

Rules of engagement *vis-à-vis* International Humanitarian Law

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The aim of the author of this article is to discuss the connection and the differences between Rules of Engagement and International Humanitarian Law. He argues that both contribute to the lawful conduct of the military operations but their means are different. He advocates that, as IHL training is mandatory for the forces, ROE training is also essential to the successful mission accomplishment. Comprehensive ROE training may help that soldiers use force in accordance with the IHL principles, within the frame of the mission specific ROE and with due consideration to the national legal and political constraints.

Introduction

According to the experience of the author of this article, only a few people in the Hungarian Defence Forces (HDF) do have valuable knowledge or perhaps real experience on the essence of special sets of rules, collectively called as Rules of Engagement (ROE),¹ although HDF troops take part in Peace Support Operations (PSO) from early '90-s and quite a large number of the Hungarian soldiers (approx. 1000 people) is deployed to a PSO abroad every year. Even though those, who have already heard about ROE from different sources, they believe that ROE are basically nothing more than a subset of the International Humanitarian Law (IHL). In fact, this is not true, since ROE and IHL are representing two different sets of rules, having different aims and means. It is, however, also to be noted that ROE are linked to the IHL in many ways. The aim of this article is to analyze the relationship between the Rules of Engagement and the International Humanitarian Law, this latter also referred to as Law of Armed Conflict (LOAC) or Law of War (LoW).²

¹ Nowadays, each military operation, be it led by UN, EU or NATO, used to have its own Rules of Engagement but the main characters of these rules issued by higher military or civilian authorities are similar.

² The terms of International Humanitarian Law, the Law of Armed Conflict and the Law of War are, in fact, identical. See e.g. War and International Humanitarian Law – Internet: <http://www.icrc.org/eng/war-and-law/overview-war-and-law.htm> (Retrieved: 15 June, 2011). For the sake of simplicity, the author of this article uses only the term of International Humanitarian Law and its abbreviation IHL throughout this document.

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Each military operation, be it in any form of the PSOs³ or be it even the most serious appearance of using force, i.e. waging war against an enemy, has an ultimate goal: to be effective. The operational effectiveness is therefore one of the highest requirements towards the military commanders. As it is indicated in the NATO Legal Deskbook (2010), “[a]ny use of force which does not translate into clear military advantage is a potential waste of ammunition and other resources”.⁴

However, being effective does not depend only on the number of the troops and the destructive ability of the force available, but, for example on the public support at home and abroad, as well. Losing the public support means reduction of the political and, consequently, which is more critical, the financial support, too. And one of the easiest way to forfeit the public support is if the operation itself loses its perceived legitimacy.⁵

Legal framework of the operations

In the era of the global information, the public gets information within seconds even from the most distant corner of the world, and form a judgement on what had been seen. We all know that the public does not like seeing suffering people who have been injured or who have lost their property and questions if the force used was lawful. The use of illegal or unnecessary force undermines the trustworthiness and acceptability of personnel participating in the given operation, therefore, the legality of using force, with other words, the legitimacy of the operation is utmost important.

Arguably, conducting military operations must be governed by law, including both international and national laws. With regard to the applicability of the international law, we have to admit that there is a significant difference as the nations’ treaty obligations are concerned, together with the differing interpretations on the relevant rules. In a multinational operation, these differences and their impact on conducting operations are to be carefully examined and evaluated. Despite all differences, a specific set of rules provided by some generally accepted international agreements can be identified as common legal basis for all nations. International Humanitarian Law is part of international public law aiming to protect certain persons and objects during international and non-international armed conflicts by restricting the means and methods of warfare, particularly the use of certain weapons. IHL is based on the 1949 Geneva Conventions and their Additional Protocols, the Hague Conventions and a

³ Peace-building, peace-keeping, peace-enforcement, peace-making, etc.

⁴ BUMGARDNER, Sherrod Lewis, HEGEDŰS, Zoltán, PALMER-DEGREVE, Dominique (Eds): *NATO Legal Deskbook – ACT Staff Element Europe*, Belgium, 2nd ed. (2010), p. 251.

