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Title:

‘Bringing military conduct out of the shadow of law: Towards a holistic understanding of rules of engagement (ROE)’

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Towards a holistic understanding of ROE

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BRINGING MILITARY CONDUCT OUT OF THE SHADOW OF LAW: TOWARDS A HOLISTIC UNDERSTANDING OF RULES OF ENGAGEMENT (ROE)

Abstract: In this article, I outline a holistic approach to the military concept of ‘Rules of Engagement’ (ROE), which complement the legal aspects of ROE with consideration of operational and political requirements for the use of military force. Drawing upon two illustrative cases from the U.S. military experience with the use of ROE, I demonstrate that ROE for any particular military operation should be formulated to optimally balance, if not fully harmonizing, the legal, operational and political concerns related to the use of force. In this task, political decision-makers and military practitioners alike are confronted with unavoidable and real-life dilemmas. How these dilemmas are handled, have significant implications for how legal requirements concerning accountability and concerns for civilian lives in military combat can be preserved through ROE.

Key words: rules of engagement (ROE); U.S. military operations; legal accountability; collateral damage

Introduction

‘Rules of Engagement’ (ROE) has since its origin in the U.S. military in the 1950s developed into an important concept for coordinating and disciplining the use of force in Western military conduct. It is established military wisdom to see ROE as a result of political, operational, and legal requirements for military action – each of the three requirements in principle equally important (Chief of the Defence Staff 2004: 53, Solis 2010: 495, U.S. Army 2013: 75). However, so far the academic literature on ROE is arguably dominated by focus on legal requirements. Within the subfield of the study of Laws of War, legal scholars debate over how restrictions and obligations should be codified through ROE to harness the use of military force to the Law of Armed Conflict (LoAC) (see e.g. Crawford 2013, Lewis 2003, Roberts 1994, Smith 2002, Watkin 2004, Westhusing 2003). Still, military history is full of examples that formalizing legal requirements through ROE is no easy solution for curbing the brutality of war. Simply formalizing legal requirements for the use of military force through ROE is no

sufficient condition for avoiding misapplication (see e.g. Hayes 1989) or prevent military or political leaders from unconsciously ignoring or even deliberately violating ROE (see e.g. DeRemer 1996).

In this regard, Kristin B. Sandvik's work on the relationship between ROE and legal accountability is a refreshing read. In a *Journal of Military Ethics*-article, Sandvik sets out the ambition "[...] to carve out a more comprehensive understanding of the relationship between ROE and legal accountability" (Sandvik 2014: 130). Sandvik aims to identify issues that might affect the ability to preserve legal accountability through ROE, and how to rearticulate ROE to handle these issues. As such, Sandvik makes a constructive contribution to advance the debate among legal scholars beyond insisting on the superiority of LoAC in governing military actions in peacetime (*jus ad bellum*) as well as in war (*jus in bello*). Nonetheless, Sandvik is dominantly focusing on legality, briefly mentioning political and operational aspects of ROE (Sandvik 2014: 119).

Since legal scholars are experts in legal matters, one can hardly criticize Sandvik and others alike for focusing on legal aspects of ROE. Nonetheless, as I will argue throughout this article, a more holistic understanding incorporating both political and operational aspects is necessary to more soberly judge how ROE can attend to legal or any other requirement in the use of military force. Unfortunately, scholars of other academic branches have shown surprisingly little interest for conceptual clarification of ROE that can complement the insights of legal scholars on the subject. Since Scott Sagan (1991) highlighted political decision-makers' dilemma in how to find the right balance between restrictive and permissive ROE in handling military crises, social scientists have showed limited interest in following up on political aspects of ROE beyond mentioning it as an instrument for political control (see e.g. Feaver 2003: 76-77, George 1991: 17-20, Kahl 2007: 16-19). In the military-science community, discussions on the operational aspects of ROE are limited to questions on how far legal and political requirements can restrict the use of force without compromising the right to use force in self-defense (see e.g. Amore 2013, Deremer 1996, Dworken 1994, Hayes 1989, Lorenz 1993, Parks 1989, Roach 1983). Little insights into the real-life problems with using ROE for these concerns follow from these analyses. The result is that different scholarly

communities treat legal, political and operational aspects of ROE separately. What is sorely needed to advance the understanding of how ROE potentially can serve to discipline and control the use of military force is a more holistic approach to see the three aspects in combination.

In this article, I attempt to give a contribution to bridge this gap in the literature by shedding light on the often overlooked political and operational dynamics playing out in the formulation and practicing of ROE. I will provide insights into how using ROE to harness political and operational requirements for the use of force is connected with inevitable dilemmas. In turn, I will show how the solutions used to handle these dilemmas have significant implications for how legal requirements can be preserved through ROE.

This article proceeds first by offering a brief historical account explaining why the term ROE have come to be heavily associated with legality at the expense of focusing on the operational and political aspects of ROE. Second, the operational function of ROE is investigated. Third, the reason for why ROE cannot be used to mechanically control the use of military force for political purposes is explained. Fourth, two intertwined dilemmas connected to using ROE to serve political and operational requirements are identified. One concerns political decision-makers' trade-off between the desire for control and the competing need to delegate decision-making authority. The other is the dilemma confronting military personnel when choosing between using ROE as formal orders to simplify decision-making in the heat of the action on the one hand, and autonomy allowing for interpretation and sensible improvisation on the other. Fifth, to illustrate the two dilemmas two historical examples of U.S. military experience with ROE are used. Finally, I conclude that the political and operational function of ROE have important implications for *how* legal requirements can be preserved through ROE. Legal requirements in ROE must be accompanied with (i) involving political decision-makers in actively using ROE to inform military judgment, and (ii) training and mentally preparing military personnel for using ROE in combat.

