

Slide 2 -

These are the four fundamental principles of IHL.

As we'll see over the next few minutes, the Principle of Military Necessity grants affirmative authority, while the other three principles place limits on that authority. One important thing to remember is that these principles are not applied in isolation, they always work together as parts of an interlocking system.

We have a video on each principle. Between each video, we'll pause for a quick scenario featuring one of our battlefield characters.

Slide 3 –

Show the video for military necessity.

Slide 4 -

On December 1st, 1864, Stout is assigned to the 14th Ohio Rifles, closing in on Savannah under General Sherman. Sherman's strategy, as part of his "March to the Sea," is to live off the land, foraging for his army as it goes, with a view towards breaking the will of Southerners to continue to resist.

Stout is put in charge of a squad of "bummers," a foraging party assigned to find civilian foodstuffs and confiscate them for the use of the Union Army. He is pointed in the direction of a small farming town outside Savannah, with orders to return with food and horsefeed to add to the regimental stores.

Is breaking the will of Southerners a legitimate part of military necessity?

Answer: No, breaking the will of the civilian population is not a necessary part of subjugating the enemy. The enemy is the military force and fighters of the opposing party to the conflict, not civilians.

Slide 5 –

Show the video for distinction.

Slide 6 –

In February 2015 Jaden is in Iraq, and is in charge of security for her Forward Operating Base. She receives intelligence from a local that several ISIS oil trucks will be passing through her area of operations. It does not appear that the oil trucks pose any direct threat to the base, but she informs her chain of command in case the intelligence can be useful to them.

The chain of command is able to confirm the reports, and determine that the oil is a legitimate target because it is being used to support the ISIS war efforts. But the drivers of the trucks are civilians. What can they do?

Answer: Jaden's chain of command produces leaflets to warn the civilian drivers, and they drop the leaflets over the trucks before engaging. The leaflets say "Get out of your trucks and run away from them." Truck drivers were able to escape from their trucks and the U.S. could direct their attack only on the military objectives, thereby abiding by the principle of distinction.

Slide 7 –

Show the video for proportionality.

Slide 8 –

Recall the description of the bombing of Dresden from the first module.

(Repeated Here: On the morning of February 13th, air-raid sirens started to whine.

Thousands of pounds of high explosives fell over the area. Once the explosions seemed to die down, the American POWs, including Robert and Kurt were marched out into the city center and ordered to pull people from the wreckage. As soon as they got started, the sirens started up again, and another rain of bombs started to fall. They were marched back to their bunker.

After two more days of raids, British and American bombers had dropped almost four thousand tons of high-explosive and incendiary bombs on Dresden, destroying two and a half square miles of the city center, and killing at least 35,000 people, likely many more. Kurt and Robert's bunker held up, and when they were finally marched out again on the evening of February 15th to clean the rubble, Kurt remarked that downtown Dresden looked like the surface of the moon. As he wrote later,

"Nobody talked much as the expedition crossed the moon. There was nothing appropriate to say. One thing was clear: absolutely everybody in the city was supposed to be dead, regardless of what they were, and that anybody that moved in it represented a flaw in the design. There were to be no moon men at all."

(Kurt Vonnegut, Slaughterhouse Five))

The raid took place shortly after the last major German offensive of the war, the so-called Battle of the Bulge, which convinced the Allies that the Germans were not yet ready to surrender. The raid was justified by Allied authorities as militarily necessary, as the destruction of one of the last intact German munitions and transportation centers would hinder their ability to hold back the Soviet offensive from the east.

Many critics, however, have argued that the raids focused on large civilian centers and that the results were not militarily decisive. Was this attack proportionate?

The memo pictured on the slide was written by Winston Churchill and reads "It seems to me that the moment has come when the question of bombing of German cities simply for the sake of increasing the terror, though under other pretexts, should be reviewed. Otherwise we shall come into control of an utterly ruined land. We shall not, for instance, be able to get housing

materials out of Germany for our own needs because some temporary provisions would have to be made for the Germans themselves. The destruction of Dresden remains a serious query against the conduct of Allied bombing. I am of the opinion that military objectives must be henceforward more strictly studied in our own interests rather than that of the enemy. The Foreign Secretary has spoken to me on this subject, and I feel the need for more precise concentration upon military objectives, such as oil and communications behind the immediate battle-zone, rather than on mere acts of terror and wanton destruction, however impressive."

Aside from proportionality, does this implicate other principles of IHL?

