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Rules of engagement

Rules on the use of force as linchpin for the international law of military operations

Boddens Hosang, J.F.R.

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Linchpin for the International Law
of Military Operations

J.F.R. Boddens Hosang

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Rules on the Use of Force as Linchpin for the International Law of Military Operations

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Johan Frederik Reinville Boddens Hosang
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Verenigde Staten van Amerika

Promotiecommissie:

Promotor: prof. dr. T.D. Gill Universiteit van Amsterdam

Overige leden: prof. dr. P.A.L. Ducheine Universiteit van Amsterdam

 prof. mr. dr. H.G. van der Wilt Universiteit van Amsterdam

 prof. mr. T. Blom Universiteit van Amsterdam

 prof. M.N. Schmitt University of Exeter, UK

 prof. dr. J.K. Kleffner Swedish Defence University

 prof. dr. E. Lijnzaad Universiteit Maastricht

Faculteit der Rechtsgeleerdheid

Acknowledgments and dedication

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For Sue

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Introduction

I. Introduction

A great many volumes of academic writing, analysis and insight exist as regards the legal bases for the use of force, covering the use of force by States in the geopolitical and international law contexts as well as the use of force by governments in the context of national law enforcement and related domestic situations. While many of those topics will by obvious necessity be discussed to some extent in this volume, this study is not aimed principally at those topics as such. Instead, this study was predicated on, and inspired by, discussions held by the present author with military and law enforcement colleagues who were operating at the other end of the debate on the use of force: the actual application of the use of force in military operations and in law enforcement. At that end of the debate, the focus appeared principally directed at the rules on the use of force issued to such personnel in order to carry out their tasks, while their analyses and interpretations were directed at those rules themselves as the principal source of authorizations and restrictions on the use of force in the conduct of their operations.

Academic analysis and insight regarding the international and national laws on the use of force, including developments in those laws and developing new insights into the interpretation of those laws, provides invaluable support to political and legal decision making at the strategic levels, that is at the level at which decisions are made as to the goals and objectives in the geopolitical arena, the legality or sometimes just desirability to deploy forces to achieve those goals and objectives, and the limits on acceptable use of force in that context. At the other end of the spectrum, military manuals and instruction cards, in combination with military training programs and drills, provide invaluable tools for military forces to understand and be able to apply the rules on the use of force which are issued to them, as well as providing tools for (military) lawyers as regards proper drafting, development and promulgation of those rules.

However, participation in debates at both ends of the spectrum makes it clear that the two ends run the inherent risk of no longer being part of a

spectrum or closed system, but rather two spheres of thought that operate in relative isolation from each other. In other words, the purely academic approach to the use of force in international law focuses on the law and its developments and meaning, while the purely practical approach to the use of force takes the law as a “given” and focuses on creating clear and practical rules.

The observation just described leads to the obvious conclusion that a linking pin is needed to ensure that the two ends of the spectrum remain connected. This necessity is not merely of interest from an academic point of view or a mere exercise in practical or legal analysis. The use of force is one of the most powerful instruments of State authority and has the inherent potential of causing death or injury as well as the destruction of property, all carried out in the interest of the policies and objectives of the State. This in itself already warrants careful legal analysis of, and constraints on, this instrument, both in the interest of ensuring its legality and in the interest of ensuring the legitimacy of the State and ensuring the international rule of law. At the same time, however, the personnel entrusted with the application of this instrument must be given the tools to do so in the manner in which it was intended, as well as the reassurance that those tools reflect the legal context in which they are operating and the confidence that they will not face legal consequences as long as they remain within that legal framework. This means that the interaction between the legal framework, consisting of all the relevant legal regimes and paradigms applicable to the use of force, and the actual rules on the use of force issued to State agents must be clear and that the dynamics of that interaction be understood and applied effectively.

II. Objective, Purpose and Methodology

Based on the observations discussed above, the principal question to be addressed in this study is the function of rules of engagement and derivative (or similar) rules on the use of force in the context of the legal framework governing the use of force during military operations. This means that this study aims to analyze the most relevant elements of the (international) law on the use of force in relation to the application of that law in military

operations and to examine how the rules on the use of force issued to military personnel function in terms of defining, shaping or determining that relationship. In terms of the spectrum or continuum discussion above, this analysis and examination seeks to identify if the rules on the use of force are, in fact, the requisite linchpin and, if so, how that role is achieved and how that linking pin functions.

In carrying out the analysis of, and seeking to answer, this overarching analytical question, several constituent or contributory questions and analyses will be addressed. Four of these questions reflect the principal areas of law which were identified, as will be explained below, as being the most relevant to the use of force in the context of military operations. In addition, a fifth question is presented below which is not related to one specific area of law, but rather represents a simplified version of the main analytical question and is addressed in various forms and wording as an integral part of the other four questions and is, in essence, the linking pin between the elements.

Because rules of engagement delineate the circumstances under which force may be used or actions which may be considered provocative may be carried out, divulging such rules, including the standing or long-term ROE, would give significant advantage to an adversary in an armed conflict or other military operation. Consequently, such rules are generally classified. In modern asymmetric conflicts, in which the opponents rely on the element of surprise, as well as given the modern role of the media and public opinion¹ restrictions on dissemination or disclosure of ROE are even more important. In such modern conflicts and operations, the political will and ability to continue military operations is equally influenced by strategic successes on the battlefield and public information and public views regarding the conduct of the operation. Access to an opponent's ROE can significantly enhance the possibilities for gaining control over that opponent's actions, reactions or ability to respond to one's own actions and thus affect the course of the operation and provide ample opportunity to

¹ The relationship between the media and military operations is discussed in greater detail below in the section on the history of ROE, as well as in chapter 1 in the explanation of the political element of ROE.

manipulate the outcome of confrontations to create (publicly visible) failures or defeats.

Consequently, any substantial study of ROE is hampered by limited access to the source material of the actual subject matter at hand or, in the case of authors such as the present author who have access to ROE on the basis of their profession, strict limitations apply as to what can or cannot be published or openly referenced as source material. While a significant number of conceptual articles have been written about ROE and related issues, the actual contents of the ROE themselves remain largely subject to rules regarding official State secrets and similar rules regarding the protection of classified information. In writing this study, consequently, open and publicly available sources have been used as reference material, especially as the principal sources for substantiating statements and interpretations of the law. While some of the sources also substantiate observations of practice and policy, the author's personal experiences or professional knowledge regarding those aspects of ROE are at times also referred to in the footnotes.

On the basis of the central question discussed above, a determination was first made as to which areas of law are most relevant for, or most directly influence, the use of force during military operations in terms of prohibitions or authorizations and in terms of direct and individual sanctions or consequences.² Bearing in mind furthermore that ROE delimit the use of force during military operations rather than defining or regulating the recourse to military action as an instrument in itself,³ it was determined that while the *jus ad bellum* and general public international law regulating the inter-State use of force affect the legal context in which the operation

² For example, the law governing State responsibility or torts would normally primarily, or at least initially, lead to consequences for the State rather than for the individual. While those areas of law certainly play a role in the context of military operations, in terms of claims for damages, they do not directly authorize or prohibit specific use of force nor create individual consequences.

³ While ROE may set forth authorizations to take the initiative in the use of force, they apply once a (political) decision has been made to deploy military forces and do not regulate such (political) decisions themselves. Consequently, ROE are an instrument *in bello* and not *ad bellum*.

takes place, and is therefore at least relevant to some degree, the areas of (international) law directly regulating the conduct of military operations, that is the *jus in bello*, are the most relevant.

This observation led to the conclusion that the laws of armed conflict, human rights law and criminal law were the principal relevant areas of law to be considered in the present study. In addition, one principle of law was included that transcends all, and is reflected in some, of the areas of law just mentioned: the right of individual, or personal, self-defense. This right is a justification or excuse under criminal law,⁴ also justifying or excusing violations of the laws of armed conflict,⁵ and is recognized as a justification or excuse for limitations or infringements of at least some elements of human rights law, especially the right to life.⁶ Given this special status of the right of personal self-defense it is also, however, necessary to compare and differentiate personal self-defense from the other forms of self-defense recognized in (international) law. These choices as regards the elements or areas of law lead to the following constituent question.

1) Constituent question 1: Do ROE affect the right of self-defense? If so, how do the ROE affect this right? If not, how can the relationship between the right of self-defense and ROE be described?

The use of force can be based on either an inherent right or on authorizations given by the political authorities governing the actions of State agents or, in fact, of States as such in the international context. As regards the inherent right of State agents (or in fact any individual) to use force, that is the right of self-defense, this right presents unique and specific issues as regards the

⁴ See Chapter 6.

⁵ See, for example, Article 31, paragraph 1 sub (c), of the Statute of the International Criminal Court. See also Knoops, G.G.J., *Defenses in Contemporary International Criminal Law*, Ardsley, 2001, pp. 242 – 246, and the International Law Commission, *Yearbook of the International Law Commission, Report of the International Law Commission on the work of its forty-eighth session*, Vol. II, Part Two, 1996, p. 40.

⁶ See, for example, Article 2, paragraph 2 sub (a), of the European Convention on Human Rights.

role of ROE in relation to the law. As will be discussed in chapter 3, the first issue regards the common element in all ROE that the right of self-defense may authorize actions not covered in the ROE or superseding the ROE. This leads to the question as to whether the ROE system itself contains an inherent “single point of failure” for the system and how this exception to ROE authority and regulation should be interpreted. Addressing this issue first was important, as an absolute exception to the role and function of ROE would render any further analysis of the role and function of ROE in relation to the law immaterial or at best make any such role and function subject to unpredictable conditions. Consequently, this topic was analyzed first and is discussed in the first substantive legal chapter in this book.⁷

Studying the relationship between self-defense and ROE, in particular the meaning and impact of the standard ROE clause establishing the precedence of self-defense over the ROE themselves,⁸ first necessitated defining the meaning of “self-defense”. As this term is used for a variety of recourses to defensive use of force, from national levels to the individual, specifying the various types of self-defense was necessary to delineate the focus of the discussion of self-defense in relation to ROE. However, even when limited to personal self-defense in the criminal law sense of the concept, and in addition to the overall complication discussed above as regards the ROE system as a whole, the right to self-defense presents two complications as regards the interaction with ROE. First, national rules on the right to personal self-defense vary, including variations on the permissible courses of action in exercising the right of self-defense and variations on legitimate subjects or triggers for exercising that right. Consequently, a modest comparative legal analysis was carried out to examine a few of such different national views on self-defense in terms of statute texts on the right to self-defense. Second, and finally, the concepts

⁷ Although not relevant to the methodology applied in this study, the topic of the interaction between the right of personal self-defense and ROE in military operations was the subject of extensive debate in the author’s professional life during a specific military operation, which in turn formed the impetus for analyzing the function of ROE in relation to the law.