A genealogy of Rules of Engagement (ROE)

Over the last decades, the term ROE has become almost synonymous with the legal regulation of the use of military force. The reason for this conceptual limitation can be traced along two historical paths: one along the development of ROE in the U.S. military, another along the increased focus on legal requirements for the use of force in UN peace operations in the 1990s.

The first historical path starts with ROE entering the U.S. military vocabulary in the early 1950s. In the context of the emerging Cold War and the growing intensity in risk of nuclear attack, political decision-makers in Washington developed the concept of ROE to restrict military efforts to avoid unnecessary provocation and to prevent escalation into nuclear confrontation with the Soviet Union.¹ By using ROE to specify under what conditions delegation of decision-making authority to military commanders was applicable, civilian authorities in Washington were able to delegate authority without fully surrendering more political control than necessary (Roman 1998). However, with the Vietnam War political involvement in military conduct through ROE became controversial. The controversy grew out of a deep disagreement between military and political decision-makers about what was achievable with the use of force. Political authorities in Washington tried to scale the level of violence in Vietnam on a day-to-day basis by constantly adjusting and amending restrictive ROE with regard to the progress at the negotiation table. With little political progress to trace, the high level of political involvement in operations created among the military “a sense of frustration, confusion, and distrust” with the use of ROE (Parks 1989: 83). The legacy of the Vietnam experience concerning ROE has been shaped by different military science communities sharing the conclusion that political involvement in military operations through ROE downgrades operational effectiveness (see Martins 1994: 35-51 for an overview).

After the Vietnam War, two initiatives took advantage of the concept of ROE for the purpose of institutionalizing legal requirements in U.S. military operations. The first initiative came as a direct response to the experience in Vietnam. The U.S. had suffered from an outcry of international and domestic contempt that arose from the notorious My Lai massacre, where a platoon of US soldiers

killed over 500 unarmed civilians including children, and from other real and alleged misadventures in Vietnam. In response to this, the US Department of Defense established the “Law of War Program” to make sure that future US military operations were conducted according to national and international legal obligations. An important part of this program was to educate military personnel in LoAC and to integrate judge advocates in military planning across the U.S. military branches and different commands (Borch 2001). Judge advocates are military lawyers who prior to the Vietnam War had much of the same function as civilian advocates. With the “Law of War Program”, they gained new formal responsibilities in operational planning. With their legal expertise, they were to develop and review operation plans to ensure compliance with the laws of war. This development gave judge advocates an important role in drafting and revising ROE (Dickinson 2010). Furthermore, this gave birth to the new military discipline of “operational law” which explicitly stated that ROE was an instrument to make the use of force to comply with national and international laws (Humphries 1992).

Separate to the Law of War program, the U.S. Navy initiated another program to juridify ROE. With a strong legacy of paying attention to international conventions and norms when operating in international waters, the U.S. Navy embarked on an ambitious project to develop a standardized set of ROE in 1978. The purpose was to make a clear U.S. statement on the right to use force in self-defense in peacetime (O'Connell 1975, Parks 1989: 84, Phillips 1993: 169-180). The U.S. Navy initiative generated what was officially approved as the “Worldwide Peacetime Rules of Engagement for Seaborne Forces” (PMROE) in 1981. In a single document, it brought together and systematized all the various relevant references to LoAC, and made it readable to support operational planning and decision-making related to the use of force. In 1986 the PMROE was used as a model for the new improved “Peacetime Rules of Engagement” (PROE) which was extended to all services, wherever located around the globe, and with a reduced classification level to facilitate discussion in operational planning (Parks 1989: 84). Based on U.S. ground forces’ experience from UN operations in the early 1990s, the PROE were redefined and updated into the new “Standing Rules of

Engagement” (SROE) in 1994, with revisions in 2000 and 2005 (Solis 2010: 494). The American SROE-regime has been designed for peacetime operations and among the U.S. military as well as among military science communities largely been debated in terms of what conditions legally entail the right to use force in self-defense in peacetime (see e.g. Amore 2013, Martins 1994, Parks 1989, Phillips 1993, Roach 1983).

The second historical path that has made the concept of ROE associated with legal regulations is related to the U.N. peace operations in the 1990s. With the end of the Cold War, the political fault-lines from the bipolar world order diminished. Freed from both the risk for nuclear confrontation and the U.N. Security Councils vetoes to intervene in sovereign states’ internal affairs, peace operations became the tool of choice for conflict resolution. While states showed increased willingness to commit military forces to U.N. mandated interventions, it soon turned out that the scope of these operations (e.g. providing of security, disarmament, demobilization, reintegration, support for humanitarian and human rights assistance, and governance) were very demanding. One of the main challenges with these operations was the question of how to use military force (Findlay 2002: 124-165). At the heart of the problem lay the dilemma of balancing between being restrictive with the use of force to avoid taking side and become an active part in the conflicts on the one hand, and sufficiently allow for the use of force to let U.N. forces accomplish their mission (e.g. protect civilians) on the other. Balancing between the two concerns became extremely difficult when U.N. soldiers became involved in several brutal civil wars and complex nation-building engagements throughout the 1990s. As a result, ROE quickly became central to the questions when and how U.N. soldiers could use military force. Since 1945, the U.N. Charter has been the most authoritative source among the treaties sorting under LoAC for the use of force in peacetime (Solis 2010: 26). Because the mandate for any U.N. mission draws its legitimacy from the U.N. Charter, formulating and implementing ROE was a question of regulating the use of force according to legal requirements given in the U.N. Charter (e.g. Berkowitz 1994, Fair 1997, Klep & Winslow 1999, Lorenz 1995, Reed 2000, Zinni & Lorenz 2000). In a multinational context in U.N. operations, ROE became first and

