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Gill, T.D.; Fleck, D.

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Terry D. Gill, Dieter Fleck

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(p. 610) Chapter 32 International Law for Military Operations

Conclusions and Perspectives

1. General. The International Law of Military Operations is relatively new and open for further development. While it encompasses 'all relevant aspects of military law that affect the conduct of operations',¹ it may still be premature to state that operational law is now 'recognized as a core legal discipline'.² Yet it may be acknowledged that in this emerging branch of international law, which has been shaped by the practice of many States, the role of legal scholarship was considerable from the outset and that cooperation between legal and operational experts may most effectively contribute to the rule of law in military operations. The principles and rules of this new discipline, as demonstrated in the various contributions to this Handbook, have drawn upon three classical branches of international law, i.e. the *jus ad bellum*, the *jus in bello*, and an emerging *jus post bellum*. The manner of that amalgamation and its intensity is part of a remarkable process that may itself influence the contents of those three branches of international law. The notion of operational law has undeniably already made its mark in the planning and conduct of military operations and its importance from an operational perspective has potentially far-reaching implications for both policy makers and practitioners. It is only natural that this is increasingly being realized at the level of legal scholarship as well.

2. This Handbook demonstrates the close relationship between legal theory and practice and the necessity of combining the two to ensure that operations are conducted in conformity with the law and that the law is capable of being applied in a way that takes account of operational challenges and realities. For international law to really 'matter' in the conduct of military operations, it must be capable of being applied in a way that enhances both of these goals. At the same time a theoretical classification of that new legal discipline is necessary and its wide range comprising different phases of international law application which have been kept (p. 611) apart for good reasons and will remain distinct is now more visible and open to a more comprehensive evaluation than before.

3. The *jus ad bellum* or international law on the use of force has been shaped by the prohibition of the use of force and the recognized exceptions to that core rule contained in Chapter VII of the UN Charter and the inherent right of self-defence. Its interpretation and implementation, unlike most other parts of operational law, is a matter of high-level decision-making. This of course does not exclude disputes being held at all levels on controversial aspects of certain of its rules. The ongoing discussion on such aspects may best demonstrate that international law is 'a system, a process, rather than [a simple catalogue of] rules or commands'.³ While decisions relating to the *jus ad bellum* may belong to the realm of high policy, it makes its influence felt throughout all levels and aspects of military operations and is therefore a core component of the International Law of Military Operations.

4. The *jus in bello*, or law of war, more often referred to now as international humanitarian law applicable in armed conflict, is the most traditional and most specified of the legal disciplines to be considered in the context of military operations. The term 'humanitarian law' is very broad in that it not only focuses on the protection of the victims of armed conflict, but in fact relates to any action belligerent States may undertake during an armed conflict. Thus, it also comprises their relationship to neutral States and their operations in occupied territories after the end of active hostilities. It is due to the remarkable activities of the International Committee of the Red Cross and the International Red Cross and Red Crescent Movement that international humanitarian law was shaped, further developed, and implemented despite so many breaches. Hardly any other branch of international law can benefit today from a comparable dense discussion on the global scale, from so many *fora* provided for this discussion, and a proliferation of expertise worldwide. The relatively broad attention for these activities is part of a progressive development which includes the introduction of humanitarian principles and rules even in areas well beyond the realm of armed

conflicts, i.e. beyond the specific field of application for which that body of law was originally designed. In this way, international humanitarian law has obtained a double relevance to military operations: firstly, as the applicable law relating to the conduct of hostilities and treatment of protected categories of persons and objects in situations of *de jure* armed conflict, whether international or non-international in character; secondly, as a source of guidance in crafting rules of best practice even in situations not amounting to an armed conflict.

(a) It is widely accepted today that principles and rules of international humanitarian law must also be observed in peace operations and related activities conducted

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(p. 612) by the United Nations and by States.⁴ While it is appropriate to positively respond to such a wider perception of and respect for international humanitarian law, certain clarifications remain necessary, to ensure a correct understanding and proper application of its rules in practice. The protection of victims of military operations is part of a balance which may require different considerations in armed conflicts than would normally be the case in peacetime. This distinction may be difficult in practice, as quite often the dividing line between peace and armed conflict is blurred. Peace enforcement operations are a case in point. The pertinent directives of the UN Secretary General on *Observance by United Nations Forces of International Humanitarian Law*⁵ may be interpreted as limiting the application of international humanitarian law to situations where 'UN forces [are] engaged as combatants in an armed conflict', while it may also be held that in a more general sense not only enforcement and peace enforcement operations, but also all peace operations are affected by international humanitarian law, even if this perception is not explicitly confirmed in treaty law.⁶ Similarly, the United States requires its forces to 'comply with the law of armed conflict during all armed conflicts, however such conflicts are characterized, and in all other military operations'.⁷ A similar policy is observed by many other States and international organizations with a view to guiding military conduct in situations which may be difficult to define in an undisputable manner. This policy not only makes practical sense, as it avoids a 'double-book' attitude at operational level, it is also theoretically convincing, as key principles of humanitarian law, i.e. the distinction between civilian objects and military objectives, the avoidance of unnecessary suffering, and the principle of humanity, are as valid in peacetime as they are in armed conflict.

