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# Clipped Wings: Effective and Legal No-fly Zone Rules of Engagement†

MICHAEL N. SCHMITT\*

Freed of the stalemate that resulted from opposing bipolar superpowers wielding off-setting veto power in the United Nations Security Council, the enforcement regime envisioned by the drafters of the UN Charter in 1945 is slowly becoming a reality.<sup>1</sup> One of the tools that has been fashioned to coercively compel desired norms of international behavior is the no-fly zone.<sup>2</sup> Its use has challenged traditional notions of sovereignty, while clarifying the operational code regarding those actions which are appropriate responses to threats to the peace, breaches of the peace, or acts of aggression.<sup>3</sup>

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1. On the effect of bipolarity's demise vis-à-vis the Charter security scheme, and obstacles to the emergence thereof, see Michael N. Schmitt, *The Resort to Force in International Law: Reflections on Positivist and Contextual Approaches*, 37 A.F. L. REV. 105 (1994). See also W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori F. Damrosch & David J. Scheffer eds., 1991).

2. On no-fly zones generally, see David E. Petersen, *The No-fly zones in Iraq: Air Occupation* (June 1996) (unpublished manuscript on file at the Naval War College (NWC) library); John N.T. Shanahan, *The Roles of Operational Design and Synchronization in No-fly Zones: Tactical Success, Strategic Failure, and the Missing Link* (June 1996) (unpublished manuscript on file at the NWC library).

3. The operational code is the unofficial, but actual normative system governing international actions. It is discerned in part by observing the behavior of international elites. Operational code is contrasted with the "myth system," the law that, according to such elites, purportedly applies. On the distinction, see W. MICHAEL REISMAN & JAMES

This article will explore how best to craft effective and legal rules of engagement (ROE) for no-fly zones. Rules of engagement are the means governments use to set forth the circumstances in which their military units and personnel are authorized to use force, and, if so, how.<sup>4</sup> They represent the intersection of policy, law, and operational concerns at the most fundamental level of international relations. This is particularly true for no-fly zone ROE, which govern operations intended to deny a sovereign State the use of its own airspace.

Before exploring this relatively new enforcement mechanism, two brief caveats are in order. First, it is not the purpose here to assess the legitimacy of such zones under international law, either generally or as to specific operations. Doing so would necessitate an in-depth analysis of the UN Charter and customary international law that is well beyond the purview of this article. Rather, the goal is to highlight factors which may contribute to safe, successful, and legal enforcement, assuming, *arguendo*, that a zone is established lawfully. Second, because the rules of engagement for no-fly zones implemented since 1991 remain classified,<sup>5</sup> the play of

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BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS AND POLICIES OF COVERT ACTION ABROAD IN INTERNATIONAL AND AMERICAN LAW 23-24 (1992); W. MICHAEL REISMAN, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 23-35 (1987); Schmitt, *Resort to Force*, *supra* note 1, at 112-19.

4. The U.S. Rules of Engagement, described *infra*, are set forth in Chairman, Joint Chiefs of Staff Instruction (CJCSI) 3121.02, Standing Rules of Engagement for United States Forces (1994) [hereinafter SROE]. This document is classified SECRET, but all portions cited herein are unclassified. Additional useful discussions of the ROE include Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F. L. REV. 245 (1997) (focusing on the SROE); Bradd C. Hayes, *Naval Rules of Engagement: Management Tools for Crisis*, Rand Note N-2963-CC (July 1989); John G. Humphries, *Operations Law and the Rules of Engagement in Operations Desert Shield and Desert Storm*, AIRPOWER J., Fall 1992, at 25; W. Hays Parks, *Righting the Rules of Engagement*, PROCEEDINGS, May 1989, at 83; Guy R. Phillips, *Rules of Engagement: A Primer*, THE ARMY LAWYER, July 1993, at 4; J. Ashley Roach, *Rules of Engagement*, NAVAL WAR C. REV., Jan.-Feb. 1983, at 51; Stephen P. Randolph, *Rules of Engagement, Policy, and Military Effectiveness: The Tie That Binds* (Apr. 1993) (unpublished manuscript available through DTIC and on file at the NWC and Air War College libraries) (focusing on air ROE during the Vietnam War and ROE in Beirut in 1982-83); Scott E. Smith, *What Factors Affect Rules of Engagement for Military Operations Other Than War* (May 1995) (unpublished manuscript on file at the NWC library); Butch Thompson, *Factors Influencing Rules of Engagement and ROE's Effect on Mission* (Nov. 1995) (unpublished manuscript on file at the NWC library).

5. As of 1 April 1998, Operations NORTHERN WATCH and SOUTHERN WATCH continued. Classification of the ROE is necessary for very practical reasons. A State against which a no-fly zone is imposed would have a much easier time of violating the zone if it knew when enforcement aircraft would employ armed force against intruders, and, more

ROE in actual operations will be referred to only rarely. Instead, the article articulates broad principles which apply to no-fly zones wherever situated. It is first necessary, however, to set the stage by describing no-fly zones themselves.

### NO-FLY ZONES

A no-fly zone is a *de facto* aerial occupation of sovereign airspace in which, absent consent of the entity authorizing the occupation, only aircraft of the enforcement forces may fly.<sup>6</sup> Violators may be forced out of the zone or, in extreme cases, shot down. No-fly zones should not be confused with aerial operations designed to enforce economic sanctions against a target State. For instance, following the Iraqi invasion of Kuwait in 1990, the United Nations imposed an embargo on Iraq and Kuwait that eventually encompassed the aerial regime.<sup>7</sup> Such an action only

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importantly, when they would not. Additionally, ROE set forth tactics for aircraft intercepts and attacks on ground threats that would endanger enforcement aircrews if they were known in advance by the target State forces.

6. Petersen explores the idea of a no-fly zone as an occupation. Petersen, *supra* note 2, generally. It should be noted, however, that the concept of aerial occupation is not a legal one. In traditional humanitarian law, occupation is a term of art for physical control by one belligerent over land territory of another (or of a State occupied against its will, but without resistance). When an occupation occurs, rights and duties arise as between the occupying power and individuals located in the occupied area. An aerial occupation, by contrast, is simply a *de facto*, *vice de jure*, status in which limits are placed on a State's use of its own airspace. Traditional occupation law is found in Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] and Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, 16 I.L.M. 1391 [hereinafter Protocol Additional I]. See also GERHARD VON GLAHN, LAW AMONG NATIONS 811-33 (6th ed., 1992); LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 246-57 (1993); Hans-Peter Gasser, *Protection of the Civilian Population*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 209-92 (Dieter Fleck ed., 1995).

7. The initial embargo prohibited the export or import of goods into either Iraq or Kuwait. S.C. Res. 661, U.N. Doc. S/RES/661 (1990), *reprinted in* 29 I.L.M. 1325 (1990). In Resolution 665, the Security Council authorized the use of naval force in the implementation of 661. S.C. Res. 665, U.N. Doc. S/RES/665 (190), *reprinted in* 29 I.L.M. 1329 (1990). See also S/PV/2938. In Resolution 670, the Security Council extended the embargo to the aerial regime.

The Security Council . . . [d]ecides that all States, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted before the date of the present resolution, shall deny permission for any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq or Kuwait other than food in humanitarian circumstances, subject to authorization by the Council or the Committee established by resolution 661 (1990) and in accor-

prohibits transit of aircraft carrying cargo into or out of a designated area. In other words, it delineates boundaries which certain aircraft may not cross; the restriction is linear. By contrast, a no-fly zone restricts flight *within* a designated area. Its coverage is three dimensional.

Enforcement of a no-fly zone presupposes the possible use of force in response to a violation. As the most severe sanction available in international law, the circumstances under which it may be resorted to are highly circumscribed. By a restrictive interpretation of the UN Charter, there are but two.

The first is pursuant to a Chapter VII mandate.<sup>8</sup> Under Article 39 of that chapter, the Security Council determines whether a "threat to the peace, breach of the peace, or act of aggression" exists.<sup>9</sup> When it does, the Council may "call upon the parties concerned to comply with such provisional measures as it deems nec-

dance with resolution 666 (1990), or supplies intended strictly for medical purposes.

*Id.*

The Resolution also required States to:

[D]eny permission to any aircraft destined to land in Iraq or Kuwait, whatever its State of registration, to overfly its territory unless:

- a) The aircraft lands at an airfield designated by that State outside Iraq or Kuwait in order to permit its inspection to ensure that there is no cargo on board in violation of resolution 661 (1990) or the present resolution, and for this purpose the aircraft may be detained as long as necessary; or
- b) The particular flight has been approved by the Committee established by resolution 661 (1990); or
- c) The flight is certified by the United Nations as solely for the purposes of UNIIMOG.

S.C. Res. 670, U.N. Doc. S/RES/670 (1990), *reprinted in* 29 I.L.M. 1334, 1335 (1990). *See also* S/PV/2943 (1990). On the subject of aerial enforcement operations generally, see Michael N. Schmitt, *Aerial Blockades in Historical, Legal, and Practical Perspective*, 2 USAFA J. LEG. STU. 21 (1991).

8. The UN Charter regime for handling situations endangering international peace and security is set forth in Chapters VI and VII. Chapter VI articulates measures for the peaceful settlement of disputes; the actions provided for therein are entirely consensual. Chapter VI operations using military forces are usually labeled peacekeeping. Though Chapter VII contemplates peaceful steps to resolve a threat/breach of the peace or act of aggression, it also permits the use of force without the consent of the parties in order to maintain international peace and security. Chapter VIII allows regional organizations (e.g., NATO) to deal with matters regarding international peace and security if so authorized by the Security Council. On peacekeeping, see *BEYOND TRADITIONAL PEACEKEEPING* (Donald Daniel & Bradd Hayes eds., 1995); Myron H. Nordquist, *WHAT COLOR HELMET? REFORMING SECURITY COUNCIL PEACEKEEPING MANDATES* (Newport Paper No. 12, Naval War College) (1997).

9. U.N. CHARTER art. 39.

essary or desirable.”<sup>10</sup> It need not do so, however, and may proceed directly to the imposition of “measures not involving the use of armed force,” such as interruption of aerial “means of communication.”<sup>11</sup> In the event the Security Council determines that non-forceful measures would be or have proved inadequate, it may authorize the United Nations, regional organizations, or member States to use force under Article 42 to restore or maintain peace. Specifically cited in the article is “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security . . . [including] demonstrations, blockades, and other operations by air, sea, or land forces of Members of the United Nations.”<sup>12</sup> It is Article 42 that provides the specific legal basis for the use of force in the *mission accomplishment* rules of engagement for no-fly zones.<sup>13</sup>

Should the Security Council decide to authorize military action under Chapter VII, it may do so in one of three ways. First, it may send in “Blue Helmets,” i.e., national forces under UN command and control (C2); certain United Nations Protection Force (UNPROFOR) operations in the former Yugoslavia, for example, were eventually conducted under Chapter VII.<sup>14</sup> Alternatively, it may defer to a regional organization to take the lead in enforcement action. For instance, the NATO controlled Implementation Force (IFOR) replaced UNPROFOR following execution of the Dayton Peace Agreement in 1995.<sup>15</sup> Finally, the Security Council may authorize member States to take action individually or collectively to implement a particular mandate. The most notable ex-

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10. *Id.* art. 40.

11. *Id.* art. 41.

12. *Id.* art 42.

13. Mission accomplishment rules of engagement are discussed *infra*.

14. The UNPROFOR mandate was originally one of peacekeeping. As the situation in the former Yugoslavia deteriorated, however, Chapter VII sanctions were authorized. *See, e.g.* S.C. Res.743 (Feb. 21, 1992), U.N. Doc. S/RES/743 (1992); S.C. Res.757 (May30, 1992), U.N. Doc. S/RES/757 (1992); and subsequent UNPROFOR Resolutions, such as that allowing UNPROFOR to defend safe areas [S.C. Res.836 (June 4,1993), U.N. Doc. S/RES/836 (1993)].

15. IFOR was authorized under Chapter VII. S.C. Res. 1031 (Dec. 15, 1995), U.N. Doc. S/RES/1031 (1995). The Dayton Peace Agreement is at General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto, U.N. Doc. S/1995/999, annex, 35 I.L.M. 75 (1996); <<http://www.nato.int/ifor/gfa/gfa-home.htm>>. A compilation of material related to the situation in the former Yugoslavia is at <[go-pher://marvin.stc.nato.int:70/11/yugo](http://marvin.stc.nato.int:70/11/yugo)>.

ample of this approach was Operation DESERT STORM.<sup>16</sup>

The second basis for the use of force is self-defense in response to an armed attack. This authorization is found in Article 51 of the Charter.<sup>17</sup> Albeit visionary, the drafters of the Charter were realists. Understanding that Chapter VII action might not be feasible or likely in all circumstances, they acknowledged the inherent right of States to defend themselves, and other States, until such time as the Security Council acted. Article 51 provides the legal basis for *self-defense* rules of engagement in effect during no-fly operations.<sup>18</sup>

A liberal interpretation of the Charter would allow for a third use of force, non-consensual intervention into another State for humanitarian purposes. The legality of humanitarian intervention in international law is an unsettled issue, for it flies in the face of traditional notions of sovereignty and territorial integrity.<sup>19</sup> It is particularly controversial if conducted without the blessing of the

16. On November 29, 1990, the Security Council, in Resolution 678, authorized: "Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements . . . the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." S.C. Res. 678, U.N. Doc. S/RES/678 (1990). The term "all necessary means" is the standard phraseology for authorizing armed force.

17. U.N. CHARTER art. 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Numerous international agreements and pronouncements have reaffirmed this right of self-defense since ratification of the U.N. Charter. See, e.g., Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art.3, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (Rio treaty); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, princ. 1, G.A. Res. 2625, U.N. Doc. A/8028 (1970); North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243; Treaty of Friendship, Cooperation and Mutual Assistance, Oct. 10, 1955, art. 4, 219 U.N.T.S. 3 (Warsaw Pact Treaty).

18. Self-defense rules of engagement are discussed *infra*.

19. On humanitarian intervention, see FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2d ed. 1997). See also Richard B. Lillich, *Humanitarian Intervention Through the United Nations: Towards the Development of Criteria*, 53 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 557 (1993). For a short summary of the subject, see Felix Lopez, *The Lawfulness of Humanitarian Intervention*, 2 USA FA J. LEG. STU. 97 (1991).

Security Council.<sup>20</sup> When authorized by the Council on the ground that the internal actions in question constitute a threat to or breach of international peace under Article 39, humanitarian intervention is somewhat less contentious, although not universally accepted.<sup>21</sup> The no-fly zones over Iraq have been justified in part on this basis.<sup>22</sup>

Since 1991, there have been three no-fly zone operations.<sup>23</sup> The first two were the products of the way the Gulf War ended. In the cease-fire talks at Safwan, the Deputy Chief of Staff for Iraq's Ministry of Defense, on being informed that aircraft would not be permitted to fly, queried whether the prohibition extended to helicopters. He argued that due to the conditions of the roads and bridges following the highly effective Coalition air campaign, helicopter flights were necessary for transport of Iraqi officials. General Norman Schwarzkopf agreed to permit the use of helicopters, although he restricted them from flying in areas occupied by Coali-

20. In the *Nicaragua* Case, the International Court of Justice rejected any possible argument for U.S. actions in Nicaragua on the basis of human rights:

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or enforce such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming, and equipping of the Contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States.

Military and Paramilitary Actions in and Against Nicaragua (*Nicar. v. U.S.*) 1986 I.C.J. 13, at ¶ 268. The *Nicaragua* case, regardless of the merits, is an illustration of why most of the international community disapproves of humanitarian intervention. It is a principle subject to abuse, particularly by States in a position of strength vis-à-vis the State in which the intervention occurs.

21. Article 2(7) of the Charter contemplates this very situation. It provides: "nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." U.N. CHARTER art. 2 (7) (emphasis added).

22. See discussion *infra*.

23. The operation titles used here—PROVIDE COMFORT, NORTHERN WATCH, and SOUTHERN WATCH—are those of the U.S. component of each of these *combined* (i.e., including forces of more than one country) operations. Other countries may use different names. For instance, the United Kingdom's forces enforcing the no-fly zone over northern Iraq do so as part of Operation WARDEN. Nevertheless, since the U.S. labels are those generally used to refer to the operations as a whole, that convention is adopted here.



tion forces.<sup>24</sup>

Soon after the cease-fire, Kurdish groups in the north and Shi'as in the south revolted.<sup>25</sup> A brutal suppression of both uprisings followed, in which helicopters were used extensively.<sup>26</sup> The Kurds fled into the harsh mountainous terrain along the Turkish-Iraqi border. Faced with mounting international pressure to come to their assistance, in part the product of a perception that the Kurds and Shi'as had acted in reasonable expectation of Coalition support,<sup>27</sup> the Security Council adopted Resolution 688. It labeled the suppression of the Kurds a threat to "international peace and security in the region," insisted that Iraq allow humanitarian relief into the area, and demanded that Iraq cooperate with the Secretary-General to realize these goals.<sup>28</sup>

Operation PROVIDE COMFORT resulted, and in April 1991 relief flights began dropping supplies to the Kurds as forces of a 13-country coalition entered northern Iraq and established a

24. RICK ATKINSON, *CRUSADE: THE UNTOLD STORY OF THE PERSIAN GULF WAR* 9 (1993). See also MICHAEL R. GORDON AND BERNARD E. TRAINOR, *THE GENERAL'S WAR: THE INSIDE STORY OF THE CONFLICT IN THE GULF* 446 (1995). President Bush had actually made the first cease-fire offer on Feb. 27, 1991. It was immediately accepted by the Iraqis. JOHN N. MOORE, *CRISIS IN THE GULF: ENFORCING THE RULE OF LAW* 254-55 (1992). Talks between Iraqi and Coalition military leaders followed on March 2, 1991. The next day, the Security Council issued Resolution 686 formalizing implementation of the cease-fire at the international level. S.C. Res. 686 (Mar. 2, 1991), U.N. Doc. S/RES/686 (1991), reprinted in 30 I.L.M. 567 (1991). In a Mar. 3, 1991, letter from Deputy Prime Minister Tariq Aziz to the President of the Security Council, the Iraqis agreed to accept the terms of 686. U.N. Doc. S/22320 (1991). Approximately one month later, a much more detailed set of demands was passed as Resolution 687. S.C. Res. 687 (Apr. 3, 1991), U.N. Doc. S/RES/687 (1991), reprinted in 30 I.L.M. 843 (1991). Its terms were grudgingly accepted by the Iraqis in letters to the Secretary General and President of the Security Council. Letters from the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council, Apr. 6, 1991, U.N. Doc. S/22456 (1991), reprinted in MOORE, *supra*, at 497.

