

The Law of Armed Conflict

INTERNATIONAL HUMANITARIAN LAW IN WAR

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13.2. What Are "Rules of Engagement"?

Joint Publication 1-02, *Dictionary of Military and Associated Terms*, defines ROE as, "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."

ROE are the primary means of regulating the use of force in armed conflict, and in situations short of armed conflict. They are akin to a tether, with which senior commanders control the use of force by individual combatants. They are the commander's rules for employing armed force, arrived at with the help of military lawyers and implemented by those who execute the military mission. ROE are "based upon three pillars – national policy, operational requirements and law."²³ The foundations of ROE are customary law and LOAC/IHL, along with considerations of political objectives and the military mission. Limitations contained in ROE guard against the escalation of situations involving armed force. They may regulate a commander's action by granting or denying use of particular weapons – artillery or tear gas, for example. In 1994–1995's Operation Uphold Democracy, in Haiti, the ROE specified that only brigade commanders and higher could authorize the use of riot control agents – tear gas.

ROE *never* limit the right and obligation of combatants to exercise self-defense. Nor may ROE authorize a violation of LOAC/IHL. Their provisions may be more restrictive than those of LOAC/IHL, however. For example, they may direct that soldiers not fire at specified targets, or that they use ammunition of no greater than a specified caliber, even though those targets or that ammunition are not prohibited by LOAC/IHL. Also, they may direct that enemy aircraft not be engaged by friendly aircraft without permission of the area air defense commander. In the U.S.–Vietnamese conflict (1965–1972), Air Force pilots flying Operation Rolling Thunder missions were restricted from attacking North Vietnamese dikes. During Operation Just Cause, the 1989 U.S. invasion of Panama, the Joint Task Force Commanding General, Army General Carl Steiner, required that an officer of the grade of at least lieutenant colonel approve all artillery fire that impacted in any populated area.

ROE are not tactical in nature; they do not instruct soldiers or Marines, sailors or airmen, in how a mission is to be executed. Tactics and ROE are complementary, not synonymous. "ROE are designed to provide boundaries and guidance on the use of force that are neither tactical control measures nor substitutes for the exercise of the commander's military judgment."²⁴ To say that soldiers charged with committing a LOAC/IHL violation were only following their ROE is often an incorrect use of the term.

In times past, senior politicians have inserted their wishes into the ROE process, with dangerous results for U.S. combatants. During the 1980 Iranian rescue mission, the Carter administration sought to require an impractical shoot-to-wound directive. During the 1982 U.S. involvement in Beirut, Reagan administration officials amended the ROE at several levels, resulting in Marine sentries carrying empty weapons on the morning they were attacked by a truck bomb. (See *SIDEBAR*, below.) Later in the Reagan

²³ Richard J. Grunawalt, "The JCS Standing Rules of Engagement: A Judge Advocate's Primer," *Air Force L. Rev.* (1997), 245, 247.

²⁴ Maj. Marie Anderson and Emily Zukauskas, eds., *Operational Law Handbook*, 2008 (Charlottesville, VA: Judge Advocate General's Legal Center and School, 2008), 79.

administration, the National Security Council initially directed that U.S. advisors in El Salvador, who often engaged in firefights with insurgents, carry only personal weapons – 9mm pistols but no rifles.²⁵

In 1986, the commanding officer of the Army's 75th Ranger Regiment was ordered to deploy a Ranger battalion to an exercise in Honduras, across a major guerrilla infiltration route. The colonel refused to accept the tasking until the ROE were changed from "no live ammunition authorized," to one magazine of live ammunition in a taped-shut ammo pouch, to live ammunition authorized in the weapon but no round in the chamber, to (finally) live ammunition with a chambered round. This time, the risk to U.S. Rangers that an empty weapon represented had been imposed by *military* seniors. Although he could have been relieved of his duties for his intransigence at any point, the Ranger commander's insistence was not career ending.²⁶

That was not an isolated instance of ill-considered ROE dictated by military superiors. In October 2000, al Qaeda's suicide bombing of the *USS Cole* in the port of Aden, Yemen, killed seventeen U.S. sailors and nearly sank the ship. The sailors' "rules of engagement" would have prevented them from firing without first obtaining permission from the *Cole's* captain or another officer, the crew members said.²⁷ This was "because of orders issued not by the ship's captain, but from the Navy's Fifth Fleet. . . . That directive was based on diplomatic concerns about repercussions should American sailors fire weapons – even as warnings – in the port of an Arab country."²⁸ The military has no corner on ill-considered ROE decisions, however.