⁵ *Ibid.*

series of treaties governing the way in which wartime military actions are to be conducted. IHL, or “jus in bello”, as such, regulates only the humanitarian aspects of the conflict, which is independent from the questions about the justification or reasons for war covered by “jus ad bellum”.⁶

Since most of the nations are bound by “Geneva Law” and “Hague Law”, all states have an obligation to ensure that IHL is respected by their citizens. Consequently, compliance with IHL is primarily a national responsibility, therefore, nations are obliged to train their forces to comply with written rules, as well as the spirit and principles of IHL and with other provisions of international law (e.g. international human rights law) that impact upon military operations.⁷

As it was mentioned above, different national laws may also have significant impact on conducting military operations, since national contingents of a multinational force must comply with their own national legal regulations, too. National laws may, for example, restrict using force, especially deadly force, in certain circumstances, or protecting others or defending property. Therefore, in multinational operations, it is in the best interest of the troop contributing nations to communicate these restrictions with their partners. Needless to say that military commanders of the multinational operations must also be informed about these restrictions, otherwise they will not be able to employ forces in an effective way.

Relationship between ROE and IHL

Rules of Engagement issued by the competent national or international authorities must be distinguished from international or national law. ROE are necessary concomitants with the military operations, and are always adjusted to the actual political requirements and to the military needs on the field. There are diverse ROE definitions in usage for different multinational missions or for national operations. For NATO forces, for example, ROE are “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. ROE are not used to assign tasks or give tactical instructions. With the exception of self-defence, during peacetime and operations prior to commencement of an armed conflict, which may include

⁶ IHL and other legal regimes – jus ad bellum and jus in bello – Internet: <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>
Retrieved: 10 March, 2011)

⁷ BUMGARDNER, HEGEDÜS, PALMER-DEGREVE: *NATO Legal Deskbook*, p. 258.

declarations of counter surprise or counter aggression, ROE provide the sole authority to NATO/NATO-led forces to use force.”⁸

For the U.S Forces, however, ROE are “directives issued by competent military authority that delineate the circumstances and limitations under which U.S. [naval, ground, and air] forces will initiate and/or continue combat engagement with other forces encountered”.⁹

The United Nations Peacekeeping Operations Handbook stipulates that Rules of Engagement for the peacekeeping operation clarify the different levels of force that can be used in various circumstances, how each level of force should be used and any authorizations that may need to be obtained from commanders. ROE are tailored to the specific mandate of the mission and the situation on the ground.¹⁰

According to the Rules of Engagement Handbook published by the International Institute of Humanitarian Law with a recommendation to use it by any country for ROE trainings, as well as for preparing or conducting real operations, ROE are “issued by competent authorities and assist in the delineation of the circumstances and limitations within which military forces may be employed to achieve their objectives”.¹¹ The Handbook draws our attention to the fact that “ROE appear in a variety of forms in national military doctrines, including execute orders, deployment orders, operational plans, or standing directives. Whatever their form, they provide authorization for and/or limits on, among other things, the use of force, the positioning and posturing of forces, and the employment of certain specific capabilities.”¹² It is also to be noted that although in some countries ROE have the status of guidance to military forces, for other nations ROE are lawful commands.¹³

⁸ NATO Rules of Engagement, MC 362/1 (23 July 2003), p. 2.

⁹ BILL, Brian, MARSH, Jeremy (Eds): *Operational Law Handbook*, International and Operational Law Department, The Judge Advocate General’s Legal Center and School Charlottesville, Virginia (2010), Internet: http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2010.pdf (Retrieved: 10 March, 2011), p. 73.

¹⁰ *Handbook on United Nations Multidimensional Peacekeeping Operations*, Peacekeeping Best Practices Unit, Department of Peacekeeping Operations, United Nations (December 2003), Internet: <http://www.peacekeepingbestpractices.unlb.org/Pbbs/library/Handbook%20on%20UN%20PKOs.pdf> (Retrieved: 2 March, 2011), p. 57, 140.

¹¹ COLE, Alan, DREW, Phillip, MANDSAGER, Dennis, MCLAUGHLIN, Rob: *Rules of Engagement Handbook*, International Institute of Humanitarian Law, Sanremo (November, 2009), Internet: <http://www.usnwc.edu/Research---Gaming/International-Law.aspx> (Retrieved: 4 April, 2011), p. 1.