Answer: This implicates distinction as well as proportionality. While, as Churchill's memo notes that there were pretexts that provided justifications under military necessity for bombing campaigns like the one in Dresden, at least one of their goals was to increase terror by targeting civilians. This violates the principle of distinction.

Slide 9 -

Show the video for limiting unnecessary suffering.

Slide 10 –

In March of 2005, Jaden is tasked with transporting some captured detainees--suspected Taliban fighters--on a military aircraft from an outlying district to a detention facility near Kabul, Afghanistan. Detainees are shackled to each other and buckled into a bench in the fuselage of the aircraft. Jaden and another MP are issued frangible ammunition for their pistols--that is, soft-point ammunition that breaks and spreads apart on impact so as not to risk penetrating the aircraft's walls during flight.

Under the Hague Convention of 1899, signed by the United States, nations must "agree to abstain from the use of bullets which expand or flatten easily in the human body," which is exactly what the bullets that Jaden is issued do. The idea behind this abstention is that the object of war is to disable an enemy's soldiers, and that this object is "exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable."

Towards the middle of the flight, one detainee suddenly undoes his seatbelt and lunges at the other American MP, dragging the other prisoners with him and briefly gaining a hold of the MP's pistol. Jaden quickly draws her pistol and shoots three rounds of the frangible ammo, hitting the target detainee twice and accidentally hitting another detainee as well. As soon as control is reestablished, the air crew attempts first aid on the detainees, but both die of their wounds before the plane touches down in Kabul.

In this situation, were Jaden's superiors right to issue Jaden frangible bullets, and was Jaden justified in firing them?

The goal in using the frangible bullets in this situation is to prevent the harm that would be caused if a bullet were to pierce the aircraft – perhaps thereby killing a whole plane full of people. There is no indication that the goal is to cause additional pain to the detainees. Because there is a legitimate justification for the use of these bullets, the suffering that is caused to the detainees by their use is not unnecessary. The use of the bullets may have saved the lives of the rest of the detainees, as well as the air crew and MPs. So in this scenario, the use of frangible bullets does not violate the principle of unnecessary suffering.

Slide 11 –

Suggested Comments:

In the media it is unusual to hear about IHL, what people often hear about are Rules of Engagement or ROE. What are ROE? ROE are the method that a nation delegates authority under IHL to its military forces. First, it is important to understand that all military operations in an armed conflict start with the full body of IHL. If a nation want to give its military all the leeway of the full body of IHL, then ROE are not necessary.

(Click to build the slide) *One way that ROE can be more restrictive than IHL is for political reasons.*

(Click to build slide) *For example, the government may tell its soldiers that they cannot attack an enemy commander, because they are in negotiations with that commander to surrender his fighters. Even though it may be legal under IHL to attack this enemy commander, for political reasons the government has restricted that part of what is allowed by IHL for their ROE.*

(Click to build the slide) *In addition to political reasons, there may also be military or operational reasons to restrict what is permitted by IHL.*

(Click to build slide) *For example, imagine that a bridge separates two opposing armed groups. As we'll discuss in just a few minutes, the bridge in this situation is a valid military target under IHL because it is located between the two armies and could create a military advantage. Despite the bridge being a lawful target, the government may tell its soldiers that they cannot destroy the bridge because they want to use it later for a counterattack. Again, even though attacking the bridge is lawful under IHL, for military reasons, the soldiers aren't allowed the full latitude authority of IHL.*

(Click to build the slide) *This intersection of law, policy, and operational concerns, is where the ROE are formed.*

(Click to build the slide)

So to summarize, Rules of Engagement are:

1. *The convergence of law, policy, and military considerations.*
2. *Directives that delineate the circumstances and limitations under which armed forces will use force.*
3. *The authority under IHL belongs to the State. ROE delegate that authority to the armed forces.*

(Note that this last point is the key to understanding ROE. The authority to use force under IHL belongs to the State, not the soldiers. The soldiers only have as much of the authority under IHL as the State decides to give them)

Slide 12 – OPTIONAL SLIDE

We learned about President Lincoln issuing the Lieber Code to the Union Army during the Civil War, and this served as a sort of guide to the Laws of War, and played the role that a modern Rules of Engagement manual might. During WWII, rules of engagement were mostly far simpler than they are now. Soldiers would know not to target civilians or medical workers, but that they could always target enemy combatants at any time.