Higher authorities in the United States on occasion have imposed restrictions on lawful weapons because of political sensitivities. . . . At the time of the 1983 Grenada rescue operation, a request was forwarded . . . for permission to employ riot control agents. . . . However, realizing a key vote on modernization of the U.S. chemical weapon deterrence capability was scheduled in the Senate that week, a response to the request was delayed lest the anticipated reaction to the use of riot control agents on Grenada undermine the Senate vote.²⁹

Although extraneous pressures bearing on ROE content are always possible, judge advocates usually take the lead in ROE formulation. Orders issued by each of the U.S. Armed Services task judge advocates with training members of their branches in ROE, as well as law of war matters, generally.³⁰

²⁵ Parks, "Deadly Force Is Authorized," *supra*, note 4, at 34.

²⁶ *Id.*, at 37.

²⁷ Thomas E. Ricks and Steve Vogel, "USS Cole Guards Told Not To Fire First Shot," *Washington Post*, Nov. 14, 2000, A1.

²⁸ Steven Lee Myers, "Inquiry Faults the Cole's Captain and Crew," *NY Times*, Dec. 9, 2000, A6.

²⁹ Parks, "Righting the Rules of Engagement," *supra*, note 9, at 92–3.

³⁰ For example, Marine Corps Order 3300.4, "Marine Corps Law of War Program," (Oct. 20, 2003), Enclosure (5), para. 2.b. "Judge advocates also will be prepared to provide instruction to Marines in the law of war and other operational law subjects. . . ." The Navy's order, SECNAVINST 3300.1B, "Law of Armed Conflict (Law of War) Program To Ensure Compliance by the Naval Establishment," (Dec. 27, 2005), para. 6.b.(5), does not specifically refer to judge advocates. The Air Force order, Air Force Policy Directive 51–4, "Compliance With the Law of Armed Conflict," (April 26, 1993), does not refer to ROE at all.

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SIDEBAR. In June 1982, Israel invaded Lebanon in an effort to end attacks on Israel that were emanating from there. That fall, in an effort to restore calm to the area, the United States participated in a multinational stability effort. U.S. Army Special Forces initiated the training of pro-Western Lebanese forces, and Marines were assigned to protect the Beirut airport. To keep their footprint to a minimum, the Marine component of the Multinational Force, Battalion Landing Team 1/8, of the 24th Marine Amphibious Unit, was billeted almost entirely in the four-story Beirut Airport terminal building.

At 0622 on October 23, 1983, Lance Corporal Eddie DiFranco was in sandbagged sentry Post 7, between a parking lot and the terminal building. He watched a yellow Mercedes truck circle the parking lot, as lost trucks occasionally did, then suddenly accelerate and burst through the barbed-wire barrier between the parking lot and the terminal, heading for the front of the terminal building.³¹ Following the ROE, DiFranco had a loaded magazine in his weapon but no round chambered.³² Lance Corporal DiFranco jerked the charging handle of his M-16 to the rear and let it slam forward, chambering a round, but before he could flick off the safety and raise the weapon to his shoulder, the truck was past him. It roared directly into the lobby of the terminal building – the Battalion Landing Team headquarters – where it detonated its load of an estimated 12,000 pounds of explosives. Two hundred forty-one Marines and sailors died in the blast.