⁸ See chapter 3 for a more detailed discussion of this clause.

of “hostile act” and “hostile intent” were examined in somewhat greater detail, as these terms carry different meanings and create different triggers for authorizing the use of force when used by NATO as compared to the national rules on the use of force in self-defense in (*inter alia*) the United States. This part of the analysis was based in part on a study of the American texts in question, including the (publicly available) unclassified section of the Chairman of the Joint Chiefs of Staff instruction on Standing Rules of Engagement for United States Forces, and relating those texts to the author’s personal experience as a member of the NATO working group which drafted the initial NATO document on ROE in the late 1990s.⁹

2) Constituent question 2: Do ROE reflect or serve to implement the laws of armed conflict? If so, how are the laws of armed conflict reflected or implemented in the ROE? If not, how can the relationship between the laws of armed conflict and ROE be described?

It seems self-evident that as the principal, specific and specialized body of law as regards the use of force under international law,¹⁰ international humanitarian law (IHL) and its interaction with ROE was one of the central constituent elements in this study. While, as will be discussed below in the section on the history of ROE, rudimentary forms of rules on the use of force existed long before the advent of IHL, it is clear that the development of IHL and its regulation of the conduct of armed forces in the context of an armed conflict has a direct impact on the use of force in that context. Consequently, the effects of this impact on the actual rules on the use of force, including ROE, need to be analyzed, in order to understand the role and function of ROE in relation to IHL.

In examining the interaction between IHL and ROE, an analysis was first made of the elements, or categories, of IHL provisions that most

⁹ See chapter 3 and the discussion in that context of the NATO document MC362/1.

¹⁰ See chapter 5 as regards the *lex specialis* relationship between IHL and human rights law.

directly and specifically address the use of force during armed conflicts.¹¹ These elements were identified as the principle of distinction and the related (or derivative) rules regulating targeting, the principle of proportionality, and the rules related to precautions in attack. Additionally, the rules on methods and means of warfare were identified as having indirect relevance for the (application of) ROE in military operations and the interaction between those rules and ROE was therefore included in this part of the study.

Next, the elements of IHL identified as (most) relevant were compared to common elements found in most ROE sets, for which relatively recent (actual) ROE for military operations were used as well as generic ROE serials contained in the most commonly used ROE compendia.¹² In view of the observations made above as regards classification of information, the outcome of the comparison to actual ROE sets is limited to specific examples of those rules without specifying or presenting the rules in question as a whole. The comparison to the ROE compendia is presented in somewhat greater detail.

This comparison between the elements of IHL most relevant for the use of force and ROE was aimed at analyzing the influence of IHL on ROE contents as well as analyzing the actual use of ROE, or the usability of ROE, for ensuring compliance with IHL obligations. While, as is discussed in greater detail in chapter 4, ROE do not necessarily reflect IHL directly in the sense of a transliteration of IHL norms into ROE texts or the adoption of IHL provisions directly in ROE sets,¹³ an analysis was made as to how IHL obligations influence both the drafting of ROE and the implementation

¹¹ While all of IHL regulates the conduct of hostilities, not all of the provisions of IHL are directly related to (individual) decisions to use force. For example, the specific rules regarding the treatment of prisoners of war after they have been captured are not directly related to the use of force and are not part of the ROE for military operations (although the authorization to initiate capture or detention often is).

¹² See especially chapter 1, as well as the references to the compendia in other chapters.

¹³ See also chapters 1 and 6 as regards the implementation of law in ROE and the status of ROE as a source of law.

and interpretation of ROE, as either the source of the ROE restrictions in such sets or as guidance (or framework) within which such ROE need to be applied. This analysis serves to identify the interaction between IHL as a body of law and ROE as the rules governing the use of force in compliance with that law.

3) Constituent question 3: Do ROE reflect or serve to implement human rights law? If so, how is human rights law reflected or implemented in the ROE? If not, how can the relationship between human rights law and ROE be described?

While IHL specifically addresses the use of force in the context of an armed conflict, not all military operations operate under the armed conflict paradigm and instead take place within the framework provided by the law enforcement, and hence human rights oriented, paradigm for the use of force.¹⁴ Furthermore, developments in the case law of the courts and other bodies established to adjudicate issues of compliance, or individual complaints regarding non-compliance, with human rights law (HRL) make it clear that HRL has a direct influence on the conduct of military operations and on the use of force within the context of such operations.

These observations led to identifying the need to analyze the effects of HRL on the rules on the use of force. To this end, the applicability of HRL to military operations was first analyzed, including an analysis of the extra-territorial applicability of HRL. While the applicability of HRL to domestic operations, including law enforcement,¹⁵ is obvious, some debate exists as regards the applicability of HRL obligations outside the territory of the State and the conditions under which such applicability arises. This section of the analysis was based primarily on the case law of a variety of human rights bodies, in order to reflect not only European standards in this regard

¹⁴ For an explanation of the paradigms applicable to the conduct of military operations, see chapter 5.

¹⁵ It should be noted that in some nations, military forces may be deployed in support of, or to carry out, law enforcement duties. See especially chapter 5 on this issue.

but also the views of the main human rights bodies in other areas of the world.

Following the analysis of the applicability of HRL to military operations outside the territory of the State in question, a potential overlap or conflict between the obligations under HRL and the requirements and obligations under IHL was identified and needed to be addressed. In this part of the analysis, the various forms, and method of application, of the *lex specialis* tool for resolving (potential) conflicts of law was addressed. Case law of the relevant courts and systems involved in these areas of law was used to analyze these issues and their impact on the rules on the use of force.

Finally, on the basis of the outcome of the preliminary analyses just discussed, the interaction between the elements of HRL most directly relevant for the use of force in the context of military operations and the rules on the use of force in those operations was examined. Given the specific aspects and nature of the HRL paradigm, and the fact that (at least in some nations) military forces may serve in a law enforcement capacity, a brief analysis was included of the effects of HRL on the rules on the use of force as applicable for law enforcement personnel and law enforcement activities.

4) Constituent question 4: Do ROE have accusatory or exculpatory properties under criminal law? If so, how are these roles carried out or performed by ROE? If not, how can the relationship between criminal law and ROE be described?

As rules on the use of force provide guidance and instruction to individual members of the armed forces, whether as ROE for higher level commanders or the derivative cards for each individual member of a military force, and as violations of applicable law may lead to individual criminal responsibility, the interaction between ROE and criminal law is an essential element in understanding the interaction between ROE and law in general. It seems readily apparent that the use of force, especially force which may cause injury or death, is heavily regulated both in international law and in the domestic law of most nations. In societies which adhere to the rule of law, the use of force between private individuals is normally proscribed

unless exceptional circumstances are at issue.¹⁶ In such societies, the use of force is generally, albeit not necessarily exclusively, vested in government authorities. Various elements of (international) law, most specifically the various instruments of human rights law, dictate that the use of (deadly) force by such government authorities or agents is also subject to conditions, restrictions, investigation and supervision. These elements are commonly set forth in criminal law, whether in a specific form¹⁷ or in its “normal” civilian form.

In approaching the interaction between criminal law and ROE, the analysis was split into the two basic roles that ROE could play in the criminal law context: as an instrument for the prosecution, that is as an accusatory device, and as an instrument for exculpating the (otherwise) unlawful use of force. As regards the accusatory role, an analysis was first made of the concept of “ROE crimes,” that is the status of violations of the ROE as a criminal act in themselves regardless of, or in addition to, the criminal nature of the acts in question apart from the ROE.¹⁸ Next, an analysis was made of the status of ROE in relation to the (international) criminal law rules regarding *nullum crimen* and *nulla poena sine lege*. This part of the analysis was necessary in order to examine whether, and if so what, role ROE could play as an accusatory device beyond the concept of ROE crimes.

As an outcome of the analysis just described, the need was identified to examine a specific complication regarding the role of ROE in the accusatory aspects of criminal law and the concept of *mens rea* as a requirement for proving intent or variations on intent. While the concepts

¹⁶ See especially the discussion on self-defense above and, more extensively, in chapter 3.

¹⁷ Such as the Uniform Code of Military Justice in the United States or the Military Criminal Code (*Wetboek van Militair Strafrecht*) in the Netherlands.

¹⁸ While discussed in far greater detail in chapter 6, what is meant by this statement is the difference between a violation of the ROE as a crime in and of itself, related to the status of ROE as a specific type of standing orders or instructions in the context of military disciplinary and criminal law, and the factual act (the *actus reus*) as possibly being a criminal act, such as murder or manslaughter, in itself regardless of the (concomitant and simultaneous) ROE violation.

of *culpa* and *dolus* and the constituent probative elements to that end vary between nations and between jurisdictions, some common ground exists in this regard. In order to identify and delineate that common ground, a modest and limited comparative legal analysis was made of the various approaches to intent and *mens rea*, in order to subsequently identify the role of ROE in this regard.

The second main analysis as regards criminal law and ROE focused on the possible exculpatory role of ROE in the criminal law process. This required first of all an analysis of the possible role of ROE as a justification or excuse under criminal law and, as a logical extension of this analysis, a closer examination of the defense of superior orders under modern (international) criminal law. In order to clarify or illustrate these parts of the analysis and in order to examine their application in practice, a brief examination was made of the way in which these concepts have been implemented in the military criminal law of the Netherlands.

Finally, in order to test the observations and conclusions reached on the basis of the analysis just described, the (limited) case law involving ROE as a central element or theme was examined. While, as is observed in chapter 6 as well, there have been only a few cases in which ROE have played a central role, this part of the analysis includes case law from a number of countries in order to examine the interaction between ROE and criminal law in various jurisdictions.

5) Constituent question 5: Are ROE a source of law? Are ROE reflective of the law or can ROE override or supersede the law?

The final constituent question differs from the previous questions in that it does not address a specific body of law as such, but rather addresses the overall status of ROE in the context of (international) law and the interaction between ROE and law in general. As was observed above, this final constituent question is essentially a simplified version of the main analytical question on which this study is based and, as such, appears in various forms in each of the chapters. While the main discussion of ROE as a source of law or as “law” in and of themselves is discussed in greatest detail in chapter 6, this question and its answers are addressed to some

extent in the other chapters as well. This question will consequently be answered in its final form in the conclusions of this study in chapter 7.

