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When Looks Could Kill

Emerging State Practice on
Self-Defense and Hostile Intent

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Cover image: the British “Three Rifles” reconnaissance platoon encounters an Afghan boy working on his farm while on patrol in Sangin district, Helmand, in October 2009.
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1. Executive Summary

In the last decade and a half since September 11, armed conflict has been marked by new patterns of warfare. Non-international conflict—conflict between a state(s) and non-state actors— is more likely than direct conflict with other state parties, and is often characterized by asymmetric tactics. Deadly threats can come from anywhere or anyone—from the push of a mobile phone button to a fighter who blends with the civilian population. In conflicts like Afghanistan, most international soldiers who fired their weapon did so following an ambush or IED detonation, or faced with a speeding suicide bomber at a check point. Where they did, their authority to use lethal force typically came from their inherent right to defend themselves or their unit (the right to unit or individual self-defense), or two related force authorizations that permit soldiers to use force against an individual who commits a hostile act or demonstrates hostile intent.

While soldiers increasingly rely on their right to self-defense in modern conflict, the self-defense paradigm is marked by an absence of hard law. For international and domestic legal bodies, legal scholars, and rights monitors, the dominant lens for examining uses of force in armed conflict is International Humanitarian Law (IHL), which contains no provision on self-defense. Instead, self-defense has emerged as an increasingly prominent justification in practice, but one whose underlying basis and standards are unclear and under-developed. Absent robust discussion on the issue, there are no fixed standards guiding self-defense, and no common understanding of its relationship with other IHL principles. State practice varies significantly, and there is significant ambiguity even within each state’s practice and jurisprudence. How self-defense is understood and used is important because as it is used in practice, self-defense appears to offer an independent framework for use of force, distinct from IHL. Untethered from any agreed international norms or standards, some states’ interpretations and use of self-defense challenge the IHL framework and weaken other constraints on the use of force. The overall ambiguity surrounding this increasingly prevalent doctrine undermines accountability, both domestically and internationally.

To better understand existing state practice, this study documents how four countries—the United States, France, Germany, and the United Kingdom—interpreted and applied self-defense in Afghanistan. The research draws on more than 75 interviews with soldiers, military lawyers, and observers who engaged with these issues in Afghanistan, as well as on background research into the legal doctrine and standards for each state, and past military studies on self-defense and hostile intent. This study is primarily aimed at sharing empirical data on emerging practice; a corollary legal article focuses to a greater extent on the legal arguments surrounding self-defense.¹

By seeking to distill differences in existing state practice, this study supports a more considered evolution and development of this increasingly significant use of force paradigm. Exploring how this practice was used in Afghanistan is particularly important because, in many ways, Afghanistan was a petri dish for the emergence and development of these concepts, which are now so central to justifying use of force. Given the number of states involved in Afghanistan and length of engagement, the lessons

learned and practice that emerged there will likely shape international law and practice significantly in the future, affecting an even broader range of conflict situations.

Better understanding and development of concepts like self-defense and hostile intent is important because where states draw the line has significant consequences for a range of protection concerns. An expansive view of these concepts gives soldiers the flexibility to respond to critical threats, but can also result in overbroad threat designations and wide latitude in the level of force permitted. This can increase the risk of civilian casualties and disproportionate uses of force. In Afghanistan, civilians were killed for getting too close to checkpoints or convoys, running away when international forces approached, or tending irrigation ditches and crops, on the assumption that these signified imminent threats. One IHL investigator said the way self-defense and hostile intent were used by U.S. troops in particular was “one of the main drivers” of civilian casualties from 2011 to 2012, a finding echoed by other military studies.

On the other hand, an extremely narrow view of self-defense, as is typical with states whose self-defense is rooted in domestic law (most European countries), can limit soldiers’ ability to respond to ambiguous or indirect threats. This limits both their personal defense—creating “a much higher risk of guys going home in bodybags,” as one British soldier framed it—and their ability to carry out the mission, including protecting civilians. A limited self-defense right can only be partially counter-balanced by providing authority to respond to indirect threats through Rules of Engagement (ROEs). In Afghanistan, the hostile act and intent ROEs were frequently unavailable due to policy or tactical restrictions. In addition, uncertainty surrounding the limits of self-defense and hostile intent led many European soldiers to take a more restrictive approach for fear of domestic criminal liability.

An additional concern with the growth of self-defense is that it may undermine IHL accountability. In Afghanistan, incidents justified by self-defense were more difficult to investigate and hold accountable, according to military and civilian lawyers interviewed, due to deference to soldiers’ perceptions of threat and the ambiguity over self-defense standards. In addition, some states’ interpretations of self-defense appear to be less protective of civilians than IHL standards. As a result, the more that incidents are justified, or plausibly justified, by self-defense, the greater the risk of displacing IHL standards and weakening accountability. The expansive U.S. interpretation of self-defense poses the greatest challenge on this account. A more relaxed imminence standard and broad threat categorization allows U.S. soldiers to use force in self-defense in more situations, with fewer constraints. In addition, because self-defense is available wherever troops or their partners are present, self-defense and hostile intent designations have been used to justify U.S. strikes beyond a “hot battlefield,” including significant strikes in Syria and Somalia. As such, it not only can erode limitations on force in conflict, but also lower the threshold for resorting to force *jus ad bellum*.

A major challenge in trying to address these different protection and use of force concerns is the ambiguity in standards and lack of settled law. It is difficult to advance discussion or address issues of practice without clarity on the basic legal standards and positions. Such a discussion has been absent in the past because of a lack of basic recognition of the legal weight and relevance of self-defense as its own paradigm. Thus, what is called for is a more considered development of this doctrine, with specific attention to some of the issues that have already arisen in practice:

- All states should clarify their positions on self-defense, hostile act, and hostile intent concepts, including how standards drawn from other bodies of law translate in soldier's self-defense, and the relationship with IHL.²
- Where interpreted too broadly, threat-based determinations bear a risk of conflating regular civilian activities with threat patterns, and mistaking civilians for combatants. A "learning curve" in how to apply self-defense and hostile intent developed in Afghanistan, curbing some overbroad threat determinations. These lessons should be incorporated into future practice and inform standards for self-defense and hostile intent in other conflict and stabilization environments.
- Although overbroad interpretations have been curbed, persistent civilian casualties in self-defense and hostile intent situations, most prominently among U.S. practice, suggest a need for further limits. In particular, more attention needs to be given to the significant latitude given to hostile intent determinations in kinetic activities, such as in night raids or other counter-terrorism operations.
- The prevalence of allegations of excessive or unnecessary force by U.S. forces under a self-defense or hostile intent paradigm raises a question whether the standards used in self-defense are less protective of civilians than IHL. This issue should be explored further, with a view toward ensuring consistent protection standards for civilians across all armed conflict situations.
- An extremely extended interpretation of imminence within the self-defense paradigm runs the greatest risk of displacing IHL within armed conflict, and of undermining constraints on use of force outside of declared conflict zones. While some degree of pre-emption may be necessary to deal with ambiguous threats, there must be some outer limits, particularly where self-defense is used to justify uses of force beyond a hot battlefield.
- Where states continue to base the right of self-defense on domestic law, as most European countries do, there must be some clear direction of how these domestic laws apply in an armed conflict situation, and allowing for some greater degree of leeway than a civilian in a peacetime situation might encounter.
- If self-defense remains extremely narrow for European forces, there must be greater consideration given to protecting ROE-based authority for responding to ambiguous or indirect threats. Given the importance of responding to these threats in many counterinsurgency or peacekeeping situations, hostile act and intent ROEs should not be as easily limited by tactical or policy restrictions as other types of offensive force.
- Legal scholars and rights monitors should recognize the growth of this practice in armed conflict, and the implications for civilian protection. Greater engagement in emerging standards will result in a more considered practice that adequately balances soldiers needs and civilian protection imperatives.

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2. Introduction: Shifting Legal Paradigms and Self-Defense

“Convoys [are] leaving a base. There’s a shepherd talking on his phone, clearly relaying information on their position. That is a clear hostile act. But can you just kill the guy?”³

French Commander who served in eastern Afghanistan

International troops faced such ambiguous threat situations routinely in Afghanistan. Whether they chose to fire or not often came down to their guidance and interpretation of when they could fire in self-defense, on an “imminent threat,” or under a related force authorization in which soldiers can fire on an individual who commits a “hostile act” or demonstrates “hostile intent.” The French commander who shared this example said he would not have given the order to shoot, but that many international forces in Afghanistan would have decided that the man presented a legitimate threat and fired.

Self-defense is supposed to be a limited carve-out within the context of soldiers’ use of force in conflict zones, so that soldiers can always protect themselves against immediate threats, regardless of other tactical limitations on their use of force. However, the use of self-defense has expanded in modern conflicts in response to a greater prevalence of asymmetric threats and insurgent tactics. Hostile act and hostile intent designations, which tend to be applied to more ambiguous or time-distant threats than pure “self-defense” situations, have also become more prominent (hereinafter referred to generically as “hostile intent” situations or the “hostile intent” paradigm). Though these two concepts are not legally part of the self-defense right for all states, they conceptually sit along the same spectrum of reactive or threat-based uses of force.

Flexibility in using these self-defense and hostile intent concepts allows soldiers to respond to the range of threats in places like Afghanistan. Where self-defense is too narrowly defined and the hostile act or intent Rules of Engagement (ROEs) are limited, soldiers have argued that it affects their self-protection and their ability to carry out the mission. One British soldier who fought during a period when there were greater limitations on responding to hostile intent in Afghanistan said this belied the “realities on the ground” and forced troops to fight with “one hand tied behind their backs.”⁴ A narrowly defined self-defense right or limited hostile act or intent Rules of Engagement (ROEs) can also limit soldiers’ ability to protect civilians, which was a part of the mission in Afghanistan and also in many other peacekeeping situations. One human rights investigator who had been in the Central African Republic after the outbreak of violence in 2013 and 2014 noted that although French soldiers were deployed to prevent further violence, they had extremely limited ROEs and a limited scope for response in

self-defense. Knowing that these restrictions would prevent French soldiers from doing anything, armed gangs would sometimes throw pieces of flesh from their victims at the French troops, the human rights investigator said, in effect taunting them with their impotence in the face of continued atrocities.

On the flip side, a too expansive self-defense or hostile intent doctrine can increase the risk of civilian harm where regular civilian behaviors are mistaken for a threat. Civilians who got too close to convoys or military bases were targeted. Civilians tending their crops or digging irrigation ditches were shot on the presumption that they were digging IEDs. The U.S. Center for Army Lessons Learned (CALL) found the vast majority of civilian casualties in Afghanistan happened in self-defense situations,⁵ while a U.S. Defense Department study found mistaken perceptions of hostile intent to be one of the leading causes of civilian casualties in Afghanistan.⁶ A Human Rights Watch study found that the airstrikes resulting in the most civilian casualties in Afghanistan were those justified by the “Troops in Contact” immediate threat, or self-defense, designation.⁷

Some degree of mistaken threat perceptions, causing tragic results for civilians, are unavoidable. One U.S. commander who had worked in the command headquarters for the International Security Assistance Force (ISAF), the NATO mission in Afghanistan, said that despite significant efforts to clarify guidance and reduce the risk of civilian

harm, mistaken threat perceptions at checkpoints, so-called “Escalation of Force” situations (EOF),⁸ frequently resulted in civilian casualties: “There have been instances in which the individual believed it was a hostile threat, engaged in deadly force, only to find that the car was speeding because the woman was pregnant and needed to get to hospital. Afghans did nothing wrong, the soldier followed ROEs, [but] you have a situation where something happened which no one wanted to happen.”⁹

However, in other cases, the lines that appear to be drawn around what constitutes an imminent threat or sign of “hostile intent” are more controversial. Some troop contingents, at certain periods of time, were regularly authorized to fire on those they suspected of “dicking,” or passing on information that might facilitate an attack, even where the actual behavior in question might simply

be talking on the phone or watching troops who passed. One British soldier stationed in an area of Iraq that had seen 50 IEDs per week said that if you saw someone watching troop movements and talking on a phone, and “if you knew without a doubt” that the individual was about to detonate the IED, “you could fire straight off.”¹⁰ Civilians who ran away when their house was invaded during a nighttime raid (a “night raid”) were shot on the theory that running away was tactical maneuvering, and a demonstration of “hostile intent.”¹¹ A British journalist on foot patrol with U.S. soldiers in Helmand saw a man crossing a river with a yellow jerry can, a plastic container that is frequently used to carry water or gasoline, but also used to make improvised bombs. The U.S. soldiers shot him on sight because they associated the can with IEDs and so deemed

Controversial Calls

International forces stage a surprise raid on a civilian home at night. As they enter, a female resident of the home shines a light on the forces breaking through the door. Is that hostile intent, such that the international forces could fire on her? Though a gray area for many, one former senior U.S. commander leading trainings in Afghanistan argued it was:

“You bet it is. You’re illuminating me to the enemy. Plus, I can’t tell the difference between a man and woman in night goggles” (former senior U.S. commander, interviewed in Washington, DC, April 11, 2012).

him to be an immediate threat. He was later found to be unarmed, and carrying no IED-making materials. According to the journalist, troops then requested permission to shoot whoever came to retrieve the body on a hostile intent theory, but permission was denied.¹²

Whether soldiers should have been permitted to fire in these situations is not clear. The self-defense paradigm is marked by an absence of hard law. Legal discussions tend to focus myopically on the traditional outlines of IHL doctrine, in which self-defense does not feature. As a result, fundamental questions about the basis, scope or standards of self-defense or hostile intent remain unclear. There is substantial gray area surrounding when these concepts apply, and significant variance in states' interpretations of what is permitted.

To facilitate a more considered development of this practice, this study explores how four different NATO forces—France, Germany, the U.K. and the U.S.—understood and applied self-defense and the hostile act and hostile intent ROEs in Afghanistan (hereinafter generally referred to jointly as “hostile act and intent ROEs” where ROE authorizations are discussed). The case studies are based on analysis of the relevant laws, policies, and military regulations in each of the countries, and 75 qualitative interviews. A corollary legal article to this study, which is published in the Harvard National Security Law Journal, focuses to a greater extent on the legal analysis and basis for these doctrines, whereas this study is designed to provide much of the empirical data from the qualitative interviews and also to share some of the non-legal findings.¹³

Qualitative interviews were conducted with military personnel from France, Germany, the U.K. and the U.S. who served in Afghanistan, including military lawyers, commanders, and ground soldiers. Civilian advisors, United Nations investigators, journalists, and others who had also worked in Afghanistan and had observed troop conduct closely or investigated incidents involving self-defense claims were also interviewed, as were some military personnel from other NATO countries who served in Afghanistan. The interviews were conducted in two phases, first as part of an earlier project led by the Harvard Law School International Human Rights Clinic in 2012, and secondly in individual interviews by the author from 2014 to 2016.¹⁴ Although some interviewees gave permission for their names to be used, anonymous citations have been used throughout in order to help protect the anonymity of those who did not wish to have public attribution. In addition to these qualitative interviews, prior military studies, human rights documentation, and press reporting provided examples of dilemmas that have arisen in practice, and some lessons learned regarding the application of self-defense and hostile intent.

This study is organized as follows: this chapter will introduce the expansion of self-defense and hostile intent, the available guiding law for these very ambiguous legal doctrines, and the relationship with other international legal concepts. Chapter III then shares the findings from the interviews and legal background research on how the four countries interpreted self-defense and hostile intent in Afghanistan. The final subsection of Chapter III will discuss some of the non-legal factors influencing how individual soldiers, or military forces as a whole, interpreted these concepts. In conclusion, Chapter IV will reflect on how the differences in the four states' positions or interpretation of these concepts created different protection risks or consequences, and the implications for future conflict, stabilization and peacekeeping contexts.



Can you find the threat? This photo, taken with a British patrol unit in Sangin district, Helmand, in October 2009, illustrates the ambiguity of threats that troops confronted on a daily basis, and civilians' awareness that their normal civilian behaviors might be confused with threats, with deadly results. Some soldiers might have construed the truck full of what appeared to be fighting-aged males (center) to be Taliban fighters, or interpreted a civilian, even a child, running away (left) as running to provide information to facilitate an attack on their position. Such behavior could have been interpreted as hostile intent, and led to an authorization to fire. The boys on the right seem to be aware of this, and lift up their shirts to show that they are not wearing suicide vests, and are not a threat. Photo: © David Gill • shot2bits.com

2.1 Expansion of Self-Defense in a Changing Conflict Landscape

International Humanitarian Law (IHL) is the specialist body of law governing armed conflict, but human rights law in general also remains applicable.¹⁵ While IHL provides combatants with the right to use violence, known as the combatant privilege, that right is limited. A fundamental premise of IHL is that only those attacks that are militarily necessary are justified,¹⁶ and that unnecessary suffering is prohibited.¹⁷ The principle of *distinction* requires that warring parties constantly distinguish between civilians and combatants and only target the latter.¹⁸ Warring parties must take all feasible precautions to avoid harm to civilians or civilian objects.¹⁹ Indiscriminate attacks, which do not distinguish between civilians and combatants, are prohibited,²⁰ as are attacks wherein the level of civilian harm would be disproportionate or excessive to the military advantage anticipated (known as the *proportionality* principle).²¹

These principles are still the prevailing standards governing soldiers' use of force. However, changing dynamics in modern conflict have sometimes challenged the application of these rules.²² These standards were designed for state-on-state combat between uniformed and regular soldiers, but modern warfare is dominated by conflict with non-state actors or individuals, who typically have irregular command and control, do not wear uniforms or other insignia, and may take part in fighting intermittently – acting as a farmer one day, a fighter the next. The ambiguity over who is a combatant or not challenges the application of IHL rules, which are premised on a fundamental distinction between combatants and civilians. International legal discussions have responded to this challenge by focusing greater attention on IHL provisions that permit individuals who are not regular members of an armed group to be targeted “for such time as they take a direct part in hostilities.”²³ How this principle of “direct participation in hostilities” should be applied to modern conflict dynamics has sparked significant academic discussion and debate, particularly over which activities constitute direct participation, and how long the target-able status endures.²⁴

Soldiers who are responding to these ambiguous threat situations and combatancy patterns on the ground increasingly rely on their right to unit or individual self-defense and threat-based ROE authorizations known as hostile act or hostile intent. A study by the Joint and Coalition Operational Analysis (JCOA), at the U.S. Defense Department, verified this trend, noting that from the earliest years in Afghanistan, ground forces “tended to rely more on self-defense considerations based on perceived hostile acts or intent” because the Taliban blended among civilians and it was too hard to distinguish them for forward targeting purposes.²⁵ As one senior military lawyer explained:

The definition [of self-defense or hostile intent] hasn't changed. What has changed is adjusting to conditions on ground. If I went to Afghanistan in 2002 and to a lesser degree in 2005 the only hostile intent I was looking for was a guy with a weapon. Now you're in a more complex and challenging environment because [the threat] could be someone with a cell phone calling in mortar fire or a guy driving a suicide vehicle up to your gate...or it could be a family in that car. Their tactics and techniques have changed, so our responses changed. [This] creates more challenges for protecting civilians, because whereas before [troops could] just look for a guy with a rifle, now any person in bulky clothes or vehicle could be a bomber. [There is] more to look for.²⁶

As a result, although soldiers and their surrounding unit have long been recognized to have a right to self-defense (known as individual or unit self-defense respectively), the use and scope of this self-defense doctrine has expanded in recent years. The tendency toward asymmetric conflict and insurgent tactics increases the likelihood that soldiers will respond in reactive, or defensive situations – for example, in response to an ambush or an attack. Meanwhile, with more and more offensive operations delegated to Special Forces and drone operations, the average soldier in Afghanistan was much less likely to be assigned to offensive operations and to use the type of targeting analysis that IHL principles were designed for. Instead, when soldiers did use force, it was more likely to be in response to a threat in the heat of the moment, and through the lens of personal or unit self-defense.

Most of the soldiers interviewed for this study suggested that the vast majority of the times they fired their weapons in Afghanistan, it was in self-defense or in a hostile intent situation. One U.S. military lawyer who provided use of force guidance at a unit level in Afghanistan said hostile intent issues (which fall within the scope of self-defense for U.S. troops) dominated all other use of force requests for the battalion he was attached to.²⁷ He said his legal team would get at least one to two calls a day from soldiers on the ground asking for legal guidance on hostile intent or self-defense situations.²⁸ Another U.S. military lawyer who advised troops in eastern Afghanistan said that how often a given soldier has to make a self-defense or hostile intent determinations depends on the role of the soldier.

For lower level soldiers stationed on a Forward Operating Base (FOB) in remote Afghanistan, who have no special offensive mandate but are simply there to hold the ground, hostile intent might constitute 100% of their uses of force, he said. Those safely stationed on a major base, with little exposure to threats, might not fire their weapons at all in the course of their deployment, in self-defense or as part of offensive targeting. Special Forces engaged in kinetic operations would frequently be engaged in forward targeting, but even on offensive missions, when they or their units came under attack, their immediate resort to force might be justified under a self-defense or hostile intent framework, he said.

2.1.1 Expansion to Aerial Assets

Although self-defense is commonly associated with ground forces, it is important to note the expansion of self-defense and hostile intent to aerial strikes, at least among U.S. forces. Those investigating U.S. airstrikes or drone strikes in Afghanistan said they frequently were told that the strikes were justified by a determination of “imminent threat” or hostile intent.²⁹ Disclosed transcripts from cockpit conversations also document the use of these terms in drone strikes and other aerial strikes.³⁰

There are several factors explaining why these concepts have become more prominent in authorizing airstrikes. First, as these terms have become more mainstream, they have bled over from ground forces to air strikes. In a self-fulfilling cycle, as the concepts of hostile intent and imminent threat have become pervasive in justifying force, soldiers have gotten more comfortable understanding responses to perceived threats in this framework. “It rolls off the tongue,” one U.S. military lawyer said, characterizing just how common these terms were in daily parlance.³¹

“Roger, thinking about the situation, I’m pretty sure we are covered [classified excerpt] demonstration of hostile intent tactical movement in conjunction with the ICOM chatter it would appear that they are maneuvering on our location and setting themselves up for an attack” (emphasis added).

Cockpit chatter prior to a February 2010 strike on two Afghan civilian vehicles, a mistaken hostile intent determination³⁰

Second, the overall concept of self-defense is not just individual but *unit* self-defense, and that unit interpretation could be quite broad. It can extend to any U.S. forces, or designated partner forces (for example, other ISAF forces or Afghan forces in Afghanistan) within the area of operations covered by an aerial asset, which is a large geographical area.³² Thus, in most cases where a strike is authorized on a “hostile intent” or “immediate threat” basis, it is on behalf of troops on the ground. For example, one of the most prevalent rationales for airstrikes in Afghanistan was in response to troops on the ground perceiving an immediate threat and calling in an airstrike in their defense, under what is known as a “Troops in Contact” situation.³³

The expansion of self-defense to aerial operations has also resulted in its use to justify significant strikes beyond a hot battlefield, wherever U.S. forces, partnered forces, and U.S. aerial assets— including drones—are present. A March 5, 2016, U.S. strike on a training camp of al-Shabab fighters in Somalia, which killed an estimated 150 alleged fighters, was justified as a tactical, self-defense response to defend against an imminent planned attack on forces affiliated with U.S. troops who were in Somalia (the African Union troops they were supporting were covered as affiliated forces in their ROEs).³⁴ Later reporting suggested that the strike was part of a much larger trend, in which self-defense of Special Forces became the rationale for a more expanded aerial strike campaign wherever they were deployed.³⁵ Several U.S. airstrikes in Syria in June 2017 against an Iranian armed drone and a Syrian fighter jet were also justified on the theory that there was a demonstration of hostile intent and/or that the strikes were necessary in defense of U.S. trainers or associated anti-ISIL rebel forces on the ground.³⁶

As a result of all these factors, self-defense is no longer a narrow, last resort means of self-protection, but has expanded to cover a large swath of uses of force, both within declared armed conflict and in other hostilities globally.

2.2 Definitions of Self-Defense and Hostile Intent

While soldiers increasingly rely on the self-defense and hostile intent concepts, the underlying legal definitions, standards, and scope of these concepts are still extremely under-developed. IHL includes no provisions or reference to self-defense. Instead, self-defense typically appears in ROEs, which are a compilation of IHL principles, domestic legal principles and other policy or tactical considerations.³⁷ In legal discussions and debates, self-defense tends to be dismissed as a ROE issue, essentially a non-legal issue, and so the outlines and origins of self-defense have not been fully considered and developed. This section will distill the available legal guidance on self-defense and hostile intent, and the standards applicable to them. However, the important take-away is the overall ambiguity and substantial gray area surrounding these concepts.

The three most commonly proposed legal theories for where this right comes from are 1) it derives from individuals’ self-defense rights under their domestic law;³⁸ 2) it has emerged as its own, independent principle under customary international law;³⁹ or 3) it derives from states’ sovereign right to self-defense.⁴⁰ This sovereign right to self-defense is part of the body of law known as *jus ad bellum*, covering when states may resort to force. IHL is more strongly associated with the *jus in bello* body of law, which governs the conduct of states once they are engaged in conflict. The legal basis or origin for self-defense is what determines the source of the standards for self-defense.

A state that bases its soldiers' right to self-defense on domestic law will apply the domestic criminal law standards to soldiers' self-defense conduct in warfare (as France, Germany, and Britain do), whereas a state that draws the standards from the sovereign right to self-defense (as the U.S. does) will apply those standards.⁴¹

A common feature of self-defense standards across all countries is that self-defense can only be in response to an imminent threat, that any response must be necessary, and that it be proportionate.⁴² However, how broadly or narrowly the concepts like imminence, necessity or proportionality are defined varies with each country, and can result in significant differences in practice.⁴³ The corollary legal article to this study covers these different origin theories and the applicable legal standards in greater detail, and each will also be briefly referenced in the four case studies as relevant to that country. Regardless of the basis for the self-defense right (domestic or sovereign self-defense) as applied in practice, self-defense appears to be used as a separate justification for use of force, independent of IHL.⁴⁴

The clearest example of self-defense is a soldier being fired upon and returning fire. But most threats in Afghanistan, as in many asymmetric conflicts, were not so straightforward. The most common threat facing soldiers might come in the form of IEDs planted in the roads they traveled, or detonated by persons or vehicles near to them. Behaviors leading up to that could include individuals digging in the ground to plant IEDs, driving aggressively or unusually close to a checkpoint or convoy, or passing on information to facilitate an attack or remotely detonating an IED.

