces to be "under a command responsible to that Party for the conduct of its subordinates".[216] This concept ensures that military forces are not held responsible for the political decisions of their State, and encourages compliance with orders and hence control of the use of force. The use of force in personal self-defence, however, is primarily the responsibility of the individual.[217] As Scaliotti explains, it is "a personal defence, which applies to the individual, who is charged with an act committed in order to defend

214 See further Section 6.3.2 for an introduction to national approaches to self-defence.

215 See also, Corn, 'Public Authority to Use Force in Military Operations' (n 19) pp. 11 and 46, voicing concerns about "overbroad application of self-defense rules in future, less hostile environments". The issue was for instance raised in connection with the 2010 disaster relief operation in Haiti.

216 AP I (n 28) Article 43(1).

217 The issue of legal responsibility was raised by Boddens Hosang, 'Self-Defence in Military Operations' (n 2) pp. 30–31, with regards to the distinction between national self-defence and personal self-defence, but is equally applicable to the distinction between ROE and self-defence.

himself or another person".[218] If operations are carried out on the basis of self-defence, and it is either considered to be personal self-defence or it is not clear whether this is a legal concept of self-defence or a military or operational concept, it is not clear how this underlying principle is adhered to. Self-defence is a plea that can enable the soldier to avoid criminal responsibility.[219] However, if the act is a lawful act of war, there should be no individual responsibility in the first place.

If defensive military operations were to be conducted on the basis of personal self-defence instead of ROE and the underlying LOAC authorisations, the result would be to shift the responsibility from the State to the individual soldier. States and Commanders would, in other words, be effectively placing an enormous burden on the shoulders of the individual members of their armed forces if they insist that their troops are operating on the basis of personal self-defence when carrying out defensive military operations. The question of responsibility would be particularly relevant in a situation in which a soldier is using force not permitted by personal self-defence but lawful in accordance with LOAC, and the forces are ordered to only use force in 'self-defence'. If the forces are operating on the basis of the legal concept of self-defence, the use of force would be unlawful. If, however, the use of force is permitted by LOAC, the use of force itself would be lawful, even if the decision to use force would be subject to disciplinary or military penal action for violating the order to only use force similar to that permitted in self-defence.

The effect of combining restrictive ROE with a requirement that use of force not in self-defence must be authorised by ROE, even during armed conflict, was arguably pushed to the extreme during the involvement of NATO States in the Afghanistan and Iraq conflicts from 2001 to 2014. The commentaries on the misapplication of self-defence by military forces during armed conflict all relate to these conflicts. While it may be argued that these trends are context-dependent and hence limited to those operations, the lack of awareness of this fact means that the heavy reliance on both self-defence as a legal and operational concept and the requirements of necessity and proportionality is likely to continue.

It is therefore necessary to recognise that current practice appears to include more than a criminal law defence in the ROE concept of inherent self-defence, here referred to as "operational self-defence". This may make sense especially at the tactical level, in that it is easier to train soldiers in one

218 Scaliotti, 'Defences before the international criminal court' (n 13) p. 158.

219 Antonio Cassese *et al., International Criminal law* (Oxford University Press, Oxford, 2013) p. 211.

cautious standard without setting out the various legal complexities, and they should not be expected to make complex legal assessments when in situations akin to self-defence. However, it is important that those in charge of assessing the force used, including Commanders and legal advisers, realise that there is a difference and what this entails.

8.3.3 *'Unit Self-Defence'*

The concept of 'unit self-defence' presents further challenges. 'Unit self-defence' is a uniquely military concept which allows military units to use force to defend themselves regardless of applicable ROE. A unit may be understood as an army platoon, a ship, an aircraft, or in some circumstances even an international task force; according to Boddens Hosang, "[t]he size or composition of the unit is not relevant, the operation as a single unit is".[220] Although there appears to be general agreement that the use of force in 'unit self-defence' is lawful, there is no consensus on its legal basis.[221] For instance, the concept has not found its way into domestic criminal legislation.[222] There are also differing approaches to what 'unit self-defence' actually entails: for example, does it require a threat to the unit as such, or is it sufficient that a member of the unit is threatened?

In 1983, Ashley Roach pointed out that "little or no operational guidance is given on how and where to exercise that right",[223] and although the guidance may be better today, it is still far from clear. Because there are differing views on what is included in the concept, there are significant divergences in the legal authorities proposed. Dale Stephens, for example, explains that "the right of unit self defense allows a commander, or an individual soldier, sailor or airman the automatic authority to defend his or her unit, or him or herself, in certain well defined circumstances."[224] Boddens Hosang appears to have a narrower definition of the concept, explaining that it consists of "the right of a commander to take all necessary measures to defend his unit against an

220 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 481, footnote 18 and commentaries to §24.07.

221 Stephens, 'ROE and the Concept of Unit Self-Defense' (n 1) p. 126; Charles P. Trumbull IV, 'The basis of unit self-defense and implications for the use of force', 23 *Duke Journal of Comparative and International* 121 (2012–2013), p. 122; Corn, 'Public Authority to Use Force in Military Operations' (n 19) p. 21; and Alan Cole *et al., Sanremo Handbook on Rules of Engagement* (International Institute of Humanitarian Law, 2009) p. 3.

222 Kalshoven and Fontein, 'Some Reflections on Self-Defence' (n 31) p. 106.

223 Ashley Roach, 'Rules of engagement', 36(1) *US Naval War College Review* 46 (Jan/Feb 1983), p. 49.

224 Stephens, 'ROE and the Concept of Unit Self-Defense' (n 1) p. 126.

(imminent) attack".[225] It is therefore not clear who will be authorised to make the decision to use force in 'unit self-defence', and whether 'unit self-defence' also include individual self-defence. As will be shown below, these two commentators have also reached very different legal conclusions.

Boddens Hosang suggests that there are four potential legal models that can be used to explain the concept of 'unit self-defence': the collective application of personal self-defence; the human right of the military unit to defend the lives of its members; the application of State self-defence by the military unit as State representative, or a right *sui generis*.[226] As explained above in 8.2, the scope for relying on personal self-defence as a legal authority for military operations is limited, especially for armed conflict operations. Furthermore, domestic rules on self-defence differ, making it an unpredictable legal basis in the context of multinational operations.[227] It is therefore unlikely to be a sufficient legal basis for the acts considered authorised in 'unit self-defence'.[228] IHRL is also inappropriate as a legal authority because the military unit is a State entity and the State cannot use force beyond the limited exceptions to arbitrary deprivation of life set out in IHRL. Furthermore, as Boddens Hosang points out, a right to use force to further State interests by State agents does not fit neatly with the purpose and nature of human rights.[229] The individual members of the unit will of course retain their right to life, but the use of lethal force would only be permissible when absolutely necessary, and the challenges arising from relying on personal self-defence during an ongoing armed conflict would apply.[230]

The reliance by the State agents on State self-defence as expressed in Article 51 of the UN Charter may therefore seem the best solution; however, this is not unproblematic either. First, the use of force in State self-defence is usually not a tactical level decision because it requires authorisations and access to

225 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 481, §24.07.

226 Hans Boddens Hosang, *Rules of Engagement* (PhD thesis, University of Amsterdam 2017, available at https://pure.uva.nl/ws/files/7940990/Boddens_Hosang_Thesis_complete.pdf, last accessed 24.04.2019) p. 110. See also Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) pp. 482–483, §24.08 with commentaries, and Stephens, 'ROE and the Concept of Unit Self-Defense' (n 1) p. 128.

227 See also Boddens Hosang, *Rules of Engagement* (n 226) p. 113.

228 See also Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 482, §24.08, paragraph 2.

229 Boddens Hosang, *Rules of Engagement* (n 226) p. 115.

230 ibid. See also Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) pp. 482–483, §24.08, paragraph 3.

information that a unit commander may not have. The scale of the response accepted in 'unit self-defence' is also likely to be smaller than when defending the State. Furthermore, the *jus ad bellum* self-defence criteria, in particular the threshold of armed attack as applied in the *Nicaragua* case, appear inappropriate in the context of military forces facing threats in an ongoing operation.[231] In practice, the threshold of State self-defence may be too high to be relevant for military forces involved in tactical-level operations.

Recognising these challenges, Boddens Hosang suggests that 'unit self-defence' could be viewed as a downscaled version of State self-defence, adapted to the applicable scale and command level. As a tactical level representation of State self-defence, the use of force in 'unit self-defence' will be lawful where the requirements set out in the Caroline incident are met (see Section 6.2.2).[232] The authority is delegated from strategic level to tactical level, and due to the downscaled interests involved, the nature and scope of the force that may be employed will have to be adapted to meet the applicable criteria.[233] This means, *inter alia*, that a small scale attack which is considered too limited to amount to an attack on the State may still be an attack on the unit and permit a response proportionate to the attack. A similar approach is taken by Yoram Dinstein, who views 'unit self-defence' as an 'on-the-spot reaction' taken by military forces in response to small-scale attacks on the basis of States' right to self-defence. He explains that "[t]here is quantitative but no qualitative differences between a single unit responding to an armed attack and the entire military doing so. Once counter-force of whatever scale is employed by military units whatever size – in response to an armed attack by another State – this is a manifestation of national self-defence, and the legality of the action is determined by Article 51 as well as by customary international law".[234] As discussed

231 Trumbull, 'The basis of unit self-defense and implications for the use of force' (n 221) pp. 143–145; Stephens, 'ROE and the Concept of Unit Self-Defense' (n 1) pp. 138–140; and Boddens Hosang, *Rules of Engagement* (n 226) p. 112.

232 Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) pp. 483–484, §24.08, paragraphs 4–7 and §24.09 with commentaries.

233 The difference in the level of authorisation and the nature and scope of the defensive force has caused others to reject the relevance of State self-defence as the legal basis for the use of force in unit self-defence. See e.g. Trumbull, 'The basis of unit self-defense and implications for the use of force' (n 221) pp. 127–132.

234 Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, Cambridge, 2011) p. 243, footnote omitted. See, however, Trumbull, 'The basis of unit self-defense and implications for the use of force' (n 221) p. 131, claiming that there is in fact a qualitative difference.

in Section 6.2.3, the right of States to use force in self-defence is increasingly considered applicable also to non-State actors.

The challenge, however, in relying on the *jus ad bellum* right of State self-defence as the basis for 'unit self-defence', is that its scope of application during an ongoing armed conflict, in response to threats arising in connection with that armed conflict, is limited. While Dinstein only proposes that State self-defence is relevant outside the context of armed conflicts, Boddens Hosang suggests that it may be applied as a general legal basis for 'unit self-defence', albeit in a limited or tactical-level form.[235] As explained in 4.3, the *jus ad bellum* defines the parameter for the armed conflict, but will not authorise violations of the *jus in bello*. The use of force during an armed conflict that is not authorised by LOAC may therefore not be based on the *jus ad bellum* right of State self-defence.[236] To allow units to rely on State self-defence during an armed conflict would be to conflate the two areas of law. Because self-defence requires the initial force to be unlawful, the argument that *jus ad bellum* self-defence could apply during an armed conflict would imply that the use of force by an adversary considered to be acting in contravention of the *jus ad bellum* will be unlawful regardless of whether it is in accordance with LOAC. This position was clearly rejected in post-Second World War trials.[237] As a result, State self-defence only provides a legal basis for the use of force in 'unit self-defence' against attacks not related to an ongoing armed conflict.

The fact nonetheless remains that States allow military units to defend themselves, beyond the limited scope of application of the criminal law concept of personal self-defence, even during armed conflicts. If personal self-defence and State self-defence are insufficient legal bases for the reliance on the concept during armed conflicts, two solutions remain: either it has become a separate customary norm, or, as is more likely, it is a non-legal operational concept referring to an act that has different legal bases depending on the circumstances. In peacetime or operations not involving armed conflict, it is based on the *jus ad bellum* right of State self-defence, while during armed conflict, the force will be authorised as personal self-defence or on the basis of LOAC.

235 Boddens Hosang, *Rules of Engagement* (n 226) pp. 112–113. Note, however, that he considers unit self-defence to be "somewhat irrelevant" in the context of international operations because the use of force will be founded on the right of force protection or NATO 'extended self-defence' instead.

236 See also Hessbruegge, *Human Rights and Personal Self-defense* (n 6) p. 232.

237 See further Section 4.3.

The argument that 'unit self-defence' is a *sui generis* right under customary international law has been presented in particularly by Dale Stephens and Charles P Trumbull IV.[238] A clear benefit of this approach is that the use of force in 'unit self-defence' would be authorised rather than merely justified on the basis of being an exculpatory ground for the purposes of criminal liability.[239] In Stephens' view, it is a non-derogable human right, and may therefore not be subject to limitations.[240] Because State self-defence is a matter of national discretion and LOAC depends on the existence of an armed conflict, 'unit self-defence' as a right *sui generis* must in his view be independent from both.[241] When it comes to identifying the applicable criteria for the customary rule on 'unit self-defence', Stephens argues that it "draws its jurisprudential authority directly from the '*Caroline'* prescription".[242]

The proposed customary rule, however, appears to be based on insufficient evidence of *opinio juris*. Trumbull, for instance, primarily bases his argument on references to a right of self-defence which is separate from State self-defence, but fails to explain why this should be interpreted as referring to a separate concept of 'unit self-defence' rather than the generally recognised personal right of self-defence.[243] It may also be criticised on its legal analysis. Although it is clear that the individual members of military forces retain human rights, this is reflected in their right to defend their right to life as established under their domestic criminal law rules on self-defence.[244] As mentioned above, it

238 Stephens, 'ROE and the Concept of Unit Self-Defense' (n 1) pp. 128–140, and Trumbull, 'The basis of unit self-defense and implications for the use of force' (n 221) especially pp. 133–139.

239 Gill *et al.,* 'General Report' (n 24) p. 144.

240 He views unit self-defence as "an example *per excellance"* of the State's human rights obligations owed to military members. Stephens, 'ROE and the Concept of Unit Self-Defense' (n 1) 144.

241 ibid, pp. 128 and 137–138. He explains that "[t]his right is one which has evolved from bitter experience", such as the 1983 Beirut bombing of U.S. Marine Headquarters, the 1987 attack on USS Stark, and the 1988 Vincennes shootdown (see pp. 128–129). See also Stephens, 'Human Rights and Armed Conflict' (n 162) pp. 21–23.

242 Stephens, 'ROE and the Concept of Unit Self-Defense' (n 1) p. 140.

243 Trumbull, 'The basis of unit self-defense and implications for the use of force' (n 221) pp. 133–139. See also Corn, 'Public Authority to Use Force in Military Operations' (n 19) p. 21, criticising Dale Stephens for failing to provide sufficient evidence for this claim. See also Kalshoven and Fontein, 'Some Reflections on Self-Defence' (n 31) p. 106, and the differing national approaches reported in Horvat and Benatar (eds.), *Legal Interoperability* (n 24) 'National Reports', pp. 180–181 (Germany: State self-defence); pp. 197–198 (Norway: collective application of personal self-defence); and pp. 212–213 (Czech Republic: collective application of personal self-defence).

244 The existence of a human right to self-defence was examined, and rejected, above in Section 6.3.1.3.

is not a right that may be conferred on a State entity, such as a military unit. This does not mean that Commanders do not have a duty to protect the lives of subordinates. In order to protect the individual members of military forces from arbitrary deprivation of life, the State is obliged to permit the use of force in self-defence, and Commanders will be obliged to do what is reasonable to effectuate the defence.[245] However, this only applies to the same (relatively limited) extent as their personal right of self-defence, and military forces are also required to accept a certain degree of risk.[246] The argument that 'unit self-defence' is founded on human rights is therefore stretching the personal right of self-defence too far.[247] Furthermore, although the *Caroline* principles may reflect the general consensus on the use of force in self-defence,[248] the result of applying *jus ad bellum* criteria to a human right is somewhat confusing.[249]

In order to achieve much needed clarity on this complex topic, it would be better to separate the widely recognised legal concepts of personal self-defence and State self-defence from the operational reality that forces may defend themselves. The fact is that none of the legal concepts completely address every aspect of 'unit self-defence'.[250] In such cases, the best way to achieve more clarity is not to stretch the application of the legal concepts, but rather to recognise the existence of a non-legal concept. As an operational concept, the authority for using force will differ for those who participate in an armed conflict and those who do not.[251] A similar approach is taken by Henderson and Cavanagh who explain that from a legal perspective, 'unit self-defence' is either a delegated authority to use State self-defence "in limited circumstances and in a constrained fashion" or "a reminder of the criminal law authority to act in self-defence to protect oneself and others".[252]

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245 On the right to life of military forces, see Section 4.2.

246 See also discussion in Section 6.3.2.1 concerning self-defence as a right or a duty.

247 See also Corn, 'Public Authority to Use Force in Military Operations' (n 19) p. 22, arguing that "[t]hose who argue that the obligation stems from human rights law fundamentally misconstrue the nature and purpose of that body of law as a check on the use of force by state actors."

248 Stephens, 'ROE and the Concept of Unit Self-Defense' (n 1) pp. 131–135.

249 See also Corn, 'Public Authority to Use Force in Military Operations' (n 19) p. 21, fn. 87.

250 Boddens Hosang also concludes that "no legal basis by itself fully satisfies every aspect of the right of unit self-defense without requiring at least some adaption or interpretation of the legal principles on which it is founded." Boddens Hosang, *Rules of Engagement* (n 226) p. 117. As mentioned, his answer is to apply a limited form of the *jus ad bellum* rule of self-defence as the sole authority for unit self-defence, however, he considers it of limited importance during international operations. See ibid, p. 113, fn. 68.

251 See also Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) p. 76, arguing that unit self-defence is an operational concept.

252 ibid, p. 76.

As was argued in relation to 'operational self-defence', since 'unit self-defence' is an exception to the restrictions imposed through ROE and other military orders, it is important that it is narrowly defined. The criteria for the operational concept of 'unit self-defence' will primarily be imposed by the applicable legal authority. Under the *jus ad bellum*, the use of force must be necessary, proportionate and immediate, and must be in response to an unlawful imminent or actual attack (the *Caroline* criteria). States appear to have included the first three requirements for the use of force in 'unit self-defence' also during armed conflict. These requirements would operate as self-imposed restraints in addition to the legal requirements arising from the applicable legal authority for the use of force, namely personal self-defence or LOAC, depending on the circumstances.[253] As Henderson and Cavanagh conclude, 'unit self-defence' should be thought of as "an order or command to use military force when certain 'triggers' are present".[254] Considering that force may be used in 'unit self-defence' in situations that are not authorised by ROE, such limitations would be a way to limit and in some way control its application.

In addition to the restraints imposed on the force by the requirements of necessity, proportionality and immediacy, the application of 'unit self-defence' hinges on the definition of a "unit". Who may be defended in 'unit self-defence'? First, if State self-defence is the legal basis, 'unit self-defence' must be limited to the nationals of the State in question.[255] It may potentially also be expanded to include other NATO forces through an application of the concept underlying NATO and its Article 5 of the North Atlantic Treaty on collective defence.[256]

253 It should be noted, however, that the U.S. SROE defines its unit self-defence concept wider, permitting force in response to "force used directly to preclude or impede the mission and/ or duties of US forces". U.S. CJCS, *SROE/SRUF* (n 67) p. A-4. See also Stephens, 'ROE and the Concept of Unit Self-Defense' (n 1) pp. 142–143.

254 Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) p. 76.