III. History of Rules of Engagement

Rules of engagement in their most basic form, meaning orders regulating the use of force and offensive actions by military units in the face of an adversary, are not a new instrument. When Publius Cornelius Scipio Africanus faced the Carthaginian forces under the command of Hannibal at the battle of Zama in 202 BC, he demonstrated his strategic and tactical talents by twice arranging his forces in an unorthodox manner.¹⁹ At the outset of the battle, he arranged his infantry to leave wide avenues between the maniples and sideways spaces between the ranks. He ordered the skirmishers (*velites*) to close with Hannibal's forces to provoke them, and to fall back into the open spaces when overcome by the Carthaginian elephants. This caused the elephants to run through these open spaces rather than trample the forces. At a later stage in the battle, while waiting for his cavalry to reform, he ordered the second line of infantry (*principes*) and the third line (*triarii*) to form up on the flanks of the first line (*hastati*) to form one long line of infantry forces, thus better able to attack and outflank the Carthaginian phalanx. Both unorthodox orders directly affected the use of force and offensive actions by his forces and structured the course of the battle to his strategic plan. As such, both orders can be considered early forms of rules of engagement, serving military operational purposes.

In 49 BC Gaius Julius Caesar crossed the Rubicon river and closed on Rome, causing Gnaeus Pompeus to retreat with his forces.²⁰ Prior to entering Rome, Caesar ordered his legions to restrict their actions towards the occupants of the city to defensive measures intended to keep the peace and to desist from all forms of looting or carnage. It was imperative at this

¹⁹ The description of the Battle of Zama is based on Liddell Hart, B.H., *Scipio Africanus: Greater Than Napoleon*, Da Capo Press, 1994 (original version copyrighted 1926).

²⁰ Cassius Dio, *Roman History*, Transcription based on Loeb Classical Library, 9 Volumes, Harvard, 1927, available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Cassius_Dio.

stage of his campaign to keep the support of the Roman populace, especially the plebeians, and to keep his forces organized in the event of a counter-attack by the Republican forces under command of Pompeus. In other words, this restraint was exercised by Caesar over his forces for both political reasons and for military strategic reasons and directly addressed (and limited) the use of force customary for Roman legions upon capturing a city. All these factors make this order a rule of engagement.

Of course many other historical examples of limitations on, or structuring of, the use of force by military forces can be given. In the period of history prior to the Cold War, early forms of rules of engagement generally served strategic purposes, mostly of a military operational nature. The order attributed to, among others, William Prescott at the Battle of Bunker Hill on 17 June, 1775, constraining his forces from opening fire until they saw the whites of the enemy's eyes²¹ preserved the initiative for opening battle and commencing engagement with the enemy. In the First World War, sections of the North Sea, especially the waters around the United Kingdom, were declared war zones and German forces were authorized to engage any shipping encountered in these areas.²² This measure, duly publicized to all nations, sought both to ensure the safety of German sea lines of communication and to sever, or at least increase the attrition of, enemy shipping transportation and support.

On 12 September, 1942, the German U-boat U-156, under the command of *Korvettenkapitän* Werner Hartenstein, sank the British troopship *Laconia*, which was subsequently found to be carrying Italian prisoners of war. The U-156 then proceeded to rescue the shipwrecked. The survivors were placed on the deck of the submarine as well as in small boats attached by towing ropes to the stern of the U-boat. Hartenstein ordered the situation of the U-boat to be broadcast openly by wireless radio in order to announce its current situation and promising not to attack any vessel that would be willing to come to assist. The U-156 was subsequently spotted by

²¹ See e.g. the reference in Phillips, Guy R., "Rules of Engagement: A Primer", in *The Army Lawyer*, July 1993.

²² Politakis, George P., *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality*, London, 1998, pp. 42 – 53.

an American military aircraft which, after consulting with its home base and having received orders to do so, attacked the submarine. Following this incident, Admiral Dönitz ordered all German U-boats to cease any attempts to rescue survivors of future U-boat engagements.²³ While the legality of this order is debatable in view of the international legal requirements for naval warfare and submarine warfare in force at the time, the order was intended to enhance U-boat survivability and to enhance the effectiveness of the U-boat as an instrument of (covert) warfare. As such, it was a rule of engagement based on operational considerations.

Since the early nineteenth century, however, and certainly in the course of the twentieth century, the instrument of “war” as such was changing in nature. Not only was war increasingly subject to regulation by international instruments, including the early 1929 versions of the Geneva Conventions²⁴ and the Kellogg-Briand Pact²⁵, the views on the nature of war slowly changed as well. While in the ancient world the art of war was seen as part of the ordinary fabric of the State as such, or as a whole, ensuring its survival and expansion,²⁶ since the late eighteenth and early nineteenth century war came to be seen as a political instrument to achieve specific political goals. As Von Clausewitz described it, war was the business of politics carried on by different means, identifying war as not only pursuing political goals and objectives but actually being a political instrument by its very nature itself.²⁷ Consequently, the nature of rules of

²³ Normally referred to as the “Laconia Order”. See, *inter alia*, Mallison, W.T. Jr., “Studies in the Law of Naval Warfare: Submarines in General and Limited Wars”, in *United States Naval War College International Law Studies*, Vol. LVIII, 1966, pp. 84 – 86 and pp. 134 – 139.

²⁴ To be replaced, of course, by the four Geneva Conventions of 12 August, 1949, later supplemented by the two Additional Protocols of 8 June, 1977, and the third Additional Protocol of 8 December, 2005.

²⁵ The Pact of Paris of August 27, 1928, providing for the renunciation of war as an instrument of national policy. A more detailed discussion of the laws of war is presented in chapter 4.

²⁶ The ancient Chinese strategist Sun Tzu, for example, regarded war as the path (*Tao*) of survival for the State. See Sun Tzu, *The Art of War*, as translated and annotated by Sawyer, Ralph D., Westview Press, 1994.

²⁷ Von Clausewitz, C., *On War*, as annotated by Howard, M. en Paret, P., Everyman’s Library, 1993.

engagement and the purposes for which they were issued shifted from a predominantly tactical or operational level, such as those described above in relation to the Battle of Zama and Caesar's march on Rome, to a predominantly strategic level, such as the Laconia Order.

In the period following World War II, the development of the Cold War and the high levels of tension between the superpowers increased the need to control the conduct of military operations carefully in order to avoid military confrontations between East and West. Rules of engagement became a prime instrument in effectuating such control, with advances in communications technology further enabling high-level control over the conduct of operational and tactical level operations.²⁸ Additionally, and increasingly in modern times, the ability of the news media to present near real-time accounts of the conduct of military operations increased the need for political command authorities to ensure that the activities of the armed forces conformed to the political intentions as well as the need to maintain the support of public opinion.²⁹

In the course of the Korean War, rules of engagement developed into early forms of the "true" rules of engagement as employed today. While the classical examples of ROE illustrated above were more ad-hoc or generic military orders relating to the conduct of hostilities in specific circumstances, the instructions given to General MacArthur for the conduct of the Korean War were less related to tactical direction of specific engagements and instead governed the general conduct of the war as a whole. For example, he was instructed that no units under his command were to be allowed to cross the Yalu river into Chinese territory (Manchuria) or to cross the border into the Soviet Union.³⁰ Additionally, he was ordered to cease operations in North Korea in the event that Soviet or

²⁸ Martins, Mark S., "Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering", in *Military Law Review*, Winter 1994. See also Hall, D.B., "Rules of Engagement and Non-Lethal Weapons: A Deadly Combination?" at GlobalSecurity.org.

²⁹ Ibid. The relationship between the media, public opinion and political control over military operations is discussed in greater detail in chapter 1.

³⁰ Martins, *op. cit.* note 28, and Milkowski, S.D., "To The Yalu and Back", in *Joint Forces Quarterly*, Summer 2001.

Chinese units were to enter the area.³¹ The intent behind these rules was to avoid the American involvement in the Korean War leading to military confrontations with the other nuclear weapon States in the area.

In spite of these intentions behind the instructions issued to MacArthur, air engagements between American and Soviet aircraft resulted in a number of downed aircraft on both sides and prompted the Joint Chiefs of Staff to issue “Intercept and Engagement Instructions” on November 23, 1954.³² These instructions were referred to by the aircrew and Navy staff personnel as the rules of engagement, a term adopted by the Joint Chiefs of Staff in 1958.³³ In terms of land forces, rules of engagement were noticeable (without the term itself being used) in the American intervention in Lebanon in 1958 in the form of an order not to return fire unless a clear target could be identified.³⁴

In the next two decades, however, ROE were increasingly disseminated to all of the armed forces services, although they were met with some degree of criticism as being (from an operational point of view) unduly restrictive and a general hindrance to proper execution of military missions. In the American intervention in the Dominican Republic in 1965 – 1966, for example, the intent to limit the effects of military operations in order to maintain the possibility of a diplomatic resolution of the situation, combined with increasingly critical press coverage of the operation and direct telecommunication between the strategic and operational levels, resulted in ROE which were criticized by the troops to which they were promulgated.³⁵

The Vietnam War most prominently brought ROE to the attention of the armed forces services and the general public. As regards acceptance of ROE by the armed forces, the ROE issued during the Vietnam War contributed considerably to the mostly negative reception by military operators as regards ROE in general. The causes and effects of the

³¹ Milkowski, *op. cit.* note 30.

³² Martins, *op. cit.* note 28.

³³ *Ibid.* The definition of ROE and its effective meaning are discussed in chapter 1.

³⁴ *Ibid.*

³⁵ Martins, *op. cit.* note 28, and Hall, *op. cit.* note 28.

restrictive ROE applied to the air operations in the Vietnam War have been discussed at length by other authors and will not be repeated here at length.³⁶ The following summary is presented as part of the historical development of ROE.

The intention to moderate negative publicity regarding the conduct of the Vietnam War on the one hand and the intentions or expectations to bring North Vietnam to the negotiating table led to strict and extensive political control over the conduct of the air campaigns against North Vietnam. This control intended to maintain the conflict at a low to moderate level, comparable to the low intensity of the earlier involvement of United States forces in Lebanon and the Dominican Republic,³⁷ while at the same time warning North Vietnam of the potential of United States air power to inflict heavy damage if agreeable results were not achieved in the diplomatic process. At the same time, the media were openly critical of United States actions in Vietnam and would remain so throughout the conflict. As a result, the rules of engagement imposed were restrictive far beyond the requirements of applicable law and were predominantly of a political nature.³⁸ From an operational point of view, the restrictions caused considerable concerns and were considered to hamper effective operations. In the Rolling Thunder operation, for example, targets were assigned in strict time brackets and could not be attacked outside those brackets, even if weather conditions precluded attacks within the time allowed.³⁹ Once attacked, targets could not be re-attacked without prior permission even if the initial attack had not been successful or if the target had been repaired or rebuilt.⁴⁰ Furthermore, targets were assigned without taking into account

³⁶ See, for example: Parks, W. Hays, "Rolling Thunder and the Laws of War", in *Air University Review*, January – February 1982; Parks, W. Hays, "Linebacker and the Law of War", in *Air University Review*, January – February 1983; Drake, Ricky J., *The Rules of Defeat: The Impact of Aerial Rules of Engagement on USAF Operations in North Vietnam, 1965 – 1968*, Thesis written at the Air University School of Advanced Air Power Studies, May 1992.