(b) The Security Council has developed an expanded role relating to international humanitarian law. In many emergency situations, both during and after armed conflicts, it has called States and non-State actors to respect its principles and rules.⁸ Regional organizations have supported this trend. The well-known *European Union Guidelines on promoting compliance with international humanitarian law*⁹ are designed to ensure that important aspects of this legal order are sufficiently present in political and military planning processes. Yet there is still a widespread lack of (p. 613) knowledge of existing principles and rules, and the issue of different legal approaches by States and non-State actors as to the interpretation and application of existing law remains important. New efforts are required to harmonize interpretation of pertinent obligations in multinational military operations. Differences have to be bridged for those forces which shoulder different legal obligations but are tasked to operate in concert.¹⁰

(c) While international humanitarian law may be seen as a guiding parameter for any use of force, irrespective of whether the situation qualifies *de jure* as an armed conflict, there are still limits for its application, as principles and rules for law enforcement operations may be different from the rules applicable to the conduct of hostilities. For law enforcement a strict rule to capture rather than kill applies, *habeas corpus* must be respected in any event, and each case of death by force must be formally investigated.¹¹ A more liberal approach may be taken for the conduct of hostilities, yet the principles of proportionality and necessity which have been developed in international humanitarian law are generally relevant for police operations and military operations in peacetime as much as during armed conflict, even if there may be differences in their application in a 'peace

setting' as opposed to an 'armed conflict setting'.

(d) Human rights obligations also form a significant part of operational law. That significance may be seen under three different aspects.¹² Firstly, in an ideal situation there would be an express mandate by the Security Council and/or a regional organization requesting not only all parties to an armed conflict, but in particular peacekeeping forces in post-conflict situations to protect human rights.¹³ Secondly, even where such commitment has not been expressly stated, peace operations are to respect the law of the Receiving State including its obligations under international law of which human rights are an important part. Finally, the human rights obligations of the Sending State apply extraterritorially for acts committed within their jurisdiction. The relationship between international humanitarian law and human rights has been shaped as part of a development,

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(p. 614) which started with the Human Rights Conference in Teheran 1968¹⁴ and did not end with the adoption of major human rights principles in Article 75 of Protocol I Additional to the Geneva Conventions.¹⁵ Legally speaking, this relationship may be characterized by mutual complementarity, as described by the Human Rights Committee,¹⁶ and also by the *lex specialis* principle which, however, should not be misunderstood as applying to the general relationship between the two branches of international law as such, but rather relates to specific rights in specific circumstances. The International Court of Justice has stated in its Advisory Opinion on the *Threat or Use of Nuclear Weapons* that the 'test of what is an arbitrary deprivation of life...falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict that is designed to regulate the conduct of hostilities'.¹⁷ More recently, in its Advisory Opinion on the *Wall in the Occupied Palestinian Territory*, the Court asserted that in armed conflicts some rights are governed exclusively by international humanitarian law, while others are governed exclusively by human rights, and still others are governed by both bodies of law. The Court expressly confirmed that in the latter case 'both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law' must be considered.¹⁸ This jurisprudence was confirmed in *Congo v. Uganda*.¹⁹ It is of great significance for the conduct of military operations.

5. The *jus post bellum* or law applicable to the transition from armed conflict to peace is connected to the aforementioned categories of *jus ad bellum* and *jus in bello*, yet it covers a much wider range of topics, rules, and decision-makers. Focusing on peacemaking, *jus post bellum* is of a transitional nature, and it often requires a simultaneous application of peacetime law and the law of armed conflict.²⁰ Those applying *jus post bellum* today have to operate in a network between different legal orders and bodies of international and domestic law. They are challenged to reconcile a wide spectrum of interests and, as traditional solutions may remain

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(p. 615) exceptions, the need for compromises will be the rule. A comprehensive set of norms of *jus post bellum* cannot be developed easily. To accomplish that task, not only must an inventory of relevant treaty obligations be assessed; also the relationships between various applicable branches of law and the institutional frameworks for the law to operate are to be considered. Clear commitments to individual and collective responsibility are of particular relevance for this process, as for a stable peace justice must become visible, even if full reparation is impossible post-conflict.