25. See generally HUMAN RIGHTS WATCH, *ENDLESS TORMENT: THE 1991 UPRISING IN IRAQ AND ITS AFTERMATH* (1992).

26. Not only were helicopters used, but in some cases fixed wing aircraft were employed, despite the ban thereon, to suppress the uprisings. See George Bush, Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nation Security Council Resolutions, WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Sept. 16, 1992, at 1669.

27. For instance, in February 1991 President George Bush seemed to call for the overthrow of Hussein when he stated, "There's another way for the bloodshed to stop, and that is for the Iraqi military and the Iraqi people to take matters into their own hands and force Saddam Hussein the dictator, to step down." Ann Devroy, *Wait and See on Iraq*, WASH. POST, Mar. 29, 1991, at A-15. See also John M. Goshko, *Rebel Urges West to Aid Iraqi Kurds*, WASH. POST, Apr. 2, 1991, at A-15.

28. S.C. Res. 688 (Apr. 15, 1991), U.N. Doc. S/RES/688 (1991).

security zone from which the Iraqis were directed to withdraw.<sup>29</sup> In order to provide relief to Kurdish groups under attack and ensure the security of troops on the ground, a no-fly zone was established by the Coalition within Iraq north of the 36th parallel.<sup>30</sup> The 36th parallel was an easily understood demarcation that incorporated much of the territory in which the Kurds lived.<sup>31</sup> Iraqi forces were notified of the zone by *démarche*. Thereafter, any Iraqi aircraft, whether fixed-wing or helicopter, entering the area without prior authorization risked being shot down.

Aircraft of Turkey, France, the United Kingdom, and the United States began flying from Incirlik Air Base in Turkey to enforce the no-fly zone. In August 1996, fighting between the two largest Kurdish groups broke out, with the Iraqi military overtly supporting one faction.<sup>32</sup> Since Operation PROVIDE COMFORT had initially been designed in part to protect the Kurds *from* the Iraqis, the specter of Kurds turning to the Iraqis for assistance caused many to rethink the viability of the operation. Soon thereafter, the humanitarian element of the mission was terminated, the French pulled out, and PROVIDE

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29. President Bush announced the operation on April 5, 1991. According to Bush it was "designed to alleviate the plight of the many innocent Iraqis whose lives have been endangered by the brutal and inhumane actions of the Iraqi government." George Bush, U.S. Humanitarian Assistance to Iraqi Refugees (White House stmt., Apr. 5, 1991), reprinted in *DISPATCH*, Apr. 8, 1991, at 233. On Operation PROVIDE COMFORT, see John P. Cavanaugh, *Operation Provide Comfort: A Model for Future NATO Operations* (May 1992) (unpublished manuscript available through DTIC, and on file at the NWC and Army Command and General Staff College libraries); David E Clary, *Operation Provide Comfort—A Strategic Analysis* (Apr. 1994) (unpublished manuscript available through DTIC, and on file at the NWC and Air War College libraries); Donald G. Goff, *Building Coalitions for Humanitarian Operations—OPERATION PROVIDE COMFORT* (Apr. 1992) (unpublished manuscript available through DTIC, and on file at the NWC and Army War College libraries).

30. The use of helicopters against the Kurds was prevalent in the North as well as the South, and President Bush warned the Iraqis against such use in March. Dab Balz, *Bush Criticizes Iraq's Use of Helicopters on Rebels*, WASH. POST, Mar. 15, 1991, at A-37. See also Rick Atkinson, *Iraq Shifts Troops to Combat Kurds*, WASH. POST, Mar. 30, 1991, at A-1, A-12; Johnathan C. Randal, *Kurds' Spring of Hope Collapses Amid Feelings of Betrayal*, WASH. POST, Apr. 3, 1991, at A-1.

31. See Ann Devroy and John M. Goshko, *U.S. Shift on Refugee Enclaves*, WASH. POST, Apr. 10, 1991, at A-1; John E. Yang & Ann Devroy, *U.S. Seeks to Protect Kurd Refugee Areas*, WASH. POST, Apr. 11, 1991, at A-1. Though the zone did have the effect of protecting the Kurds, it was established in part as a security measure for the Coalition forces on the ground in northern Iraq.

32. Operation NORTHERN WATCH Command Briefing (unclassified version) (1997) (on file with author).

COMFORT was renamed NORTHERN WATCH.<sup>33</sup>

No comparable humanitarian relief effort was mounted in the south. The plight of the Shi'as was less one of starvation or exposure to the elements than it was of brutal suppression. Iraqi helicopter operations against the Shi'as continued until August 1992, when Operation SOUTHERN WATCH was activated to enforce a no-fly zone south of the 32N parallel.<sup>34</sup> As in PROVIDE COMFORT, the operation was based on Security Council Resolution 688.<sup>35</sup> In response to Iraqi military involvement in the inter-Kurd hostilities, the no-fly zone was extended northward to the 33rd parallel in September 1996.<sup>36</sup> Operation SOUTHERN WATCH is conducted by aircraft of the United States, United Kingdom, and France operating from bases in Saudi Arabia, Kuwait, and the United Arab Emirates.

Interestingly, Resolution 688 neither mentioned Chapter VII nor specifically authorized establishment of no-fly zones. On its face, it authorized no affirmative action. Further, neither NORTHERN nor SOUTHERN WATCH is a classic Chapter VII operation as envisioned in the Charter, i.e., a response to aggression by one State against another. Instead, they more closely resemble humanitarian intervention mounted by multinational forces in response to a threat to international stability.

Despite the difficulty of fitting either operation into a neatly framed Charter-based scheme, legal justification for them has been based on Security Council Resolutions 678, 687, and 688.<sup>37</sup> Reso-

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33. *Id.* The two Kurdish groups are the Patriotic Union of Kurdistan (PUK) and Kurdish Democratic Party (KDP). The Iraqis sided with the KDP in their August 31<sup>st</sup> attack on the PUK stronghold of Irbil.

34. See William H. Johnson, *A Piece of the Puzzle: Tactical Airpower in Operations Other Than War* (1994) (unpublished manuscript available at the NWC library), at 12.

35. Although singling out the Kurds, 688 applied generally to all Iraqis. The resolution stated, "the Security Council . . . [g]ravelly concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas . . . which threaten international peace and security . . ." S.C. Res. 688, *supra* note 28.

36. President William Clinton, Remarks Announcing Missile Strike on Iraq, Sept. 3, 1996, 32 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1641 (1996). The response also included two separate cruise missile attacks designed to suppress air defense facilities (OPERATION DESERT STRIKE I & II). DoD Press Release No. 190-M, <<http://www.milnet.com/milnet/dstrike/dstrike0.htm>>. On Sept. 4, 1996, the President issued a report to Congress in which he stated that the expansion of the southern no-fly zone was a "reasonable response to the enhanced threat posed by Iraq." PRESIDENT WILLIAM CLINTON, REPORT TO CONGRESS, Sept. 4, 1996.

37. *Id.* In the report, the President stated that the zones "were established pursuant

lution 678 was the initial grant of authority to use force against Iraq under Chapter VII.<sup>38</sup> Subsequently, Resolution 687 set forth the terms of the cease-fire, specifically reaffirming 678 in the process.<sup>39</sup> Thus, so the argument goes, the 678 use of force authorization remains intact to effectuate even subsequent resolutions, including 688. This being so, and because 678 authorized member States to act on their own, they were entitled to mount operations to ensure compliance with 688. The results were Operations PROVIDE COMFORT and SOUTHERN WATCH. With the demise of the humanitarian component of PROVIDE COMFORT, NORTHERN WATCH is a bit more difficult to plug directly into this equation because of the absence of direct linkage to the 688 circumstances. Nevertheless, the no-fly zone continues as a *de facto* limit on Saddam Hussein's options against the Kurds. Moreover, his involvement in Kurdish internecine conflict, repeated interference with UN weapons inspectors, alleged involvement in a plot to assassinate George Bush, etc., arguably justify keeping the pressure on him in order to limit the extent of his defiance. Resolution 688, considered in light of the cease-fire resolutions and Iraqi acceptance of their terms, provides a colorable legal basis for doing so in the form of no-fly zones.

Much cleaner from a legal point of view is the no-fly zone that was established over Bosnia-Herzegovina. At the London Conference in September 1992, it was agreed that as a confidence-building measure, and to facilitate the delivery of humanitarian assistance, military flights over Bosnia-Herzegovina would be banned.<sup>40</sup> Nevertheless, such flights continued. In response, the

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to and in support of United Nations Security Council Resolutions (UNSCR) 678, 687, and 688, which condemned Iraq's repression of its civilian population, including its Kurdish population, as a threat to international peace and security in the region." *Id.*

38. S.C. Res. 678, *supra* note 16.

39. S.C. Res. 687 & 688, *supra* notes 24 & 28 respectively.

40. Specific Decisions by the London Conference, Doc. LC/C7 (Final), Aug. 27, 1992, reprinted in 31 I.L.M. 1539 (1992). Subsequently, on September 15, 1992, measures to implement the decisions were agreed upon by the London Conference Working Group on Confidence and Security-Building and Verification Measures. Report of the Secretary-General on the International Conference on the Former Yugoslavia, ¶¶ 103-109, U.N. Doc. S/24795, Nov. 11, 1992, reprinted in 31 I.L.M. 1549, 1574-75 (1992). See also U.N. Doc. S/24634, Oct. 8, 1992. Additionally, in a Joint Declaration, the Presidents of Croatia and the Former Republic of Yugoslavia agreed to permit UNPROFOR observers at airfields in their countries as a confidence-building measure. Joint Statement of 19 October 1992 issued by Federal Republic of Yugoslavia President Cosic and President Izetbegovic of Bosnia and Herzegovina, ¶ 5, previously issued in U.N. Docs. A/47/571 & S/24702

Security Council adopted Resolution 781 prohibiting them and authorizing UNPROFOR to track compliance through placement of observers at military airfields.<sup>41</sup> In support of the effort, NATO Airborne Early Warning and Control System (AWACS) aircraft began monitoring the zone and passing data it collected to UN authorities.

Violations by the Bosnian Serbs continued. In March 1993 the Security Council upped the stakes with Resolution 816. It authorized member States:

4. (A)cting nationally or through regional organizations or arrangements, to take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures in the airspace of the Republic of Bosnia and Herzegovina, in the event of further violations to ensure compliance with the ban on flights . . . and proportionate to the specific circumstances and the nature of the flights.

It also requested:

5. (T)he Member States concerned, the Secretary-General and UNPROFOR to coordinate closely on the measures they are taking to implement paragraph 4 above, including *the rules of engagement* . . . .<sup>42</sup>

The resolution specifically cited Chapter VII of the Charter as the basis for authorization.

Paragraph 4 is in accordance with Chapter VIII of the UN Charter, which allows the Security Council to seek the assistance of regional organizations in enforcement actions.<sup>43</sup> The response came from NATO the following month in the form of Operation DENY FLIGHT. Starting with fifty fighter and reconnaissance aircraft, over time the operation grew to more than 200 operating from bases in Italy and aircraft carriers in the Adriatic.<sup>44</sup> DENY

(1992), reprinted in 31 I.L.M. 1581, 1582 (1992).

41. S.C. Res. 781 (Oct. 9, 1992), U.N. Doc. S/RES/781 (1992).

42. S.C. Res. 816 (Mar. 31, 1993), ¶¶ 4-5, U.N. Doc. S/RES/816 (1993) (emphasis added).

43. "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. . . ." U.N. CHARTER art. 53 (1). The one exception is for the purposes of collective self-defense pursuant to Article 51.

44. The effort did not prove particularly successful. As one commentator has noted, [T]he no-fly zone had not even been particularly successful at the *tactical* level.

FLIGHT continued until December 1995, when responsibility for all operations—ground, air, and sea—was transferred to NATO in accordance with the Dayton Peace Agreement.<sup>45</sup> Thereafter, control of airspace became the responsibility of the IFOR,<sup>46</sup> a NATO-led force tasked with executing JOINT ENDEAVOR, the peace implementation operation.<sup>47</sup> In December 1996, IFOR transitioned into the Stabilization Force (SFOR). SFOR continues to conduct aerial operations from bases in Italy.<sup>48</sup>

Thus, of the three no-fly operations, only DENY FLIGHT was explicitly authorized in a Security Council resolution. All three, however, look to the UN Charter and the authority it vests in the Council for legitimacy. Since no-fly zones violate traditional notions of near absolute sovereignty over one's own territory, a zone not at least arguably grounded in the Charter regime would be unlikely to survive international scrutiny.<sup>49</sup> That being so, it is

For example, there were over 650 violations of the Bosnia-Herzegovina no-fly zone between April 1993 and January 1994. This is a direct result of a flawed operational design that allowed the Bosnian Serbs to fly helicopters essentially unchallenged despite the helicopter's devastating firepower. The Bosnian Serbs also continued to fly fixed-wing aircraft in strikes of their own against Bosnian and Croat targets even *after* heavy retaliatory U.N. air strikes in September 1995.

Shanahan, *supra* note 2, at 15.

45. Dayton Peace Agreement, *supra* note 15, Annex 1A, Agreement on the Military Aspects of the Peace Settlement, Art. I. For a summary of the Dayton Peace Agreement, see Dep't of State, Fact Sheet: Summary of the General Framework Agreement, Nov. 30, 1995, <<http://www.nato.int/ifor/gfa/gfa-summ.htm>>.

46. With regard to airspace, the relevant Security Council Resolution provided that under Chapter VII it was authorizing IFOR Member States, acting under paragraph 14 [of the resolution] above, in accordance with Annex 1-A of the Peace Agreement, to take all necessary measures to ensure compliance with the rules and procedures, to be established by the Commander of IFOR, governing command and control of airspace over Bosnia and Herzegovina with respect to all civilian and military air traffic.

S.C. Res. 1031 (Dec. 15, 1995), U.N. Doc. S/RES/1031 (1995).

47. It also included troops from Russia, Egypt, Jordan, Malaysia, and Morocco. Partnership for Peace troops were provided by Albania, Austria, Bulgaria, the Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Poland, Romania, Sweden, and the Ukraine. Background information on this topic is available in NATO, Basic Fact Sheet No. 4: NATO's Role in Bringing Peace to the Former Yugoslavia, March 1997, <<http://www.nato.int/docu/facts/bpfy.htm>>.

48. Background information on SFOR is available at NATO, Basic Fact Sheet No. 11, The NATO-led Stabilization Force (SFOR) in Bosnia and Herzegovina, Apr. 1997, <<http://www.nato.int/docu/facts/sfor.htm>>.

49. The zone would be a use of force against the territorial integrity of a member State in violation of U.N. Charter Article 2(4). Consider the *Corfu Channel* case. British ships were passing through the Corfu Channel in Albanian territorial waters when they

essential to query exactly what the mandate—explicit or implicit—is whenever considering no-fly zones. In the case of DENY FLIGHT, the resolutions authorizing the zone made it quite clear that the prohibitions were limited to military flights, and specifically those in the airspace over the Republic of Bosnia and Herzegovina. Any other use of force (at least vis-à-vis the no-fly zones) not falling within these narrow boundaries would, therefore, be questionable under international law. The sole exception is acts in self-defense pursuant to Article 51 of the Charter. In the cases of the zones over Iraq, far greater interpretive acumen is required, for the mandate is implicit.

Before turning to the rules of engagement, it is important to emphasize that the use of force in no-fly zones is far from an academic question. Violations of the zones have occurred periodically, often drawing a forceful response. In December 1992, an Iraqi MiG-25 fighter south of the 32nd parallel was downed by a SOUTHERN WATCH F-16 Fighting Falcon.<sup>50</sup> The next month, another F-16 shot down an Iraqi MiG-23 fighter which had crossed the 36th parallel into northern Iraq.<sup>51</sup> Less than a year later, NATO jets downed four Galebs which violated the no-fly zone over Bosnia-Herzegovina.<sup>52</sup> Enforcement aircraft in all of the no-fly operations have taken ground fire from anti-aircraft artillery (AAA) or surface-to-air missiles (SAM), in many cases necessitating an attack in self-defense on the AAA or missile site in question. More seriously, during DENY FLIGHT, a French Mirage crew was taken prisoner after ejecting and an American F-16 was

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were fired upon by Albanian gunners. Several months later, two British warships were struck by mines (made in Germany) within those waters. Therefore, the British sent in their minesweepers to clear the mines, relying on the right of innocent passage. The International Court of Justice found the Albanians liable on the basis that they knew of the mines' presence but did nothing to warn the British warships. It also held the first passage of the warships through the channel lawful under law of the sea principles. It found, however, that the minesweeping was not innocent and, therefore, violated Albanian sovereignty. See generally *Corfu Channel (U.K. v. Alb.)* 1949 I.C.J. 4. Interestingly, for separate reasons, it was the United Kingdom that was awarded damages.

50. Petersen, *supra* note 2, at 8.

51. Combined Task Force Public Affairs, Operation Provide Comfort Fact Sheet, July 1, 1994 (on file with author). The fact sheet details other instances in which Coalition aircraft were threatened, and in which a forceful response ensued.