³⁷ Martins, *op. cit.* note 28.

³⁸ Parks, (both articles) *op. cit.* note 36.

³⁹ Drake, *op. cit.* note 36.

⁴⁰ *Ibid.*

connections between them, meaning that multiple targets belonging to the same target category, such as the enemy's power supply or logistic supply lines, were frequently assigned at different intervals, allowing the North Vietnamese to redistribute their use of such assets to the elements which had not been attacked. Finally, some targets were assigned at regular intervals even though they had previously been destroyed. This allowed the North Vietnamese to increase air defense systems around such targets, increasing the risk to United States airmen.⁴¹

The negative operational effect of the restrictive ROE on air operations over North Vietnam were lessened to a significant degree with the commencement of the first Linebacker campaign.⁴² Although strict geographic limitations still applied, the targets assigned were, from an operational point of view, more logically related and re-attack of targets was permitted to ensure target destruction. As a result, the Linebacker campaign contributed to the return of North Vietnam to the negotiations in Paris. Although the political intent behind the ROE was therefore essentially the same as had been the case for the restrictive ROE during the Rolling Thunder air campaign, the changing political situation, including a change in presidents in the United States, led to a concomitant change in the ROE. Although still politically driven, the ROE were now more permissive and would become even more so in the second Linebacker air campaign.⁴³

Leaving aside the (further) historical aspects of the Vietnam War and its eventual conclusion, two points regarding the ROE are essential to highlight in this discussion of ROE development in the course of history. Firstly, the ROE restrictions and resulting limitations on, and risks to, military operations during the Vietnam War were politically inspired and were significantly more restrictive than required under applicable law,

⁴¹ Drake, *op. cit.* note 36 and Parks, "Linebacker and the Law of War", *op. cit.* note 36. As will be discussed in chapter 4, targeting and rules of engagement are closely related. The targeting process relies in part on the rules of engagement for the determination of valid or permissible targets.

⁴² Parks, "Linebacker", *op. cit.* note 36.

⁴³ *Ibid.*

including in particular the laws of armed conflict.⁴⁴ While, as will be discussed later, ROE are generally seen by military forces as being a (pseudo) legal instruments produced by (military) legal advisers, the limitations imposed by ROE and experienced as a hindrance to operations are not necessarily based on legal considerations and are, instead, frequently based on political considerations or objectives.⁴⁵ A second point to be emphasized in this stage of the discussion is that even in these early stages of ROE development, ROE were dynamic instruments that changed and adapted according to the changes in the policies and considerations on which they were based. While in this case the underlying basis for the ROE was predominantly (or perhaps exclusively) political in nature and the ROE were modified in keeping with shifts in policy goals, considerations and evaluations, the discussion of the military operational element and the legal element of ROE in chapter 1 will demonstrate that military operational developments in a given operation or changes in the legal status of the forces in question similarly require careful attention to possible requirements for changes in the ROE.

One example of such a requirement to change the ROE as a result of changes in the operational situation, although unheeded at the time, concerns the deployment of United States Marine Corps units to Beirut in the early 1980's.⁴⁶ On 29 September, 1982, United States Marine Corps units deployed for the second time as part of a multinational force (MNF II) to act as a neutral buffer between the many factions engaged in combat in and around Beirut. The deployment of MNF II followed the assassination of president-elect Bashir Gemayel, the Israeli occupation of west Beirut and the massacre at the Palestinian refugee camps Sabra and Shatila.⁴⁷ The MNF II, just as its predecessor, was to form an impartial buffer between the factions and not to become involved in the conflict itself. Under the

⁴⁴ Ibid. The laws of armed conflict, and their impact on rules of engagement are discussed at length in chapter 4.

⁴⁵ The political aspects of ROE are discussed at length in chapter 1.

⁴⁶ For a description of the backgrounds and developments of the United States deployment in Lebanon, see Hall, *op. cit.* note 28, and more extensively Martins, *op. cit.* note 28.

⁴⁷ Hall, *op. cit.* note 28.

circumstances in Beirut at the time, however, the restrained approach taken by the American forces was misconstrued by at least some of the factions as either weakness or perhaps a sign that the force could be forced to leave the area.⁴⁸

In addition to the underlying socio-political and cultural causes of increased hostility towards the American presence in Beirut, the higher (political) command levels had, in keeping with the political goals of the deployment, decided not to expand the latitude permitted for armed response to the taunts and threats.⁴⁹ Although this somewhat oversimplifies the actual instructions issued to the marines participating in MNF II,⁵⁰ the main instruction issued was that United States forces were not to open fire except in response to a hostile act, thus essentially limiting the permission to use force to a “do not fire unless fired upon” injunction.⁵¹ These rules remained in place despite a number of confrontational incidents between local militia members and members of the MNF II. Following a terrorist bomb attack on the United States Embassy on April 18, 1983, the ROE for sentries were finally broadened to some extent, leading to two sets of instructions being in force simultaneously with differing latitude for the use of force.⁵² The confusion this caused was worsened by a change in the orders regarding the weapon states, authorizing only some guards to have

⁴⁸ Hall, *op. cit.* note 28, favors the view that the American reluctance to respond to taunts was seen as a weakness by the local factions.

⁴⁹ *Ibid.*

⁵⁰ For a full text version of these instructions, see Hall, *op. cit.* note 28. The differences between tactical level instructions such as these instructions, commonly referred to as Soldiers’ Cards, and the higher-level rules of engagement is discussed in chapters 1 and 2.

⁵¹ Hall, *op. cit.* note 28, Martins, *op. cit.* note 28. The term “hostile act” and its concomitant concept of “hostile intent” have different meanings in the context of rules of engagement, depending on the context in which they are used. The complications created by the differences between the meanings of these terms in the context of (American) self-defense law as opposed to (NATO and EU) rules of engagement is discussed in chapter 3.

⁵² Hall, *op. cit.* note 28.

the magazine fitted to the weapon while other guards were to keep their magazines in the pouch.⁵³

On 23 October, 1983, a truck bomb managed to pass the sentries of the Marine Corps barracks in Beirut and detonated, killing 241 United States servicemen and demolishing the building.⁵⁴ While many factors contributed to the incident, the confusion among the sentries as to the limits or authorizations regarding the legitimate use of force in any case controlled their reactions and caused them to hesitate when the use of deadly force would have been justified.⁵⁵

The standardization of rules of engagement in the United States armed forces and clarification of the rules (and rights) regarding the use of force in self-defense began in 1981 with the Joint Chiefs of Staff Worldwide Peacetime ROE for Seaborne Forces, albeit initially limited to the maritime environment. As Parks points out, these early JCS ROE were primarily intended to regulate the use of force in defense of carrier battle groups in the event of a Soviet attack.⁵⁶ In 1986, however, the JCS standardized ROE were issued to all United States forces in the form of the Peacetime Rules of Engagement (PROE).⁵⁷ The clarification on the right of self-defense, and the duty of commanders to defend their units, in the context of applying the ROE received further emphasis however in the wake of the incident with the USS Stark in 1987.

The USS Stark, an Oliver Hazard Perry class frigate, was deployed under the command of Captain Glenn Brindel in the Persian Gulf in 1987. On 17 May, 1987, the ship was attacked by an Iraqi fighter aircraft which fired two Exocet missiles on the vessel, causing major damage and killing

⁵³ Ibid. Weapon states refers to the readiness levels of the weapons carried or manned by military personnel. Common weapon states include: magazine in the pouch; magazine on the weapon but no round chambered; round chambered but weapon on safe; and, in situations of high tension or high alert, round chambered and weapon ready to fire.

⁵⁴ Ibid.

⁵⁵ Martins, *op. cit.* note 28.

⁵⁶ Parks, W.H., "Deadly Force is Authorized," in *Naval Institute Proceedings*, January 2001, p. 33.

⁵⁷ Ibid., p. 33.

37 crew members. Although the ship broadcast warning messages to the Iraqi plane, as required by the rules of engagement, it failed to defend itself or take the necessary actions to prevent (or respond to) the attack. In the review following the attack, Captain Brindel was relieved of duty, along with the tactical action officer who had been on duty at the time.⁵⁸ After the attack on the USS Stark, the JCS PROE were revised and reissued, with greater emphasis on the right and duty regarding the use of force in self-defense.⁵⁹

Following the deteriorating situation and complete civil chaos in Somalia and the failure of the United Nations operation UNOSOM I to carry out its mandate in the face of strong opposition from local factions, an interim force was deployed to Somalia in 1992 under United States command. The Unified Task Force (UNITAF) was mandated by the United Nations Security Council but was not a UN-led operation. Consequently,

⁵⁸ The attack on the USS Stark is well-documented and descriptions and details can be found in a variety of sources. An annual ceremony is held in remembrance of those lost in the incident.

⁵⁹ Parks, *op. cit.* note 56, p. 33. It should be noted that the corollary incident to the attack on the USS Stark, that is the incident with the USS Vincennes in 1988, is only indirectly a ROE-related incident, although the present author frequently uses the case when teaching ROE and the laws on the use of force, as an example of how theory and reality regarding rules on the use of force can conflict. On July 3, 1988, the USS Vincennes, a Ticonderoga class cruiser, following a number of unrelated skirmishes in the Persian Gulf, was confronted with what was at the time assumed to be an attacking aircraft. Following a series of errors and system faults, but also after reconfirming the right to use force under prevailing ROE, the commander of the USS Vincennes, William C. Rogers III, authorized the use of force against the aircraft. The aircraft in question, however, turned out to be a civilian airliner, Iran Air Flight 655. While the ROE played a part in Rogers' decision to use force, the incident and the errors involved were less related to the ROE and their interpretation and more related to a number of human and technological errors. For a further discussion of the causes leading up to the error, see Zwanenburg, M., Boddens Hosang, J.F.R. and Wijngaards, N., "Humans, Agents and International Humanitarian Law: Dilemmas in Target Discrimination," in *Proceedings of the 4th Workshop on the Law and Electronic Agents (LEA 2005) at the 10th International Conference on Artificial Intelligence and Law, 2005*, and available online at: https://static.aminer.org/pdf/PDF/000/313/514/analysis_on_negotiation_in_platform_level_armored_force_combat_entity.pdf (last accessed on 5 April, 2016).

the ROE for UNITAF were issued by the United States. While the UNITAF ROE initially allowed a greater degree of freedom regarding the use of force than had been the case in Beirut ten years earlier,⁶⁰ this changed in 1994, shortly after commencement of the UNOSOM II mission. Protests following an (alleged) incident involving a civilian casualty from sniper fire from United States forces led to a ROE change specific to the snipers and restricting their use of force. In addition to the confusion caused by two separate ROE sets for the same operation,⁶¹ the ROE change had the unusual effect of limiting the use of force by snipers, without changing the use of force by the units for which the snipers offered force protection.⁶²

At the end of 1994, the United States Joint Chiefs of Staff replaced the earlier PROE with a Chairman Joint Chiefs of Staff Instruction, Standing Rules of Engagement for the Use of Force for U.S. Forces (SROE). These SROE were to apply to all United States forces at all times, except where mission-specific ROE were issued (which would then take precedence over the SROE). The SROE also delineated the rules regarding the use of force in self-defense. These SROE were updated and reissued in 2000, clarifying and placing more emphasis on the right to self-defense,⁶³ and were revised and reissued again in 2014.