Would these types of more ambiguous or indirect threats trigger self-defense? For most soldiers, they would not. Most countries serving in Afghanistan except the U.S. maintained extremely narrow definitions of what constituted an "imminent threat" and triggered the right to self-defense – typically limiting it to immediate or ongoing, and direct attacks, and sometimes permitting soldiers to respond only as a "last resort."⁴⁵ Instead, where most non-U.S. soldiers fired on more indirect or time distant threats, they typically did so under two ROE terms known as "hostile act" or "hostile intent."⁴⁶ Although soldiers tend to discuss hostile act and hostile intent along the same spectrum of defensive responses as self-defense, these concepts denote situations in which force would technically not be permitted under many countries' self-defense restrictions. For these countries, hostile act and intent ROEs tend to be described as part of a "mission accomplishment" paradigm, and require specific authorization, either in the moment or as a standing authorization.⁴⁷ (See Box 1, p. 18, for an example.)

Hostile act and hostile intent can be difficult to define, or to distinguish from each other, in part due to the difficulty of creating bright line rules around complex and highly varied threat situations. (See Box 2, p. 20). NATO and member countries' guidance for what constitutes a hostile act includes laying mines, or breaching the perimeter of a military base or aerial zone.⁴⁸ Hostile intent is often described as an intent to commit a hostile act, or as something slightly more indirect or time distant than a hostile act. In practice, training vignettes might provide examples of hostile intent as pointing a weapon, speeding toward a checkpoint while ignoring warning signs, or observing troops and passing on information.⁴⁹ (See definitions and examples, Box 3, p. 21) For most soldiers the distinctions between self-defense, hostile act and hostile intent was "murky" at best, in the words of one British soldier interviewed. Because of the difficulty of making distinctions, this paper will generally refer to situations of a hostile act or hostile intent as "hostile intent situations."

Example of Authorization Required for Hostile Act or Hostile Intent ROEs

BOX 1

This excerpt from a presentation for British troops on how to apply the Rules of Engagement (ROEs) in Afghanistan illustrates the additional authorization levels that could be required for using force under the hostile act or intent ROEs. In the guidance, it is noted that the hostile act and hostile intent ROEs (ROEs 421 and 422) are “standing” or available as a default to troops in the given area of operation. They do not have to request it in advance, or in the middle of an operation (described in the presentation as a “hasty” grant of authority). By contrast, a more offensive ROE posture discussed, ROE 429A, has to be pre-authorized or requested mid-operation, the guidance explains. (Source: See endnote 48, Army Recruiting and Training Division, Platoon Commander’s Battle Course, Infantry Battle School.)

Rules of Engagement

Card Alpha (JSP 398)

- Inherent right to self defence
- Mainly used in a defensive poise

421. Attack anyone demonstrating hostile intent - not constituting an imminent attack.

422. Attack anyone committing a hostile act - not constituting an actual attack.

492A. Attack PID EF

" ... Roe 429A. has to be authorized for pre-planned or hasty use. As of 01 May 09, COMD THF has authorized 421/422 as standing ROE to all land-based and avn FEs operating under OP HERRICK. Therefore, there is no longer a requirement for UK FEs to apply to HQ TFH or RC(S) for the grant of pre-planned or hasty ROE 421/422."

" ... Hostile act (not constituting an imminent attack) is defined as persons in the target set who commit or directly contribute to any intentional act causing serious prejudice or serious danger to ISF/OEF forces. Examples would include EF mine laying on ISAF likely routes, and breaching or attempting to breach an ISAF camp perimeter, INTENTIONALLY impeding ISAF/OED led military operations."

Because firing on more ambiguous or indirect threats would tend to exceed the limits of European countries’ self-defense doctrines, force justified by hostile act and intent ROEs is technically a form of offensive force for those countries (including for French, German and British soldiers).⁵⁰ As one German military lawyer explained:

Hostile intent is the basis for offensive targeting. It is not a self-defense posture. The view that hostile intent is a posture of self-defense is a very U.S.-based framework. This is a major difference between European [countries] and the U.S. Self-defense is much narrower in European discourse. It is only in response to an imminent threat or direct act.⁵¹

By contrast, the U.S. considers hostile acts and signs of hostile intent as behavior or actions that trigger the right of self-defense.⁵² Lethal force justified by a sign of

hostile intent would be a form of defensive force for U.S. soldiers, part of the inherent and inalienable right of self-defense. (See Box 2, p. 20.)

Whether the authority to respond to hostile act or hostile intent is considered to be part of the inherent right of self-defense or not has important consequences for how readily troops can respond to ambiguous threats. Self-defense is available for soldiers in wartime or in peacetime, in an armed conflict situation or on a peacekeeping mission. It generally cannot be restricted by other tactical rules, supranational rules of engagement, or policy decisions, although (perhaps self-evidently) in some situations, a commander's immediate orders to a subordinate may necessarily contradict his self-defense.⁵³ By contrast, use of force outside of self-defense is contingent on a situation of armed conflict. In addition, offensive force can be limited by tactical or policy guidance at the discretion of the command leadership. In practice, this happened frequently in Afghanistan, with the result that many European soldiers' ability to respond to more ambiguous threats – the majority of threats they faced in many areas – was extremely limited, as the case studies will illustrate.

The remainder of this paper will primarily discuss incidents or scenarios of use of force through a self-defense or hostile intent lens. Any one of these incidents or examples might also be examined through an IHL framework, and in some cases, this paper will consider whether the actions justified under self-defense would raise concerns under an IHL framework. However, the value in examining these incidents from a self-defense or hostile intent lens is to build greater documentation of how these concepts are understood and applied in practice, and also to spur discussion about what the relationship *should* be between self-defense and IHL. None of the countries in this study dispute that IHL is the controlling law with regard to their soldiers' use of force but, with the exception of the U.S.—whose law of war manual notes that self-defense is an independent but often parallel justification to IHL—none have made clear how they view the relationship between IHL and self-defense.⁵⁴

What is a Hostile Act or Hostile Intent & When is it OK to Fire?

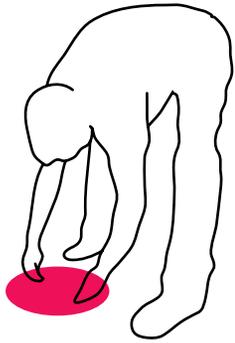
BOX 2

When firing, what is the source of authority?

	RIGHT TO SELF-DEFENSE	OFFENSIVE FORCE (ROE AUTHORIZATION)
US VIEW	Hostile Act Hostile Intent	
EUROPEAN VIEW		Hostile Act Hostile Intent

Hostile intent?

A man talking on a mobile phone could be relaying troop locations or calling in an attack, demonstrating hostile intent, or he could just be calling home to Mom.



Hostile act?

A man digging in the ground could be planting an IED, a clear hostile act, or he could be digging an irrigation ditch for crops.

Self-Defense or offense?

Soldiers could fire where they perceived a threat, in response to a "hostile act" or a sign of "hostile intent." U.S. soldiers considered this part of their right to self-defense, whereas European soldiers did not but could fire on a ROE basis where authorized. But determining what is a threat in practice is often a tough call.



Views of Hostile Acts & Intent

BOX 3

View of Most European Countries (e.g., France, Germany, U.K.)

	SELF-DEFENSE	HOSTILE ACT	HOSTILE INTENT
DEFINITION	Response to an ongoing or imminent (immediate) attack; response is necessary and instantaneous, often a “last resort”; response is limited / proportionate / “reasonable” (UK)	An act, not including an actual attack, that harms forces or hinders the mission, but is not sufficient to trigger self-defense	Often defined as intent to commit a hostile act; or “intention to inflict damage” (NATO)
TIME CONSTRAINTS	Imminence required, and means immediate	Some extended imminence may be possible, depending on country interpretation	
EXAMPLES	Responding to direct fire, or an individual aiming a weapon	Laying a mine, impeding NATO operations; breaching military zone or perimeter (inc. aerial zone); failure to respond to warning signs in a speeding/ aggressive vehicle	Moving in range of weapons systems (NATO/UK); “warlike gestures” (UK); use of “shadowers/ tattletales” (NATO)

SOURCES: The source materials that the definitions and examples are drawn from are listed in note 48. For more detail on the legal definitions of self-defense for each individual country, see Gaston, “Reconceptualizing Individual or Unit Self-Defense,” *Harvard National Security Journal*, 296-98.

U.S. View

	SELF-DEFENSE	HOSTILE ACT	HOSTILE INTENT
DEFINITION	Self-defense is an imminent (not immediate) threat, as manifested in a hostile act or hostile intent: <ul style="list-style-type: none"> • Hostile act: Attack or use of force against U.S. forces or designated persons or property, or directly impeding the mission or duties or U.S. forces • Hostile intent: Threat of imminent use of force against U.S. forces or designated persons or property, including threat to mission⁴ 		
TIME CONSTRAINTS	Imminence does not mean immediate		
EXAMPLES	Self-defense is not distinguished from hostile act and hostile intent, and can be: <ul style="list-style-type: none"> • “Trying to enter [a perimeter] with a weapon demonstrates hostile intent” • “Pointing a weapon demonstrates hostile intent” • “A vehicle purposefully speeding directly at you is a hostile act. You may engage.” • Breaching the perimeter 		

SOURCES: Definitions of U.S. self-defense are available in U.S. Operational Law Handbook, at 83. The vignettes and examples of practice are available in CLAMO, *Legal Lessons Learned from Afghanistan and Iraq*, Volume 1, at pp. 317-319, <https://fas.org/irp/doddir/army/clamo-v1.pdf>.

3. Emerging State Practice: United States, France, Germany, United Kingdom

As soldiers have increasingly relied on the self-defense and hostile intent concepts (either in ROE form or as part of the inherent right), different definitions and standards have emerged in practice. Nowhere are these different interpretations on better display than in Afghanistan, where many different contingents of NATO soldiers faced a variety of complex threat situations. ISAF, the NATO mission in Afghanistan, had common ROEs, including common definitions of hostile act and hostile intent. However, many states had additional ROEs for their forces that would have primacy over ISAF ROEs. Ultimately, the prevailing application of any ROE comes down to each member states' interpretation and enforcement, influenced by conditions on the ground, domestic laws or policies, or different underlying legal theories about the basis for self-defense. This section will use the responses from military lawyers and soldiers interviewed, together with documentation of past incidents and available information on the states' standards, to discern differences in the interpretation and application of self-defense and hostile intent by U.S., French, German, and British soldiers in Afghanistan.

Identifying states' interpretations of self-defense and hostile intent is challenging. Official guidance tends to be limited for most countries, both because these doctrines are under-considered, and because ROEs and other official military tactical guidance remains classified even many years later.⁵⁵

Pinning down the outlines of state practice is also challenging because application of self-defense and hostile intent could vary depending on the time period and location of deployment. It was influenced by a number of factors, including the surrounding threat conditions and soldiers' level of awareness about the environment. In nearly every interview, and for each scenario, troops and military lawyers interviewed would contextualize their answer depending on the prevalent threat trends or characteristics at the time. Many emphasized that the "right" answer (if there was one) on whether to fire or not could vary sharply from one day to another, and from one situation to another.

How freely soldiers might rely on self-defense and, to an even greater extent, on hostile intent depended strongly on a state's overall force posture and policies, as well as on ISAF policies or tactical directives. For example, one factor that may have increased reliance on self-defense, but significantly limited reliance on hostile act and intent ROEs, was a series of tactical and policy restrictions that limited situations in which certain types of offensive force could be used from 2009 onward. These ISAF tactical directives (as they will be referred to generically) were developed in response

to the shift toward counterinsurgency and were significantly motivated by a desire to reduce the risk of civilian casualties (see COIN Tactical Directives boxed text). In practice, they may have had the additional side effect of increasing reliance on self-defense, where other types of force were more limited. This will be illustrated by some

examples in the British and German case studies, and discussed in the concluding analysis.

The COIN Tactical Directives & Civilian Casualties

From 2006 onward, civilian casualties became an increasingly controversial issue in Afghanistan, generating intense local hostility toward international forces and boosting Taliban recruitment. By 2009, civilian casualties had become such a prominent issue that ISAF command decided it was undermining the overall strategy and campaign in Afghanistan, feeding resentment against the Afghan government and international military, and furthering Taliban recruitment and support.

In July 2009 and early 2010 the then-commander of ISAF, Stanley McChrystal, began to issue a series of tactical directives aimed at reducing the risk of civilian casualties. The tactical directives limited use of airstrikes in heavily populated areas, altered practices on night raids, and even suggested practices for less aggressive driving. Subsequent ISAF Commanders General Petraeus and General John Allen also issued tactical directives either adjusting the McChrystal directives, or developing additional measures to reduce civilian casualties.

Nonetheless, notwithstanding this variance from one troop contingent to another, what stood out from the interviews with soldiers from different NATO countries were clear distinctions in state practice. Ascertaining what these distinctions are, and where the gray area remains, helps to illustrate how self-defense and hostile intent are currently understood and applied.

Those interviewed who served in Afghanistan (whether commanders, lawyers, or regular soldiers) were asked about how they understood the definitions of self-defense and hostile intent, how they were trained on them, and common threat situations they faced on the ground. Soldiers were asked in particular about situations that appeared to be “gray areas,” where guidance did not make clear to them how they should respond. Soldiers who had served alongside other ISAF troops were also asked how their interpretations or application of self-defense or hostile intent might differ from other troop contingents. Civilian observers or investigators were also asked to comment on any differences they noticed between different troop contingents’ responses, where they had been in a position to make such a comparison.

In addition, to offer some basis for comparison across the four militaries’ positions, interviewees were typically then asked whether they could respond to some common scenarios surrounding use of force, and whether they could do so under self-defense authority or must be authorized under a hostile act or intent ROE. The five scenarios typically presented to interviewees were:⁵⁶

- Firing first: Can you fire slightly pre-emptively where an individual appears about to fire—essentially, must you wait to be fired upon before being able to fire in self-defense? If some degree of pre-emption is allowed, what are the criteria that determine when an attack becomes imminent?
- Firing on an unarmed man: Can soldiers fire on an unarmed man who has posed a direct threat? Many states’ domestic restrictions included a bright-line rule of never firing on an unarmed individual. But soldiers said Taliban had learned of this rule against firing on an unarmed man, and so Taliban would drop their weapons to the ground after firing. State policies differed on whether their soldiers could fire in such a situation.

- Firing on those possessing heavy weaponry: On the flip side, can you fire on an individual just because they are armed? What if they are armed with more significant military weaponry, for example, not an AK-47, but a RPG or a mortar?
- Firing on someone digging or planting an IED: The deadliest threat for ISAF troops (as well as for civilians) were IEDs, which spiked dramatically from 2006 onward.⁵⁷ Could soldiers fire on someone digging in the ground, on the presumption that it was an IED?
- Firing on a “dicker” or other indirect threats: Finally, how should soldiers interpret the situation described in the introduction, in which someone is not armed but suspected of providing information on troop movements to enable an attack, known by soldiers as “dicking”? How should they respond if they see someone talking on a phone or using a device that they believe would be used to remotely detonate an IED?

While this section will try to draw some distinctions and illustrate the overall trends or differences that stood out from one state’s guidelines to another, it is important to emphasize the context- and situation-specific nature of these determinations. Many soldiers also emphasized the difference between whether they theoretically could fire—because there was a legitimate basis to believe there was a threat and it was in their authority to respond to such threats—and whether they must or should do so. For example, one German commander who had served in northern Kunduz province in 2010 remembered the following situation:

We were taking fire. And we could see in this distance a house. There was [someone dressed as a] woman going back and forth up to a roof and watching, then down again. It was clear to us that she was furnishing information to fighters down below. We could have maybe fired on this woman, but even if you could do so, should you?⁵⁸

Soldiers from all four countries offered additional considerations that might cause them to refrain from using lethal force, even when justified and authorized, for example, out of fear that the individual who appeared to be a combatant was an affiliated force, such as an Afghan police officer out of uniform, or fear of causing civilian casualties. One commander said they occasionally came across a “kid” planting an IED. “You would

see it and then him running away. You could naturally fire on him, that’s hostile intent, but you wouldn’t,” he said, because of concern that killing a child from the neighboring village would cause strategic blowback.⁵⁹

Finally, while the underlying legal positions and guidance matter, the law is far from the only factor. A final subsection following the four case studies will discuss a number of other non-legal factors raised in interviews, from the level of kinetic activity and threats in an area of operations, to the number of casualties incurred, to the length of the tour. In addition to psychological factors, many soldiers also emphasized training and operational factors,

Could You Versus Should You (Fire)?

“Whenever I was advising troops, I tried to get them to think about what else it could be ... [A guy on a mobile phone] could be a spotter or it could be a guy calling his mom. If you see someone digging, he could be [planting] an IED, or could be someone digging an irrigation ditch.”

— German commander on urging junior soldiers to consider other, innocent explanations for seemingly threatening behavior

including the level of situational awareness, the availability of signal intelligence, and command leadership structures and approaches. In some situations, these non-legal factors may have had equal or greater bearing on responses in self-defense, and are important to highlight in understanding emerging practice.

3.1 United States

The U.S. has the most expansive definition of self-defense and of hostile intent both conceptually and in practice. Unlike the other three countries in this study, and most other NATO forces, hostile act and hostile intent are inherent to the U.S. definition of self-defense.⁶⁰ The definition of individual or unit self-defense under the U.S. Standing Rules of Engagement (SROE) is:

Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander ... military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent.⁶¹

Rather than being considered a separate, and offensive form of force, hostile act and hostile intent are considered to be the trigger words activating U.S. troops' right of self-defense. The authority to respond to a hostile act or a sign of hostile intent, like the right to respond defensively itself, is considered to be inherent, and always available.

The U.S. self-defense definition creates two key distinctions from the other three countries, which can enable a much broader use of force. First, because U.S. troops' core right of self-defense includes hostile act and hostile intent, U.S. forces have an inherent right to respond to many of the ambiguous threat patterns that other countries would require specific authorization (under the ROEs) to fire upon.⁶² Additionally, since the right to self-defense is considered to be inherent and inalienable, it cannot be restricted by tactical directives or other policy limitations on uses of force. As a result, U.S. troops' ability to fire on hostile acts or signs of hostile intent would not have been affected by the 2009 ISAF tactical directives or other policy limitations in the same way that other states' soldiers were (as will be illustrated in the German and British case studies).

This does not mean that U.S. soldiers' ability to fire on hostile acts or hostile intent was completely unrestricted. U.S. rules of engagement make clear that commanders can limit their soldiers' self-defense where necessary to carry out a mission, and some commanders may have chosen to do so on a situation-specific basis in order to apply the ISAF tactical directives, or in view of other strategic or tactical imperatives.⁶³ In addition, U.S. soldiers would commonly still call back to commanders or military lawyers for guidance on whether to fire or not where time was available, and they would frequently be advised not to fire on a hostile intent situation where it was not necessary.

The second important distinction is that the even if all four states' self-defense is guided by the principles of imminence, necessity and proportionality (or related concepts), the U.S. appears to have a broader, more flexible interpretation of these standards.⁶⁴ Most importantly, for the U.S.: "[i]mminent does not necessarily mean immediate or instantaneous."⁶⁵ For the other three countries, self-defense is limited to

ongoing or imminent, meaning immediate, attacks. Military lawyers from other states all raised this issue as the major difference between U.S. and European approaches to self-defense. As one German lawyer said, “Our notion of self-defense is narrower than the U.S. because we require imminence.”⁶⁶ (See Box 4.)

Because of these distinctions, self-defense and hostile intent were much more available to U.S. forces and could be applied to many more use of force situations in Afghanistan. Perhaps in part because of this latitude, U.S. forces appeared to rely more on self-defense and hostile intent than other ISAF forces. For some contingents it had practically become the default use of force. As noted in the introductory chapter, interviewees said U.S. forces deployed at a lower level in kinetic areas (for example, on a FOB in eastern or southern Afghanistan) might rely on self-defense in nearly 100 percent of the times they used their weapon. The overall trend noted in this study of self-defense becoming more prevalent in uses of force is most true for U.S. forces.

3.1.1 Broader U.S. Application of Self-Defense and Hostile Intent

In practice, both U.S. and other European soldiers who were interviewed characterized U.S. troops as responding much more quickly to a perceived threat than their NATO counterparts. Summarizing the main transatlantic difference, European states tend to “wait a lot longer,” in the words of one U.S. military lawyer.⁶⁷ U.S. troops were least hesitant about their authority to fire first when they perceived a threat. For example, none of the U.S. soldiers thought they had to wait to be fired upon in order to act in self-defense. One U.S. military lawyer offered a more precise contrast of how British and U.S. forces might respond differently to seeing someone with a gun and deciding when they could fire “British use [what is known as] a “5/7” rule to determine hostile intent, in which a hostile [individual] must be in the act of pulling back the trigger,” she noted, whereas U.S. forces can fire before it reaches that point.⁶⁸ Another French commander said the French approach was, “We do not fire, unless we are sure,” while he characterized American troops as able to fire on a threat or suspicion of danger.⁶⁹

There was no question of whether U.S. troops could return fire on a (presumed) Taliban fighter who fired but then dropped his weapon. This was a point of hesitancy if not an absolute no-go area for all other troops, likely partly due to the broader threat conception. U.S. troops were more willing to recognize that threats might come from unarmed men and had no bright-line rule on not firing on someone without a weapon. In addition, the U.S. appeared to have slightly more flexible rules on retreat.

The U.S. Standing Rules of Engagement provide a right to pursue individuals or forces if they “continue to commit hostile acts or demonstrate or hostile intent.”⁷⁰ U.S. troops generally said they did not have to cease as soon as the attack stopped, but had the right to pursue, if not absolute. In practice, similar to other states, the more the individual was continuing to show tactical behavior—seeming to run to another firing position or still aiming a weapon for example—the more likely that U.S. troops would construe it as continuing hostile intent, and be able to fire in self-defense at any point.

As with their European counterparts, U.S. troops interviewed distinguished that merely having a weapon would not be sufficient to trigger hostile intent or self-defense in the U.S. view (but see counter-example in Box 5). However, U.S. forces said taking affirmative steps to use the weapon – setting up or placing a mortar, aiming the weapon

U.S. Expansive View of Imminence

BOX 4

The standards applicable to a soldier's self-defense depends on the legal basis for that right. The U.S. views a soldier's self-defense as a subset of, or stemming from, its sovereign right to self-defense, which means that it imports the principles for when a state may defend itself against an attack by another state or other act of aggression to its soldiers' self-defense. These are known as *jus ad bellum* principles.

The U.S. has among the most expansive interpretations of when it can respond *jus ad bellum*. Particularly following September 11, the U.S. has argued that in the changing context of war, with more lethal and rapid weaponry available, the time horizon of imminence should be extended. It briefly argued that *preventive* attacks (an attack to prevent an inchoate or unclear, but serious, threat from forming) were permissible to justify its 2003 invasion of Iraq.ⁱ It has since retreated from that extremely extended view of imminence, but maintains that self-defense still encompasses *pre-emptive* attacks—those that counter a likely, tangible and serious threat, but one that does not appear to be immediately or instantaneously comingⁱⁱ. A 2011 speech by John Brennan, then Assistant to the U.S. President for Homeland Security and Counterterrorism, voiced the current position of the U.S. as follows:

[A] more flexible understanding of “imminence” may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts. After all, al-Qa’ida does not follow a traditional command structure, wear uniforms, carry its arms openly, or mass its troops at the borders of the nations it attacks. Nonetheless, it possesses the demonstrated capability to strike with little notice and cause significant civilian or military casualties.ⁱⁱⁱ

While the other three countries in this study support some degree of anticipatory use of force as part of sovereign self-defense, they (along with most European countries) have generally rejected this expansive interpretation of pre-emption.^{iv}

The U.S. interpretation of imminence for unit or individual self-defense carries forward this extended temporal view of imminence. U.S. military lawyer Maj. Eric Montalvo analyzed the history of the ROE amendments that led to the current definition of imminence in the U.S. SROE. He argues that in 2005, the definition of imminence was revised to no longer be immediate, and that this directly followed the expansion of pre-eminence in the Bush Administration's 2002 U.S. National Security Strategy.^v

- i. For a broader discussion of the law on self-defense, and U.S. positions since September 11, see Chapters 4 “Self-defense” and 6 “The Use of Force Against Terrorism: A New War for a New Century?” in Christine Gray, *International Law and Use of Force* (Oxford University Press: 2008).
- ii. The 2002 and 2010 U.S. National Security Strategies (NSS) illustrate the U.S. reversal in position on preventive self-defense, with the 2010 NSS claiming the right to act preventively in self-defense, “even if uncertainty exists as to the time and place of the enemy attack,” and the 2010 NSS omitting this preventive self-defense claim. The current U.S. Operational Law Handbook affirms that “Preventive self-defense – employed to counter non-imminent threats – is illegal under international law.” Lee, “Operational Law Handbook,” 7; National Security Council, *The National Security Strategy of the United States of America* (2002); National Security Council, *The National Security Strategy of the United States of America* (2010).
- iii. John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, “Strengthening Our Security by Adhering to Our Values and Laws,” Remarks at the Harvard Law School Program on Law and Security, September 16, 2011.
- iv. See Gary L. Guertner “European Views of Preemption in U.S. National Security Strategy,” *Parameters* 37, no. 2; Gray, *International law and Use of Force*. However, emerging discussion within the U.K. and an August 2015 UK drone strike against two British men in Syria suspected of plotting terrorist attacks may suggest a greater willingness to consider pre-emptive strikes in self-defense in the future when facing with serious terrorist threats, a move toward the U.S. position.
- v. Eric Montalvo, “When Did Imminent Stop Meaning Immediate? *Jus in Bello* Hostile Intent, Imminence, and Self-Defense in Counterinsurgency,” *The Army Lawyer* (August 2013).

“You can’t just shoot at everyone with a cell phone. It could just be bad reception. For every sort of black letter rule that soldiers want [to put] in place, you can think of a thousand situations where there’s an innocent reality to it.”