255 The U.S. SROE, for instance, limits unit self-defence to the defence of other U.S. forces. U.S. CJCS, *SROE/SRUF* (n 67) p. A-3. By contrast, according to the German contribution to Horvat and Benatar (eds.), *Legal Interoperability* (n 24) 'National Reports: Germany', p. 181, unit includes all personnel and equipment of a mission. The reliance on unit self-defence by UN forces, a topic beyond the scope of this book, would also be permitted on the basis of the *jus ad bellum*, but in the form of the applicable UN Security Council resolution rather than State self-defence. For a contrary view, see Trumbull, 'The basis of unit self-defense and implications for the use of force' (n 221) pp. 129–130.

256 North Atlantic Treaty, Washington, D.C [4 April 1949] (available at https://www.nato.int/cps/ic/natohq/official_texts_17120.htm, last accessed 24.04.2019) Article 5: The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the

Protection of units from other countries, on the basis of *jus ad bellum* and collective State self-defence, requires a request from the threatened State, and is likely to be a strategic-level decision.[257] Agreement on collective 'unit self-defence' on behalf of all military forces where applicable could be reached between troop-contributing nations during the planning of a NATO operation. Second, 'unit self-defence' is generally limited to forces close to those threatened, either by being in the vicinity or operating together with those forces as a single unit.[258] This excludes forces arriving after the attack in order to support the forces, such as quick reaction forces (QRF) or close air support (CAS), from relying on 'unit self-defence' as the authority for their use of force. Instead, they must rely on other authorities for their use of force, such as LOAC or personal self-defence or defence of others, where applicable.[259]

This narrow interpretation of 'unit self-defence' is important to avoid giving military forces the impression that they have an authority to use force that is unlikely to be accepted by the Courts which would hear cases of alleged unlawful use of force. The legal basis proposed for the use of force in 'unit self-defence' ought to be recognised in the jurisdiction in which the issue would be litigated.[260] Kalshoven and Fontein have, for instance, expressed concern that "Units of (…) lower echelons may be strongly inclined to assist each other; and if this result in a violation of their RoE, the excuse that it was a matter of collective unit defence may lie readily at hand".[261] However, "due to the lack of a legal basis, [it] would be unlikely to succeed".[262] Furthermore, the misapplication of 'unit self-defence', in particularly against forces that are not opposing forces in an armed conflict, may have disastrous consequences. In the worst case, it may initiate an armed conflict. Unclear rules may also have the opposite effect, that is, Commanders may become unsure about when to act and wait too long before using defensive force, with potentially deadly consequences for those attacked. Clear rules are therefore of crucial importance, and the current lack

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Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

257 On collective self-defence, see Section 6.2.3.

258 U.S. CJCS, *SROE/SRUF* (n 67) p. A-3 and Boddens Hosang, 'Force Protection, Unit Self-Defence, and Personal Self-Defence' (n 2) p. 484, §24.10 with commentaries.

259 Boddens Hosang, 'Force Protection, Unit Self-defence, and Personal Self-defence', ibid, p. 485, §24.10, paragraphs 3–4.

260 Henderson and Cavanagh, 'Claiming self-defence on the battlefield' (n 18) p. 76.

261 Kalshoven and Fontein, 'Some Reflections on Self-Defence' (n 31) p. 105.

262 ibid, p. 111.

of consensus is troubling. Considering that the legal basis and its requirements will define the scope for applying the force, this lack of consensus regarding the legal basis for the use of force in 'unit self-defence' is likely to cause operational challenges and friction.

8.3.4 *'NATO Self-Defence'? Self-Defence and 'Extended Self-Defence' as Defined in the MC 362/1*

The NATO ROE doctrine, the MC 362/1[263], includes a definition of self-defence. However, as explained previously, the use of force in self-defence by military forces participating in a NATO operation will be defined by the respective domestic legislations.[264] As emphasised in the NATO training publication on ROE, the definition provided in the MC 362/1 must therefore be viewed as a general description, useful as a reference point for the various national versions of self-defence, rather than as a legal basis or description of a common rule.[265]

The reference in NATO doctrine to "extended self-defence" is more complicated because it appears to introduce an additional self-defence form. Under the heading "extended self-defence", the MC 362/1 explain that "[w]ithin the general concept of self-defence, NATO forces and personnel also have the right to take appropriate measures, including the use of necessary and proportional force to defend other NATO forces and personnel from attack or imminent attack".[266] However, rather than being a separate self-defence concept, this reference to self-defence in the MC 362/1 should, according to STANAG 2597, also be understood as a baseline for planning purposes for NATO operations.[267] The purpose of the concept is to extend the objects of protection to include other

263 NATO, *Military Decision on MC 362/1 – NATO Rules of Engagement* [hereinafter *MC 362/1*], 30 June 2003. The MC 362/1 is NATO UNCLASSIFIED, however, permission to use parts of the document for the purposes of this research is granted by the NATO Military Commission in document IMSTAM(O&P)-0006-2018 (copy on file with the author).

264 Note that the self-defence concept included in the MC 362/1 may also be relevant to State or *jus ad bellum* self-defence, however, as the focus of the book is on the use of force during an armed conflict, this perspective is not examined further here.

265 According to STANAG 2597, the MC 362/1 definition is not a legal definition but a planning tool to know where ROE begins/what ROE are needed. See NATO, *STANAG 2597: Training in Rules of Engagement*, ATrainP-4 [hereinafter: *STANAG 2597*], 4 May 2015 (available at http://nso.nato.int/nso/zPublic/ap/ATrainP-4%20EDA%20V1%20E.pdf) p. B-20. The STANAG main document is available at https://nso.nato.int/nso/zPublic/stanags/CURRENT/2597EFed01.pdf, both last accessed 24.04.2019. See also Dreist, 'Rules of engagement in NATO operations' (n 155) p. 126.

266 NATO, *MC 362/1* (n 263) p. 4. See also NATO, *STANAG 2597* (n 265) p. B-20.

267 NATO, *STANAG 2597*, ibid, p. B-19.

NATO forces. It does not increase the amount of force that may be used or extend the circumstances where self-defence may be applied.[268]

The importance of the reference to 'extended self-defence' therefore appears to be a reminder of the purpose of NATO as a defence organisation. As explained above in the context of protection of others,[269] military forces from certain States have a limited ability to defend third persons with self-defence.[270] For instance, it may be limited to persons in a close relationship with those able to assist, which may be interpreted to mean other members of the same unit or nationality. The inclusion in the MC 362/1 of the concept of 'extended self-defence' is therefore one way to ensure that NATO forces come to the assistance of other members of the NATO forces, of all nationalities.

Although STANAG 2597 refers to national concepts of personal self-defence and the different approaches taken to the defence of others, 'extended self-defence' may also be an expression of State self-defence. Boddens Hosang considers it to be "an operational level reflection of the right to collective self-defense, which is the basis for the Alliance",[271] meaning State self-defence as reflected in Article 5 of the North Atlantic Treaty.[272] It is therefore limited to NATO forces, and because of the political sensitivity of visiting forces using force in another NATO State, it should in his view only be applied during NATO operations.[273] He acknowledges that Article 5 will only be an appropriate legal basis for tactical level force during Article 5 operations;[274] however, this position fails to take into account that such operations in many cases will involve participation in an armed conflict, which excludes the continued application of the *jus ad bellum* to authorise otherwise unlawful force.[275] The same concern

268 See however Dreist, 'Rules of engagement in NATO operations' (n 155) p. 127, who appears to consider the NATO concepts of 'hostile act' and 'hostile intent' to be part of 'extended self-defence', thereby extending the circumstances where self-defence may be relied upon beyond situations of imminent or actual attack. As explained in 3.5, these NATO ROE concepts are not self-defence concepts but rather mission accomplishment ROE.

269 See Section 8.2.8.

270 See also U.S. Army, *Operational Law Handbook* (U.S. Army Judge Advocate General's Legal Center and School, International and Operational Law Department, Charlottesville, Virginia, 2017) p. 79, for an example of such an approach.

271 Boddens Hosang, *Rules of Engagement* (n 226) p. 102. See also Gill *et al.,* 'General Report' (n 24) p. 170.

272 Article 5 is set out in note 256.

273 Boddens Hosang, *Rules of Engagement* (n 226) pp. 102–103.

274 ibid, pp. 103–104.

275 See the discussions in Sections 4.3 and 8.3.3.

will apply to the contention that in non-Article 5 operations, the authority must be found in the mandate or legal basis for the operation as such.[276]

As a result, the better approach is to consider 'extended self-defence' as an application of the relevant self-defence provision. During peacetime and operations not involving participation in an armed conflict, this will either be State self-defence (to the extent the authority is delegated) or personal self-defence. During armed conflict, 'extended self-defence' must be based on personal self-defence as set out in the respective domestic legislation.

8.3.5 *'Force Protection' Distinguished from Self-Defence*

'Force protection' is an operational concept closely related to self-defence, and is another area where the definitions, and therefore also the suggested legal bases, differ. In NATO, 'force protection' is defined as a "set of measures and means to minimise the vulnerability of personnel, facilities, materiel, operations and activities from threats and hazards in order to preserve freedom of action and operational effectiveness thereby contributing to mission success".[277] According to STANAG 2597, NATO ROE are supposed to provide Commanders with a sufficient range of force protection measures,[278] implying that unlike self-defence, force protection is not a justification for acting beyond the authorised ROE.

'Force protection' is, however, also used as a reference to a different concept, namely the ability or permission to protect military forces under attack from unnecessary suffering or death, even by scholars from NATO States.[279] Boddens Hosang, for instance, argues that "[i]n its simplest form, force protection is the collective exercise of personal self-defense or unit self-defense", although aspects of force protection go beyond what is permitted in self-defence and therefore require a different legal authority.[280] He suggests that this will be the

276 Boddens Hosang, *Rules of Engagement* (n 226) p. 104.

277 Allied Joint Doctrine for Force Protection AJP-3.14 (November 2007) cited in NATO, *STANAG 2597* (n 265) p. B-81. The definition found in the Sanremo ROE Handbook is similarly focused on preventive measures: "force protection: actions taken to prevent or mitigate hostile actions against personnel (to include family members), resources, facilities, and critical information. Force protection does not include actions to defeat the enemy or protect against accidents, weather, or disease." Cole *et al.*, *Sanremo Handbook on Rules of Engagement* (n 221) p. 82.

278 NATO, *STANAG 2597* (n 265) p. B-81.

279 See e.g. Jens David Ohlin and Larry May, *Necessity in international law* (Oxford University Press, Oxford, 2016) Chapter 11: 'Force Protection', pp. 259–272, and Gill *et al.,* 'General Report' (n 24) p. 154.

280 Boddens Hosang, *Rules of Engagement* (n 226) p. 104.

mandate or other legal basis for the operation in question, in other words the *jus ad bellum*. For instance, if the military force is authorised in UN Security Council resolution to use "all necessary means", this should be interpreted to mean that the forces are authorised to defend themselves.[281] If the *jus ad bellum* authority to act is unclear, for instance during national evacuation operations, the authority to use force beyond self-defence will be equally unclear.[282] Although Boddens Hosang appears to suggest that the UN mandate for the operation will provide the legal basis for the use of force even during armed conflicts, he also points out that LOAC will permit the measures necessary for force protection.[283] As repeatedly emphasised in this book, the reliance on the *jus ad bellum* to authorise use of force during an armed conflict, presumably not permitted by LOAC, would amount to a conflation of the *jus ad bellum* and *jus in bello* which must be avoided.

The main challenge with the above proposition is not, however, conflation of two separate areas of law, but rather that 'force protection' in the NATO context should not be perceived as an aspect of self-defence. According to the NATO definition set forth above, 'force protection' include measures and means used to minimise vulnerability, not the use of force in response to an attack. Examples may include building fences around a military installation, the use of guards to protect personnel and equipment, the use of armoured vehicles, the use of warning zones, and the requirement to use vehicles with weapons mounted on the top (so-called 'top cover'). 'Force protection' must therefore be distinguished from the authority to use of force in self-defence. To the extent that it involves the use of force or other provocative measures, the authority to employ measures or means for the purpose of force protection must be authorised by ROE. There are no specific force protection ROE in NATO doctrine, but there are several ROE that will enable the forces to ensure force protection, such as ROE permitting the use of force to prevent unauthorised access to a military installation or to prevent someone from taking possession of military equipment.

Means and measures employed in force protection that do not involve the use of force will in many cases not require a legal basis because they do not infringe other persons' rights. For operations not involving participation in an armed conflict, the scope for employing force protection will either be defined by the State itself for its own military forces or in the case of military forces operating in support of another State, in the agreement between the host nation

281 ibid, pp. 104–105.
282 ibid, p. 106.
283 ibid, p. 105.

and the military forces present on how to effectuate the mandate for the operation.[284] During an armed conflict, force protection that results in the destruction of enemy property will be lawful provided it is "imperatively demanded by the necessities of war".[285] The use of force related to force protection, as in the case of someone who tries to destroy the gate to a camp or who fails to respect a warning zone, will have to comply with LOAC or personal self-defence as applicable.

8.4 Conclusions on the Relevance of Self-Defence as a Legal Basis for Use of Force during Armed Conflict Operations

"War is by definition a risky and hazardous business".[286] This was stressed in the so-called *Krupp case* before the Nuremberg Military Tribunals and still holds true today. Beyond armed conflicts, the acceptable risk to military forces is low, and an attack on military forces is likely to be considered a threat to the State, permitting the use of force in State self-defence to the extent that is necessary and proportionate under the circumstances. During armed conflicts, however, military forces must accept a certain degree of risk as part of their work, and they cannot set aside the governing legal regime as a result of any risk to their lives. As the judgement in the *Krupp case* made clear, the rules and customs

284 A relevant topic in this regard is the use of force by UN forces, however, this is not within the topic of this book. For a selection of the extensive literature on the topic, see e.g. Simon Chesterman, *The Use of Force in UN Peace Operations* (External Study, Best Practices Unit, UN Department of Peacekeeping Operations, New York, 2004); Trevor Findlay, *The Use of Force in UN Peace Operations* (SIPRI, Oxford University Press, Oxford, 2002); Katherine E. Cox, 'Beyond Self-Defense: United Nations Peacekeeping Operations and the Use of Force', 27 *Denver Journal of International Law and Policy* 239 (1999); Boddens Hosang, *Rules of Engagement* (n 226) pp. 106–110; and Trumbull, 'The basis of unit self-defense and implications for the use of force' (n 221) pp. 138–139.

285 1907 Hague Regulations (n 38) Article 23(g) reads: "To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war". This rule is reflected in customary law and international criminal law, see the *ICRC CIL Study* (n 117) Rule 50, and the Rome Statute (n 38) Article 8(2)(b)(xiii). See also Rule 97 of Yoram Dinstein *et al.*, *Oslo Manual on Select Problems of the Law of Armed Conflict: Rules and Commentaries* (per August 27 2018, forthcoming, copy on hand with the author): "It is specifically prohibited to destroy, damage or seize enemy private or public property unless such destruction is justified by military necessity under the principles and rules of LOAC".

286 *Krupp et al.*, Judgment of 31 July 1948, U.S. Military Tribunal Nuremberg, in T*rials of War Criminals Before the Nuremberg Military Tribunals,* Vol. IX (available at http://werle.rewi.hu-berlin.de/KRUPP-Case%20Judgment.pdf, last accessed 24.04.2019) p. 1346.

of land warfare "are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly – and at the sole discretion of anyone belligerent – disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely".[287] LOAC is designed specifically for the situations that military forces may face when participating in an armed conflict, and the scope for setting this legal regime aside in order to defend oneself, is accordingly limited. The need for setting certain rules aside due to the necessities caused by an armed conflict is the justification for the existence of LOAC. As a result, the justification of necessity only applies to the extent permitted by this *lex specialis* legal regime, namely in the form of military necessity, and the scope for relying on necessity to set further rules aside in self-defence must be narrowly construed.

Because the primary legal basis for the use of force during an armed conflict will be LOAC, self-defence should only be relied upon in the limited circumstances where LOAC is insufficient and the more restrictive requirements of personal self-defence are met. This was emphasised by the ICTY Trial Chamber in the *Gotovina* case. When examining the legality of the use of force against another person in an armed conflict, the Court should first establish the status of the victims. If they were not taking a direct part in hostilities, the next question would be whether the victims had carried out an immediate illegitimate attack on the perpetrator, and whether the response was proportionate.[288]

As explained in detail in Section 8.2, the generally recognised criteria for personal self-defence entail that self-defence by its nature is unsuitable as a legal basis for the use of force during military operations. The same conclusion is reached by Hans Boddens Hosang who points out that self-defence "may be a controversial basis on which to plan and carry out premeditated military operations to achieve political or strategic objectives".[289] During armed conflict, military forces may mainly rely on personal self-defence in the context of civilians threatening them in a way which is not perceived as amounting to direct participation in hostilities.

The extensive focus and reliance on self-defence appears therefore unfounded, unless the self-defence concept referred to is something other than the legal concepts. The use of operational concepts to permit the use of force beyond ROE in exceptional cases makes operational sense; the main rule is that the use of force is subject to command and control, but military forces

287 ibid.

288 *Prosecutor v. Gotovina and others* (n 87) §1730.

289 Gill *et al.,* 'General Report' (n 24) p. 157.

must nonetheless be able to defend themselves. This does not, however, have any impact on when or how legal regimes become applicable. Regardless of what the operational concepts are referred to as, the use of force during armed conflict will primarily be regulated by LOAC, and only exceptionally by self-defence, primarily personal self-defence. The use of force not permitted by applicable ROE may still be authorised by LOAC, especially when the ROE are restrictive and permitting only a fraction of the acts LOAC allows. The result is that use of force beyond ROE, on the basis of the ROE exception referred to as 'self-defence', will in most cases be legally premised on LOAC.

Although States are free to impose policy restrictions akin to respective national rules on personal self-defence and to refer to such defensive force based on LOAC as 'self-defence',[290] they must also ensure that the use of force complies with LOAC. Furthermore, States must be aware of and take measures to mitigate the risks resulting from the terminological conflation. There is a danger that both the criminal law concept of self-defence and the operational concept of self-defence are viewed as the same concept, with the result that too much force is used in 'true' self-defence situations. The operational concept of self-defence, which may be based on LOAC, is "quasi-offensive in nature",[291] and should not be applied in response to unlawful threats posed by civilians, neither in peacetime nor during armed conflicts (provided the civilians are not taking direct part in hostilities).[292] According to Bagwell and Kovite, the tendency to require military forces to fight offensive operations on the basis of self-defense means that they "are left with little recourse but to stretch some aspects of self-defense, while modifying or ignoring others".[293] The requirement that the attack must be imminent is particularly problematic to apply to armed conflict operations, with the result that it has been stretched to no longer mean immediate.[294]

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290 See also Gary P. Corn, 'Developing Rules of Engagement: Operationalizing law, policy and military imperatives at the strategiunic level', in Geoffrey S. Corn, Rachel E. VanLandingham and Shane R. Reeves (eds.), *U.S. Military Operations – Law, Policy and Practice* (Oxford University Press, Oxford, 2016) p. 224.

291 A term used by Husby to describe self-defence as applied by U.S. forces in recent conflicts. Husby, 'A Balancing act: In Pursuit of Proportionality in Self-defense for On-Scene Commanders' (n 54) p. 11.

292 See also Gaston, 'Reconceptualizing Individual or Unit Self-Defense' (n 11) pp. 327–329, citing a U.S. airstrike on a al-Shabaab training camp in Somalia, killing an estimated 150 persons, as an example of such expansive self-defence being applied outside of an armed conflict.