This brief historical overview of the development of (standardized and standing) ROE focused, as regards more modern times to the present day, on the developments in the United States. The principal reason for this is that the United States has traditionally been at the forefront of ROE development, including the theory, teaching and policies on ROE. Various questionnaires by the International Society for Military Law and the Law of War have shown that other nations either tend to follow (and where necessary modify or adapt to national standards and requirements) the

⁶⁰ Hall, *op. cit.* note 28.

⁶¹ While it is not unusual for different weapon systems or unit types to be subject to different restrictions, such differences are normally the result of different sets of (or different rules within) documents such as targeting directives, etc., instead of issuing different ROE sets. See Chapter 2 for a further discussion of the relationship between ROE and other operational directives.

⁶² Hall, *op. cit.* note 28.

⁶³ Parks, *op. cit.* note 56, p. 34.

United States system or have a more ad-hoc approach to ROE. Other nations have also been considerably less open about their rules on the use of force, while the United States has a history of declassifying ROE, or at least the derivative soldier's cards, sometime after the operation in question has ended. Finally, there is very little to no publicly available information regarding the practice of issuing standing ROE for national forces in other nations. As regards The Netherlands, standing ROE are issued to Royal Netherlands Navy vessels, concurrently issued by the Belgian authorities for Belgian vessels, but the document itself is classified.⁶⁴ As will be discussed in chapter 2, however, as well as referred to in other chapters, the ROE used by international organizations such as NATO, the EU and the UN follow their own system and structure and many nations who are members of these organizations apply those systems in their national ROE practice as well. The background and history of those systems, however, falls outside the scope of this brief historical overview of ROE.

⁶⁴ Except when deployed for a specific operation or mission, for which specific ROE are issued and specific command and control relationships apply, Dutch and Belgian naval vessels operate under the unified command of the Admiral BENELUX (ABNL). Officially the standing ROE are authorized by the Dutch and Belgian Chiefs of Defense to the ABNL, who promulgates them to the vessels under his command.

Chapter 1

Basic Principles of Rules of Engagement

I. Introduction

Prior to discussing the influences of the most relevant parts of the law, both national¹ and international,² on the rules for the use of force, a few general observations on the rules in general are in order. While rules of engagement (ROE) are commonly written specifically for the operation to which they are to apply, as will be discussed in section III below, all sets of rules of engagement have certain elements in common. These elements include the basic components or sources of input for the rules of engagement, the drafting procedures, and the basic nature, purpose and function of rules of engagement. These common elements will be discussed in this chapter, in order to provide a general overview and introduction to the concept of rules of engagement and similar rules on the use of force.

Following the historical background of rules of engagement as discussed in the introduction, this chapter focuses on current doctrine and concepts regarding such rules as evidenced inter alia by the (operational) practices and doctrines of the North Atlantic Treaty Organization, the European Union, the United Nations and such national doctrines and concepts as are relevant to the present discussion and as are available to the general public. Moreover, a number of generally available publications have been written on basic or general ROE theory,³ including manuals for

¹ See especially Chapters 3 and 6 regarding self-defense law and criminal law.

² See especially Chapters 4 and 5 regarding international humanitarian law and international human rights law.

³ The most commonly used and most authoritative introduction to general ROE theory is the article by Roach, J.A., "Rules of Engagement," in *Naval War College Review*, Vol. 36, no. 1, 1983 (reprinted in the *United States Naval War College International Law Studies*, Vol. 68, available online on the United States Naval War College website, <http://stockton.usnwc.edu/ils/>). Additionally, a very thorough introduction to the history and theory of ROE can be found in Phillips, G.R., "Rules of Engagement: A Primer," in *The Army Lawyer*, July 1993, pp. 4 – 28.

teaching ROE basics in military training and instruction courses.⁴ Finally, practical experience in drafting and authorizing ROE for the participation of Netherlands armed forces units in recent and current military operations has contributed to a number of the observations made in this chapter.

In discussing the common elements of rules of engagement, some reference is unavoidably made to the military operational context in which the rules are drafted and applied. More detailed explanations of that context and some of the concepts and terms used in that context are provided in chapter 2. This chapter, however, is intended to provide a clear understanding and to define the main topic of this study and to provide and explain the theoretical and conceptual model of ROE which has been used in the past few decades. This theoretical and conceptual model is used as the baseline and accepted standard in the analyses presented in this study and will be re-examined in the conclusion in combination and comparison with the conclusions derived from this study as a whole.

II. Basic Components of Rules of Engagement

Rules of engagement and the derivative instruction cards⁵ for (lower command level) commanders and troops are, in the most basic definition, rules governing the use of force and actions which can (potentially) influence or regulate the escalation of the use of force or hostilities in the

⁴ See, for example: Center for Law and Military Operations, *Rules of Engagement (ROE) Handbook for Judge Advocates*, CLAMO, 2000, available at http://www.difesa.it/SMD_/CASD/IM/ISSMI/Corsi/Corso_Consigliere_Giuridico/Documents/52952_roehandbook.pdf (last accessed on 5 April, 2016).

⁵ Although such cards are often referred to, at least in the United States, as “ROE cards” or as ROE themselves, they are not ROE in the more commonly used meaning of that term. Instead, they are simplified summaries of the actual ROE and are intended to provide the personnel to which they are issued with clear and understandable instructions on the use of force relevant to their level of decision making. For example, such derivative cards do not contain rules on the deployment (or employment) of weapon systems subject to command decisions at a higher level (such as air and artillery support) but instead clarify and regulate the use of force in self-defense or self-protection (discussed in greater detail in chapter 3), the right to detain civilians where applicable (discussed in greater detail in chapter 5), authorizations for individual use of force for mission accomplishment, etc.

area of operations. The North Atlantic Treaty Organization defines ROE as “directives to military forces (including individuals) that define the circumstances, conditions, degree, and manner in which force, or actions which might be construed as provocative, may be applied.”⁶ The United States armed forces define ROE as “directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”⁷ For the purpose of determining the specifics of the relationship between ROE and criminal law, however, as discussed in greater length and detail in chapter 6, the definition used by the Canadian armed forces is perhaps the most useful: “ROE are orders issued by military authority that define the circumstances, conditions, degree, manner, and limitations within which force, or actions which might be construed as provocative, may be applied to achieve military objectives in accordance with national policy and the law. The term ‘orders’ is to be interpreted as the authorized limit of force approved by higher command and should not be interpreted as an obligation to use force.”⁸

In other words, ROE are operational orders or directives governing both the use of force and actions which can be construed as provocative. They represent and reflect both operational and political policy guidance regarding the operation or tasks for which they are issued and must, to be lawful, be no more permissive than the applicable (national or international) law under the given circumstances. In the classic work on ROE written by Roach⁹, the component parts of ROE are represented in a Venn diagram showing four circles, representing policy, diplomacy, operational interests

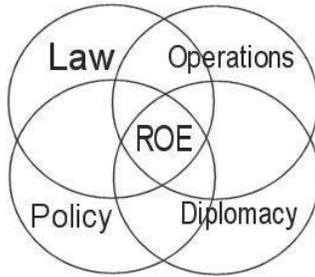
⁶ MC 362/1, Military Decision of 30 June, 2003. Used by specific permission of the Military Committee through Military Committee decision IMSM-0417-04, on file with the author.

⁷ Joint Publication 1-04, “Legal Support to Military Operations”, 17 August, 2011. See also Joint Publication 1-02, “Department of Defense Dictionary of Military and Associated Terms”, 8 November, 2010.

⁸ Canadian Forces Joint Publication CFJP-5.1, “Use of Force for CF Operations”, August 2008, P. 2-3.

⁹ Roach, *op. cit.* note 3.

and law, with ROE ideally originating in, or deriving from, the overlap in the middle of the four circles:



In practice, the relative influence of each of the four¹⁰ constituent elements on any given set of ROE will vary according to the specific circumstances, sensitivities or complexities of the operation or task for which they are issued. Nonetheless, each of the constituent elements always has at least a minimum level of influence on the final outcome of the ROE and some observations on each of these elements will be presented below.¹¹

A. Military Operational

The military nature of ROE is self-evident and follows logically from their role in the context of military operations. Nonetheless, the professional experience of the present author supports the assessment made by Parks and Duncan that military commanders – and in fact military operational experts – do not play as big a role in the drafting of ROE as the nature of those

¹⁰ Although Roach identifies four areas of influence, the areas of “policy” and “diplomacy” can be assimilated under a more general area labelled “politics”.

¹¹ For a more general description of the elements and theory of ROE, see, in addition to the articles cited above: Boddens Hosang, J.F.R., “Self-Defense in Military Operations: The Interaction between the Legal Bases for Military Self-Defense and Rules of Engagement”, in *Military Law and the Law of War Review*, Vol. 47 (2008, Issue 1), pp. 25 – 96.

documents requires.¹² In addition to yielding occasional difficulties in drafting ROE which are considered suitable by the recipient military commanders, the “default”¹³ assignment of the responsibility of drafting the ROE to (military) legal advisers ignores the fact that ROE are ultimately and essentially operational documents which have to be applied and understood by military personnel and their units in complex and sometimes lethal situations. Consequently, even the most politically acceptable and legally sound ROE are ultimately ineffective if they are not simultaneously operationally relevant, understood by the personnel to whom they are disseminated, and useful for the conduct of the operation. It may therefore be observed that the drafting of ROE should be more demand-driven rather than supply-driven.¹⁴

The extent to which military operational expertise is incorporated into the drafting process depends on two factors: trust and capability. As is inherent in any combination of those two concepts, each depends on the other for their development. The personnel normally charged with the drafting of ROE must trust and recognize that the military operational experts have a valid contribution to make in the ROE process, rather than maintaining a proprietary or parochial approach to that process. Military operational experts, on the other hand, must be willing to offer their

¹² Parks, W.H., “Deadly Force is Authorized,” in *Naval Institute Proceedings*, January 2001; and Duncan, J.C., “The Commander’s Role in Developing Rules of Engagement”, in *Naval War College Review*, Summer 1999.