52. Fact Sheet No. 4, *supra* note 47. The fact sheet details other uses of force during the operations in the former Yugoslavia. See also Marian Nash, *U.S. Practice: Contemporary Practice of the United States Relating to International Law (NATO Action in Bosnia)*, 88 AM. J. INT'L L. 515, 522-25 (1994).

downed by a SAM.<sup>53</sup> The gravity of no-fly zone enforcement is perhaps best illustrated by the horribly tragic incident over northern Iraq on 14 April 1994, in which two U.S. F-15 Eagles mistakenly shot down a pair of U.S. Army Black Hawk helicopters. Twenty-six U.S., U.K., French, Turkish, and Kurdish personnel on board perished.<sup>54</sup>

The use of force in each of these incidents was governed by the rules of engagement then in effect. In the aftermath of the Black Hawk shoot-downs, the President of the Aircraft Accident Investigation Board concluded that, in his opinion, Operation PROVIDE COMFORT “personnel did not receive consistent, comprehensive training to ensure they had a thorough understanding of the USEUCOM-directed ROE. As a result, some aircrews’ understanding of how the approved ROE should be applied became over-simplified.”<sup>55</sup> ROE problems were not the sole cause of the tragedy, but they certainly contributed to it. As should be apparent, carefully drafted rules of engagement are essential to ensure compliance with national policy, international law, and sound and safe tactical practices.

#### RULES OF ENGAGEMENT

*Underlying Bases of ROE.* Rules of engagement are directives from national authorities which “delineate the circumstances and limitations under which [forces of a country] will initiate and/or continue combat engagement with other forces encountered.”<sup>56</sup> Properly designed, they have three underlying bases that operate in tandem and synergistically—policy, law, and operational concerns.

First, and most fundamentally, ROE are the means by which the National Command Authorities (NCA)<sup>57</sup> (or comparable authority in other countries) express their intent as to how force

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53. Shanahan, *supra* note 2, at 15. The capture nearly caused the Dayton Peace Agreement process to breakdown.

54. On the incident, see Aircraft Accident Investigation Board Report, Vol. 11, Summary of Facts (unclassified, undated) (copy on file with author).

55. *Id.* at 46.

56. JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, Joint Pub 1-02, 329 (1994). See also SROE, *supra* note 4, at GL-15.

57. The National Command Authorities consist of the President and Secretary of Defense or their duly deputized alternates or successors. Joint Pub 1-02, *supra* note 56, at 253, <[http://www.dtic.mil/doctrine/jel/old\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/jel/old_pubs/jp1_02.pdf)>.



will and will not be used to achieve *policy* objectives. They are the realization of Clausewitz's classic maxim that war is "a true political instrument, a continuation of political intercourse, carried on by other means."<sup>58</sup> Since the NCA cannot be in the cockpit of aircraft monitoring a no-fly zone, ROE allow them to express their intent regarding the use of force to those who are.

The rules of engagement must, therefore, be carefully written so as to preclude actions that might run counter to national policy. The process requires sensitivity to the distinction between *purpose* and *means*. A no-fly zone is nothing more than one means to effectuate a national (or international) purpose, such as mounting a humanitarian relief effort or keeping feuding parties apart.<sup>59</sup> At times, this subtle, yet critical distinction is lost in the rush to design an impermeable no-fly zone. The proper measure for success, however, is not the extent to which violations occur, but rather the congruency of the operation's execution with its underlying political purpose. Those who view it as existing in a political vacuum risk failure by their inability to factor Clausewitzian principles into planning. The Black Hawk shoot-down is apt evidence of the need to be able to live with the political and policy consequences of one's ROE.<sup>60</sup>

The proper focus is on how rules of engagement can shape and bound the use of force to comport with the underlying *purpose* of the mandate. For instance, if the purpose of a vaguely drafted no-fly zone Security Council resolution is simply to ensure safe delivery of relief supplies or to keep ground attack aircraft from giving in to the temptation to strike enemy forces held in place by a cease-fire, then it is not necessary in the ROE to permit unarmed civil aircraft to be engaged. A civil downing would evoke an inter-

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58. CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds., 1984). As he so perceptively noted, "the political object is the goal, war is the means of reaching it, and the means can never be considered in isolation from the purpose." *Id.*

59. For example, in the former case, they make execution of the relief mission free from interference by a rogue State's aircraft and helicopters possible; in the latter, they may prevent military actions from the air that could threaten the fragile control over an on-going conflict.

60. Similarly, consider the political consequences had SOUTHERN WATCH aircraft shot down one of the Iraqi military helicopters transporting Haj pilgrims returning from Mecca or engaged Iranian aircraft that penetrated the southern no-fly zone to attack the camps of Iranian opposition groups in Iraq. *Iraqi Copters Cross No-fly Zone*, TORONTO STAR, Apr. 23, 1997, at A-19; *Baghdad Says Iran Bombed Exiles in Iraq*, N.Y. TIMES, Sept. 30, 1997, at A-1.

national outcry certain to endanger continuance of the operation. By contrast, if the policy goal is to keep intense pressure on a rogue State by denying it the use of its own airspace, then perhaps a comprehensive ban is merited.

Much as rules of engagement are intended to help ensure that use of military force furthers national policy, so too do they ensure that use is lawful.<sup>61</sup> This is the second structural element of ROE—international law. Indeed, in the Department of Defense Dictionary of Defense and Associated Terms, the entries “rules of engagement” and “law of war” are cross-referenced, the only cross-reference in either definition.<sup>62</sup>

The determinative effect of law is reflective of both the *jus ad bellum*, i.e., that law which governs when States may resort to the use of force in their relations, and the *jus in bello*, that law which limits how force may be used once resorted to. As to the former, it has been noted that a no-fly zone is usually a non-consensual aerial occupation of another sovereign State’s airspace by force. Absent consent of the nation in whose airspace the zone is established, ongoing hostilities in an international armed conflict, or some form of Security Council authorization, a no-fly zone would constitute a breach of the enforcing State’s obligation to respect the sovereignty of other States. It would likely be characterized by the international community as a breach of the prohibition on the use of force found in Article 2(4) of the Charter.<sup>63</sup> Moreover, even if an

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61. Military lawyers (judge advocates) have long played an integral role in the development of ROE. See, e.g., Dep’t of Defense Directive 5100.77, DoD Law of War Program (July 10, 1979) (requires the Chairman of the Joint Chiefs of Staff and Unified and Specified Command Commanders to ensure ROE comply with the law of armed conflict); JCS Memorandum MJCS 0124-88, Implementation of DoD Law of War Program (Aug. 4, 1988) (on file with author) (legal advisers are to review ROE for compliance with the DoD Law of War Program). The requirement for legal involvement in armed conflict is long-standing. See, e.g., Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 1, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV] (signatories are to issue instructions to their forces on the Convention’s annex); Geneva Convention IV, *supra* note 6, art. 144 (Parties “undertake . . . to disseminate the text of the present Convention as widely as possible in their respective countries, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction . . .”); Protocol Additional I, *supra* note 6, art. 82 (“Parties . . . shall ensure that legal advisers are available when necessary, to advise military commanders at the appropriate level on the application of the convention and this Protocol and on the appropriate instruction to be given to the armed forces in this subject.”). On the requirement for and role of legal advisers, see LESLIE C. GREEN, ESSAYS ON THE MODERN LAW OF WAR 73–82 (1985).

62. Joint Pub 1-02, *supra* note 56, at 329 & 215 respectively.

63. “All Members shall refrain in their international relations from the threat or use

implicit or explicit mandate existed, enforcement exceeding the scope of authorization would be unlawful. Thus, intentionally shooting down a civil aircraft in a no-fly zone for military aircraft or enforcing the zone beyond its geographical boundaries would violate international law.

It is also possible that the actual execution of a lawful decision to resort to force to enforce a no-fly zone could violate *jus in bello* prescriptive norms, especially proportionality or necessity. The fact that these two principles are applied in a no-fly zone does not affect their substantive content. An act is militarily necessary or proportionate in a particular context or it is not.

Military necessity is the principle of the law of armed conflict that prohibits destructive or harmful acts that are unnecessary to secure a military advantage.<sup>64</sup> Before an action can be taken, the actor must be able to articulate the direct military advantage that will ensue therefrom. In other words, destruction may not be wanton or of marginal military value, and military motivations must underlie it.<sup>65</sup> Issues of military necessity are rare in no-fly zone en-

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." U.N. CHARTER art. 2 (4).

64. The Charter of the International Military Tribunal at Nuremberg specifically characterized "the wanton destruction of cities, towns or villages or devastation not justified by military necessity" as a war crime. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(b), 59 Stat. 1544, 82 U.N.T.S. 279. The offense was further clarified in *The Hostage Case*:

[Military necessity] does not permit the killing of innocent inhabitants for the purpose of revenge or the satisfaction of a lust to kill. The destruction of property to be unlawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.

*The Hostage Case* (U.S. v. List), 11 T.M.W.C. 759, 1253-54 (1950). Codification of the principle is in Article 23(g) of Hague IV, which prohibits acts that "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Hague IV, Annex, Regulations Respecting the Laws and Customs of War on Land, *supra* note 61, art. 23(g). Though there is occasionally some discussion as to whether the article protects all property or only State property, both the U.S. Army and the International Committee of the Red Cross opine that it covers any property, wherever situated and however owned. See 2 DEPARTMENT OF THE ARMY, INTERNATIONAL LAW (Pamphlet No. 27-161-2) 174 (1962); INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 301 (Jean S. Pictet ed., 1958).

65. During an international armed conflict, the issue usually arises in the context of a target that would be protected as a civilian object, but which in some way now contributes

forcement because specific approval is usually required to strike targets other than in self-defense. When authorization is provided, it tends towards selection of traditional military targets directly related to zone enforcement.<sup>66</sup>

Whereas military necessity is a raw assessment of overall military advantage, proportionality expands analysis by balancing the advantage gained against the incidental injury to civilians or collateral damage to civilian objects that results.<sup>67</sup> It prohibits injury or damage disproportionate to the military advantage secured by the action. To illustrate, if a mobile SAM site is operating from the middle of a village, but poses minimal risk to the operation, or there are clear alternatives to flying through its weapons engagement zone (WEZ),<sup>68</sup> and attacking it is certain to result in significant casualties among the villagers, it should generally not be hit. The attack would be disproportionate. Similarly, if a no-fly zone intended to foreclose ground attacks is limited to forbidding the

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to the military effort. Since the law wishes to protect civilians and civilian objects, it imposes a requirement of directly contributing to an enemy's war effort before it will dispense with that protection.

66. *E.g.*, air defense related facilities as in the case of DESERT STRIKE I & II in 1996. Transcripts of DoD Press Briefings on Desert Strike are collected at <<http://www.defenselink.mil/iraq/brief.html>>. Examples of necessity questions are, nevertheless, imaginable. For instance, it would violate the principle of military necessity to destroy an electrical generation station serving a city from which a shoulder-launched SAM had been launched simply to convince the other side not to launch additional missiles. In the no-fly context, the relationship between that act and the goal of precluding the SAM sites from engaging enforcement aircraft is too attenuated.

67. Though the United States is not a Party to the agreement, Additional Protocol I contains two proportionality provisions, both of which the United States characterizes as declaratory of customary international law. Article 51(5) provides that "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" is disallowed as indiscriminate. Article 57(2) (b) requires an attack to be canceled 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." Additional Protocol I, *supra* note 6, arts. 51(5) & 57(2)(b) respectively. For a summary of Protocol I and the U.S. position on key articles, see INTERNATIONAL AND OPERATIONS LAW DIVISION, OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP'T OF THE AIR FORCE, OPERATIONS LAW DEPLOYMENT DESKBOOK, tab 12 (n.d.). An unofficial article often cited as accurately setting forth the U.S. position is Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 A.M. U.J. INT'L. L. & POL'Y. 419 (1987).

68. The area (measured in range and altitude) in which targets can be effectively engaged and destroyed.

presence of military aircraft, it would be disproportionate to destroy a military aircraft with no offensive capability transporting civilians across the zone. Military (actually political advantage sought by the mandate) advantage is outweighed by the incidental injury. The proper remedy in this case is to clarify the requirements; at minimum, parties should be warned that further violations will be dealt with by force.<sup>69</sup>

Both these principles must be factored in as the mandate is translated into rules of engagement. The only exception to their applicability occurs when the mandate itself authorizes acts which would otherwise be unnecessary or disproportionate. After all, the Security Council resolution on which the authority for the zone is based has actual legal valence; the ROE merely interpret the mandate. As an example, the Security Council could authorize an attack on civil aircraft of no military value to the target State or threat to enforcement aircraft (necessity), even if civilian casualties (proportionality) would ensue, simply by implicitly or explicitly including them in its mandate.

To justify this departure from the traditional law of armed conflict, it must be understood that Chapter VII permits what would otherwise be in violation of the law if performed by States acting without Council sanction.<sup>70</sup> Article 39 allows the Security Council to conduct a balancing test between whatever enforcement actions it deems necessary and the threat to which they respond. Moreover, the Charter, a treaty based in the original consent of the Parties, is generally controlling over existing customary

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69. The advantage calculation would shift if such violations occurred because the overall effectiveness of the zone would diminish. Thus, even under the principle of proportionality, downing subsequent similar violators following adequate warning might be justifiable.

70. As noted in the *Nuclear Weapons* case,

[The] prohibition of the use of force is to be considered in the light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual self-defense if an armed attack occurs. A further lawful use of force is envisaged in Article 42, whereby the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter.

International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, General List No. 95, July 8, 1996, ¶ 41, 35 I.L.M. 814 (1996) [hereinafter *Nuclear Weapons*]. This point must not be carried to an extreme, for the Court was speaking to the issue of the resort to force, vice methods used to employ force. On the case, see Michael N. Schmitt, *The International Court of Justice and the Use of Nuclear Weapons*, 7 USAFA J. LEG. STU. 57 (1997) (and NAV. WAR C. REV., Spring 1998, at 91).

law;<sup>71</sup> as to treaty law, Article 103 provides for the supremacy of Charter obligations.<sup>72</sup>

It can be argued that in certain extreme cases, such as direct enforcement against civilian objects or personnel, the prohibition on targeting them is more than customary international law; it has become *jus cogens*, a peremptory norm of international law which admits of no deviation.<sup>73</sup> The very existence of *jus cogens* norms is

71. The listing of sources found in Article 38 of the Statute of the International Court of Justice is generally recognized as being set forth in priority order. It provides:

1. The Court . . . shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the consenting 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 teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, T.S. 993, 3 Bevens 1179.

72. U.N. CHARTER art. 103. The International Court of Justice has in fact noted the primacy of Security Council actions. In the *Lockerbie* case, the Court declined to indicate provisional measures requested by Libya on the basis that Charter obligations prevail over those in other agreements such as the Montreal Convention. The Charter obligations were contained in Resolution 748 (1992), which cited Chapter VII as its basis. The holding of the Court illustrates the degree to which Council actions are determinative:

Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention . . . .

Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, (*Libya v. U.S.*) 1992 I.C.J., ¶ 39, 31 I.L.M. 662 (1992). In *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 31, Oct. 2, 1995, 31 I.L.M. 32 (1996), the court rejected claims that the Security Council establishment of the Tribunal based on Chapter VII of the Charter was inappropriate. In particular, it stated that "the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken." It declined even to consider the question of legality.

73. The Vienna Convention on the Law of Treaties describes the norm, using the label "peremptory," as follows:

Art. 53. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm

controversial however.<sup>74</sup> Any action pursuant to a Chapter VII determination by the Security Council that the measure will contribute to the maintenance of international peace and security would be unlikely to fall as violative of *jus cogens*.

Theory aside, in cases of even questionable uses of force, law quickly fades before policy. A policy decision will have to be made regarding whether or not traditional *jus in bello* prescriptive norms will yield to a weightier policy interest effectuated via Chapter VII. The decision may well turn on a balancing of potential harm to enforcement against likely international condemnation. For obvious reasons, an act violating the traditional *jus in bello* normative paradigm should only be approved in the most extreme circumstances.

From a technical point of view, it must be understood that both necessity and proportionality are principles of the law of armed conflict, a body of law which only applies in international, as distinct from non-international, armed conflict.<sup>75</sup> No-fly zones may or may not take place in a state of international armed conflict. Fortunately, the difficulty of drawing the complicated legal distinction between international and non-international armed conflict is eased by the policy decision of many States to have their forces apply the law of armed conflict irrespective of the characterization of the conflict absent instructions otherwise.<sup>76</sup> There-

from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), 63 AM. J. INT'L L. 875 (1969), 8 I.L.M. 679 (1969). It should be noted that Article 64 of the Convention provides that "if a new peremptory norm of general international law of the kind referred to in Article 53 emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.* art. 64.

74. The entire issue of *jus cogens* norms is controversial. Indeed, in *North Sea Continental Shelf*, 1969 I.C.J. 4, 42, the International Court of Justice noted that it was not "attempting to enter into, still less pronounce on any question of *jus cogens*." In fact, there have been no cases in which a treaty provision, or implementation thereof, has been determined violative of a *jus cogens* norm. For conflicting views on the existence of *jus cogens* norms, see LAURI HANNIKAINEN, *PEREMPTORY NORMS IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS* (1988) and JERZY SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL* (1974).

75. On the distinction between international and non-international armed conflict, see GREEN, *supra* note 6, at 52-66; MALCOLM N. SHAW, *INTERNATIONAL LAW* 815-821 (4th ed. 1997).

76. The SROE guidance on the subject is as follows:

U.S. forces will always comply with the Law of Armed Conflict. Not all situa-

fore, as a matter of policy, if not law, execution of no fly zone ROE must generally comport with these principles.