293 Bagwell and Kovite, 'It is not self-defence' (n 3) p. 13.

294 ibid, pp. 13–16. For further discussion on the SROE requirement of imminence, see references in Chapter 6, fn. 369.

Another danger resulting from referring to defensive force during armed conflict as self-defence is that military forces may mistakenly believe that the use of force which is permitted under LOAC is unlawful because it does not meet the requirements for lawful personal self-defence. This may result in otherwise avoidable harm to military forces, and may hamper mission accomplishment. It appears, in other words, that the conflation of the two separate 'use of force' concepts caused by referring to them by the same term may have undesirable effects on the application of both legal regimes. Similar concerns are voiced by Corn:

> Rather than restraining the use of force, the concept of self-defense has expanded beyond legally permissible limits, and the traditional dividing line between defensive and offensive uses of force has eroded. While the vast majority of these combat engagements are otherwise justifiable under LOAC, the co-opting of self-defense authorities to justify offensive targeting risks misapplication of both regimes in combat and overbroad application of self-defense rules in future, less hostile environments.[295]

From a legal perspective, the better approach would be to make a clearer distinction between the use of force on behalf of the State, and the use of force in personal self-defence. In the NATO context, a solution would be to enhance the ROE and guidance on the use of force in response to attacks or threats of attacks carried out by persons who may be considered lawful targets, either because they are combatant or they directly participate in hostilities.[296] Only the use of force in true self-defence should be excluded from the regulation of command and control tools such as ROE. This would reduce the need for an operational self-defence concept permitting the use of force beyond ROE, and it would make the distinction between 'lawful acts of war' and the exceptional role of personal self-defence clearer. The introduction of additional ROE in NATO ROE doctrine authorising the use of force in response to attacks or imminent attacks by opposing forces, as suggested in Chapter 9, would be one way to enhance the distinction between warfighting and self-defence.

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295 Corn, 'Public Authority to Use Force in Military Operations' (n 19) p. 11.

296 See also Bagwell and Kovite, 'It is not self-defence' (n 3) especially pp. 40–42; and Corn, 'Public Authority to Use Force in Military Operations', ibid, p. 56.

CHAPTER 9

The Use of Force by NATO Forces in Response to Attacks or Imminent Attacks by Opposing Forces

Military forces involved in an armed conflict will routinely face attacks or threats of attack, and when the attacker is a lawful target under LOAC, the use of force in response to that threat or attack is regulated by LOAC. It would therefore be expected that the use of force in response to such threats or attacks would be a separate 'use of force' category or ROE in NATO ROE doctrine. However, as explained in Section 3.3, which sets out the use of force in response to attacks or imminent attacks by opposing forces as a ROE 'use of force' category, the MC 362/1[1] does not contain an express ROE for authorising the use of force in these circumstances. This is likely a consequence of the change in ROE methodology and the tendency to require all use of force to be authorised by ROE or lawful as self-defence even for operations involving participation in an armed conflict. Unfortunately, due to the emphasis on self-defence as the regulating concept for all defensive uses of force, there has been little focus on developing this 'use of force' category. The existence of a 'use of force' category beyond pre-planned use of force and self-defence is mainly recognised in joint targeting doctrine, where it is emphasised that the targeting procedures do not apply to contact situations, which includes self-defence and combat engagement.[2] Furthermore, the differing approaches among NATO States to whether the use of force in response to an attack is regulated by self-defence only or may also be regulated by LOAC, can make it difficult to achieve agreement on how to regulate this 'use of force' category in NATO ROE when the doctrine is updated.

The lack of express ROE for responding to attacks or imminent attack by opposing forces may be compensated for by reading an authorisation to respond

1 NATO, *Military Decision on MC 362/1 – NATO Rules of Engagement* [hereinafter *MC 362/1*], 30 June 2003. The MC 362/1 is NATO UNCLASSIFIED, however, permission to use parts of the document for the purposes of this research is granted by the NATO Military Commission in document IMSTAM(O&P)-0006-2018 (copy on file with the author).

2 As explained in Section 3.1, combat engagement encompasses actions in response to both threats or attacks not giving rise to self-defence; in other words, hostile intent not constituting an imminent attack, hostile acts not constituting an actual attack, and imminent or actual attacks from opposing forces in an armed conflict.

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to threats or attacks into other ROE series or creating an appropriate ROE in, for instance, the series authorising the use of force in designated operations. For instance, if the ROE authorising attack on forces 'declared hostile' is available and the threat is considered to originate from persons in that category, this ROE may be sufficient. It is even possible to consider the use of force authorised through the operational concept of self-defence set out in Section 8.3.2. This seems to be the most common practice today. However, as explained in Section 3.3, the lack of a clear standard for formulating this authorisation is unfortunate. Without a standardised manner in which force is authorised in these situations, the parameters for the use of force become less predictable and potentially unclear. This is problematic for forces whose lives depend on that authority; for the commander in need of exerting command and control over such a use of force; and, of course, civilians potentially placed at risk by the potential for misuse or excessive use of force. This Section will therefore deal with the use of force in response to attack as a separate category, even though some of the acts it covers are also discussed in Section 8.3.

Because the use of force in response to threats or attacks from the opposing forces is to be expected and forms part of the ordinary war fighting, it is generally regulated by LOAC. As has been emphasised, LOAC regulates the use of force in both offence and defence.[3] A basic example of the use of defensive force is the use of force in response to an attack by the opposing forces.[4] As explained in Chapter 5, the use of force must be directed at lawful targets, those who plan and carry out the attack must take all feasible precautions to verify that the attack is lawful and to avoid causing incidental harm to protected civilians and civilian objects, and, where such incidental harm is likely to result, the attack must be suspended if it is expected to cause excessive civilian harm in relation to the military advantage anticipated to be gained from the attack.[5]

The practical challenge with these rules is first and foremost that when military forces are under attack, they are often not in the position to make an assessment of the status of the attacking forces. As Corn explains, "[i]n the context of combat operations, the line between actions that constitute

3 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) [1977], printed in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988) pp. 711ff, Article 49(1). See also Section 5.1.3.

4 The commentary to AP I Article 49(1) stresses that defensive force particularly includes 'counter-attacks'. Yves Sandoz, Christopher Swinarski, and Bruno Zimmermann (eds.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* [*hereinafter: AP Commentary*] (ICRC, Martinus Nijhoff Publishers, Geneva, 1987) para. 1880.

5 See Chapter 5 for a more in-depth examination of LOAC requirements.

pure self-defense, such as a unit responding to a hostile act of civilians, and a unit performing the doctrinal military mission of conducting a hasty defense against a belligerent attack, is often blurred".[6] They may not have the resources to both defend themselves and examine the source of the threat, or it may be practically impossible to identify the attackers without getting killed in the process. Perhaps more importantly, it may be very difficult to collect information about civilians or civilian objects in the vicinity of the attackers in order to make the proper proportionality assessment. For these reasons, some States train their troops that they will be authorised to use force that is necessary and proportionate to defend themselves when attacked, so that they are not required to go through the LOAC analysis.[7] This is an important reason why self-defence is presented as the justification for the use of force more often than would be expected in military operations during armed conflict. As explained, other reasons are the combined effects of restrictive ROE causing military forces to look to alternative authorisations for the use of force, and self-defence being the only authorised exception to ROE.

This trend begs two questions. First, is LOAC actually that difficult to apply when military forces are under attack? Second, what is the practical distinction between authorising the use of force that is necessary and proportionate and applying LOAC in situations of attack? Considering that LOAC was designed to apply to combat situations, it should be practically possible to apply to the situation where military forces are under attack. As explained in Section 5.4, the requirement is to do everything *feasible* under the circumstances, meaning that the required standard is adapted to the realities military forces face. If it is impossible to do more to verify the status of the attackers or the presence or

6 Gary P. Corn, 'Developing Rules of Engagement: Operationalizing law, policy and military imperatives at the strategic level', in Geoffrey S. Corn, Rachel E. VanLandingham and Shane R. Reeves (eds.), *U.S. Military Operations – Law, Policy and Practice* (Oxford University Press, Oxford, 2016) p. 244.

7 For example, a soldier's card issued to British forces involved in the occupation phase of Operation Iraqi Freedom, "Card Alpha", stipulates that "[t]his guidance does not affect your inherent right of self-defence. However, in all situations you are to use no more force than absolutely necessary". This clearly imposes a law enforcement 'use of force' standard to a situation regulated by LOAC. The card was classified as restricted, but is published in: UK, *The Iraq Fatality Investigations,* Report into the death of Ali Salam Naser by Inspector Sir Georg Newman, Presented to Parliament by the Secretary of State for Defence by Command of Her Majesty, March 2017, Document CM 9410, (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/595981/1080_WL_Iraq_FAT_Cm9410_Rpt_Death_of_Ali_Naser_PRINT.pdf, last accessed 24.04.2019) Appendix 3, p. 66. The report also makes the comment that "[t]he standard applicable Rules of Engagement ('RoE') were those of self-defence". ibid, p. 19.

absence of civilians, it is not required. In the case of someone attacking NATO forces with military-type weapons such as rifles, rockets or grenades, it will in most cases be reasonable to assume that they are military forces or an organised armed group participating in the armed conflict. Their behaviour may in other words be sufficient to identify them as opposing forces.

The next question for the military forces will be whether the information they have (or lack) makes it reasonable to use force, and therefore potentially risk causing harm to civilians. The determination will be entirely context-dependent. However, some general remarks are still possible. For instance, if their situational awareness and the general knowledge of the pattern of life in the area indicates that the risk of civilian presence is high, an assessment should be made as to whether the use of force is necessary or whether it can be avoided. If a decision not to use force results in unacceptable risk to one's own forces or the target is deemed sufficiently important to justify the potential civilian losses, the continued use of force will be lawful under LOAC.

Legally, LOAC provides military forces with the necessary authorities to deal with actual attacks or threats of attack. There are two likely reasons why personnel are trained to use the force that is necessary and proportionate in such situations. First, the LOAC rules are very detailed and therefore complex to teach and apply. Second, it means that the 'use of force' training will be applicable to all defence situations. As a result of the restrictive 'use of force' authorities under the law enforcement paradigm, the outcome of applying those principles in a LOAC is likely to be the same.[8] If anything, the discussion in Section 8.2 indicates that the use of force in self-defence in general permits less force than LOAC. Because any use of force not permitted by LOAC must be a measure of last resort, it is unlikely that the use of the general or peacetime concepts of necessity and proportionality would entail a violation of LOAC. When NATO forces are attacked or about to be attacked, the main difference between the use of force permitted by LOAC and self-defence would be the degree to which the impact on innocent parties or civilians is considered;[9] however, military forces are trained to always take the risk of harm to civilians into account. Furthermore, because such troops in contact (TIC) situations are not pre-planned, the extent to which precautions may be taken in the preparation for the attack in order to verify the presence and hence risk to civilians

8 See also Gary P. Corn, 'Should the Best Offense Ever be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force rules in the Standing Rules of Engagement', *49 Vanderbilt Journal of Transnational Law* 1 (2016), p. 46.

9 See discussion in Section 8.2.7 in relation to the use of force in self-defence and effects on innocent bystanders.

and civilian objects, is limited.[10] As a result, there is little reason to go into the details of LOAC when training tactical level military forces in how to respond to attacks by opposing forces.

Importantly, this does not mean that LOAC training in general is not required. Tactical level forces may face threats that amount to DPH but do not meet the required threshold of self-defence. The authority to respond to such threats will be regulated by the NATO hostile act and/or hostile intent ROE. As will be further explained in Chapter 11, it is essential that military forces participating in operations where the NATO hostile act and hostile intent ROE are implemented are trained both in how these ROE should be interpreted and applied, and how they relate to other 'use of force' categories.

The following example may be used to illustrate some of the complexities of the use of force in response to attacks or imminent attacks by opposing forces. A platoon involved in an armed conflict is under fire at a forward operating base (FOB). They know that there may be civilians in the area, but they are not certain where. If they were to stand up and see exactly where to return the fire, they would likely be killed. They are thus aiming in the direction they are being shot from. At first glance, it may be difficult to see how the LOAC requirements can be met. The platoon cannot aim specifically at the individual members of the attacking forces, and unable to see where the civilians are, the platoon cannot avoid harming them. Self-defence may therefore appear to be the better legal authority for the defensive acts.

While this is an area where LOAC application is complicated, it is nonetheless possible to apply. First, the use of force may be sufficiently aimed at the opponents even if each shot is not directed at a specific individual. The requirement to do everything feasible to verify that attacks are only directed at lawful targets is therefore met.[11] The second issue is the presence of civilians. Although civilians will usually attempt to get away from an area where there is ongoing fighting, this may not be possible. They may be forced to stay as involuntary human shields or they could be otherwise physically prevented from leaving the area. As a result, the platoon must assume that there is a risk of collateral damage. However, due to the heavy incoming fire, the troops are unable to verify the exact presence or absence of civilians or to reduce the potential harm caused to civilian persons or objects without themselves being killed. LOAC requires that all feasible precautions are taken to minimise collateral damage, and to refrain from launching attacks expected to cause excessive

10 See Section 5.5.

11 AP I (n 3) Article 51(2)(i).

civilian harm.[12] In the current case, the extent of civilian harm is not known or expected to be excessive to the military advantage of saving the lives of the platoon members, and further precautions are not feasible. Although the failure of the attackers to distance themselves from their civilian population places the latter at risk, it does not prevent the platoon from defending themselves.[13]

Even if the decision is made to simplify the training of tactical-level forces to focus on necessity and proportionality, and the requirement to take all feasible precautions to avoid collateral damage, it should be remembered that any assessment of the lawfulness of the use of force after the fact should be based on the applicable legal regime. During armed conflict, this is most likely to be LOAC. The decision to simplify the requirements for the use of force does not alter which legal regime actually applies. If the NATO forces are assessed to have used force beyond what is justified by the general principles of necessity and proportionality, it may still be lawful under LOAC. In particular, there is no requirement under LOAC to use lethal force as a measure of last resort. Attacking opponents who are no longer a threat (without being *hors de combat*) could be a violation of an order to only use necessary and proportionate force, but it would not be unlawful killing.

As previously explained,[14] the scope of application of self-defence and hence the relationship between LOAC and self-defence will differ depending on the type of the conflict. During NIACs, the opposing forces will not have the right to participate in hostilities. As a result, the initial self-defence requirement of unlawful or unjustified attacks is met, and self-defence would legally be applicable. However, because LOAC is better suited to war fighting than self-defence, self-defence is most relevant in the assessment of the legality of the use of force where there is uncertainty regarding the opponent's status as lawful target under LOAC.[15]

12 ibid, Article 51(2)(ii-iii).

13 As Merriam explains in the context of target verification, the tendency of non-state actors not to distinguish themselves from the civilian population will also affect what may reasonably be required of an attacker with regard to verification. While the failure of the opposing forces to comply with the principle of distinction would require the attacking forces to take further measures to gather information and verify the opponents, it may also "explain or excuse a faulty targeting decision based on that information", because the routine failure to comply with the principle of distinction will cause the attacker to make mistakes. John J. Merriam, 'Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters', 56 *Virginia Journal of International Law* 83 (2016), p. 130.

14 See Sections 6.3.2.1 and 8.2.3.2.

15 See discussion in Section 8.2.3.2.

CHAPTER 10

When May Force Be Used to Accomplish Designated Tasks?

The use of force to accomplish designated tasks to enable mission accomplishment and force protection encompasses a vast range of activities. The focus of the ROE in this category is not the use of force as such, but the authorisation of actions to be taken in given circumstances or for a set purpose, and control of the force used to achieve that purpose. If it becomes necessary to use force, it must be limited to either 'minimum force' (which could include deadly force) or non-deadly[1] force, depending on what the applicable ROE authorises. Because the use of force is not intended or planned, if the need to use force arises, it will be solved locally rather than through the application of targeting procedures. As a result, procedures such as the collateral damage estimation methodology are therefore unlikely to be applied.[2]

The ROE regulating the use of force to accomplish designated tasks will in many instances relate to situations where persons are behaving in an undesirable rather than threatening manner. They may for instance be trying to seize NATO property, or may fail to comply with orders of diversion. The ROE may also include the use of force against persons who knowingly obstruct NATO operations, without those actions amounting to a 'hostile act' or 'hostile intent'. Furthermore, recalling that the NATO hostile act and hostile intent ROE include a restriction on whom the intent or act must be directed toward (NATO forces or PDSS), the use of force to defend persons not defined as PDSS can also fall into the current category.

The decision to limit the use of force to non-deadly force will of course be influenced by the applicable legal authority. Yet, it may also be determined by operational or political considerations. In particular, it may be used as a measure to reduce the risk of escalation. Although it is suggested in MC 362/1[3] that

1 This alternative is more likely to be employed for operations not involving participation in an armed conflict.

2 See explanation of targeting in Section 3.1. The targeting procedures are further explained in Section 12.2.

3 NATO, *Military Decision on MC 362/1 – NATO Rules of Engagement* [hereinafter *MC 362/1*], 30 June 2003. The MC 362/1 is NATO UNCLASSIFIED, however, permission to use parts of the document for the purposes of this research is granted by the NATO Military Commission in document IMSTAM(O&P)-0006-2018 (copy on file with the author).

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the term "minimum" should be removed if the ROE only authorises non-deadly force, all use of force not based on LOAC must be limited to what is necessary and proportionate; the term "minimum" should therefore be included.

These ROE have the potential for being applied both below and above the threshold of an armed conflict, with the result that the same ROE may have different legal bases depending on the context. During armed conflict, the arbitrary deprivation of life determination will be based on LOAC.[4] The initial focus when drafting ROE should therefore be on the legal authorities provided by that legal regime.[5] Where LOAC does not provide the desired authority, the legal basis for the use of force authorised by the ROE must be sought in other international instruments or even host nation law. Some areas, however, may be subject to other international law as well as LOAC. In particular, in the context of detention, it is much debated (and disputed) whether IHRL also applies, because the act of detention will bring a person within a state's effective control.[6]

If the force is directed at persons who are considered to be lawful targets on the basis of their status or because their current conduct amount to DPH, the ROE requirement to only use force to accomplish a designated task, with either 'minimum use of force' or 'non-deadly force'[7], will be a limitation on the use of force allowed by LOAC, imposed for political and/or operational reasons.

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4 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports* [1996] 226, para. 25, commenting on the right to life under the ICCPR (International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, *UNTS* vol. 999, p. 171). Note that for ECHR, a State is required to derogate from Article 2 in order for lawful acts of war not to violate that provision. See European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[1950], as amended by Protocols Nos. 11 and 14, *ETS* 5, Article 15(2). See also Gloria Gaggioli, *Expert Meeting on the Use of Force in Armed Conflict: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (ICRC, Geneva, 2013, https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf, last accessed 24.04.2019) p. 79, final assertion. See also Section 4.2 on human rights and Section 6.3.1.3 on the treatment of self-defence in human rights.

5 The approach taken in this book to the *lex specialis* rule in international law is explained in Section 1.4, while its application to the current topic is examined in Section 4.4.

6 UN Human Rights Committee (HRC), *Draft General Comment No. 36 – Article 6: Right to Life* [hereinafter *Draft General Comment 36*] [19 October–6 November 2015] U.N. Doc. CCPR/C/GC/R.36/Rev.2, para. 66, and UN Human Rights Committee, *General Comment No. 31 – The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* [26 May 2004], U.N. Doc. CCPR/C/21/Rev.1/Add. 13, para. 10. The application of human rights standard of detention during armed conflict was examined in *Hassan v. the UK* [GC] (Judgement), App. No. 29750/09, (ECtHR, 16 September 2014). See also the discussion in Section 4.2.3.