¹³ Parks states that “in too many cases, commanders and their staffs have defaulted”. The “default” is to view the ROE as a principally legal document best written by military legal advisers (or judge advocates, in the U.S. system). Parks, *op. cit.* note 12.

¹⁴ Parks’ assessment that many ROE are “cut and paste” documents (in “Deadly Force is Authorized”, *op. cit.* note 12) fits in the supply-driven approach to drafting ROE. Notwithstanding the usefulness of generic ROE compendia such as the document MC 362 discussed below, the ROE for a given operation need to be carefully tailored to the specific operational necessities and circumstances of the operation for which they are written. While certain sections of the derivative cards, especially those sections relating to fairly standard principles of the use of force (including the requirements of necessity and proportionality), can over time become standardized, the actual ROE and the operation-specific instructions in the derivative cards cannot.

contributions to the drafting of the ROE while trusting that those who are in charge of drafting the ROE will (have) take(n) their interests and concerns into account while doing so.

As regards capability, operational expertise is an essential requirement in drafting operationally useful and understandable ROE. Staff legal advisers or other personnel assigned to draft ROE must engage in frequent discussions with operational units and the personnel to whom ROE will be issued (or have been issued in the past) in order to develop or enhance their ability to incorporate operational concerns and requirements in the ROE. On the other side of that relationship, military operational commanders and their staffs must develop the capability to draft viable ROE requests and ROE proposals and to support their requests and proposals with clear explanations and rationale. This requires investing in the time and assets required for adequate ROE training, developing political sensitivity in (higher) operational commanders, as well as a more teamwork-oriented approach to ROE in command staffs. In order to achieve that, some commonly encountered complaints about ROE as being “complicated”, “legalese” and a “higher command level responsibility” must be addressed and training must be made available for operational commanders to participate in the ROE drafting process.¹⁵

B. Legal

The element of law, and the various sources of that element, in ROE is discussed in more specific detail in the following chapters of this study. At this stage, consequently, a few more basic and general observations can suffice. As the ROE are an operational document and are intended to be clear, succinct and easily understood by those applying them, ROE

¹⁵ For a description of one possible approach to this issue, see the final section in Duncan, *op. cit.* note 12, on ‘Responsibility for Crafting ROE in a JTF’. For a comprehensive approach to ROE training, see Martins, M.S., “Rules of Engagement for Land Forces: A Matter of Training, not Lawyering,” *Military Law Review*, Vol. 143, Winter 1994, pp. 1-160; available at http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/27687D~1.pdf (last accessed on 5 April, 2016).

generally do not restate applicable (provisions or elements of) law.¹⁶ There are two principal reasons for this. First, the succinct nature of ROE precludes repetition or inclusion of the entire corpus of applicable law, while selecting only certain parts of the law creates the risk that the elements left out will consequently be ignored or erroneously considered irrelevant or inapplicable by those carrying out the operation. Second, as applicable law usually requires interpretation, which in turn requires some level of legal training and experience, restating the law “as is” does not enhance the clarity of ROE for military professionals who are not necessarily lawyers. These observations apply equally to all areas of law, including national (criminal) law, the laws of armed conflict and human rights law.

Consequently, while ROE certainly require legal review to ensure that they are not more permissible than the law applicable to the operation, they cannot, conversely, be expected to incorporate the entire applicable set of laws in the given ROE profile. While it may be useful in some cases, due to the particular conditions or sensitivities related to a given operation, to emphasize specific rules of applicable law that are of special concern by paraphrasing them or referring to them in the ROE in question, care should be taken to avoid the impression that the ROE profile reflects all relevant principles of law. Proper guidance in the ROE does not, in other words, replace legal review or advice on or during the operation itself, nor is an act that falls within the ROE necessarily a lawful act on the basis of that fact alone.¹⁷

¹⁶ Exceptions to this observation are specific instruction cards for use by Netherlands military personnel on specific duties, in which the applicable (statute-based) law was restated in general and simple terms without deviating from the substance of the actual law in question. One example is the instruction card IK 2-27 which sets out the rules on the use of force by personnel on guard duty at military installations and which closely follows the Kingdom Act on the Use of Force by Guards of Military Installations and Objects (*Rijkswet geweldgebruik bewakers militaire objecten*). In order to clarify the relationship between such cards and the law, the various cards of this nature all indicate, however, that in the event of discrepancies between the card and the law, the latter always prevails.

¹⁷ ROE authorize the use of force, but do not make the use of force under the circumstances described in the ROE mandatory; they are authorizations, not

Since ROE on the one hand do not and should not restate the law, but ROE are, on the other hand, used as the authorizations and instructions on the use of force, two issues are of tantamount importance as regards the law element in ROE. The first of these issues is the responsibility of those drafting and promulgating the ROE and simply consists of ensuring that, at least in objective terms, the ROE are not more permissive as regards the use of force than can be justified under applicable law. While clearly not every incident or circumstance that may arise in the course of an operation or in the performance of the tasks in question can be foreseen ahead of time, legal review of the ROE and ensuring the contribution of legal input while drafting the ROE can nonetheless ensure that obvious or objective nonconformity with the law is avoided.

The second issue rests on the shoulders of both those applying the ROE and those who might be available to offer legal advice in the field,¹⁸ and consists of interpreting the situation at hand and interpreting the ROE to determine which course of action is authorized and lawful. This interpretation of the situation and the ROE includes the mandatory evaluation whether the anticipated force to be used is both necessary and proportional under the given circumstances. While these elements are discussed in more detail in the following chapters, including the various interpretations and definitions of those terms in the context of the various fields of law, it may be argued as a general comment that both elements are

obligations to use force. ROE cannot, therefore, be considered a *carte blanche* for the use of force. As an example, ROE authorizing the use of deadly force to prevent unlawful entry into a military restricted area do not provide legal immunity for killing an unarmed child who climbed the fence on a dare.

¹⁸ Article 82 of the First Additional Protocol of 1977 to the Geneva Conventions of 1949 makes it mandatory for the High Contracting Parties to make legal advisers available to commanders “at the appropriate level”. While it is up to the States Parties to decide what “the appropriate level” means, it should be noted that the ROE themselves generally address the higher command levels and that lower levels of command – where such legal advice might not be available – are generally only issued the derivative instruction cards discussed above. The interpretation of the actual ROE themselves, as well as decisions on their application in specific tasks or missions, can therefore usually be supported by advice from the staff legal adviser at the battalion level (or comparative level in naval operations) as well as higher up in the chain of command.

fundamental principles of the law on the use of force regardless of the specific legal basis for such use of force under the given circumstances. In the case of (national) self-defense, the customary law nature of these principles has been established by the International Court of Justice.¹⁹ In other cases, the principles form part of either specific rules within the applicable law,²⁰ or of the legal basis itself.²¹ In nations which allow the deployment of armed forces in support of, or in the actual role of, law enforcement an additional source of authorization of the use of force exists in the form of the rules on the use of force by law enforcement personnel. In those rules, proportionality and necessity are commonly implicitly part thereof as well as explicitly or implicitly part of applicable international human rights instruments.²²

¹⁹ ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, 27 June, 1986 (Nicaragua case), § 176 and 194, and ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July, 1996 (Nuclear Weapons case), § 41 (and further).

²⁰ In the case of armed conflict, for example, the principle of necessity forms the basis for the provision contained in Article 52, paragraph 2, of the First Additional Protocol of 1977 to the Geneva Conventions of 1949. The principle of proportionality is contained in, *inter alia*, Article 57, paragraph 2 under (b), of the same Additional Protocol.

²¹ For example: the phrase “all *necessary* means” in mandating resolutions issued by the United Nations Security Council.

²² See chapter 5. In the Netherlands, the authorization and legal basis for the use of force by law enforcement personnel is set forth in Article 7 of the Police Act of 12 July, 2012 (*Politiewet 2012*). Paragraph 1 of that Article states that force is authorized if the goal for which it is applied justifies such use of force, taking into account the inherent danger of the use of force, and that force is only authorized if the justified goal cannot be attained by lesser means. Paragraph 5 further stipulates that the use of force must be reasonable and proportional to the goal for which it is applied. Article 6 makes the provisions in question applicable to military personnel acting in lawful support of law enforcement personnel. For an extensive discussion on the use of the armed forces in support of law enforcement personnel (specifically in the context of counterterrorism) in the Netherlands and the applicable laws and regulations, see Chapter 2, section 3, of Ducheine, P.A.L., *Krijgsmacht, Geweldgebruik en Terreurbestrijding*, 2008. For a discussion of justification defenses for use of force by the police and the interpretation of “reasonableness” in relation to the Fourth Amendment in the United States, see Harmon, Rachel A.,

What is of particular importance in the relationship between necessity and proportionality on the one hand and ROE on the other hand, is that the ROE do not necessarily restate these principles but must nonetheless be applied within the confines of these principles. Put simply, even when the ROE authorize a particular use of force under the given circumstances, the serviceman²³ about to use force (or about to order the use of force) must individually establish whether that use of force is necessary and proportional under the given circumstances, as those terms are defined and are to be applied under the applicable legal paradigm.²⁴

As was indicated above in the discussion on the military operational element of ROE, ROE are frequently considered a legal document. Three main factors can be identified that contribute to this view. Firstly, since ROE are rules of behavior which are, at least in most legal systems, enforceable by law,²⁵ they can be mistaken for quasi-legislative documents.²⁶ This quasi-legal status can also be (mistakenly) derived from the fact that ROE profiles, while not restating the law, frequently contain rules which are clearly derived from principles of international or national law. Geographical ROE, for example, which regulate the (relative) positioning of units or forces in the theater of operation, normally state that units may not cross the border into States neighboring the area of operations

“When is Police Violence Justified?”, in *Northwestern University Law Review*, Vol. 102, no. 3 (2008). Necessity and proportionality are discussed in depth on pp. 1172 – 1183.

²³ The term “serviceman” is used throughout this study to indicate an individual member of the armed forces and refers equally to male and female military personnel. No gender bias is intended or should be inferred.

²⁴ See especially chapters 4 and 5 as regards the significant differences in definition, object and purpose of these terms under (respectively) international humanitarian law and international human rights law.

²⁵ See chapter 6 on the criminal law aspects of ROE.

²⁶ As will be discussed in greater detail in chapter 6, the precise legal status of ROE varies between legal systems. One aspect that appears similar, however, is that ROE are a form of military (standing) order and that contravention of such an order can constitute a (military) criminal or disciplinary offence. Depending on the actual rule in question, behavior that violates the rules of engagement can itself of course constitute a criminal act, apart from the added crime of contravention of a standing order.

without prior permission from those neighboring States. This injunction is, of course, a simple and basic principle of public international law that applies equally outside the context of military operations, but is often repeated in the ROE in order to emphasize this rule. Similarly, as was discussed above, standard principles of law such as the requirements of necessity and proportionality are frequently used in conjunction with the ROE even though such principles do not need restatement in the ROE in order to be valid or to apply to the conduct of the operation.

