



UvA-DARE (Digital Academic Repository)

Concept and sources of the international law of military operations

Gill, T.D.; Fleck, D.

Publication date

2015

Document Version

Final published version

Published in

The handbook of the international law of military operations. - 2nd edition

License

Article 25fa Dutch Copyright Act (<https://www.openaccess.nl/en/policies/open-access-in-dutch-copyright-law-taverne-amendment>)

[Link to publication](#)

Citation for published version (APA):

Gill, T. D., & Fleck, D. (2015). Concept and sources of the international law of military operations. In T. D. Gill, & D. Fleck (Eds.), *The handbook of the international law of military operations. - 2nd edition* (pp. 3-13). Oxford University Press.

<http://opil.ouplaw.com/view/10.1093/law/9780198744627.001.0001/law-9780198744627>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Oxford Public International Law

Part I General Issues, Ch.1 Concept and Sources of the International Law of Military Operations

Terry D. Gill, Dieter Fleck

From: The Handbook of the International Law of Military Operations (2nd Edition)

Edited By: Terry D. Gill, Dieter Fleck

Content type: Book content

Published in print: 10 December 2015

Product: Oxford Scholarly Authorities on International Law [OSAIL]

ISBN: 9780198744627

Subject(s):

Military assistance — Peace treaties — Treaty provisions — Military matters — International peace and security — Peace keeping

(p. 3) Chapter 1 Concept and Sources of the International Law of Military Operations

1.01 The International Law of Military Operations comprises all areas of public international law which relate to:

- the provision of a legal basis for any type of military operation in an international context;
- the command and control of such operations;
- the deployment of forces from the State(s) participating in the operation to and within the mission area (and vice versa) through the transit of international sea and airspace, and through the territory of third States;
- the use and regulation of force for the conduct of hostilities and law enforcement operations, the maintenance of public order, and the treatment of persons captured or detained within the context of the conduct of the operation;
- the status of the forces throughout the duration of the operation; and
- the legal responsibility of States, of international organizations, and of individual members of the forces and all other entities participating in the operation for any violations of international law and contravention of relevant international regulations in force for the operation.

1. General. The term 'International Law of Military Operations' is perhaps not (yet) a generally used term of art as is, for example, 'international humanitarian law', 'international human rights law' or 'the law of the sea'. It therefore calls for some explanation. 'Military operational law' is a term in general use in a growing number of armed forces, but it is relatively new, only having come into use in the past two decades to describe the various bodies of national and international law which are applicable to and regulate the planning and conduct of military operations. These include traditional areas or branches of international law, such as the law governing the use of force (the *jus ad bellum*), international humanitarian law (or as it more often referred to within many armed forces, the law of armed conflict), the law of the sea, and military use of airspace; as well as various branches or types of national (p. 4) law of any given country involved in military operations, such as military criminal justice and disciplinary regulations. It has also come to include hybrid areas of law and regulation, such as the 'rules of engagement' drawn up for a particular operation and status-of-forces arrangements for troops deployed on another State's territory, either in the form of formal treaties (status-of-forces agreements), or more informal ad hoc arrangements, combining both areas of international and national law and regulation. However, with the increase in both the density and importance of international rights and obligations to most military operations, there is a need to identify which areas of international law and the rules contained within them are most relevant to military operations.

2. Definition of Terms. Specific information will be appropriate on some terms used in this Handbook for specific forms of military operations. While the conceptual distinction between 'conduct of hostilities' and 'law enforcement operations' follows generally accepted principles relating respectively to the application of the means and methods of warfare within the context of an armed conflict on the one hand and the exercise of authority over persons or territory and maintenance of public order on the other hand as explained and discussed in Chapter 4, certain military operations are often referred to in different terms, so that more specific definitions had to be developed for this book. This for example is the case for the term 'peace operation' which is often used as comprising all operations that are conducted under the authority of the UN or conducted by regional organizations and alliances or by ad hoc (non-standing) coalitions of States that were sanctioned by the UN or authorized by a UN Security Council resolution, with stated intention to: '(a) serve as an instrument to facilitate the implementation of peace agreements already in place,