7 The terms 'non-lethal' and 'non-deadly' are used interchangeably in NATO ROE.

The application of LOAC is not determined by the terminology in the ROE, but rather the facts of the situation where the ROE are applied.

If the persons are not determined to be lawful targets, they are protected civilians.[8] The question then becomes to what extent harm may be inflicted on civilians as a consequence of military operations. Historically, LOAC has allowed military forces to destroy both life and property when such destruction is "incidentally unavoidable".[9] However, while it may be argued that there is still some scope for destroying property in situations unrelated to an attack where this is "imperatively demanded by the necessities of war",[10] the extent to which military necessity justifies incidental harm to civilians is now exclusively addressed by the proportionality rule.[11] This means that harm to civilians not

8 As explained in Section 5.2, LOAC distinguishes between combatants and civilians, and lawful targets and protected persons.

9 U.S., 'Instructions for the Government of Armies of the United States in the Field' (Lieber Code) [1863], printed in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988) pp. 3ff, Article 15 ("Military necessity admits of all destruction of life or limb of … persons whose destruction is incidentally unavoidable in the armed contests of the war..."); *United States vs. List et al.* ('The Hostages Trial') (Nuremberg, 1948) 11 *NMT* 1230, pp. 1253–54 (military necessity "permits the destruction of life of … persons whose destruction is incidentally unavoidable by the armed conflicts of the war..."); Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its Annex: Regulations Respecting the Laws and Customs of War on Land ('1907 Hague Regulations'), printed in Schindler and Toman, *The Laws of Armed Conflicts*, ibid, pp.66ff, Article 23(g) (It is especially forbidden "To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war"). For an example of the destruction of property rule being applied, see the Norwegian post WW2 Supreme Court case Rt-1946-880, where it was held that the Norwegian Armed Forces were not liable for compensation for a factory bridge destroyed to prevent German forces from advancing. For a detailed discussion of Article 23(g), see Sigrid Redse Johansen, *On military necessity: And the commander's assessment of military necessity under the international law of armed conflict during conduct of hostilities* (PhD thesis, University of Oslo, 2017, copy on file with the author, forthcoming CUP publication) pp. 337–359.

10 1907 Hague Regulations (n 9) Article 23(g). See also Section 3.1, and Rule 97 in Yoram Dinstein *et al.*, *Oslo Manual on Select Problems of the Law of Armed Conflict: Rules and Commentaries* (August 27 2018, forthcoming, copy on hand with the author): "It is specifically prohibited to destroy, damage or seize enemy private or public property unless such destruction is justified by military necessity under the principles and rules of LOAC". For a contrary view, see International Law Association Study Group on the Conduct of Hostilities in the 21st Century (ILA), 'The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare', 93 *International Law Studies* 322 (2017), p. 348.

11 U.S. Department of Defense (DoD), *Law of War Manual* (December 2016 update, Office of the General Counsel of the Department of Defense, Washington, 2016, available at https://www.hsdl.org/?abstract&did=797480, last accessed 24.04.2019) p. 53.

considered to take direct part in hostilities is only permitted when all feasible precautions to avoid such harm have been taken and the harm is not excessive.

For operations not involving attack, such as boarding a vehicle or vessel or entering a building in order to carry out a search, the general movement of troops, and preventing the commission of a serious crime towards civilians, a distinction must be made between the use of force directed at civilian property with resulting harm to civilians and that directed at the civilians. As mentioned above, destruction of civilian property resulting from military activities other than attack may be lawful if justified by military necessity.[12] According to the Oslo Manual, "Necessary destruction, damage or seizure of property may be connected to an attack, but it may also result incidentally from sheer movements and manoeuvers of armed forces. By way of example, buildings, roads, bridges, fences and cultivated fields may be destroyed or damaged as a result of the weight and speed of military vehicles (such as tanks)."[13] The issue of incidental effects to civilian persons from such destruction of property is not clearly regulated, but it appears unlikely that it will be more permissive than the proportionality rule regulating incidental effects of attack. Most likely there is very little acceptance for causing incidental harm to civilians when applying this narrow rule on the destruction of property.

There are two legal approaches that may be taken where the force is directed at the civilians. First, 'attack' could be interpreted wide enough to include any operation causing harm, injury or destruction.[14] Alternatively, such harm to civilians cannot be knowingly inflicted because it would amount to an indiscriminate attack on civilians. The first approach, applied in the Tallinn Manual 2.0 for the cyber context, would require that any operation causing harm to civilians is considered to be an attack to which the proportionality rule applies, regardless of whether the operation causes or was intended to cause the requisite level of harm to the adversary to amount to an attack.[15] However, this

12 1907 Hague Regulations (n 9) Article 23(g).

13 *Oslo Manual* (n 10) Rule 97, Commentary para. 6: "Necessary destruction, damage or seizure of property may be connected to an attack, but it may also result incidentally from sheer movements and manoeuvers of armed forces. By way of example, buildings, roads, bridges, fences and cultivated fields may be destroyed or damage as a result of the weight and speed of military vehicles (such as tanks)."

14 According to Tallinn 2.0, if "the consequences are destructive, the operation is an attack". Michael N. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* [hereinafter *Tallinn Manual 2.0*] (2nd edition, Cambridge University Press, 2017) p. 416.

15 ibid, pp. 418–419. The inclusion of operations not intended to amount to attack is based on the reading of para. 15 in light of para. 16 which deals with the distinction between actual and intended harm.

seems difficult to justify at least for the more traditional domains of military operations. Incidental harm to civilians, beyond the incidental effects of an attack on an adversary, was previously permitted, but is now restricted by the proportionality rule. Expanding the definition of attack to include all military activity causing harm to civilians or civilian objects, in order to justify that harm, would be an avoidance of the general requirement to afford general protection to civilians against dangers arising from military operations, and the prohibition on directing attacks on civilians in particular.[16] Not all military activity amounts to an attack,[17] and such activity will not become an attack, even a lawful attack, merely by causing harm to civilians. As a result, LOAC does not permit military forces to knowingly harm civilian people beyond conducting lawful attacks. Instead, they must take all constant care to spare them,[18] and if their actions are expected to cause harm to civilians not justified by military necessity (by way of being proportionate collateral damage to an attack), the forces must stop or alter their behaviour.

Where the use of force is not permitted under LOAC, other legal regimes, such as other applicable international law or domestic or host nation law, could potentially provide a legal authority. However, it is unlikely that the use of force causing incidental harm to civilians beyond that permitted by LOAC would be lawful. As explained in Chapter 4, IHRL imposes strict limitations on the use of lethal force, and the prohibition on arbitrary deprivation of life is peremptory and non-derogable.[19] This means that it applies as a limitation on State-sanctioned use of force at all times, regardless of whether the requirements for human rights jurisdiction are met for the victims in a particular case.[20] The prohibition on arbitrary deprivation of life continues to apply during armed conflict, although as a result of the *lex specialis* rule the use of force in compliance with LOAC will not be arbitrary.[21]

With the exception of LOAC-based force, the possibility for using lethal force is limited. As explained in Section 4.2, the prohibition on arbitrary deprivation

16 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) [1977], printed in Schindler and Toman, *The Laws of Armed Conflicts* (n 9) pp. 711ff, Article 51(1–2).

17 Program on Humanitarian Policy & Conflict Research at Harvard Univ. [HPCR], *Manual on International Law Applicable to Air and Missile Warfare* [hereinafter: *AMW Manual*] (2009, version 2.1 March 2010, HPCR, Harvard University) Rule 1(e), Commentary para 4.

18 AP I (n 16) Article 57(1).

19 This prohibition is examined in Section 4.2.2.

20 See further Section 4.2.3.

21 See further Section 4.4 on the principle of *lex specialis*.

of life "covers not only intentional killing but also the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life".[22] Furthermore, IHRL requires that the use of force is absolutely necessary and strictly proportionate to the permitted aims. Lethal force is only likely to be considered proportionate when directed at a person who poses a serious and imminent threat to the lives or bodily integrity of others.[23] The right to life also demands that force must only be used as a matter of last resort.[24] In order to ensure that least possible force is applied and to avoid unwanted escalation of the situation into one requiring the use of deadly force based on either a different ROE or self-defence, Escalation of Force procedures may be applied.[25]

Two points should be emphasised in this regard. First, as explained above, if the harm is caused while the military forces are about to be involved in an attack, it should be considered in light of the military advantage anticipated to be achieved from that attack. Thus, if the military forces are under threat of attack and use force to deal with it, and that force incidentally harms civilians, the question becomes one of (LOAC) proportionality. Furthermore, if the non-participating civilians themselves pose an imminent threat to the military forces, self-defence would apply.[26] The abovementioned limitations on the authority to cause harm to civilians should therefore not affect the military forces' ability to defend themselves. As emphasised, LOAC defines attack to include the use of force in both offence and defence.

Second, the harm to civilians that is considered must be a reasonably foreseeable result of the military forces' actions. The requirement to take constant care to spare the civilian population and civilians apply to every aspect of military operations, not just attacks,[27] but accidents happen, even during armed conflict. The question is then whether the harm was foreseeable, and if so, what was

22 *Salman v. Turkey* [GC], App. no. 21986/93, Judgment (Merits and Just Satisfaction) (ECtHR, 2000-VII), para. 98. See also *McCann and others v. the UK*, App. No. 18984/91 (ECtHR, 27 September 1995), para. 148, and *Stewart v. the UK* (Decision), App. No. 10044/82 (ECtHR 10 July 1984), para. 15.

23 UN HRC, *Draft General Comment 36* (n 6) para. 18. See also Section 4.2.2.

24 See generally Section 4.2, and Gary P. Corn, 'Should the Best Offense Ever be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force rules in the Standing Rules of Engagement', *49 Vanderbilt Journal of Transnational Law* 1 (2016), p. 52.

25 On Escalation of Force procedures, see also Section 8.2.5.2.

26 See Section 8.2 for an analysis of the ability of military forces to rely on personal self-defence during armed conflict.

27 AP I (n 16) Article 57(1). See also discussion in Section 5.5.

done to avoid it. In some forms of operations, the use of force must be considered likely even if the purpose may be achieved without using force. Those who plan and execute the operation must do everything feasible to avoid such harm. Examples include designated tasks such as securing the release of captured persons; detaining individual members of the opposing forces or individuals who are considered a security threat; or preventing someone from taking possession of mission essential property. Other aspects of military operations, such as driving down a road, is usually less likely to involve the use of force, even if the NATO forces are authorised to use 'minimum force' to prevent interference with their mission or their freedom of movement, and harm to civilians may not be foreseen. This will depend, however, on how the transport is planned.

To illustrate, if NATO forces are planning to drive from point A to point B in an area where there are limited active hostilities and in a non-provocative manner, the expected risk of harm to civilians is limited to unintentional accidents. The harm to a person stepping into the road immediately before the convoy, making it impossible for the convoy to avoid that person, would not violate LOAC. By contrast, if the troops plan to drive at high speed through populated areas or the decision is made to never stop or slow down a convoy regardless of the situation, harm to civilians should be expected. If it is just a movement of troops or equipment from one place to another, civilians cannot be killed to prevent potential risks. If civilians are crossing the road where a military convoy is approaching, they must attempt to avoid them, for instance by sounding a horn, shouting, driving around them, slowing down or stopping, even if this entails an increased risk to their own safety. The military forces basically cannot shift the entire burden of risk onto innocent civilians; they must accept some risk themselves as well. However, if there is a known high risk in the area of someone placing a magnetic IED under the vehicles if they stop or slow down and stopping would be expected to result in an attack, the use of force to avoid that attack would be lawful if the harm caused to innocent civilians is not excessive to the military advantage anticipated. The ability to use force to secure freedom of movement will therefore depend on whether the force is directed at civilians or persons considered to be lawful targets. Although risk perception is highly subjective, it must be reasonable. For instance, information about how other members of the NATO forces are conducting such operations and the degree of harm caused to own forces and to civilians will be relevant in assessing the reasonableness.

The use of force to defend civilians deserves particular attention. As explained in Section 8.2,[28] the approach taken to the defence of others under

28 See Section 8.2.8 in particular.

self-defence rules differ among States. ROE authorisation is therefore required in order to provide NATO forces with the same authority to use force, for instance, to protect civilians from serious crimes, including preventing conflict related sexual violence. The defence of civilians in general will usually be excluded from the hostile act and hostile intent ROE, as these will be limited to the defence of 'persons with designated special status' (PDSS). An alternative ROE will therefore be required. Importantly, while the ability to use force in defence of oneself cannot be denied by ROE or other orders because this would violate the soldiers' right to life, ROE may impose limitations on the use of force to defend others.[29]

By way of conclusion, the use of force under this ROE category may include deadly force when directed at lawful targets or is the result of an attack on a lawful target and deemed non-excessive. If the force is intended to be directed at non-participating civilians, it is difficult to avoid a determination of indiscriminate attack under LOAC. The force used in such circumstances should therefore be limited to non-deadly force, unless the activity is not deemed part of the hostilities, making LOAC not applicable, and there is an alternative legal basis such as host nation law enforcement authority.

Furthermore, because the use of lethal force outside the context of armed conflict and hence not regulated by LOAC is usually only permissible in order to protect life, the ROE permitting the use of force to accomplish designated tasks cannot be formulated too widely or vaguely, lest they risk authorising a use of force that has no legal justification and is therefore unlawful. For instance, the use of force for "mission accomplishment" or to secure "freedom of movement" cannot be authorised without restricting the use of deadly force to individuals who are lawful targets or to situations that qualify as attack and the civilians harmed can be considered lawful collateral damage. As Corn makes clear, providing military forces with the authority to "treat any efforts to impede [the forces] (…) from accomplishing unspecified missions as sufficient to trigger the use of lethal force is beyond legally suspect".[30] Instead, the ROE must be narrowly tailored to only authorise the use of force necessary to achieve a legitimate interest with a clear legal basis.[31]

29 See further Section 8.2.10.

30 Corn, 'The Public Authority to Use Force in Military Operations' (n 24) p. 52, reference to U.S. forces excluded.

31 See also ibid, pp. 52–53.

CHAPTER 11

NATO Hostile Intent and Hostile Act ROE: Applicable Law and Its Consequences

11.1 'Hostile Act' and 'Hostile Intent' as Operationalisation of DPH

The NATO 'hostile intent' and 'hostile act' ROE concepts, as explained in Chapter 3, authorise attack against designated *persons demonstrating a hostile intent* (*not constituting an imminent attack*) (HI) or *who commit or directly contribute to a hostile act* (*not constituting an actual attack*) (HA). In that these NATO concepts exclude acts constituting imminent or actual attacks, the legal authority for the use of force authorised by these ROE must be other than self-defence.[1] For operations involving participation in armed conflicts, the use of force must comply with LOAC.[2] This means that LOAC regulates both the question of who the attack may be directed at, and how it is carried out. As a result of the negative definition of the ROE as authorising attacks in situations *not* giving rise to self-defence, they function as a bridge between various TCN approaches to self-defence.[3]

The NATO hostile act and hostile intent ROE authorise the use of force, or attack, in response to certain conduct, and are therefore commonly used to regulate conduct-based targeting.[4] As a result, they are particularly useful in

1 See also Randall Bagwell and Molly Kovite, 'It is Not Self-Defence: Direct Participation in Hostilities Authority at the Tactical Level', 224(1) *Military Law Review* 1 (2016), p. 34: "these ROE are explicitly offensive attack ROE, not based on self-defense".

2 The MC 362/1 envisages that the NATO hostile intent and hostile act ROE may be included for ROE outside of armed conflicts as well. See NATO, *Military Decision on MC 362/1 – NATO Rules of Engagement* [hereinafter *MC 362/1*], 30 June 2003, p. 4. The MC 362/1 is NATO UNCLASSIFIED, however, permission to use parts of the document for the purposes of this research is granted by the NATO Military Commission in document IMSTAM(O&P)-0006-2018 (copy on file with the author). Depending on the operation, the use of force is likely to be based on the *jus ad bellum*, such as a UNSC Resolution, or it would be based on applicable law enforcement authorities. In the latter case, the term 'attack' as a description for the use of force by NATO forces could pose a challenge with regard to human rights law and the requirement of necessity and proportionality, including graduated force. This peacetime aspect of the application of the NATO 'hostile intent' and 'hostile act' concepts is, however, beyond the scope of this book.

3 This function of the ROE is further explained in Section 3.5.2.2.

4 On conduct-based targeting, see also Section 5.2.

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conflicts where attacks on the opponents require a determination of whether they are taking a direct part in hostilities. The NATO hostile intent and hostile act ROE may also be used to authorise the use of force against combatants if the decision is made to only target the opponent when demonstrating hostile intent or committing or directly contributing to a hostile act, although it is generally unlikely that the use of force against an adversary in an IAC would be subject to such self-imposed restraints. As a result, the most relevant legal authority for the NATO hostile intent and hostile act ROE is the LOAC concept of 'direct participation in hostilities' (DPH).[5] The following sections will therefore consider how the NATO 'hostile act' and 'hostile intent' concepts operationalise this LOAC concept by authorising attack on persons considered to take direct part in hostilities.

Due to the complexities of the notion of DPH, as described in Section 5.2.3., it is unlikely that ROE authorising the use of force in relation to DPH will make reference to that concept.[6] Instead, it may be explained elsewhere in the OPLAN, for instance the legal annex (Annex AA). Furthermore, because it is challenging to prove a continuous loss of protection based on DPH, it is likely that the main ROE for dealing with opposing forces who fail to distinguish themselves from the civilian population in ways other than through their actions will be the NATO hostile intent and hostile act ROE.[7] It is therefore also of interest to consider the extent to which the NATO hostile act and hostile intent ROE correspond with DPH. Are there acts of DPH these ROE do not authorise attack against? If there are, those developing ROE must consider whether such acts are sufficiently dealt with through other ROE.

As explained in Section 5.2.3, there are three generally accepted criteria for DPH: there must be a certain threshold of harm expected from the hostile act or hostile intent; there must be a direct causal relation between the hostile act or hostile intent and that harm; and the hostile act or hostile intent must be part of the ongoing hostilities. Both the hostile act and hostile intent ROE distinguish between adverse effects towards either one's own forces or other, designated persons. This distinction will be considered jointly, before analysing

5 See also Bagwell and Kovite, 'It is not self-defence' (n 1) p. 34, and U.S. Army, *Operational Law Handbook* (U.S. Army Judge Advocate General's Legal Center and School, International and Operational Law Department, Charlottesville, Virginia, 2017) p. 479. DPH is set out in detail in Section 5.2.3.

6 See also Hans Boddens Hosang, *Rules of Engagement* (PhD thesis, University of Amsterdam 2017, available at https://pure.uva.nl/ws/files/7940990/Boddens_Hosang_Thesis_complete.pdf, last accessed 24.04.2019) p. 205.

7 ibid.

the application of the remaining DPH criteria for hostile intent and hostile act respectively.