foremost a question of coordinating different national interpretation of what LoAC allowed of military force in different contexts (see Findlay 2002: 368-374). Once again, legality came to dominate the scholarly debate and understanding of the military experience with ROE.

In sum, (i) the increased focus on legality in peacetime ROE in the U.S. military since the Vietnam War, and (ii) the focus on legal requirements in ROE in the context of U.N. operations after the Cold War, have made scholars approached the concept of ROE focusing on legal rules and regulations for the use of military force. Unfortunately, the dominant focus of legal aspects of ROE has relegated the political and operational functions of ROE to the shadow of scholarly debate. While ROE unquestionably may contribute to secure that the use of force is brought in line with LoAC, a too narrow reading of the historical military experience with the use of ROE has made scholars fail to acknowledge and explore the political and operational functions, and the dilemmas inherent in any effort to balance several and frequently diverging concerns. In the next section, I attempt to show how the inclusion of political and operational complexities in empirical ROE-analysis may offer important insights that complement the understanding of the prospects and limitations for how ROE can serve legal requirements.

Operational nature of ROE

In operational terms, ROE should ideally provide soldiers and commanders with guidelines stating (i) the conditions needed to be met before (ii) specified actions – including the use of lethal force – can be carried out. This refers to *when, where, against whom, and how* military force should be used. In addition, ROE can also state *who* has the authority to make judgment about the conditions and approve actions (George 1991, Sagan 1991). A soldier or a commander could in this context mean an infantryman guarding a control post; a fighter pilot in a cockpit patrolling airspace; a navy captain on the bridge with the command of all of the vessel's weapon systems; or any other personnel with the authority to make judgment about the use of military force. They all have in common the need for some kind of guidelines informing them about the conditions that need to be fulfilled before they

can use force. May the infantryman fire at anyone approaching his control post, or only when those approaching do not halt to warning shots? How close should the infantryman allow an intruder to approach his post before he fires a warning shot? Does the soldier in question have the authority to make the decision himself, or may he only open fire upon the orders from his superiors? Could the fighter pilot decide to engage another aircraft simply from the information of his radarscope, or is he required to confirm visually that it is an enemy aircraft before firing missiles at it? How does he visually recognize an enemy aircraft from a friendly or neutral one? From the aircraft's insignia, or from its aggressive maneuvers? What if the aircraft does not display any insignia, and what constitutes aggressive maneuvers? Does the navy captain have to wait for an enemy vessel to fire the first shot before he can make the decision to attack the enemy in self-defense? How close can an enemy vessel be allowed to approach before the captain may decide to attack it in self-defense? Does it matter to the answer if the situation takes place in territorial or international waters?

All of the above are examples of the kind of questions that ROE ideally should provide guidance for, or even answers to. Making decisions about the use of force, soldiers and commanders always face the problem of crossing the Rubicon of firing the first shot – that is, initiating combat – without necessarily being a hundred percent sure of the intentions of the enemy. This is a micro-level security dilemma of untenable choices. While ROE are unlikely to ever fully solve this dilemma in advance of combat, it can provide welcoming support for soldiers' and commanders' judgment by stating the conditions required to be met before they can fire their weapons. Thus, in military and operational terms, the core function of ROE is aimed at instructing and coordinating operational decision-making concerning the use of force – often under dangerous and stressful circumstances that are inherent to military combat.

Political function of ROE

While ROE may be said to have its core function rooted in operational requirements for the use of force, it could also be seen as the incarnation of the Clausewitzian insight that “war is the

continuation of policy by other means” in its capacity to ensure that military operations are not drifting away from serving particular political goals (Clausewitz 1976 [1832]: 28-29). Requiring the infantryman to shoot warning shots might reduce the risk of killing innocent civilians who accidentally happen to move in vicinity of his control post. Such cautions may be vital if the overall political goal with the military operation is to win the hearts and minds of the local population. Likewise, requiring the fighter pilot to identify visually a suspicious aircraft before engaging it decreases the chances that the pilot will mistake defensive maneuvers for aggressive ones. This may be essential to avoid unnecessary escalation of the situation and give the enemy a justification for launching a full-scale attack. By distinguishing between territorial and international waters, the navy captain has to consider specific requirements established in international law when making decisions on the use of force. This could be pertinent if the reason for sailing a military vessel in the same waters as an enemy fleet is to uphold legal regulations of international waters. With these examples in mind, ROE clearly are a useful instrument to harness the use of military force to some kind of political, operational, or legal requirement. Nonetheless, history has taught political decision-makers as well as military professionals that this is easier said than done.