(b) support a peace process, or (c) assist conflict-prevention or peacebuilding efforts'.¹ For the purposes of this Handbook such a wide approach appeared not specific enough as it includes aspects of enforcement, peace enforcement, and peace support for which different legal parameters have to be observed. Hence we define 'enforcement operations' as action which can be characterized as sustained full-scale combat operations authorized by the Security Council against a State to maintain or restore international peace and security under Chapter VII of the UN Charter and qualifying as an international armed conflict under international humanitarian law; 'peace enforcement operations' as action authorized by the Security Council under Chapter VII to maintain or restore international peace and security, which—while potentially involving combat—will not entail the application of full-scale hostilities on a sustained basis against a State, and which fall conceptually and in terms of their objectives and the intensity of the use of force between enforcement operations and traditional peacekeeping; and 'peace operations' as military operations—enforcement and peace enforcement operations excluded—to establish or maintain peace, which have their legal basis

 **References**

(p. 5) in the general powers of the Security Council, of the General Assembly, and of regional organizations, and which require the consent of the Receiving State(s), considering that peace operations are governed further by the underlying principles of consent of all relevant parties, impartiality, and use of force restricted to defence of the peacekeepers and their mandate. These more specific definitions are used throughout this Handbook and commented on in the relevant chapters. The Glossary of Terms in the Annex will facilitate information and transparency.

3. Sources. Contemporary military operations conducted by States, or by or under the authority of international organizations such as the UN, NATO, or the European Union and the African Union, are increasingly complex in character and more often than not involve a large number of States and other international actors, bringing the participating States and their armed forces into contact with a variety of different areas of international legal regulation, ranging from the more traditional areas of international law named above to rules governing specific types of operations. More generally, international human rights law has increasingly become regarded as complementing the rules and principles of international humanitarian law in certain aspects of military operations and the rules relating to accountability and (criminal) responsibility for breaches have become of operational concern, which civilian and military policy makers, planners, commanders, and legal advisors must have a knowledge of and be able to apply in the planning and conduct of military operations. Moreover, this relevance and applicability of various areas of international law usually takes place in a complex and dynamic environment in which at one moment traditional war fighting can occur, while simultaneously or immediately afterwards, the same troops can be involved in maintaining public order, in law enforcement, or in providing humanitarian assistance. This complexity, in both the nature of contemporary operations and in the branches and subdivisions of international law relevant and applicable to military operations, has led to the gradual development of what may be considered a new sub-discipline of international law, referred to as 'International Law of Military Operations'. It is defined or described in the 'black letter' text of Section 1.01 and is intended to cover all areas of public international law, both traditional and more recent in terms of concern to the armed forces, which are of relevance throughout the planning and execution of any military operation, especially, but not limited to, those conducted across State borders or involving any outside actor.

4. A New Perspective. The International Law of Military Operations (ILMO) consists of various existing branches of international law. What is new is the way and extent to which these various areas of the law interact with each other and influence and regulate and shape the way in which contemporary military operations are planned and conducted. Whether 'ILMO' qualifies as a distinct sub-discipline of international law or is a combination of existing areas or sub-disciplines of international law which apply to military operations, is to a large extent a question of how one

defines the notion of legal sub-discipline and is probably less important than the function it has in bringing together the rules and principles of (p. 6) international law relating to the planning and conduct of a military operation and applying these in a systematic manner to promote coherence, consistency, and compliance with legal obligations. There are, of course, numerous sources in which the relevant international legal rules and regulations can be found, but these are scattered across a huge array of documents, treaties, and academic references, which makes it an extremely challenging, if not almost impossible, undertaking to locate, identify, and apply the many rules which are relevant to contemporary military operations. There are numerous manuals and handbooks issued by the armed forces of various nations, which describe and comment upon various branches of international and national law relevant for their armed forces.² However, none is completely devoted to and specifically designed to bring all areas of international law of relevance into focus, and most include large bodies of national law of relevance only to that particular nation's forces (which is one reason why we have not attempted to include national law within this Handbook beyond noting where it interacts with international law) and are moreover, generally 'service-specific'; that is, specifically aimed at one branch of the armed forces (army, air force, or navy) or one generic type of operation (e.g. naval operations, counterinsurgency, or peace operations). Despite the large number of sources available, there is no single source which offers a complete overview of the different rules and guidelines contained in various areas and sub-disciplines of international law which are relevant to contemporary military operations.