The centrality of legal norms in ROE should by now be apparent. Although ROE can never address every possible legal issue that might arise (lest they be so complex as to be rendered completely incomprehensible), effective ROE will cover those most likely to arise in the context of a particular operation, as well as those most difficult to analyze in the split-second decision-making that characterizes aerial operations. It is also important to understand that although the legal aspects of ROE tend to be seen as restrictive, law also allows ROE to act as force *enablers*.<sup>77</sup> This is most true in the case of self-defense. Recognition that the use of force is always an act of national policy causes some flyers to hesitate to use force, even when reasonable to defend themselves, their troops or other appropriate assets.<sup>78</sup> An understanding of

tions involving the use of force, however, are armed conflicts under international law. Those approving operational rules of engagement must determine if the internationally recognized Law of Armed Conflict applies. In those circumstances when armed conflict, under international law, does not exist, Law of Armed Conflict principles may nevertheless be applied as a matter of national policy. If armed conflict occurs, the actions of U.S. forces will be governed by both the Law of Armed Conflict and rules of engagement.

SROE, *supra* note 4, at A-2 to A-3. The UN position is that the Law of Armed Conflict as articulated in the primary conventions (1949 Geneva Conventions, Protocols Additional, and the Cultural Property Convention) should apply in all peace operations. Draft Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to the United Nations Peacekeeping Operations, Report of the Secretary General (May 23, 1991), U.N. Doc. A/46/185, *reprinted in* UN PEACE OPERATIONS (Walter G. Sharp ed., 1995). The difficulty of determining the status of an armed conflict is illustrated by the case of the former Yugoslavia. Seemingly contradictory conclusions on the subject have been reached by the International Criminal Tribunal for the Former Yugoslavia. *Cf* Prosecutor v. Drazen Erdemovic, Case No. IT-96-22-A, Appeals Chamber Judgment, Oct. 7, 1997 (finding an international conflict vis-à-vis the Bosnian Croats) with Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Opinion and Judgment, May 7, 1997. On these cases, see Leslie C. Green, Erdemovic-Tadic-Dokmanovic: Jurisdiction and Early Practice of the Yugoslav War Crimes Tribunal (unpublished manuscript on file with author, forthcoming in LESLIE C. GREEN, FURTHER ESSAYS ON THE MODERN LAW OF WAR, Transnational Pub.).

77. As has been pointed out by others, ROE can also be viewed as a crisis management tool for commanders that allows them, when unable to be present personally, to exercise positive control over their forces during stressful situations. Viewed thusly, ROE do not so much limit a commander's courses of action, as they frame them. For an example on point, see Douglas C. Palmer, Rules of Engagement as an Operational Tool 1-3 (Feb. 22, 1993) (unpublished manuscript on file at NWC library).

78. There is evidence that fear of prosecution in the event the ROE are violated has also contributed to hesitation to act in self-defense. In February 1993, Army Specialist James Mowris and his platoon were on patrol in a Somali village when they saw two men



the international law basis for the ROE can help counter this dangerous propensity.

The third component of effective rules of engagement—complementing policy and law—is operational soundness. ROE may comport with policy and fall within the limits of the law, but if they do not make sense from the perspective of the pilot in the cockpit, they are unacceptable. As an example, consider a no-fly zone in which there have been multiple incidents of intruder aircraft launching missiles at enforcement aircraft. A rule of engagement that would require a violator to be visually identified (VID) by enforcing aircraft, an act only possible at a distance well within the violator's weapons engagement zone (WEZ), would be foolish at best, possibly suicidal. Combat capable violators must be engaged beyond visual range (BVR) if the zone is to be enforced safely. Of course, fairly complex identification ROE (or guidance on the rules issued by the commander) will need to be developed to guard against mistaken engagements.

This example illustrates the point made earlier that the three bases of ROE operate in tandem and synergistically. The principle of distinction in international law<sup>79</sup> requires a degree of pre-engagement certainty that helps prevent mistaken downings likely to undermine *policy* objectives. At the same time, and as will be discussed more fully below, the *law* of self-defense allows enforcement aircraft to take whatever actions are tactically prudent to defend themselves and others should a situation not specifically accounted for in the ROE arise. The default right of self-defense permits ROE driven by policy and law to remain *operationally*

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running in an adjacent military area that was abandoned. Mowris chased them and, by his account, fired a warning shot into the ground to convince them to stop. One of the Somalis was killed. Mowris was subsequently convicted of negligent homicide in a trial that suggested the ROE on the use of force were poorly understood by the soldiers. The court-martial convening authority subsequently decided to set aside the conviction. Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 17, 66 (1994). Apparently, one consequence of the prosecution was that soldiers in Somalia "were reluctant to fire even when fired upon for fear of legal action. It took weeks to work through this . . . There is no doubt that this case had a major effect on the theatre." Letter from Colonel Wade H. McManus, Jr., Commander, Division Support Command, to Major General Guy A.J. LaBoa, Subject: Specialist James D. Mowris (Sept. 28, 1993), reprinted in I Record of Trial, U.S. v. Mowris, GCM No. 68 (Fort Carson & 4th Inf. Div., July 1, 1993). *Id.* at 66.

79. The principle requires belligerents to distinguish between valid military targets and civilians and civilian objects. It is codified in Protocol I Additional, *supra* note 4, art. 51(4)–(5).

credible to those who might contest the zone. Credibility gives rise to the deterrent effect the declaration of the no-fly zone was intended to achieve in the first place.<sup>80</sup>

A healthy focus on the bases of ROE will also act to identify defective rules of engagement.<sup>81</sup> Only rules responsive to all three are acceptable. Stated inversely, any rule of engagement that hinders achievement of policy aims, is unlawful or is likely to result in unlawful actions, or is operationally unsound must be rejected. Understandably, then, ROE are best drafted by a team consisting of a judge advocate and an operator,<sup>82</sup> and must be reviewed at an appropriate policy level.

*Mission Accomplishment and Self-Defense Rules.* Rules of engagement come in two varieties—mission accomplishment and self-defense. Although it is critically important that this distinction be recognized, the most common mistake made in drafting ROE is the blurring of the two. When this occurs, the likelihood of inadvertently frustrating the mission or placing those who are tasked with its execution at risk tends to be high.

Mission accomplishment rules are the easiest to understand and execute for the operator but present the greatest challenge to those responsible for drafting ROE. As the tether to the specific policy objectives the no-fly zone is intended to achieve, they help ensure that tactics and procedures used by enforcement aircraft are lawful and operationally sound. Mission accomplishment rules also allow the NCA the opportunity to provide direction on important policy questions regarding the use of force not explicitly addressed in the initial political mandate.

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80. Deterrence, properly understood, is the product of the will and capacity perceived by the subject of the deterrent action.

81. The classic example of failure to adequately do so is the bombing of the Marine Headquarters at Beirut International Airport in October 1983. In that case, the ROE failed to account for an increase in the terrorist threat, as evidenced by the earlier bombing of the U.S. Embassy. Dep't of Defense, Report of the Commission on the Beirut International Airport Terrorist Act, October 23, 1983 (Dec. 20, 1983); various lectures by Professor Richard J. Grunawalt, Legal Counsel to the Commission, Naval War College, 1995-97.

82. In aerial operations, "operator" is a term of art for a flyer. It is absolutely essential that the judge advocate have a basic understanding of operational concepts and weapons system capabilities. For a survey of these matters, see Robert A. Coe & Michael N. Schmitt, *Fighter Ops for Shoe Clerks*, 42 A.F.L. REV. 49 (1997).

It is here that the actual rules for *enforcing* the zone are set forth. Unlike self-defense rules, mission accomplishment rules are operation specific. They do not apply outside the context of a particular no fly zone enforcement effort. Reduced to basics, mission accomplishment ROE set forth who may do what to whom, and how, when, and where that action may occur.

Mission accomplishment rules are difficult to develop because of the need to ensure consistency with each of the three bases of ROE. For the sake of illustration, consider a seemingly straightforward Security Council mandate which states that military aircraft are not to fly in a set zone. What does the term "military aircraft" mean? Is it limited to armed aircraft? Does it include military helicopters? Military transport aircraft? Whose military aircraft? What of civil aircraft contracted to carry military supplies and personnel? Are civil aircraft conducting reconnaissance for military purposes considered to be "military aircraft"? What about military aircraft performing civilian functions, such as the transport of officials involved in cease-fire negotiations? Does it matter if military aircraft are transporting civilians because the civil air transport system in the country has collapsed?<sup>83</sup> Are military aircraft delivering relief supplies included in the ban? Are military medical aircraft exempt?

The problem is that the political mandate directing enforcement of the zone is likely to be very broadly drafted because of the difficulty of Security Council agreement on minutiae, however important the details may be. The dynamics of consensus-building, particularly in a multi-national environment, drive mandates towards generalities. In some cases, even the no-fly mandate itself must be inferred, as in the case of the Iraqi zones. Mission accomplishment ROE fill in the gaps for those in the cockpit who cannot be expected to resolve policy and legal issues as they receive a radar return from an incoming violator. Therein lies the dilemma. ROE drafters are expected to put policy and legal flesh on a skeleton that was not the product of their own labors and which may be understood differently by the various States involved. In extreme cases, this may result in differing, even conflicting, mission accom-

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83. Recall, for instance, that Iraqi military helicopters penetrated the southern no-fly zone over Iraq to pick up pilgrims returning from the Haj. With regard to the decision not to engage the helicopters, DoD spokesman Kevin Bacon stated, "We are not prepared to stop what appear to be small-scale and humanitarian operations." *Iraqi Copters Cross No-fly Zone*, TORONTO STAR, Apr. 23, 1997, at A-19.

plishment ROE during a *combined* operation consisting of multiple national contingents.<sup>84</sup>

Self-defense rules of engagement are much easier to draft, but pose far greater interpretive problems. While ROE governing the use of force to accomplish the mission must be precise enough to safeguard against exceeding the policy mandate, falling short of it, or violating international law, self-defense rules are intentionally drafted broadly in order to pass as much discretion to the operator as possible. The burden of decision shifts from the drafter to the cockpit; the desire is to avoid any possibility of a crew hesitating to defend itself because the ROE are not directly on point. Therefore, whereas mission accomplishment ROE should anticipate scenarios, self-defense ROE should clarify standards.

For very practical reasons, self-defense ROE are at the heart of no-fly zone enforcement.<sup>85</sup> Such zones are most likely in the netherworld lying between armed conflict and peace, where it is often unclear who is and who is not friendly. Moreover, they are non-consensual in fact, if not by law. Even when technically consensual, there will be powerful incentives to violate the no-fly zone. If not, there would be little need for enforcement with combat aircraft. What this means is that crews enforcing such zones regularly fly into a highly dangerous environment armed with only a contingent right to use force, i.e., contingent on whether the zone has been violated or whether there is a need to act in self-defense. Effective ROE will allow them to exercise the latter right, which is the foundation of a State's willingness to engage in such operations, to the fullest extent permissible under international law.

There are four types of self-defense, each deriving its legal basis from Article 51 of the Charter.<sup>86</sup> On the macro level is *national* self-defense, the act of defending one's country and national interests. Generally, national self-defense is accomplished by declaring forces "hostile," i.e., subject to attack *sans plus*. The mere

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84. A "combined operation" is "[a]n operation conducted by forces of two or more allied nations acting together for the accomplishment of a single mission." Joint Pub 1-02, *supra* note 56, at 77.

85. For a superb discussion of the right to self-defense in international law, see YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF DEFENCE* 175-308 (2d ed. 1994).

86. The hierarchy of self-defense is based in part on that set forth in the SROE. SROE, *supra* note 4, at A-4-A-5. The SROE describe collective self-defense as a subset of national self-defense, and individual self-defense as a lesser included form of unit self-defense. It is probably more useful to think of them as separate entities that operate quite differently in differing contexts.

existence of hostile forces renders them targets. National self-defense plays little role in no-fly self-defense ROE.

The second form of self-defense is *individual* self-defense—the act of defending oneself. Complementing individual self-defense is the third type, *unit* self-defense, an action taken to defend other personnel or units of one's own military forces. Finally, political authorities may extend a defensive umbrella to other States or their military personnel. This *collective* self-defense must be approved at the highest level—in the United States, the NCA.<sup>87</sup> Collective self-defense is an essential element in a *combined* no-fly zone operation during which aircraft of a particular nation typically perform set functions, such as reconnaissance, relying on aircraft from another nation for protection. Article 51 legitimizes this cooperative approach.

It is well established under international law that an act in self-defense must be characterized by two elements—necessity and proportionality.<sup>88</sup> Beyond that, each State defines the criteria under which its forces may exercise self-defense. The United States takes a relatively liberal view of the right. As used in the self-defense rules of engagement,<sup>89</sup> necessity and proportionality differ from the *jus in bello* principles of military necessity and proportionality discussed earlier.<sup>90</sup> Proportionality and necessity in the context of self-defense ROE are about *when* force may be resorted to. By contrast, in the *jus in bello* context, military necessity and proportionality are basic principles regarding *how* force may be used; they apply to both mission accomplishment and self-defense ROE.

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87. *Id.* at A-6.

88. This was made clear in the *Nuclear Weapons* case. There the International Court of Justice stated:

The submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) (*I.C.J. Reports 1986*, p. 94, ¶ 176): 'there is a specific rule whereby self-defense 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.' This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.

*Nuclear Weapons*, *supra* note 70, at ¶ 41.

89. SROE, *supra* note 4, at A-6.

90. An act in self-defense must comport with both the elements of self-defense *and* the *jus in bello*. *Nuclear Weapons* case, *supra* note 70, at ¶ 42.

When used as an element of self-defense, necessity is defined as a situation in which a "hostile act occurs or a force or terrorist unit exhibits hostile intent."<sup>91</sup> "Hostile act" and "hostile intent" are ROE terms of art. The cleanest basis for a use of force in self-defense is in response to a hostile act. It is described as an:

[A]ttack or other use of force by a foreign force or terrorist unit [organization or individual] against the United States, US forces, and in certain circumstances, US citizens, their property, US commercial assets, and other designated non-US forces, foreign nationals and their property. It is also force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel and vital US Government property. When a hostile act is in progress, the right exists to use proportional force, including armed force, in self-defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat.<sup>92</sup>

In the context of a no-fly zone, hostile act means that someone is shooting at you or at someone else involved in the enforcement operation. As a matter of law and policy, the right to defend oneself in the face of a hostile act is universally accepted.

It is with the concept of hostile intent that most difficulties surface. For U.S. forces, hostile intent is:

[T]he threat of imminent use of force by a foreign force or terrorist unit, or organization against the United States and US national interests, US forces, and in certain circumstances, US citizens, their property, US commercial assets, or other designated non-US forces, foreign nationals and their property. When hostile intent is present, the right exists to use proportional force, including armed force, in self-defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat. A determination that hostile intent exists and requires the use of proportional force in self-defense must be based on convincing evidence that an attack is imminent.<sup>93</sup>

Simplified, hostile intent means someone is *about to* shoot at you or someone else involved in the enforcement operation. Unfortunately, the policy and legal underpinnings of ROE may seem

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91. *Id.*

92. SROE, *supra* note 4, at GL-9.

93. *Id.*

to conflict with their operational basis when seeking to understand self-defense ROE. Whereas the judge advocate and policy maker want to insure no action is taken until the requisite threshold for self-defense under Article 51 has been reached, the operator is concerned about one thing—being shot down. These two very different cognitive paradigms can lead to confusion over the meaning of self-defense ROE. The most common misunderstanding turns on the distinction between “threaten” and “threat.” The mere fact that something is a threat to an enforcement aircraft does not mean it has demonstrated hostile intent. It must first threaten the aircraft, i.e., it must engage in an *act* that is hostile or evidence an intent to commit a hostile action. The best way to think of the distinction is as the difference between a verb and a noun; because the standard is one of intent, the actor, even though posing a threat (noun), must act (verb) to suggest his intent in some way.

To illustrate, consider a combat aircraft flying at high speed and altitude towards a no-fly zone line. Armed with long-range air-to-air missiles, this “high-fast flyer” is a potent threat to enforcement aircraft, particularly non-fighters such as tankers. The longer enforcement aircraft wait to engage it, the greater the threat it poses and the more difficult it will be to counter if it crosses the line. Yet, it has done nothing that suggests hostile intent; it has threatened no one. Instead, the high-fast flyer has merely flown within its own sovereign airspace, as it is clearly entitled to do under international law. Unless it commits an act that in some way reveals malevolent intent, it may not be engaged until it has crossed the line, a point at which *mission accomplishment* ROE intercede to govern the response. This is a difficult distinction to make for a crew member who must fly in the face of a threat which has not yet threatened.<sup>94</sup>

Even with definitional clarity, hostile intent is difficult to ascertain in practice because it is both subjective and contextual. It is subjective in the sense that unless there is reliable intelligence information regarding the intent of the opposing forces, it is exceedingly difficult to determine intent until a hostile act actually occurs. For instance, if a target State fighter approaching the no-fly zone illuminates an enforcement aircraft with its fire control

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94. Of course, ROE are always contextual. If a similar aircraft employing identical tactics approached the no-fly-zone boundary the previous day and attacked an enforcement aircraft, the threshold for engaging on this day would certainly be lower.

radar (“locks on”), it may or may not be intending to take a missile shot. Perhaps it only aims to frazzle enforcement aircrews, demonstrate resolve against the operation, or desensitize enforcement aircraft in order to catch them off-guard when it really does intend to shoot.<sup>95</sup> Or perhaps it is about to launch a deadly air-to-air missile.

Each determination is also contextual. What is a demonstration of hostile intent in certain scenarios may not be in others. Being locked-on in the Gulf of Sidra by a Libyan fighter, for example, is far more likely to constitute hostile intent than being locked-on in the Hudson Bay by Canadian aircraft. When assessing context, the following factors are often telling:<sup>96</sup>

*The current political context.* What is the level of tension between the enforcing States and the State over whose territory the zone has been established? Have there been any recent statements or acts indicating the possibility of an attempt to test the resolve of the no-fly forces? Is there any reason to believe now would be an opportune time to do so? For instance, have there been any recent indications of cracks in the coalition enforcing the zone or slippage in international support for it?<sup>97</sup>

*Prior practice.* Have there been prior violations and/or uses of force against enforcement aircraft? In what circumstances? By ground or airborne assets? What tactics were employed, and do they resemble those the aircrew is observing now?