6. As many military operations are conducted in the transitional phase between war and peace, the law of military operations is to a significant extent *jus post bellum*. This phase may be characterized by a lack of clear applicable rules mixed with additional requirements for enhanced civil-military cooperation in a difficult environment. Hence, specific efforts of military legal advisors are essential in this phase to identify pertinent rules and apply them in a convincing and effective manner. Sending States and international organizations should support this by providing necessary

personnel support and issuing clear rules of behaviour for each mission.²¹

7. Controversial Problems. The present Handbook has been written in an effort to provide reliable information for practitioners and to encourage further research in the academic field. Both aims include an openness for existing controversies and for questions yet to be answered. Indeed, not all contributions are uncontroversial and some chapters have deliberately been written in an effort to carry a critical dialogue to further depths.

(a) The conceptual distinction between law enforcement and conduct of hostilities is a case in point. Discussion shows that different rules must apply in these two different modes of operation. The principles of necessity and proportionality will spell out differently for combat and police tasks. In combat, necessity is a Force enabler empowering both sides to employ the degree of force necessary within the law to achieve the goals of their respective missions and proportionality relates to the balance between military advantage and likely damage to civilians and civilian objects (and not to the use of force between combatants *inter se*), whereas in a law enforcement operation, necessity relates strictly to the question whether force may be employed to achieve a lawful purpose, in particular, in response to grave danger to the law enforcement officers themselves or to civilians, and likewise proportionality places strict limitations on the degree of force to achieve that purpose. Yet these differences will be a matter of graduation where risks for innocent persons exist, and they do not affect the applicability of the principles as such.²² States deciding on the use of armed forces for law enforcement purposes bear a responsibility to consider the relevant legal implications and they must ensure that the personnel employed is trained in the applicable rules.

(p. 616) **(b)** Operational detentions are in the focus of the dividing line between law enforcement and the conduct of hostilities. The principle that only prisoners of war enumerated in Article 4 of the Third Geneva Convention may be detained until the 'cessation of active hostilities'²³ and that *habeas corpus* rights must be ensured in all other situations is difficult enough to be translated to the requirements of non-international armed conflict. It is even more difficult in a peace enforcement action where a state of armed conflict does not exist or may be disputed, so that there may be ambiguity as to applicability of the law of armed conflict, including prisoner-of-war status. The executive branch must ensure that operational detentions are confined to imperative reasons of security. They must be limited in purpose, time, and procedures. Human rights must be fully respected. Parliaments and governments authorizing operational detentions are responsible for the full legality of their actions and they must exercise effective control over such activities.

(c) The legal bases for military deployment and the use of force may as such be a matter of dispute that cannot be resolved in every single case, even though one should be careful to distinguish between genuine lack of clarity as to the relevant facts and grey areas in the law on the one hand and simple violation of the law coupled with *ex parte* justifications on the other. Parties may continue to differ on the causes and modalities of their military action. It is all the more important to apply *jus in bello* rules irrespective of any consideration of *jus ad bellum* and to develop cooperative steps towards application of a *jus post bellum*. Parties may continue to differ on the causes and purposes underlying their resort to force. However, this should never result in or be used as a pretext for less than full compliance with the *jus in bello*, or prevent cooperative efforts to achieve peace and apply the *jus post bellum*, once the conflict has ended.

8. Open Issues. A number of issues had to be left open in this Handbook. It would go beyond its purpose to discuss the important influence national law and policy have on the conduct of any military operations. That discussion would have to be country-specific,²⁴ even if there will be similarities in many States, and it would transgress what is possible in a single volume. We have made one partial exception to this consideration, namely in relation to the right of personal or individual self-defence, which is largely governed by national criminal law. This was unavoidable, as this right is so closely related to military operations that its omission would have left many questions unanswered. Chapter 24 makes clear that the different 'guises' or applications of what is sometimes loosely referred to as 'self-defence' are, in fact quite distinct notions, albeit stemming

from a common root. It is also clear, notwithstanding widely varying interpretations of what is allowed under personal self-defence, that it is at best a concept of limited usefulness in most situations arising in the context of military operations and should not be used out of context.