U.S. military lawyer on firing on ambiguous threats

at an individual, or seeming to maneuver while carrying a weapon – could be hostile intent, sufficient to fire. The location and surrounding threat context could also signal a clear threat, not merely the positioning of the weapon. One soldier stationed in Iraq in 2007 and 2008 said that in his area the threat from un-uniformed militias was so strong, “If a guy without a uniform came around a corner with a gun pointed at you, you could fire on him. If a guy was setting up a mortar tube, that was hostile intent.”⁷¹

Where possession of weapons or an IED was determined to be a clear threat, whether the threat was immediately forthcoming mattered less to U.S. troops, because of the extended U.S. interpretation of imminence. One gray area raised by a military lawyer deployed in eastern Afghanistan was seeing men bringing what looked like weapons across the Afghan-Pakistani border, in an area where civilians do not live or go regularly, and was a known weapons transfer point. Even with no troops present, so no direct or immediate threat, some commanders might make the call that this is the last or only opportunity to neutralize a clear threat to U.S. troops or military interests, thus justifying the use of lethal force as a matter of self-defense.⁷² One senior German commander, who served at headquarters level with U.S. counterparts, gave the example of a known IED maker actively making an IED, but he is in a rural area and the threat could not reach troops for several days given poor road transport. “Americans would consider that a lawful target; Germans would not,” he said.⁷³

U.S. troops were more willing to engage someone seen digging in the ground (on the basis that they represented an IED threat) than their European counterparts.⁷⁴ Military lawyers noted there would still have to be some justification for believing it was an IED or a legitimate threat. U.S. and European troops interviewed often raised the U.S. response to potential IED diggers as a point of contrast—that U.S. troops would be far more likely to shoot someone digging (presuming they saw evidence to believe it was a threat) than their European counterparts.⁷⁵

Responses between U.S. and European troops interviewed also differed significantly on the scenario of firing on someone acting suspiciously with a mobile phone (presumed to be relaying information on a mobile phone, or remotely detonating an IED with it). Most U.S. troops and lawyers agreed they could fire on a so-called “dicker” or a “spotter” if their behavior was building toward a clear and imminent (if not immediate). In these cases, the individual need not be armed to demonstrate hostile intent, but troops would tend to look for other behaviors or equipment that would distinguish them from an ordinary civilian—for example, having binoculars, a radio, or military-grade equipment, patterns in the individual’s conversation that coincided with lulls or upticks in firing, or whether he appeared to be having a normal conversation. By contrast, with the exception of some U.K. troops deployed pre-2007, nearly all other European ISAF troops interviewed said they could not fire in this situation, unless there was specific information available to verify that the man was calling in an attack (and even then, it would not be on a self-defense basis).

Overall, this pattern of firing on a suspected “spotter” was more prevalent in Iraq than Afghanistan, U.S. soldiers said, because in Afghanistan remote-detonation was not common, and while having lookouts pass on information was, those doing so were often children. Nonetheless, for units who were engaged in more kinetic activity or hostile areas, firing on unarmed “spotters” was more common. One civilian advisor often embedded with U.S. troops engaged in kinetic activities in Afghanistan noted that, “Whenever military would come across spotters they’d try to kill them.”⁷⁶

From the Cockpit

BOX 5

In one of the more well-publicized incidents, two Reuters cameramen and ten other civilians were killed in Iraq in 2007 because of a mistaken perception that the camera equipment were weapons (mistaken for AK-47s and a RPG). Although most U.S. lawyers and soldiers interviewed for this study said that simple possession of a weapon, particularly an AK-47, which are prevalent in Afghanistan and Iraq, would not constitute hostile intent in themselves, the released helicopter gunship video and audio of the strike clearly illustrates that the initial request to target was based on possession of the weapons, not firing or aiming with them:

Crazy Horse 1-8: “Hotel 2-6 this is Crazy Horse 1-8. Have individuals with weapons. He’s got a weapon too.”

Crazy Horse 1-8: “Hotel 2-6: this is Crazy Horse 1-8. Have five to six individuals with AK-47s. Request permission to engage.”

Hotel 2-6: “Roger that. Uh, we have no personnel east of our position. So, uh, you are free to engage. Over.”

Crazy Horse 1-8: “Alright, we’ll be engaging.”

Hotel 2-6: “Roger go ahead.”

In the aftermath of the initial attack, the helicopter fliers continue looking for signs of weapons or other hostile intent, with intercom chatter surrounding a wounded man at one point saying “Come on, buddy. All you gotta do is pick up a weapon.” A van arrives and begins picking up the bodies, at which point the fliers become more urgent in requesting permission to engage again, at one point exclaiming “Come on, let’s shoot” before the order is given to fire on the van:

Hotel 2-6: “We also have on individual moving. We’re looking for weapons. If we see a weapon, we’re gonna engage. Yeah Bushmaster, we have a van that’s approaching and picking up the bodies.” [...]

Crazy Horse 1-8: “We have a black SUV-uh Bongo truck. Picking up the bodies. Request permission to engage.”

Bushmaster 7: “This is bushmaster seven, roger. ... Engage. 1-8, engage.”

SOURCE: (YouTube) sunshinepress, “Collateral Murder – Wikileaks – Iraq,” April 3, 2010, <https://www.youtube.com/watch?v=5rXPfnU3G0>.

This does not mean that U.S. troops or lawyers argued that the blanket standard was to shoot individuals picking up a phone or watching troops, but simply that the individual doing so was targetable if there was sufficient information to illustrate a threat, either where the behavior and circumstances matched a threat pattern, where intelligence or electronic surveillance evidence linked the behavior with a threat, or a combination of the above. As one U.S. military lawyer framed it: “If someone is relaying your position to someone who would ‘pull the trigger,’ the spotter is targetable. However, if he is collecting information but there is no imminence to the threat then he is not targetable. Imminence might be shown through a radio, cell phones, or pattern

of attack.”⁷⁷ This points to a key underlying difference helping to explain why U.S. troops might have been more willing to presume hostile intent – they more often had electronic eavesdropping and simultaneous translation to confirm the threat. However, while such intelligence was more available to U.S. troops, it is important to note U.S. troops could also make a hostile intent determination based on their observation of the situation alone. One U.S. military lawyer noted the importance of the background context and the threat patterns in a given area: “Are they [meaning enemy fighters in the area] using cellphones to call in mortar fire, or to communicate with snipers? Or are you in the middle of Kabul where people use cellphones to call home?”⁷⁸

Although soldiers could fire where they deemed there to be an immediate threat, where time was available to seek guidance, most did. Military lawyers tended to be deployed down to very low levels with U.S. troops or would be available for feedback in real time, and in these situations, many said they tried to impress upon soldiers the need to consider what else it could be. One U.S. military lawyer, giving the example of a scenario in which troops saw a man on a phone from a high overwatch point and found it suspicious, offered: “You can’t just shoot at everyone with a cell phone. It could just be bad reception. For every sort of black letter rule that soldiers want [to put] in place, you can think of a thousand situations where there’s an innocent reality to it.”⁷⁹

3.1.2 Broad Threat Interpretations and Civilian Casualties

A general risk of threat-based determinations is that the same behaviors that characterize a threat could equally be regular civilian activities, and civilians could be mistaken for combatants. This is a risk to some degree with all determinations of self-defense and hostile intent, but the risk of mistaking civilian behavior for threats may be higher where the threshold for determining a threat is much lower, or more flexible. As one U.S. military lawyer, Maj. Eric Montalvo, has argued in a paper considering U.S. self-defense criteria, “broad application of hostile intent and imminence gives a service member greater authority to engage perceived threats, which increases the risk of civilian casualties.”⁸⁰ The much more flexible and expansive definition of self-defense under the U.S. interpretation appeared to carry a higher risk civilian casualties, particularly as applied at certain periods of time or in certain operations. For this reason, the discussion of how broad threat interpretations might result in civilian harm will be discussed here, in reference to U.S. application of self-defense and hostile intent. However, these risks are worth bearing in mind in the discussion of other states’ practice. The risk of civilian harm are lower with narrower interpretations of self-defense and hostile intent, but not eliminated altogether.

The U.S. interpretation of self-defense, with greater latitude for soldiers to identify a threat based on the immediate behavior and context alone, frequently led to broad categorizations of what acts might trigger lethal force. This frequently led to mistakes and civilian casualties. Interviewees suggested that particularly early in the U.S. deployments in Iraq and Afghanistan, there was a greater tendency to assume that many normal civilian activities were signs of hostile intent. U.S. (and British) soldiers said that between 2005 and 2006, in many places in Iraq, firing on someone who was perceived to be dicking or spotting—passing on information about troop movements—happened frequently.⁸¹ Early on in Iraq, shooting someone digging in the ground in

“Just having a shovel was enough.”

U.S. commander on early, broad hostile intent determinations

certain areas, particularly at night, was also standard operating procedure, according to several U.S. soldiers who were interviewed. “Just having a shovel was enough” quipped one U.S. commander.⁸² At certain periods, according to those interviews, shooting individuals for possession of a weapon was not uncommon in Iraq, although it is not clear if this was an official part of the ROE guidance and interpretation or simply a common practice (see also the incident described in Box 5). Several interviewees also described a brief practice of “baiting” individuals—laying wiring or other bomb making material out and then shooting whoever came to pick it up under a hostile intent theory.⁸³

Incidents of over-broad targeting decreased over time, according to U.S. soldiers interviewed, and were less frequent in Afghanistan than in Iraq due to a “learning curve” in how to recognize hostile intent and imminent threats. As troops began to learn local patterns, for example that Iraqi farmers might be digging at night to avoid the heat, they became more cautious about presuming hostile intent, although they could still fire if they were confident it was an IED threat. “When I first started, see[ing] someone digging at the side of the road at night... maybe a third of the people would have thought that was hostile [behavior or intent]. Now no one does because the education about culture has increased,” one U.S. military lawyer interviewed in 2012 said.⁸⁴

This learning curve extended from one area of operations to another. Soldiers deployed in Iraq and then Afghanistan brought lessons learned with them. Many U.S. soldiers served multiple tours in Afghanistan and those serving in later years had a much better sense of what was “normal” versus what was a threat. In addition, by the end of the ISAF engagement in Afghanistan, the more civilian casualty risk-averse approach adopted following the 2009 shift to a counterinsurgency strategy had resulted in a much more deliberative and cautious approach toward presuming hostile intent.

Although this learning curve may have partially addressed concerns, the underlying, broad U.S. hostile intent interpretation still created a risk of civilian casualties in later years in Afghanistan. Most non-U.S. troops interviewed said they would not fire on the scenario of seeing an individual digging in the ground or watching troops and talking on a mobile phone. Such behavior might simply be normal civilian activity or even if there was bad intent, such activity might not rise to the level of direct participation in hostilities. By contrast, U.S. troops generally said that they could fire in these situations if they perceived an imminent threat. This type of latitude allowed substantial room for mistakes to be made. Civilians were killed because they were seen to be watching troop movements, carrying materials that might have a dual purpose for making IEDs, or because they ran away when international forces approached. The introductory chapter provided an example from 2011 of a unit of U.S. Marines who shot a man they came upon while on patrol because he was carrying a gas can, which might potentially have been used to make an IED. A military lessons learned study provided the example of four women collecting grass on a hilltop who were taken out with an anti-tank missile because the local platoon commander assumed their sickles were weapons, sufficient to demonstrate hostile intent.⁸⁵ These examples were not isolated incidents. One IHL investigator commented that the way hostile intent was used by U.S. troops in particular was “one of the main drivers” of civilian casualties from 2011 to 2012.⁸⁶

This suggests that the potential for over-broad threat categorizations in self-defense and hostile intent situations merits further attention. In particular, while international military have made significant efforts to interrogate mistaken threat determinations at areas like checkpoints—so-called escalation of force incidents—

there has been greater resistance to second-guessing troops in high-intensity, so-called “high value” target situations.⁸⁷ For example, past documentation of night raids in Afghanistan found a pattern of civilians being shot on a “hostile intent” theory for fleeing the scene, trying to protect family members or others present, or other defensive reactions.⁸⁸ Though not all civilian casualties are unlawful, incidents or patterns in which hostile intent designations failed to take sufficient due precautions to distinguish civilians from combatants—as a too broad threat categorization might do—could raise issues under IHL.

3.1.3 Incidents of Excessive or Unnecessary Uses of Force

Interviewees and past documentation also provided frequent examples of excessive or disproportionate force in U.S. self-defense responses, beyond what other ISAF troop contingents would have considered necessary to deal with the threat. This frequently led to high civilian casualty tolls following self-defense responses. For example, in the infamous “Haditha” case, a U.S. Marines unit that was attacked with an IED in Haditha, Iraq, on November 19, 2005, responded by dragging several men out of their car and shooting them; the unit then stormed several nearby houses, resulting in twenty-four individuals killed, all presumed civilians.⁸⁹ In March 2007, a convoy of Marines traveling outside the eastern Afghan city of Jalalabad was hit by a vehicle-borne explosive device (and possibly further small arms fire).⁹⁰ They responded by firing indiscriminately at surrounding cars and fields, killing nineteen civilians and wounding fifty.⁹¹

“We’re on patrol and get a pop shot at us. No one’s hit, but 30 people are suddenly on line and they fire like 1,000 rounds each onto a village. ... There was another case where we were sort of pinned down and started blowing up houses around us.”

U.S. advisor embedded with U.S. forces in southern Afghanistan

These two incidents were well publicized and strongly criticized for being instances of excessive force that may have risen to the level of an IHL violation.⁹² However, while these incidents may have been at the extreme end, interviews suggested that a level of over-reaction and heavy use of force following a perceived threat was relatively common among U.S. forces in Iraq and Afghanistan. A U.S. civilian advisor who frequently embedded with U.S. troops from 2008 through 2010 said that it was common for one-off attacks to result in disproportionate levels of force. “We’re on patrol and get a pop shot at us. No one’s hit, but 30 people are suddenly on line and they fire like 1,000 rounds each onto a village. ... There was another case where we were sort of pinned down and started blowing up houses around us.”⁹³ In another example, a journalist who had frequently embedded with both British and U.S. troops noted that in general, British troops were far more conservative in returning fire, only when necessary and as necessary to stop the threat. By example, he recounted the following experience while on patrol with U.S. Marines in Helmand in 2011:

Two bullets flew overhead, and that was enough to trigger completely disproportionate use of force. They just opened up with everything. Grenades, heavy machine gun fire, .50 cal from a nearby base, all at this slightly run down grouping of 3 mud brick compounds. One guy was shooting so much that he shot this bush on fire. If that was the Brits [British troops] they would have hunkered down, used some smoke and tried to get back to base.⁹⁴

Other non-U.S. soldiers interviewed also sometimes argued that U.S. responses were not only excessive, but were not necessary at all. Although the legal standard for

self-defense for all four states includes the requirement that the attack be necessary, many of the European troops interviewed said they thought that U.S. soldiers had a lower threshold of what was necessary than they did. One French commander said that while traveling in a convoy with American troops it was fired on several times, but no damage was done and receiving a small amount of fire was common in that area. Although it did not present a significant threat, he said that all the U.S. troops in the convoy started firing: “[They] threw everything at it. It was chaos”⁹⁵

It is difficult to say whether the problem is that the U.S. interpretation or application of self-defense permits this level of force (in which case the U.S. self-defense standards would appear less protective of civilians than IHL standards), or if these are simply incidents of violations or bad judgment calls. Much of the evidence is anecdotal and there were also counter-examples of U.S. troops acting with appropriate restraint. For example, a United Nations advisor serving in an area with U.S. troops noted that, “It would take something pretty explicit for American forces to escalate. You’d have to not only carry a weapon but also display some sort of hostile act toward the forces, such as aiming or waving a weapon, before they took action.”⁹⁶ Some European soldiers said the U.S. standard struck the right balance between flexibility and control, and wished they had more discretion in their use of force, similar to U.S. troops. One German soldier said his experience with American troops was that they were “authorized to respond to force more often but in a way that matched reality. [It was] not trigger happy.”⁹⁷

Many soldiers also linked the patterns of excessive or unnecessary force to the greater stress placed on U.S. troops by virtue of their longer deployments, in what was more often, heavily kinetic fighting areas. These psychological pressures will be discussed in greater detail in the section on “Non-Legal Factors” at the conclusion of the four case studies.

3.2 France

French troops’ application of self-defense and hostile intent was more limited than others in the study. Not only does France have a very narrow, criminal-law based conception of self-defense; those restrictions are often de facto applied to uses of force under hostile act and hostile intent. Authorization for hostile act and hostile intent also tends to require a commander’s approval. All of these factors led to a more conservative use of these threat-based or reactive uses of force than many other ISAF nations.

France joined its coalition partners in Afghanistan in 2001 on a limited support basis. By early 2002 France had deployed several hundred French forces to Afghanistan, notably, a couple of hundred French Special Forces active in the east and southeast of Afghanistan. From 2004, France gradually increased troop numbers and in 2008, French troops assumed responsibility for the small, central province of Kapisa, outside of Kabul.⁹⁸ French troops fell under the command of the U.S.-led Regional Command East (RC-EAST), and so had frequent collaboration or joint missions with U.S. forces.

According to military lawyers interviewed, French troops’ individual self-defense draws from France’s domestic criminal code, which applies to French citizens regardless of whether they are overseas or in France. The self-defense provisions within the French criminal code permit defense of life where the attack was unjustified, and where a response to it is necessary, immediate and strictly proportionate to the gravity of the

attack.⁹⁹ The defending individual must also be able to identify the attacker clearly.¹⁰⁰ Perhaps reflecting this domestic rule, most of the interviews with French soldiers and lawyers emphasized having positive identification—clear identification of the individual posing the threat—in order to respond in self-defense and/or under a hostile intent ROE. By contrast, other states’ forces tended to describe positive identification as something that was desirable but not always possible in many threat scenarios.

Like many countries, France requires that an attack have happened or be imminent for a self-defense response to be justified. France’s interpretation of imminence is extremely narrow – any response in self-defense must be virtually concurrent to the time of the attack, and must cease immediately.¹⁰¹ A French lawyer who specialized in these ROE matters emphasized that this was a major distinction between French and U.S. interpretations “For the French [the response] must be immediate... there is no extended self-defense under French doctrine.”¹⁰²

Whereas acts that might trigger self-defense would include (obviously), an armed attack on a French soldier, hostile acts are considered to be acts that are not so direct in French legal doctrine. French guidance suggests they could include “intrusion or attempted intrusion into a protected military zone; penetrating the airspace of a military adversary that is above a protected military zone;” aggressive speeding or threatening behavior of a vehicle, or mining naval routes.¹⁰³ French guidance on hostile intent provided the examples of: the regrouping of armed individuals; suspect behavior by individuals belonging to armed groups in the immediate proximity of vehicles belonging to (French/NATO) forces; preparations to destroy necessary means of communication, or pointing arms at a French or NATO soldier.¹⁰⁴

3.2.1 French Domestic Criminal Liability and Hostile Intent Usage

From the beginning of French engagement in Afghanistan, French troops were permitted to apply nearly all of the common NATO ROEs, including those related to hostile intent.¹⁰⁵ While French troops technically could be authorized to use the hostile act and intent ROEs, prior to 2005 doing so would have risked domestic criminal liability, as pointed out in an article by French military lawyer Gilles Castel.¹⁰⁶ French criminal law applies to all citizens overseas, including French soldiers deployed in an armed conflict. Without a defense to justify their actions—such as of self-defense—soldiers might be liable for assault or murder for firing on someone. Since use of force under hostile intent is by definition beyond the French self-defense framework, soldiers responding with lethal force to threats under this paradigm might have been criminally prosecuted, even if acting on orders to do so. Although this was never tested in court, the gap in legal protection created confusion and caused French troops to limit their own responses in overseas deployments. According to Castel, French troops stationed in Kosovo faced with a violent, and partially armed mob, were not able to respond in self-defense because they could not identify one, individual attacker.¹⁰⁷ French troops confronted with armed bandits at illegal roadblocks in the Ivory Coast could not respond in self-defense because weapons were only being indirectly brandished, not used to directly threaten the troops, and thus not triggering their right of self-defense.¹⁰⁸

In recognition of these challenges, in 2005 a provision was inserted in France’s Defense Code that would provide a legal excuse for French military should they ever

be brought to trial for their actions in conflict. Article L4123-12-II of 2005 Defense Code (amended December 2013) exempts French military personnel, in the course of an operation outside French territory, from French criminal liability where 1) the acts are necessary to further the mission; 2) provided that they do not violate international law—either treaty or customary—to which France is bound; and 3) fall within the rules of engagement that applied at the time.¹⁰⁹

3.2.2 French Application of Self-Defense and Hostile Intent

“We are not allowed to use preemptive force even in response to hostile act or hostile intent.”

French military lawyer on France’s tight imminence requirement

Following the 2005 legal amendment, French troops would theoretically have had no restraints in responding either in self-defense, or to a broader range of circumstances under the hostile act and intent ROEs as needed. However, French reliance on the hostile act and intent ROEs continued, in practice, to be limited by the spirit of French domestic self-defense restrictions, if not technically. In interviews, French soldiers, commanders, and military lawyers discussed self-defense and hostile intent interchangeably, and tended to apply restraints or restrictions more indicative of a self-defense paradigm to hostile intent situations. For example, the three criteria typically cited by French soldiers for hostile intent were that the threat must be imminent, it must be real or serious, and the response must be proportionate—essentially the same standards as would apply to a simple self-defense situation. One French commander said that hostile intent “has to be really characterized by a legitimate threat in order to justify a use of force”¹¹⁰ whereas another said he had “never seen someone fire [on a hostile intent situation] when it was so indirect that it wasn’t a threat.”¹¹¹ The most significant restriction was that French soldiers and lawyers still tended to apply the tight imminence requirement associated with self-defense standards to hostile intent situations. As one French lawyer emphasized, “We are not allowed to use preemptive force even in response to hostile act or hostile intent.”¹¹²

Another factor may have been the tight command control over use of lethal force under hostile intent. French soldiers and commanders said they required specific and direct authorization at the time to fire in hostile intent situations. One military lawyer noted that requiring specific authorization to fire in situations of hostile intent was more a matter of training and common practice than a legal requirement. Similarly, he said the reticence by commanders to authorize firing in these situations was more a matter of command style and approach than a bright-line legal rule. “Every commander is very prudent when thinking about using the 42 series [the ROEs including hostile intent and hostile act].”¹¹³

This aligned with the comments of other French soldiers and commanders interviewed, nearly all of whom emphasized that restraint in use of force was fundamental to the French approach, regardless of whether force was technically permissible or not in that situation. As one senior commander summarized his guidance to troops, “Avoid firing unless you have no other option.”¹¹⁴ He said he always tried to urge troops under his command to think first and be limited in when they used lethal force, especially if there might be “any risk of civilian casualties or blue-on-blue [unintentional attack on friendly forces], then it was forbidden to fire unless there was a direct risk to the soldier.”¹¹⁵

This overall restrained approach was reflected in French troops' responses to the common scenarios presented in interviews—French troops were more likely to say they could not use force in most of the hostile intent scenarios posed. On the most basic scenario of whether troops could fire first, most said no. One French lawyer interviewed noted that this was not legally required, but that given the tight imminence requirement and the overall French approach of firing only when sure, in practice, most soldiers would wait until they were fired upon to use lethal force in self-defense.

One of the common scenarios presented to interviewees was of a (presumed) Taliban fighter firing and then, knowing about many ISAF members' restrictions on firing on an unarmed individual, simply dropping their weapon to avoid being shot—this was reported to be a frequent issue in Afghanistan. Presented with this hypothetical, all of the French soldiers said they would not have been permitted to fire, seemingly under either a self-defense or hostile intent paradigm (though they did not distinguish between the two). French soldiers tended to say either that self-defense does not give the right to pursue (an individual dropping a weapon might be presumed to be retreating or stopping the attack), or that they could not fire on unarmed persons, even if only a few minutes after being fired upon by that person.

The one exception to this rule was where the individual(s) appeared to be regrouping, moving to a firing position, or otherwise demonstrating tactical maneuvering, either in the dropped weapon scenario or other scenarios that raised a question of hostile intent. Such tactical behavior would be taken as an example of hostile intent and though not all commanders would decide to fire, in some circumstances they did. Some commanders described scenarios in which they arrived in a situation that had other threat markers (for example a town deserted of civilians, or otherwise suggesting an ambush), and then saw an individual engaged in tactical maneuvering, such as taking defensive or offensive positioning, or not responding to warnings. In those cases, they noted, they would be authorized to fire even if the individual was not armed. One commander said they would frequently be in a firefight and notice an individual running between the compounds where fighters were hiding, apparently restocking the fighters. Unless the individual was a child (which it frequently was), if it was “clear that he’s restocking [the Taliban], we would shoot,” he said, although noting that not all commanders would take that position.¹¹⁹

Mere possession of serious weaponry was not sufficient to justify use of force. French soldiers interviewed said that they also could not fire either in self-defense or under a hostile intent theory on someone carrying a mortar or other serious weaponry because that would not be an imminent threat.

French soldiers and lawyers interviewed offered similar responses for why generally they would not fire on someone digging in the ground or appearing to pass on information about troop movements. In the scenarios of a potential IED digger or someone “spotting” (providing information on their location), French soldiers emphasized criteria that an attack be necessary and that it be a legitimate threat, which would not be clear in either situation. Even if theoretically permissible to shoot in some of these situations, alternatives—such as attempting to arrest or questioning the person exhibiting suspect behavior—should be exhausted first. If these were not available or were exhausted, they might fire on the individual, but only with specific authorization. A military lawyer offered the following example: “You are in a helicopter and you see a guy putting an IED [i]n the road. [That is] clear hostile intent or hostile act. ... you have

the right to use [force] but you would never do so without calling back for an order.”¹¹⁶ In these scenarios, he noted, going back to the commander for authorization is just an additional check that ensures that the action is necessary and tactically sound, he noted. Also, as another commander offered: “in theory with hostile intent you have time to reflect, analyze, and ask for permission.”¹¹⁷

A similar level of commander restraint was encouraged where individuals appeared to contribute to other attacks, but were not directly armed, for example the scenario of someone acting as a lookout and passing on information. French commanders and military soldiers said they would not have fired on someone who appeared to be watching a convoy and relaying their position, for example, without some form of offensive force authorization. This was not purely a question of whether French forces could fire, but also whether they believed that they should do so, given the risk of civilian casualties, or whether taking out someone providing information would substantially affect Taliban operations. “Even if you did shoot, that guy would just be replaced by someone else tomorrow,” one commander noted.¹¹⁸

3.2.3 Risk Assumption and Conservative Use of Force

Overall, French troops had an extremely conservative approach to using force under a hostile intent paradigm, which may have significantly limited French responses in Kapisa. Particularly from the assumption of French responsibility in Kapisa in 2008, French troops faced a virulent insurgency centered around Taghab district. Ambiguous threats emanating from seemingly civilian areas, ambushes, and other indirect attacks sharply defined the French experience in Kapisa.¹²⁰ One of the seminal events in the French deployment in Afghanistan was an ambush on a convoy of French forces in 2008 in Sarobi district, just outside of Kapisa, that resulted in 10 French soldiers’ deaths and sparked a sharp debate in France about whether French troops should be engaging in the war, and how prepared they were to do so.