While ROE provide guidelines, it is important to acknowledge that ROE are not orders directing soldiers and commanders how to act. Rather, ROE set limits for how soldiers and commanders should think about a problem in a given situation, and how to use their military expertise to solve the problem with the use of force. Too many unpredictable and constantly changing circumstantial factors are pertinent in most situations in combat for ROE to function as “bright-line rules” offering precise guidance (Osiel 2002: 246). Hence, ROE should seek to solidify political, legal, and operational requirements into general guidelines for the use of force that “[...] encourage [soldiers and commanders] to exercise situational judgment on the basis of *local knowledge*, assessed in light of *prior knowledge*” (Osiel 2002: 359, emphasis added).

In this context, military expertise in managing organized violence and military action could be understood in the Aristotelian term *phronesis* – practical knowledge based on experience. Expertise

(*phronesis*) includes not only the skill to decide how to achieve a certain end (*techne*), but also the ability to reflect upon and determine whether an end is consistent with overall intentions (Aristotle 2013: Book V). Using situational judgment in military combat implies more than deciding whether the situation calls for the use of force (using *local knowledge*) – *techne*. It also includes judgment of whether a particular military action in a particular situation is consistent with overall operational, political, and legal intentions (using *prior knowledge*) – *phronesis*. This accentuates the importance of the operational function of ROE in *assisting*, as opposed to instructing, on-scene soldiers' and commanders' judgment in making sense of the situation when considering if and how to apply the use of force. Due to the inherent unpredictability of military combat, ROE should ideally be general enough to give soldiers guidance relevant in all possible situations, and specific enough to provide useful support for decision-making in any given situation. This makes it unrealistic to try to define ROE that 'mechanically' control decisions on the use of force made by on-scene soldiers and commanders in the heat of the moment in combat:

“All potential circumstances cannot be fully anticipated by central authorities, and as such [ROE] are therefore deliberately written in a flexible manner in order to balance the legitimate need for top-level guidance on appropriate action with the necessity for field-level judgments about specific conditions, threats, and opportunities” (Sagan 1991: 444).

ROE dilemmas

By influencing the specification of the ROE (conditions required for the use of force, and delegation of authority to make judgment about the conditions), political decision-makers can maintain some control over the moves and actions of military forces on the battlefield, and thus increase the chances that the military effort will conform to their desired political objectives. As such, ROE do not give political decision-makers the means to dictate directly military decisions concerning the use of force in the field. ROE provide an opportunity to narrow down the number of possible decisions and

set of actions soldiers and commanders may choose from when confronted with situations that demands judgment about the use of force. While this may sound promising for anchoring military operations to political intentions, it is difficult to do efficiently in practice because of the problem of anticipating all relevant circumstances in advance of any given situation. The balance between instructions and room for judgment built into any set of ROE unavoidably manifests into two intertwined dilemmas.

First, for political decision-makers ROE pose a '*control/delegation-dilemma*'. To secure the coherence between political intentions and military use of force, decision-makers may issue specific and instructive ROE. On the one hand, the more specific the ROE are formulated (concerning required conditions and authority to make judgments), the more instructive it will be. Instructive ROE increase the chances that force is not used in unnecessary circumstances and to avoid unintended escalation – thus preserving *prior knowledge* in the decision-making. On the other hand, because ROE never fully can account for all prevailing circumstances confronting soldiers and commanders in the field, more specifically defined ROE also increase the risk for ROE to be inadequate in unforeseen circumstances. Instructive ROE reduce the autonomy for soldiers and commanders to utilize their expertise (by training and experience, or by being closest to the situation) by exercising judgment using *local knowledge*. Too tightly drawn ROE may even limit opportunity to take initiative and make military forces vulnerable to attack and reduce ability to execute their missions. In contrast to being specific and instructive, the more permissive ROE are defined, the less is the risk for ROE to be operational inadequate. Nevertheless, at the same time, less specified and instructive ROE are more ambiguous and increase the risk for unnecessary use of force and unintended escalation with unforeseen political effects. Hence, the dilemma with the use of ROE for political decision-makers is a trade-off between the advantages of military specializations (preserving flexibility through decentralized decision-making) and the disadvantages of military agency in implementation of military policies (preserving control through centralized decision-making).

Second, for military personnel, ROE represent an '*efficiency-autonomy dilemma*'. The more specific and instructive the ROE are, the easier it will be to apply them in stressful situations of life and death. Particularities described in the ROE can significantly reduce the amount of information and number of actions a soldier or a commander needs to consider in the excitement, or anxiety in a combat situation to make the right decision to use force. At the same time, the more specific and instructive the ROE, the less autonomy the on-scene commander has to utilize his or her judgment under conditions not codified in the ROE to seize initiative and opportunities that might emerge. This gives less leeway to on-scene soldiers and commanders to utilize military expertise (*phronesis*), and reflect upon and determine whether military action is consistent with political intentions. In contrast, less specified ROE give more latitude for military judgment. However, this also comes with more ambiguity for how the ROE should be applied in any specific situation. For the military, the dilemma is a trade-off between using ROE either as formal orders, or as guidelines allowing for more interpretation and sensible improvisation in decision-making concerning the use of force in the heat of a military combat.

Legal, political and operational requirements in ROE

In this section, I will use two historical examples from the US military's experience to illustrate how the political 'control-delegation dilemma' and the operational 'efficiency-autonomy dilemma' have challenged political and military decision-makers' ability to preserve political and operational requirements through ROE. The two cases used here are not meant to serve as templates for how to use ROE. The cases are simply chosen because they are interesting and instructive examples of the dilemmas that are inevitably connected to the preparation and implementation of ROE, and because they show the validity of these dilemmas in different contextual settings.