5. This Handbook is an attempt to fill this gap by providing as comprehensive an overview as possible of all areas of international law relevant to all types of operations; ranging from traditional combat operations to peace operations and devoting attention to a wide variety of areas of specific interest and importance within the context of contemporary military operations. While it is impossible to cover every single aspect of international law of potential interest and area of concern, we have tried to make the book as comprehensive as possible in terms of scope and coverage, while still keeping it readable and usable as both a training tool and as an academic reference. This also indicates the dual purpose underlying the book: it is firstly intended to serve as a comprehensive, but usable guide to policy officials, commanders, and their legal advisors at both the national and international level for the planning and conduct of any military operation, and as a general training tool which complements other existing resources, such as military manuals, internal guidelines and regulations, and other similar materials. The planning and conduct of any military operation has become increasingly intertwined with knowledge of and correct application of international law in its various manifestations to promote compliance with the law as a matter of both policy and principle, as a means of contributing to the mission's success and legitimacy, and to assist in maintaining political and public support for the mission and cohesion and (p. 7) cooperation between allies, and between participating States and international organizations with host governments and their populations. Secondly, the Handbook is also intended to serve as an academic reference for students and scholars engaged in teaching and research in one or more areas of international law which are covered in the book. Such research and teaching is conducted at a variety of institutions including military staff colleges, defence academies, universities, and international institutions, organizations and similar bodies engaged in developing and applying international law in both a traditional academic sense and in a more practical sense, such as in training courses for senior personnel or in research projects relating to one or more areas of international law addressed in this Handbook. We have attempted to maintain a balance throughout in terms of these dual purposes and intended audiences, but with an emphasis on the former over the latter wherever a choice became necessary. That means that while we have paid attention and given due recognition to areas of controversy relating to certain aspects and applications of international law, we have emphasized clarity and usability over lengthy investigations and discussions of certain rules and practices which are subject to differing interpretations and controversies. We have also aimed at maintaining this balance in terms of the background and perspective of the contributors to this Handbook, which is a collective effort on the part of contributors from differing backgrounds, perspectives, and nationalities. Many of the contributors are serving or recently retired military legal advisors with extensive practical experience, while

others are professional academics or (former) policy officials engaged in researching and teaching one or more areas of international law covered in this Handbook; and a few of the contributors combine both of these backgrounds and perspectives. As such, this Handbook is unique in attempting to bring together both a professional and academic perspective and including persons from differing regions and experience.

6. General Organization of the Handbook. This Handbook is organized along the lines of an annotated manual and follows the general style and approach used in such works, particularly the companion volumes addressing international humanitarian law³ and the law of visiting forces⁴ under the editorship of one of the editors of this work and issued by the same publisher. The book is divided into five parts and into (sub-)chapters, sections (in bold 'black letter' type), and numbered paragraphs containing commentary. The sections are consecutively numbered per chapter and together form a Manual, which is intended as an easy reference tool for practical use and which appears integrally as an annex to the complete work. Part I addresses certain issues of general importance. It is divided into four chapters and serves as a general introduction to the work. Parts II and III are organized along the general theme of the relevant international legal basis for any given type of (p. 8) operation, with Part II addressing operations conducted within the context of the UN Collective Security System in a broad sense and Part III addressing operations conducted on the basis of individual or collective exercise of national self-defence, or another possible legal basis under international law. These two parts are respectively divided into three and seven chapters, with two of those within Part II (Chapters 5 and 6) further subdivided into sub-chapters. In both these parts, the approach has been to address the relevant legal basis, the regulation and use of force, command and control, and the status of forces respectively. Separate attention is given to some of these issues in relation to specific legal bases, in Part IV, where 16 chapters address areas of particular concern and interest covering a wide range of topics and specific issues. Two of these chapters (20 and 22) are also further subdivided into sub-chapters. We have attempted to provide as broad a coverage as possible and address issues of topical or special concern and which are of both practical and academic importance. These can play a role in any of the types of operation covered in Parts II and III, but are specific enough to warrant separate coverage. Part V containing two chapters is a synthesis and conclusion to the Handbook, addressing the role of the military legal advisor in contemporary military operations and providing general conclusions.