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(p. 617) There are other topics, however, that would deserve further study in continuation of the contributions included in this Handbook:

(a) The post-conflict and peacetime application of rules of international humanitarian law should be evaluated, to specify their *lex specialis* role in relation to human rights and support their full implementation during armed conflict.

(b) The role of non-State actors in the conduct of military operations deserves further discussion. Even if they may be widely considered today as not only enjoying individual rights, but also bearing obligations under international law,²⁵ it may be difficult to see insurgent fighters as exercising law enforcement authority, unless they actually control territory and may thus exercise quasi-governmental authority over persons and territory in a classic civil war context. On the other hand, principles and rules of law enforcement go beyond existing human rights obligations and insurgents executing law enforcement measures should be held to respect all relevant obligations irrespective of their authority to act at all.

(c) Command and control issues will remain case-specific, and even within one single organization, like the UN, different rules may apply to regulate specific cases. Yet it is striking that rules concerning general terms and conditions, such as operational command and operational control, have not yet been formally adopted in the UN, so that the authors of sub-Chapter 6.5 had to develop their commentary on the basis of more informal internal policy. In the interest of transparency and accountability such policy should be adopted in a formal review process and duly published. Relevant international organizations should also take initiatives to ensure that reparation be made for wrongful acts committed during military operations.

(d) Economic reconstruction and military support that may be given to this end are too important in any post-conflict situation to leave them unregulated. International organizations and States involved in post-conflict reconstruction should cooperate in the development of principles and rules that help to ensure respect for self-determination, national sovereignty, and individual protection, and avoid conflicting situations for individual soldiers participating in such activities.

9. There will remain a variety of different sources of the international law relevant for military operations. For the applicable treaty law with its overlapping rules and varying States parties, interpretive efforts are required to ensure common understanding. Rules of customary law must be identified, based on the well-established components of practice and *opinio juris*. Even where the customary status of a certain rule may be disputed, its characterization as best practice, shaped by international experience, national interests, and national law, may be relevant. For all rules so identified the task of implementation and enforcement requires particular efforts to be taken, to ensure restoration of the rule of law with a clear sense of international responsibility. Lawyers at all levels are involved in this process. (p. 618) A proactive role to ensure compliance with existing rules may be key to a successful performance of military missions.

10. Aside from the three branches of international law referred to in the preceding paragraphs, it is clear that the International Law of Military Operations draws upon and is influenced by many other sub-disciplines of international law. These include, as has been shown in various chapters, the law of the sea, air law, the law of international responsibility, and international criminal law. These branches of international law provide a framework for shaping operations themselves, identifying rights and obligations of the State(s) involved and those of third States and avoiding unnecessary contention and disputes. The complexity of contemporary military operations is such that a firm understanding of how these areas of international law relate to military operations is essential from both a practical and a more theoretical perspective. Yet, in many cases, insufficient attention has

been given to these implications and how the law both influences and is influenced by the conduct of military operations. The inclusion of chapters in this Handbook relating to these areas of international law will hopefully contribute to a better understanding of this mutual relationship and stimulate further clarification and development of the law, where necessary.

11. Finally, it is clear that, while no complete summary of the conclusions of a volume such as this is possible, one point in particular deserves some attention. That is the role of the (military) legal advisor who is, and should be, involved at all stages and levels of planning and conducting any military operation and in the training and instruction of the personnel who carry it out. This crucial role is twofold, firstly to ensure that commanders and sub-commanders receive the necessary legal advice to enable them to conduct their mission, and secondly, to promote and as far as possible to ensure that the operation is conducted in full compliance with the law. This task is a demanding, indispensable, and essential one and requires both a firm command of the law, operational and situational awareness, and an ability to constructively guide and advise on a wide range of issues and in varying situations. It is hoped that this Handbook will contribute to a better understanding of this task and will aid in its successful execution.

Footnotes:

¹ US Army *Operational Law Handbook 2014* (Charlottesville, Virginia: The Judge Advocate General's Legal Center & School, International and Operational Law Department); US Field Manual 1-04, *Legal Support to the Operational Army* (2013), Section 1–5.

² US Army *Operational Law Handbook 2014; Legal Support to the Operational Army* (2013), Section 1–5.

³ R. Higgins, *Problems & Process. International Law and How We Use It* (Oxford: Clarendon Press, 1994), 10.

⁴ D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd edn (Oxford: Oxford University Press, 2013), Sections 421, 1305–9.

⁵ Secretary General's Bulletin: *Observance by United Nations Forces of International Humanitarian Law*, ST/SGB/1999/13 (1999).