An act of DPH must first of all entail adverse effects on the military operations or military capacity of a party to an armed conflict, or it must be likely to inflict death, injury, or destruction on protected persons or objects. Both the 'hostile act' and the 'hostile intent' concepts require that the threat or act is directed at either NATO personnel or other 'persons with designated special status' (PDSS). Provided that the persons designated special status are either protected persons or military personnel of a party to the conflict, hostile acts or hostile intent directed at them could amount to DPH. Depending on the operation, it may for instance include the civilian population, or UN personnel, such as UNAMA in Afghanistan, aid workers and NGO representatives, who would be viewed as civilian. If NATO is supporting a non-NATO State, the host nation forces may also be designated PDSS, and these would fall under the category of military personnel of a party to the conflict. For instance, Afghan National Security Forces (ANSF) had such status "when actively participating in Operations in conjunction with ISAF forces".[8]

The NATO concept of 'hostile intent' is defined as a "likely and identifiable threat" recognisable on the basis of the capability, preparedness and intention to attack or otherwise inflict damage.[9] Although the reference to intent gives the impression that the concept is entirely subjective, a person's intent will in most cases be determined on the basis of his or her actions, and the indicators provided for identifying the hostile intent are in part objective.[10] For instance,

8 UK, *Baha Mousa Public Inquiry*, October 2010, Module 4, Witness Statement Annex A, Serial 3, Document MIV001853, 'Platoon commanders battle course – rules of engagement' (http://webarchive.nationalarchives.gov.uk/20110805153733/http://www.bahamousainquiry.org/module_4/mod_4_witness_statem/exhibit_mje.htm, last accessed 24.04.2019) p. 10.

9 NATO, *MC 362/1,* p. A-1-1, cited in NATO, *STANAG 2597: Training in Rules of Engagement*, ATrainP-4 [hereinafter: *STANAG 2597*], 4 May 2015 (available at http://nso.nato.int/nso/zPublic/ap/ATrainP-4%20EDA%20V1%20E.pdf) p. B-35. The STANAG main document is available at https://nso.nato.int/nso/zPublic/stanags/CURRENT/2597EFed01.pdf, both last accessed 24.04.2019.

10 See also commentary on the concepts in Section 3.5.2.2. The potentially purely subjective nature of hostile intent was criticised by the experts participating in the ICRC project on direct participation in hostilities because it makes it prone to abuse and misunderstanding. See Nils Melzer, *Third Expert Meeting on the Notion of Direct Participation in Hostilities* [hereinafter: *DPH report 2005*], Geneva, 23 – 25 October 2005, Summary Report, Co-organized by the International Committee of the Red Cross and the TMC Asser Institute, available at https://www.icrc.org/eng/assets/files/other/2005-09-report-DPH-2005-icrc.pdf, p. 37. See also p. 40, where it concluded that "one criterion could be whether the act in question objectively revealed "hostile intent" (…) Only in this objectified sense could this criterion give reliable guidance to soldiers as to whom they could or could not identify as legitimate targets".

military forces at times employ escalation of force procedures to help determine whether or not a person's behaviour is demonstrating hostile intent.[11] If the person does not demonstrate hostile intent, he or she will be made aware that he or she is being perceived as a potential threat, and will probably take the opportunity to make the lack of hostile intent clear. Furthermore, in order for hostile intent to warrant attack, there must be a clear and substantial threat. This, together with the clarification that isolated acts of harassment will not normally be considered hostile intent, suggests that the threshold requirement of DPH is met for the NATO 'hostile intent' concept. In fact, unlike the hostile intent ROE, DPH does not require there to be 'a substantial threat'; adverse effects are sufficient. In this regard, the ROE is therefore more restrictive than the DPH rule.[12]

As explained in Chapter 5, the 'direct causal link' criterion should be understood as requiring a clear link between the act and the ensuing harm.[13] The requirement of capability, preparedness and in particular intention to attack or otherwise inflict damage ensures that this criterion is met as well. If the harm to NATO forces or PDSS is intended rather than accidental or coincidental, the direct causal link is clear. Finally, the intended attack or otherwise infliction of damage must be related to the armed conflict rather than, for instance, amount to a crime that ought to be dealt with by law enforcement rather than military force. This is probably the most challenging aspect of DPH to prove, despite the ICRC clarification that the requirement refers to "the objective purpose of the act" rather than the mindset of the individual.[14] As with the other criteria, the determination will have to be made on the basis of the person's conduct and the circumstances at the time. As a result, the formulation of the NATO hostile intent ROE is unlikely to reflect the third criterion, but compliance will be ensured by the general training of the military forces to direct their efforts towards persons involved in the armed conflict rather than crime, and the mission-specific training and examples provided on what

11 See further Section 3.5.3.3.

12 The concerns voiced by the experts participating the ICRC project of direct participation in hostilities, for instance that "'Hostile intent' could easily become a blank check for the use of force by reckless soldiers based on entirely subjective perceptions, even where the facts would clearly have prohibited such force", does not appear applicable to the NATO concept of hostile intent. See Melzer, *DPH report 2005* (n 10) p. 37.

13 See Section 5.2.3.2.

14 ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law [hereinafter ICRC Interpretive Guidance] (May 2009, prepared by Nils Melzer, available at https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, last accessed 24.04.2019) p. 59.

could amount to hostile intent for the purposes of the NATO hostile intent ROE. In most cases, belligerent conduct is distinct from criminal conduct or innocent acts.

The NATO 'hostile act' concept has greater potential for being wider than DPH. As explained in Chapter 3, while 'hostile intent' can be viewed as early preparation for attack, 'hostile act' includes not only acts preparatory to attack but also other acts causing serious prejudice.[15] The first criterion for DPH does not require attack on military forces, but rather acts 'likely to *adversely affect* the military operations or military capacity of a party to an armed conflict'. This is wider than killing and wounding military personnel or causing damage to military objects, and may therefore encompass 'causing serious prejudice' as well.[16] With regard to civilians and civilian objects, however, the threshold requirement is only met if the act is likely to cause at least death, injury, or destruction. Acts causing serious prejudice to civilians could in other words fail to meet the threshold requirement for DPH. For instance, persons interrupting the electricity, water, or food supplies of civilian or international organisations included on the PDSS list might not satisfy the threshold criterion for DPH.[17] The use of force will in such cases therefore primarily be possible if the person is considered to be a lawful target at any time.[18]

Because the NATO hostile act ROE makes reference to "designated forces or individuals who commit or directly contribute to" hostile acts, the second criterion of so-called 'direct causal link' or clear link between the act and the ensuing harm is likely to be unproblematic. The third criterion, however, of belligerent nexus, may in some cases be harder to satisfy, especially for hostile acts causing serious prejudice. As was pointed out in Chapter 3, the type of acts that may be included in the NATO 'hostile act' concept could potentially be carried out by persons who have no intention of causing serious prejudice to NATO forces. Civilians may, for instance, accidentally prevent a convoy from moving, thereby enabling someone to attach an IED to a vehicle, without

15 NATO, *MC 362/1*, p. A-1–2 cited in NATO, *STANAG 2597* (n 9) p. B-37.

16 According to the ICRC, "For example, beyond the killing and wounding of military personnel and the causation of physical or functional damage to military objects, the military operations or military capacity of a party to the conflict can be adversely affected by sabotage and other armed or unarmed activities restricting or disturbing deployments, logistics and communications. Adverse effects may also arise from capturing or otherwise establishing or exercising control over military personnel, objects and territory to the detriment of the adversary." *ICRC Interpretive Guidance* (n 14) p. 48.

17 These are examples provided by the ICRC as activities not reaching the required threshold. ibid, p. 50.

18 See further Chapter 3.

having knowledge of the IED emplacer being nearby. Although the belligerent nexus test is described as being objective rather than dependant on the person or persons' state of mind, if the act is not "specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another",[19] it cannot be considered DPH.

Provided the above criteria for DPH are met for the NATO 'hostile act' concept, the controversial 'for such time' debate will not cause concerns. The hostile act in question must be committed or directly contributed to at the time of the attack. In fact, the NATO 'hostile act' concept may be more restrictive than DPH because it is generally accepted that measures preparatory to the execution of a specific act, as well as the deployment to and the return from the location of its execution, are part of the DPH. The situations likely to be addressed by the NATO 'hostile intent' concept may be considered measures preparatory to the execution of an attack or infliction of damage. Although it is theoretically possible that a capability and preparedness to inflict damage may be identified without having knowledge of its relation to a specific act amounting to DPH, if military forces have information or indications that leads them to believe that a person is a likely and identifiable threat, they will most likely also have information about what the person is expected to do. As a result, it will in practice be most likely that the 'for such time' criterion is met. This conclusion is supported by the experience of U.S. Army Colonel Bagwell from Afghanistan:

> When actually applying the NATO ROE in combat, determining when the authority terminated did not prove to be an issue. In the overwhelming majority of cases where ROE were employed, the identity of the person being attacked was not known (he was only recognized as an unknown person emplacing an IED), therefore as soon as he could no longer be visually identified as the person who committed the act, he could no longer be attacked. In this situation, it was not a unique limitation of direct participation authority that terminated authority to continue the attack. Instead, once the person blended back into the civilian population, the LOAC principle of distinction prevented him from being targeted as he could no longer be distinguished from innocent civilians.[20]

19 *ICRC Interpretive Guidance* (n 14) p. 58.

20 Bagwell and Kovite, 'It is not self-defence' (n 1) p. 35, referencing Bagwell's personal experiences from Afghanistan (footnote omitted).

11.2 NATO Hostile Act and Hostile Intent ROE and Customary Law

The close relationship between the NATO concepts of 'hostile act' and 'hostile intent' on the one hand, and DPH on the other hand, means that State practice on when force is authorised and used on the basis of the hostile act and hostile intent ROE is relevant for understanding how States view this LOAC rule. Because the notion of DPH is complex and somewhat controversial, State practice on its application is particularly useful. For instance, it is clear that States consider the use of force authorised by these ROE to be lawful. To the extent that the ROE challenge an interpretation of DPH, such as the one provided by the ICRC, it provides useful State practice to challenge those positions. This is also emphasised by Prescott, who explains that the ROE concepts are relevant to the definition of DPH "because in many ways it sets the lowest threshold for activity that can be viewed as justifying a lethal response from an opposing armed force in armed conflict involving unfriendly actors who do not necessarily identify themselves as being members of an organized armed force".[21]

The impact of ROE on customary law development or interpretation of DPH may be illustrated by the ISAF approach to persons involved in the use of IEDs. The fact that NATO States participating in ISAF considered the building and emplacement of IEDs to fall within the scope of the NATO hostile act and hostile intent ROE indicates that the customary law rule on DPH, as set out in AP I[22] Article 51(3) and AP II[23] Article 13(3), is less restrictive than the ICRC proposes. Because it was a NIAC with opposing forces becoming lawful targets either due to their sporadic DPH or continuous participation as a member of an organised armed group, there was in most cases no alternative rule authorising the attack. As explained in Chapter 8, self-defence is of limited use as a legal authority for war fighting, and the opposing forces were not recognised as combatants. The controversies concerning continuous direct participation

21 Jody M. Prescott, 'Tactical Implementation of Rules of Engagement in a Multinational Force Reality', in Geoffrey S. Corn, Rachel E. VanLandingham and Shane R. Reeves (eds.), *U.S. Military Operations – Law, Policy and Practice* (Oxford University Press, Oxford, 2016) p. 253. His argument is made in relation to a discussion of hostile intent, but is arguably equally applicable to hostile act.

22 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) [1977], printed in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988) pp. 711ff.

23 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) [1977], ibid, pp. 775ff.

or membership in an organised armed group primarily concern the 'for such time' criterion, not which acts amount to DPH. The conclusion reached by the experts involved in developing the ICRC Notion on DPH, that "it was generally regarded as unhelpful, confusing or even dangerous to refer to hostile intent for the purpose of defining DPH",[24] must therefore refer to the U.S. version of the concept, which is used to refer to self-defence.[25]

However, ROE have to be used as evidence of customary law with caution. First, ROE are not informed by law only but also reflect operational and policy considerations.[26] These are likely to change from one operation to another, as well as during an operation when circumstances change. An additional limitation on the application of the ROE may also be imposed in other operational documents, as the COMISAF CIVCAS Directives illustrates.[27] As Schmitt explains, "the extensive restrictions placed on US and coalition forces in Afghanistan did not result from legal concerns, but rather apprehension that even legal collateral damage would prove counterproductive in the specific context of Afghanistan".[28] Second, a ROE need not correspond with all aspects of a legal authority. Other aspects may be addressed by other ROE, or the decision may have been made not to include it in the ROE set. The fact that the NATO hostile act or hostile intent ROE in some regards are more restrictive than the notion of DPH should therefore not necessarily be taken as evidence of State practice for a more conservative rule.

11.3 Conclusions on the Relationship between the NATO Hostile Act and Hostile Intent ROE and DPH

To a large extent, the NATO hostile act and hostile intent ROE overlap with the LOAC rule on DPH. However, the concepts are not identical. First, not all acts of DPH are covered by the NATO 'hostile act' and 'hostile intent' concepts. As explained above, while the DPH requirements may be met if an act causes adverse effects on the military operations or military capacity of a party to an armed conflict, 'hostile intent' is only considered to be demonstrated when

24 *ICRC Interpretive Guidance* (n 14) p. 59, fn. 151.

25 The potential for self-defence is included in the explanation for the dismissal of hostile intent as a relevant source of State practice for direct participation in hostilities. ibid.

26 See also ibid.

27 See further Sections 2.4.1 and 5.5.

28 Michael N. Schmitt, 'Targeting and International Humanitarian Law in Afghanistan', 85 *International Law Studies* 307 (2009), p. 328.

there is a "clear and substantial threat". Threats that are not substantial, but nonetheless cause adverse effects on the NATO military operations or military capacity, will therefore have to be dealt with either under the hostile act ROE or, if authorised, under a more offensive or status-based ROE (see Chapter 12). Under the hostile act ROE, mere intention to cause adverse effects is not sufficient; the person attacked must either be committing the act or directly contributing to it. The NATO hostile act and hostile intent ROE may therefore not provide the authority to attack persons involved in preparatory acts for causing adverse effects which could be considered DPH.

The more practical distinction between DPH and the NATO hostile act and hostile intent ROE arises in the context of attacking persons who take direct part in hostilities on a regular basis and therefore do not regain the civilian protection between each individual act of DPH. Because the hostile intent ROE requires substantial threat and the hostile act ROE concerns acts being carried out, none of these ROE will enable military forces to attack such persons regardless of their current activity. For instance, if military forces have been under attack, and the attacking forces are clearly retreating (rather than repositioning), the NATO hostile act and hostile intent ROE will not authorise the military forces to follow and re-attack those persons. This would require authorisation under a more offensive ROE. If restrictions are imposed on the more offensive ROE, the reliance on the NATO hostile act and hostile intent ROE would contribute to ensuring a conservative exploitation of the DPH exception, thereby enhancing civilian protection (potentially at the cost of increased risk to one's own forces).

As identified above, the NATO 'hostile act' concept also has the potential for being wider than the DPH rule, at least as it is defined by the ICRC. This is due to the inclusion of 'acts causing serious prejudice'. If the ROE is being used to protect other persons than NATO forces, and these persons are civilian, the DPH rule only permits the use of force when the act is likely to inflict death, injury, or destruction on protected persons or objects. This is clearly more restrictive than 'acts causing serious prejudice', and could, as mentioned, exclude the ability to use force against persons interrupting the electricity, water, or food supplies of civilian or international organisations included on the PDSS list, or persons causing denial of service within the PDSS cyber domain. The use of force to protect civilian PDSS from threats that are not of the threshold required by the DPH rule would therefore depend on whether status-based targeting is possible, or alternatively, the use of force under some form of law enforcement authority. For instance, if the person committing acts causing serious prejudice to civilian PDSS may be considered a lawful target at all times (status-based targeting), the ROE authority to attack that person only when

committing a hostile act is an operational limitation on the circumstances in which LOAC permits attack.

To some extent, similar issues may arise in the context of acts causing serious prejudice to military forces. The DPH rule prescribes that the act must be "specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another". Acts may cause serious prejudice to NATO forces without being specifically designed to have that effect. However, as with the DPH test of 'adverse effects', the question for the military forces is whether it is reasonable to perceive the act as having the necessary belligerent nexus, on the basis of having taken all feasible precautions to verify the person as a lawful target.[29]

The NATO hostile act and hostile intent ROE may be hard to define and apply, and their complexity is not helped by the fact that the applicable LOAC rule for the use of force under these ROE, DPH, is arguably difficult to define and apply. Both the operational and legal concepts are very contextual. In order for NATO forces to apply these ROE to their full potential, within applicable law, they need guidance on how they should be applied in the operation, as well as in the cultural and operational context they operate in. This is of course not an easy task. As Prescott points out in relation to hostile intent, "one of the most significant challenges militaries face is how to properly account for it in their use-of-force doctrines".[30] If the ROE become too abstract or difficult, military forces will look for alternative solutions, which in the case of conduct-based threat is likely to be self-defence, an application which, as explained in Chapter 8, in many cases will be inappropriate. As Corn explains,

> The lack of clear operational guidance on the DPH rule has put intense pressure on the only other use-of-force authority available to service-members when interacting with presumptive civilians – self-defense. This pressure has had the negative effect of broadening the concept of self-defense to meet the realities on the ground, in effect converting a limited peacetime use-of-force authority into a quasioffensive targeting regime.[31]

29 See Chapter 5, in particular Section 5.4.2.

30 Prescott, 'Tactical Implementation of ROE' (n 21) p. 253.

31 Gary P. Corn, 'Should the Best Offense Ever be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force rules in the Standing Rules of Engagement', *49 Vanderbilt Journal of Transnational Law* 1 (2016), p. 46.

Thankfully, the potential for the wrong people being killed is reduced by one of the time-honoured 'principles of war', namely "economy of force, which holds that commanders should only use that amount of force necessary to attain the sought-after military advantage. Employing greater force wastes assets that would otherwise be available for employment against other military objectives".[32]

11.4 'Attack'

The NATO hostile act and hostile intent ROE authorise 'attack', as opposed to 'minimum use of force' or use of 'non-deadly force', the terms found in the lower series of the NATO ROE. Attack is also authorised in the context of persons 'declared hostile', and this Section is therefore equally applicable to Chapter 12. The authority to attack does not mean that NATO forces will be authorised to attack persons considered to fulfil the ROE criteria in all circumstances. As Boddens Hosang stresses, "ROE must always be applied within the confines of IHL".[33] In particular, it is important to apply the rules on verification of targets set out in Section 5.4 and on carrying out attacks in Section 5.5, especially the proportionality rule. Furthermore, the use of offensive attack ROE will also be influenced by the purpose of the mission, Commanders' intent and the applicable political policy indicator (PPI). In particular, there will be more scope for conducting offensive targeting if the PPI is ZULU (risk of escalation is acceptable) than if it is XRAY (de-escalation).[34]

When the term "attack" is used, there is no requirement to use graduated force, such as employing escalation of force procedures, before lethal force. As a result, attack ROE are unsuitable for use outside the realm of armed conflicts and LOAC due to the human rights requirement to only use lethal force when 'absolutely necessary'.[35] However, as previously explained, it is particularly difficult to verify a target on the basis of conduct only. Escalation of force procedures (EoF) may therefore be employed to ascertain the intentions of the person. For instance, a person committing an act perceived as causing serious harm or prejudice to NATO forces or PDSS may stop if presented with warnings

32 Michael N. Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis', 1 *Harvard National Security Journal* 5 (2010), p. 33.

33 Boddens Hosang, *Rules of Engagement* (n 6) p. 192.

34 PPI and their application are explained in Section 2.4.2.

35 See further Section 4.2.1.

or warning shots. If it is a member of the opposing forces, the warning could trigger behaviour that more clearly amounts to a hostile act or DPH.[36]

The authority to attack is also relevant for the debate on whether there is an obligation to capture rather than to kill.[37] The State practice on authorising and applying the NATO attack ROE arguably indicates that there is no duty to capture rather than to kill.