A second factor contributing to the impression that ROE are (quasi-) legal documents is the observation that the ROE for a given operation are derived from, and must be in conformity with, the legal basis or mandate for the operation. The interpretation of the mandate and its translation into clear and practical military instructions generally requires at least some form of legal analysis. As modern military operations are increasingly both politically and legally complex, mandates issued by the national command authorities, whether on the basis of an international mandate such as a Security Council resolution or on the basis of a national interpretation or application of a rule of international law, are increasingly the result of (political) compromises and complex policy considerations and are consequently less suitable for instant conversion into ROE.²⁷ Furthermore, operations may be undertaken on the basis of a highly specific or even controversial interpretation or application of a rule of international law,²⁸ requiring precise legal interpretation of that rule into ROE in order to ensure that the units in question stay within the limited legal or political bandwidth available.

²⁷ The need for clear mandates and the risks inherent in mandates derived from political compromises was discussed in the Brahimi report as well (United Nations, *Report of the Panel on United Nations Peace Operations*, UN Document A/55/305 – S/2000/809, New York, 2000.). See especially Chapter II, Section F (§§ 56 through 64) of the report.

²⁸ Examples include Operation *Allied Force* in Kosovo (based on the disputed principle of humanitarian intervention) and Operation Iraqi Freedom (based on a much-debated reactivation of dormant UN resolutions). Regardless of whether these operations were legally valid, which is a question that falls outside the scope of this study, the political sensitivity of these operations made the margin for error rather small.

In summary, the legal element of ROE is an essential and vital element and helps safeguard the legality of the use of force in the given operation, but at the same time must be seen in the proper perspective as regards the importance and influence of the other two elements of ROE. While ROE always require review by, and input from, legal advisers, ROE should not be considered a purely legal document or the exclusive domain of those legal advisers. Finally, as ROE do not and cannot restate the law, nor obviously replace the law applicable to the operation, conformity of the ROE with applicable law does not by itself guarantee the legality of actions undertaken pursuant to the ROE. This means that even when the legal element in the ROE has been suitably and sufficiently taken into account and incorporated into the ROE in question, legal advice will still be required during the course of the operation itself.

C. Political

As was stated in the introduction, military forces always serve a political goal and are deployed exclusively to attain political objectives. This lesson by Von Clausewitz²⁹ is certainly applicable to modern military operations and appears to be increasingly relevant in the modern geopolitical context in which operations take place. While the end of the Cold War has removed

²⁹ “We see, therefore, that war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means. [...] The political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose.” Von Clausewitz, C., *On War*, as annotated by Howard, M. en Paret, P., Everyman’s Library, 1993. Compare this with the teachings of the ancient Chinese strategist Sun Tzu: “Warfare is the greatest affair of State, the basis of life and death, the Way (Tao) to survival or extinction.” Translation offered in R.D. Sawyer, *Sun Tzu, The Art of War*, Westview Press, 1994. Both strategists also, however, warned that policy or political rulers must not hinder military operations. Von Clausewitz states that “the commander in any specific instance, is entitled to require that the trend and designs of policy shall not be inconsistent with [the means of war]” (p. 99). Sun Tzu warned of “three ways by which an army is put into difficulty by a ruler”, including erroneous instructions, instructions that are civilian in nature and fail to recognize the specifics of military command, and taking command without understanding the military chain of command (p. 178).

the threat of major inter-State conflict from the international political arena, it has simultaneously made international decision making more complex. The forming of new alliances and the subtle reappraisals of old alliances have made the political context in which military operations are considered, proposed or deployed less predictable. As ROE are the principal tool for controlling the conduct of military forces as regards the use of force and potentially provocative actions, they are a prime asset for political management and direction of military operations in this new political context.³⁰ ROE are consequently normally approved by the (political) command authorities responsible for the operation in question.

Parks' assessment that "the rap lawyers receive for ROEs is not entirely fair,"³¹ while referring to the responsibility of military commanders to be more in charge of the ROE drafting process, applies equally to the observation that many restrictions in modern ROE are not based on legal requirements but instead serve political goals. During operation *Just Cause* in Panama, for example, the ROE initially prohibited dropping bombs closer than 150 yards from the barracks at Rio Hato, a valid and lawful military target under the laws of armed conflict, in order to avoid increased resistance against the United States forces throughout Panama.³² During the Korean War, General MacArthur was ordered to halt operations in North Korea if major Chinese or Russian forces were seen to enter the area.³³ Finally, the geographical limitations on the area of operations of British

³⁰ Grunawalt, in speaking of United States ROE and policy, states that "in a Clausewitzian sense, rules of engagement serve the most fundamental of political purposes – they ensure that the military instrument of the United States is indeed employed pursuant to the overarching national policy purposes of our nation." Grunawalt, R.J., "The JCS Standing Rules of Engagement: A Judge Advocate's Primer," in *Air Force Law Review*, Vol. 42, 1997.

³¹ Parks, 'Deadly Force is Authorized', *op. cit.* note 12.

³² Cole, R.H., *Operation Just Cause: The Planning and Execution of Joint Operations in Panama, February 1988 – January 1990*, Joint History Office, Office of the Chairman of the Joint Chiefs of Staff, Washington, 1995.

³³ Milkowski, S.D., 'To the Yalu and Back', *Joint Forces Quarterly*, No. 28, Spring/Summer 2001, pp. 38-46.

forces around the Falkland Islands was imposed primarily for political reasons and not strictly required under the laws of naval warfare.³⁴

The restrictions imposed on ROE, and on the conduct of military operations in general, as a result of political motivations is caused to a large extent by the increased visibility of such operations and the related political sensitivity (or even vulnerability) of the responsible national authorities. The increased publicity and the speed at which events are picked up and relayed to the general public by the major (news) networks, but even more so by social media, in combination with the increased technical capabilities of those media to provide live (or almost immediate) footage of events, has dramatically increased public awareness of, and involvement in, military operations and consequently directly affects public support for those operations.³⁵

³⁴ However, see also chapters 4 and 5 for a common sense approach to the interaction between international humanitarian law and human rights law. That discussion is relevant in this context, since both legal (*jus ad bellum*) and common sense considerations impose restrictions on the geographical scope of military operations even during armed conflict and some of the examples above may reflect both policy and legal considerations. While clearly an armed conflict on a global scale such as World War II would be an exception, in modern armed conflicts the actual conduct of hostilities tends to be limited to the specific area of conflict. Terrorist attacks by “fighters” from non-state groups, such as Al Qaida and ISIS, carried out in the capitals or major cities of States engaged in armed conflict with such groups do not necessarily change that observation, nor do they necessarily qualify as belligerent acts (apart from the absence of any belligerent rights or combatant privilege in non-international armed conflicts; see chapter 4). For a discussion of the reasoning behind the exclusion zone during the Falklands war and the sinking of the Argentine cruiser *General Belgrano* by the British submarine *Conqueror*, see Hastings, M. and Jenkins, S., *The Battle for the Falklands*, London, Pan Books, 1997, pp. 173-177. See also footnote 65 in Fenrick, W.J., “The Exclusion Zone Device in the Law of Naval Warfare,” in *Canadian Yearbook of International Law*, Vol. 24, 1986, pp. 91-126.

³⁵ Porch, D., “No Bad Stories: The American Media – Military Relationship,” in *Naval War College Review*, Vol. 55, No. 1, Winter 2002, pp. 85-108. See also CBS News, “Poll: Iraq Taking Toll on Bush,” 24 May 2004, <http://www.cbsnews.com/stories/2004/05/24/opinion/polls/printable619122.shtml> (last accessed on 5 April, 2016).

The potential impact of this phenomenon on the actions of the various parties in an operation was recognized already in 2001, in a study carried out by the British Ministry of Defense into future strategic concepts.³⁶ The study stated (inter alia):

“[Adversaries] will focus on perceived weaknesses and vulnerabilities, such as the sensitivity of public opinion to casualties and other cultural, legal and ethical constraints. Pervasive use of propaganda can be expected with the intention of constraining Alliance rules of engagement or seeking to detach wavering Alliance members. [...] Coalitions may include countries with disparate interests and perceptions. Decision-making processes during such operations may be slower and rules of engagement limited by public opinion across the coalition.”

The need for coalition unity referred to in the British study accurately identifies another main (international) policy issue involved in the political aspects of ROE: the need for cohesion and agreement within a coalition. Bennett and Macdonald indicate a preference for negotiation and consensus in the drafting of coalition ROE over dictation by one member of the coalition, offering an alternative in the form of flexibility in the ROE themselves in the form of differing ROE for the various members of the coalition.³⁷ Such diversity in coalition ROE, while realistic and pragmatic, is not widely encouraged at the military strategic or political level as it

³⁶ United Kingdom Ministry of Defense, “The Future Strategic Context for Defense,” 2001.

³⁷ Bennett, D.A. and Macdonald, A.F., “Coalition Rules of Engagement” in *Joint Forces Quarterly*, No. 8, Summer 1995, pp. 124-125. While the various nations contributing forces to a coalition will frequently impose national caveats for their forces, limiting the use of specific ROE by their national components in the coalition, diversity in ROE implementation and application within a multinational force can create complex operational difficulties for the commander of such a multinational force and should ideally be limited to the absolute minimum required to meet national legal or (critical) policy requirements. Political reality dictates, however, that such national caveats are ultimately unavoidable.

undermines unified command over the actions taken by the military forces in question.

In the Netherlands, the Government is required by the Constitution to communicate to parliament any intent to deploy military forces if the purpose of such deployment is to protect or promote the international rule of law.³⁸ The “Article 100” letter to parliament and the concomitant debate in parliament on operational deployments generally follow the outline of the Government’s policy document regarding such deployments.³⁹ The 1995 version of this document stated as one of the applicable criteria that, in principle, the ROE for all units participating in specific military tasks in the context of the operation had to be identical, even for units from other participating nations. Since the 2001 version, later versions of the document no longer contain this criterion but this issue is nonetheless still addressed

³⁸ Article 100 of the Constitution of the Kingdom of the Netherlands. The reference to the protection or promotion of the international rule of law is understood to mean peace operations of any nature, including UN-operations and “coalition of the willing” operations other than the exercise of the right of (collective) national self-defense. While technically the rule does not apply to deployment for the purposes of national or collective self-defense, the rule is applied in the event that an operation has overlapping purposes of both (collective) national self-defense and protection or promotion of the international rule of law. The requirement is for the government to inform parliament in advance (paragraph 1) or, should this not be possible, as soon as possible afterwards (paragraph 2). Paragraph 2 is understood to apply also in the event that operational security considerations make prior information to parliament impossible or undesirable, for example as regards participation in special operations.