A general trend observed in this study was that a higher threat profile or prevalence of ambiguous attacks resulted in a tendency to loosen or lower the threshold for self-defense (see subsequent section on “Non-legal factors”). However, this did not appear to be the case for French soldiers. The documented studies and interviews with French soldiers suggest that even after the 2008 ambush, French soldiers did not as a whole respond with more aggressive use of force, or rely more on hostile intent (for example, to prevent the risk of future hostile actions developing into a full attack). Instead, available studies and interviews with French soldiers suggest the reaction, if any, was more conservative assumption of mission responsibilities—not sending French troops out on patrol as frequently or not doing so without full air cover or other precautions.¹²¹

The more restrained French approach appears to have endured despite the high volume of threats in certain areas, to the frustration of some allies. One U.S. commander who had served with French troops in eastern Afghanistan, noting their restrained force posture, quipped, “You’d have to go into their FOB and their hooch and beg them to shoot you.”¹²² One French soldier serving in 2010 said they had “contact” (meaning firing on them or other hostilities) nearly every time they exited the base, but his description of the more restrained French responses to hostile intent was the same as those serving in earlier periods. He drew a marked difference between French soldiers’ responses to

“You’d have to go into their FOB and their hooch and beg them to shoot you,” quipped one U.S. commander, describing the French approach to use of force. Meanwhile many French soldiers described American forces as “trigger-happy cowboys.”

Was this difference a question of risk tolerance or reserve? As one French advisor offered: “The tendency in American military culture, is you shoot first and then you think about it. You don’t take the risk on yourself. The French soldier will automatically think first, then fire based on assessing situation.”

the high threat levels in Kapisa and U.S. forces serving alongside them, noting that U.S. soldiers' use of force appeared disproportionate to him given the level of risk to soldiers and the very high risk that use of force would result in civilian casualties or undermine other counterinsurgency efforts. Another French advisor, drawing a contrast between U.S. and French interpretations of when it was necessary to use force, categorized it as a question of assumption of risk, "The tendency in American military culture is you shoot first and then you think about it. You don't take the risk on yourself. The French soldier will automatically think first, then fire based on assessing [the] situation."¹²³

3.3 Germany

Germany has an extremely limited self-defense provision but a more flexible application of hostile intent in practice. What is notable about this case study is that because German troops were limited from applying hostile act and intent ROEs until 2009 or 2010, the German experience provides a contrast in the levels of force permissible under a self-defense versus a "mission accomplishment" hostile intent paradigm.

German troops participated in operations in Afghanistan beginning in November 2001. In 2003 and 2004, Germany established and led two of the five Provincial Reconstruction Teams (PRTs) in northern Afghanistan: Kunduz and Faizabad (PRTs are provincial bases with an integrated stabilization and reconstruction mission). In 2006, Germany assumed responsibility for the Regional Command-North (RC-N), and, by 2009, Germany was responsible for the third largest troop contingent in Afghanistan.

Similar to French soldiers, German soldiers' right to self-defense appears to be based primarily on the right to self-defense under Germany's domestic criminal law. Germany military manuals or guidance provide almost no consideration of these self-defense or hostile intent questions, and military lawyers interviewed said they were not aware of any official state position taken. However, military lawyers said the understanding in training and in discussions is that soldiers' self-defense is based on the concepts of "Notwehr" or "Nothilfe" in domestic law (literally emergency defense and emergency help), which is codified in sections 32-35 of Germany's Criminal code, self-defense.¹²⁴ Germany considers the hostile act and intent ROEs to denote situations that go beyond the limits of self-defense, and so are a form of offensive force.

Under German domestic law, self-defense is justified only where necessary to avert an immediate, illegal attack, against one's self or another.¹²⁵ German lawyers noted that domestic self-defense provisions provide an extremely limited basis for use of force, only in response to a direct attack or immediate threat and typically as a "last resort".¹²⁶ One German lawyer distinguished German self-defense from that of U.S. soldiers by noting that German soldiers can only act within an immediate time frame, "The trigger point for self-defense is when the attack becomes imminent. When I have to act in order to avert damage."¹²⁷

German commanders and lawyers also tended to frame responses in self-defense as being constrained by what was reasonable or appropriate in the situation, and that soldiers should always try to de-escalate the situation, and seek alternatives where possible. As one lawyer framed the overall German approach to self-defense, "You should always be asking not only what is the threat but also what force do you need to resolve the situation? ... It is often tempting to use all the force at one's disposal, but you

should use only the level needed to deal with the threat or situation.”¹²⁸ Proportionality is not a formal part of German domestic law on self-defense, but it has been interpreted as a constitutional requirement where a firearm is used, so would be required in many if not most soldiers’ self-defense situations.¹²⁹ The same German lawyer explained that proportionality would mean that if an individual fires at a convoy – presenting a legitimate threat – the soldiers’ response cannot be to “unleash all the force of the convoy on the attackers.”¹³⁰ Another German commander offered the more colorful, soldier-friendly definition that “Proportionate means if a man throws a stone, you can’t shoot him with an F-16 [fighter aircraft].”¹³¹

3.3.1 Change in Force Posture Enables Hostile Intent

Despite its relatively high troop commitments and engagement in Afghanistan, Germany’s official position until mid-2009 was that it was not engaged in an armed conflict in Afghanistan. Until this change, German rules of engagement were limited to those of a defensive, peacekeeping mission. Due to this overall force posture, Germany placed significant caveats—formal statements declaring that NATO member states will opt out of parts of a given mission or rules of engagement—on its troops’ participation in the ISAF mission in Afghanistan. These caveats not only restricted where its troops could be deployed geographically, but also German troops’ participation in combat operations or use of offensive force, which as noted, for Germany includes force under hostile act and intent ROEs.¹³² German troops serving in these early years could only respond to situations that would have been covered by German domestic law provisions on self-defense – an extremely narrow scope for use of force.

This peacekeeping posture earned Germany the ire of its other NATO partners, who were facing difficult fighting and troop losses in other parts of the country.¹³³ It also became increasingly discordant with the deteriorating security situation in Kunduz.¹³⁴ In July 2008 German forces also took over the Regional Command North (RC-North) Quick Reaction Force from Norway, which required some greater ability to engage in hostilities beyond self-defense.¹³⁵

All of these factors led to a significant shift in German soldiers’ ROEs and Germany’s overall position on use of force in the summer of 2009. ROEs are classified, but interviews with commanders and second-hand sources, including materials disclosed in a German Parliamentary inquiry, suggest that new ROEs went into effect in July 2009 that permitted the use of force beyond “immediate threat” situations, and permitting some use of force in response to hostile intent.¹³⁶ Then in February 2010, Germany officially recognized that it was engaged in an armed conflict under international law in Afghanistan.¹³⁷

German commanders noted that the change in force posture and accompanying ROEs largely brought Germany’s ROEs in line with those of other NATO countries in Afghanistan.¹³⁸ This created significantly more flexibility for German soldiers to respond to different threat situations in Afghanistan. Timo Behr notes that the new rules of engagement put in place for German forces in April 2009 allowed the “use of force pre-emptively and to pursue their enemies... eased existing restrictions on the use of heavy weapons, including mortars and artillery, and gave more freedom of decision to field commanders.”¹³⁹ German commanders interviewed said that with the ability to

rely on the hostile act and intent ROEs, or “expanded self-defense”, as some referred to it, German forces could respond to more ambiguous threats than would have been allowed under a pure self-defense framework. One commander who had served before and after the force posture change, noted that before 2009, soldiers could only consider something to be an imminent threat once it had materialized (for example, someone firing at them) versus after 2009, “you could also base it on the intent of the man.”¹⁴⁰

3.3.2 German Application of Self-Defense and Hostile Intent

The difference in German soldiers’ responses to the hostile intent scenarios posed in interviews helps illustrate the difference in available force levels between a very tight self-defense framework and authority to respond under hostile act and intent ROEs (at least the German interpretation of them post-2009). The rule of thumb understood by most soldiers who served prior to the 2009 force posture change was that their self-defense doctrine limited them to firing only on immediate threats and as a last resort. Troops interviewed tended to summarize this as only being able to fire when directly fired upon.¹⁴¹ This position would allow soldiers serving prior to the force posture change with no room to fire in any of the other hostile intent scenarios posed in questions, and with an extremely limited self-defense basis for using force.

By contrast, those serving after the rule change, when hostile intent became available, could respond in more of the scenarios. Illustrating how the different time periods affected ability to fire or not, a former German commander who served in both periods noted that at the beginning of 2009 German troops, presented with an individual who appeared likely to fire on them, would have held their fire until he did so: “We would not have opened fire on him. We would have absolutely waited for him to open fire. By the time I came [late summer 2009] you could open fire on those who had not yet fired.”¹⁴²

Interestingly, after Germany made the decision to change its force posture, German soldiers’ interpretations of what was permissible under a hostile intent paradigm appeared to be slightly more flexible than those of some other European partners. French troops and British soldiers serving in their more restricted periods post-2007 (as will be discussed shortly) were more likely to say they would not fire until they received fire, than German soldiers serving post-2009. In the scenario of a man (presumably Taliban) firing and then dropping his weapon, roughly half of the German soldiers interviewed serving post-2009 said they would have been permitted to fire back versus none among French troops and none among British troops serving post-2007. More German than French commanders and soldiers said that they theoretically could fire on someone digging an IED under a hostile intent theory, although the lack of certainty in knowing it was an IED threat was a common restraint in practice. Another commander remembered the following example:

Sometimes we had a suspicious person [who we thought was planting an IED or preparing an attack] but it was never enough for my people to engage them. One time on the main road ...we saw signs of an IED. The leader [of the approaching platoon] identified a man at distance of 200 meters who he thought was a trigger man, but at 200 meters and houses nearby, there was nothing you could do.¹⁴³

Most soldiers said they never caught anyone in the act, or had enough information to be sure it was the individuals near to the IED, so there was nothing they could do except to send out a bomb team later or alert their forces to be on guard.¹⁴⁴

“Hostile intent can extend imminence. If you are authorized to use force not just in self-defense but in defense of mission ... then you may have a situation [of firing on] someone [who] is a known threat but not imminently.”

German commander on differences between self-defense and hostile intent

While the availability of hostile act and intent ROEs might have given German troops greater flexibility than those serving before 2009, and arguably more flexibility than some of their European counterparts at that time, German troops still appeared to have more restrictions than U.S. troops, in terms of how imminent or direct the threat must be to justify use of force under hostile act or intent ROEs. For example, in the scenario of firing on a presumed Taliban fighter who had dropped his weapon, the reason that only half of the German soldiers said they could fire was because of ambiguity over whether the Taliban would be interpreted as retreating, or withdrawing, or not. German self-defense doctrine requires that a response cease when the threat or attack ceases and two lawyers interviewed explained that the limitation on ceasing an attack immediately also applies in a hostile intent situation. However, if the individual is running toward a weapon—a continued sign of hostile intent—then troops can continue firing. This created a distinction with U.S. troops, as one German lawyer explained: “I discussed this with my U.S. colleagues [in Afghanistan] and they would say ‘If the Taliban shoots and runs away, I would keep shooting,’ but German troops would not unless [in running away] they were showing tactical behavior,” such as regrouping or running toward a weapon stash.¹⁴⁵ He noted that such behavior could emerge into a recognizable pattern, as it did in Afghanistan, with Taliban recognizing NATO troop limitations and deliberately firing and dropping a weapon to protect themselves. Where it became a recognizable threat pattern, he said, troops might more readily recognize it as hostile intent and fire without seeing additional tactical behavior.¹⁴⁶ Not all German soldiers interviewed seemed aware of or comfortable with this legal distinction and some said they did not believe they were permitted to fire in a scenario where a Taliban fired and then dropped his weapon.

Another key distinction between German and U.S. soldiers came in how far German soldiers could stretch the timeframe of imminence under hostile intent. Some German commanders interviewed framed the use of hostile intent ROEs in practice as an “expanded self-defense,” essentially a form of defensive or reactive force with a more relaxed imminence standard than under pure self-defense. As one senior German commander explained, “Hostile intent can extend imminence. If you are authorized to use force not just in self-defense but in defense of mission ... then you may have a situation [of firing on] someone [who] is a known threat but not imminently.”¹⁴⁷ He gave the example of a known IED bomb maker building an IED in a distant location. He said that if it were known that that the bomb-maker’s actions presented a real threat and the only way to address the threat was to kill him, then it would be permissible to use an airstrike or other remote means of attack, even if the threat was not immediately forthcoming.¹⁴⁸ However, this ‘extended imminence’ only lengthened the time threshold so far, and not as far as U.S. troops would stretch it, he noted. “If it’s a situation where the individual could not threaten you in the next few hours or even days,” then German troops could not fire on them, even under a hostile intent theory, he said.¹⁴⁹

Unlike many U.S. soldiers, German troops also said they would not have fired on someone appearing to watch their location and passing on information, either because they could not be sure the individual was a threat at all, or whether the threat posed was imminent enough to justify force. Most German soldiers said they did not have the sort

“We were in Afghanistan long enough to know that there are lots of men armed and they could be Afghan police, intelligence, many non-enemy persons. The information sharing just wasn’t good enough that you could be sure. It could also have resulted in collateral damage.”

German commander who served in 2011

of electronic surveillance and simultaneous translation that other countries had to tell them what the man was saying, which would be necessary to connect the individual to an imminent or ongoing attack. Other soldiers interviewed from countries with more extensive electronic eavesdropping networks noted that limited access to on-time intelligence affected German contingents more than others, and may have made them less comfortable affirming hostile intent where the behavior and context itself did not make the threat clear (for more, see the subsequent section on “Non-Legal Factors”).¹⁵⁰

Although anecdotal, German troops were also more likely to say they would take additional measures to verify the certainty of the threat or to avoid collateral damage than U.S. forces. It was not clear whether this was the more restrained, last resort posture of self-defense influencing the application of hostile intent, or if it was simply due to fewer German resources to verify and distinguish threats. In discussing whether to fire on certain hostile intent scenarios, German soldiers frequently mentioned the strategic blowback that would result from mistakenly killing a civilian, or a member of local Afghan forces. Responding to the scenarios of whether German troops would fire on someone who possessed a military-grade weapon or appeared to be providing information on troops, one German commander offered: “We were in Afghanistan long enough to know that there are lots of men armed and they could be Afghan police, intelligence, many non-enemy persons. The information sharing just wasn’t good enough that you could be sure. It could also have resulted in collateral damage.”¹⁵¹

Most German troops interviewed argued for trying alternatives first in all of the scenarios. In the scenario of someone appearing to observe troop movements and report on them, for example, several soldiers suggested alerting troops who were being watched, or dispatching Afghan security forces or police to deal with the problem. Addressing the scenario of seeing someone who appeared to be a sniper but was too far away to be an imminent threat, or for them to be certain he was a sniper, one German commander suggested that “You could not kill him but you can take interim steps – shouting ‘Stop, don’t move,’ [firing] warning shots, ordering him to handover his bag (assuming he has one), put him [under] arrest.”¹⁵²

3.3.3 Negative Consequences of Limitations on Force

The stark difference in how German soldiers responded to threats before and after the 2009 change illustrates how important these hostile intent concepts can be in determining what situations troops can use force in. The pre-2009 experience of German troops is perhaps one of the most extreme examples of a mismatch between the level of force soldiers were empowered to use and the level of hostilities or threat levels. Most German troops interviewed who served after the 2009 change said that their ROEs gave them adequate flexibility. However, there were still some concerns, with commanders expressing frustration that even when there were clear ways to prevent IEDs from being planted, the lack of immediacy of the threat sometimes prevented them from doing so. One senior German commander remembered a situation in which they had intelligence that an IED was to be placed on a key choke point in a road German soldiers took frequently, and he wanted to place a sniper in position to fire on the man as he planted the IED. His military lawyer would not pre-authorize the sniper’s response in any way, because he said it could be a farmer digging or some other mistaken identification.¹⁵³

One German soldier said that he often found that the German restrictions and procedures themselves or carrying out their mission because the rules were not flexible enough to account for the surrounding dynamics or operational realities. He gave one example where he and other troops were in an overwatch position over the village (a high position, e.g., on a hill, giving troops a visual vantage point) and saw armed Taliban fighters getting into position to fire. They requested permission to fire either on a self-defense or hostile intent theory but because the Taliban fighters were not an imminent danger to the soldiers yet, permission was not granted.

There is also some evidence in German practice that the ISAF tactical restrictions that went into effect from 2009 may have skewed the way that self-defense or hostile intent were applied, creating inadvertent side effects. On September 3, 2009, a German commander in charge of the Kunduz PRT, Col. George Klein, ordered airstrikes on two fuel tanker trucks that had been hijacked (allegedly by Taliban) on a theory that the tankers presented an “imminent threat” to the German PRT. Although the tankers were at the time stuck in a muddy tract and grounded, Klein designated it a “Troops in Contact” situation, which is essentially a determination that troops are facing an immediate threat, a self-defense situation.¹⁵⁴ The strike destroyed not only the tankers but killed an estimated 100 to 150 locals, mostly civilians, who had surrounded the grounded tankers and were collecting fuel.¹⁵⁵ It sparked significant public criticism, arguably increased local and diplomatic tensions, and remains one of the most controversial airstrikes, not just for the German contingent, but among the ISAF operation as a whole.

One senior commander interviewed, who served shortly after the strike, pointed out that under the tactical restrictions and rules of engagement at the time, the only way that the Commander could have had airstrikes deployed for what he deemed to be a real threat was to call a “Troops in Contact,” in essence a self-defense claim.¹⁵⁶ A journalist who was privy to some of the ISAF investigation material was even more direct: “They want to bomb it but they can’t [under their ROE] so they reclassify it as an imminent threat, which allows German JTACs to call in a strike ...This was a clear case where they manufactured hostile intent.”¹⁵⁷ Because self-defense is considered to demand an immediate response, because soldiers’ lives are in danger, strikes under self-defense may be less scrutinized than other offensive strikes. In the case of the Kunduz bombing, a more reflective and considered approach to the strike authorization might have resulted in a response that dealt with any potential threat from the downed tanker without the heavy collateral and strategic damage.

3.4 United Kingdom

British forces experienced the greatest variance in the use of self-defense, hostile intent, and other uses of force, from a posture up until 2006 that was closest to the U.S. approach (including similar responses to hostile intent scenarios) to one of the most restricted approaches by 2012. This was not due to changes in the law and understanding of self-defense per se – the U.K. interpretation of self-defense remained narrow throughout the engagement – but due to the way other force restrictions and policies interacted with the U.K.’s underlying interpretation and limits on self-defense. The U.K. was one of the earliest countries to join the U.S.-led engagement in Afghanistan, participating in

“It is] really drilled in that unless it is really an imminent threat, you are not going to pull the trigger... There is just no question of using force unless you absolutely had to.”

U.K. soldier on the U.K. interpretation of self-defense

the conflict since 2002, and was the second largest troop contributor throughout most of the engagement. Unlike Germany and France, the U.K. participated fully in detention operations and even in more controversial counterterrorism and counternarcotic raids. British forces assumed responsibility for Helmand province, establishing a PRT there in 2006.¹⁵⁸ The U.K. position on the relationship between self-defense and hostile intent is similar to Germany and France, with self-defense based on British domestic criminal law and hostile intent situations exceeding those limits. Under British common and statutory law, individuals have a limited right to self-defense, where the defense is necessary and the response is reasonable and proportionate, given the circumstances at the time.¹⁵⁹ The defending individual does not have to wait to be attacked, but the threat must be imminent, meaning ongoing or immediately forthcoming¹⁶⁰

U.K. troops interviewed echoed some of the same legal terms of art from domestic law in describing their right of self-defense, suggesting a tight nexus between domestic law restrictions and training on how to apply these principles in conflict zones. One of the key elements of British common law and statutory law is the reasonableness of the response, based on a subjective test: the defending individual must have “instinctively and honestly” believed the defense to be necessary.¹⁶¹ British soldiers interviewed said they were trained that if they genuinely felt under threat, they were permitted to defend themselves. As one soldier described it “the key buzzwords are ‘imminent threat to life’ and ‘honestly held belief that someone is about to attack you or end your life.’”¹⁶²

In addition, British lawyers and commanders placed a strong emphasis on the imminence of the threat under a self-defense paradigm, with imminence being interpreted as immediate in keeping with the domestic law interpretation. One commander suggested that the U.K. self-defense restrictions are perhaps inherently more restrictive than other NATO countries because of the formative U.K. experience in Northern Ireland, and troops having to apply these principles in a normal, largely peacetime atmosphere close to home.¹⁶³ He said it is “really drilled in that unless it is really an imminent threat, you are not going to pull the trigger... There is just no question of using force unless you absolutely had to.”¹⁶⁴

Terms like hostile intent and hostile act came up less frequently in interviews with British soldiers, in part because training emphasizes the terms of art that are closer to British legal standards – such as “imminent threats to life” or “acts that endanger life.”¹⁶⁵ This may have created greater opportunities for a bleed-over in standards from self-defense to hostile intent, similar to with French troops. British troops sometimes applied self-defense standards to hostile intent situations, for example, carrying over the prohibition on not firing on an unarmed man to hostile intent scenarios.

However, although the U.K. has not provided as much public legal guidance as France or the U.S., examples from practice and interviews with soldiers who served alongside both British and American troops suggest that British troops’ interpretations of hostile intent brought them closest in line with American practice. U.K. troops who served in earlier years in Afghanistan, or alongside U.S. troops in Iraq also described firing on those presumed to be detonating IEDs (either digging in the ground, or passing on information to facilitate detonation, for example) as a commonly accepted practice. However, for much of the latter part of the U.K. deployment in Afghanistan, hostile intent was much less available to British forces, in large part due to efforts to avoid some of the civilian casualty concerns raised in the U.S. section.

3.4.1 Policy and Tactical Restrictions on U.K. Forces

Fighting in Helmand was among the most intense of any province in Afghanistan throughout the ISAF mission. There was a much higher rate of ambushes, IEDs, and other attacks than troops faced in other provinces, and an earlier onset of kinetic fighting than in other parts of Afghanistan. British soldiers serving in Afghanistan in 2006 described being ambushed or attacked on a daily or weekly basis in places like Sangin, Afghanistan, at a time when the rest of the country was still in a largely peacekeeping mode. British forces serving in these early periods were frequently engaged in conflict, and frequently relied on hostile act or intent ROEs, along with many of the other offensive ROEs, to justify force.

However, by 2007 heavy fighting in Helmand had resulted in a substantial number of civilian casualties, which became a divisive political issue in Afghanistan and back home in the U.K. As a result, in July 2007 the U.K. placed its forces on “Guidance Card Alpha” – the British ROEs and force posture designed for peacekeeping situations.¹⁶⁶ According to author Leigh Neville, this significant change was “in response to increasing collateral damage and civilian deaths caused by airstrikes and artillery, and the consequent political fallout from Kabul and Whitehall.”¹⁶⁷ Although not as significant as airstrikes and artillery, some of the interviews with soldiers and civilian monitors suggest that broad discretion in firing on hostile intent also contributed to the rising civilian casualties in Helmand in this period. Others interviewed suggested the change in posture was not specific to civilian casualties, but was a general response to changing dynamics and strategy in Afghanistan, which called for a more measured use of force.

The change to a peacekeeping posture significantly limited British soldiers’ ability to use hostile act and intent ROEs, and thus their ability to respond to many of the threats that were prevalent in Helmand, according to soldiers interviewed. This effectively limited soldiers to using force only in self-defense situations as the default, similar to the German experience prior to their force posture change in 2009 (in contrast to the German soldiers, though, U.K. soldiers might still be allowed to use offensive force with special authorization). One ground soldier serving in 2007 said that once the Card Alpha peacekeeping restrictions went into effect, midway through his tour, soldiers “couldn’t open fire unless there was a direct threat” to themselves or other soldiers.¹⁶⁸ He said this was difficult to apply in the Helmand river valley where he was deployed because the terrain offered ample opportunities to hide, so all of the threats against them were indirect or ambiguous, and they were limited from firing on those. “You can’t see direct threats coming on to you. The Taliban often can go through head high fields of corn... get ahead of you and just wait [to fire on you].”¹⁶⁹

Restrictions on British soldiers’ use of force continued to ratchet up in successive years. From 2009 onward, the ISAF counterinsurgency tactical directives (also aimed at reducing civilian casualties) further limited use of offensive ROEs for all ISAF forces, including British forces. These directives could not restrict use of force in self-defense, but would have affected all other uses of force, including force authorized by the hostile act or intent ROEs. Those deployed from 2011 onward said the overall tactical and policy approach resulted in increasingly tighter restrictions on uses of force and on operations that would expose British soldiers to risks or potentially incur civilian casualties. “They [the British government] were very much eyes on the finish line. ...We were pretty hunkered down... didn’t even go out on patrol,” one British soldier who served in 2012

said.¹⁷⁰ Another British soldier who served multiple tours in Iraq and Afghanistan said the interpretation of ROEs and the willingness to authorize use of force “changed massively” from 2011 on.¹⁷¹ He observed a much heavier emphasis on legal clearance and authorization for any use of force in his later tours, which he attributed to British government concerns about domestic lawsuits and public criticism.¹⁷²

As a result of these cumulative restrictions, British troops found their ability to respond to ambiguous or indirect threats significantly limited from 2007 on. There was a brief window in 2009 when Card Alpha restrictions were lifted temporarily, and hostile act and intent ROEs were made standing, or available as a default, for troops in RC-South in any counter-IED related operations or actions, and in certain high-intensity, high conflict areas.¹⁷³ However, for most of the rest of U.K. troops’ deployment after 2007, hostile act and intent ROEs, much less other offensive ROEs, could not be relied upon unless specifically authorized for the operation or in the moment. The authority to use these ROEs was often reserved to a higher level, creating a very high threshold for when such force could be used. A military lawyer stationed with British troops in 2008 in Helmand suggested that to receive an authorization to act on a hostile act or sign of hostile intent would typically take days of observation of the intended target and a great volume of paperwork.¹⁷⁴ Even then, permission would rarely be granted, so many ground troops simply stopped requesting it.