¹² *Ibid.*

¹³ *Ibid.*

With these in mind, we may differentiate IHL from the ROE according to the followings:

- a) IHL forms an international legal regime accepted as binding by the majority of the international community, and as such, it is mutually applicable. In contrary to this, ROE are rules of a concrete force, indicating also the notions of the concerned politico-military leadership on how it wishes that the mission is to be conducted lawfully in the given circumstances. We must not forget, however, that ROE must always be in accordance with the IHL rules, meaning that ROE shall never allow to conduct such an operation, which would be prohibited by the IHL;
- b) IHL is defined by international treaties, therefore, these rules are more or less constant. ROE, however, are different in each operations, moreover, should the significant change in the situations require, they may be amended or supplemented also during the course of the operation;¹⁴
- c) The imperative rules of IHL are to be observed in all circumstances (even in those, where ROE for a particular mission are not provided, which is very unlikely). Breaching IHL rules shall have a consequence of a criminal prosecution, meanwhile breaching ROE does not necessarily mean violation of IHL, as well, since ROE are/should be more restrictive than the general rules of the IHL are. In addition, the question of the criminal responsibility for breaching ROE is highly depending on the national legal approach to the Rules of Engagement system.¹⁵

Despite of all of these differences, there is a strong relationship between the IHL and the ROE: IHL provides the international legal framework which ROE must fit into. It has to be emphasized, however, that ROE are not part of the IHL, even though they take into consideration the IHL rules. Since IHL provisions are already provided in treaties, ROE shall not duplicate IHL, rather, whenever necessary, ROE only refer back to the IHL. In practice, language of the ROE is prepared in a way to reflect the relevant IHL rules and principles concerning the use of force. These most important IHL principles are:

- a) Military necessity – by which it is allowed for the belligerents to use force in order to make the military operation successful, excluding operations that are

¹⁴ “Each situation is different; therefore, a cookie-cutter process of determining ROE that work in all situations is impossible.” HITTINGER, William R.: Rules of Engagement as a Force Multiplier, *CSC 2000*, Internet: <http://www.smallwarsjournal.com/documents/hittinger.pdf> (Retrieved: 14 March, 2011), p. 14.

¹⁵ *The Military Commander and the Law*, The Judge Advocate General’s School, United States Air Force, Internet: http://milcom.jag.af.mil/Military_CC_and_Law_2009.pdf (Retrieved: 15 March, 2011), p. 641.

forbidden by IHL. In order to satisfy this principle, force to be used must be controlled, and only necessary force can be used.

- b) Distinction – requiring belligerents to identify and distinguish between combatants and civilians and between valid military objectives and civilian objects, and to direct operations only against combatants and military objectives. In applying this principle, “dual use” objects¹⁶ may cause some difficulties.
- c) Proportionality – prohibiting an attack¹⁷ which is expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. It has to be made clear that this principle does not exclude the possibility of causing collateral damage, which is unintended loss of life or injury to civilians or damage to civilian objects from a military action.
- d) Humanity – the prohibition of causing suffering, injury or destruction not necessary for reaching the legitimate military goals. This principle limits military actions which might otherwise be justified by the principle of military necessity (see above).
- e) Precaution – requiring from the belligerents to take preliminary measures before conducting military operations in order to save the civilians and civilian objects to the farthest possible extent.
- f) Prohibited weapons - weapons that cause superfluous injury or unnecessary suffering are prohibited. There are special treaties prohibiting special types of weapons (e.g. chemical or biological weapons, land mines, cluster bombs, etc.).
- g) Non-discrimination – prohibiting adverse treatment on the basis of race, religion, sex, etc.¹⁸

¹⁶ “Dual use objects” are primarily civil infrastructure that (may) serve also military purposes (e.g. bridges, electrical system, certain factories, etc.)

¹⁷ There are various definitions of “attack”. For example, according to Article 49 of the I. Additional Protocol to the 1949 Geneva Conventions, “attack means acts of violence against adversary, whether on offense or in defense”. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Internet: <http://www.icrc.org/ihl.nsf/4e473c7bc8854f2ec12563f60039c738/17e741d8e459de2fc12563cd0051dc6c!OpenDocument> (Retrieved: 30 March, 2011). For NATO forces, however, “attack” means “use of force by or against any force or personnel or directed at a target or objective”. See NATO Rules of Engagement, p. F-1. In addition, according to the IHL ROE Handbook, “attack” is defined as “acts of violence or computer network attack in which there is a reasonable expectation that death, bodily harm or damage to property may occur. See COLE, DREW, MANDSAGER, MCLAUGHLIN: *Rules of Engagement Handbook*, p. 81.