Because the force used under the NATO hostile act and hostile intent ROE is in response to the behaviour and/or intentions of the opposing forces, the persons attacked will in many cases be unplanned and unanticipated targets. The primary application of these ROE is therefore likely to be in combat engagement, which in NATO is distinguished from targeting.[38] Depending on the situation and the procedures for the operation, the NATO hostile act and hostile intent ROE may also be applied during dynamic targeting. As explained in Section 3.1, targeting is the process used to select and prioritise targets and to tailor the response to them in light of operational requirements and capabilities. An aspect of the targeting process is the collateral damage estimation, which is a tool used to consider LOAC proportionality.[39]

The application of the targeting process will depend on, for instance: whether there is time to carry out the formal procedures; whether the means to be used require particular procedural requirements to be met, for instance because it is defined as indirect fire;[40] the degree of expected risk to protected persons or objects; or whether support is needed from other units. According to NATO doctrine, the use of force beyond the targeting process, in combat engagement, "normally involves joint fires coordinated at the tactical level in accordance with the rules of engagement".[41] This means that the necessary

36 Escalation of force procedures is further considered in Sections 3.5.3.3 (factors contributing towards the determination of hostile intent and hostile act) and 8.2.5.2 (in the context of self-defence).

37 See Section 5.3.1.

38 As explained in Section 3.1, NATO defines combat engagement to include actual, imminent or likely actions against the opposing forces, such as responding to an attack. It is not part of the joint targeting process, and according to AJP-3.9, "it must not be confused with targeting". NATO, *Allied Joint Publication 3.9: Allied joint doctrine for joint targeting* (*AJP-3.9*), (NATO Standardization Office (NSO), Edition A Version 1, 31 July 2017), https://www.gov.uk/government/publications/allied-joint-doctrine-for-joint-targeting-ajp-39a, last accessed 24.04.2019) p. 1–3.

39 See further Section 12.2.

40 Indirect fire is defined as "Fire delivered at a target which cannot be seen by the aimer". NATO, *AAP-06(2018): Glossary of terms and definitions* (NATO Standardization Office, Edition 2018).

41 NATO, *AJP-3.9* (n 38) p. 1–3.

assessments and determinations to ensure lawful use of force must be made locally, with the resources available. They will be expected to take all feasible precautions to verify that the targets are military objectives, to avoid causing incidental harm to protected persons or objects, and to refrain from causing excessive collateral damage. In doing so, they must make an honest and reasonable determination of whether and how to carry out the attack.[42] In addition, they must ensure that their use of force supports the operation, as defined, *inter alia*, in the OPLAN.

42 On the LOAC rules for identifying targets and carrying out attacks, see Sections 5.4 and 5.5.

CHAPTER 12

The Use of Force in an Attack on Forces 'Declared Hostile' and Applicable Law

12.1 Forces 'Declared Hostile'

The use of force or attack on forces 'declared hostile', without the qualification that they be involved in a 'hostile act' or 'hostile intent' as defined by NATO, requires the persons to be lawful targets at any time, regardless of current conduct.[1] If the opponent complies with the principle of distinction, such as by wearing uniforms, then this is the least complicated attack ROE. This may, for instance, be the case in an IAC against another State's armed forces (combatants). The challenge arises when the opposing forces fail to distinguish themselves from the civilian population. As one commentator explains, "the only method to PID an insurgent who does not wear an identifiable uniform is to observe his conduct".[2] Most commonly this will be done by physically observing the person, or through "detailed and time-consuming intelligence collection".[3] If the attack is not carried out on the basis of the opposing forces' current activity, it will usually require detailed information about the persons being attacked in order to enable a reasonable conclusion that they are lawful targets.

In the context of NIACs, where combatancy does not apply, the application of this ROE category depends on the legal and operational ability to conclude that someone is a lawful target for an extended period of time. As explained in Chapter 5, persons who are lawful targets beyond individual acts of DPH are generally referred to as members of organised armed groups. In the case of dissident armed forces, their identification is helped by the use of uniforms. Other groups that do not distinguish themselves from the civilian population are, however, considerably more complicated to deal with. The membership or

1 This category of attack ROE may also be applied to attacks on objects, however, this is beyond the focus of this book.

2 Eric D. Montalvo, 'When Did Imminent Stop Meaning Immediate? *Jus in bello* Hostile Intent, Imminence and Self-Defense in Counterinsurgency', *Army Lawyer,* August 2013, p. 24, p. 31. See also Randall Bagwell and Molly Kovite, 'It is Not Self-Defence: Direct Participation in Hostilities Authority at the Tactical Level', 224(1) *Military Law Review* 1 (2016), p. 8.

3 Bagwell, Randall and Kovite, 'It is not self-defence', ibid, p. 8.

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relation to the organised armed group will in many cases require a quantity of intelligence collection that is reserved for commanders and other important members. Instead, the main focus and source for identifying opposing forces in a NIAC is conduct. This complex relationship between status and conduct-based targeting in a NIAC is emphasised by Janin:

> When targeting terrorist leadership, hostile status is almost certainly accompanied by a conduct-based justification. Indeed, the distinction between conduct and status becomes blurred. When managing the rank-and-file civilian-belligerents, the issue reverts back to conduct even if they are declared hostile, as part of a larger group, because they do not distinguish themselves and do not merit their own intelligence dossier.[4]

As a result, although members of an organised armed group ('MOAG') is referred to as a separate category, it was suggested in Section 5.2.3 that the legal requirements should focus on conduct rather than membership. Persons taking a direct part in hostilities on a regular or continuous basis lose their protection from direct attack both during and in between individual acts of DPH. Membership in an organised armed group is merely one, albeit important, way the legal requirements for continuous DPH may be met.

Although the ROE permitting attack on forces 'declared hostile' is generally considered to enable status-based targeting, during NIACs, the text setting out the persons or groups who are the opposing forces may therefore consist of a combination status and conduct requirements. For instance, the ROE may designate as lawful targets members of an organised armed group, the identification of whom is based on continuous DPH, or the ROE may authorise attack on forces designated hostile in circumstances where they are a threat to the NATO mission or NATO freedom of movement.[5] It should be noted that such

4 Janin, Albert S., 'Engaging Civilian-Belligerents Leads to Self-defense/Protocol I Marriage', *Army Lawyer* (July 2007), DA PAM 27-50-410, p. 103. The term "civilian-belligerent" is used by the author to describe persons participating in hostilities without being combatants. ibid, p. 83.

5 Prescott raises concerns that the authorisation to conduct conduct-based targeting accidentally "morphs into a status-based understanding". Prescott, Jody M., 'Tactical Implementation of Rules of Engagement in a Multinational Force Reality', in Corn, Geoffrey S., Rachel E. VanLandingham and Shane R. Reeves (eds.), *U.S. Military Operations – Law, Policy and Practice*, Oxford University Press, Oxford, 2016, pp. 267–268. To illustrate the problem, he uses the example of someone digging an irrigation ditch being mistaken for an IED emplacer. However, this is arguably not so much a distinction between conduct and status-based targeting but more to do with situational awareness and having sufficient situational awareness and contextual understanding to distinguish threatening behaviour from innocent acts.

formulations are not limited to NIACs. During IACs, similar wording may be used to limit attacks to situations set out in the mandate given in a UNSC resolution. For instance, the ROE may only authorise attack on combatants committing or about to commit attacks on the civilian population.

The process that may be used to enable pre-planned status-based targeting on the basis of DPH (i.e. conduct) is explained in detail by Bagwell and Kovite:

> The second way U.S. forces, acting under NATO ROE, used direct participation authority (…) was by gathering intelligence over time that linked a particular individual to continuous acts of direct participation. In these situations, the nature of the acts committed and the amount of intelligence linking the individual to the acts enabled U.S. forces to determine whether the individual was directly participating in hostilities. If determined to be a direct participant, the person was placed on a list of verified targets. Attack was authorized against the person for such time as he remained on the list. To account for the fact that a person can indicate he is no longer a direct participant by not committing any acts of direct participation over a period of time, the person's inclusion on the list was not permanent. United States forces were required to refresh his status with new intelligence evidencing the person's continued direct participation within a given timeframe. Otherwise, the person was removed from the list.[6]

The greatest challenge with this form of targeting is most likely how to ensure that the 'for such time' requirement of DPH is met. As explained in Chapter 5,[7] if the person is a member of an organised armed group, this increases the likelihood of that person continuing to take a direct part in hostilities in the future. One way of reducing the risk of errors is therefore to have a different authority level for determining that someone is a lawful target, regardless of current activity, depending on whether the person is considered to be a member of an organised armed group or whether the affiliation or motivation for previous conduct is unclear. If it is difficult to determine whether a person is a member of an organised armed group, more information will be required in order to determine continued loss of civilian protection, and where possible, the assessment may be better made at a higher level of command where there is more experience with making such assessments.

6 Bagwell and Kovite, 'It is Not Self-Defence' (n 2) pp. 35–36, referencing Bagwell's personal experiences from Afghanistan (footnotes omitted).

7 See Section 5.2.3.4.

In order to determine that someone is taking a direct part in hostilities on a continued or regular basis, whether as a member of an organised armed group or not, military forces must have sufficient information about past activities to warrant an expectation of continued participation in the future. As Janin explains, they may end up having their own 'intelligence dossier'.[8] This may for instance include information about past activities, affiliations and contact with other members of an organised armed groups, and intercepted communications providing information about such affiliations or future conduct. The information may come from observing activity, human intelligence (HUMINT), signals intelligence (SIGINT), or imagery intelligence (IMINT).[9] However, this type of information is most likely to exist for more important targets. As a result, in operations where the opponent does not wear uniforms or an equivalent thereof, status-based targeting ROE will be of less practical importance for NATO forces involved in combat engagement, dealing with threats as they arise.

When persons may be attacked based on their status rather than being a threat at the time, the attacking forces must to a greater extent verify that the opposing forces are lawful targets and not *hors de combat* or otherwise protected for instance due to being medical personnel.[10] This will also be more complicated to achieve when the opposing forces fail to respect the principle of distinction. 'Distinction' not only requires those participating in the hostilities to distinguish themselves from civilians, but also make it possible for those attacking them to avoid harming, *inter alia*, civilians, injured persons or medical personnel. While State military forces usually will use distinctive emblems such as the red cross or 'genfer cross' to enable the opposing forces to identify persons entitled to special protection, it is less likely that organised armed groups will have similar systems.[11]

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8 See also Prescott, 'Tactical Implementation of ROE' (n 5) p. 252, emphasising that "military operations are intelligence-driven".

9 Norwegian Armed Forces, *Manual i krigens folkerett* (*Trans: Manual of the Law of Armed Conflict*), issued under the authority of the Chief of the Defence, [2013] [hereinafter referred to as *Norwegian LOAC Manual*], p. 55.

10 Hans Boddens Hosang, *Rules of Engagement* (PhD thesis, University of Amsterdam 2017, available at https://pure.uva.nl/ws/files/7940990/Boddens_Hosang_Thesis_complete.pdf, last accessed 24.04.2019) p. 192, stresses that: "ROE must always be applied within the confines of IHL, ROE authorizing attack on enemy armed forces do not normally distinguish between combatant and non-combatant members of those armed forces. The prohibition against attacking medical personnel, for example, applies regardless of what is written in the ROE and is included in IHL training".

11 ibid, p. 193, fn. 148.

12.2 'Attack' and the Role of Targeting Procedures

Because the ROE authorise 'attack' on individuals, the considerations presented in Section 11.4 will be equally applicable. There is no requirement of force escalation included in the term, which means that unless otherwise is stipulated, force may be used as a measure of first resort. While the NATO hostile act and hostile intent ROE are most relevant for combat engagement and dynamic targeting, the ROE authorising attack on forces 'declared hostile' are likely to be used in both dynamic and deliberate targeting.

These targeting procedures are intended to provide "a methodology that aids the decision-making linking objectives with effects through the appropriate prosecution of prioritised targets and the assessment of any effect generated".[12] The targeting doctrines and the detailed procedural requirements therein are important tools for ensuring that force is used in accordance with LOAC. By ensuring that LOAC is complied with, the use of force will also respect the prohibition of arbitrary deprivation of life.[13] Although a detailed examination of the targeting process is not within the scope of this book, an overview will be included in order to indicate how the LOAC requirements for the use of force are taken into account.[14]

The force execution phase consists of six steps: find, fix, track, target, engage, exploit, and assess (F2T2E2A).[15] This means that before force is used under the NATO attack ROE, the NATO forces must, *inter alia*, detect, locate and identify the targets (find and fix), and maintain the information (track) until the attack is carried out.[16] This process is usually ISR-intensive. Before the decision to attack can be made, it is important to ensure that the target is lawful, is not subject to operational limitations (i.e. is not on a no-strike list or restricted target list, see further below), and that attacking it is expected to contribute

12 NATO, *Allied Joint Publication 3.9: Allied joint doctrine for joint targeting* (*AJP-3.9*), (NATO Standardization Office (NSO), Edition A Version 1, 31 July 2017), https://www.gov.uk/government/publications/allied-joint-doctrine-for-joint-targeting-ajp-39a, last accessed 24.04.2019, p. 1–4.

13 The prohibition on arbitrary deprivation of life is examined in Section 4.2. For an analysis of the joint targeting process from a human rights perspective, see Ian David Park, *The Right to Life in Armed Conflict* (Oxford University Press, Oxford, 2018) pp. 125–134.

14 For a more detailed overview, see e.g. Gary P. Corn, James H. Dapper, and Winston Williams, 'Targeting and the Law of Armed Conflict', Chapter 6 in Geoffrey S. Corn, Rachel E. VanLandingham and Shane R. Reeves (eds.), *U.S. Military Operations – Law, Policy and Practice* (Oxford University Press, Oxford, 2016) and James A. Burkart, 'Deadly Advice: Judge Advocates and Joint Targeting', 2016 *Army Lawyer* 10.

15 NATO, *AJP-3.9* (n 12) pp. 2–4 to 2–6.

16 ibid, p. 2–5.

towards achieving the end state.[17] The targeting step will also include an assessment of means and method of attack, the risk to one's own forces, risk of collateral damage (collateral damage estimation (CDE), see below) and its reduction, and de-confliction of assets. When the decision is made to carry out the attack, the strike is ordered and the situation is continually monitored.[18] Finally, it should be identified whether the engagement of the target presents further opportunities for exploitation, and an initial assessment is made of the effects achieved.[19] Further assessment is made in the next phase of the targeting cycle, which results in a battle damage assessment (BDA) and measures of performance and effectiveness.[20]

When the target has been selected and planned in advance, the find, fix and track aspect of the F2T2E2A will be used to "simply confirm, verify, and validate previous decisions (in some cases requiring changes or cancellation)".[21] Depending on whether the target is attacked on the basis of a schedule or when located ('on-call targets'), deliberate targeting should make it feasible to take further precautions both to verify the lawfulness of the target and the presence or absence of protected persons and objects. It should also enable further precautions to be taken to reduce the risk of collateral damage, both because it may be possible to gather further information and because there may be more time to issue warnings or find other ways of achieving the same military advantage.

Deliberate targeting in particular also enables more detailed control of the use of force by the senior military command or higher headquarters through the process of retaining the target engagement authority and/or the release authority for the ROE. This allows for stricter control over the requirements for being placed on a target list and how they are applied. For instance, the determination may be required to be made at more than one level of command or involve more people at the same level. By retaining the ROE it is also possible for higher levels of command to influence the determination of the acceptable risk of collateral damage for a given attack and risk to mission or own forces. Doing so may, in other words, help reduce civilian casualty rates. However, as

17 ibid.

18 ibid, pp. 2–5 and 2–6.

19 ibid, p. 2–6.

20 ibid, pp. 2–6 and 2–7.

21 U.S. CJCS, *Joint Targeting* (Joint Publication (JP) 3–60, 31 January 2013, https://www.justsecurity.org/wp-content/uploads/2015/06/Joint_Chiefs-Joint_Targeting_20130131.pdf, last accessed 24.04.2019) p. II-21. The NATO targeting doctrine is influenced by the U.S. doctrine.

was discussed in Section 2.4.1, if the control of the use of force is too detailed and time-consuming, that is, if the ROE become too restrictive, it may make it impossible to carry out operations.

Joint targeting is intended to contribute to creating desired effects while avoiding undesirable ones, such as collateral damage.[22] The tool used to predict and mitigate collateral damage is called Collateral Damage Estimation (CDE) Methodology (CDM).[23] It applies to both dynamic and deliberate targeting, although the level of detail expected will depend on what is feasible in any given situation. Application of CDM will for instance be simplified when prosecuting time sensitive targets (TST).[24] According to doctrine,

> The CDM encompasses the joint standards, methods, techniques, and processes for a commander to conduct CDE and mitigate unintended or incidental damage or injury to civilian or noncombatant [sic] persons or property or the environment. It assists commanders in weighing risk against military necessity and in assessing proportionality within the framework of the military decision-making process. In short, the CDM is a means for a commander to adhere to the LOW.[25]

After establishing PID, CDM requires those involved in the targeting process[26] to identify potential collateral objects, including no-strike entities, in the vicinity of the target.[27] Collateral objects are persons, places or objects that may not be the object of an attack due to legal, political or operational limitations. It may, for instance, be persons not considered as ROE defined opposing forces, and objects or places with general or special protection. Objects and places

22 NATO, *AJP-3.9* (n 12) p. 1–5.

23 ibid, p. 1–9. This is only intended to be a brief overview over CDM. See also U. .S. CJCS, *No-Strike and the Collateral Damage Estimation Methodology* (CJCSI 3160.01A, 13 February 2009, https://www.aclu.org/files/dronefoia/dod/drone_dod_3160_01.pdf). The U.S. doctrine is also applied by NATO. It was made available to ACLU under the Freedom of Information Act on 13 May 2011.

24 TST is defined as "TSTs are those targets requiring an immediate response because they pose (or will soon pose) a danger to friendly forces or are highly lucrative, fleeting targets of opportunity whose successful engagement is of high priority to achieve campaign or operational objectives". NATO, *AJP-3.9* (n 12) p. 1–2.

25 U.S. CJCS, *No-Strike and the Collateral Damage Estimation Methodology* (n 23) p. D-1. LOW is Law of War, referred to as LOAC in this book.

26 The CJCSI 3160.01A states that it is the "inherent responsibility of all commanders, observers, air battle managers, weapons directors, attack controllers, weapons systems operators, intelligence analysts, and targeting personnel". ibid, p. A-6.