The British soldier who noted greater attention to liability concerns in the later years of British engagement also described an additional evidentiary hurdle troops faced in getting authorization to use hostile act or intent ROEs: video evidence. He remembered a situation in Helmand in late 2011, in which his patrol group was receiving active fire from a nearby compound and were pinned down. Although arguably this situation justified a hostile intent use of force, if not triggering self-defense itself, because they could not visually identify the fighter(s) and there was concern the compound might also contain civilians, they were restricted from firing. The commander of the unit called back for higher level authorization to fire, but it was not granted until a helicopter was able to fly over and send video imaging of the situation back to headquarters. “In the last three years of the war the British government wanted 100 percent surety and wanted to be able to prove [that any actions taken were lawful.] So they started to get this heavy emphasis on video surveillance and legal clearance.”¹⁷⁵

As a result of the successive restrictions, the U.K. case study illustrates the full range of experiences with self-defense and hostile intent, with those serving prior to 2007 responding to ambiguous or indirect threats in a way that was similar to, if not quite as broad as, U.S. troops, and those serving afterwards taking an approach that was among the most limited. One journalist who had embedded with British troops at different periods of time said the difference was stark: “In the past, [British troops] operated under a higher threshold than self-defense – it was hostile intent. If they saw someone on a mobile phone ‘dicking,’ that’s hostile intent and you can fire. Or at least, they could first [fire a] warning shot and if the kid keeps popping his head up, you can shoot to kill.” After the restrictions were tightened, he noted, “Then the Brits could only operate under the self-defense card. It’s amazing the difference. You see people moving around with weapons and you can’t shoot them.”¹⁷⁶

3.4.2 British Application of Self-Defense and Hostile Intent

The successive restrictions meant that what levels of force U.K. soldiers could use depended significantly on when they served. U.K. soldiers who served in Afghanistan prior to 2007 generally said they could respond to most of the five scenarios posed; those who served after 2007 could not fire in any of them.

Taking the first hypothetical of whether troops can be the first to fire, U.K. troops who were deployed after the 2007 ROE change generally said that they could not fire unless fired upon. In response to the related scenario of a Taliban who had dropped his weapon, they said that it was made very clear to them that if an individual was without a weapon—even if he had just fired it and dropped it—they could not fire on him. In contrast, troops stationed before 2007 or for the brief periods when rules were relaxed and hostile intent was standing, said that they generally could fire when they perceived a threat, including firing the first shot. As one U.K. soldier stationed in 2006 said, “Under these [war-fighting] ROEs if you see someone believed to be Taliban or enemy you can open fire, and kill them.”¹⁷⁷ Soldiers in the more permissive periods also said they could give pursuit or continue firing on someone who had fired on British troops provided they were positively identified, however, a completely unarmed man (a Taliban who dropped his weapon) might still call for restraint. As one commander deployed in early 2006 described it, “We came in with a clear understanding that if someone is engaging you with a rifle, and they still have weapon and still visible, then you can still fire on them even if they are withdrawing [because they are] still potentially a hostile threat.”¹⁷⁸

In response to the hypothetical of someone with a mortar, but not clearly presenting an immediate threat, British soldiers who served after 2007 generally said they could not fire because there would be no imminence, as required under the default self-defense rules. One British soldier with multiple deployments in Afghanistan said that under no circumstances could British troops fire if the threat was not imminent.

He offered the following example, “We had a situation one time ... Three guys walked in front of us, one with an AK-47, one with a radio, one with a mortar. We asked if we could engage and they said no, even though we had guys on the ground [and vulnerable].”¹⁷⁹ What it took for a situation like that to become an imminent threat would be some evidence that the individual was about to use the weapon. “The moment the guy points the rifle in your direction, you can engage. But if it’s pointed at his feet, then no. It can be as small a change as a few degrees of radius.”¹⁸⁰ Another commander noted that of course, a mortar might be determined to be a legitimate military target, but that would be a matter of forward targeting, not self-defense.

By contrast, soldiers serving during less restrictive periods seemed freer to target a man “holding a mortar or other military-grade equipment, although the certainty that it was a threat or the degree of imminence were still factors. One soldier serving in 2009 said that in a situation in which

Can troops shoot an individual carrying military-grade weaponry?

British soldiers’ experiences suggested the answer depended on whether they could respond under self-defense versus hostile intent authority.

Self-defense only: No.

“We had a situation one time ... Three guys walked in front of us, one with an AK 47, one with a radio, one with a mortar. We asked if we could engage and they said no, even though we had guys on the ground.” — Soldier serving when hostile intent ROE was limited

Hostile intent: Yes.

“If you see a guy walking toward you with ... an IED, you shoot them.” — Soldier serving when hostile intent ROE was standing

hostile act and intent ROEs were authorized, “If you see a guy walking toward you with a rifle [raised] or with an IED, you shoot them.”¹⁸¹ That said, he suggested that it would have to be clear that the man was a threat or that it really was an IED. Otherwise, there would be a risk of mistakenly shooting a civilian, who were also often armed. If it was not immediately clear, he said, they would first observe and be prepared to fire so that “If it looks like he’s getting in firing position or making his way toward you, you’d be ready to shoot. ... Even if on [hostile intent], you still had to have a justification [for shooting].”¹⁸²

A similar pattern emerged in the scenario of someone believed to be digging an IED. Those who served after 2007 generally said they were never allowed to do anything in response to such a situation, whereas those before, or in the brief window during 2009, offered some examples of greater flexibility. A soldier serving in 2006 noted, “If we believed someone was planting an IED or subsequently planning an attack, then they were a legitimate target [and we would fire on them].”¹⁸³ However, he said they would have to be certain he was planting a bomb. If there was any doubt about his actions or a risk of civilian casualties, then they would not fire on him, the soldier said.

Soldiers’ responses to whether they could target a so-called “dicker” (someone passing on information) also cleaved along the same lines of when they served. Those interviewed who were deployed during periods of restricted use of force (generally post-2007) said they would never receive authorization to fire on such individuals because they were unarmed. “British ROEs were very strict in that if the guy didn’t have a weapon in his hand, he hadn’t fired some shots, he wasn’t running away with a weapon

in his hand, then you couldn’t do anything,” one experienced British soldier said.¹⁸⁴ Those serving prior to 2007 or in periods when hostile intent and more aggressive force were available told a different story. One U.K. soldier who served before and after the force posture change noted that at the start of his tour, if they saw someone “dicking” they would try to shoot them but after the rule change they were no longer allowed.¹⁸⁵ A journalist who embedded with U.K. troops during the brief 2009 period, when hostile act and intent were standing, and then again after British troops were back on a self-defense, noted a similar change. He said the hostile intent ROEs appeared to allow British troops to fire on those suspected of passing on information or “dicking” (provided the information suggested a threat), but that under the more restricted ROEs, this was not allowed.¹⁸⁶

Another U.K. soldier in the course of a clear, hold, and build operation in 2009, with hostile act and intent ROEs standing and more offensive force readily available when they called back for it, described one such situation: “We dropped leaflets saying we were coming so [there were] no civilians in an area... We kept getting contacted. There was a guy on the hill and every time we got contacted, he’d be there on the

Can troops shoot a “spotter,” that is, someone passing on information?

British soldiers said that whether they could fire on a so-called dicker or a spotter (someone passing on information to facilitate an attack) depended on whether they could respond under self-defense versus hostile intent authority.

Self-defense only: No.

“British ROEs were very strict in that if the guy didn’t have a weapon in his hand, he hadn’t fired some shots, he wasn’t running away with a weapon in his hand, then you couldn’t do anything.”— Soldier serving when hostile intent ROE was limited

Hostile intent: Yes.

“There was a guy on the hill and every time we got contacted, he’d be there on the phone. And then when it died down he would disappear. So we got the green light and a sniper got him.” — Soldier serving when hostile intent ROE was standing

phone. And then when it died down he would disappear. So we got the green light and a sniper got him.”¹⁸⁷ In another example, the soldier noted that one time they heard someone through electronic eavesdropping, who had been directing fire, say that they would take a break and go for prayers. In such circumstances, he argued, “Are you going to wait 20 minutes for them to come back and then shoot them?” In such cases, he said they would be given permission to fire.¹⁸⁸

3.4.3 U.K. Restrictions Illustrate Balancing of Risks

“You do need ROE [limitations] because otherwise, some guys will just whack off [and fire unnecessarily]. That would be counterproductive. But some of these ROEs ... bore no relation to what was actually going on on the ground.”

British soldier who served in 2007 in Helmand

The contrasting U.K. experience at different points in time illustrates the full spectrum of policy, tactical and legal concerns surrounding this practice. The very limited recourse that U.K. troops had to respond to threats in the more restricted periods, where hostile act and intent ROEs were not regularly available, illustrates the very narrow basis of self-defense under British law. Similar to French and German domestic legal constraints, it is limited to only where necessary for an immediate defense of life. The difference between pre- and post-2007 restrictions illustrates that, while the hostile act and intent ROEs can enhance troops’ ability to respond to more ambiguous threats, force under these ROEs is much more vulnerable to tactical and policy restrictions. Where it was not available, U.K. troops found themselves in a very limited peacekeeping mode, which did not allow them to respond to the range of threats they were facing.

As suggested previously, one of the main motivations for increasing restrictions was the perception that broader interpretations and application of force were resulting in a higher risk of civilian casualties, which was seen to cause consequences at a policy level and create a risk of domestic criminal liability. “There were a lot of mistakes, kids shot,” one journalist said. “It’s very gray area under hostile intent. It’s where the mistakes come from and I think the Brits knew that.”¹⁸⁹ While the successive restrictions appeared to limit the risk of civilian harm to some extent, it did not entirely remove this risk, according to interviews. Outside of U.S. forces, the most frequent examples of overbroad threat interpretations and mistaken hostile intent determinations leading to civilian casualties involved British troops. Although many of these stemmed from the earlier years, before force restrictions were in place, they persisted throughout the deployment. One U.K. soldier offered an example from Helmand in 2013, in which troops from another company “saw a guy moving about near our camp and called down an apache strike on him because they thought he was on an IED detail. [...] It later turned out he was just carrying watermelons coming back from the bazaar.”¹⁹⁰

While the restrictions did not entirely curb the risk of mistaken threat interpretations, British soldiers and observers noted they sometimes limited troops’ ability to protect themselves. In interviews for this study and in the media, U.K. troops frequently argued that the rules had gone too far, and curbed force necessary to defend themselves. One journalist noted that the later policy restrictions on hostile intent curbed troops’ ability to defend themselves in some situations and gave the example of British troops pinned down for 45 minutes and not able to call for back-up fire because it was not deemed necessary.¹⁹¹

Several argued it was a case of a mismatch between the timing of the restrictions and the level of fighting on the ground. More than one of the U.K. soldiers interviewed noted that British troops saw the worst fighting in 2009 to 2011 as they supposedly

entered a peacekeeping role, and suggested there was a mismatch in the overall force posture and the level of threat on the ground. “You do need ROE [limitations] because otherwise, some guys will just whack off [and fire unnecessarily]. That would be counterproductive. But some of these ROEs ... bore no relation to what was actually going on on the ground,” one British soldier commented.¹⁹²

However, another British military commander said that U.K. ROEs and tactical restrictions struck the right balance. “It didn’t stop people from protecting themselves,” when needed, he said.¹⁹³ Instead, he argued that the “more ponderous” approach to use of force was a response to an evolution in conflict dynamics, from what he characterized as an open gunfight in places like Sangin, in Helmand in 2006, to a more settled conflict, in which a higher level of force and civilian casualties would not be appropriate.¹⁹⁴

3.5 Non-Legal Factors Affecting Self-Defense and Hostile Intent

The focus for this study has been on the differences in practice created by the underlying legal distinctions. However, it is important to note some of the other factors that soldiers highlighted in interviews. At an individual or unit level, many stressed the importance of psychological factors, and the command leadership style. At a national level, differences in training, in military traditions, or in the overall force posture toward Afghanistan were also important.

In response to the question of what affected self-defense or hostile intent interpretations, many soldiers, particularly U.S. soldiers, raised the psychological state and overall situational awareness of soldiers. Where mistakes were made about hostile intent, or excessive or disproportionate responses used, U.S. troops tended to attribute it not to differences in the legal interpretations or ROEs but to soldiers’ mental or emotional state or their level of experience dealing with these situations. As one U.S. commander noted, “Unfortunately if you’re aggressive or scared or emotional [hostile intent] might be misinterpreted.”¹⁹⁵ Many emphasized the difficulty of applying these definitions under the stressful conditions of combat. “Soldiers are under stress. [There is] already so much going on in these situations. No one sees everything, knows everything. You must make a decision in a second and you don’t have time to have a philosophic moment.”¹⁹⁶

The time period of a tour of duty, or deployment, was important to this psychological state and situational awareness. Multiple interviewees, from a range of countries, said that troops new to an area, and unfamiliar with what “normal” was, were more likely to read hostile intent into otherwise innocent actions, with mistakes certain to occur.¹⁹⁷ As a tour went on, many said, greater awareness and familiarity with the environment enhanced soldiers’ abilities to distinguish true threats and to accurately gauge hostile intent, potentially de-escalating the situation or finding alternatives to using force. Another senior U.S. commander with many years in Afghanistan noted, “The less you have local knowledge and Afghans involved, the more civilian casualties you’ll get due to hostile intent mistakes.”¹⁹⁸ However, this could cut both ways. Even if they had a better understanding of the culture at the end of a tour, which might lead to greater restraint, soldiers from all four countries said that just before the end of a tour, soldiers become less willing to assume risks and more likely to err on the side of using force to protect themselves in ambiguous situations. A tour that saw particularly heavy

“The more dangerous an area the soldiers are in, there’s a lower threshold for hostile intent. The psychological state will be worse where they’ve seen their friends die, and every Afghan outside your base is [seen as] a potential threat.”

Observation by American journalist frequently embedded in southern Afghanistan ²⁰²

fighting and casualties within the unit also increased soldiers’ tendency to see threats everywhere in their environment, or could lead to a desire for vengeance. “Troops are much more likely to treat all Afghans as bad when someone gets hurt. I’ve seen them be much more trigger happy and show less restraint [after troop losses]... When things are less kinetic and you have a better relationship with locals, you’re more likely to show restraint,” one U.S. civilian advisor observed.¹⁹⁹ Similarly, a French commander offered that when a fellow soldier is wounded or killed, there is a “natural desire to avenge yourself.”²⁰⁰ This is something that commanders have a responsibility to control, lest it loosen restraints on use of force, even in self-defense, he said.²⁰¹

Soldiers who were in more combat-heavy areas, and facing a much higher risk of threats materializing, were much more likely to respond aggressively, or to use excessive force, many said. “For the troops up north, not much happened to them so they weren’t as ready to shoot, versus the guys in Kandahar, where the previous week they were shooting so much they ran out of ammo,” were much more likely to be ready to respond to potential threats, one journalist offered.²⁰³

Many of the soldiers interviewed had been deployed in Iraq in addition to Afghanistan, and often drew a contrast between the level of hostilities and tensions in the two operations, and the effect this had on the propensity to see threats in their environment. As the same journalist noted, “There was such a palpable tension in Iraq. The stress level of soldiers seemed much more at a pitch. I found everyone to be way more on edge in Iraq,” and respectively higher levels of violence and more violent responses, he said.²⁰⁴ Many soldiers suggested that this is why there was a much greater tendency for over-broad interpretations of hostile intent in Iraq.

Soldiers interviewed from different ISAF troop contingents suggested that this helped explain why U.S. troops’ self-defense response in Afghanistan was much more aggressive than other forces—U.S. soldiers overall tended to be fighting in more kinetic areas with higher troop casualties and overall threat levels. In addition, U.S. forces tended to serve in these high-conflict areas for a longer period of time. On average, U.S. forces serve longer deployments than European counterparts—12 to 18 months as opposed to the four-to-six months typical among many other countries. Several German and French troops interviewed noted that their forces might have more aggressive responses too if they had served in the areas U.S. troops served, with as many troop losses, and with as long deployments. A French soldier commented that after six months of combat, the typical time for a French deployment, it can be hard for soldiers to “keep a normal perspective,” and maintain restrained behavior, especially where comrades are killed or wounded. He said he could understand how much harder it would be for American troops on a year-long or 18-month deployment, in more kinetic areas.²⁰⁵ Another German commander said that with Americans staying for one year, “naturally the tension keeps rising, and maybe also the willingness to use force.”²⁰⁶

The tempo of hostilities can change over time, and can result in one unit or battalion having very different responses from another deployed in the same location at a different point. A strong example of this is the September 2009 Kunduz bombing by German troops mentioned earlier, in which 100 to 150 were killed on the presumption that the two stranded oil trucks represented an “immediate threat” to the base. Previously Kunduz had been a relatively calm province, and German soldiers had a reputation for not engaging in significant fighting. This made the dramatic strike and high death toll all the more surprising. However, according to one commander,

the deteriorating situation in Kunduz in the period immediately preceding the strike resulted in the highest number of German casualties since 1955.²⁰⁷ He argued that this created a “siege-like mentality” among the German troops at the Kunduz PRT that may have led to them seeing self-defense threats even when they were not present.²⁰⁸

The military culture or training, as reinforced by the local commander, also plays into this situational awareness, and how soldiers interpret the guidance, notwithstanding combat stress. Although difficult to appraise objectively, French soldiers almost universally stated that their training emphasizes hesitating and thinking before any force is deployed, in nearly all situations. Many suggested that this core training could make a difference in gray situations in which they perceived a possible threat but use of force was not clearly called for.

German troops and commanders interviewed tended to emphasize the decentralized nature of the command structure—that the *how* of implementing an order was often left to the lowest level of authority. “The German military traditionally is very focused on giving the order of the effect or outcome you want, and leaving it to the subordinate to determine how [to implement it],” said one German military commander.²⁰⁹ This commander had extensive experience working with French troops in combined units in other contexts, and he argued that this difference in command structure, with French troops much more centralized, was key to explaining different ways of implementing the same ROE, in particular the hostile intent ROE. He argued that this would explain why French troops tended to call back for authorization even where the hostile intent ROE was standing, and in a clear hostile intent situation, versus when this was available to German commanders, they would feel more comfortable making the judgment call. Evaluating and appraising larger military leadership and command styles is beyond the scope of this study, but it is important to remember these other factors when evaluating national differences in interpreting and applying self-defense and hostile intent.

Finally, in addition to these psychological and command factors, differences in operational resources could also affect how commonly soldiers resorted to firing on hostile intent situations. In particular, greater availability of intelligence resources and information could influence whether soldiers felt more comfortable firing on what would appear to be a very ambiguous or unclear threat based only on the outward appearance, or immediate observation. As one senior military lawyer explained, “For the soldier it’s a split-second decision when faced with what you see to be a life-threatening act. But there’s a prior moment where you get intelligence that helps you make those decisions.”²¹⁰

This could include not only background information about threat levels and patterns prior to being faced with a potential threat situation, but also specific intelligence in the moment that would help verify whether an action posed a threat or whether the intent was to harm. As briefly noted in the German and U.S. case studies, U.S. soldiers had a more expansive intelligence network, with more available electronic eavesdropping and simultaneous translation. This could help in knowing whether an individual on a mobile phone was in fact passing on information to facilitate a direct attack—clear hostile intent—or just calling home, as one U.S. military lawyer put it.²¹¹

U.S. troops generally had the best access to such intelligence, however, some other contingents also had additional eavesdropping and intelligence resources, which helped troops make hostile intent determinations. Some of the interviews with British

troops and observers noted that Danish troops, serving in the same area of operations in Helmand as British troops, had fewer restraints on firing on hostile intent. Although not definitive, two Danish lawyers interviewed offered the suggestion that greater willingness to use force might have been partially due to greater real-time intelligence resources verifying threats. They said Danish troops had some level of surveillance equipment deployed down to a lower level, enabling some troop contingents to have more information in hostile intent situations.²¹² Dutch commanders interviewed noted that they maintained their own electronic surveillance network in Uruzgan, the province they took responsibility for, and that this allowed Dutch commanders to be more confident in authorizing use of lethal force in situations like someone passing on information, calling in an attack, or other ambiguous hostile intent situations.²¹³

By contrast, troops with less access to intelligence and eavesdropping resources to verify threats may have been less willing to make a hostile intent determination in ambiguous situations. This may have been a particular issue for many non-Anglophone contingents. During the Cold War, an intelligence sharing arrangement evolved between five Anglophone countries, the U.S., the U.K., Canada, New Zealand, and Australia, known as the “Five Eyes” agreement. Integrated into the classification system of all of the countries, it lowers the barriers to sharing intelligence among members of the “Five Eyes,” including critical, real-time “Signals Intelligence” such as intercepted communications in contexts like Afghanistan.²¹⁴ One Dutch commander remembered this being a particular issue for German forces, generating complaints about inequity in information sharing.²¹⁵

Interviewees’ varied in their opinion of how determinative these other non-legal factors were in influencing a state or a particular unit’s interpretation of self-defense, as opposed to the underlying legal rules. The importance of these other factors likely also varied depending on the particular situation. However, it is likely that these other non-legal factors become even more important where the legal standards themselves are loose. Where there is a clear legal rule that certain types of behavior or threat determinations are not permitted, then that legal rule will prevail. Where there is significant gray area, then other factors in decision-making, including the psychological state, command approach, or personal experience with threat determinations, may be dispositive.

4. Analysis and Conclusions

The state practice documented in the case studies illustrates some of the different interpretations or guiding lines that have emerged for self-defense and hostile intent, and the implications this has for different tactical and protection interests. The underlying legal interpretations or definitions taken by each state have been significantly influential in determining the expansiveness of self-defense or hostile intent, and when and how they were used. These positions set the parameters or outer bounds of this practice, and help determine how other tactical or policy restrictions might affect soldiers' ability to respond to indirect or time-distant threats. Although not the focus of this study, those interviewed also emphasized the importance of the psychological state of the soldier, his situational awareness, as well as availability of resources that could help determine the presence of a legitimate threat. Overall, U.S. troops had much greater flexibility for firing on ambiguous, distant, or indirect threats than European troops. Of these, Germany during its pre-2009 peacekeeping mode had the most stringent restrictions, followed by France throughout its engagement, and the U.K. in its more restrictive post-2007 period.

Except for the U.S., individual or unit self-defense remains a relatively narrow basis for use of force. Self-defense under German, French, and British doctrine remains a limited exception, often interpreted as a means of last resort after other alternatives have been tried. In addition, although all four require imminence, European forces' interpretation of imminence is much narrower. European forces require that self-defense be in response to an ongoing or immediately forthcoming attack, versus clear U.S. guidance that imminence does not mean immediate. Without this limiting factor of imminence, the U.S. self-defense paradigm could be applied to many more situations in Afghanistan. This appeared to be not only a theoretical possibility, but happened in practice in Afghanistan, with interviewees from all four countries noting that U.S. soldiers would frequently respond to threats that were not likely to manifest immediately, or in some cases even for days or weeks, under a self-defense paradigm.

The responses to the scenarios presented illustrate this transatlantic divide. U.S. forces could theoretically respond in all of the five scenarios under a self-defense framework, assuming the threat was clear based on overall threat patterns and information in the immediate situation. By contrast, European soldiers would not have been permitted to respond in self-defense to the latter three scenarios (possession of heavy weaponry, digging or remotely detonating an IED, or passing on information to facilitate a later attack), and there was even significant hesitancy on the second scenario of firing on an individual believed to have just fired if he was not directly armed (particularly for British and French troops).

Does the availability of hostile act and intent ROEs equalize this transatlantic difference? The case studies offer a mixed picture, but generally suggest that the ROEs did not fully equalize force levels. Ability to respond to hostile intent situations on a ROE basis is not the same as responding under self-defense authority because offensive or "mission accomplishment" ROEs can be constrained by policy or tactical restrictions

and frequently were in Afghanistan, as the British and German case studies illustrated. Whether these ROEs are made standing, and whether authorization is delegated to a lower level, can also make a difference in how available hostile intent authority is.

In terms of how hostile act and hostile intent have been interpreted, U.S. troops were overall more comfortable with their ability to use lethal force against ambiguous or time-distant threats (where a clear threat was presumed) than European forces, even when hostile act or intent ROEs were authorized. In essence, even though the literal definitions and vignettes provided in guidance are often the same, in practice U.S. interpretations of hostile act and intent concepts are more flexible, and apply to a greater range of threat scenarios. U.S. troops are also more empowered even at a lower level to make a hostile intent threat determination on their own and respond with force if deemed necessary, although calling back for authorization or guidance where time permits is consistently encouraged.

Of the three European countries, British troops pre-2007 had an interpretation and experience with hostile act and intent ROEs that came closest to U.S. troops'. A succession of tactical and policy restrictions from mid-2007 onward significantly limited British troops' ability to use force under the hostile act and intent ROEs. These restrictions may have brought with them a more conservative, less flexible interpretation of hostile intent, in addition to requiring additional levels of authorization and process, which made it difficult to obtain permission to use force under these ROEs.

German and French troops were overall more insistent on having to find alternatives or additional information to substantiate the threat, even under a hostile intent paradigm. It is possible that this is due to the association with self-defense—hostile act and intent can still seem quasi-defensive and can be hard to distinguish from self-defense situations, so troops may unconsciously conflate the two paradigms and apply self-defense restrictions to hostile act and intent. The French interpretation of hostile act and intent appeared to be very much infused by the limited, direct and immediate framework of a self-defense response, even if it was a distinct, and technically offensive, use of force. Differences in command approach, or in the availability of intelligence resources to verify a claim also may have helped explain German and French troops' more hesitant approach.