*Indications and warning intelligence.* Have there been any deployments of threat systems that might suggest a greater capability or willingness to engage enforcement aircraft? For example, have additional or more capable surface-to-air missile systems or aircraft come into the area? Have SAMs been moved to as yet undetermined locations, thereby raising the possibility of a “SAM-bush”?<sup>98</sup> Has there been an increase in air-to-air training? Has

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95. The MiG-25 downed by the SOUTHERN WATCH F-16 in December 1993 was likely testing U.S. resolve to enforce the zone. Petersen, *supra* note 2, at 8; William Matthews, *Coverage of Iraqi No-fly Zone Increases*, A.F. TIMES, Jan. 11, 1993, at 4.

96. The SROE cite four factors without amplification: 1) the state of international/regional political tension; 2) military preparations; 3) intelligence; and 4) indications and warning information. SROE, *supra* note 4, at GL-9.

97. This is likely to be the case, e.g., in the event of a mistaken enforcement action, such as the Black Hawk shootdowns. Another example of a period posing such a risk was during the Iraqi involvement in the Kurdish in-fighting, the shift from Operation PROVIDE COMFORT to NORTHERN WATCH, and the resulting pullout of French forces.

98. A SAMbush occurs when a SAM system “ambushes” an enforcement aircraft.



there been an unexplained stand-down (period of little or no flying) that might suggest preparation for an engagement?<sup>99</sup> Have there been unusual movements of ground forces that indicate a possible military action likely to be accompanied by air support?

*Capabilities.* Does the aircraft or missile system have the capability to engage at this distance or altitude? With what likelihood of success? How much of a threat is the missile (or other weapon) if the possible hostile intent matures into a hostile attack? In other words, are the enforcement aircraft's defensive systems, such as electronic-counter measures (ECM) or chaff and flare,<sup>100</sup> effective against this particular threat or can the enforcement aircraft easily maneuver to "defeat" the threat?<sup>101</sup>

The fact that the determination of hostile intent is subjective and contextual renders it unwise to include a laundry list of acts which amount to hostile intent in the ROE.<sup>102</sup> If an act contained on the list does not rise to the level of hostile intent given the circumstances in which it is occurring, and the aircrew nevertheless reacts forcibly, the response may be characterized as a violation of the prohibition on the use of force in Article 2(4). After all, no act justifying a response under Article 51 has occurred. The action will, at very best, embarrass the enforcement State. More likely, it will result in some form of international condemnation.

On the other hand, a laundry list may cause the aircrew to hesitate to act in valid self-defense should they be faced with a situation not previously contemplated. It is simply impossible to reliably and comprehensibly predict those actions that are indica-

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For example, a mobile SAM system could be placed in a hidden location near the no-fly boundary. A "bait" aircraft might then fly quickly towards the line knowing this will cause the enforcement aircraft to maneuver into a position to engage the potential violator that is within range of the hidden SAM site. This is but one possible SAMbush scenario.

99. Stand-downs are used to prepare the aircraft, plan, and ensure adequate rest for aircrews prior to combat.

100. Chaff consists of metallic filaments released by the aircraft to disrupt ground-based radar by creating returns that effectively "cloud" it over. Flares are dropped to disrupt heat-seeking missiles. See Coe & Schmitt, *supra* note 82, at 81.

101. If so, not only does this lower the likelihood of the act constituting hostile intent, it allows the aircrew greater time to make the hostile intent determination.

102. That said, operators will typically look to the judge advocate to do so, pointing out the difficulty of making a complex determination in the mere seconds available in the cockpit. Self-defense being a legal standard, operators expect the judge advocate to determine which acts meet it. The temptation to do so must be resisted, for such a list places both national policy and aircrews at risk. The list will inevitably tend to be viewed as exclusive.

tive of hostile intent. That being so, ROE drafters should not attempt to do so. The far better course is to rely on the pre-mission self-defense training that aircrews receive to enable them to evaluate events as they unfold.

This does not mean that rules of engagement should not include lists of acts that *might* suggest hostile intent. Most do exactly that. For instance, in the no-fly environment, being locked on by a fire control radar or having a potential opponent maneuver into a position from which he can best engage enforcement aircraft are classic examples of potentially hostile intent. The same is true with regard to ground-based SAMs that lock on to enforcement aircraft. Whenever such lists are included in ROE, however, it is critically important to stress that they are only *possible* indicators of hostile intent, neither exclusive nor determinative in nature.<sup>103</sup>

Hostile intent is not only difficult to define, it is difficult to place temporally. Recall that the language of Article 51 speaks in terms of an "armed attack." Yet, surely there is no requirement to take the first hit before the right to self-defense arises.<sup>104</sup> Given today's effective weaponry, any such assertion would be absurd,

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103. The SROE language is as follows:

Commanders should use all available information to determine hostile intent. Intelligence, politico-military factors, and technological capabilities require a commander to consider a wide range of criteria in determining the existence of hostile intent. No list of indicators can substitute for the commander's judgment. The following guidance is not meant to be a 'checklist' but rather examples which taken alone or in combination might lead a commander to determine that a force is evidencing hostile intent. Among the actions that might lead to a reasonable belief that hostile intent exists are . . . .

SROE, *supra* note 4, at A-B-1. Though this particular caveat is for seaborne forces, a similarly worded proviso would be appropriate for aerial operations.

104. For a discussion of this issue, see George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?* NAVAL WAR C. REV., May-June 1986, at 69. The concern that political pressure will require excessive risk-taking is not new. During the Falklands Campaign, the Commander of the Falklands Battle Group was worried that "political requirements could result in our entering [the exclusion zone around the Falklands declared by the British] with our hands tied behind our backs. I thought it was all too possible that I was going to be told again, 'The enemy must fire the first shot.'" He was worried that his political masters would want the United Kingdom to appear the "wronged party." SANDY WOODWARD, ONE HUNDRED DAYS: THE MEMOIRS OF THE FALKLANDS BATTLE GROUP COMMANDER 108 (1992). Admiral Woodward's concern appears well founded. In a joint U.S. Naval War College and UK Royal Naval Staff College seminar held in October 1996, the British position was that "UK ROE will normally accept the risk of first hit, i.e., do not fire unless fired on." Royal Navy Staff College Background Paper, ROE. Political Tool or Military Nightmare? (undated, n.p., on file with author).

for taking the first hit in aerial combat is usually fatal. Most commentators and practitioners agree that there is a right to *anticipatory* self-defense, i.e., the right to act in self-defense before the other side attacks. The question that confounds international law is how anticipatory may the need for self-defense be?<sup>105</sup>

The most widely accepted standard is that articulated by Secretary of State Daniel Webster regarding the *Caroline* incident in the nineteenth century. For Webster, self-defense was to "be confined to cases in which the necessity of that self-defense is *instant, overwhelming, and leaving no choice of means, and no moment for deliberation.*"<sup>106</sup> This standard was subsequently referred to approvingly during the Nuremberg trials.<sup>107</sup> Today it is expressed as the requirement of imminency.

But what is it that must be imminent? Imminency cannot possibly be measured in terms of proximity to the actual attack, for such a standard is not responsive to the rationale for the right to self-defense, specifically the right not to have to sit idly by while a fatal blow is delivered. The proper measure of imminency is that point in time when the threatened act can be viably deterred or defeated. In other words, one may not act in self-defense until the moment when failing to do so may be too late. This fine distinction is of critical importance in aerial operations because of the finality and speed of the hostile act that follows a demonstration of hostile intent.<sup>108</sup>

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105. Professor Dinstein adopts the terminology "interceptive" self-defense. It occurs after the other side has "committed itself to an armed attack in an ostensibly irrevocable way." He argues that interceptive self-defense is consistent with Article 51. DINSTEN, *supra* note 85, at 190.

106. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), *reprinted in* JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW 411, 412 (emphasis added). The *Caroline* incident involved a Canadian insurrection in 1837. After being defeated, the insurgents retreated into the United States where they recruited and planned further operations. The *Caroline* was being used by the rebels. British troops crossed the border and destroyed the *Caroline* by setting fire to the vessel and sending her over Niagara Falls. Britain justified the action on the grounds that the United States was not enforcing its laws along the frontier and that the action was a legitimate exercise of self-defense. 2 DIGEST, *supra*, at 409-11.

107. International Military Tribunal (Nuremberg), Judgment and Sentence, 41 AM. J. INT'L L. 172, 205 (1947). The German leaders tried to justify the invasion of Norway as self-defense against an anticipated British attack from Norway.

108. Along these same lines, it is occasionally asked whether an aircraft must "call home" to seek authority to act in self-defense. The SROE do require that the threatened aircraft call home if time permits. If there is time, however, to radio to the air operations center (AOC) for instructions, usually the threat is not imminent. The crew may seek

Self-defense not only has a start point, it has an end point as well. Recall the requirement that self-defense be a response to a threatening or hostile act. When that act ends, i.e., when there is no longer an ongoing hostile act or demonstration of hostile intent to respond to, the enforcement aircraft may not persist in engaging in self-defense. This is colloquially known as the “once it’s over, it’s over” rule.<sup>109</sup> It is replete with practical implications for no-fly zone operations. Most significantly, if an aircraft is acting in *self-defense* against another aircraft, and that aircraft clearly and unambiguously breaks off the engagement, then the attacked aircraft has no right under self-defense to continue the fight.<sup>110</sup> It too must break off (absent a mission accomplishment rule to the contrary). This may seem contrary to good sense,<sup>111</sup> which would suggest that the aircraft which committed the hostile act remains a threat by definition. So it, in fact, does; however, recall that self-defense only grants a legal right to respond to *threatening acts*, not *mere threats* (no matter how potent).

What if the action of the enforcement aircraft defeats the threat before it is engaged? For example, assume an enforcement aircraft is illuminated by the fire control radar of a SAM site. This would in many cases constitute a demonstration of hostile intent and permit an immediate attack on the site. The threatened aircraft’s most prudent course of action, however, would usually be to maneuver to evade the missile if fired and depart the SAM’s weapons engagement zone. This is so because a quick, immediate response to a SAM site with whatever ordnance happens to be available is a dangerous proposition; SAMs are specifically de-

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general guidance (or even authority to engage under the mission accomplishment rules), but in most cases it may not engage in self-defense until there is no longer time to call home—until the need is “instant and overwhelming.” Simply put, the imminency requirement is that an enforcement aircraft may not act in self-defense until it has to, but it need not necessarily wait until the hostile intent is about to become a hostile act.

109. Of course, though the right to self-defense is no longer operative, it cannot be overemphasized that mission accomplishment ROE may provide a separate and distinct authorization to engage.

110. Note that a “clear and unambiguous” breaking off of the engagement will be difficult to discern. Therefore, it is tactically sound and legally acceptable to continue the fight until convinced it is over.

111. It would also appear to conflict with the general approach to surrender of aircraft during armed conflict, i.e., that capitulation is seldom accepted in aerial combat because of the difficulty of verifying true status. DEP’T. OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (AFP 110-31), ¶ 4-2d (1976).

signed to shoot down aircraft. The alternative, and often better, approach tends to be a measured sequential attack on the site by aircraft carrying anti-radiation missiles, followed by those employing either cluster bomb units or "iron" bombs.<sup>112</sup> May the aircraft withdraw and take time to coordinate such an attack?

No it may not, at least not pursuant to the *self-defense* rules of engagement. Once there are no aircraft within the SAM's weapons engagement zone (WEZ), there is no present threatening act to defend against. This poses a Catch-22 dilemma for no-fly-zone enforcement. An aircraft that is illuminated is at immediate risk and generally should maneuver out of the WEZ as quickly as possible. Once it does, however, international law intervenes to deny the aircraft or its fellow aircraft the right to subsequently attack the site in self defense. The quandary is obvious. The State against whom the no-fly zone is applied could easily frustrate enforcement by simply illuminating enforcement aircraft, thereby forcing enforcement aircraft into the Hobson's choice of breaking off the overall mission as planned or attacking under less than optimal circumstances.<sup>113</sup>

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112. Such missions are labeled SEAD—suppression of enemy air defenses. When the sites are actually destroyed, vice simply suppressed for a period sufficient to allow friendly aircraft to transit the area, SEAD is sometimes labeled DEAD—destruction of enemy air defenses. See Coe & Schmitt, *supra* note 82, at 53. It is important to understand that tactics are situation specific. If the aircraft being threatened is armed with a HARM, a missile specifically designed to home in on a target's radar emission (and thus very useful against SAM sites), then the best course of action may well be to attack immediately. For this reason, it may be prudent to send a HARM "shooter" into the WEZ first to determine whether the SAM site is likely to act aggressively. Descriptions of air-to-ground weapons are found in *id.* at 67–70.

113. This is a particular problem for reconnaissance missions. No-fly zone or associated operations generally have a reconnaissance component to allow the task force to remain apprised of the threat to enforcement aircraft. Unfortunately, tactical reconnaissance aircraft usually must fly within the WEZ of the site it is imaging to secure photos that are of sufficient clarity for use in identifying threats. Thus, such aircraft cannot simply fly around or above ground-based threat systems.

It should be pointed out, in this regard, that the U.S. definition of self-defense does allow a reaction to hostile acts intended to impede the *mission*. Illumination with fire control radar, however, is a demonstration of hostile intent, not a hostile act, and the hostile intent provision does not extend to impeding mission accomplishment. Moreover, as a matter of international law vice national policy, acting in response to an effort to impede the mission is more an act of *self-help* than of self-defense, though the use of force as a means of self-help under the Charter regime is controversial. See VON GHLAHN, *supra* note 6, at 633–62. On self-help in a peacetime context, see Corfu Channel, *supra* note 49.

A remedy is to be found in mission accomplishment ROE. By definition, the original mandate called for the enforcement of a no-fly zone, but it is unlikely to include many specific restrictions on this tasking. The zone cannot be enforced effectively if ground-based defenses are permitted to force enforcement aircraft to alter planned missions simply by turning on their radar systems.<sup>114</sup> Therefore, the authority to enforce the zone necessarily implies corresponding authority to take whatever reasonable steps are called for to do so safely; this authority would logically include the right to destroy SAM sites that have already demonstrated hostile intentions and are, thereby, frustrating *overall* accomplishment of the mandate. The proper method for articulating the right is through mission accomplishment ROE, not an overly expansive view of the legal right of self-defense.

Reasonableness is the key. One might argue that it would be even more prudent to take out all SAM sites with an ability to reach enforcement aircraft, regardless of whether or not they had committed a hostile act or demonstrated hostile intent. Absent specific authority in the mandate, doing so as part of the no-fly operation without any incidents of interference with operations would likely be judged to be beyond either the Charter-based use of force authorization of the mandate or the Article 51/customary international law right of self-defense. Reasonableness requires that issuance of the mission accomplishment rule result from evidence that activities at the site(s) have moved it along the continuum from a mere threat towards a target which has acted in a threatening manner. Having just demonstrated hostile intent or committed a hostile act would clearly meet the threshold.

In such cases, the temporal element surfaces again. The longer it has been since the qualifying action, the more difficult it will be to justify an after the fact air strike against the offending site(s) as an appropriate exercise of the mandate. This is particularly so if at some point following the incident, aircraft flying in the area were not threatened; the absence of reaction might indicate

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114. This possibly became somewhat of a reality in Operation DENY FLIGHT. NATO commanders wanted to attack SAM sites in Bosnia-Herzegovina that threatened enforcement aircraft. The UN disapproved the proposal out of fear that the action might result in retaliation against UNPROFOR troops on the ground. As a result, NATO aircraft enforcing the ban were required to fly outside the WEZs of known sites. Steven Watkins, *Does Deny Flight Still Work?* A.F. TIMES, July 24, 1995, at 3. In this case, operational concerns gave way in the face of greater UN policy implementation.

that the initial malevolent act was an aberration. Since international law does not permit acts in mere retribution (at least absent specific Chapter VII authorization), a strike may be questioned on legal grounds. Therefore, prudent ROE drafters will limit the extent of the authorization to restrike, recalling the policy component of ROE, to a level at minimum consistent with the relative political fragility of the particular operation. This can be done by setting time standards (e.g., no strike more than X hours after the incident) or by physical criteria (e.g., strike only with aircraft currently airborne or on strip alert).

Finally, it is vital to remember that hostile intent and hostile acts are merely shorthand for the necessity requirement of self-defense. In fact, necessity is slightly more restrictive than either intent or act, for there are situations in which it is not necessary to engage, even when a hostile act has been committed. Consider an individual firing a pistol out the door of a helicopter at a fighter trailing it out of the zone. In most cases, the weapon poses little threat to the fighter, which can easily lengthen the distance/altitude from which it is trailing the helicopter. Unless the mission accomplishment ROE allow a forceful response based on the act, there is ample time to seek guidance before resorting to force. Remember, the use of force in self-defense has no retributive or deterrent purpose; it merely serves to protect one's self and one's unit. There is no authority to engage under the law of self-defense until friendly forces actually need to be protected.<sup>115</sup>

The second prong of self-defense is proportionality. Proportionality is defined as the requirement that "the use of force be reasonable in intensity, duration, and magnitude, based on all the facts known to the commander at the time, to decisively counter the hostile act or hostile intent and to ensure the continued safety of U.S. forces."<sup>116</sup> Several fine points about this definition merit mention. One is the pervasive question of proportional to what? Many laymen interpret the requirement as "proportional" to the force used against them. By this interpretation, one could not respond to small arms ground fire with bombs or use a missile to down a helicopter that has employed machine guns against an air-

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115. One must be careful about black and white characterizations of lawfulness. The determination of actual necessity will be made in the cockpit based on the aircrew's subjective judgment.

116. SROE, *supra* note 4, at A-5.

craft. This is clearly not the proper reading. The right to use self-defense is designed to protect without unnecessarily escalating the hostilities; it is not a rule designed to ensure a “fair fight” on a level playing field.