1.02 As such, the International Law of Military Operations includes rules embedded in:

- the UN Charter and customary international law relating to the use of force and the maintenance and restoration of international peace and security,
- international humanitarian law,
- international human rights law,
- other areas of conventional and customary international law relevant to international military operations such as international law relative to the status of forces and the exercise of criminal jurisdiction, the international law of the sea and air law, the law of international responsibility and international criminal law, international environmental law, and the law of international organizations.

It is supplemented by national constitutions, laws, and regulations. While the conduct of hostilities in armed conflict is regulated by international humanitarian law as *lex specialis*, law enforcement operations undertaken outside the context of armed conflict must follow human rights law. Where authority is exercised over persons or territory within the context of an armed conflict, both bodies of law are applicable and should be applied in accordance with established rules of legal interpretation and methodology to ensure compliance with all applicable legal obligations and resolve any conflict between rules from different bodies of law which may arise.(p. 9)

1. As with any branch of public international law, the International Law of Military Operations is governed by the traditional sources of international law contained in Article 38 of the Statute of the International Court of Justice, which is generally recognized as containing an authoritative but incomplete listing of the sources of international legal obligation. Alongside treaties and international customary law as primary sources, these include general principles of law recognized in all legal systems, judicial decisions, authoritative publications, and decisions of international organizations (the last of which does not appear in Article 38). The first two are the most important in terms of setting out primary legal obligations, while the other sources are generally used in a more supportive role to supplement and interpret the obligations contained in the primary sources of treaty law and customary law. Since the International Law of Military Operations is in some respects a hybrid body of law (as are most areas of military law) it is largely governed by treaties, customary law, and the other sources governing various other branches and sub-disciplines of international law such as, for example, those relating to the use of force, international humanitarian law, international human rights law, or the law of the sea and air law. The most important of these other areas of international law are contained in the 'black letter' text of Section 1.02 immediately above. It is obvious that the number of treaties and customary rules from so many different branches of international law are far too numerous to name or even to attempt to list separately. However, all rules and commentary contained in this Handbook contain full references in the footnotes indicating the sources of legal obligation and their interpretation in academic and official publications. Three branches of international law mentioned earlier call for some brief comments in terms of our approach and the way they have been applied within this Handbook.

2. *Regulation of the Use of Force.* It is self-evident that any international military operation must have a legal basis under international law for it to be in compliance with international law. We have taken the approach that any international military operation must comply with these rules; that the only recognized exceptions to the Charter prohibition of the use of force in international relations are those contained in the Charter itself, or are otherwise generally recognized in international law and that therefore any use of force which is not in compliance with these, will be *prima facie* illegal. We have stated clearly where there are areas of controversy and set out a legal position on what to us seems to be the most reasonable and persuasive position, without attempting to provide a definitive interpretation or ignore points of contention. Likewise, we have avoided pronouncing judgment on the legality or lack thereof of any specific military operation, which is not the purpose of a Handbook such as this. Possible uses of force which have not been gone into extensively, such as armed reprisals, preventive war, national liberation wars and so forth, were considered to be either clearly lacking in any recognized legal basis or irrelevant for the purposes of this Handbook, or both.

3. *International Humanitarian Law.* As regards the other branch of international law most associated with military operations, international humanitarian law, it is axiomatic that it will apply equally to any and all parties to an armed conflict,

 References

(p. 10) irrespective of whether that party is acting in compliance with or in breach of the law governing the use of force. Moreover, it can be applied as a set of guiding principles without prejudice to legal obligations arising from any other applicable body of law in any military operation not constituting an armed conflict, whether international or non-international in character. In the context of the conduct of hostilities, the treatment of specific categories of protected persons such as prisoners of war, the wounded, sick or shipwrecked and in certain other areas, such as the law of belligerent occupation, it will operate as the primary international legal regime in determining the legality or lack thereof of any particular action or omission carried out by a party to an armed conflict. In its relationship to international human rights law, it will have the status of *lex specialis* in the abovementioned situations.