A later investigation of the bombing reported, “The Commission concludes that the . . . ROE contributed to a mind-set that detracted from the readiness of the [Marines] to respond to the terrorist threat which materialized on 23 October 1983.”³³

Today, most U.S. operations are joint operations, often involving a unified geographic commander, such as Southern Command, Central Command, European Command, or Southern Command, or Joint Forces Command, whose forces operate with other countries’ armed forces. “The standing ROE (SROE) provide that U.S. forces assigned to be OPCON [under operational control, or command] or TACON [under tactical control, or command] to a multinational force will follow the ROE of the multinational force if authorized by the SECDEF [the Secretary of Defense].”³⁴ In such cases every effort is made to arrive at a common ROE or, if possible, have common ROE in place

³¹ Eric Hammel, *The Root* (New York: Harcourt Brace Jovanovich, 1985), 292–4.

³² Some sources, for example, Martins, “Rules of Engagement for Land Forces,” *supra*, note 7, at 11, disagree with Hammel, saying that the sentries, including DiFranco, did not have loaded magazines inserted in their weapons. The first two points of the ten-point ROE in effect on the day of the bombing read: “1. When on post, mobile or foot patrol, keep loaded magazine in weapon, bolt closed, weapon on safe, no round in the chamber. 2. Do not chamber a round unless told to do so by a commissioned officer unless you must act in immediate self-defense where deadly force is authorized.” *Id.*, Hammel, at 427. If the sentries did not have a loaded magazine in their weapons, they were in violation of their ROE.

³³ Dept. of Defense, *Report of the Commission on Beirut International Airport Terrorist Act* (Dec. 20, 1983), 135.

³⁴ Anderson and Zukauskas, *Operational Law Handbook*, 2008, 2008), *supra*, note 24, at 594.

before operations begin.³⁵ If that proves impractical, U.S. forces will employ their own ROE, after discussing the differences in ROE with the allied forces, and informing subordinate units of the differences they may encounter. The United States does have standing combined ROE with a number of other states. Those standing combined ROE ease joint operations planning.

However, if an American unit is under the *operational control* of a multinational force that employs a different ROE, as opposed to the American unit merely *operating with* a multinational force with a different ROE, the guidance is different. In such cases, unless directed otherwise, the U.S. unit will follow the ROE of the multinational force.³⁶ (There are occasions when U.S. units are directed otherwise.)

13.3. When SROE/ROE Apply³⁷

To understand ROE, one must understand the SROE. Although complementary, the two are quite different. If U.S. forces engage in an unanticipated armed conflict, it is the SROE that apply by default. The SROE apply to all military operations and contingencies outside U.S. territory. Inside U.S. territory, the SROE apply only to air and seaborne homeland defense missions.

"The SROE establish fundamental policies and procedures governing the actions of U.S. force commanders . . ." ³⁸ SROE apply in common Article 2 and common Article 3 armed conflicts and in peace-keeping missions, peace-enforcing missions, and anti-terrorist missions. They also apply in military operations other than war – what the military calls "OOTW," pronounced "OUGHT-wah." SROE do not apply, however, in *posse comitatus* situations – when soldiers are deployed on land within the United States to assist federal or local civilian authority in time of disaster or civil disturbance. That is when the SRUF come into play.

The SROE are always present, applicable to all U.S. armed forces, standing by in the "military supermarket" that is managed by the Pentagon's Joint Staff.³⁹ It is the Joint Staff that is responsible for developing and maintaining the SROE.⁴⁰ The SROE are like a catalogue of provisions from which a military "tactical shopper," with the agreement of the Joint Staff, selects precisely the items that will fit into his military mission shopping basket. In other words, when a specific military task is contemplated, the SROE are the basis for the formation of mission-specific ROE that will apply to that military task alone; the SROE are mined to make up mission-specific ROE.

³⁵ See Cmdr. Mike Spence, "Lessons for Combined Rules of Engagement," U.S. Naval Institute *Proceedings* (Oct. 2000), 56–60, for a discussion of issues in formulating combined ROE.

