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Reimagining IHL Principles Part II: A New Framework

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December 11, 2020

by [Jeroen van den Boogaard](#) | Dec 11, 2020



Part II: A New Framework for IHL Principles

To open the debate, in [my previous post](#) I argued that military necessity, humanity, chivalry, and proportionality are not IHL principles. Rather, they are either foundations or rules of IHL. So, what then are the principles of IHL? In this post, I introduce my proposed list of IHL principles: distinction, precautions, superfluous injury or unnecessary suffering, protection, and humane treatment.

As mentioned in Part I, State views on what constitute the key principles of IHL differ. What I propose diverges from what some States, like the Netherlands, have traditionally considered to be the five main IHL principles. A comprehensive proposal is needed which is based on a review of the main functions IHL principles perform. First, to ensure that soldiers are properly prepared for their job, they must be trained in and master a limited number of principles. Second, these IHL principles must also be clear and sufficiently general to find application in the bulk of situations occurring in any type of military operation. As such, the complete body

of IHL rules must be covered by these principles. If these principles fail to provide sufficient guidance in a particular situation, the operator must descend to the level of the more specific rules.

Therefore, in addition to guidance for the legal limits to the conduct of hostilities, the many protective rules included in the Geneva Conventions should, in my opinion, also be reflected in the list of principles. This perspective is often lacking in sets of IHL principles currently used. Without these protective rules being represented, the principles lack relevance in guiding military forces in planning and executing all types of military operations in accordance with their IHL obligations.

Function of IHL Principles

To identify what norms qualify as IHL principles, I suggest we look at the function of IHL principles. There are two main functions. First, that of IHL education and training (for example, the basic IHL course for cadets at the Netherlands Defence Academy is structured in accordance with the five “principles” of military necessity, humanity, distinction, proportionality, and honor and good faith) and second, as guidance for military forces in planning and executing military operations in accordance with their IHL obligations.

Educational Purposes: Bring Your Phone, but Use the Principles

During armed conflict, military commanders and soldiers are bound by the *rules* of IHL. It is the violation of these rules for which they may be held accountable and, in some cases, criminally prosecuted. So why are IHL principles so important for the purpose of IHL education and training?

It is true that today nearly every soldier can install an app on his or her smartphone containing every applicable rule of the Geneva Conventions and other treaties (including even the ICRC collection of Customary IHL rules) and bring them to the battlefield for consultation. But this is not how soldiers operate and apply IHL in the midst of combat. It is quite challenging even for IHL scholars to gain complete knowledge and understanding of all IHL rules. While there may be eminent IHL scholars who have mastered IHL, they are usually not the ones deployed in combat. We cannot expect the same level of IHL knowledge from soldiers—not even from those who have completed officers’ training. Therefore, it is preferable to use a limited number of IHL principles, easily remembered by any soldier. Although the number of principles may be somewhat subject to personal preferences, adding more principles to the list than five would not seem desirable for educational purposes. Of course, IHL education and training is not the ultimate purpose in itself, but aims to prepare soldiers to do their job within the limits of the law.

IHL Principles for Operational Guidance During Armed Conflict

Operational reasons dictate that soldiers must find guidance in IHL principles when planning and conducting their operations. Therefore, the principles must be suitable as a basis for their actions during combat. As such, the IHL principles must cover the (predominantly Hague) rules on the conduct of hostilities. In other words, the principles must provide guidance to solve the most important questions during combat—which persons or objects may be attacked, when, and where? Which methods of warfare may be used? Furthermore, guidance is needed on what protection must be provided to objects and persons if these come under the control of the forces.

For these reasons, I propose the following list of five IHL principles. The first of these—distinction—is also included in the current list of IHL principles in the 2005 Army Military Manual of the Netherlands; the other four differ from the Dutch list. Due to the short nature of this post, I will not be able to go into detail on the arguments for each principle. I set this out as a conversation starter.

The Principle of Distinction

During combat, soldiers must determine their targets. The specific rule regarding the definition of a military objective is thus important, as are the rules defining combatants and the exception—members of medical personnel and chaplains. Therefore, the first principle they need is the principle of distinction. The importance of this principle is without debate and it is found in the vast majority of lists of IHL principles.