From the cases, I will argue that without any acknowledgement of the additional political and operational dilemmas, the chances to preserve legal requirements through ROE will be reduced. To follow up on Sandvik's (2014) ambition to identify ways to increase legal accountability through ROE,

I will argue that using ROE to preserve legal concerns must be accompanied by (i) political decision-makers' involvement in preparing ROE, and (ii) training and mentally preparing soldiers and commanders for the operational use of ROE.

Political function of ROE: The Eisenhower administration's 'predelegation orders' (1956-1959)

The concept of ROE was developed not as an instrument to secure legal requirements or legitimize the use of force, but as a response to the 'control-delegation dilemma' that confronted US political decision-makers during the 1950s. With the introduction of new tactical nuclear weapons, it became necessary to delegate parts of the U.S. President's decision-making authority for the use of nuclear weapons to military commanders. Air-to-air rockets with tactical nuclear warheads would increase the effectiveness of air defense interceptors of continental U.S. against Soviet bombing attacks. However, the effectiveness of such weapons in air defense scenarios would require instant use in response of a confirmation of an attack. This implied that decisions ultimately had to be taken by individual interceptor pilots (Sagan 1993: 93-95). Old command and control procedures, which required explicit consent of key political decision-makers including the President himself, were time-consuming and did not fit with the operational requirement of instant authorization. Therefore, the Eisenhower administration adopted two formal 'predelegation' orders – ordering delegation of authority to use nuclear weapons in advance of an attack. The first order (1956) gave authority to specified military commanders-in-chiefs to use nuclear weapons for continental air defense under certain conditions. The second predelegation order (1959) was a broadening of the first, and included naval defense, and also applied to the defense of U.S. forces overseas (Roman 1998: 121-135). The delegation of authority came with the obvious risks including greater potential for nuclear escalation, collateral damage, and alienation of allies. U.S. President Dwight Eisenhower decided that the benefits of reducing civilian control of the use of nuclear weapons outweighed the risks, but he was determined to minimize the risks as much as possible by his guidance to the commanders through specification given in ROE.

The two sides of the dilemma that President Eisenhower faced also materialized in how the ROE for the predelegation orders were prepared and implemented. The Defense Department and The Joint Chiefs of Staff considered the ROE as too rigid to guide military decision-makers under any condition, threat, or opportunity. From a military perspective, the concern was that the ROE would not sufficiently allow on-scene military commanders to utilize their *local knowledge*. The U.S. State Department on the other hand, feared that the ROE were too general to avoid the use of force in situations where a Soviet or unidentified aircraft might have been controlled without destruction. Hence, from a political perspective, it was feared that on-scene commanders did not have enough *prior knowledge* and might trigger nuclear war without substantive provocation. ROE were developed to cover contingencies and specify conditions to balance these two main concerns. In 1956, the ROE consisted of a single page. By 1959, the ROE had grown into an 11 pages long document indicating the increased complexity of the ROE necessary to balance these competing concerns (Roman 1998: 145-160). Despite the detailed guidance in the ROE, Eisenhower knew that ultimately the effective use of nuclear weapons in any ambiguous situation depended on the professional judgment of the on-scene military commanders. Consequently the ROE stated that “nothing in these instructions shall be construed as preventing any responsible commander from taking such action as may be necessary to defend his command” (original ROE quoted in Sagan 1993: 93).

This historical example highlights the insight that the political function of ROE is not an instrument exclusively for imposing restrictions on the use of force, but rather a mechanism to solve the dilemma in balancing between the need to control and the need to delegate the authority to use force. Eisenhower did not only restrict on-scene military commanders’ freedom of action by limiting their authority to specified conditions. He also informed the judgment of his commanders to make sure as far as possible that the actual use of nuclear weapons outside of his control would confirm to his political priorities. The point made is not that the ROE attached to the predelegation orders constituted the perfect balance between political desire for control and the operational necessity for

delegation. Such perfect balance may never be achievable. That is exactly why it is a dilemma. The take-home message is rather that the dilemma would only be dealt with if political leaders acknowledged and engaged in it.

Building further legal concerns into ROE do little to make political authorities acknowledge this dilemma. Executing the legal right to use force does not automatically translate into military or political victory. Legally having the right to use force under conditions described in LoAC may be of little value if it escalates a crisis into a full-fledged war. While this may be self-evident in the context of the Eisenhower administration and the prospects for nuclear war in the 1950s, it is also applicable in less intensive scenarios. Furthermore, only abiding by standards codified in LoAC, political leaders can always dismiss allegation of not doing enough to avoid collateral damage by making the excuse that they operate within the Laws of War. Military conduct that causes civilian injuries or casualties does not in itself render the use of force unlawful according to LoAC. For example, as long as the damage from the use of force is outweighed by the military advantage that would be achieved by the use of force, and all feasible precautions are taken to distinguish between civilian and military objects and persons and to avoid civilian losses, collateral damage does not make military actions unlawful. What *is* likely to reduce civilian casualties and suffering from the use of military force is to make political authorities engage in the ‘control-delegation dilemma’. That allows them to reflect *whether* and *how* military advantage may outweigh damage, and on *what* precautions are necessary to avoid collateral damage.