³⁶ Appendix A, *Joint Chiefs of Staff Standing Rules of Engagement*; *supra*, note 18, at para. 1.c.(1).

³⁷ This section is largely based on: Anderson and Zukauskas, *Operational Law Handbook*, 2008, *supra*, note 24, Chapter 5.

³⁸ Army Field Manual 3–24 and Marine Corps Warfighting Publication 3–33.5, *U.S. Army-Marine Corps Counterinsurgency Field Manual* (Chicago: University of Chicago Press, 2007), D-9, at 350.

³⁹ Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 5810.01, "Implementation of the DOD Law of War Program," (Aug. 12, 1996), para. 5.a. (2) (b) 1. "Ensure that the Joint Operations Planning and Execution System includes appropriate guidance to ensure review of plans and rules of engagement for compliance with the law of war."

⁴⁰ The Joint Staff supports the Chairman of the Joint Chiefs of Staff who, among other duties, directs the Staff. The Joint Staff is "purple," that is, staffed by a roughly equal number of select senior Army, Navy, Air Force, and Marine Corps officers. It is the J-3, the Joint Operations Division of the Joint Staff, that develops and maintains the SROE.

MNC-I ROE CARD

Nothing on this card prevents you from using necessary and proportional force to defend yourself

1. You may engage the following individuals based on their conduct:
 - a. Persons who are committing hostile acts against CF [Corps forces].
 - b. Persons who are exhibiting hostile intent towards CG.
2. These persons may be engaged subject to the following instructions:
 - a. Positive Identification (PID) is required prior to engagement.

PID is a reasonable certainty that the proposed target is a legitimate military target. If no PID, contact your next higher commander for decision.

- b. **Use Graduated Measures of Force.** When time and circumstances permit, use the following degrees of graduated force when responding to hostile act/intent: (1) shout verbal warnings to halt; (2) show your weapon and demonstrate intent to use it; (3) Block access or detain; (4) fire a warning shot; (5) shoot to eliminate threat.
- c. **Do not target or strike** anyone who has surrendered or is out of combat due to sickness or wounds.
- d. **Do not target or strike** hospitals, mosques, churches, shrines, schools, museums, national monuments, and any other historical and cultural sites, civilian populated areas or buildings **UNLESS** the enemy is using them for military purposes or if necessary for your self-defense.
- e. **Do not target or strike** Iraqi Infrastructure (public works, commercial communication facilities, dams), Lines of Communication (roads, highways, tunnels, bridges, railways) and Economic Objects (commercial storage facilities, pipelines) **UNLESS** necessary for self-defense or if ordered by your commander. If you must fire on these objects, fire to disable and disrupt rather than destroy.
- f. **ALWAYS** minimize incidental injury, loss of life, and collateral damage.

The obverse of the same card read:

3. The use of force, including deadly force, is authorized to protect the following:
 - Yourself, your unit, and other friendly forces
 - Detainees
 - Civilians from crimes that are likely to cause death or serious bodily harm, such as murder or rape
 - Personnel or property **designated by the OSC** when such actions are necessary to restore order and security
4. In general, **WARNING SHOTS** are authorized **ONLY** when the use of deadly force would be authorized in that particular situation.
5. **Treat all civilians and their property with respect and dignity.** Do not seize civilian property, including vehicles, unless the property presents a security threat. When possible give a receipt to the property's owner.
6. You may **DETAIN** civilians based upon a reasonable belief that the person: (1) must be detained for purposes of self-defense; (2) is interfering with CF mission accomplishment; (3) is on a list of persons wanted for questioning, arrest or detention; (4) is or was engaged

in criminal activity; or (5) must be detained for imperative reasons of security. **Anyone you detain MUST be protected.** Force, up to and including deadly force, is authorized to protect detainees in your custody. You **MUST** fill out a detainee apprehension card for **EVERY** person you detain.