Different perceptions of how much imminence matters under hostile act and intent ROEs also contributed to the lesser flexibility for European forces under the hostile intent paradigm. Even if hostile act and intent ROEs technically denote offensive force (which is not limited by imminence), both British and German troops seemed to require a greater degree of imminence of the threat than U.S. troops, if not as tight or immediate as under self-defense. Here again, what may be happening is an associative effect—the quasi-defensive nature of hostile intent situations results in soldiers unconsciously carrying over some elements from the self-defense paradigm, including self-defense's most important element of imminence, into their application of hostile act and intent ROE. For French troops, this was the most exaggerated, with French troops seeming to apply the same understanding of imminence in self-defense to situations authorized by hostile act and intent ROEs.

4.1 Impact for Protection

Where the lines are drawn in terms of when soldiers may fire in self-defense or in response to a sign of hostile intent has important implications for civilian protection, and also for the overall strength of IHL accountability for uses of force. An expansive use of self-defense and hostile intent was found to be a leading cause of civilian casualties in Afghanistan by both civilian observers and in military lessons learned studies. Civilian casualties appeared to happen more frequently when the doctrine was broadly interpreted, because with a lower threshold for what behaviors might constitute a threat there is a greater risk of conflating normal civilian behavior with a targetable threat. The U.S. doctrine is the broadest and creates the greatest risk of civilian harm. However, mistaken or broad threat targeting also happened among other ISAF troops at certain periods of time, notably U.K. practice prior to 2007.

An expansive notion of self-defense was more frequent in Iraq than in Afghanistan, and more in earlier years of engagement. While the most extreme examples were curbed over time, the broad threat categorizations still led to a significant number of civilian casualties throughout the engagement in Afghanistan. Overbroad interpretations of self-defense and hostile intent may increase the risk of incidents in which civilian behavior is not distinguished from combatant activity. It would potentially make targetable actions that would not necessarily constitute direct participation in hostilities. Where this happens regularly, across the entire force contingent, this may raise additional concerns about whether warring parties are taking all feasible precautions to avoid harm to civilians or civilian objects, as required under IHL.²¹⁶

Over-readiness to perceive a need for self-defense also too frequently resulted in excessive or unnecessary force. This was most frequently documented with U.S. soldiers, and may have been due to the broader or more flexible standards, or to the state of psychological pressure, since U.S. troops more frequently served longer tours in more kinetic areas. The number of incidents of excessive or extreme responses in self-defense situations were significant enough to raise concerns about the interpretation of necessity and proportionality under the U.S. self-defense standards. This would be an important point of inquiry in the future development of hostile intent standards, and in terms of developing guidance and limitations for future engagements.

In addition to these legal and humanitarian concerns, it is important to highlight the tactical and strategic consequences of a higher risk of civilian casualties under a self-defense paradigm. The extensive measures to reduce the risk of civilian casualties through the series of ISAF tactical directives from 2009 onward were motivated by concern that popular backlash in response to civilian casualties was undermining the counterinsurgency strategy and fueling attacks against international soldiers. Because it tends to be treated as a separate justification for force and tactical directives do not apply to it, self-defense can act as a large loophole to these tactical restrictions. Where self-defense is interpreted expansively such that it applies to a wide range of situations, and with broad threat categorizations that can increase the risk of civilian harm, then it may undercut the strategic value of restrictions like the ISAF tactical directives.

The lessons learned about self-defense, hostile intent, and civilian protection have important bearings for other contexts. There is an inherent risk in having a very broad, very subjective and threat-based targeting model. If hostile intent plays an equal role in future conflicts or peacekeeping deployments, it would be important to

build on the learning curve in Afghanistan, and other contexts, and ensure that there are appropriate checks on overbroad hostile intent determinations. It is even more important to further develop and clarify limits on overbroad use of force if self-defense continues to be used in a greater range of use of force situations. Otherwise, there is a risk that the existing IHL standards and framework will be increasingly displaced by a different use of force framework with potentially laxer standards than IHL.

In addition to its likely use in future conflict and post-conflict scenarios, during the course of the research, interviewees frequently raised the relevance of these hostile intent and self-defense concepts for domestic policing situations. Many drew a connection between civilian casualties resulting from overbroad threat categorizations in counterinsurgency or stabilization contexts, and mistaken identity, profiling, and citizen deaths in policing situations. Some argued that international military returning from deployments in places like Afghanistan are better trained and have more experience dealing with ambiguous threats than police officers who did not have this experience, or pointed to the much greater depth of legal and command guidance supporting soldiers to make these real-time decisions. Soldiers in most contingents and situations had the ability to, and were encouraged to, seek the advice of on-call military lawyers where they faced an unclear hostile intent situation. Civilian police officers do not tend to have such on-call legal guidance. On the flip side, the prevalence of overbroad threat categorizations in Afghanistan (at least among U.S. forces) and the not insignificant number of civilian casualties that resulted suggest there is still work to be done in refining how these threat determinations are made on the military side; it may yet be premature to suggest cross-over lessons learned for civilian sectors.

4.2 Accountability Issues and the Impact on the IHL Framework

The incidents of overbroad threat interpretations and excessive or unnecessary force also raise concerns about accountability under the IHL framework in two ways: first, they underline the extent to which incidents justified under the self-defense paradigm were more difficult to investigate or scrutinize; and second, they raise the potential that the self-defense paradigm can bring with it lower, less protective standards than those applied to uses of force justified under an IHL framework. Both of these issues together feed into a larger concern about displacement of the IHL framework.

Interviews suggest self-defense cases are more difficult to raise questions about because in addition to the ambiguity surrounding self-defense standards, self-defense determinations are extremely subjective, and there tends to be a degree of deference to the soldier who felt his life was at risk. This happens both with formal, court proceedings and the sort of lower-level, more regular investigations into incidents by military lawyers and IHL monitors. Only a handful of cases have gone forward to trial, and the charges have almost always been dismissed or the soldier found not culpable.²¹⁷ In many cases, other disciplinary actions short of trial may have been applied. However, military lawyers interviewed said that where a soldier claims a risk to life was present, there is a hesitancy to second-guess him.²¹⁸

In interviews for this study, those who had investigated civilian casualties in Afghanistan noted that incidents involving self-defense claims were more difficult to investigate and hold to account because the threat perception is so subjective. One noted

Civilian Protection, Self-Defense Justifications, and Unintended Consequences of Tactical Restrictions

BOX 6

As discussed earlier, there were extensive measures taken to reduce the risk of civilian casualties in Afghanistan, including through the ISAF tactical directives, as well as bilateral efforts like the U.K. Card Alpha change. While designed to decrease civilian casualties, they may have created some unintended side effects, with other consequences for civilian protection. Where the tactical directives and other policy measures tightened use of force under offensive or mission accomplishment ROEs, soldiers still seeking to respond to what they saw as legitimate threats would try to shoehorn these uses of force into a self-defense or “imminent threat” designation. This was most clearly illustrated in the German bombing in Kunduz, but also arose in other interviews with British soldiers, who argued that they would try to argue for authorization on an imminent threat basis because it was their only way to get authorization to use force (this is not to suggest that permission was always granted). A French lawyer who had deployed with French troops in Afghanistan said that not so much for French troops but for other parts of the ISAF contingent, the “Troops in Contact” designation, which is based on troops under immediate threat, had become “the magic word” in terms of troop contingents getting air support that they wanted, even if otherwise limited from doing so.ⁱ

Uses of force justified under self-defense tended to be harder for independent monitors to investigate, and appeared to come under less scrutiny. Under some interpretations they may carry a lower standard of protection than IHL. Tactical restrictions on offensive uses of force may increase the tendency to justify uses of force under a self-defense paradigm – this may have played an important role in the expansion of self-defense in Afghanistan. As a result, although designed to increase civilian protection by encouraging restraint, the tighter restrictions may have created the unintended side effect of pushing more uses of force under a self-defense paradigm, with potentially lower standards or scrutiny of them.

i. [FR2] Interview with French military lawyers, Paris, France, June 18, 2015 (on file with author).

that it can be hard to gather objective evidence in hindsight, so often the determination of whether self-defense was justified or not will come down to the civilian witness’ testimony against the soldier’s, a “he-said, she-said,” that is difficult to resolve.²¹⁹

This can undermine overall accountability in an armed conflict situation. Because self-defense was so prevalent in Afghanistan, independent investigators said their ability to inquire into civilian casualty incidents was more frequently limited. One UN investigator argued that, by 2012, to say that a civilian had demonstrated “hostile intent” had become a “very convenient excuse” that often “obviate[d] the need for a lot of investigation.”²²⁰ “The problem is that it is so subjective that it could be used to explain away a lot,” he said.²²¹

There is an obligation to investigate suspected war crimes, and hold them accountable under IHL.²²² These obligations are typically met by state militaries’ internal reporting and disciplinary procedures, and by the relevant prosecutorial mechanisms, whether through a state’s military justice system (as with the United States) or regular civilian judicial system (as with France, Germany and the United Kingdom). However, accountability is also increasingly enhanced in practice in the form of independent investigation and reporting by independent monitors such as those affiliated with the United Nations system, or by human rights groups. Although

By 2012, hostile intent had become a “very convenient excuse” that “obviate[d] the need for a lot of investigation,” argued a UN investigator

these fall into the realm of non-binding “soft law”, independent investigations and external pressure play a key accountability role in informally enforcing IHL and helping prevent future violations or unintended civilian harm. Thus, the concern that the greater prevalence of these self-defense or hostile intent determinations might block independent investigation into civilian casualty incidents is a serious concern for future engagements.

Expanded use of self-defense may also be undermining IHL’s ability to place limits on use of force at a systemic level. Investigators’ comments point to a strong risk that this alternative justification for uses of force outside of the IHL framework, with ambiguous standards and a high level of deference to the soldier’s immediate threat perception, can displace the traditional IHL standards in a greater range of incidents in armed conflict. This would be even more concerning where the self-defense standards applied are less protective than IHL standards. The higher frequency of civilian casualties and reports of “unnecessary” or excessive force in the U.S. application of self-defense raise a question whether the necessity and proportionality standards under the U.S. interpretation of self-defense are more permissive of civilian harm than the similarly named standards under IHL.²²³ Even where the standards are not starkly different, the shift to the self-defense paradigm may result in soldiers placing more weight on the immediate threat than other factors in the moment of deciding whether to use force or not. Or, there may be a risk that justifying more incidents under a self-defense rather than a regular targeting paradigm results in a less considered or deliberative targeting process than might be required under IHL, as with the German strike in Kunduz in 2009. The ambiguity over what the standards should be makes it difficult to draw decisive conclusions, but these are issues that should be explored in greater depth, and considered in the further development of this doctrine.

In addition to these concerns about creating alternative, potentially lower standards within an armed conflict context, the expansion of this practice to U.S. hostilities beyond an active conflict zone may lower overall thresholds against use of force in the international system. The use of self-defense to justify significant, independent strikes by counter-terrorism forces in Africa, as exemplified by the March 2016 strike on al-Shabab, suggests there has been a significant expansion in how this concept is being used. The principles and restrictions created under the *jus ad bellum* paradigm were established due to larger concerns about limiting a state’s resort to force within the international system. If the threshold of when states may resort to force *jus ad bellum* is now whenever an individual soldier wherever deployed faces an imminent—and not immediate—threat, then it may significantly weaken the overall prohibition on states’ resorting to force. It may also undermine domestic restrictions on when a state may engage in conflict, which provide a democratic check on going to war.

With self-defense applicable to any number of threats, on an extremely extended imminence timeline, it could threaten to become the exception that swallows the rule, displacing IHL in many areas and undermining overall IHL accountability.

4.3 Soldiers’ Defense and Tactical Restrictions

While the civilian protection and accountability concerns are important, the pendulum can swing too far the other way, as the experiences of British and German

soldiers in more restricted periods illustrated. Self-defense is a necessary doctrine, both in ensuring soldier protection and ensuring that forces can carry out their broader protection missions. The experience of British and German soldiers during more limited periods suggests that a slightly more extended version of self-defense is important in conflicts like Afghanistan. Soldiers did not offer direct examples of not being able to protect civilians due to too tight self-defense restrictions in Afghanistan, but several German and British soldiers offered examples of not being able to target clear threats or combatant activity. Several commanders and soldiers argued that what would have been important was a level of discretion to respond to ambiguous but very real threats. “I wish that... [we had been] trusted to make more judgement calls. But of course, the danger is when you get into the gray areas, that you also get bad judgment calls. You can give them [troops] too much freedom, or reign them in too much,” one U.K. soldier said.²²⁴

This is not a new issue *per se*. UN peacekeeping missions have long struggled with what level of offensive or extended force to empower peacekeepers with, as they have evolved from primarily observation missions in the 1940s, to an expectation of some level of protection or other mission goals from the 1990s onward.²²⁵ Self-defense was always presumed, but peacekeeping missions have gradually moved away from an extremely narrow definition of self-defense, toward force authorities that include defense of civilians or defense of the mission.²²⁶ Failure to have a robust enough level of force to protect civilians or the mission during the 1990s and early 2000s is the reason that the generic ROE, authorized for UN peacekeeping missions, now authorize use of force up to deadly force in self-defense or to “protect civilians under imminent threat of physical violence.”²²⁷

There has come to be a recognition that the ability to carry out the mission also depends on the ability to project force and respond to ambiguous threats in many peacekeeping and stabilization missions. As a result, as with the ISAF forces in Afghanistan, many peacekeeping missions also include hostile act and intent ROEs.²²⁸ However, as the case studies of European countries in Afghanistan suggest, the issue is not just whether hostile act and intent are present in the ROEs, but how available they are, based on tactical or policy restrictions, or the force posture. If the ability to respond to more ambiguous threats or support mission tasks is technically part of the force authorizations, but effectively limited by tactical or policy restrictions, then soldiers may find themselves in the same position as the early peacekeeping missions—hamstrung from protecting themselves, civilians around them, or their mission.

4.4 Ways Forward

Ultimately where the boundaries are drawn on self-defense is a question of allocating risk. When asked about the difference between ISAF forces on self-defense, one United Nations investigating officer explained, “The main thing is that they have different levels of risk at which point they are allowed to use force. In general Europeans would have to wait longer and have more provocations than American forces before they use deadly force.”²²⁹ Similarly, a U.S. military lawyer argued that the international community and international law reflect the position that forces “assume the risk” of being attacked, and “Europeans accept this risk more than the U.S. does.”²³⁰

How to balance the risk between combatants and civilians, and how to ensure sufficient protection standards without limiting what is militarily necessary, are fundamental questions that IHL has grappled with throughout its historical development. These questions are being reconsidered in response to emerging threats in modern conflict, with one result being the growth of the self-defense and hostile intent paradigms. However, because these paradigms are coded as self-defense or ROE issues, this reconsideration is largely taking place outside the realm of IHL discussions. What is needed is a more considered discussion of the different tensions between using force under a self-defense or IHL paradigm, and how these interact with other tactical controls or policy considerations within armed conflict or peacekeeping situations. This is a discussion that needs to be happening not only among the military, but among the broader range of jurists, IHL observers, and other civilians who are active in monitoring and supporting appropriate use of force in armed conflict. There are a number of ways to advance such a discussion:

First, all NATO member states should clarify their positions on self-defense, hostile act and hostile intent, and the relationship between these concepts and IHL. While this study found enough evidence to reach conclusions on different states' positions with regard to the legal rules guiding the self-defense right, and (where separate) for use of force under hostile act and intent authorizations, it was far from straightforward. The underlying legal basis has consequences for how broadly or narrowly the right is conceived, and also which standards apply. Thus, it is difficult to advance discussion on the overall practice and standards without having clarity on this fundamental point. Greater doctrinal clarity might also help in building an emerging consensus on what the standards and limits of self-defense should be. As the case studies indicate, there are significant differences in what states view as the legal basis and applicable standards, and in where states draw the lines surrounding what uses of force are permissible under these paradigms. It is difficult for these different viewpoints to begin to cohere with such ambiguity over the underlying standards and positions themselves.

Having clearer guidance and doctrine on these practices might also help those engaged in trying to guide soldiers in applying these standards and in enforcing them. Military lawyers interviewed from all four countries have noted that these cases have been difficult to investigate and explore from a jurisprudential standpoint because of the lack of clarity over standards. In the limited and mixed jurisprudence that exists, basic questions such as whether a law of war analysis or a criminal justice framework should be applied remain unanswered, with prosecutors applying one or another to claims of self-defense on a case-by-case basis.²³¹ Having clear standards on how self-defense or hostile intent decisions should be held to account might also begin to address some of the challenges that independent investigators faced in Afghanistan, and allow them to have the same type of conversations about accountability for these incidents as they do for those justified under offensive uses of force.

Second, in addition to clarifying the overall doctrine, there is a need to consider the substance of these emerging doctrines. States should be careful to strike a balance between ensuring that a soldier's self-defense rights are appropriate to armed conflict threats, but that this self-defense paradigm is not unconstrained. In clarifying the doctrinal positions and standards applicable to self-defense, states might try to strike a balanced approach, aiming for a self-defense paradigm that is neither overbroad nor too limited, taking into consideration the concerns raised in this study.

"I wish that ... [we had been] trusted to make more judgement calls. But of course, the danger is when you get into the gray areas, that you also get bad judgment calls. You can give them [troops] too much freedom, or reign them in too much."

British soldier who served in 2007



In modern international conflict, deadly threats can come from anyone or anywhere. A farmboy planting something or digging in the ground might be tending crops or shoring up irrigation, or he might be planting explosives. How soldiers interpreted such situations was a life and death question, with either soldiers or civilians' lives hanging in the balance. How to balance the risk between combatants and civilians, are fundamental questions that IHL has long grappled with. These questions are being reconsidered in response to emerging threats in modern conflict through the growth of the self-defense and hostile intent paradigms. Helmand, Afghanistan, October 2009. Photo: © David Gill • shot2bits.com

Avoiding a too limited conception: The experiences of German and U.K. soldiers in more restricted periods suggest that it is important that the soldiers in complex, counterinsurgency or peacekeeping environments have some flexibility to respond to ambiguous or indirect threats. Their scope to respond defensively must be greater than exists for citizens in a peacetime environment. One approach would be to broaden the interpretation of soldier self-defense for European countries, such that it encompasses some ability to respond to some hostile act and intent situations (even if not as broad as the U.S. conception). Alternatively, authority to respond to such situations could remain available only under mission accomplishment ROEs (still beyond the core self-defense rights), but in that case, it would be important to ensure that these hostile act and intent ROEs are protected from tactical and policy restrictions to a greater extent than they currently are, and are made available and delegated to lower command levels. In essence, since hostile act and intent authorizations function more as quasi-defensive uses of force, they might also be treated as quasi-defensive forces and distinguished from other uses of offensive force. Where tactical or policy restrictions or mission rules are placed on uses of force, these quasi-defensive ROEs would be protected (essentially available) more than purely offensive force, if still not treated as the absolute, inherent right of pure self-defense.

Avoiding expansive interpretations: However, while there may be a need to broaden or enhance European troops' ability to respond to ambiguous threats, high civilian casualties and displacement of the IHL paradigm may result from a too expansive self-defense concept, as is currently most illustrated by U.S. practice. This includes ensuring that any interpretation of self-defense does not in practice lead to overbroad targeting, with a higher risk of considering civilians and civilian behaviors as threats. Some of the work on this has already begun, over the course of the learning curve in Afghanistan, but more attention is needed to the risk of overbroad designations, particularly in high threat environments, for example in night raids or other counter-terrorism operations. In considering how to tighten U.S. standards, greater attention should also be given to the way that the necessity and proportionality standards are interpreted under unit or individual self-defense. While soldiers must be able to respond when they perceive a threat, given other humanitarian and tactical considerations, there is some value in keeping this a relatively limited basis for force, only when actually necessary and only to the degree needed to defuse the threat. Reports of frequent excessive or unnecessary responses under a self-defense framework by U.S. soldiers undermine that limited paradigm and may increase the risk of civilian casualties.

The most significant change would be to cabin the definition of imminence in U.S. self-defense. The current extended U.S. view of imminence is the factor most responsible for self-defense's more expansive use as a justification for the use of force. It enables it to be used in more threat scenarios within an armed conflict, including in situations that might otherwise be dealt with through regular IHL targeting processes. It also allows it to be used more broadly against time-distant threats outside of hot battlefields, a substantial erosion on overall limits on use of force. The extremely extended U.S. view of imminence in unit and individual self-defense—as in no longer in accordance with the dictionary definition of immediate—only came into existence in 2005. One military lawyer who has studied the enactment of this rule argues it was strongly influenced by the Bush Administration push to enlarge the U.S. understanding of imminence in its sovereign right to self-defense in the period leading up to the invasion of Iraq.²³² The

Bush administration position on preventive force has since been rolled back, but the legacy of an extended imminence in the *in bello* individual or unit self-defense lives on. The two need not be linked; there may be very justifiable reasons why imminence might be more constrained at a soldier or unit level than at a state level.

While it would still be good for troops to have a recourse to immediate and necessary self-defense wherever they are, this right should be even more narrowly construed beyond a hot battlefield. The scale of the self-defense response also matters. A soldier's response to an immediate threat with his own personal weapon is different from a pre-planned drone strike that kills 150 presumed combatants (as with the 2016 U.S. strike on a Shabab training camp). The more a tactical self-defense response is used to justify what otherwise would appear to be a significant act of aggression, the more it weakens the overall limits on use of force.

In conclusion, greater recognition of self-defense and hostile intent by all state parties and observers engaged in monitoring armed conflict would enhance further development and regulation of this emerging practice. Uses of force under self-defense and hostile intent paradigms have emerged to fill a gap in responding to more ambiguous threat situations in modern conflict. In some ways, they are more apt for capturing necessary responses in modern armed conflict than IHL status-based determinations. However, the lack of recognition of these practices among the broader legal community and among other humanitarian actors has resulted in lesser levels of scrutiny and accountability for how these paradigms are interpreted and applied, which has directly contributed to some of the problematic practices that have arisen.

This practice is not going to go away any time soon. Greater consideration for some of the issues surrounding self-defense and hostile intent earlier might have prevented significant civilian casualties in Afghanistan, while enabling use of force paradigms that made it easier for soldiers to carry out their mission. Modern warfare will continue to pose life-and-death challenges to the blurry boundaries between IHL, self-defense and hostile intent. The lives of soldiers and civilians alike depend on our ability to clarify the legal framework and practice surrounding this critical juncture.

Key recommendations going forward include:

- All states should clarify their positions on self-defense, hostile act, and hostile intent concepts, including how standards drawn from other bodies of law translate in soldier's self-defense, and the relationship with IHL.
- Past lessons learned in distinguishing regular civilian activities from threat patterns, which have somewhat curbed overbroad threat determinations, should be incorporated into future practice in other conflict and stabilization environments. However, persistent civilian casualties in self-defense and hostile intent situations, most prominently among U.S. practice, suggest a need for further limits. More attention needs to be given to the significant latitude given to hostile intent determinations in kinetic activities, such as in night raids or other counter-terrorism operations.
- The prevalence of allegations of excessive or unnecessary force by U.S. forces under a self-defense or hostile intent paradigm raises a question whether force

that might be considered unnecessary or excessive under IHL is permitted under self-defense. This issue should be explored further, with a view toward ensuring consistent protection standards for civilians across all armed conflict situations.

- An extremely extended interpretation of imminence within the self-defense paradigm, as with U.S. practice, runs the greatest risk of displacing IHL within armed conflict, and of undermining constraints on use of force outside of declared conflict zones. While some degree of pre-emption may be necessary to deal with ambiguous threats, there must be some outer limits, particularly where self-defense is used to justify uses of force beyond a hot battlefield.
- Where states continue to base the right of self-defense on domestic law, as most European countries do, there must be some clear direction of how these domestic laws apply in an armed conflict situation, allowing for some greater degree of leeway than a civilian in a peacetime situation might encounter.
- In addition, if self-defense remains extremely narrow for European forces, then there must be greater consideration given to protecting ROE-based authority for responding to ambiguous or indirect threats. Given the importance of responding to these threats in many counterinsurgency or peacekeeping situations, hostile act and intent ROEs should not be as easily limited by tactical or policy restrictions as other types of offensive force.
- Legal scholars and rights monitors should recognize the growth of this practice in armed conflict, and its implications for protection concerns and IHL accountability. Greater engagement in emerging standards will result in a more considered practice that adequately balances soldiers needs and civilian protection imperatives.