Properly understood, proportionality as used in the ROE allows the application of no more force than necessary to counter the hostile act or demonstration of hostile intent.<sup>117</sup> Aircrews train to the standard of using the minimum force necessary to get the other side to “knock it off,” without taking unnecessary risks themselves. For instance, a missile launch by a single SAM site would not merit a response in self-defense against other SAM sites in a country—at least not in self-defense.<sup>118</sup> Similarly, consider a combat search and rescue (CSAR) effort. A column of soldiers moving towards a downed crew member likely harbors hostile intent if the aircraft was shot down by its forces. The troops would reasonably appear to be on their way to capture the crew member. The existence of necessity is clear, for the opposing forces are unlikely to be deterred except by force (or a demonstration thereof), and the threat is imminent (they are approaching). May the column be attacked and destroyed? Recalling that a no-fly operation is underway rather than open hostilities, answer is—it depends. If the column can be deterred by warning shots or selective destruction of only a few of the vehicles without forfeiting the ability to destroy it in its entirety, that should be tried. On the other hand, if it is nearly upon the pilot or shooting at him, destruction of the entire column would clearly be an appropriate response.<sup>119</sup>

What then of the situation where the armament of the enforcement aircraft clearly exceeds the amount of force actually necessary to cause the other side to cease its threatening act? May

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117. For instance, the IFOR (ground) ROE guidelines on opening fire provided, “You may only open fire against a person if he/she is committing or about to commit an *act likely to endanger life and there is no other way to stop the hostile act*” (emphasis in original). Force Commander’s Policy Directive Number 13, Rules of Engagement, Part 1: Ground Forces, July 19, 1993, reprinted in Bruce D. Berkowitz, *Rules of Engagement for U.N. Peacekeeping Forces in Bosnia*, ORBIS, Fall 1994, at 635, 643.

118. This does not mean that an attack on the country’s air defense system would be illegal. It simply means that it would not be justifiable under the principle of self-defense. This point emphasizes the fact that actions during no-fly operations, other than in self-defense, are essentially political in nature.

119. Care must be taken not to read this principle too liberally. It is not a justification for risking the downed survivor. Uncertainty should always be resolved in favor of protecting the crew member or other assets involved in the CSAR effort.



it be used? Yes, because the law does not deprive an aircraft under attack of the right to defend itself pursuant to Article 51 merely because the mission planners did not fully anticipate the nature of the threat when determining the weapons load. The U.S. ROE account for this very situation by specifically authorizing a response by "*all necessary means available*."<sup>120</sup> Consistent with the law of self-defense, then, an enforcement aircraft may use the amount and type of force *currently available to it* that is *reasonably necessary* to deter a demonstration of hostile intent or defend against a hostile act.

As should be clear from the discussion of necessity and proportionality, determining when self-defense is appropriate is no easy task, particularly in the heat of potential battle. Enforcement aircrews can only make subjective educated guesses based on the information at hand. That information must be "convincing,"<sup>121</sup> but the resulting determination need not be correct, it need only be *reasonable*—i.e., would a reasonable airman enforcing this specific no-fly zone in the circumstances then prevailing have believed the information sufficient to conclude an attack was forthcoming?<sup>122</sup> Constant scenario-based training is the key to achieving reasonableness.<sup>123</sup>

Before turning from the distinction between mission accomplishment and self-defense ROE, it must be understood that they are independent; neither limits the other. An action authorized in accordance with the mission accomplishment ROE is not disallowed because it fails to meet the criteria for self-defense. Thus, hostile intent and hostile act are generally not relevant when acting pursuant to the mission accomplishment ROE. By the same token, and more importantly, self-defense ROE are never limited by mission accomplishment ROE. If the two should ever come into conflict, self-defense always "trumps" mission accomplish-

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120. SROE, *supra* note 4, at A-5.

121. *Id.* at GL-10.

122. *See. e.g., The Hostage Case* (U.S. v. List), 11 T.W.C. 759 (1950) (acquitting general who had ordered destruction during German evacuation of Norway on basis that destruction was necessary due to general's mistaken belief that Soviets were pursuing his forces). For an example of such an evaluation in the context of state-sponsored assassination, see Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L. L. 609, 648-650 (1992).

123. For an excellent article on ground forces ROE and training, which contains many principles that can be applied to the aerial environment by analogy, see Martin, *supra* note 78.

ment rules.<sup>124</sup> This is a core principle of the U.S. approach to rules of engagement, one that is so central that U.S. forces are not permitted to operate under multinational rules of engagement inconsistent with U.S. notions of self-defense.<sup>125</sup>

This absolute severability of the two genre of ROE has important implications in no-fly zone enforcement. For example, mission accomplishment ROE will usually impose very stringent identification requirements before a zone violator may be engaged. The goal is to preclude mistakes such as those made during the Black Hawks shoot-down incident. If the violator, however,

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124. The SROE includes the following provision repeatedly throughout the document: "These rules do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity." See e.g., SROE, *supra* note 4, at A-3.

125. The relevant provisions of the SROE are as follows:

(1) U.S. forces assigned to the OPCON [operational control] of a multinational force will follow the ROE of the multinational force unless otherwise directed by the NCA. US forces will be assigned and remain OPCON to a multinational force only if the combatant commander and higher authority determine that the ROE for that multinational force are consistent with the policy guidance on unit self-defense and with the rules for individual self-defense contained in this document.

(2) When U.S. forces, under US OPCON, operate in conjunction with a multinational force, reasonable efforts will be made to effect common ROE. If such ROE cannot be established, U.S. forces will exercise the right and obligation of self-defense contained in this document while seeking guidance from the appropriate combatant command. To avoid mutual interference, the multinational force will be informed prior to U.S. participation in the operation of the U.S. forces' intentions to operate under these SROE and to exercise unit self-defense.

*Id.* at A-1. The need to seek common ROE extends beyond multinational concerns to the consistency of ROE as between U.S. forces. On at least two occasions, different sets of ROE applicable to U.S. forces have not been consistent. During operations in Somalia in 1994, there was a point at which U.S. snipers had more restrictive ROE than those assigned to UNOSOM II (United Nations Operations in Somalia II). This was the result of an incident in which a U.S. sniper acting in compliance with the ROE killed a Somali in the back of a truck armed with a crew-served weapon that was approaching a U.S. compound. Soon thereafter, Somalis appeared charging that he had shot a pregnant woman. In the ensuing brouhaha, the U.S. JTF changed its rules on snipers, while UNOSOM did not. See F.M. Lorenz, *Rules of Engagement in Somalia: Were they Effective?* 42 NAVAL L. REV. 62, 69-72 (1995). The second incident occurred during Operation JOINT ENDEAVOR. When the operation commenced, some U.S. forces involved were assigned to IFOR, while others were not. The former applied NATO ROE; non-IFOR troops were governed by U.S. ROE, including the SROE. NATO ROE were eventually made applicable to all U.S. forces in the Area of Responsibility (AOR). Letter from Headquarters, European Command to Commandant [sic], Naval War College, Subj: Lessons Learned from Operation JOINT ENDEAVOR, June 28, 1996, USAFE/JA Joint Universal Lessons Learned (JULL) (n.p.) (on file with author).

commits a hostile act or demonstrates hostile intent in a situation necessitating an immediate response, it may be engaged in self-defense *regardless* of whether or not it has been identified to the level provided for in the mission accomplishment ROE. Similarly, if the mission accomplishment ROE permit, a violator may be engaged even when it has neither committed a hostile act nor demonstrated hostile intent.

### THE ROE SYSTEM

ROE systems differ from State to State, with the exception that each country usually issues some form of broad ROE that establish overarching national rules. These are supplemented for specific operations. Whenever serving in a combined operation, the need to understand a coalition partner's ROE system is self-evident, particularly if a set of common ROE cannot be agreed upon. When this occurs, it will be left to the Coalition Commander and the senior officers from each nation contributing forces to develop tactical guidance that accounts for their respective ROE differences in a way that plays to the strengths in each country's rules.

The U.S. system is relatively straight forward. At the pinnacle are the Joint Chiefs of Staff Standing Rules of Engagement (SROE).<sup>126</sup> Promulgated in 1994, the SROE set forth general rules of engagement which govern the use of force by the U.S. military during both peacetime and armed conflict (absent a specific exemption).<sup>127</sup> They consist of a Chairman's Instruction, which introduces the rules, and four enclosures: A-Standing Rules of Engagement for U.S. Forces; B-Supplemental Measures;

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126. SROE, *supra* note 4. On the SROE generally, see Grunawalt, *supra* note 4.

127. The previous rules primarily governed operations during peacetime. The decision was made that this approach had the potential for creating confusion in the transition from peace to war. Therefore, the current iteration was designed to apply regardless of the state of conflict. The 1988 Peacetime Rules of Engagement were promulgated by Memorandum from Secretary of the Joint Staff for Unified and Specified Combatant Commanders and Commander U.S. Element, NORAD, Peacetime Rules of Engagement for U.S. Forces (Oct. 28, 1988) (on file with Oceans Law and Policy Dep't, Naval War College). The current ROE provide: "These ROE apply to U.S. forces during all military operations and contingencies. Except as augmented by supplemental ROE for specific operations, missions, or projects, the policies and procedures established herein remain in effect until rescinded." Chairman of the Joint Chiefs of Staff Instruction (CJCSI 3121.01), CJCS Cover Letter (the Instruction itself), Oct. 1, 1994, at ¶ 3. The SROE do not apply when military forces are assisting federal and local authorities during a civil disturbance or disaster. *Id.* at A-2.

C-Compendium and Combatant Commander's Special ROE; and D-References.

Enclosure A contains the basic rules of engagement that apply in all operations, including those involving no-fly zone enforcement, and at all times. No further authorization is needed for their execution by aircraft enforcing a zone.<sup>128</sup> The enclosure describes the purpose, scope and policies underlying the rules. More importantly, Enclosure A contains the self-defense rules of engagement. Appendices for Seaborne Forces, Air Operations, and Land Operations are attached. When issues of self-defense in the no-fly environment arise, it is to Enclosure A that reference should be made.<sup>129</sup>

Supplemental measures, grouped into appendices for general measures, maritime, air, and land operations, are found in Enclosure B. It is essentially a catalogue of draft rules of engagement that decision makers at the appropriate level can turn to in crafting mission accomplishment rules to support a particular operation. For example, possible measures such as the authority to pursue aircraft across designated borders, defend designated non-U.S. assets, or conduct reconnaissance are included. The authorization level for the supplementals varies depending on the nature of the rule sought.

Enclosure C contains a compendium of guidance on the ROE. It also gathers standing rules of engagement issued by the U.S. Combatant Commands to complement the SROE for the area or function the combatant command controls.<sup>130</sup> In a no-fly

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128. Unless, of course, there are combined rules of engagement for the particular operation with which all contributing States must comply. In such cases, the combined operation's rules supplant the SROE for the purposes of that operation. As noted above, though, the U.S. will not be bound by such rules unless they are consistent with the U.S. position on self-defense.

129. Though much of the enclosure is classified, the first eight pages contain general information on self-defense that is not. This section can be used as a strawman for the development of coalition self-defense ROE.

130. The Combatant Commands are established in 10 U.S.C. 164. In layman's terms, they are the broadest military organizations which employ combat forces. Combatant commands report directly to the NCA (President and Secretary of Defense). They may be organized either geographically or functionally. The five geographic commands are Atlantic Command (primarily continental U.S.), European Command, Pacific Command, Central Command (Middle East), and Southern Command (Latin America). The functional commands are Strategic Command, Transportation Command, Special Operations Command, and Space Command. On command relationships, see Joint Chiefs of Staff, Unified Action Armed Forces (Joint Publication 0-2), Feb. 24, 1995.

zone operation, it is essential to understand both the SROE and the standing ROE of that command which has authority over the operation.<sup>131</sup>

Lastly, Enclosure D lists references and contains a glossary of abbreviations, acronyms, terms and definitions. The glossary is particularly useful in achieving common understanding of the rules. For instance, some States do not allow the use of force in the face of hostile intent as a measure in self-defense. Yet, optimally, the threshold to cross prior to using force should be the same for all assigned forces in a combined operation. To achieve this commonality, non-U.S. armed forces that do not apply the intent criterion would have to receive the equivalent of mission accomplishment ROE authorizing a response to hostile intent before they could react as U.S. forces would under the SROE.

Sometimes the difference is more one of form than substance. For instance, U.S. forces usually consider being illuminated by an aircraft's fire control radar to be a demonstration of hostile intent that may require a forceful response. Certain coalition allies, on the other hand, may characterize the illumination as a hostile *act*. In practical terms, the ROE are consistent. The glossary can provide a useful tool for seeking common ground between differing national terminology. Conversely, it can be used to identify substantive variance when the same or similar terms are used.<sup>132</sup>

As noted, combatant commands issue supplemental measures that are the operation-specific mission accomplishment rules of engagement. Those selected are usually activated in an Operation Order outlining execution of the operation.<sup>133</sup> They may also be requested by any subordinate commander (usually a Joint Task Force [JTF] commander) tasked with enforcing the no-fly zone. This option is available throughout the course of the operation. If the JTF commander comes to believe his ROE are flawed or insufficient to successfully execute the mission, he is obligated to seek

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131. For instance, NORTHERN WATCH is a European Command operation, whereas SOUTHERN WATCH falls under the control of Central Command. Only Central Command, Pacific Command, and Southern Command have issued ROE of their own.

132. Drawing on a naval example, some States define disabling fire as firing into the rudder, whereas others define it as firing into the bridge. Similarly, warning shots at sea are variously described as firing across the bow, firing into the funnel, and raking the bridge.

133. The planning and execution process for U.S. military operations is described in JOINT CHIEFS OF STAFF, DOCTRINE FOR PLANNING JOINT OPERATIONS (Joint Pub. 5-0), Apr. 23, 1995.

whatever authority is necessary to remedy the shortfall. Should Enclosure B not contain a suitable mission accomplishment rule to meet his needs, he may draft and propose one of his own.

The need to revise the ROE during an operation is not uncommon. After all, the original rules were responsive to the political and military environment existing at the time of issuance; however, the environment is in constant flux. For instance, additional SAM systems or ones with greater capabilities may deploy into a previously benign area. If so, it may be prudent to request more robust ROE for air-to-ground strikes in order to ensure the new SAMs do not interfere with the mission. Or consider identification ROE, i.e., the rules regarding how intruders and/or threats are to be identified, and with what surety. If the target State deploys high performance fighter aircraft into an area where there had previously been only helicopters or low performance aircraft, it would be prudent to develop beyond visual range (BVR) identification ROE in lieu of existing ROE requiring visual identification. Alternatively, if enforcement aircraft with a greater capability to identify potential intruders deploy into a JTF's tactical area of responsibility (TAOR), then for legal and policy reasons it may be wise to make the identification ROE more restrictive, at least vis-à-vis missions involving such aircraft.

A shift in the ground situation can also require revision. Consider, the combat search and rescue (CSAR) ROE. If there are friendly forces or friendly indigenous groups in the area, then the rules of engagement for air support to a downed crew member will be much less robust than in a region where anyone approaching the crew member is probably unfriendly. In the former case, a friendly-fire incident is a concern, thereby making it absolutely essential that those approaching be positively identified. In the latter, the primary concern will be safe and prompt recovery of the crewman. If the ground situation changes, then so too should the ROE (or the guidance thereon). Indeed, any change in the environment—political, military, or legal—should occasion a review of the ROE.<sup>134</sup>

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134. The bombing of the Marine Barracks in Beirut in 1983 is the generally cited example of failure in this regard. The Commission found that the "ROE contributed to a mind-set that detracted from the readiness of the [Marines] to respond to the terrorist threat which materialized on 23 October 1983." Commission Report, *supra* note 81, at 135.

When drafting supplemental ROE, combatant commands should not attempt to supplement the SROE self-defense rules. Self-defense is already fully provided for in the SROE to the maximum extent allowed in international law. Along these same lines, use of self-defense terms of art such as "hostile act" or "hostile intent" in the combatant command's ROE is also ill-advised, for combatant commander ROE are *mission accomplishment* rules. Attempts to expand or explain the right of self-defense in the form of supplemental ROE may inadvertently result in interpretations that are inconsistent with the policy aims for the operation or complicate the exercise of self-defense by enforcement aircraft.

As a hypothetical example, consider a combatant command rule of engagement that reads, "Illumination of JTF aircraft by fire control radar of a surface-to-air missile site is a demonstration of hostile intent justifying an attack on the emitting site in self-defense." This seemingly clear rule invites confusion for a number of reasons. Those experienced in ROE will know that the combatant command ROE are intended for mission accomplishment. Their immediate question will be whether or not this rule sets a different standard than the SROE self-defense principles, particularly since a basic premise of ROE draftsmanship is to never create lists of hostile intent. The sense that maybe the rule is but a poorly articulated effort to set a *lower* threshold than would normally be the case for self-defense is strengthened by the operational fact that the range or altitude parameters of the fire control radar of some SAM systems significantly exceed their weapons engagement zone.<sup>135</sup> When this is so, illumination may be an unfriendly act, but it is not a demonstration of hostile intent because no threat can be posed.<sup>136</sup> By this stream of analysis, the rule is interpreted as a poorly drafted mission accomplishment rule that allows the SAM site to be engaged at a point which might not be justified in self-defense. This is not to say that lowering the threshold would be unreasonable or unlawful. A mission accomplishment rule along these lines is in most no-fly contexts a reasonable attempt to create a safe environment in which to operate. The point is simply that if

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135. *E.g.*, the missile may not have the range of the radar associated with the SAM system.

136. This rather black and white assertion must be tempered by operational prudence. For instance, intelligence sources may indicate a missile has a certain range, but it may, in fact, have a greater range than advertised or previously witnessed.

the intent is not to alter the existing threshold, the rule invites confusion.

The obverse is equally possible. Given inclusion of the terms self-defense and hostile intent, a reasonable conclusion would be that the rule is an attempt to refine the already applicable SROE self-defense rules. But if the actual intent is to lower the threshold, then that intent will have been frustrated. Conversely, if the goal is to clarify self-defense, there is a risk that aircraft will hesitate to defend themselves in the face of what would otherwise be a demonstration of hostile intent until they have been illuminated by a fire control radar. This is the very danger that the drafting prohibition on lists of acts demonstrating hostile intent is directed against.