4. *Human Rights Law.* With respect to international human rights law we have taken the approach

that it is applicable in principle to all military operations, including situations of armed conflict, wherever and whenever individuals are under the jurisdiction or territorial control of any given State or international organization, or are in the physical custody of any State or other subject of international law. It will depend on the actor involved (State or international organization) and the scope of treaty obligations, whether it applies as conventional or customary law. In situations of armed conflict it will complement the provisions of international humanitarian law to the extent there is either territorial or personal jurisdiction over persons affected. In the situations referred to in the previous paragraph international humanitarian law will have the status of *lex specialis* in the event of any conflict of obligation. In situations of belligerent occupation and operational detention it will complement and act alongside the obligations contained in international humanitarian law and other relevant legal considerations. In the context of law enforcement and maintenance of public order outside the abovementioned situations it will serve as the sole or primary governing legal paradigm.

5. National Law. These and other relevant areas of the International Law of Military Operations are supplemented by national constitutions, laws, and regulations. These can include the rules relating to the use of force which are governed by national criminal law (such as personal self-defence addressed in Chapter 24), national caveats in multinational operations relating to specific activities, law enforcement, certain aspects relative to the status of forces, and other areas. These have received attention in this Handbook to the extent this was felt essential to provide a complete picture and analysis. However, in keeping with the title and purpose of this work, we have avoided dealing with national law in detail, instead indicating where the demarcation between national and international law lies wherever the two come into contact. It would be impossible to do justice to the complexity and depth of domestic legal regulation of any State or selection of States, much less all States, alongside the various branches of international law which are dealt with in this Handbook. Moreover, national legal rules and regulations are dealt with in specific directives and publications issued by individual nations and are better left to other publications to comment specifically upon.

(p. 11) **1.03** Alongside rules of positive international law of either a conventional or customary nature, international military operational law is also influenced and to a significant extent regulated by rules and practices which are not of a legal nature, but which are part of the policy of States and international organizations. International cooperation has led to accepted standards and best practice, even in the absence of treaty or established customary obligations. However, while States and international organizations may adopt further going restrictions on the employment of force or allow for more favourable treatment of persons who have been detained for any lawful reason, they may never exceed what is allowed by the relevant binding international legal obligations applicable in a given situation.

1. We have included, where necessary, rules and practices which are not strictly of a legal nature. These include hybrid constructions such as 'rules of engagement', which combine legal, policy, and operational considerations and 'memoranda of understanding' relating to various topics such as, for example, status-of-forces arrangements outside of a formal treaty relationship. We have also included so-called 'best practice', where appropriate, as guidelines on how to conduct certain types of activity, not governed by legal rules, or as a complement to legal rules, where these are relevant and have gained a large degree of acceptance. Whenever such non-legally binding rules are used they are indicated by the use of 'should' or similar language to denote their non-legal character, rather than the use of terms such as 'shall', which denote a binding legal obligation. These practices serve a useful, indeed in some cases, a vital role in supplementing and complementing binding legal obligations.

2. While such non-binding practices can provide a useful supplement to existing legal obligations, they may never exceed what is allowed under any binding legal obligation which is applicable to a given situation. For example, many States will apply international humanitarian law relating to the treatment of prisoners of war as a guideline for the detention of persons outside the context of an armed conflict, since it provides for a comprehensive set of standards, which is familiar to members

of the armed forces. However, this is without prejudice to the obligations arising from international human rights law which are applicable to the detention of persons and which are applicable to the State in question.

1.04 In applying rules from different branches of international law, all applicable rules must be taken into account and interpreted and applied with a view to giving them the fullest possible effect. This follows both from the obligations the parties have undertaken and are bound by and from the fact that international law is an integrated system of rights and obligations which is governed by established rules of interpretation and legal methodology.(p. 12)

1. The fact that rules from different legal instruments arising from a single branch of international law, or rules arising from different branches of international law may apply to a given situation has the consequence that they must be applied with a view to meeting all legal obligations and giving all relevant obligations the fullest possible effect. A State can be bound by different legal instruments or sources of obligation arising from a single branch or sub-discipline of international law such as two or more treaties from, for example, international humanitarian law, which are both applicable in a given situation. It will also often be the case that rules from different branches of international law can be applicable to a given situation such as, for example, when both international humanitarian law and international human rights law apply to a particular situation, or when a Security Council mandate permitting the use of force or detention of persons for a particular purpose must be applied in accordance with relevant obligations arising from international humanitarian law and or international human rights law.