The use of military force can only be legitimate if it is executed on behalf of some political objective – it can never be justified in itself. If we want to make political leaders more accountable for their decisions that may lead to civilian fatalities and serious violations of human rights and humanitarian law by their armed forces, a realistic and promising avenue is to make sure they engage in finding the more optimal balance between political and operational requirements through ROE. If military forces act according to ROE and something goes wrong, that would hold political decision-makers accountable because they are responsible for authorizing the ROE – as was the case

with Eisenhower. If we reduce ROE to a vehicle for legal concerns, it allows political decision-makers simply to delegate away authority together with legal accountability without engaging in the 'control-delegation dilemma'. In that case, they may leave the unavoidable dilemmas to lower levels in the chain of command where military decision-makers have less prior knowledge of over-arching political goals to find adequately solutions to the dilemmas. This will not only contribute to the shifting of accountability from political levels down to the lower levels of the chain of command, it may also decrease the chances that ROE will be of any help to inform soldiers' and commanders' judgment of whether the use of force is consistent with overall political intentions.

Operational function of ROE: U.S. soldiers in Somalia (1992-1993)

ROE became a hot topic among U.S. soldiers and military judge advocates confronted with the 'efficiency-autonomy dilemma' in the U.N. mandated mission in Somalia between 1992 and 1993. The problem did not revolve around legal, but operational requirements for the use of force. Chaotic warfare among rival militias and clans had plunged Somalia into a war-torn and ravaged country. This had prompted the UN authorized deployment of a U.S.-led military mission – operation *Restore Hope* – to provide a secure environment for delivery of humanitarian assistance to the starving masses of the Somali people. Because of the humanitarian mandate of the mission, U.S. forces were not to intervene actively in the conflict, only to secure the delivery of relief supplies. As a consequence the ROE for *Restore Hope* directed soldiers to a minimal and gradual approach to the use of force in response to threats in order to avoid contributing to any escalation of the conflict. Nonetheless, a complex threat environment made decisions about the use of force very difficult (Findlay 2002: 166-218).

In Somalia there were two conditions that complicated the usefulness of ROE in determining if a threat of attack was imminent or not. First, guns were an ever-present aspect of Somali life. U.S. soldiers faced severe difficulty distinguishing between a Somali with a gun who might threaten them, and one carrying a gun merely for self-protection. Second, massive unemployment and poverty led young Somalis to form roving gangs and turn to thievery. Swarms of people trying to steal food or

equipment surrounded most military vehicles that stopped in towns due to traffic. Such complex situations placed soldiers in potentially dangerous situations facing threats, which were hard to identify before they eventually came under fire. The constant threat of possible hostile civilians required soldiers to use ROE to make decisions concerning the use of force in a split of a second (Dworken 1994: 27).

In contrast to the earlier practice in the U.S. military of using the general standing ROE for peacetime operations, ROE for *Restore Hope* was written in a language that dealt specifically with the situation in Somalia (Dworken 1994: 34). In addition, the ROE was implemented through active training rather than simply briefing soldiers about the content of ROE. Karen V. Fair, a judge advocate who served with the U.S. military forces in Somalia, explains that because the threat environment was subject to constant changes, ROE were implemented by training soldiers through open discussions of hypothetical but realistic scenarios. The soldiers and officers were encouraged to continually revisit the subject of ROE: “The mental process required by the soldiers in imagining the scenario in his or her mind’s eye and then applying the ROE benefited our unit greatly” (Fair 1997: 119). Even though the ROE for *Restore Hope* were written in a language that dealt with the specific situation in Somalia in contrast to the general U.S. peacetime ROE (SROE), the complex and dynamic threat environment made it impossible to define ROE which were specific enough to be instructive in every circumstance. Consequently, frustrated soldiers and commanders constantly challenged the judge advocate to give them precise answers to questions of which circumstances that would allow them to use force.

“[...] I could never give exact answers to their specific questions. Therein lays the frustration when dealing with ROE. A constantly changing and unknown threat is a subjective event and differs according to each individual’s perception. My mission and the individual unit commander’s mission was to provide the soldiers with the tools to use their own sound judgment. I could not make a decision for them when they were faced with an impending

threat. [...] The constant call for a more detailed ROE for every situation with precise, exact answers would be ideal, but unrealistic.” (Fair 1997: 122-123)

According to Fair (1997: 122), operation *Restore Hope* represented at the time a “quantum leap” in the redefinition of ROE for future operations. The practice that developed with the use of ROE redefined how soldiers should be prepared for peace operations. Soldiers should not only be formally informed of the ROE applicable to an operation, but also mentally trained and prepared – at all levels in the chain of command – in how to apply them in combat situations. This view is supported by other judge advocates that have come to the same conclusions after analyzing U.S. experience from other military operations in the 1980s and 1990s (Bolgiano 1995, Martins 1994, Parks 1989, Phillips 1993, Roach 1983).