In current armed conflicts identifying the enemy can be extremely difficult, so Rules of Engagement can help commanders issue guidance to their troops on how to be both safe and cautious while trying to determine whether a given person or situation is threatening. But this can be heavily context dependent, which means the Rules of Engagement can get complicated.

The image here is the cover of a book of ROE vignettes that the Army put out in 2011 to help train Soldiers deploying to Afghanistan on the Rules of Engagement. As the introduction notes, “The COIN environment in which we operate today in Afghanistan is complex. Day-to-day success is measured less by mission accomplishment and more by whether our actions have moved the population closer to the Afghan government or closer to the insurgents. How your Soldiers react will shape your area of operations and can contribute significantly to our ultimate success. The rules will help your Soldiers focus on the mission by freeing them from destructive urges and encouraging actions that advance our goal of separating insurgents from the population. These vignettes can help you hone your Soldiers to operate successfully within the rules on today’s complicated battlefield.”

The first Vignette reads:

Vignette #1 Situation: You are patrolling a main supply route (MSR) that has suffered several improvised explosive device (IED) attacks in the last week. At 0300 hours, you notice a white Toyota pulled off to the side of the road. A man and a teenage boy are digging at the side of the road. You have not been told of any authorized construction projects on the MSR this evening. You see no weapons.

Question: What can you do under the rules of engagement (ROE)?

What do you think? What can the soldier do? What should they be allowed to do?

The book's answer is:

The circumstances suggest these personnel may be demonstrating hostile intent. However, hostile intent results from the threat of imminent use of force. In this situation, you should use graduated, nonlethal force to determine their intent or to detain these individuals for their suspicious behavior. If you determine at any time they are an imminent threat to you or others, you may engage the targets with deadly force. Generally, the International Security Assistance Force (ISAF) ROE and the U.S. Standing ROE allow for the use of deadly force for self-defense against a hostile act/hostile intent. Here, the situation appears to fall short of self-defense or hostile act/hostile intent. The ROE allows minimal force to accomplish the mission. Here, our mission includes maintaining the security of the MSR. The escalation of force (EOF) continuum embedded in the ROE does two things for us here. First, it enables you to determine the minimum amount of force needed to accomplish the mission. Second, it enables you to determine whether the subjects are showing hostile act/ hostile intent. Detention is authorized only for:

- a. force protection.
- b. self-defense.
- c. accomplishment of the mission.

Once each of these conditions no longer exists, we must release the detainee at or near the point of capture (as circumstances permit). Assuming at least one of these conditions (a, b, or c) continues to exist, you must document the circumstances that justify initial and continued detention before you can hand over any detainee to a higher headquarters or proper Afghan authority.

This vignette provides a good transition to our next topic. The problem the vignette poses is determining who the man and the boy are in the context of the battlefield. Are they just regular civilians going about their day? Or are they fighters? Are they something else?

Slide 13 –

As we discussed earlier with the principle of distinction, there are different categories of people on the battlefield. How does a person's status affect how they are treated? Before we can answer this question, we need to better understand what the categories of people on the battlefield are.

(Click to Build Slide) *Civilians are persons who take no part in hostilities and perform no work of a military character. They are entitled to general protection from military operations. Additionally, acts or threats of violence meant to spread terror amongst the civilian population*

are strictly prohibited. However, civilian protections are not absolute. If a civilian directly participates in hostilities, they will lose their protected status unless and until their direct participation ceases.

(Click to Build Slide) Noncombatants are different from Civilians. Does anyone know what a noncombatant is? Any guesses? Historically this included far more people than it does today – a noncombatant was any member of the armed forces who was not in a combat role – a cook, a logistician, a lawyer. But, as combat changed, and more people had to be prepared for two jobs, only two military jobs retained this status. Does anyone know what they are?

The first one is medical personnel. The second is religious personnel. As long as they identify themselves by wearing distinctive insignia, and refrain from participating in hostilities, they are protected from attack. They can carry only defensive weapons, and must provide their services to all sides of the conflict.

If captured, they are not POWs, but retained personnel. They can be held to serve the needs of POWs but must be released if their services are not needed.

(Click to Build Slide) Combatants are members of the armed forces of a state party to the conflict and have the right to participate in hostilities.

Combatants have combatant's privilege: they may participate directly in hostilities and are entitled to combatant immunity insofar as their actions remain lawful under IHL. A combatant will not be prosecuted for lawful acts committed during an armed conflict. They may be targets of military attacks as long as they have not been rendered hors de combat (meaning they're out of the fight) by surrender, capture, injury, sickness, or other means. Additionally, combatants who fall within the power of an adverse party are entitled to prisoner of war (POW) status.