⁶ Fleck (ed.), *Handbook of International Humanitarian Law*, Sections 1301–1352.

⁷ Department of Defense, Law of War Program (DoD Directive 2311.01E, 9 May 2006), para. 4.1; US Navy, US Marine Corps, US Coast Guard, *The Commander's Handbook on the Law of Naval Operations* (NWP 1-14M, MCWP 5-12.1, COMDTPUB P5800.7A), para. 6.1.2 (June 2007).

⁸ See G. Nolte, 'The Different Functions of the Security Council With Respect to Humanitarian Law', in V. Lowe, A. Roberts, J. Welsh, and D. Zaum (eds), *The United Nations Security Council and War. The Evolution of Thought and Practice since 1945* (Oxford: Oxford University Press, 2008), 519–34.

⁹ *European Union Guidelines on promoting compliance with international humanitarian law*, [2005] OJ C 327/04, 1, 23 December 2005.

¹⁰ See e.g. Art. 21 Dublin Convention on Cluster Munitions of 30 May 2008.

¹¹ See Fleck, 'Law Enforcement and the Conduct of Hostilities: Two Supplementing or Mutually Excluding Legal Paradigms?' in A. Fischer-Lescano, H.-P. Gasser, T. Marauhn, and N. Ronzitti, *Frieden in Freiheit. Peace in Liberty. Paix en liberté* (Baden-Baden: Nomos, 2008), 391–407, at 405.

¹² See Fleck (ed.), *Handbook of International Humanitarian Law*, Section 1307; T.D. Gill, 'Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law: A Plea for Mutual Respect and a Common-Sense Approach', *Yearbook of International Humanitarian Law 2013*, 251–66.

¹³ In its recent practice the Security Council has confined itself to calling on all parties to the

conflict to protect human rights and respect international humanitarian law, while the obligation of peacekeepers to comply with these rules themselves is obviously taken for granted, see e.g. SC Res. 1291 (2000), para. 15, with respect to the conflict in the Democratic Republic of Congo. For the interim UN authorities in Kosovo and East Timor the Security Council has included the maintenance of law and order (which should include the protection and promotion of human rights) in the respective mandates, without, however, establishing specific control mechanisms, see SC Res. 1244 (1999), para. 9, for Kosovo and SC Res. 1272 (1999), para. 2, for East Timor.

¹⁴ Resolution XXIII Human Rights in Armed Conflict, in D. Schindler and J. Toman (eds), *The Laws of Armed Conflict*, 4th edn (Leiden: Nijhoff, 2004), 347.

¹⁵ See M. Bothe, 'The Historical Evolution of International Humanitarian Law, International Human Rights Law, Refugee Law and International Criminal Law', in H. Fischer, U. Froissart, W. Heintschel von Heinegg, and C. Raap (eds), *Krisensicherung und Humanitärer Schutz. Crisis Management and Humanitarian Protection* (Berlin: Berliner Wissenschafts-Verlag, 2004), 37–45.

¹⁶ General Comment No. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add. 13 (2004), <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/58f5d4646e861359c1256ff600533f5f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/58f5d4646e861359c1256ff600533f5f?Opendocument)>, paras 2, 10, 11; see also General Comments Nos 15, 18, and 28. All General Comments are available at <<http://www.unhchr.ch/tbs/doc.nsf>>.

¹⁷ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports, 1996, 226, *ILM* 35 (1996), 809, para. 25.

¹⁸ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, General List no. 131, ICJ Reports, 2004, *ILM* 43 (2004), 1009 *et seq.*, paras 102–142, at 106.

¹⁹ ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 19 December 2005, para. 216.

²⁰ C. Stahn and J.K. Kleffner (eds), *Jus Post Bellum. Towards a Law of Transition From Conflict to Peace* (Cambridge: Cambridge University Press/T.M.C. Asser Press, 2008), 234.

²¹ The Council of the European Union *Generic Standards of Behaviour for ESDP Operations*, 8873/3/05REV 3 (18 May 2005) may be welcomed as a first step in this direction.

²² Cf. Fleck, 'Law Enforcement and Conduct of Hostilities', 401–6.

²³ Cf. Art. 118(1) GC III.

²⁴ For an excellent example see N.D. White, *Democracy Goes to War. British Military Deployments Under International Law* (Oxford: Oxford University Press, 2009). For a comparative study in the European region see G. Nolte (ed.), *European Military Law Systems* (Berlin: de Gruyter, 2003).

²⁵ See A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).