27 ibid, p. C-1–2.

such as religious, cultural or historical buildings or structures; medical facilities (military and civilian); civilian refugee camps; works and installations containing dangerous forces such as dams, dykes and nuclear electrical generating stations; and public utilities and facilities such as water supply facilities and fire stations are likely to be placed on a no-strike list (NSL) to enhance their protection.[28] Collateral objects located within the collateral hazard area (CHA) become collateral concerns. The CHA is determined by the collateral effects radius (CER) of the warhead, weapon, or weapon class planned to be used.[29] The identification and geospatial location of collateral concerns must be maintained during the force execution phase of the attack.[30]

Where there is a risk of collateral damage from an attack, military forces are required to reduce that risk.[31] This is done, *inter alia*, by reducing the collateral hazard area so that less collateral objects become collateral concerns (known as "weaponeering"). The collateral hazard area may for instance be reduced by using a different warhead, weapon or weapon system with a smaller collateral effects radius, or by using a delayed fuse, meaning that the warhead is fused "to detonate either in the target structure or below ground, which mitigates fragmentation effects by using the building or ground to absorb fragments".[32] If the target is in an area with protected buildings, the risk to those buildings may be reduced by defining the direction of the attack so that they are less likely to be hit by missiles which accidentally over – or undershot. Finally, when the most appropriate way of carrying out the attack has been determined, the decision has to be made whether the expected collateral damage is lawful, and whether it is acceptable in light of operational and political considerations and restraints on the use of force. The higher the risk of collateral damage, the higher the target engagement authority for the attack is likely to be, thereby enabling stricter control of the use of force.[33]

Although the CDM is a very useful for assessing proportionality, it is not in itself sufficient. It does not, for instance, take into account foreseeable indirect

28 ibid, Enclosure B, and U.S. CJCS, *JP 3–60 Joint Targeting* (n 21) p. II-12.

29 U.S. CJCS, *No-Strike and the Collateral Damage Estimation Methodology* (n 23) p. GL-4.

30 ibid, p. C-3.

31 See Section 5.5.

32 U.S. CJCS, *No-Strike and the Collateral Damage Estimation Methodology* (n 23) p. D-A-2.

33 On the different CDE levels, see ibid, Appendix A to Enclosure D. See also illustrations in U.S. Defense Intelligence Agency, *Joint Targeting Cycle and Collateral Damage Estimation Methodology* (*CDM*) (Presentation given by General Counsel 10 Nov 2009, https://www.aclu.org/files/dronefoia/dod/drone_dod_ACLU_DRONES_JOINT_STAFF_SLIDES_1-47.pdf, last accessed 24.04.2019, released under Freedom of Information Act on 13 May 2011) slides 30–36.

effects of the attack.[34] It is therefore important that those who plan and carry out the attacks ensure that all feasible precautions are taken to avoid collateral damage, beyond the considerations included in the CDM. Furthermore, CDM does not consider military advantage. Instead, it assists the proportionality calculation by estimating the collateral damage that must be taken into account. Those who plan or decide upon an attack must use the information collected through CDM to assess whether the expected collateral damage is excessive to the concrete and direct military advantage anticipated.[35]

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34 "The effects of blast induced debris have not been characterized; of note, blast induced debris has been operationally observed to be a significant hazard to noncombatant personnel." U.S. CJCS, *No-Strike and the Collateral Damage Estimation Methodology* (n 23) p. D-A-2. On the question of what effects must be taken into account when assessing proportionality, see Section 5.5.

35 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) [1977], printed in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988) pp. 711ff, Article 57(2)(a)(iii).

PART 4

Conclusions and Proposals

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CHAPTER 13

Conclusions and Proposals

13.1 NATO ROE and the Legal Basis for the Use of Force

13.1.1 *General Comments*

When NATO forces use force, they must ensure that it complies with both the rules of engagement (ROE) for the operation and applicable law. This requires them to fully understand the legal and operational framework for the use of force and how it applies to their present context. It would therefore be helpful if the 'use of force' concepts applied in ROE and the applicable law could be communicated in a clear and concise manner. However, this requires further clarity concerning the scope of the operational categories, what the respective legal bases are, and how these legal bases apply in practice. The intention of this book was to shed further light on these questions, so that military forces may be given clearer guidance.

ROE are political and operational restraints on the use of lawful force. Because the focus in the ROE is on the tasks authorised rather than the legal basis for such acts, 'use of force' authorisations are formulated through operational categories and concepts. Fifteen years after the current NATO ROE doctrine, the MC 362/1[1], was approved, it is prudent to examine how these 'use of force' categories and concepts have developed and how they interrelate with their respective applicable legal bases. The last fifteen years have tested not only NATO ROE doctrine but also the law of armed conflict (LOAC). In particular, the concept of direct participation in hostilities has been the subject of extensive debate, and attempts have been made to clarify how it should be applied. As a result of the decision to focus this book on operations involving participation in an armed conflict, the concept of 'direct participation' is central to understanding when NATO forces may use force against other persons.

The need to examine the relationship between the 'use of force' categories in NATO ROE and the applicable legal framework is also influenced by the approach NATO has taken to ROE for operations during armed conflict. While it was initially envisaged that ROE for such operations would consist of

1 NATO, *Military Decision on MC 362/1 – NATO Rules of Engagement* [hereinafter *MC 362/1*], 30 June 2003. The MC 362/1 is NATO UNCLASSIFIED, however, permission to use parts of the document for the purposes of this research is granted by the NATO Military Commission in document IMSTAM(O&P)-0006-2018 (copy on file with the author).

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limitations on the use of force that is lawful under LOAC but nonetheless not permitted, the NATO operations in Afghanistan and Libya demonstrated that this approach did not work in practice. The approach taken has instead been to use the ROE to define all circumstances when force and other provocative measures may be used, not merely when lawful force may not be used. As a result, during NATO operations, all use of force or other provocative measures must be authorised by ROE. The only exception to this rule is the use of force in self-defence.

As a result of the sole authority approach, self-defence has become both a legal exception for the use of force and an operational exception. The legal concept of self-defence is an exception to the prohibition on arbitrary deprivation of life. Operationally, self-defence is also being used to refer to the ability to use force beyond ROE. In other words, it is used as an operational exception to the requirement that all use of force during NATO operation must be authorised by ROE. The legal basis for the use of force is not, however, determined by the terminology used to explain it, but rather by the facts and applicable law. Because LOAC applies to the use of force in offence and defence,[2] the application by military forces of both the legal and operational self-defence concepts is intriguing. While the use of defensive force is generally not regulated by NATO ROE, the existence and importance of self-defence is referenced in the ROE, and the study of the 'use of force' categories in NATO operations would not be complete without including the legal and operational self-defence concepts.

The search for the legal basis for the use of force authorised by NATO ROE has revealed that there are fundamentally different approaches to the relationship between legal bases for the use of force and rules regulating the use of force. For some, they are the same; the rules providing exceptions to the prohibition on arbitrary deprivation of life serve as the legal basis for the use of force. In the current context, this means that when LOAC applies, the use of force authorised by ROE will be legally based on LOAC, through the concept of 'combatant immunity' and 'lawful acts of war', or in law enforcement authorities. Others, however, view LOAC merely as the rules explaining how force may be used. For them, it does not provide legal authority, which, when a State is operating outside its own territory, must be found in the *jus ad bellum*. As a result, the use of force necessary to achieve the *jus ad bellum*

2 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) [1977], printed in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988) pp. 711ff, Article 49(1).

goal will be presumed lawful unless expressly prohibited, even if there is no clear rule providing the authority to use force in the circumstances at hand. As explained in Section 4.3, this approach to the *jus ad bellum* results in an undesirable conflation of the two areas of law, and departs from the important lessons of the Nuremberg Tribunals that LOAC applies equally to all parties, regardless of who is perceived as having the lawful cause for being in an armed conflict.

Another area where States and commentators differ in their approach is with regards to the application of IHRL, especially in extraterritorial operations. In addition, NATO States have ratified different LOAC treaties. As a result of these differing international legal obligations, States may have divergent approaches to, for instance, detention. However, in the context of the use of force against persons, the impact is less significant. First, the duty to respect the prohibition on arbitrary deprivation of life is so thoroughly entrenched in international law that it has arguably become a peremptory norm, reflected in both IHRL and LOAC. Second, States generally agree that the *lex specialis* of armed conflict is LOAC, and a large part of LOAC regulating the conduct of hostilities is now recognised as customary international law and therefore applies equally to all States.

As a result, the use of force by military forces during armed conflict, expected to affect the right to life of others, must first and foremost comply with LOAC. If LOAC is insufficient, self-defence will in extraordinary circumstances provide an alternative authority for the use of force. Legally, military forces may also use force in the context of law enforcement. However, NATO forces are only exceptionally involved in such activities, and the topic has therefore not been examined in this book.

As mentioned in the introductory chapter, the research was also made challenging by the use of identical or similar terms to describe different concepts, a phenomenon that can conceal divergence in national approaches. This is so with regard to many of the central terms and concepts of the book, such as 'hostile act', 'hostile intent', 'attack', 'self-defence', 'combatant', and 'direct participation in hostilities' (DPH), and is one of the reasons why the exact legal regulation of the respective 'use of force' concepts is unclear. As a result, there is a need for both enhanced awareness of these divergent views, and for further clarification.

The following subsections will summarise the findings concerning the relationship between the use of force authorised by NATO ROE, whether explicitly in the ROE or implicitly as self-defence, and applicable law. The focus will be on the potential room for manoeuvre under the respective categories, and whether any changes should be made in how they are interpreted.

13.1.2 *The Use of Force in Self-Defence during Armed Conflict*

Although it is only indirectly a part of NATO ROE, the use of force in self-defence is the only exception to the requirement that all use of force must be authorised by ROE. As such, it has played a particular role in NATO 'use of force' doctrine. Contrary to the impression that the reliance on self-defence during military operations may give, the legal concept of self-defence only applies in exceptional circumstances. During armed conflict, this is defined by the respective troop-contributing nations' domestic legislation, unless a third party enters the conflict and thereby potentially triggers State self-defence.

Central to all expressions of the legal concept of self-defence is the idea that *otherwise unlawful* acts are justified if they are taken as a necessary and proportionate response to an *unlawful* attack or one that is imminent. The reference to "otherwise unlawful acts" limits the potential application of self-defence during armed conflict because the use of force by military forces against opposing forces during an armed conflict is *lawful*, as a result of the LOAC concepts of 'combatant immunity' and 'lawful acts of war'. In addition, if the opponent is a combatant, his or her attack is also a lawful act, with the result that there is no 'unlawful attack' to defend against with self-defence. Self-defence is therefore mostly relevant for military forces participating in armed conflict in relation to threats arising from persons known to be civilians, or where their status as lawful targets is not sufficiently clear and the presumption of civilian status applies.

During NIACs, the opposing forces do not have the right to participate in hostilities. As a result, their attack on NATO forces would most likely be considered unlawful under applicable domestic law, which means that self-defence requirement of an 'unlawful attack' is met. However, NATO forces will most likely be authorised to use force, making their acts lawful rather than "otherwise unlawful". Furthermore, as a result of the requirements of necessity and proportionality, force may only be used as a last resort; it cannot be incited, and, if possible, attempts must be made to try to avoid its use, at least if the threat is not imminent. Excessive use of force may prevent a finding of self-defence.

The use of force in self-defence must be reasonable, and if mistakes are made, for instance with regard to the severity of the situation or the degree of force required to fend off an attack, this will only be accepted if they are considered reasonable. In both regards, military forces are likely to be assessed to a higher standard than civilians in general, both due to their training and experience with the use of force and the effects of this, and because it should be less likely that they overreact due to fear or panic. They will, in other words,

be assessed on the basis of what a 'reasonable soldier' would have done, not a reasonable civilian.

Although self-defence is most likely to be raised in connection with force being used against persons who are not lawful targets, it may also apply to the use of means and methods prohibited by LOAC. For instance, the use of tear gas or exploding ammunition under 400 grams is by most States considered to only be permissible for, respectively, law enforcement purposes and against vehicles. However, if they are the only means available to effectively act in self-defence, their use may be accepted as lawful if proportionate. Although the use of unlawful methods in self-defence is theoretically lawful, most prohibited methods, such as starvation, are unsuitable as individual acts in response to imminent threats. This is because, *inter alia*, they require planning, take time to carry out, or lack defensive intent. Self-defence may nonetheless be accepted for a violation of prohibitions such as the misuse of enemy uniform or feigning protected status, at least if it is done in order to escape the situation rather than attack.

Whereas causing civilian casualties may be acceptable when using force based on LOAC, harm to innocent third parties caused during acts of self-defence is more complicated. Because the innocent parties do not represent a threat, no right of self-defence arises in relation to them. Legally, such harm should therefore be treated as a question of necessity; however, the tendency seems to be to assess all consequences of the self-defence act together, under the proportionality principle. Still, the harm to third parties is subject to a stricter proportionality assessment, meaning that it must be clearly outweighed by the harm the defensive act is intended to prevent. While harm caused recklessly is likely to be deemed disproportionate, harm to others may be considered reasonable if it was unintentional or, as may be the case in a hostage situation, it is caused knowingly in order to prevent greater harm.

Defensive acts may be undertaken in order to protect oneself, others and to some extent property. For NATO operations, the protection of others should be interpreted to include all forces participating in that operation, in furtherance of Article 5 of the North Atlantic Treaty.[3] At the same time, it is preferable that the authority to defend others is provided for in the ROE, making it unnecessary to argue self-defence other than in exceptional circumstances. The protection of coalition forces should also be regulated in ROE. The use of force to protect persons who are not part of the NATO mission or coalition forces, such

3 North Atlantic Treaty, Washington, D.C, 4 April 1949 (https://www.nato.int/cps/ic/natohq/official_texts_17120.htm, last accessed 24.04.2019).

as members of the civilian population or NGOs, is more complicated. It will depend, *inter alia*, on the scope of the applicable domestic self-defence rule; whether the State has a duty to protect them; and the risk of harm to those carrying out the defence. Interference in situations unrelated to the operation may have negative implications for mission accomplishment because it interrupts an operation or, more importantly, is sometimes culturally unacceptable. It may therefore be limited, through ROE, to situations of serious harm.

This ability to impose limitations on the use of force in self-defence by military forces is not limited to the defence of others unrelated to the mission. The authority to use force to protect property may also be limited. Furthermore, the use of force to defend other NATO forces may be restricted if it is expected to cause unreasonable risk to one's own forces. To the extent such limitations are not tantamount to ordering military forces to commit suicide, Commanders may also impose restrictions on the ability of subordinate personnel to defend themselves. However, such restrictions must be reasonable, and must be imposed, for instance, to gain a tactical advantage or to enhance the protection of the civilian population. Furthermore, limitations are more likely to be acceptable in response to imminent attacks than ongoing ones, and where the attack is expected to cause light injuries rather than death or serious injury.

If military forces use force in violation of a military order, the force itself may nonetheless be lawful either on the basis of self-defence or LOAC, but because military forces have a duty to comply with orders that are not manifestly unlawful, acting contrary to orders may itself be a criminal offence.

Whereas the legal concept of self-defence operates as an exception to the prohibition on arbitrary deprivation of life, the operational concept applies as the only exception to the ROE limitations on the use of force. It permits the use of force not authorised by ROE, which means that the legal authority for that use of force may be either LOAC or self-defence. As a result, it may be applied in a wider range of situations than the legal concept. To the extent the use force may be characterised as LOAC defensive force, the imposition of limitations in the form of necessity and proportionality in the self-defence meaning of those terms amount to operational or political rather than legal limitations.

In incidents where the operational concept of self-defence is applied, the main challenge to legality is whether sufficient precautions are being taken in order to avoid harm to civilians, and whether means or methods prohibited by LOAC are being used because the action is considered to be self-defence. As the discussion in Section 8.3 suggests, the risk of violating LOAC when applying the self-defence requirements for the use of force is minimal. There is nonetheless a concern that the conflation of two areas of law, with very different purposes, will have negative effects on both. The use of force accepted as self-defence

in an armed conflict where the legal basis was LOAC may fail to meet the self-defence criteria in a different, peacetime, context. If not informed of the differences, military forces may unintentionally use force beyond what is permitted. Furthermore, the focus on self-defence even during armed conflict can cause military forces to become hesitant in defending themselves, thereby putting themselves and others at additional risk.

13.1.3 *The Use of Force in Response to Attacks or Imminent Attacks by Opposing Forces*

The use of force by NATO forces in response to attacks or imminent attacks by opposing forces is a central aspect of warfighting and would as such be expected to be part of the ROE rather than dependant on self-defence. However, it is not among the proposed ROE in the MC 362/1, and is usually dealt with as 'self-defence', despite LOAC applying to the use of force in defence as well as offence. This is likely a result of the change in the approach to NATO ROE, whereby the use of force during all types of operations requires ROE, even during armed conflict.

Because the use of force in such situations is doctrinally dealt with as a form of self-defence, military forces are given the impression that the use of force in such situations will be lawful when it is necessary and proportionate. Although these peacetime 'use of force' concepts do not require considerations akin to the LOAC rules on precautions in attack (and in particular the avoidance of collateral damage), they do limit the use of force to that which is absolutely necessary. Legally, regulating the use of force in contact situations in this manner should not cause NATO forces to act unlawfully.

It would nonetheless be preferable to have explicit rather than implicit authorisation of the use of force in such situations. Furthermore, self-defence is by its nature an exception, and defending against attack from opposing forces does not fit with that characteristic. The challenge is to a find a way to formulate it so that all NATO States will accept. Because it is closely connected to self-defence, it is a sensitive issue and, as previously explained, not all States consider LOAC to apply to defensive force. Furthermore, if such ROE were to be included, it would be important to emphasise that it should only be subject to restrictions on its use or be retained in exceptional circumstances.

13.1.4 *Use of Force to Achieve Designated Tasks*

This category covers all use of force which does not qualify as an attack and is not defensive force under either self-defence or in combat engagement. It therefore includes a wide variety of situations, from searching and seizing vessels to defending third parties from serious crime. This category raises a

different issue than the others: to what extent may force be used against individuals outside of attack? If the person harmed is a lawful target, the use of force against that person would most likely amount to a lawful attack under LOAC. The fact that the NATO forces were tasked to carry out, *inter alia*, a search of that person's property does not affect the legality of the use of force under LOAC. However, if the person is not a lawful target, the only way NATO forces may expose that person to harm is if it is incidental to an attack on a lawful target and not deemed excessive. As a result, if there is no attack, force may not be used if it harms civilians. In any case, force may never be directed at a person not considered to be a lawful target (except in self-defence). Instead, the requirement to take constant care to spare the civilian population will apply. Although LOAC is not the only potentially applicable legal regime, other areas of law, whether national or international, are likely to only permit the use of force as a measure of last resort, and to only permit the use of lethal force in exceptional circumstances.

As a result, it is important not to vaguely or widely formulate or interpret the ROE permitting the use of force to accomplish designated tasks. This means that ROE authorising the use of force for 'mission accomplishment' or to secure 'freedom of movement' must be qualified in a manner that avoids the use of deadly force against individuals who are not lawful targets or causing harm that cannot qualify as lawful collateral damage.

The ROE authorising the use of force to accomplish designated tasks may be formulated as either permitting 'minimum use of force', which includes deadly force, or lesser forms of force, usually expressed as non-deadly or non-lethal force. According to the MC 362/1, if the decision is made to only authorise non-deadly force, the term 'minimum' should be deleted. However, because these ROE have the potential for authorising the use of force not authorised by LOAC and may therefore based on peacetime rules, the requirement to use no more force than necessary will still apply. The term 'minimum' implies that escalation of force procedures should be applied, which is a useful reminder even where only non-deadly force is authorised. It ensures that the force used is no more than necessary, and that the situation does not escalate into a self-defence situation where this could have been avoided. The term 'minimum' should therefore always be included.