The possibility of confusion is not far-fetched. Envision a scenario in which multiple enforcement aircraft are in the no-fly zone. Suddenly, there are several radar warning receiver (RWR) indications that they are being painted by fire control radar; one pilot reports seeing a missile on its way up. Meanwhile, another enforcement aircraft receives a RWR indication of *target acquisition* radar associated with a SAM site, but no indication of *fire control* radar.<sup>137</sup> Standard hostile intent ROE would allow an immediate attack on the site emitting in the acquisition mode. At least one other ground site has already committed a hostile *act*, and activation of acquisition radar by a second site would reasonably appear to be a continuation of the effort to down an enforcement aircraft. Further, some SAM systems are able to fire their missiles while in target acquisition mode, switching to missile guidance only after the missile has been launched. A rule crafted in terms of fire control radar could delay appropriate actions in self-defense against the second site.

The suggestion that combatant command supplemental ROE is the wrong place to amplify self-defense, and the urging against lists of acts which constitute a demonstration of hostile intent, does not mean to imply that rules of engagement should be set forth in a void of possible scenarios. What it does suggest is that tying

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137. Radars operate in various modes. In the acquisition mode, they simply search the sky for targets. In the target tracking (fire control) mode, they are locked on to and follow a particular target in preparation for launch. In missile guidance mode, radar guides a missile that has been launched to target. Whether or not the functions are distinct (and distinguishable by aircraft) depends on the radar system. For example, the phased array radar on an Aegis cruiser performs all three functions.



them to real-world situations is best left to those tasked with the actual execution of the mission, most often a JTF Commander and his Joint Forces Air Component Commander (JFACC).

It is at this level that the third, and for the aircrew most critical, phase of no-fly ROE development and implementation occurs. Typically, a JTF commander will issue guidance on the application of the ROE to his aircrews.<sup>138</sup> This guidance should be drafted jointly by the operation's staff judge advocate, who will be attuned to legal concerns and the nuances of precision draftsmanship as well as the JFACC, the officer responsible for operational matters. The guidance will be issued by the JTF commander, the one individual in the organization who best understands the policy mandate he has been given. Thus, all three underlying components of the ROE are accounted for in the guidance.

The commander's guidance is not a formal part of the rules of engagement. Rules of engagement set forth the parameters of *what* it is that enforcement aircraft may do. The commander's guidance on the application of the ROE takes those instructions and sets out *how* the tasks will be accomplished. For instance, the mission accomplishment ROE will state that a particular type of aircraft violating the no-fly zone may be warned to depart, and if it does not, engaged. The guidance, by contrast, outlines the form and content of the warning and the requisite identification criteria before the violating aircraft may be shot down. It authorizes no act not already authorized in either the SROE or the combatant command's supplemental ROE.

Though lengthy by comparison to the ROE, the commander's guidance should inform crew members how they can defend themselves and accomplish the mission, not constitute a legal treatise. Furthermore, the ROE guidance should be based on various situation specific factors: the tasked mission, the threat from ground and air-based systems, capabilities of enforcement assets, and tactical good sense. It must also be subject to a robust legal analysis, not only for compliance with legal limits/authorizations found in the ROE, but more generally with international law, especially the law of armed conflict.

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138. The guidance can take multiple forms. In Operation NORTHERN WATCH, e.g., it is in a booklet entitled the Commander's Guidance on the Application of the Rules of Engagement, which is one part of an overall set of guidance labeled the Consolidated Operating Standards. In SOUTHERN WATCH, by contrast, the guidance is contained in a Special Instruction (SPIN) issued by the JTF Commander.

## RECURRING ISSUES

In any no-fly zone operation, there are three seminal goals: 1) no violations; 2) no mistakes; and 3) no friendly losses. The first is intended to achieve the policy mandate without raising the political stakes by actually having to shoot down an aircraft that dares test the zone. Its success depends on deterrence through credibility, the product of capability and perceived willingness to enforce. Critical to this deterrence is maintaining control over when and in what way enforcement aircraft occupy the zone. In other words, it is important that the target State not be able to drive enforcement aircraft from the zone, thereby opening it to their own.<sup>139</sup> It is equally important that the engagement decision matrix not be so involved, or the authority to engage so highly set, that enforcement aircraft cannot react in a timely fashion.

The second goal, no mistakes, is intended to maintain the international political cohesion that made possible establishment of the zone in the first place. In that no-fly zones are intrusions on the sovereignty of a State, setting one up is a rather exceptional decision for the international community to make. Continued legitimacy of the zone depends on strict compliance with the limits of the mandate by enforcing States.

Lastly, the operation must be mounted safely, both for the sake of the aircrews involved and to maintain domestic and international support for the operation. This requires a full understanding of what the law of self-defense, and the ROE articulating it in the operational context, allows. None of these goals can be achieved without clarity of purpose and execution. In the remaining section of this article, several of the recurring issues that tend to generate confusion or hesitation during no-fly zone operations will be examined.

*Who to Shoot and When?* The question of who to shoot is far more complex than might appear at first glance. To the extent the policy mandate does not specify the precise subjects of enforcement, the ROE must do so. Of course, those ROE cannot extend enforcement authority beyond what is a reasonable interpretation of the mandate, for mission accomplishment rules permitting the use of force depend on the mandate involved for legality and le-

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139. For example, by employing the technique of illuminating aircraft with SAM system fire control radars discussed *supra* in the section on self-defense.

gitimacy. Effectively drafted mission accomplishment ROE will, at a minimum, make the following clear for enforcement aircrews.

*What nationality are the aircraft that enforcement action can be taken against?* Zone prohibitions should be framed with specificity in the ROE. Obviously, aircraft of the target State will be included. That State, however, might be allied or cooperating with other States, the aircraft of which may attempt to enter the zone. If so, decision makers should consider extending the zone's prohibitions to include aircraft of such States. Alternatively, a zone may be expressed in terms of a general prohibition, with specific aircraft exempted. For instance, UN aircraft are permitted to fly in the zones over Iraq, and do so often in their weapons monitoring role.<sup>140</sup> Similarly, relief or humanitarian flights by specified countries or organizations may be exempted. Whenever there are either exemptions to a general prohibition or specific prohibitions on aircraft of a certain nationality, rigid identification procedures must be in effect before a possible violator may be engaged.<sup>141</sup> As the Black Hawks shoot-down so tragically demonstrated, determining aircraft nationality can be a challenging proposition.

*Does the prohibition extend to civil aircraft?* There is little doubt that no-fly zones may be enforced against military aircraft.<sup>142</sup> The legality of using force against civil aircraft is a far less settled issue, as the downing of Korean Airlines flight 007 (KAL 007) over the Soviet Union in 1983 demonstrated.<sup>143</sup> International

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140. The mission is performed by the U.N. Special Commission (UNSCOM).

141. This need is compounded by the distribution of similar aircraft in the air forces of many States. For instance, during DESERT STORM, both Iraq and members of the Coalition flew French-made Mirages and Soviet-built MiGs.

142. Over the course of the last fifty years, there have been a number of incidents in which military aircraft were downed during peacetime operations. For instance, in 1952 and 1954, Soviet aircraft shot down B-29s over Japan, in 1953 a USAF F-84 was downed by Czech fighters, and the Soviets shot down a U.S. Navy P-2 in 1959. In each case, international condemnation focused on the fact that the aircraft had inadvertently, vice intentionally, violated foreign airspace. When a U-2 was shot down by the Soviets over Soviet territory in 1960, however, there was a relative lack of condemnation. These incidents would tend to support the contention that it is intent of the downed aircraft that will drive international assessments of legality. In the case of a no-fly zone, the intent of a combat aircraft to violate an internationally "sanctioned" prohibition approaches *res ipsa loquitur* status. On the incidents, and the reaction thereto, see 1956 I.C.J. Pleadings, Aerial Incident of Oct. 7, 1952 (U.S. v. U.S.S.R.); 1959 I.C.J. Pleadings, Aerial Incident of Nov. 7, 1954 (U.S. v. U.S.S.R.); 1956 I.C.J. Pleadings, Aerial Incident of Mar. 10, 1953 (U.S. v. Czech); 1958 I.C.J. Pleadings, Aerial Incident of Sept. 4, 1954 (U.S. v. U.S.S.R.); Schmitt, *Aerial Blockades*, *supra* note 7, at 51-52.

143. One hundred six deaths resulted. KAL 007 was certainly not the first incident of

outrage was expressed loudly and immediately. But for a Soviet veto, the Security Council would have passed a resolution declaring that "such use of force against international aviation is incompatible with the norms governing international behavior and elementary considerations of humanity."<sup>144</sup> The International Civil Aviation Organization (ICAO) approved a resolution containing identical language.<sup>145</sup> Following a fact-finding commission review of the incident, the ICAO Council subsequently reaffirmed that "whatever the circumstances which . . . may have caused the aircraft to stray off its flight plan route, such use of armed force constitutes a violation of international law, and invokes generally recognized legal consequences."<sup>146</sup> Not long thereafter, the ICAO Assembly adopted a proposal for amendment of the Chicago Convention. Article 3 *bis* provides that "the contracting states recognize that every state must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of the aircraft must not be endangered."<sup>147</sup> Though it has yet to secure the 102 ratifications necessary to come into effect, there is some support for the position that it is in fact declaratory of existing customary law.<sup>148</sup>

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a civil airliner being downed. In 1954 the Chinese shot down a Cathay Pacific airliner which they mistakenly believed to be a Nationalist Chinese military aircraft. Keesings Contemporary Archives 13733 (1954). Other incidents of downing civil airliners include downings of: an Air France airliner over Berlin in 1952; an El Al airliner in 1955 by Bulgaria; a Libyan airliner by the Israelis over the Sinai Peninsula in 1973; and the forced landing of a Korean Air Lines aircraft in 1983 by the Soviets. See Schmitt, *Aerial Blockades*, *supra* note 7, at 52. See also Bin Cheng, *The Destruction of KAL Flight KE007, and Article 3 Bis of the Chicago Convention*, in AIRWORTHY: LIBER AMICORUM HONOURING PROFESSOR DR. I.H. PH. DIERDERICKS-VERSCHOOR 49, 55 (J.W.E. Storm van Gravesande & A. van der Veen Vonk eds., 1985); Craig A. Morgan, *The Shooting of Korean Airlines Flight 007: Responses to Unauthorized Intrusions*, in INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 202, 204-210 (W. Michael Reisman & Andrew Willard eds., 1988); and John T. Phelps, *Aerial Intrusions by Civil and Military Aircraft in Time of Peace*, 107 MIL. L. REV. 255, 266-274 (1985).

144. The text of the draft resolution (S/15966/Rev. 1) is reprinted at 22 I.L.M. 1148 (1983). Poland also voted against the resolution, and the P.R.C., Guyana, Nicaragua, and Zimbabwe abstained. U.N. Doc. S/PV.2476 (1983), reprinted in 22 I.L.M. 1138, 1144 (1983).

145. ICAO Council Resolution, Sept. 16, 1983, 22 I.L.M. 1150 (1983).

146. ICAO Council Resolution, Mar. 6, 1984, 23 I.L.M. 937 (1984).

147. Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 3 *bis*), May 10, 1984, reprinted in 23 I.L.M. 707 (1984).

148. Use of the term "recognize," in light of rules of interpretation, would suggest it was intended to be declaratory. For a discussion of Article 3 *bis*, see Cheng, *supra* note

Despite the crescendo of condemnation following KAL 007, the existence of a Security Council Chapter VII mandate would arguably allow enforcement against a civil aircraft in a no-fly zone, even if downing it would otherwise violate international law. The Charter is, as discussed earlier, supreme. Nevertheless, it should be obvious that any downing of civilian aircraft would be highly controversial, regardless of its purported legality. Therefore, before drafting ROE vis-à-vis civil aircraft, it must be absolutely clear that the original mandate authorizing the zone was intended to cover them; during post-incident furor over a civil aircraft shoot-down is the wrong time to discover that it does not.

Even if it is clear that such action is authorized by the mandate, the authorization level for actually engaging should remain at a level where the decision maker can factor in the policy and political environment then existing. The fact that one can shoot down a civil aircraft violating a no-fly zone does not mean that one *should*. Downing armed fighters that violate the zone is relatively straightforward from a policy perspective; shooting down civilian aircraft is an entirely different matter. Not only should the approval level be highly placed, but the steps that the enforcement aircraft must perform before it may engage a civil aircraft in mission accomplishment need to be very carefully considered. In particular, the ROE (and commander's guidance on the application of the ROE) must ensure positive identification and impose redundant warning requirements. The warning requirement is particularly important—it acts to shift the onus of responsibility for the shoot-down to the violating aircraft. Additionally, because civil aircraft are being intercepted, tactical guidance for intercept methodology should comply with the procedures set forth by ICAO.<sup>149</sup>

Finally, in determining if, when, and how to engage civil aircraft, account should be taken of what it is they are doing. The closer the aircraft is to performing a military function, the less the political risk. It is likely that ROE or ROE guidance based on

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143, at 60–61; Gerald F. Fitzgerald, *The Use of Force Against Civil Aircraft: The Aftermath of the KAL 007 Incident*, 1984 CAN. Y.B. INT'L L. 291; Michael Milde, *The Chicago Convention After 40 Years*, 9 ANNALS OF AIR & SPACE LAW 119 (1984).

149. Convention on International Civil Aviation (Chicago Convention), Dec. 7, 1944, annex 2 (Rules of the Air), 15 U.N.T.S. 295, T.I.A.S. No. 1591, 61 Stat. (2) 1180, 3 Bevans 944, reprinted in 22 I.L.M. 1154 (1983). See also, Schmitt, *Aerial Blockades*, *supra* note 7, at 56–64.

what the aircraft is doing may prove difficult to execute. Even with a visual (VID) intercept, it may be impossible to determine if it is carrying military or humanitarian relief supplies. Nevertheless, in certain circumstances, ROE based on *act* (e.g., air-dropping supplies) may make sense. Of course, if a civil aircraft commits a hostile act or demonstrates hostile intent *necessitating* a response in self-defense, enforcement aircraft may defend themselves.

*Does the type of aircraft make a difference?* When the two Black Hawk helicopters were downed over northern Iraq, some criticism was voiced because the helicopters posed no serious threat to the two F-15s. What is forgotten in this assertion is that mission accomplishment ROE were applied in the shoot-down; a threat is not generally a prerequisite in these rules. The question of whether the F-15s were threatened by the helicopters (if they had actually been Iraqi Hinds)<sup>150</sup> is one of self-defense; in fact, there was never any claim that the F-15s mistakenly acted in self-defense.

The incident highlights the fact that the type of aircraft violating the zone matters when contemplating enforcement action. The more offensively capable the aircraft, the more acceptable the enforcement action, and the less likelihood of negative impact on the policy aims underlying the zone. Understanding this fact is useful in crafting ROE and ROE guidance that is responsive to the policy component of the rules of engagement.

When considering criteria and intercept procedures based on type of aircraft, probably the cleanest distinction that can be made, at least from the perspective of the enforcement aircraft's cockpit, is between fighter/attack aircraft, transport aircraft, and helicopters. Whether the three should be handled differently depends on the context in which the no-fly zone exists. If helicopters have been active in air-to-ground operations, the need to distinguish between engaging fighters and helicopters is minimal. Both are offensively oriented threats to the maintenance of peace. By the same reasoning, if establishment of the zone was primarily in response to the threat to peace posed by ground attack *aircraft*, it may be prudent to set different procedures for responding to helicopters and transports. This certainly is not required as a matter

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150. The F-15 pilots misidentified the Black Hawks as Iraqi Mi-24 Hinds during their visual identification. See Aircraft Accident Investigation Board Report, Executive Summary, Vol. I (May 27, 1994) at ¶ 3 (on file with author).

of law so long as the mandate covers all military aircraft, but it is a prudent political step to take. The point is that enforcement procedures and criteria must reflect attendant conditions; type of aircraft is one variable ROE drafters and enforcement operation commanders should consider to ensure this.

If a decision is made to treat varying types of aircraft differently, the differences will lie primarily in identification and warning. Because of the high risk involved in flying close enough to fighter/attack aircraft to visually identify them, it is appropriate to authorize beyond visual range identification and engagement in most circumstances. By contrast, since they pose minimal threat to high performance fighter aircraft, a visual identification of helicopters and transports is ordinarily a reasonable requirement from a tactical perspective. If tactically acceptable, doing so would certainly make sense from a legal or policy perspective.

Differences in the warning requirement take two forms, procedural and substantive. Procedurally, the ICAO intercept procedures are viable in the case of helicopters or transports, but would not be when intercepting a fighter aircraft with air-to-air capability. Substantively, the nature of a particular operation may justify dispensing with the warning requirement altogether for fighters, or even for helicopters if they have previously been involved in offensive operations. Violating the zone may alone be sufficient justification for engaging them. On the other hand, and again in situation-specific scenarios, it may be politically judicious to warn helicopters or transport aircraft out of the area before acting to shoot them down.

*Who authorizes engagement of violators?* Whereas the authority to act in self-defense must reside in the cockpit, the decision as to when to engage in a mission accomplishment intercept can be set at whatever level makes sense from a policy and operational perspective.<sup>151</sup> Context is controlling. The more politically

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151. Legally, it does not matter where the level is set, so long as the execution of the engagement, and the criteria therefore, are appropriate. Of course, the system of authorization cannot be so complex that it fails to function effectively. It has been argued that during DENY FLIGHT, the requirement to secure both NATO and UN approval for the use of force (in mission accomplishment) frustrated accomplishment of the mission. The problem was not that of connectivity (i.e., technology for communications), but rather unwieldy and slow decision-making. See Brian G. Gawne, *Dual Key Command and Control in Operation Deny Flight: Paralyzed by Design* (Nov. 1996) (unpublished manuscript on file at NWC library).

sensitive a particular type of engagement, the higher the authorization level should be set.<sup>152</sup> For example, if consistent with the operational context, the decision may be made to let the aircrew of the enforcement aircraft determine when to engage a fighter, but require a decision by the JFACC or task force commander to engage anything else. The most sensitive issues surround civil aircraft. It would be unwise to let aircrew act against civil aircraft without higher approval; the political consequences of the act are simply too momentous.