Endnotes

- 1 E. L. Gaston, "Reconceptualizing Individual or Unit Self-Defense," *Harvard National Security Journal* 8 (2017), <http://harvardnsj.org/wp-content/uploads/2017/02/Gaston-NSJ-Vol-8.pdf>.
- 2 For a more in depth discussion of the ambiguity and complications created in applying standards from other bodies of law to soldier, self-defense, see *ibid.*, 300-304.
- 3 [FR4] Interview with French commander, Paris, France, June 23, 2015 (on file with author).
- 4 [UK1] Interview with former British soldier, London, U.K., March 31, 2015 (on file with author).
- 5 Center for Army Lessons Learned, *Afghanistan Civilian Casualty Prevention Handbook* 6 (June 2012), 21, <https://info.publicintelligence.net/CALL-AfghanCIVCAS.pdf>.
- 6 Joint and Coalition Operational Analysis (JCOA), *Reducing and Mitigating Civilian Casualties: Enduring Lessons* 10 (April 2013), <https://publicintelligence.net/jcoa-reducing-civcas>.
- 7 Marc Garlasco, "Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan," *Human Rights Watch*, September 8, 2008, 18-19, <https://www.hrw.org/report/2008/09/08/troops-contact/airstrikes-and-civilian-deaths-afghanistan>.
- 8 For a discussion of the evolution of Escalation of Force procedures and how they have related to threat perception in counterinsurgency contexts, see Lieutenant Colonel Randall Bagwell, "The Threat Assessment Process (TAP): the evolution of the escalation of force," *The Army Lawyer* (April 2008) 5, https://www.loc.gov/rr/frd/Military_Law/pdf/04-2008.pdf.
- 9 [US20] Telephone interview with U.S. commander, April 4, 2012 (on file with author).
- 10 [UK11] Telephone interview with former British soldier, October 19, 2015 (on file with author).
- 11 Erica Gaston and Jonathan Horowitz, "The Cost of Kill/Capture: Impact of the Night Raid Surge on Afghan Civilians," *Open Society Foundations* (2011).
- 12 [OT13] Interview with British journalist, Kabul, Afghanistan, February 14, 2012 (on file with author).
- 13 Gaston, "Reconceptualizing Individual or Unit Self-Defense," *Harvard National Security Journal*.
- 14 The author initiated and participated in a research study by the Harvard Human Rights Program on hostile intent in 2009, and relied on 29 of the interviews from that study, which primarily focused on U.S. practices. Harvard Law School International Human Rights Clinic, *Tackling Tough Calls: Lessons from Recent Conflicts on Hostile Intent and Civilian Protection* (March 2016), <https://www.justsecurity.org/wp-content/uploads/2016/03/Tackling-Tough-Choices-Hostile-Intent-HLSIHR-2016.pdf>. Forty-six further interviews were conducted with lawyers or troops from other NATO forces. For both phases of research, interviewees were identified through snowball sampling. Through past experience working in Afghanistan on civilian protection and civil-military issues, the author had existing contacts with soldiers who had served in Afghanistan and Iraq. These interviewees often recommended other colleagues they had served with after they were interviewed. Additional interviewees were identified from public reporting, or introduced by journalists or ministerial officials who had served in Afghanistan.
- 15 In its General Comment 31, the United Nations Human Rights Committee, affirmed that the human rights principles and treaty obligations do not cease in periods of armed conflict: "[T]he Covenant applies also in situations of armed conflict... While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specifically relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive." General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/CRP.4/Rev.1 (May 26, 2004), Auth/81, §11. See also Concluding Observation of the Human Rights Committee, Israel, §11, CCPR/CO//78/ISR (August 21, 2003) Auth/80. The UN General Assembly Resolution no. 2675 also affirmed that human rights continues to apply in armed conflict. UNGAR 2675 (XXV) of 9 Dec 1970 (Auth/79).
- 16 Gary D. Solis, *The Law of Armed Conflict, International Humanitarian Law in War* (Cambridge University Press, 1st Edition: 2010), 258.
- 17 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, Art. 35(2). See also Solis, *The Law of Armed Conflict, International Humanitarian Law in War*, 269.

- 18 International Committee of the Red Cross [ICRC], Customary International Humanitarian Law (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005), “Rule 1. The Principle of Distinction between Civilians and Combatants,” *International Committee of the Red Cross (ICRC)*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1. [hereinafter ICRC Customary IHL Study].
- 19 Protocol I, Art. 57(1); Protocol II, Art. 13(1); ICRC Customary IHL Study, Rule 15.
- 20 ICRC Customary IHL Study, Rule 11, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule11.
- 21 ICRC Customary IHL Study, Rule 14, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14.
- 22 For more on changing dynamics of warfare, in particular in relation to intra-state and civil wars, see Human Security Report Project, *Human Security Report 2009/2010: The Causes of Peace and The Shrinking Costs of War* (Oxford University Press: 2011); Human Security Centre, *Human Security Report 2005: War and Peace in the 21st Century* (Oxford University Press: 2005); Stathis N. Kalyvas, “The Changing Character of Civil Wars, 1800–2009,” in Hew Strachan and Sibylle Scheipers eds., *The Changing Character of War* (Oxford University Press: 2014).
- 23 Protocol I, Art. 51(3); Protocol II, Art. 13(3).
- 24 International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law 59 n.151 (Nils Melzer ed., 2009), <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>. Program on Humanitarian Policy and Conflict Research, Harvard University, *IHL and Civilian Participation in Hostilities in the OPT* (October 2007), <http://www.hpcrresearch.org/sites/default/files/publications/ParticipationBrief.pdf>; ICRC Customary International Humanitarian Law Study, Rule 6; HCJ 769/02 *Public Comm. Against Torture in Israel v. Gov't of Israel (Targeted Killings Case)* (2005).
- 25 Joint and Coalition Operational Analysis (JCOA), *Reducing and Mitigating Civilian Casualties: Enduring Lessons* (April 2013), 1, <https://publicintelligence.net/jcoa-reducing-civcas/>.
- 26 [US11] Interview with senior U.S. military lawyer in Washington, D.C., April 12, 2012 (on file with author).
- 27 [US15] Interview with former U.S. military lawyer, April 12, 2012 (on file with author).
- 28 Ibid.
- 29 [OT11] Telephone interview with IHL investigator, February 27, 2012 (on file with author); [OT10] Telephone interview with UN Staff, February 17, 2012 (on file with author). Further confirming this pattern, in its investigation of air strikes in Afghanistan, Human Rights Watch found that both NATO and the U.S. require “hostile intent” for air strikes to be authorized to defend ISAF forces. Garlasco, “Troops in Contact.”
- 30 One example of this was documented in the radio transmissions and cockpit conversations, which were obtained by the Los Angeles Times investigation, surrounding a February 21, 2010 U.S. airstrike that resulted in an attack on civilian vehicles. See “Transcripts of U.S. drone attack,” *Latimes.com*, 00:33 min., <http://documents.latimes.com/transcript-of-drone-attack>.
- 31 [US15] Interview with former U.S. military lawyer, April 12, 2012 (on file with author).
- 32 The use of aerial operations in self-defense has sometimes created confusion among ground investigators because the strike may appear to take place far from any known troops on the ground (thus making it unclear whom the “self-defense” justification is used on behalf of, where these individuals do not present a clear threat to the aerial asset). In some of these cases, the self-defense or “hostile intent” determination is made on behalf of one JTAC controller on the ground, who may not be known or visible to those investigating later, or to a small group of Special Forces physically distant from the individual(s) posing a threat, but still within the wide geographic area of operations of a drone or airplane, and thus within the scope of unit self-defense.
- 33 Garlasco, “Troops in Contact.”
- 34 Helene Cooper, “U.S. Strikes in Somalia Kill 150 Shabab Fighters,” *New York Times*, March 7, 2016, https://www.nytimes.com/2016/03/08/world/africa/us-airstrikes-somalia.html?_r=0. The initial reporting of the basis for the strike was unclear, and a question was raised as to whether the strike was a signal of expanded authority for offensive targeting under the 2001 Authorization to Use Military Force (AUMF), the domestic instrument that authorizes the use of force against Al-Qaeda or affiliated forces. Charlie Savage, “Is the U.S. Now at War with the Shabab? Not Exactly,” *New York Times*, March 14, 2016, <https://nyti.ms/2nUiKTL>. Later reporting by the New York Times confirmed that it was not justified by the AUMF but was part of a “built-in exception ... for airstrikes taken in ‘self-defense,’” where an immediate threat is present. Charlie Savage, Eric Schmitt and Mark Mazzetti, “Obama Expands War with Al Qaeda to Include Shabab in Somalia,” *New York Times*, November 27, 2016, <https://nyti.ms/2k9Mw3a>. Previous articles by the author have speculated that this represents an expansion of the individual or unit self-defense doctrine more broadly. Erica Gaston, “Do the Strikes on al Shabab Stretch the AUMF or The Unit Self-defense Doctrine?” *Lawfare.com*, March 18, 2016, <https://www.lawfareblog.com/do-strikes-al-shabaab-stretch-aumf-or-unit-self-defense-doctrine>.

- 35 Mark Mazzetti, Jeffrey Gettleman, and Eric Schmitt, "In Somalia, U.S. Escalates a Shadow War," *New York Times*, October 16, 2016, <https://www.nytimes.com/2016/10/16/world/africa/obama-somalia-secret-war.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&r=0&mtref=undefined&gwh=83C194AD558F110BAF83159C5F34F93B&gwt=pay>.
- 36 According to Guardian reporting, the Pentagon Spokesman, Capt Jeff Davis justified firing on the Iranian drone by saying: "We have said before that demonstrated hostile intent and actions of pro-regime forces towards coalition partner forces in Syria that are conducting legitimate counter-Isis operations in Syria, will not be tolerated." The Guardian report also noted the determination was made because the armed drone was approaching a US outpost "where US advisors were training an anti-Isis local militia," a scenario that resembles many of the other Troops in Contact and self-defense-justified aerial strikes in Afghanistan. Julian Borger, "US Shoots Down Second Iran-made Armed Drone over Syria in 12 Days," *Guardian*, June 20, 2017. Reporting on a U.S. strike against a Syrian aircraft on June 18, 2017, did not specifically cite "hostile intent" but did note that the strike was taken in defense of U.S.-allied forces on the ground, and cited "collective self-defense", which is part of the U.S. definition of self-defense. Steve Holland, Phil Stewart and Andrew Osborn, "White House Says it Retains Right to Self-Defense in Syria; Moscow Warns Washington," *Reuters*, June 19, 2017. The current U.S. Standing Rules of Engagement, which includes the specific provision on collective self-defense as it relates to unit or individual self-defense on p. 83, is published in the U.S. Operational Law Handbook, and also available at https://www.loc.gov/rr/frd/Military_Law/pdf/OLH_2015_Ch5.pdf [hereinafter U.S. SROE].
- 37 The NATO Legal Deskbook defines Rules of Engagement as "directives to military forces (including individuals) that define the circumstances, conditions, degree, and manner in which force, or actions which might be construed as provocative, may be applied." Sherrod Bumgardner et. al, *NATO Legal Deskbook* (NATO, Brussels, 2nd ed.: 2010) [hereinafter *NATO Legal Deskbook*], 254, <https://info.publicintelligence.net/NATO-LegalDeskbook.pdf>.
- 38 Most national criminal codes recognize an individual right to self-defense as a limited defense against certain criminal acts. It is so common in criminal codes that it has been recognized as an element of customary international law in the Rome Statute of the International Criminal Court, and also forms part of key codes for law enforcement and UN peacekeepers. For more see Gaston, "Reconceptualizing Individual or Unit Self-Defense," *Harvard National Security Journal*, 286.
- 39 Lieutenant Commander Dale Stephens, "Rules of Engagement and the Concept of Unit Self-Defense," *Naval Law Review* 126, 145; Charles P. Trumbull, "The Basis of Unit Self-Defense and Implications for the Use of Force," *Duke Journal of Comparative and International Law* 23 (Fall 2012). This theory was also mentioned by several European military lawyers interviewed.
- 40 Hans F.R. Boddens Hosang, "Force Protection, Unit Self-Defence, and Extended Self-Defence," in Terry D. Gill and Dieter Fleck eds., *The Handbook of the International Law of Military Operations* (Oxford University Press: 2010), 421-422.
- 41 Gaston, "Reconceptualizing Individual or Unit Self-Defense," *Harvard National Security Journal*, 295-300.
- 42 Hosang, "Force Protection, Unit Self-Defence, and Extended Self-Defence," 421-422.
- 43 Gaston, "Reconceptualizing Individual or Unit Self-Defense," *Harvard National Security Journal*, 308-317.
- 44 There is an ongoing debate among IHL lawyers and in some jurisprudence about whether IHL provides the authority for actions taken in war—for example, the authority to kill or detain combatants—or simply regulates conduct where this takes place, with the authority coming from other sources such as domestic or UN authorization. One of the most prominent cases to find that IHL did not provide authority (in this case to detain) in the U.K. was recently overturned. The full opinion of the Appeals court is available at: Mohammad & Others, [2015] EWCA Civ 843, <https://www.judiciary.gov.uk/wp-content/uploads/2015/07/serdar-mohammed-v-ssd-yunus-rahmatullah-v-mod-and-fco.pdf>. The weight of opinion likely still rests on the interpretation that IHL does provide authority and so this study will make that presumption.
- 45 Gaston, "Reconceptualizing Individual or Unit Self-Defense," *Harvard National Security Journal*, 314-315; Hans F.R. Boddens Hosang, "Personal Self-Defence and its Relationship to Rules of Engagement," in Gill and Fleck eds., *The Handbook of the International Law of Military Operation* (Oxford University Press: 2010), 430-31.
- 46 Hostile act and intent ROEs are generally classified, but examples of these ROEs have appeared in other literature describing the so-called '42-series' of NATO ROEs, including in Rob McLaughlin "An Australian Perspective on Non-International Armed Conflict: Afghanistan and East Timor," *International Law Studies Journal* 88, 305; Jody Prescott, "Direct Participation in Cyber Hostilities: Terms of Reference for Like-Minded States?" *West Point Center for the Rule of Law* (Paper presented at the 4th International Conference on Cyber Conflict, 2012), https://ccdcoe.org/publications/2012proceedings/4_3_Prescott_DirectParticipationInCyberHostilities.pdf.

- 47 Commander Alan Cole et. al, “San Remo Handbook on Rules of Engagement,” *International Institute of Humanitarian Law*, November 2009, 4, <http://www.iihl.org/wp-content/uploads/2015/12/ROE-HANDBOOK-ENGLISH.pdf>.
- 48 For more examples of what might constitute hostile act, or hostile intent, see generally, NATO Legal Deskbook, 254; État-Major des Armées, Division Emploi 1 [French Ministry of Defense], *Directive Interarmées sur l’Usage de la Force en Opération Militaire se Déroulant à l’Extérieur du Territoire National*, July 25, 2006, 35, http://www.cicde.defense.gouv.fr/IMG/pdf/20060725_np_cicde_pia-5-2-usage-de-la-force-en-operation-militaire.pdf. [Hereinafter French Ministry of Defense Interarmy Publication PIA-5.2]. Army Recruiting and Training Division, *Platoon Commander’s Battle Course, Infantry Battle School*, http://webarchive.nationalarchives.gov.uk/20120215203912/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/module_4/mod_4_witness_statem/exhibit_mje/miv001853.pdf.
- 49 Ibid.
- 50 For a deeper discussion of why hostile act and hostile intent situations tend to be beyond European domestic criminal law limits on self-defense, see Gaston, “Reconceptualizing Individual or Unit Self-Defense,” *Harvard National Security Journal*, 306-307.
- 51 [DE2] Interview with German military lawyer, Berlin, Germany, February 13, 2015 (on file with author).
- 52 Ibid. The definition of U.S. self-defense is included in the U.S. case study, the section accompanying endnote 61.
- 53 As Hosang notes, “The right to personal self-defence is an inherent right and therefore cannot be limited or prohibited by ROE.” Hosang, “Personal Self-Defence and its Relationship to Rules of Engagement,” 439, ¶ 23.12. The NATO Legal Deskbook also states that NATO rules and policies, “do not limit the right to self-defense and in exercising it, individuals and units will act in accordance with national law.” *NATO Legal Deskbook*, 256. Another example of this principle in military guidance can be found in the U.S. Operational Law Handbook, which notes that “Authority to use force in mission accomplishment may be limited in light of political, military, or legal concerns, but such limitations have NO impact on a commander’s right and obligation of self-defense.” David H. Lee, “Operational Law Handbook 2015,” *The Judge Advocate General’s Legal Center and School* (June 15, 2015), 83, http://www.loc.gov/r/r/frd/Military_Law/pdf/operational-law-handbook_2015.pdf. See also Gaston, “Reconceptualizing Individual or Unit Self-Defense,” *Harvard National Security Journal*, 304-305.
- 54 The U.S. Law of War Manual notes that “[i]n some cases, hostile acts or demonstrated hostile intent may also constitute taking a direct part in hostilities (DPH),” but in some cases may be narrower or broader than what is considered to be DPH. Lee, *Operational Law Manual*, ¶ 5.9.3.3, 229; Gaston, “Reconceptualizing Individual or Unit Self-Defense,” *Harvard National Security Journal*, 304.
- 55 Countries vary in the level of official consideration they have given these questions, and whether there are even official positions on the definitions, scope, and standards surrounding self-defense and hostile intent. For example, Germany has almost no guidance on these issues, reportedly either publicly or non-publicly. German lawyers and soldiers interviewed said they were not aware of a legal manual or other related guidance that discussed the definitions and limits of these concepts. France and the U.S. have produced some guidance on how they interpret self-defense, hostile intent and the standards they are judged by, but the standards are generally vague and may not get to specific questions, such as how broadly the “necessity” requirement can be interpreted. Although self-defense and hostile act and intent ROEs have come into play in preliminary investigations into soldiers’ conduct, most of these are non-public. Few have gone forward to trial, so there has also been little jurisprudence testing how these standards are applied. As a result, what tended to be far more helpful for understanding the definitions and standards for self-defense and hostile intent were the qualitative interviews with soldiers and military lawyers about how they understood these concepts, and how they were trained to apply them. Military lawyers or those with experience training soldiers on “vignettes” or scenarios that might arise in conflict were particularly helpful in understanding the four militaries’ underlying legal positions and definitions with regard to these concepts. For further discussion of the absence of jurisprudence on these issues, see Gaston, “Reconceptualizing Individual or Unit Self-Defense,” *Harvard National Security Journal*, 300-304.
- 56 Interviews with most, but not all, of the U.S. military representatives were conducted in the first phase of this research, as part of the Harvard Law School Human Rights Program study into hostile intent. These five scenarios were the most common ones discussed by U.S. military personnel, and as interviews with U.S. personnel went on, they were specifically asked about these different scenarios. These five scenarios were then used in a more systematic way in interviews with European soldiers and lawyers in the second phase of research. However, as a result of this two-part methodology, these exact five scenarios were not asked uniformly to all U.S. soldiers interviewed.
- 57 Reporting by Greg Jaffe offers an excellent depiction of the typical scenario of a “digger,” and offers an example of some of the authorization and approval processes to fire on it in Greg Jaffe, “U.S. and Taliban Fight

for Key Afghan Highway,” *The Washington Post*, April 14, 2012, https://www.washingtonpost.com/world/national-security/us-and-taliban-fight-for-key-afghan-highway/2012/04/14/gIQAtyahHT_story.html?utm_term=.004d8e323464.

- 58 [DE11] Interview with German commander, Hamburg, Germany, August 26, 2015 (on file with author).
- 59 [DE9] Interview with German commander, Berlin, Germany, August 28, 2015 (on file with author).
- 60 “Hostile act” is defined in the U.S. Standing Rules of Engagement as “[a]n attack or other use of force against the United States, U.S. forces or other designated persons or property” or “force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property.” U.S. SROE, 97 ¶ 3(e). “Hostile intent” is defined as “[t]he threat of imminent use of force against the United States, U.S. forces or other designated persons or property,” or the threat of precluding or impeding the mission and/or duties as described under hostile act. U.S. SROE, 97 ¶ 3(f).
- 61 U.S. SROE, 96 ¶ 3(a).
- 62 Hosang notes that the NATO ROEs on hostile act and hostile intent were intended in part to equalize force levels, and allow states that did not have the authority to respond to such situations within their self-defense rights a way to do so. He notes that for states that consider the right to respond to hostile act and hostile intent to be inherent to self-defense, as the U.S. does, then authorization under the NATO common ROEs may be considered a “parallel, but preferred” authorization to acting under self-defense. Hosang, “Personal Self-Defence and its Relationship to Rules of Engagement,” 439, ¶ 23.12(3).
- 63 All formulations of the U.S. SROE standing definition of self-defense note that nothing can contravene soldiers’ individual right to self-defense except for a commander’s tactical decision in the name of the unit self-defense. An example can be found in Lee, “Operational Law Handbook 2015,” 83.
- 64 For a more extended discussion of whether and how the U.S. interpretation of these standards might be broader, see Gaston, “Reconceptualizing Individual or Unit Self-Defense,” *Harvard National Security Journal*, 308-317.
- 65 U.S. SROE, 84.
- 66 [DE6] Interview with senior German commander, Berlin, Germany, July 21, 2015 (on file with author).
- 67 [US18] Interview with U.S. military lawyers, Washington, DC, April 13, 2012 (on file with author).
- 68 [US17] Interview with U.S. military lawyer in Cambridge, Massachusetts, November 8, 2011 (on file with author).
- 69 [FR8] Interview with French commander, Paris, France, July 2, 2015 (on file with author).
- 70 U.S. SROE.
- 71 [US4] Telephone interview with former U.S. soldier, March 20, 2012 (on file with author).
- 72 [US12] Telephone interview with former U.S. military lawyer, April 2, 2012
- 73 [DE4] Interview with German commander, Berlin, Germany, July 6, 2015 (on file with author).
- 74 [OT8] Interview with soldiers from three NATO member states, in Mons, Belg., Apr. 28, 2015 (on file with author).
- 75 [OT8] Interview with NATO officer, April 28, 2015 (on file with author); [OT9] Interview with NATO officer, April 28, 2015 (on file with author); [US19] Interview with U.S. military lawyer in Washington, D.C., April 28, 2015 (on file with author).
- 76 [OT15] Interview with U.S. civilian advisor, Washington, DC, April 13, 2012 (on file with author).
- 77 [US17] Interview with U.S. military lawyer in Cambridge, Massachusetts, November 8, 2011 (on file with author).
- 78 [US11] Interview with senior U.S. military lawyer in Washington, D.C., April 12, 2012 (on file with author).
- 79 [US15] Interview with former U.S. military lawyer, April 12, 2012 (on file with author).
- 80 Maj. Eric D. Montalvo, “When Did Imminent Stop Meaning Immediate? Jus in Bello Hostile Intent, Imminence, and Self-Defense in Counterinsurgency,” *The Army Lawyer* (August 2013), 59.
- 81 For example, one U.S. commander who served in Iraq during the height of the insurgency in 2004 and 2005, said that in the area he was deployed in Sadr city, firing on someone who looked to be remotely detonating an IED with his cell phone had become a standard hostile intent pattern. [US5] Interview with U.S. commander,

- Washington, DC, April 13, 2012 (on file with author). Some British troops interviewed also had observed the same tendency, particularly in Iraq.
- 82 [US13] Interview with former American commander, Washington, DC, April 12, 2012 (on file with author); [OT15] Interview with U.S. civilian advisor, Washington, DC, April 13, 2012 (on file with author).
- 83 A description of the practice of "baiting" is available in Paul von Zielbauer, "Snipers Baited and Killed Iraqis, Soldiers Testify," *New York Times*, September 25, 2007, http://www.nytimes.com/2007/09/25/world/middleeast/25abuse.html?_r=0.
- 84 [US15] Interview with former U.S. military lawyer, April 12, 2012 (on file with author). Another former U.S. military lawyer offered another example of the learning curve from his experience: "In course of a year guys on the ground learn something about the locals. ...They can use that to tailor what they think is a threat. In Afghanistan, people would do things at what we thought were odd [suspicious] hours, but often for a very legitimate reason," such as fixing dykes, which they often did at night, he said. "If you see a guy hacking at the ground in the night and you don't have that ground knowledge, you'd assume it's an IED". [US12] Telephone interview with former U.S. military lawyer, April 2, 2012. The same military lawyer also noted that there could also be very illegitimate reasons for suspicious behavior, that still might not make it a threat: "we saw people at night doing some digging, with two other guys as lookouts [and other suspicious behavior]. Come to find out he was just stealing water." *Ibid*.
- 85 Center for Army Lessons Learned, Afghanistan Civilian Casualty Prevention Handbook, 22.
- 86 [OT10] Telephone interview with UN Staff, February 17, 2012 (on file with author); [OT14] Telephone Interview with former UN investigator, February 17, 2012 (on file with author).
- 87 Interviewees noted that from 2009 onward several of the tactical directives and other ISAF command guidance attempted to address civilian casualties at checkpoints or in other escalation of force incidents. For examples of some of the guidance related to reducing mistaken threat determinations at checkpoints or in other escalation of force incidents, see Department of the Army, *Civilian Casualty Mitigation Notes*, July 2012, 2-9, 2-11, <https://fas.org/irp/doddir/army/atp3-37-31.pdf>; Robert Beljan, "Afghanistan: Lessons Learned from an ISAF Perspective," *Small Wars Journal*, May 30, 2013, 13-15; Nathan Hodge, "U.S. Weighing New Road Rules for Troops in Afghanistan," *Wired Magazine*, July 28, 2009, <https://www.wired.com/2009/07/us-weighing-new-road-rules-for-troops-in-afghanistan/>; Center for Army Lessons Learned, *Afghanistan Civilian Casualty Prevention*, 26, 27.
- 88 Gaston and Horowitz, "The Cost of Kill/Capture."
- 89 See Tony Perry, "Marine Gets no Jail Time in Killing of 24 Iraqi Civilians," *Los Angeles Times*, January 25, 2012, <http://articles.latimes.com/2012/jan/25/local/la-me-haditha-20120125>.
- 90 The Marines claimed that they were also taking additional small arms fire, but an independent investigation by the Afghanistan Independent Human Rights Commission later challenged that report based on witness testimony. See Declan Walsh, "Afghanistan War Logs: How U.S. Marines Sanitised Record of Bloodbath," *The Guardian (London)*, July 26, 2010, <http://www.theguardian.com/world/2010/jul/26/afghanistan-war-logs-us-marines>.
- 91 *Ibid*.
- 92 Geoffrey S. Corn asserts that, "whether characterized as war crimes or as criminal homicides" the acts of U.S. forces in Haditha are in clear violation of the Uniform Code of Military Justice. Geoffrey S. Corn, "Haditha and My Lai: Lessons from the Law of War," *Jurist*, June 2, 2006, <http://www.jurist.org/forum/2006/06/haditha-and-my-lai-lessons-from-law-of-war.php>. Discussing self-defense and hostile intent interpretations, former U.S. Judge Advocate and law professor Gary Solis categorizes the Haditha killing as a clear violation of the applicable ROE: "Even in 2005, the ROE did not allow firing on unarmed individuals not involved in a combat incident only because they were fleeing." Solis, *The Law of Armed Conflict, International Humanitarian Law in War*, 490. See also David Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice," *Journal of International Criminal Law*, 11 (3) (2013) 513, FN 23, <https://academic.oup.com/jicj/article-lookup/doi/10.1093/jicj/mqt023>.
- 93 [OT15] Interview with U.S. civilian advisor, Washington, DC, April 13, 2012 (on file with author).
- 94 [OT13] Interview with British journalist, Kabul, Afghanistan, February 14, 2012 (on file with author).
- 95 [FR6] Interview with French captain, Paris, France, June 26, 2015 (on file with author).
- 96 [OT16] Telephone interview with UN advisor, February 17, 2012 (on file with author).
- 97 [DE11] Interview with German commander, Hamburg, Germany, August 26, 2015 (on file with author).
- 98 Before the French contingent took charge of Kapisa, other members of the ISAF coalition had led operations

against insurgent activities in the Taghab Valley of Kapisa, with mostly temporary and limited successes. At the end of 2007, U.S. troops established the first PRT in Takhar. They were subject to “near constant combat,” and then were briefly succeeded by Italian forces. For more on past operations, see Joshua Foust, “France in Kapisa: A Combined Approach to Statebuilding,” in Nik Hynes and Péter Marton eds., *Statebuilding in Afghanistan: Multinational Contributions to Reconstruction* (Routledge: 2012), 88.