All persons are civilians unless they qualify as combatants under the Geneva Conventions or customary international humanitarian law. This rule ensures that nobody is without status and protection during an armed conflict.

Under the Geneva Conventions, there are several categories of persons who can be considered combatants, but the main ones are:

(Click to build slide)

1. Members of the armed forces of a state party to the conflict, as well as militias and volunteer corps forming part of such armed forces.

(Click to build slide)

2. Members of other militias and other volunteer corps that belong to a state party to the conflict (think of organized resistance movements) that fulfill four conditions:
 - a. Being under responsible command.
 - b. Having a fixed distinctive sign recognizable at a distance.
 - c. Carrying arms openly.

d. *Conducting their operations in accordance with IHL.*

(Click to build slide)

3. *Under Additional Protocol I, if a combatant cannot distinguish himself, then he can retain combatant status so long as he carries his arms openly:*
 - a) *during each military engagement, and*
 - b) *during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate*

This last provision is controversial, and is one of the reasons the US opted not to ratify API. Does anyone have any thoughts as to why this provision is controversial?

(It's because it decreases the requirements of distinction, which could put civilians more at risk, and give an advantage to groups that distinguish themselves less).

IHL protects those taking no active, or direct, part in hostilities. Combatants are supposed to distinguish between protected people and lawful targets, and the method of doing so is that combatants, who do take an active part in hostilities make themselves visible. Armies do this with uniforms, others, with fixed signs and carrying their weapons openly. For the principle of distinction to work, the person using a weapon has to be able to distinguish who is who.

Civilians who do directly participate in hostilities lose their protected status for the duration of their direct participation. We'll talk more about direct participation in hostilities in a little bit.

There's also another group of people, which have emerged as a major actor in more modern conflicts. These are members of organized armed groups. They are different than civilians who participate in hostilities, because they have an ongoing membership and role in the armed group. They are not affiliated with a government, and do not receive combatant privilege – they can be prosecuted for participating in hostilities. In practice they do not tend to follow the principle of distinction.

Slide 14 -

Under IHL the default assumption is that a person is a civilian, and for the most part we think of civilians as innocent bystanders. But civilians can play other roles on the battlefield, and each one has different consequences for how they are to be treated under IHL.

(Click to build slide) *The first category is that of plain old civilian – the innocent bystander. These people are protected from attack (which doesn't always mean they are safe – they must not be intentionally targeted, but it is not illegal to hurt or even kill a civilian as collateral damage in conducting an attack). This protection stays in place as long as they stay out of the fight. They can only be detained for security reasons, and must be released as soon as the security threat has dissipated.*

(Click to build slide) Civilians accompanying the armed forces are also protected from attack so long as they remain out of the fight. This category consists of people such as embedded journalists, technical specialists like aircraft mechanics that may be part of a flight crew, or even people such as cooks or those who provide laundry services. They can be detained, and are entitled to treatment as Prisoners of War if they are detained.

(Click to build slide) Civilians taking a direct part in hostilities. These civilians lose their protection from attack while they participate in hostilities. In the next section we'll look at what it means to participate in hostilities, and how long people lose their protection for. Participating in hostilities can be anything from shooting at forces of a party to the conflict, to acting as a lookout while others are setting up for an attack. If they are captured, they can be detained by criminal due process and charged with crimes, or for as long as they are considered a security risk.

(Click to build slide) This category of civilian hasn't been seen on the battlefield in a long time. It's the kind of thing that you'd picture in old-timey England with local townsfolk gathering their pitchforks, and torches, and whatever else they can scavenge to fend off an incoming invasion. This kind of spontaneous local uprising is allowed under IHL, and the civilians participating in it cannot be prosecuted under criminal law for actions they take while fighting. Much like combatants, they can be lawfully attacked, and must be given POW treatment if captured, but they may only receive this status for actions taking during the moment of an invasion.

(Click to build slide) Including this last group under the category of "civilian" is controversial. These are people who are members of an organized armed group that is unaffiliated with a legitimate government. Think Al Qaeda, or Iraqi insurgent fighters. Those who have a continuous combat function may be targeted at any time, but do not get POW protections if they are detained. They can be criminally prosecuted for their actions.

Those without a continuous combat function cannot be targeted, but can be detained if they are a security threat, and they can be and prosecuted for any criminal actions they take. **(Click to build slide)** These people have a role similar to civilians accompanying the armed forces.