7. **MNC-I General Order No. 1 is in effect.** Looting and the taking of war trophies are prohibited.
8. **ALL personnel MUST report any suspected violations of the Law of War committed by any US, friendly or enemy force.** Notify your chain of command, Judge Advocate, IG [Inspector General], Chaplain, or appropriate service-related investigative branch (e.g. CID, NCIS).

Conclusion. After reading the MNC-I ROE card, would you agree or disagree with Colonel Parks's statement in his Hernandez case report that, "ROE cards . . . represent a military tendency to reduce each aspect of training to the 'bare bones' . . . ROE cards seldom are able to provide adequate information to properly reinforce previous training, and it is unlikely that a soldier, sailor, airman or Marine will have time to refer to his or her ROE card when the occasion presents itself to make decisions based upon the ROE training . . . "?

DESERT STORM ROE

Eleven years before the MNC-I ROE card was issued in Iraq, in the Persian Gulf War U.S. forces were issued this ROE card for Operation Desert Storm (January 16–21, 1991). Desert Storm was the combat phase of the UN-authorized mission to eject invading Iraqi forces from Kuwait. They are "a good example of rules of engagement issued by many states when contemplating a straightforward international armed conflict between the armed forces of different states. They are, in effect, a distillation of the Geneva Conventions and related treaties, or of customary international law."⁹⁰ Like the MNC-I ROE card just examined, this Desert Storm card was slightly smaller than a playing card, with print on both sides. This ROE card, based on 1988 ROE, is in many respects similar to that issued to MNC-I troops, based on the 2000 SROE, but is less sophisticated and easier to understand:

ALL ENEMY MILITARY PERSONNEL AND VEHICLES TRANSPORTING THE ENEMY OR THEIR SUPPLIES MAY BE ENGAGED SUBJECT TO THE FOLLOWING RESTRICTIONS:

- A. Do not engage anyone who has surrendered, is out of battle due to sickness or wounds, is shipwrecked, or is an aircrew member descending by parachute from a disabled aircraft.
- B. Avoid harming civilians unless necessary to save U.S. lives. Do not fire into civilian populated areas or buildings which are not defended or being used for military purposes.
- C. Hospitals, churches, shrines, schools, museums, national monuments, and other historical or cultural sites will not be engaged except in self-defense.

⁹⁰ Peter Rowe, "The Rules of Engagement in Occupied Territory: Should They Be Published?" 8–2 *Melbourne J. of Int'l L.* (2007), 327, 331.

- D. Hospitals will be given special protection. Do not engage hospitals unless the enemy uses the hospital to commit acts harmful to U.S. forces, and then only after giving a warning and allowing a reasonable time to expire before engaging, if the tactical situation permits.
- E. Booby traps may be used to protect friendly positions or to impede the progress of enemy forces. They may not be used on civilian personal property. They will be recovered and destroyed when the military necessity for their use no longer exists.
- F. Looting and the taking of war trophies are prohibited.
- G. Avoid harming civilian property unless necessary to save U.S. lives. Do not attack traditional civilian objects, such as houses, unless they are being used by the enemy for military purposes and neutralization assists in mission accomplishment.
- H. Treat all civilians and their property with respect and dignity. Before using privately owned property, check to see if publicly owned property can substitute. No requisitioning of civilian property, including vehicles, without permission of a company level commander and without giving a receipt. If an ordering officer can contract the property, then do not requisition it.
- I. Treat all prisoners humanely and with respect and dignity.
- J. ROE annex to the OPLAN provides more detail. Conflicts between this card and the OPLAN should be resolved in favor of the OPLAN.

REMEMBER

1. FIGHT ONLY COMBATANTS.
2. ATTACK ONLY MILITARY TARGETS.
3. SPARE CIVILIAN PERSONS AND OBJECTS.
4. RESTRICT DESTRUCTION TO WHAT YOUR MISSION REQUIRES.

Conclusion. Is it better to have a more detailed ROE card? Do greater specificity and smaller type merely increase chances that the card will go unread? Is it immaterial, as the cards will go unread by many troops no matter how specific or how general?