*Who to Defend?* As noted earlier, U.S. aircraft may always defend themselves or other U.S. military assets. No supplemental rule is required to effectuate this right. This core principle extends to all U.S. military assets, whether assigned to the task force or not. Thus, if Iraqi forces engaged U-2 flights operating in support of the UN weapons monitoring operation (United Nations Special Commission-UNSCOM), as was threatened, U.S. forces of either SOUTHERN or NORTHERN WATCH could act in their defense without any further approval.<sup>153</sup>

Beyond that, a specific supplemental rule must be issued to authorize defense of forces of any other State or organization. In most cases, there will be a supplemental rule authorizing defense of all aircraft participating in monitoring the no-fly zone. Careful review of the scope of the authorization is well-advised. Does it only apply to aircraft assigned to the operation or to aircraft of those States generally?<sup>154</sup> Are there geographical limits placed on the exercise of this collective self-defense?<sup>155</sup> Are there any tactical limits?

As a matter of law, States may not unilaterally extend protection to other States absent their consent.<sup>156</sup> Collective defense

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152. For instance, in the case of the four Galebs shot down by NATO fighters in 1994, they were first warned by NATO AWACS monitoring the area. They then were warned off by the fighters. After these warnings went unheeded, the fighters had to secure authority from the NATO Combined Air Operations Center before they could engage the violators. Nash, *supra* note 52, at 524.

153. On the threats, see *Containing Saddam*, THE ECONOMIST, Nov. 15, 1997, at 16; *Saddam v. the UN, Continued*, THE ECONOMIST, Nov. 15, 1997, at 43.

154. For example, if operations are run out of a base in country X, can country X's aircraft be defended even if they are engaged in operations wholly unrelated to the no-fly enforcement operation? The default answer is no, absent authorization to the contrary.

155. For example, do the ROE permit forces to cross a border in order to effectively defend X's aircraft?

156. *Nicaragua Case*, *supra* note 20, at 104-05.



ROE should not be approved until such a request has been received; generally, this will occur during the planning phase of the operation. An interesting derivation of this premise involves the extent of self-defense authorized. If the protected State's interpretation of self-defense is narrower than the U.S. interpretation, e.g., by limiting self-defense to hostile acts, may U.S. aircraft nevertheless act based on their own standard (which includes notions of hostile intent)? The answer is technically "yes," because intent is an appropriate criterion for self-defense under Article 51 of the UN Charter, which does not distinguish between State, individual, and collective defense. They should do so, however, only if the consent of the protected State is express.<sup>157</sup> This position is a logical extension of the *ab initio* need for consent to collective self-defense.

Extension of direct defense to international governmental organizations (e.g., UN), non-governmental organizations (e.g., relief organizations), or any other groups that may be threatened (e.g., the Kurds) also requires specific authorization. As in the case of States, a request for such assistance should precede its execution. This point bears only on the issue of immediately necessary self-defense of such organizations and groups. Beyond that, *mission accomplishment* ROE may be fashioned to implement a national policy providing for their defense.

The question of defense involves not only who to defend, but also against whom. For U.S. forces defending themselves, the SROE rule is clear—anyone. The matter is murkier when defending forces of other States or organizations. A coalition partner may be engaged in entirely separate operations in the target State or have disputes with neighbors unrelated to the no-fly zone enforcement.<sup>158</sup> To come to the defense of its aircraft in other than the no-fly zone enforcement context is to risk creating the impression that the U.S. or its coalition allies have taken sides in an unrelated dispute. When this potential exists, ROE and/or the guidance issued thereon must be carefully drafted to ensure collective defense is engaged in only as it pertains to the no-fly operation itself.

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157. Of course, this begs the *policy* question of why U.S. forces should place themselves at risk in circumstances in which a State's own forces would not do so.

158. The classic example is cross-border operations during Operations PROVIDE COMFORT and NORTHERN WATCH against Kurds using northern Iraq as a sanctuary in their war against the Turks. Turkey is also at odds on a recurring basis with Syria.

*Where Can Enforcement Aircraft Fly . . . and Enforce?* There are few principles more established in international law than territorial inviolability. This inviolability extends not only to physical crossings of international borders, but also to the causation of harmful effects in other States.<sup>159</sup> Control over airspace by a State is near absolute within its land borders and territorial sea; it is even more absolute skyward to the point where space begins.<sup>160</sup> The three exceptions to the need for State consent prior to entry into national airspace are flights pursuant to a Chapter VII authorization (e.g., a no-fly zone), necessity in a self-defense situation, *force majeure*, and assistance entry when immediately necessary to save lives. Each applies in the no-fly zone context, and ROE and ROE guidance should reflect the relevant legal principles.

First, because of the principle of territorial inviolability, an ROE supplemental rule must specifically authorize the crossing of international borders. The legal basis for the authority to cross into the target State is obviously the Security Council's express or implied mandate. Beyond that, consent would be required to cross any other borders necessary to enforce the zone. If not granted, violators could not be pursued into neighboring States. An oft-heard contrary assertion is that they may be chased across international borders when enforcement aircraft are in "hot pursuit."<sup>161</sup> The assertion is mistaken, for the term hot pursuit is a legal concept limited to either law enforcement or the proportional protection of territorial sovereignty. Moreover, the pursuit is typically from the enforcement State's territory into international airspace,

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159. Trail Smelter was a case involving a smelter that was discharging sulfur dioxide near Trail, British Columbia. The United States alleged that the sulfur dioxide drifted over parts of Washington. The arbitration tribunal held for the United States on the ground that countries have a duty not to use, or allow the use of, their territory for activities harmful to another State. Trail Smelter (U.S. v. Can.) 3 R.I.A.A. 1911, 1965 (1941).

160. See AFP 110-31, *supra* note 111, at ¶¶ 2-5; DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M), ¶ 2.5.1 (1995). Note for example, that in the law of the sea there is a right to innocent passage through the territorial sea. No such right exists in the airspace. NWP 1-14M, *id.* at ¶ 2.5.1.

161. For an excellent discussion of aerial hot pursuit, see N.M. POULANTZAS, THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW 271-352 (1969). Roach cites a form of pursuit labeled "self-defense pursuit," distinguishing it from the hot pursuit of the law of the sea. Roach, *supra* note 4, at 50. Self-defense pursuit would certainly be appropriate in the aerial environment; however, because of the speeds involved, it would be less a pursuit than merely an ongoing engagement.

not into the sovereign airspace of a third State.<sup>162</sup> There being no international legal doctrine of hot pursuit *per se* applicable to a no-fly zone operation, any pursuit that occurs must be based on the authorizing mandate or consent. Where pursuit is generally appropriate is in pursuing a violating aircraft back across a no-fly line *within* the target State. Since the flight is into the target State's airspace, permitting enforcement aircraft to pursue such violators is a reasonable interpretation of the mandate, absent indications otherwise that it was not so intended.

Another argument sometimes heard is that if violating aircraft use neighboring States as sanctuary from enforcement aircraft, and the "host" States fail to act effectively to preclude that practice from continuing, then enforcement aircraft may cross the relevant border to deny violating aircraft *de facto* sanctuary.<sup>163</sup> This is impermissible without express or implied Security Council authorization. The right to cross borders in self-help derives from application of the law of neutrality and the existence of opposing belligerents.<sup>164</sup> No-fly operations usually occur, however, in the absence of classic belligerency between the States enforcing the zone and the target State. Additionally, Security Council approved actions are typically specific as to the identity of the target of the sanctions. The sanctuary State is not yet one. That being so, additional authorization should be sought before crossing borders not encompassed by the original grant of authority.<sup>165</sup>

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162. Poulantzas describes incidents of pursuit during armed conflicts not amounting to war, rejecting the contention that a right to enter a third State's territory exists absent consent. POULANTZAS, *supra* note 161, at 329-338.

163. Note that the State would be obligated to act to keep its territory from becoming a sanctuary by virtue of Article 2 (5) of the Charter. That article provides that "[a]ll Members . . . shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action." U.N. CHARTER art. 2 (5).

164. The classic case on sanctuary in the law of armed conflict involves the *Altmark*, a German naval auxiliary vessel during the Second World War. In 1940, the *Altmark* transited Norwegian territorial waters carrying British prisoners. Permission to transit had been granted by the Norwegians, who had also refused British requests that the vessel be searched for prisoners. After the *Altmark* had passed through nearly 400 miles of Norwegian waters, a British destroyer entered the waters and released the prisoners. The British justified their action in part on the basis that the German vessel was using Norwegian waters improperly as sanctuary. On the incident, see ROBERT W. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 236-39 (50 Naval War College International Law Studies, 1955).

165. A colorable argument could be offered that crossing into the sanctuary State would be authorized by the original mandate because the sanctuary State is unable or unwilling to comply with its own obligations under the Charter. Doing so, however, may

The major exception for no-fly zone enforcement border-crossing authority involves self-defense. There is no geographical limitation to the inherent right of self-defense. Enforcement aircraft defending themselves or others may cross or shoot across any borders in self-defense. For example, if an intruder aircraft illuminates an enforcement aircraft with its fire control radar from across a neighboring border, a response in self-defense may be necessary. The existence of the border should not affect the aircrew's decision to defend. Further, in an actual air-to-air engagement, the existence of all aspect missiles and the ability of high performance aircraft to rapidly turn and engage often make it difficult, if not impossible, to ascertain when an engagement has broken off. As a result, enforcement aircraft may sometimes have to "pursue" intruder aircraft across borders while the engagement is ongoing. Recalling that this is an act in self-defense, rather than one in mission accomplishment, the pursuit (really the continuation of the engagement) is legal so long as the aircrew's belief that they are still engaged and need to defend themselves is reasonable. Since each of these situations is based on the right to self-defense, no specific supplemental ROE are required.

*Force majeure* is the principle of international law that a State must allow an aircraft in distress (from weather, mechanical problems, etc.) to enter its airspace and land if no other safe alternative is available to it. Note that the right of military aircraft to claim *force majeure* entry is unsettled.<sup>166</sup> Nevertheless, given the alternative, which may very well be bailing out over the territory of the no-fly zone target State, the logical course of action in most cases is to at least attempt entry on the basis of *force majeure*.

Finally, the right of assistance entry is the right to enter a State's territorial sea or airspace to effect the rescue of a downed crew member at sea.<sup>167</sup> Whether it extends to downed crew mem-

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present a very real threat in terms of an intercept on enforcement aircraft by sanctuary aircraft alleging a violation of their airspace. Further, it would certainly be less politically disruptive to allow the Security Council to address the matter.

166. The Air Force law of war manual states that "No settled international rule permits intrusion of military aircraft into national airspace on the grounds of mistake, duress, distress or other *force majeure*." AFP 110-31, *supra* note 111, ¶¶ 2-5d. The Navy version, by contrast notes that "(a)ircraft in distress are entitled to special consideration and should be allowed entry and emergency landing rights." NWP 1-14M, *supra* note 160, ¶ 2.5.1.

167. The right of assistance entry into airspace is less settled. On the U.S. policy regarding assistance entry, see Joint Staff, Guidance for the Exercise of Right of Assistance

bers on land is unsettled. Arguably, it is an obligation of the State in whose territory a downed crew member is located to come to the aid of such a person.<sup>168</sup> If that State is not attempting to recover the crew member or refuses to consent to entry of the rescue aircraft from the enforcement forces, and it appears the lives of the crew are at risk due to injuries or the elements, then a colorable claim exists that, under the doctrine of self-help, rescue forces may enter for the very limited purpose of recovering the crew.

*Miscellaneous Issues.* There are a myriad of context-specific issues that arise during no-fly-zone operations, the resolution of which depends on an extremely close working relationship between judge advocates and operators. Many arise in the air-to-ground arena. The key to effective air-to-ground ROE is to focus on the distinction between the self-defense and mission accomplishment ROE. Mission accomplishment ROE, designed to create a benign environment in which to enforce the zone, should never be mistaken for self-defense ROE, which are intended to ensure an enforcement aircraft an adequate defense against a hostile act or demonstration of hostile intent.

Along these lines, a pervasive issue is the identification criteria for engaging SAM sites in mission accomplishment. It is not unusual for there to be spurious indications on an aircraft's RWR gear of SAM site activity. Therefore, mission accomplishment ROE may require multiple indicators which must be received before a site may be engaged in mission accomplishment. After all, in order for deterrence to work, the entity to be deterred must be able to determine clearly at which of its acts the response was aimed. The criteria, however, in no way affect a crew's response in self-defense. Aircrews need to be sensitive to the likelihood of spurious returns and factor that reality into their determination of whether a hostile act or demonstration of hostile intent has occurred. That said, the decision to engage in self-defense is theirs alone to make, regardless of whether mission accomplishment criteria have been met.

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Entry (CJCSI 2410.01A), Apr. 23, 1997.

168. In fact, there is just such an obligation in international agreements for the recovery of astronauts. See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art. V, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205; Agreement on the Rescue of Astronauts, and the Return of Objects Launched into Outer Space, arts. 1-4, Apr. 22, 1968, 19 U.S.T. 7570, T.I.A.S. No. 6599, 672 U.N.T.S. 119.

Another common air-to-ground scenario involves combat search and rescue operations. As noted earlier, a crucial question is when may supporting aircraft engage ground forces approaching the downed crew member. As with any self-defense situation, the ROE and commander's guidance should avoid creating checklists of acts demonstrating hostile intent. It may cite sample indicators though, caveating the list with the need to apply them contextually. Relevant factors may include the reason the crew member is down (hostile fire or mechanical problems?), who controls the territory he is in (the target State or indigenous groups friendly to the enforcement operation), and who is approaching him and what their reaction is to measures short of the use of force, such as the presence of enforcement aircraft. The commander's guidance should also set forth who controls the decision that a response in defense of the downed crew is necessary, lest the recovery operation become disjointed. The decision should rest with the on-scene commander, though the commander's guidance must make clear who is serving in that role.<sup>169</sup>

In both these examples, basing ROE on sound intelligence and tactics is crucial to success. The determination of whether an act in self-defense is necessary in the face of fire control radar illumination may need to turn on whether the SAM system is mobile or not. If intelligence is generally reliable and an enforcement aircraft receives a RWR indication of a non-mobile SAM site from a location at which there is no known site, that should cause less concern (possibly a spurious hit) than an indication of a mobile SAM that may have been placed there under the cover of darkness. Similarly, recall the discussion of the threat system's WEZ when considering defensive actions. Some might be lulled into complacency when they receive an indication of a SAM that cannot reach their altitude. Yet, good intelligence work may indicate that it is possible to use the radar of that particular system to feed data to another system armed with a missile of greater altitude capabilities. This intelligence data will likely be determinative in assessing whether to engage in self-defense.

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169. As a practical matter, in a CSAR situation it may be more dangerous to attempt to defend the downed crew member than seek "repatriation" after capture. The on-scene commander must direct only tactically sound and safe procedures unlikely to worsen the crew member's situation.

In the air-to-air environment, a recurring concern is the degree of certainty necessary before engaging a violator.<sup>170</sup> There is no easy answer to this dilemma. As a general rule, the best approach is to require all reasonably available systems to attempt to identify a target before it is engaged *if it poses no threat*. Not only would this require visual identification, but it would also necessitate a call by any command and control aircraft working the area (such as an AWACS) that it had no indications the target was anything but a wrongful violator. Additional sources of information that should be considered include intelligence information, the location of the aircraft when it was first noted (e.g., was it in the target State), on-board electronic identification systems that enforcement aircraft possess, non-responsiveness to warnings, and identify friend or foe (IFF) squawks (or the absence thereof).<sup>171</sup> The further one moves along the continuum toward aircraft which pose a threat, the more authorization of beyond visual range identification and engagement may be appropriate. Of course, identification criteria should never serve to keep an aircraft from defending itself against what it reasonably believes to constitute a threat under the self-defense rules of engagement.

Rules of engagement, and the commander's guidance on ROE issued to implement them, are tools for integrating policy, legal, and operational concerns and limits during a no-fly zone operation. It is absolutely critical that all three concerns be carefully factored into their development, for the speed with which the aerial picture unfolds is such that ROE for no-fly zones must be very precisely and carefully crafted if the political mandate is to be implemented at minimum risk. As the Black Hawks incident so tragically illustrated, there is no room for error.

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170. The risk of a mistake is two-fold. First, there are aircraft which are not forbidden to fly in the zone (e.g., relief aircraft). Secondly, there is always the possibility of a blue-on-blue engagement, i.e., one in which a friendly aircraft is engaged. For a brief discussion of this latter issue, see Paul M. Ziegler, *Considerations for the Development of Theater Hostilities Rules of Engagement: Blue-on-Blue Versus Capability Sacrifice* (Nov. 1992) (unpublished manuscript on file at NWC library).

171. On the issue of IFF squawks, see Coe & Schmitt, *supra* note 82, at 78-79. The importance of IFF was tragically demonstrated in the Black Hawk incident. The helicopters were squawking a Mode I code that was incorrect for the location they were in. The Mode IV code for "friendly" was only received momentarily by the lead F-15. The wingman received no Mode IV response. It remains unexplained as to why the Mode IV interrogation was unsuccessful. Board Report, Executive Summary, *supra* note 150, at 5.

Ultimately, two themes must pervade the development of effective ROE for no-fly zone enforcement. First, the distinction between self-defense and mission accomplishment rules has to be clear on the face of the ROE and any guidance thereon. If not, either the mission or the crews who execute it will be placed at risk. Second, the importance of ensuring that operational concerns are addressed in the ROE and guidance is paramount. Effective ROE are the product of a firm grasp not only on the law and the foundational policy objectives of the operation, but also operational reality. Abstract legal or policy discourses only serve to obfuscate the guidance aircrews need to succeed and survive.