- 99 French Penal Code, Article 122-5. A French inter-army doctrine states clearly that this provision of the French Criminal Code is the basis for French soldiers’ right of self-defense and discusses its use by soldiers in armed conflict. Centre Interarmées de Concepts, de Doctrines, et d’Experimentations, [French Ministry of Defense], *Directive Interarmées sur l’Usage de la Force en Opération Militaire se Déroulant à l’Extérieur du Territoire National*, July 25, 2006, 14 ¶ 3.2.2.2, http://www.cicde.defense.gouv.fr/IMG/pdf/20060725_np_ema_emp-1_dia-5-2-usage-force-hors-tn.pdf. [Hereinafter French Ministry of Defense Inter-army Doctrine DIA-5.2].
- 100 Col. Gilles Castel, “Self-Defense: A French Perspective,” *NATO Legal Gazette* No. 36, 42.
- 101 A French inter-army directive on the deployment of force overseas described the imminence question in a unit self-defense situation as follows: “The aggression that provoked the response must be ongoing or imminent. As a result, there must be, at a minimum, a commencement of the act of aggression (for example: the presence or threat of arms or the positioning of individuals suggesting an imminent opening of fire). In contrast, the act of defense must not be continued after the cessation of the act of aggression (for example, in the case of the aggressors’ flight)”; French Ministry of Defense Interarmy Publication PIA-5.2.
- 102 [FR2] Interview with French military lawyers, Paris, France, June 18, 2015 (on file with author).
- 103 French Ministry of Defense Interarmy Publication PIA-5.2, 26-27.
- 104 Ibid.
- 105 Interviewees indicated that French ROEs largely synched with those of the common ISAF ROEs and mission, except for French caveats on detention, counter-narcotics or other aspects of the US-led counter terrorism mission. French caveats also prevented them from fighting outside Kapisa. A discussion of these caveats is available in David P. Auerswald and Stephen M. Saideman, “NATO at War: Understanding the Challenges of Caveats in Afghanistan,” 28 (paper presented at the Annual Meeting of the American Political Science Association in Toronto, CA, September 2-5th, 2009), <http://shape.nato.int/resources/1/documents/nato%20at%20war.pdf>.
- 106 Col. Gilles Castel, “Self-Defense: A French Perspective,” 41-46.
- 107 Ibid., 42.
- 108 Ibid., 43.
- 109 Article L4123-12. English translation: “II. A military soldier is not criminally responsible where, acting in compliance with the rules of international law and within the framework of a military operation taking place outside French territory or the territorial waters of France, irrespective of the purpose, duration or scope... the soldier uses acts of coercion or armed force, or gives an order [to do so], provided it is necessary to carry out the mission.”
- 110 [FR4] Interview with French commander, Paris, France, June 23, 2015 (on file with author).
- 111 [FR8] Interview with French commander, Paris, France, July 2, 2015 (on file with author).
- 112 [FR7] Telephone interview with French military lawyer, July 23, 2015 (on file with author).
- 113 [FR7] Telephone interview with French military lawyer, July 23, 2015 (on file with author).
- 114 [FR4] Interview with French commander, Paris, France, June 23, 2015 (on file with author).
- 115 Ibid.
- 116 [FR7] Telephone interview with French military lawyer, July 23, 2015 (on file with author).
- 117 [FR8] Interview with French commander, Paris, France, July 2, 2015 (on file with author).
- 118 [FR4] Interview with French commander, Paris, France, June 23, 2015 (on file with author).
- 119 Ibid.
- 120 Foust, “France in Kapisa: A Combined Approach to Statebuilding;” Joshua Foust, “Kapisa Province: A COIN Case Study in Afghanistan,” *World Politics Review*, March 31, 2009.
- 121 Ibid.

- 122 [US5] Interview with U.S. commander, Washington, DC, April 13, 2012 (on file with author)
- 123 [FR3] Interview with French military advisor, Paris, France, June 13, 2015 (on file with author)
- 124 Two German lawyers suggested that they thought it was possible that German soldiers' self-defense had a dual basis, in both domestic criminal law and as a customary international law (which is also given weight in German's domestic law). They said it was more commonly discussed with reference to the domestic conceptions of *Nothilfe* and *Notwehr*, but that some of the jurisprudence or preliminary investigations into soldiers' conduct might also consider international law, specifically, IHL, suggesting an ambiguous or at least mixed approach. However there is no definitive legal position on this issue, and since the weight of the evidence is on domestic criminal law as the basis, the remainder of this article will treat Germany's position as such. [DE14] Interview with German military lawyer, Berlin, Germany, February 9, 2016 (on file with author).
- 125 German Criminal Code ("Strafgesetzbuch"), § 32 Notwehr, <http://www.gesetze-im-internet.de/stgb/BJNR001270871.html#BJNR001270871BJNG000902307>. An English translation is available at http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.
- 126 An additional limitation from German constitutional law is that use of a firearm in self-defense is only permitted under domestic law as a last resort. Kristian Kühl, *Strafrecht Allgemeiner Teil* 134–35 (4th ed. 2002).
- 127 [DE6] Interview with senior German commander, Berlin, Germany, July 21, 2015 (on file with author).
- 128 [DE14] Interview with German military lawyer, Berlin, Germany, February 9, 2016 (on file with author).
- 129 German ROEs are classified, but a pocketcard guide to ROEs for German soldiers summarized in a German Parliamentary inquiry, noted that Germany's constitutional law, or Basic Law requires that where a firearm is used, the force "must not be disproportionate to the intended success." *Deutscher Bundestag, Beschlussempfehlung und Bericht des Verteidigungsausschusses: Drucksachen [BT] 17/7400 (Resolution and Report of the Defense Committee) 42 (Oct. 25, 2011)*, <http://dip21.bundestag.de/dip21/btd/17/074/1707400.pdf> [hereinafter German Parliamentary Inquiry into Kunduz Incident].
- 130 [DE14] Interview with German military lawyer, Berlin, Germany, February 9, 2016 (on file with author).
- 131 [DE6] Interview with senior German commander, Berlin, Germany, July 21, 2015 (on file with author).
- 132 Auerswald and Saideman, "NATO at War: Understanding the Challenges of Caveats in Afghanistan," 23–24, 26; Robert Hunter, "NATO Caveats Can Be Made To Work Better for the Alliance," *European Affairs* 9, no. 1–2 (2008), <https://www.europeaninstitute.org/index.php/42-european-affairs/winterspring-2008/68-nato-caveats-can-be-made-to-work-better-for-the-alliance>; Vincent Morelli and Paul Belkin, "NATO in Afghanistan: A Test of the Transatlantic Alliance," *Congressional Research Service*, <https://fas.org/sgp/crs/row/RL33627.pdf>.
- 133 German ROEs further characterized other NATO partners' engagement in Afghanistan on an armed conflict basis, with more aggressive ROEs, as "not being in conformity with international law." Susanne Koellbl and Alexander Szandar describe the limits on German ROEs, and the friction this caused with allies in "Not Licensed to Kill: German Special Forces in Afghanistan Let Taliban Commander Escape," *Spiegel Online*, May 19, 2008, <http://www.spiegel.de/international/world/not-licensed-to-kill-german-special-forces-in-afghanistan-let-taliban-commander-escape-a-554033.html>.
- 134 An Afghanistan Analyst Network report documents Germany's initial decision to take responsibility for Kunduz, the escalation of fighting in later years, and historical factors driving conflict. Nils Wörmer, "The Networks of Kunduz: A History of Conflict and their Actors, from 1992 to 2001," *Afghanistan Analysts Network*, August 2, 2012, https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/09/The_Networks_of_Kunduz_FINAL.pdf.
- 135 Deutsche Welle staff, "Germany Takes Over Quick Reaction Force in Afghanistan," *Deutsche Welle*, June 30, 2008, <http://www.dw.de/germany-takes-over-quick-reaction-force-in-afghanistan/a-3451110>.
- 136 The change in rules of engagement was affirmed in several interviews, notably [DE1] Interview with Senior German commander, German military base, Germany, February 16, 2015 (on file with author); [DE4] Interview with German commander, Berlin, Germany, July 6, 2015 (on file with author); [DE6] Interview with senior German commander, Berlin, Germany, July 21, 2015 (on file with author). It is also referenced in a study on German strategy by the German Parliamentary Inquiry following the Kunduz incident and several thinktank studies or papers. German Parliamentary Inquiry into Kunduz Incident, 41–42, <http://dip21.bundestag.de/dip21/btd/17/074/1707400.pdf>; Philipp Münch, "Strategielos in Afghanistan," *SWP-Studie*, November 2011, 16; Auerswald and Saideman, "NATO at War: Understanding the Challenges of Caveats in Afghanistan," 23–24.

- 137 The first official mention of Afghanistan as a war is documented in Sebastian Fischer and Matthis Gebauer, “Westerwelle wagt sich an die Wahrheit über Afghanistan,” *Spiegel Online*, February 10, 2010, <http://www.spiegel.de/politik/ausland/bundeswehreinsatz-westerwelle-wagt-sich-an-die-wahrheit-ueber-afghanistan-a-677063.html>; Rob Turner, “German Foreign Minister Calls Afghanistan ‘Armed Conflict,’” *DeutscheWelle*, February 10, 2010, <http://www.dw.com/en/german-foreign-minister-calls-afghanistan-armed-conflict/a-5234588>.
- 138 [DE1] Interview with senior German commander, German military base, Germany, February 16, 2015 (on file with author); [DE4] Interview with German commander, Berlin, Germany, July 6, 2015 (on file with author); [DE6] Interview with senior German commander, Berlin, Germany, July 21, 2015 (on file with author). Caveats still remained on the “kill” part of kill-or-capture operations, and on detentions. For more on German Special Forces engagement and tensions surrounding these restrictions, see Koelbl and Szandar, “Not Licensed to Kill.”
- 139 Timo Behr, “Germany and Regional Command-North: ISAF’s Weakest Link?” in Hynek and Marton eds., *Statebuilding in Afghanistan*, 53.
- 140 [DE8] Interview with German soldier, Berlin, Germany, August 28, 2015 (on file with author).
- 141 One German military lawyer interviewed stated that the idea that German troops had to wait to be fired upon to fire was a common misperception, exaggerated in the media, but was not legally correct even in a pure self-defense situation prior to the 2009 rule change. [DE4] Interview with German commander, Berlin, Germany, July 6, 2015 (on file with author). However, he noted that many troops did not understand this, and all other soldiers and commanders interviewed suggested that not firing until fired upon was the rule of thumb prior to 2009.
- 142 [DE1] Interview with senior German commander, German military base, Germany, February 16, 2015 (on file with author).
- 143 [DE13] Interview with German commander, Hamburg, Germany, August 26, 2015 (on file with author).
- 144 Although the most common response was that the lack of certainty would prevent them from firing, one German soldier remembered an exception: “What was usually a giveaway was if they were digging and then camouflaging it...they would be shoveling a hole, and then rather than letting dirt pile up on the side of the road, they placed it on a tarp and carried it away.” In this way, coming troops would not notice as readily that ground had been displaced, and detect the IED. If you saw such actions, he argued, then it could be a sign of hostile intent and lethal force could be used. [DE4] Interview with German commander, Berlin, Germany, July 6, 2015, (on file with author).
- 145 Ibid.
- 146 Ibid.
- 147 [DE6] Interview with senior German commander, Berlin, Germany, July 21, 2015 (on file with author).
- 148 Ibid.
- 149 Ibid.
- 150 [OT1] Interview with Dutch commander, Berlin, Germany, April 29, 2015 (on file with author); [OT2] Interview with Dutch commander, Berlin, Germany, April 9, 2015 (on file with author).
- 151 [DE13] Interview with German commander, Hamburg, Germany, August 26, 2015 (on file with author).
- 152 [DE6] Interview with Senior German commander, Berlin, Germany, July 21, 2015 (on file with author).
- 153 Ibid.
- 154 Follow-up investigations reported that Klein affirmed that it was an “imminent threat” following repeated questioning by the U.S. pilots who delivered the bombs. Spiegel staff, “Investigation in Afghanistan: New Allegations against German Officer who Ordered Kunduz Air Strike,” *Der Spiegel (English online version)*, September 21, 2009, <http://www.spiegel.de/international/world/investigation-in-afghanistan-new-allegations-against-german-officer-who-ordered-kunduz-air-strike-a-650200.html>. More on the factors underlying the imminent threat determination are available in the German Parliamentary Inquiry into Kunduz Incident, 176-179, <http://dip21.bundestag.de/dip21/btd/17/074/1707400.pdf>. For a larger discussion of Troops in Contact situations, see Garlasco, “Troops in Contact.”
- 155 For a general account of the incident including different estimated casualty counts and the proximity to the PRT and other threat considerations see Thomas Ruttig, “The Incident at Coordinate 42S VF 8934 5219: German Court Rejects Claim from Kunduz Air Strike Victims,” *Afghan Analysts Network*, December 15, 2013, <https://www.afghanistan-analysts.org/the-incident-at-coordinate-42s-vf-8934-5219-german-court-rejects-claim-from-kunduz-air-strike-victims/>.

- 156 [DE1] Interview with senior German commander, German military base, Germany, February 16, 2015 (on file with author); [OT5] Telephone interview with NATO military lawyer, December 14, 2015 (on file with author).
- 157 [OT18] Interview with American journalist, Washington, DC, April 12, 2012 (on file with author).
- 158 American troops took over responsibility for some key combat areas in Helmand from British troops in 2010, and the province began transitioning to Afghan security control in 2013.
- 159 The common law principle of self-defense is set out under *Palmer v R*, [1971] AC 814, 831-832, which provides that “It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary.” This was affirmed in *R. v. McInnes*, 55 Cr. App. R. 551 and also codified in the Criminal Justice and Immigration Act of 2008. Criminal Justice and Immigration Act 2008, §76, <http://www.legislation.gov.uk/ukpga/2008/4/section/76>. For further supporting legal citations and information, see Gaston, “Reconceptualizing Individual or Unit Self-Defense,” *Harvard National Security Journal*, 300.
- 160 *Beckford v. The Queen* (1988) UKPC AC 130 (Lord Griffiths); *R v. Deana* (1909) 2 Cr. App. R. 75; *Attorney-General’s Reference No. 2 of 1983* [1984] QB 456.
- 161 UK Criminal Justice Act, at § 76 (7)(b). See also, *Palmer* [1971] AC 814 (Privy Council), opinion by Lord Morris; *R. v Oatbridge*, 94 Cr App R 367.
- 162 [UK5] Interview with former British soldier, Glasgow, U.K., July 31, 2015 (on file with author).
- 163 [UK7] Interview with British commander and military advisor, London, U.K., October 9, 2015 (on file with author).
- 164 Ibid.
- 165 Nearly all of those interviewed did not use this phrase to describe their actions and most pointedly noted that these terms are not used. [UK6] Telephone interview with former British soldier, August 3, 2015 (on file with author); [UK5] Interview with former British soldier, Glasgow, U.K., July 31, 2015 (on file with author); [UK1] Interview with former British soldier, London, U.K., March 31, 2015 (on file with author); [UK4] Interview with former British soldier, Glasgow, U.K., July 31, 2015 (on file with author). One soldier deployed in 2006 seemed unaware of the phrase entirely, and noted that he wished that UK troops had hostile intent concepts.
- 166 Ibid. Troops from other ISAF countries co-stationed with the British have suggested that because the British were in command of RC-South, this affected all of RC-South and not just British troops. [OT4] Interview with Danish military lawyer, Copenhagen, Denmark, December 4, 2015 (on file with author); [OT5] Telephone interview with NATO military lawyer, December 14, 2015 (on file with author).
- 167 Leigh Neville, *The British Army in Afghanistan 2006-14: Task Force Helmand* (Osprey Publishing: 2015), 33.
- 168 [UK1] Interview with former British soldier, London, U.K., March 31, 2015 (on file with author).
- 169 Ibid.
- 170 [UK5] Interview with former British soldier, Glasgow, U.K., July 31, 2015 (on file with author).
- 171 [UK9] Telephone interview with former British soldier, October 19, 2015 (on file with author).
- 172 Ibid.
- 173 The excerpt of the British ROE guidance disclosed in a public inquiry and shared infra in Box 1 confirms that the hostile act and intent ROEs were “standing” or made default as of May 1, 2009. This was also confirmed in interviews with soldiers who served under the British regional command in that time period, or just afterwards, when the standing order was again withdrawn. [OT4] Interview with Danish military lawyer, Copenhagen, Denmark, December 4, 2015 (on file with author); [OT5] Telephone interview with NATO military lawyer, December 14, 2015 (on file with author). One British soldier serving in that time period noted that in addition to the hostile act and hostile intent ROEs being standing, the related, but slightly more offensive ROEs “429” was made more readily available in the same time period and operational situations. He said it was relatively easy for his unit to obtain authorization for it mid-operation or mid-patrol by simply calling in. [UK3] Interview with former British soldier, Scotland, U.K., July 30, 2015 (on file with author).
- 174 [OT4] Interview with Danish military lawyer, Copenhagen, Denmark, December 4, 2015 (on file with author).
- 175 [UK9] Telephone interview with former British soldier, October 19, 2015 (on file with author).
- 176 [OT13] Interview with British journalist, Kabul, Afghanistan, February 14, 2012 (on file with author).
- 177 [UK1] Interview with former British soldier, London, U.K., March 31, 2015 (on file with author).
- 178 [UK6] Telephone interview with former British soldier, August 3, 2015 (on file with author).
- 179 [UK4] Interview with former British soldier, Glasgow, U.K., July 31, 2015 (on file with author).

- 180 Ibid.
- 181 [UK3] Interview with former British soldier, Scotland, U.K., July 30, 2015 (on file with author).
- 182 Ibid.
- 183 [UK6] Telephone interview with former British soldier, August 3, 2015 (on file with author).
- 184 [UK9] Telephone interview with former British soldier, October 19, 2015 (on file with author).
- 185 [UK1] Interview with former British soldier, London, U.K., March 31, 2015 (on file with author).
- 186 Ibid.
- 187 [UK3] Interview with former British soldier, Scotland, U.K., July 30, 2015 (on file with author).
- 188 Ibid.
- 189 [OT13] Interview with British journalist, Kabul, Afghanistan, February 14, 2012 (on file with author) .
- 190 [UK3] Interview with former British soldier, Glasgow, U.K., July 31, 2015 (on file with author).
- 191 [OT13] Interview with British journalist, Kabul, Afghanistan, February 14, 2012 (on file with author).
- 192 [UK1] Interview with former British soldier, London, U.K., March 31, 2015 (on file with author).
- 193 [UK7] Interview with British military advisor, London, U.K., October 9, 2015 (on file with author).
- 194 Ibid.
- 195 [US13] Interview with U.S. commander, April 12, 2012 (on file with author).
- 196 [DE13] Interview with German commander, Hamburg, Germany, August 26, 2015 (on file with author).
- 197 For a larger discussion of the importance of guiding troops to distinguish what was “normal” from threats, see Center for Army Lessons Learned, *Afghanistan Civilian Casualty Prevention*, 16-17, 23.
- 198 [US10] Interview with U.S. commander, Washington, DC, November 1, 2011 (on file with author).
- 199 [OT15] Interview with U.S. civilian advisor, Washington, DC, April 13, 2012 (on file with author).
- 200 [FR4] Interview with French commander, Paris, France, June 23, 2015 (on file with author).
- 201 Ibid.
- 202 [OT13] Interview with British journalist, Kabul, Afghanistan, February 14, 2012 (on file with author).
- 203 [OT12] Telephone interview with American journalist, March 20, 2012 (copy on file with author).
- 204 Ibid.
- 205 [FR4] Interview with French commander, Paris, France, June 23, 2015 (on file with author).
- 206 [DE7] Interview with German commander, Leipzig, Germany, July 27, 2015 (on file with author).
- 207 [DE1] Interview with senior German commander, German military base, Germany, February 16, 2015 (on file with author).
- 208 Ibid.
- 209 Ibid.
- 210 [US11] Interview with senior U.S. military lawyer in Washington, D.C., April 12, 2012 (on file with author).
- 211 Ibid.
- 212 [OT4] Interview with Danish military lawyer in Copenhagen, Denmark, December 4, 2015 (on file with author); [OT5] Telephone interview with NATO military lawyer, December 14, 2015 (on file with author).
- 213 [OT1] Interview with Dutch commander, Berlin, Germany, April 29, 2015 (on file with author); [OT2] Interview with Dutch commander, Berlin, Germany, April 9, 2015 (on file with author).
- 214 The Five Eyes agreement evolved out of an initial 1946 Anglo-American intelligence sharing agreement, the UK/U.S. Agreement. Archival documents are available at <https://www.nsa.gov/news-features/declassified-documents/ukusa/>. See also, Brigadier-General James S. Cox, *Canada and the Five Eyes Intelligence Community*, Canadian International Council and Canadian Defence and Foreign Affairs Institute (December 2012), <http://cdfai.org.previewmysite.com/PDF/Canada%20and%20the%20Five%20Eyes%20Intelligence%20Community.pdf>.

- 215 [OT1] Interview with Dutch commander, Berlin, Germany, April 29, 2015 (on file with author).
- 216 Protocol I, Art. 57(1); Protocol II, Art. 13(1); ICRC Customary IHL Study, Rule 15, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule15.
- 217 For a discussion of some of the jurisprudence surrounding self-defense claims, see Gaston, “Reconceptualizing Individual or Unit Self-Defense,” *Harvard National Security Journal*, 302-303, 236-27. Two cases where a self-defense claim was not successful are *Bici v. Ministry of Defense* (2004) (U.K.) and *US vs. Behenna* (U.S.), but the latter was evaluated under the domestic UCMJ provisions, not based on the soldier self-defense doctrines. *Ibid.*, 301-303.
- 218 [DE14] Interview with German military lawyer, Berlin, Germany, February 9, 2016 (on file with author); [US12] Telephone interview with U.S. military lawyer, April 2, 2012; [US19] Interview with U.S. military lawyer in Washington, D.C., April 28, 2015 (on file with author).
- 219 [OT11] Telephone Interview with IHL investigator, February 27, 2012 (on file with author). A *TIME* magazine investigation by journalist Jason Motlaugh offers an example: in his reporting, Motlaugh interviewed a woman who said that foreign troops broke into their compound at night, and shot her husband while he was cowering in bed with her. “Western military officials tell a different story of that night’s events,” Motlaugh writes. “[The man] showed ‘hostile intent’ when confronted, officials say, and was killed.” Jason Motlaugh, “Why Night Raids May Doom U.S. Goals in Afghanistan,” *TIME magazine*, December 18, 2010, <http://content.time.com/time/world/article/0,8599,2037444,00.html>.
- 220 [OT10] Telephone interview with UN Staff, February 17, 2012 (on file with author).
- 221 *Ibid.*
- 222 The ICRC Customary law study found that the duty to investigate is part of the duty to prosecute created under all four Geneva Conventions. See ICRC Customary IHL Study, Rules 144, 158. The 1977 Protocol I to the Geneva Conventions strengthened the duty to identify, report, and prosecute serious violations, in a sense operationalizing the investigation and prosecution requirements under the Geneva Conventions. Protocol I, Art. 85. Although contested, many also consider this duty to investigate to be an obligation under customary international law in non-international armed conflicts. Michael N. Schmitt, “Investigating Violations of International Law in Armed Conflict,” *Harvard National Security Journal* (2001) 2, 31, 40-45. In some situations, the duty to investigate and hold war crimes accountable may also be incumbent under international human rights law. *Ibid.*, 48-56; Michelle Lesh, “Accountability for targeted killing” in Jadranka Petrovic ed., *Accountability for Violations of International Humanitarian Law: Essays in Honour of Tim McCormack* (Routledge: 2015), 97-100.
- 223 Gaston, “Reconceptualizing Individual or Unit Self-Defense,” *Harvard National Security Journal*, 314-15, 324-25.
- 224 [UK1] Interview with former British soldier, London, U.K., March 31, 2015 (on file with author).
- 225 James Sloan, “The Evolution of the Use of Force in UN Peacekeeping,” *Journal of Strategic Studies* (2014), 1-29.
- 226 *Ibid.* Sloan also notes that, in the 18 peacekeeping operations between October 1999 and the time of publication in 2014, in none of the operations were peacekeepers limited to force only in self-defense. All included some authorization of force to protect civilians, and many go beyond that to enforce protection of the mission. *Ibid.*, 692-94.
- 227 Patrick C. Cammaert and Ben Klappe, “The UN Collective Security System,” in Gill and Fleck eds., *The Handbook of the International Law of Military Operations*, 155-56.
- 228 A January 2017 guidance manual on use of force in UN peacekeeping operations by the UN Department of Peacekeeping Operations recommended that the military components of peacekeeping missions must be “proactive to deter/disrupt hostile intent or act,” and that the mission ROEs should empower them accordingly. United Nations Department of Peacekeeping Operations/Department of Field Support, *Use of Force by Military Components in United Nations Peacekeeping Operations*, January 2017, 12, <http://dag.un.org/bitstream/handle/11176/400571/2016.24%20Guidelines%20on%20Use%20of%20Force%20by%20Military%20Components%20in%20Peacekeeping%20Operations%20Jan2017.pdf?sequence=1&isAllowed=y>. The guidance also notes that “Only a reasonable belief in the hostile intent is required before the use of force is authorized.” *Ibid.*, 19.
- 229 [OT14] Telephone Interview with former UN investigator, February 17, 2012 (on file with author).
- 230 [US17] Interview with U.S. military lawyer, Cambridge, Massachusetts, November 8, 2011 (on file with author).
- 231 Gaston, “Reconceptualizing Individual or Unit Self-Defense,” *Harvard National Security Journal*, 304-305.
- 232 See the discussion in the boxed text “U.S. Extended View of Imminence” in chapter II.B.

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