13.1.5 *The Attack Series*

13.1.5.1 The NATO Hostile Act and Hostile Intent ROE

The NATO ROE authorising attack on persons carrying out a hostile act (not constituting actual attack) or demonstrating hostile intent (not constituting imminent attack) are 'use of force' authorities applicable to conduct-based

targeting. They are therefore different from national 'hostile act' and 'hostile intent' concepts, which generally refer to self-defence. Because the ROE authorise the use of force in response to threatening behaviour, they are particularly useful in operations where the opposing forces fail to distinguish themselves from the civilian population. The NATO 'hostile act' concept enables NATO forces to respond to any intentional acts that cause prejudice or pose a danger, while the NATO 'hostile intent' concept authorises attack on persons having the intent to attack or otherwise inflicting damage before the threat becomes imminent. Because the ROE authorise 'attack' rather than 'minimum use of force', there is no requirement to use graduated force. Escalation of force procedures may nonetheless be useful to ascertain intent.

The comparison of the NATO hostile act and hostile intent ROE and the most likely legal basis for their application during armed conflict, namely direct participation in hostilities, revealed that in most cases, the ROE concepts are narrower than the legal concept. Whereas the NATO 'hostile intent' concept requires 'a substantial threat', 'adverse effects' are sufficient under DPH. The 'causal link' criterion of DPH is met by the requirement of 'capability, preparedness and intention to attack or otherwise inflict damage' under the ROE concept. Finally, although the belligerent nexus requirement for DPH is not clearly reflected in the 'hostile intent' concept, it is likely that general training on lawful targets and mission specific training on what constitutes a likely threat in the area of operation will ensure that the ROE is applied in compliance with this DPH criterion.

Because the NATO 'hostile act' concept includes not only acts preparatory to an attack, but also other acts causing serious prejudice, it is potentially wider than DPH, particularly when the hostile act is committed against 'persons with designated special status' (PDSS) rather than NATO forces or partner forces. This is because the threshold for DPH is higher when directed at civilians than opposing forces; it must be likely to cause death, injury or destruction. This aspect of the NATO 'hostile act' concept therefore requires the person committing the hostile act to the lawful targets at all times in order for an attack in response to the hostile act to be lawful. Alternatively, the application of the concept may be reformulated to only authorise attack on "designated forces or individuals who commit or directly contribute to any intentional act causing serious prejudice or posing a serious danger to NATO forces or posing a serious danger to PDSS".

While the second DPH criterion, a causal link, is most likely met by the reference to 'designated forces or individuals who commit or directly contribute to' hostile acts, there is a potential for 'acts causing serious prejudice' to encompass acts that do not meet the belligerent nexus criterion. This is because

the acts covered by the ROE, such as impeding NATO military operations, may also be carried out without any intention to adversely affect the military operation. If the act is not specifically designed to create such adverse effects, it is not DPH. As suggested above in relation to hostile intent, compliance with the belligerent nexus criterion should most likely be ensured through training.

As a result of the reactive nature of the NATO 'hostile act' and 'hostile intent' concepts, the 'for such time' criterion is most likely complied with when applying these ROE. In fact, it is likely that acts preparatory to DPH, which is considered part of the direct participation, are not covered by the NATO hostile act and hostile intent ROE. Furthermore, the NATO hostile act and hostile intent ROE will not authorise attack on persons considered to take a direct part in hostilities on a regular basis unless they commit a hostile act or demonstrate hostile intent at the time.

Finally, because both DPH and the NATO hostile act and hostile intent ROE are highly contextual, it is important that military forces be provided with clear mission specific examples of how the ROE should be applied. Mission specific examples of what constitutes a hostile act or hostile intent are also useful sources when analysing State practice on the application of DPH.

13.1.5.2 Attack on Forces 'Declared Hostile'

The use of force or an attack on forces 'declared hostile', sometimes referred to as 'ROE defined opposing forces', is the least complicated 'use of force' category, at least when the opponent complies with the principle of distinction by distinguishing themselves from the civilian population. However, while combatants in an IAC are likely to wear uniforms or other fixed distinctive signs, opposing forces in a NIAC are less likely to comply with the principle of distinction, with the potential exception of dissident armed forces. This makes this ROE category more challenging to apply in NIACs.

As explained in Chapter 12, the identification of opposing forces in a NIAC is usually done on the basis of their conduct; membership in an organised armed group will in most cases be difficult to discern when the members wear civilian attire. As a result, the most practical legal criteria for identifying opposing forces in a NIAC are those enabling a determination of direct participation in hostilities, not a theoretical test for membership. State practice suggests that the protection from direct attack may be lost for an extended period of time, either on the basis of membership in an organised armed group or other indications suggesting continuous direct participation in hostilities. Members of an organised armed group will therefore factually constitute a separate category, although the identification is likely based on their conduct and hence the criteria for DPH.

Status-based targeting allows opposing forces to be attacked at any time, regardless of current activity, provided they have not become *hors de combat.* As a result, NATO forces can be proactive in their use of force, rather than just reactive. Furthermore, status-based targeting enables detailed planning, which again makes it possible to apply targeting procedures designed, *inter alia*, to enhance LOAC compliance.

13.2 The Need for a Holistic and Uniform Approach to ROE

In addition to setting out the NATO 'use of force' categories and corresponding legal bases, the research has also given rise to more general conclusions on NATO ROE doctrine. The expectation that NATO forces only use force authorised by ROE (unless self-defence) affects the approach taken to NATO ROE with regard to drafting, implementation and interpretation. When the sole authority for using force beyond self-defence, the ROE for an operation must cover all potential aspects of the operation; there can be no 'gaps' between ROE series or rules where desired and lawful acts may fall. The ROE must in other words not only be relevant and lawful, they also need to be sufficient to accomplish the mission. Furthermore, they must be sufficiently broad or flexible to enable their adaptation to changing situations. There is, in other words, a need to have a holistic approach to ROE, and the NATO ROE doctrine should have templates covering the most likely potential aspects. This requires that the current version, the MC 362/1, be updated to include, among others, more modern cyber ROE. Additionally, the authority to respond to threats or attacks by opposing forces on the basis of LOAC rather than self-defence should be explicit rather than implicit. Preferably, such ROE should be introduced into the NATO ROE doctrine as this will help ensure a uniform and predictable approach to the issue. In the absence of a ROE template authorising the use of defensive LOAC force, it should be created in a spare number.

Both the requirement of ROE authorisation or orders to use force and the importance of self-defence as an exception to this requirement is far from new. It should therefore not be controversial. For instance, Vattel explained in 1758 that:

> To fight without orders is almost always, in the case of a soldier, to fight contrary to express orders. Accordingly there is hardly any other case than that of self-defense when a soldier or subordinate officers may act without orders. In that case orders may safely be presumed; or rather the

> right to defend oneself from attack belongs naturally to every man, and no permission is needed.[4]

The sole authority approach to ROE for all operations has nonetheless been met with criticism, in particular in the context of armed conflict operations, and especially NATO Article 5 operations. This appears to be the result of divergent command and control approaches. Those in favour of mission or de-centralised command are likely to prefer as few ROE as possible, while detailed ROE enable order based or centralised command. However, completely de-centralised command, to the extent that the military forces are authorised to use the force they consider necessary, provided it complies with LOAC, appears utopic, particularly during multinational operations requiring joint political approval. Because ROE are currently one of the preferred tools for imposing political constraints on the use of force and enable operational command and control, it is difficult to envisage an operation without them. As a result, it seems likely that the sole authority approach for all operations will be continued.

The current tendency in NATO to apply the same ROE methodology to all operations is favourable for several reasons. It reflects the political demand for increased control over the use of military force, while the uniform ROE methodology for all operations avoids a potential source for confusion. Due to the inherent flexibility in NATO ROE doctrine, both the contents, number and detail of ROE may be adapted to any operation. During operations below the threshold of an armed conflict, the focus will be on the tasks at hand and the use of minimum force to achieve these. During armed conflicts, ROE permitting attack on lawful targets will also be expected to be included. If the conflict is politically sensitive, the ROE can be tailored to enable detailed control and limited use of force, for instance, by developing numerous and detailed ROE that may be retained at higher levels of Command. If it is a NATO Article 5 conflict, the ROE may be broader and subject to less limitations, and as a result, more closely reflect the room for manoeuvre defined by LOAC.

Another benefit of the uniform approach to ROE for operations both below and above the threshold of an armed conflict is that the North Atlantic Council (NAC), which authorises the ROE for all NATO operations, will not need agree

4 Emer de Vattel, *Le droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (*The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*) (first published 1758, translated by Charles G. Fenwick, The Classics of International Law, No. 4 vol. III. Carnegie Institution of Washington, Washington D.C., 1916) Book III, Chapter XV, § 231, at p. 230.

on the legal classification of the situation. As long as all NATO States consent to the ROE, the legal and political assessments justifying that consent is a national rather than multinational responsibility. Furthermore, a distinction in ROE methodology for different types of armed conflict would be particularly confusing in operations where deterrence fails and the situation changes from a crisis to an armed conflict. Similarly, where there is a combination of traditional and hybrid warfare, and therefore a need for ROE both dealing with armed conflict type scenario and authorities to use force in reaction to threats not sufficiently connected to the armed conflict, this uniform approach is clearly beneficial.

Another, and perhaps unintended, consequence of the emphasis on ROE authorisation for all use of force is the resulting increased focus on the exception, namely self-defence. The use of force in self-defence is legally only permitted in exceptional circumstances. Even extensive applications of the 'operational self-defence' concept, legally founded on LOAC, is problematic because the use of force outside the ROE framework would be the use of force beyond the Commander's command and control. Integrating as many aspects of the use of force during military operations into the ROE as possible enhances operational and political control because it makes it possible to subject the use of force to limitations and to retain the authorisation level. Even though military forces retain a right to defend their lives, Commanders are able to impose limitations on certain aspects of that right, such as by controlling the response to imminent but not yet occurring attacks, or the defence of others.

Concerns have also been raised that extensive reliance on self-defence reduces the possibility of investigating potential crimes. According to Gaston:

> The comments by civilian investigators and military lawyers suggest that the existence of an alternate justification for the use of force that is considered to be inherent and inalienable (and thus, unquestionable) and is highly subjective makes it easier to avoid independent scrutiny. The greater prevalence of self-defense and hostile intent in the Afghanistan context means that this inscrutable defense would be applied to a greater number of incidents. At a macro level, this would deflect scrutiny over a wider proportion of use of force situations and would lead to overall weaker accountability for allegations civilian harm, and overall weaker IHL accountability.[5]

5 Erica L. Gaston, 'Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege', 8(2) *Harvard National Security Journal* 283 (2017), p.327.

Reducing the scope of applying self-defence as an exception to ROE, by ensuring that the ROE for an operation better reflect both the offensive and defensive force required to accomplish the mission, could therefore also enhance LOAC accountability.

The overemphasis on self-defence is not only the result of restrictive ROE and the sole authority approach; complicated 'use of force' categories, especially the NATO hostile act and hostile intent ROE, and insufficient guidance on how to apply complex concepts such as DPH, are also to blame. As Corn points out, "in the absence of clear policy guidance, self-defense authorities have frequently been invoked at the operational and tactical levels as the basis for targeting presumptive civilians taking direct part in hostilities".[6] NATO should therefore endeavour to provide further guidance on mission specific application of complex 'use of force' authorities, for instance as an appendix to the ROE, or in a SOP or FRAGO.[7] The current challenges should also be used as a lesson learned to not so easily apply existing approaches and solutions to new challenges without thoroughly analysing the appropriateness of doing so. In particular, national solutions and concepts do not always easily transfer into a multinational context.

The final comment that should be made on the overall application and interpretation of NATO ROE is the relationship between the ROE and other 'use of force' guidance. While it would be beneficial for the sake of clarity to include most if not all 'use of force' guidance in one document, this would also be impractical. It would require NAC approval to all details concerning use of force, which may be difficult and time-consuming to achieve, and it would leave the Commander with limited ability to further adapt the 'use of force' guidance to the changing realities of the operation. The better approach is therefore to emphasise that all 'use of force' guidance must comply with the ROE, and to keep the number of alternative sources to a minimum.

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6 Gary P. Corn, 'Should the Best Offense Ever be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force rules in the Standing Rules of Engagement', *49 Vanderbilt Journal of Transnational Law* 1 (2016), p. 212.

7 For instance, during the UN Operations in Somalia II (UNOSOM II), a 'frag order' was issued as a supplement to the ROE, declaring "armed militias, technical vehicles, and crew served weapons as threats which could be "engaged without provocation"". Todd C. Huntley, 'Balancing Self-Defense and Mission Accomplishment in International Intervention: Challenges in Drafting and Implementing Rules of Engagement', 29 *Maryland Journal of International Law* 83 (2014), p. 99.

13.3 The Relationship between Self-Defence, LOAC and ROE

In that the initial interest in the research topic focused on the relevance and application of self-defence by military forces during armed conflict, and as a reaction to the surprisingly extensive reliance on self-defence to justify the use of force, it seems only fitting to end the book with some overall comments on the relationship between self-defence, LOAC and ROE.

The relationship between self-defence and LOAC is commonly described by referring to the former as defensive and the latter as offensive. Because LOAC regulates the use of force in offence and defence, this is an oversimplification. In the context of armed conflicts, defensive force will primarily be regulated by LOAC. Self-defence will only apply in those cases in which the initial attack is unlawful, and is relevant where LOAC does not apply, thereby providing more robust authorisations to deal with the threat. As a result, LOAC and self-defence apply in parallel, and are not one the same scale. Furthermore, rather than stating that 'ROE begins where self-defence ends', NATO doctrine should make it clear that self-defence is not the starting point during armed conflict. Legally, self-defence is the fall back, and factually, self-defence happens later.

The area in which self-defence and LOAC most closely interact is in the context of conduct-based targeting and DPH. If the belligerent nexus requirement is not met, the only way to lawfully use force in response to the threat is on the basis of self-defence. If the 'for such time' criterion of DPH is narrowly construed, the military forces are required to catch the person 'red handed', which may escalate the situation into what the military forces perceive as self-defence. The application of self-defence during armed conflict is therefore influenced by the interpretation of DPH. A wide interpretation of DPH reduces the need for relying on self-defence. A corresponding broad interpretation of the NATO 'hostile act' and 'hostile intent' concepts, authorising the use of force on the basis of DPH, will also reduce the scope for relying on the 'operational self-defence' concept because the ROE would be more inclusive and better reflect the military necessities for using force.

As a result, States must ensure that the interpretation and communication of the criteria for both DPH and the NATO hostile act and hostile intent ROE are sufficiently clear to be able to apply at the operational and tactical levels. If not, self-defence will be applied instead.[8] Complex operational realities may

8 As Corn explains, "in the absence of clear policy guidance, self-defense authorities have frequently been invoked at the operational and tactical levels as the basis for targeting presumptive civilians taking direct part in hostilities". Corn, 'Public Authority to Use Force in Military Operations' (n 6) p. 45.

tempt Commanders to introduce further and more detailed regulation. However, as others also have emphasised, "[a]s conflict structures become more and more diffuse, legal certainty and clarity of humanitarian law prescriptions become ever more important."[9] LOAC should not become so complicated that it is impossible to apply.

In particular, it must be possible to identify the opposing forces beyond situations where they are about to attack NATO forces. This requires that the criteria for membership in an organised armed group in particular become more practical. Further, the scope for repeatedly stepping in and out of civilian protection, and hence misusing the protection to gain operational advantage, should be reduced. It was argued in Chapter 5 that despite the attempts made to define whether someone is a member of an organised armed group, State practice suggests that the identification of such members is done on the basis of their conduct. Rather than developing complex, generally applicable legal criteria for membership in an organised armed group, the better approach is to develop clearer criteria for continued loss of protection. This would make it possible to treat all non-State actors as continuous DPH. Phrased differently, the legal criteria for losing civilian protection will be the same for all non-combatants, both during IACs and NIACs.

Being a member in an organised armed group would, however, be a valuable source of information for making the assessment of continuous DPH. In operations where such membership and hence continuous DPH is possible to discern, mission specific criteria for status-based targeting may be developed, thereby providing military forces with a clearly defined opponent. This enables the application of ROE authorising attack on forces 'declared hostile', rather than having to rely on the reactive NATO hostile act and hostile intent ROE. The authority to attack persons considered to regularly take direct part in hostilities without a sufficiently clear connection to a group could be retained at a higher level, thereby enabling further assessment and control, or limited to situations where the person demonstrates a hostile intent or commits a hostile act. Due to the complexities of these ROE concepts, it is important to provide mission specific examples of what amounts to 'hostile act' or 'hostile intent', for instance in the OPLAN.

In addition to providing military forces with clear mission-specific criteria for becoming a lawful target, it is also important to emphasise that absolute certainty is not required for target identification. Instead, an attacker is

9 Robin Geiss and Michael Siegrist, 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?', 93(881) *International Review of the Red Cross* 11 (March 2011), p. 46.

expected to act in honest belief and make a good faith assessment of the information reasonably available at the time. Rather than focusing on whether there is any doubt as to the status of the person attacked, the test should be whether a reasonable soldier in the same or similar situation would have made the same decision. If military forces are more comfortable in applying LOAC and ROE, they are less likely to look to alternative authorities not tailored for the unique situations that arise in an armed conflict.

Although any potential expansion of DPH may raise concerns that the protection of civilians is reduced, this is not necessarily the case. First, clear LOAC rules, including a more inclusive interpretation of DPH, reduce the scope for resorting to self-defence. This in turn allows the Commander to exercise further control over the use of force, since most uses will require ROE authorisation. This is beneficial both for mission accomplishment and the protection of civilians. Interpreting LOAC and DPH to include members of organised armed groups at all times would also enhance the distinction between civilians and those participating in the armed conflict. Civilian protection is premised on civilians abstaining from participating in hostilities. This could arguably reduce the risk of harm to protected civilians. As Hays Parks explains, permitting those who nonetheless choose to directly participate in hostilities to keep returning to being a protected civilian is "to the benefit of a very few but to the danger of the ninety-five percent of the civilian population in any nation who do not take part in the hostilities".[10]

When the opposing forces are lawful to attack at any time, it also becomes possible to plan the attack in more detail, and to apply targeting procedures such as weaponeering and collateral damage estimation aimed at reducing civilian casualties. Furthermore, dealing with situations before they escalate to the level of potential 'self-defence' enables the forces to deal with the situation in a way that provides greater tactical control.[11] This reduces the risk of harm both to the military forces and to nearby civilians. The risk of civilians being mistaken for taking direct part in hostilities on a regular basis would be countered by setting the threshold for finding continuous DPH sufficiently high.

Clarifying the scope of DPH and the NATO hostile act and hostile intent ROE would also close some of the interoperability gap between States with expansive self-defence interpretation and reliance and those with a more restrictive approach; more precisely, between the U.S. and European States. Furthermore, reducing the scope for relying on the 'operational self-defence' concept also

10 W. Hays Parks, 'Air War and the Law of War', 32 *Air Force Law Review* 1 (1990), p. 118.

11 See also Todd C. Huntley, 'Balancing Self-Defence and Mission Accomplishment' (n 7) p. 107.

avoids the challenges discussed in Section 8.3, whereby the quasi-offensive operational concept, which includes defensive force regulated by LOAC, is confused with the criminal law concept. Finally, clarifying the possibility for something akin to status-based targeting during all types of armed conflict may also have the added value of refining the understanding of the relationship between LOAC and IHRL, since human rights courts would be less likely to automatically apply the default behaviour criteria.[12]

12 Francoise J. Hampson, 'Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law', 87 *International Law Studies* 187 (2011), pp. 203–205. Note that in internal NIACs, human rights may impose a requirement to capture rather than kill if possible or reasonable, especially when the person is not a threat at the time. By further developing and defining the scope for applying status-based targeting during NIAC, such considerations may be better taken into account.

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