¹⁸ COLE, DREW, MANDSAGER, MCLAUGHLIN: *Rules of Engagement Handbook*, pp. 5–6. See also BUMGARDNER, HEGEDŰS, PALMER-DEGREVE: *NATO Legal Deskbook*, pp. 248–251.

Beyond these IHL principles, targeting considerations are also connecting IHL and ROE. During the targeting process, targets are selected and prioritized, thereafter appropriate means are chosen to engage them, taking into account the actual operational requirements and capabilities, and considering the applicable ROE and IHL rules. The relationship between ROE and targeting can be summarized as follows:

- a) Only those military objectives can be targeted that are permitted to be targeted by the relevant ROE. ROE, however, must never allow targeting those objectives that are not in accordance with IHL (for example, medical personnel, chaplains of the armed forces and those who are “hors de combat” may not be attacked).¹⁹
- b) Since actual political considerations are also reflected in the Rules of Engagement, the mission specific ROE, in most cases, are more restrictive than IHL rules: guided by certain political intentions, ROE used to impose policy restrictions on targeting that go even beyond the IHL requirements.

Taking into account all of these, ROE may restrict commanders’ right to take certain actions. In exceptional cases, higher authority or a military commander may trough the ROE:

- a) prohibit any attack which may result in collateral damage;
- b) prohibit any attack by which, as expected collateral damage, specified classes of persons (e.g. children) or a specified number of persons are threatened to be injured or to die;
- c) prohibit any attack which may cause otherwise permissible collateral damage to civilian objects; or
- d) direct that, in accordance with the principle of military necessity, specified military objectives be disabled rather than destroyed.²⁰

According to the checklist suggested by the ROE Handbook, military operators are allowed to attack a selected objective, if the following criteria are met:

- a) the ROE permit to conduct attack;
- b) the objective to be attacked is not on the restricted target list, or on the no-strike list;
- c) the target makes an effective contribution to the enemy military action, therefore, attacking (destroying, neutralizing) the target in the given circumstances offers a definite military advantage;
- d) the ROE permit collateral damage, if the planned attack is expected to cause collateral damage;
- e) even though ROE permit collateral damage, there is no other military target available with the same military advantage, and with less risk of collateral damage;

¹⁹ COLE, DREW, MANDSAGER, MCLAUGHLIN: *Rules of Engagement Handbook*, p. 26.

²⁰ *Ibid.*, p. 26.

- f) all feasible precautionary measures (including choice of means and methods of attack, effective advance warning, etc.) have been taken in order to save the civilians and civilian objects;
- g) the expected collateral damage is not excessive in relation to the concrete and direct military advantage anticipated.

It has to be underlined that targeting cycle requires continuing assessment. Selection and positive identification of the target to be attacked, choosing appropriate means (weapons) and methods to destroy/neutralize it, defining the best circumstances in which the attack can be best conducted, etc. necessitate constant analysis. Should the given circumstances change, the decision on conducting the attack has to be reassessed, even if all requirements mentioned above had been previously met.

IHL and ROE training

Before deploying troops to a NATO or EU-led mission, soldiers must receive appropriate training in IHL. As it is indicated in the EU Guidelines on promoting compliance with International Humanitarian Law, “[t]raining in IHL is necessary to ensure compliance with IHL in time of armed conflict. Training and education must also be undertaken in peacetime. This applies to the whole population, although (...) [a]dditional obligations apply to the training of military personnel.”²¹ For NATO forces, the importance of the IHL training is emphasized in a separate NATO Standardization Agreement (STANAG).²² According to this document, soldiers are to be trained regularly in IHL, in addition, separate IHL training prior to and during the international operation has to be provided for forces participating in NATO operations.²³ It is to be noted that, according to the referred STANAG, ROE training shall be included into the IHL training program.²⁴

Similarly, in order to ensure that ROE are understood and properly followed, appropriate ROE training tailored to different ranks, positions and tasks has to be

²¹ Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL), 2009/C 303/06,

Internet: <http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,hu&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=505470:cs&page> (Retrieved: 10 April, 2011), Article III, paragraph B, point h)

²² Training in the law of armed conflict, STANAG 2449 (Edition 1), NATO Standardization Agency (29 March 2004)

²³ *Ibid.*, p. 3., para. 12.

²⁴ *Ibid.*, Annex C, D.

provided. With regard to the training, two questions have to be answered: when and by whom it has to be provided?