The lessons from the ROE regime during operation *Restore Hope* should remind us that maintaining political or legal concerns in the use of force through ROE must ultimately be preserved through how on-scene soldiers and commanders use their professional judgment to handle the ‘efficiency-autonomy dilemma’. Increasing legal concerns built into ROE is no direct solution or substitute for prudent judgment when soldiers and commanders translate general guidance into action in a high-risk and information poor environment (Meyer 2013: 255). The U.S. experience from Somalia in contrast to the experience from the Vietnam War is illustrating in this regard. In Vietnam, the increasing legal requirements in response to sensational press reports of the brutality of the war resulted in a growing body of ROE documents with numerous references to LoAC. Without training in how to use the ROE, complex documents did little to clear up the ambiguity of what conditions allowed for the use of force and what did not. The investigation report of the My Lai massacre even concluded that inadequate training in LoAC was a contributing cause of the killings (Martins 1994: 47-51). Hence, simply legalizing requirements in ROE is not sufficient to make military personnel accountable or in a position to make better judgments concerning how the use of force is consistent with overall political intentions and legal requirements. To discipline the use of force through ROE for

the purpose of reducing human casualties and suffering, it is utmost important to train and mentally prepare commanders and soldiers in the field on how to understand and apply ROE on-scene to better balance the 'efficiency-autonomy dilemma'.

Conclusion

The importance of ROE as a concept to make political decision-makers and military organizations accountable for the consequences of military conduct has so far received surprisingly little academic attention. Legal scholars dominate the academic literature available on ROE with an exclusive focus on ROE as an instrument for legal requirements in military use of force. However, disregarding empirical research on the operational and political aspects of ROE, conclusions about the prospects of preserving legality and legitimacy in military use of force through ROE remain partial at best. In this article, I have attempted to make a contribution to build a more holistic understanding of ROE by scrutinizing political and operational functions of ROE as conceptualized in the 'control/delegation-dilemma' and the 'efficiency-autonomy dilemma'. The former dilemma deals with using ROE to balance between centralized political control against operational flexibility in decentralized decision-making. The latter dilemma is an operational trade-off between the advantage of using ROE as a tool for efficient decision-making on the one hand, and preserving autonomy to utilize professional military judgment on the other. I consider this as important insights necessary to take into account to realistically fulfill any ambition to increase legality in the use of military force through ROE.

Lessons from the counterinsurgency campaigns in Afghanistan and Iraq over the last decade have demonstrated the significance of using ROE for finding the right balance between brutality (permissive ROE allowing too much force, escalating the conflict unnecessary) and passiveness (restrictive ROE allowing too little force, giving insurgents the tactical advantage). The challenge – political as well as operational – confronting these operations have been formidable, and described as “armed social work; an attempt to redress basic social and political problems while being shot at” (Kilcullen 2010: 43). In the highly acclaimed U.S. Army counterinsurgency doctrine from 2006 (Field

Manual 3-24), it is stated: “The use of discriminating, proportionate force as a mindset goes beyond the adherence to the rules of engagement” (U.S. Army 2006: paragraph 7-35). Codifying legal requirements in ROE is only one necessary step to make political and military decision-makers more accountable and increase their sensitivity for civilian damage in combat. However, to face this challenge, it is even equally crucial that political decision-makers acknowledge and engage in the ‘control-delegation dilemma’, and that the military confront the ‘efficiency-autonomy dilemma’. This is not to say that legal requirements do not matter. Rather, it is to say that formalizing legal requirements through ROE is no guarantee for accountability or for avoiding or reducing civilian casualties in combat. A clear policy and a well-prepared military organization (at all levels) are necessary conditions for making military conduct adhere to the requirements in LoAC through ROE. Using ROE to harness successfully the use of military force to any concern requires finding solutions capable of balancing legal, operational, and political requirements. One set of requirements cannot be preserved without taking into account the other two – a take-home message equally important for political and military decision-makers, as well as for academic scholars interested in what ROE can be used for.

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Notes

1. While the literature is consistent in asserting that ROE is an US invention, there are some divergences in the historical reporting as to exactly when and how the term came into use (Findlay 2002: 14, Martins 1994: 35, O’Connell 1975: 169, Solis 2010: 492). This could possibly be explained by inconsistent and interchangeable use in variations of the terms “intercept and engagement instructions” and “rules of

engagement and intercept instructions” in the 1950s. Nevertheless, by 1958 the term “rules of engagement” was formally established in the US military by the Joint Chief of Staff (Roman 1998: 135)

References

- Amore, C. D. (2013) Rules of Engagement: Balancing the (Inherent) Right and Obligation of Self-Defense With the Prevention of Civilian Casualties, *National Security Law Journal*, 1(1), pp. 39-76.
- Aristotle. (2013). *Eudemian Ethics* (B. Inwood & R. Woolf, Trans.) (Cambridge: Cambridge University Press).
- Berkowitz, B. D. (1994) Rules of Engagement for U.N. Peacekeeping Forces in Bosnia, *Orbis*, (Fall), pp. 635-636.
- Bolgiano, D. G. (1995) Firearms Training Systems: A Proposal for Future Rules of Engagement Training, *The Army Lawyer*, (December), pp. 79-82.
- Borch, F. L. (2001) *Judge Advocates in Combat - Army Lawyers in Military Operations from Vietnam to Haiti* (Honolulu, Hawaii: University Press of the Pacific).
- Chief of the Defence Staff (2004) *The Joint Service Manual of the Law of Armed Conflict* (Joint Service Publication 383).
- Clausewitz, C. v. (1976 [1832]) *On War* (M. Howard & P. Parat, Trans.) (Oxford: Oxford University Press).
- Crawford, N. C. (2013) Bugsplat: US Standing Rules of Engagement, International Humanitarian Law, Military Necessity, and Noncombatant Immunity, in: A. F. Lang Jr, C. O'Driscoll, & J. Williams (Eds.) *Just War: Authority, Tradition, and Practice* (Washington: Georgetown University Press).
- Deremer, L. E. (1996) Leadership Between a Rock and a Hard Place, *Airpower Journal*, (Fall), pp. 87-94.
- Dickinson, L. A. (2010) Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance, *American Society of International Law*, 104(1), pp. 1-28.
- Dworken, J. T. (1994) Rules of Engagement - Lessons from Restore Hope, *Military Review*, (September), pp. 26-34.