2. In such cases, the established rules and principles of interpretation and legal methodology will provide guidance in how such obligations can be applied in a coherent fashion and in resolving any conflicts between specific rules which may arise. The first step in this will be determining which legal sources and obligations apply to a given situation. Once this has been established, the next step will be to ascertain to which extent the obligations arising from them are mutually compatible and to identify any potential conflicting obligations. The third step is to interpret and apply all relevant legal instruments and obligations in context, both in relation to each other, and in relation to the relevant factual situation. The guiding principle here will be to apply them in such a way that they complement each other to the maximum extent possible, thereby contributing to the fulfillment of obligations to which the State is bound. Finally, any potential conflicts between rules and obligations must be resolved using the established principles of legal methodology. These include the application of principles relating to any hierarchy between instruments or other sources of obligation alongside other principles relating to the precedence of rules, including, but not limited to the aforementioned principle of *lex specialis*, whereby a rule or set of related rules specifically enacted for a particular subject or situation will be given precedence to the extent necessary to resolve any conflict of obligation, while taking account of the obligations contained in another legal instrument to the extent they are compatible with the rule with a *lex specialis* character. For example, the rules relating to the conduct of hostilities will act as *lex specialis* in the context of an armed conflict when hostilities occur to which the State in question is a party, but this will not affect the applicability of other rules from other legal regimes in so far as they do not collide with the former. Hence, there is no reason why rules from, for example, international human rights law would not continue to apply to the extent they were applicable in other contexts.⁵

(p. 13) **1.05** The International Law of Military Operations is therefore more than a mere collection of rules from different legal sub-disciplines. It can serve as an instrument which is aimed at harmonizing obligations arising from different legal sub-disciplines and translating such obligations from the abstract level of treaty and customary law to operational directives aimed at applying these obligations in the practical context of military operations.

1. The International Law of Military Operations serves a dual purpose. The first is 'horizontal' in

nature, which it can fulfil by bringing together and applying in context the relevant rules of international law from different sources and legal regimes which are relevant to the planning and conduct of military operations; it can assist in providing guidance and promoting coherence between these legal regimes and their respective obligations. The second is 'vertical' in nature which it can achieve by integrating legal obligations and considerations into operational planning and directives, which aim to apply often abstract and broadly formulated rules and principles of treaty and customary law in an operational context.

2. In this context, if done correctly, legal and military considerations will be interwoven and integrated in such a way as to promote mission accomplishment while ensuring compliance with the law. This is a task which falls primarily upon the shoulders of the military legal advisor, alongside policy makers and military commanders. The International Law of Military Operations can therefore be seen as a sort of 'language' in which legal obligations and considerations are communicated to the responsible political and military leadership and are fully integrated into the planning and conduct of a military operation. It therefore serves a purpose as not only being a specialized area of international law, but also an instrument to promote compliance with the law in a special context, that of a military operation. As such it may well qualify as a distinct sub-discipline of international law and is, in any case, more than a mere collection of rules.

Footnotes:

¹ Stockholm International Peace Research Institute (ed.), *SIPRI Yearbook 2009: Armaments, Disarmament and International Security* (Oxford: Oxford University Press, 2009), 126 .

² See e.g. The Judge Advocate General's Legal Center & School, International and Operational Law Department, Charlottesville, Virginia 22903, *Operational Law Handbook 2014*.

³ D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd edn (Oxford: Oxford University Press, paperback 2014) .

⁴ D. Fleck (ed.), *The Handbook of the Law of Visiting Forces* (Oxford: Oxford University Press, 2001) .

⁵ For extensive discussion in depth of the problems arising from the application of rules from different legal regimes within international law and the function of principles of legal methodology, see 'Fragmentation of International Law' Report of the Study Group of the International Law Commission Finalized by Martti Koskienniemi, A/CN.4/L.682, 13 April 2006.