As the first question is concerned, the ROE training shall be integrated in the pre-deployment training for those, who are planned to be deployed. But, as it was indicated above, ROE may change during the course of the operation, too, therefore, a regular training on the relevant ROE issues for those who are already deployed to the mission area is also essential. Should the ROE remain unchanged, this periodical training may also be required just for maintaining the level of ROE knowledge. In addition, some ROE questions might not be answered on the spot and they may require further and deeper analysis. In this latter case, experts in the parent headquarters, or even in the capitals of the sending country shall be in a position to understand the ROE question and provide adequate answer to them.

Regarding the second question, the author of this article considers it as more controversial. ROE trainings are in most cases provided by legal advisors, only because it is all about “rules”. Arguably, some expression (e.g. self-defence, hostile intent, hostile act, etc.) may require legal expertise when being explained, but according to the opinion of the legal advisors’ community,²⁵ this kind of training should preferably be provided in conjunction with the military operators (J3/J5 experts) since they (should) have the necessary professional knowledge on the discussed operational issues (i.e. tactics, techniques, etc.). Besides, although legal advisors play key role in making ROE understood, it has to be emphasized that it is in the commander’s responsibility to provide adequate training for the personnel under his/her command on mission specific issues, including ROE. Undoubtedly, it is one of the legal advisor’s tasks to draw the commander’s attention, if necessary, to the importance of the ROE training and to the fact that ROE are a very complex subject connected to all kinds of operations, therefore, ROE training must be as comprehensive as possible.

It seems to be obvious that acting in special (i.e. ROE-based) situations can not be trained only in classrooms by providing academic lectures on the most important ROE provisions. An effective ROE training requires carefully prepared scenario in realistic environment involving different ROE challenges the soldiers in PSO may face with (e.g. escalation of force/self defence situations, use of riot control means, detention, etc.) and, if available, good role-players acting as they were real. Only this kind of training may help in building the required self-confidence in the soldiers necessary to

²⁵ *Rules of Engagement (ROE) Handbook for Judge Advocates*, Center for Law and Military Operations (CLAMO), Charlottesville, Virginia (1 May 2000), Internet: <http://www.difesa.it/NR/rdonlyres/15563AC1-B128-41EB-A6C0-FB2C701CE649/0/roehandbook.pdf> (Retrieved: 1 March, 2011), p. 2–12.

take immediate decisions in quick evolving stress situations.²⁶ These ROE trainings may be stand alone or incorporated in other exercises practicing different military skills, or, if practicable, connected to discussing the relevant IHL issues. In this latter case, however, we must not forget to separate ROE and IHL matters with a caveat that these two areas are linked together in many ways, and especially IHL principles mentioned above influencing ROE application have to be emphasized.

Whatever ROE training is provided, be it either a classroom “vignette”²⁷ training²⁸ or ROE exercise simulating real world scenario, the “after action” discussion (i.e. identification of the lessons) can not be left out. This part of the training bears as high importance as the training itself, since instructor(s)/lecturers and trainees can discuss together the scenarios and the answers/reactions, from which those that are not in line with the approved ROE or other applicable rules may be corrected.

Conclusion

Despite the distinct nature of ROE and IHL, these two sets of rules are linked to each other in many ways. Their common aim is to ensure the legitimacy of the operation, but there is a big difference as their means are concerned. Either way, the importance of the comprehensive training in these two areas can not be overemphasized. Concentrating on the ROE, soldiers, not only those, who are planned to be deployed to a PSO, but also those in the heartland, whose job is to provide professional answers to the ROE related questions coming from the field, are to be trained properly on ROE issues. How this training is provided, it is always up to the nation concerned, but particular attention has always to be paid to the mission to be performed, and also differing national legal specialities have to be taken into consideration.

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²⁶ *Joint Task Force Commander’s Handbook for Peace Operations*, Joint Warfighting Centre, Fort Monroe Virginia (1997), p. I-15.

²⁷ “Vignettes” are short descriptions of real or realistic situations imagined or taken from the past in order to highlight the problematic parts of handling certain situations and to practice the possible answers based on previous experiences and, of course, according to the relevant rules.

²⁸ “The ROE vignettes are a lot like football plays. We practice the vignettes but in the real game they let the fans on the field.” *JTFC Handbook for Peace Operations*, p. I-17.

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