The Principle of Precautions

While distinction is crucial, it does not paint the complete picture. Connected to distinction is the obligation to protect civilians from the effects of warfare. Therefore, the second IHL principle soldiers need is the principle of precautions. This IHL principle determines what soldiers must do to avoid, or in any event minimize, injury and damage to protected persons and objects. This principle is the basis for active and passive precautions, warnings, and the IHL proportionality rule. Admittedly, there are a number of military manuals that do not list this as a principle but instead simply include precautions within a broader proportionality “principle.” As noted in [Part I](#) of this post, I argue IHL proportionality is a rule, not a principle. Support for including the principle of precautions in the list can also be derived from a number of [authors](#).

The Principle Not to Use Means and Methods of a Nature to Cause Superfluous Injury or Unnecessary Suffering

Connected to both previous principles is the question which means and methods soldiers may use during combat. Therefore, it would be necessary to add to the list of IHL principles one that covers the rules of weapons law and identifies permitted methods of warfare. The

principle on which many of the specific rules for this are based is the prohibition to use means and methods of a nature to cause superfluous injury or unnecessary suffering, in addition to the already identified principle of distinction.

The Principle of Protection

Armed conflict includes active combat, but also less eventful situations, such as that of occupation, to which IHL remains applicable. During both situations, persons or objects come under the control of foreign forces. The universally ratified Geneva Conventions provide detailed rules protecting a multitude of persons and objects. The principle of protection should therefore be added as an IHL principle. It is the basis for specific rules for the protection of wounded, shipwrecked, and sick soldiers; prisoners of war; interned civilians; children; medical installations; cultural property; the natural environment; et cetera.

The essence of this principle is that the specific protection persons and objects are entitled to must be taken into account when they have come under the control of the enemy. This is a different situation than that which is already covered by the principle of distinction, which applies mainly during hostilities and often requires soldiers to take active measures.

The Principle of Humane Treatment

The last IHL principle I propose adding is that of humane treatment. While this has not traditionally been included as an IHL principle, it should be. The rules for the protection of persons codified in the Geneva Conventions and the Additional Protocols are more elaborate than this principle. But especially in situations of non-international armed conflict, there are only a few specific treaty rules of IHL regulating how persons must be treated. Common Article 3 provides the minimum level of protection owed to any person finding him or herself in the hands of the opponent. Therefore, an IHL principle of humane treatment is necessary to remind soldiers that a minimum level of protection is always required.

Furthermore, many armed forces, including those of the United States and NATO, have proclaimed that they will apply the most important protective IHL rules and principles during all military operations. This includes peace support operations, counter-terrorism operations, and operations during which security forces are trained. Outside of armed conflict, the IHL principles regulating the conduct of hostilities are mostly useless. Instead, soldiers may find themselves in situations where they gain control over persons or objects. The principle of protection may then be unsuitable for these situations. For example, since the definition of combatants is inapplicable outside international armed conflict, there are no specific protective IHL rules like those protecting prisoners of war. In such circumstances, the principle of humane treatment provides basic guidance. Additional guidance may of course also be found in other applicable legal frameworks in these situations, such as international human rights law.

The exact interpretation of the term “humane treatment” is difficult to assess. However, at a minimum, it includes the prohibition of torture and degrading or inhumane treatment. As the ICRC notes ([para 553](#)):

The meaning of humane treatment is context specific and has to be considered in the concrete circumstances of each case, taking into account both objective and subjective elements, such as the environment, the physical and mental condition of the person, as well as his or her age, social, cultural, religious or political background and past experiences. In addition, there is a growing acknowledgement that women, men, girls and boys are affected by armed conflict in different ways. Sensitivity to the individual’s inherent status, capacities and needs, including how these differ among men and women due to social, economic, cultural and political structures in society, contributes to the understanding of humane treatment under common Article 3.

Those planning, deciding on, and conducting military operations must adhere to the treaty and customary rules of IHL applicable to them. In addition, I maintain that using the five proposed IHL principles for the purpose of providing general guidance and for educational and training purposes would maximize the chance that military forces comply with the specific IHL rules during armed conflict. Including these five IHL principles into military manuals of States is therefore encouraged with a view to increase the implementation of IHL.
[1]

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The views expressed in this contribution are those of the author, and do not necessarily reflect the official position of the Kingdom of the Netherlands, or of any of the other professional affiliations of the author.

Footnotes

[1] I have proposed this in greater detail for the Netherlands in a longer article available [here](#) (in Dutch).

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by Jeroen van den Boogaard

December 8, 2020