- Fair, K. V. (1997) The Rules of Engagement in Somalia - a Judge advocate's Primer, *Small Wars & Insurgencies*, 8(1), pp. 107-126.
- Feaver, Peter D. (2003). *Armed Servants* (Cambridge: Harvard University Press).
- Findlay, T. (2002) *The Use of Force in UN Peace Operations* (Oxford: Oxford University Press).
- George, A. L. (1991) The Tension Between "Military Logic" and Requirements of Diplomacy in Crisis Management, in: A. L. George (Ed.) *Avoiding War: Problems of Crisis Management* (Oxford: Westview Press).
- Hayes, B. C. (1989) *Naval Rules of Engagement: Management Tools for Crisis* (Santa Monica: RAND Corporation).
- Humphries, J. G. (1992) Operations Las and the Rules of Engagement in Operations Desert Shield and Desert Storm, *Airpower Journal*, 11(3), pp. 25-41.
- Kahl, Colin H. (2007). In the crossfire or the Crosshairs?, *International Security*, 32(1), pp. 7-46.
- Kilcullen, D. (2010) *Counterinsurgency* (Oxford: Oxford University Press).
- Klep, C., & Winslow, D. (1999) Learning the lessons the hard way - Somalia and Srebrenica compared, *Small Wars & Insurgencies*, 10(2), pp. 93-137.
- Lewis, M. W. (2003) The Law of Aerial Bombardment in the 1991 Gulf War, *The American Journal of International Law*, 97(3), pp. 481-509.
- Lorenz, F. M. (1993) Law and Anarchy in Somalia, *Parameters*, (Winter), pp. 27-40.
- Lorenz, F. M. (1995) Forging Rules of Engagement: Lessons Learned in Operation United Shield, *Military Law Review*, (November/December), pp. 17-25.
- Martins, M. S. (1994) Rules of Engagement for Land Forces: A Matter for Training, not Lawyering, *Military Law Review*, 143(Winter), pp. 3-160.
- Meyer, T. (2013) Flipping the switch: Combat, State Building, and Junior Officers in Iraq and Afghanistan, *Security Studies*, 22(2), pp. 222-258.
- O'Connell, D. P. (1975) *The Influence of Law on Sea Power* (Manchester: Manchester University Press).

- Osiel, M. J. (2002) *Obeying Orders - Atrocity, Military Discipline and the Law of War* (New Jersey: Transaction Publishers).
- Parks, W. H. (1989) Righting the rules of engagement, *U.S. Navy Institute Proceedings*, 115 (May), pp. 83-93.
- Phillips, G. R. (1993) Rules of Engagement: A Primer, *The Army Lawyer*, (July), pp. 4-27.
- Reed, R. M. (2000) Chariots of Fire: Rules of Engagement in Operation Deliberate Force, in R. C. Owen (Ed) *Deliberate Force - A Case Study in Effective Air Campaigning* (Alabama: Air University Press).
- Roach, A. J. (1983) Rules of Engagement, *Naval War College Review*, (January-February), pp. 46-55.
- Roberts, A. (1994) The Laws of War in the 1990-91 Gulf Conflict, *International Security*, 18(3), pp. 134-181.
- Roman, P. J. (1998) Ike's Hair-Trigger: U.S. Nuclear Predelegation, 1953-60, *Security Studies*, 7(4), pp. 121-164.
- Sagan, S. D. (1991) Rules of Engagement, in: A. L. George (Ed.), *Avoiding War – Problems of Crisis Management* (Boulder: Westview Press).
- Sagan, S. D. (1993) *The Limits of Safety - Organizations, Accidents, and Nuclear Weapons* (Princeton, New Jersey: Princeton University Press).
- Sandvik, K. B. (2014) Regulating War in the Shadow of Law: Toward a Re-articulation of ROE, *Journal of Military Ethics*, 13(2), pp. 118-136.
- Smith, T. W. (2002) The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence, *International Studies Quarterly*, 46(3), pp. 355-374.
- Solis, G. D. (2010) *The Law of Armed Conflict - International Humanitarian Law in War* (Cambridge: Cambridge University Press).
- U.S. Army (2006) *Field Manual 3-24: Counterinsurgency* (Washington: Headquarters Department of the Army).
- U.S. Army (2013) *Operational Law Handbook* (Charlottesville, Virginia).

Watkin, K. (2004) Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict, *The American Journal of International Law*, 98(1), pp. 1-34.

Westhusing, T. (2003) Taking Terrorism and ROE Seriously, *Journal of Military Ethics*, 2(1), pp. 1-19.

Zinni, A. C., & Lorenz, F. M. (2000) Command, Control, and Rules of Engagement in United Nations Operations, in: J. N. Moore & A. Morrison (Eds.), *Strengthening the United Nations and Enhancing War Prevention* (Durham, North Carolina: Carolina Academic Press).