³⁹ Known as the “Toetsingskader”, this policy document was first submitted to parliament on July 13, 1995 (Parliamentary document 23 591 Nr. 5). The document has since been updated and resubmitted on a number of occasions. The document outlines the main topics or considerations applied in the governmental decision-making process but is not a rigid “check list” for deciding whether to participate in an operation. In other words, not meeting one of the criteria in the document does not automatically rule out participation but will require an explanation as to why that criterion is not relevant in the given operation or how not meeting the criterion can be adequately redressed.

in the parliamentary debate preceding operational deployment of Netherlands armed forces units.⁴⁰

In summary, it may be concluded that the political influence on the contents of the ROE and military operations in general is a traditional influence and in keeping with the inherent political nature of military operations. As Von Clausewitz and Sun Tzu warned⁴¹, however, political leaders need to be keenly aware of the specifics of the art of war and military operations. As the Brahimi report advised the United Nations to ensure that mandates given to United Nations forces are clear and achievable, so must national political command authorities bear in mind that political compromises or “constructive ambiguities” are not readily reconcilable with clear, concise and effective ROE.

III. Drafting Rules of Engagement

While the discussion above explained the influence of the three main elements in ROE drafting and ROE application at the theoretical level, it seems useful to include a few observations on the practical aspects of the actual ROE process. As was stated above already in brief, regardless of the actual ROE writing responsibility in a specific case, the process as a whole requires involvement of representatives of all three elements identified above. As regards the (military) legal advisers, the observations regarding the necessity for trust between the legal advisers and the operators and the necessity of acknowledging limitations in experience and role responsibility were identified by Myrow as well.⁴² As Myrow points out, in addition to the observations regarding the differences in the roles of legal advisers as compared to military operational personnel, it is not uncommon for the legal adviser to incorporate political considerations as part of the

⁴⁰ See, for example, the minutes of the parliamentary debate on the Government’s evaluation of the Kosovo operation held on 13 April, 2000 (*Handelingen van de Tweede Kamer*, 13 April 2000, pp. 69-4675 to 69-4679 and 77-4973 to 77-5031).

⁴¹ See *supra* note 29.

⁴² Myrow, S.A., “Waging War on the Advice of Counsel: The Role of Operational Law in the Gulf War,” in *Journal of Legal Studies*, 1996/1997.

legal input for the ROE. This observation is supported by the practical experience of the present author and is an unavoidable aspect in a situation in which the legal adviser is commonly the main staff officer (or the responsible entity at the higher levels of decision making as regards the ROE process) in charge of evaluating or drafting the ROE and the necessity to ensure that the ROE take the entire context of the operation into account. It is also, perhaps, a result of the fact that, in the present author's experience, the political advisers and ultimately the political command authorities tend to be the final entities evaluating and approving the ROE, thus necessitating inclusion of political considerations by other entities at the earlier stages of the ROE process to avoid unnecessary or unwanted delays in the process.

The present author also agrees with Myrow that ultimately it is not important who is assigned the primary duty of drafting the ROE, as long as close coordination and direct involvement of the other disciplines involved in the ROE process is guaranteed.⁴³ That includes specifically the involvement of the commander, or his or her staff, as indicated above.⁴⁴ However, the authority or entity assigned the responsibility to draft the initial ROE document can realistically be any knowledgeable or experienced staff or ministry officer or expert. In the present author's experience, in the Netherlands such drafting has been carried out at the ministry level, at the level of the armed forces service staff level and at the level of subordinate command staff levels. In all cases, the initial draft was closely coordinated, or sometimes even written in direct cooperation or consultation, between the legal advisers in question and the operational units or personnel assigned to carry out the duties in question ("ROE by committee"). Following the conclusion of such an initial draft, the ROE were subsequently submitted to the political advisers for review against the political context and to ensure compliance with the political directives and perceptions regarding the operation in question. It should be noted, however, that such political review generally takes on a more abstract level of consideration of the ROE in question, while the legal and operational input tends to be more pragmatic in approach.

⁴³ Ibid.

⁴⁴ Duncan, *op. cit.* note 12, and Parks, "Deadly Force", *op. cit.* note 12.

In drafting the ROE for a given operation or situation, regardless of who or which element is assigned this duty, recourse may be had to some useful tools which have been drafted by various entities over the years. Such tools are sometimes referred to as “ROE compendia” or handbooks and contain sample ROE or generic ROE formats, in addition to guidance on ROE considerations and procedural or policy aspects to be considered. In the North Atlantic Treaty Organization (NATO), the document in question is a Military Committee document known as MC 362/1 and contains standard NATO policy on ROE, definitions and guidance on specific concepts and terminology and a compendium with numbered ROE serials in a generic format. Using the compendium first of all enhances ROE comprehension, as units trained in, and used to, working with the MC 362/1 format will generally recognize the overall purpose or intent of a given ROE already from its standard numbering system. Secondly, using the compendium and the standard format is helpful in ensuring consideration of the most commonly assigned types of activities in military operations in general. By following the compendium, those drafting the ROE are automatically forced to consider whether certain types of use of force or (potentially) provocative actions are relevant or suitable in the operation for which the ROE are being drafted, or whether the topic in question can be left out of the given ROE set. The European Union uses a similar document to draft the ROE for EU military operations, although the policy section of the EU document obviously differs from the NATO version of the document. Finally, as regards international organizations, the United Nations also has a general ROE document containing the rudiments of a policy section and an elementary compendium format. All three documents are classified, although the NATO Military Committee has kindly permitted the present author to use elements of MC 362/1 for the purpose of the present study.⁴⁵

⁴⁵ See *supra* note 6. It should be noted that the classification system of NATO (and EU) documents consists of two elements. First, release of the information contained in the documents is subject to authorization by the organization unless the document is marked as being releasable to the public. That means that even documents marked “unclassified” may only be used for official (NATO or EU) purposes. Second, the level of classification (e.g. “confidential”, “secret”, etc.)

In addition to the ROE compendia used by the three international organizations discussed above, unofficial ROE compendia and guidance handbooks have been drafted by other entities as well and these are available to the general public. An example of such a “civilian” ROE compendium and handbook, which is also increasingly being used by non-NATO and non-EU nations, is the San Remo Handbook.⁴⁶ In using such tools, it should be noted however that while MC 362/1 and the EU compendium use the same format and the same numbering system, as well as generally the same definitions of a number of principal ROE terms and concepts, the UN document and the San Remo Handbook use their own system and their own definitions. Especially as regards the UN document, this means that units trained in one system and, even more important, one set of definitions and concepts, must be carefully trained and prepared for deployment in a military operation which uses a different system and different definitions and concepts.⁴⁷

As regards the actual ROE drafting process, national ROE will follow the specific nation’s own national review and authorization process, which varies per country, while ROE sets issued by international organizations follow a standard procedure. The NATO procedure commences with the writing of a draft ROE set by the headquarters of Allied Command Operations (ACO), also known as the Supreme Headquarters Allied Powers

indicates the level and type of security measures to be applied in storing, transmitting or transferring the document. Such information is additionally subject to the “need to know” principle, meaning that the information may only be shared with those who, in addition to having the requisite security access level, have a legitimate need to know the information in order to carry out their assigned duties. See NATO document C-M(2002)60 (The Management of Non-Classified NATO Information).

⁴⁶ Cole, A., et al. [eds.], *Rules of Engagement Handbook*. International Institute of Humanitarian Law, San Remo, 2009.

⁴⁷ See especially chapter 3 as regards the difficulties with the concepts of self-defense, hostile act and hostile intent. In this context, it should be noted that the UN system uses the definitions of hostile act and hostile intent as used by the United States, as discussed in chapter 3, while the EU uses the NATO definitions of those same terms. Given that these terms refer to authorizations to use force either inherently (US and UN) or only when authorized by the ROE (NATO and EU), the differences are more than merely semantic or academic.

Europe (SHAPE). This set is submitted by the Supreme Allied Commander Europe (SACEUR) to the Military Committee (MC) of NATO in the form of a Rules of Engagement Request (ROEREQ). As all decision making within NATO takes place by consensus, the Military Representatives of the Member States, who make up the Military Committee, must reach unanimity on the ROE set, either through the process of negotiation or by accepting the ROE set subject to national caveats.⁴⁸ Once the ROE set has been approved by the Military Committee, it is submitted to the North Atlantic Council (NAC) for formal approval at the highest political level. The NAC may, as necessary or desired, request advice from the Legal Adviser or the Operations Policy Committee (formerly the Policy Coordination Group). Once the NAC reaches consensus on the ROE, it issues a Rules of Engagement Authorization (ROEAUTH) to SACEUR, outlining which of the requested ROE were authorized. SACEUR will then issue a Rules of Engagement Implementation message (ROEIMPL) to his subordinate commander in charge of the operation.⁴⁹ The subordinate commander, normally one of the Joint Force Commanders, then issues his or her own ROEIMPL to the Force Commander, and so on down the chain of command.⁵⁰

The EU system closely resembles the NATO system, modified to the command and control structures in place in the EU, especially within the EU's European External Action Service (EEAS). Within the EU, the initial draft ROE set is normally written by the EU Military Staff within the EEAS and then submitted as a ROEREQ to the EU Military Committee (EUMC) for consideration by the Military Representatives of the Member States. After approval by the EUMC, the ROE set is considered consecutively by the EU Political and Security Committee (PSC) and by the Council of the

⁴⁸ Caveats are national restrictions, meaning that the ROE in question either cannot be applied at all by the national forces of the member State imposing the caveat, or only under specified restrictions. See Cathcart, B., "Force application in enforcement and peace enforcement operations," in Gill, T.D. and Fleck, D. [eds.] *The handbook of the international law of military operations*, Oxford, 2010, p. 115.

⁴⁹ See chapter 2 as regards the NATO, EU and UN command structures.

⁵⁰ The ROE process for NATO is described in MC 362/1, *op. cit.*, note 6, paragraphs 21 – 23.

European Union. Once approved by the Council, the ROE set is issued as a ROEAUTH to the Operation Commander, who then implements the set via a ROEIMPL to the Force Commander, and so on down the chain of command. Contrary to NATO, however, any subsequent changes to the ROE are not considered by the Council except to the extent that they are related to a change in the mandate for the operation in question. In all other cases, the authority of the Council as regards the ROE is mandated to the PSC.⁵¹

The UN, finally, applies a completely different procedure, in keeping with the core principle that UN operations are not only wholly under UN command and control, but are in fact (temporary) organs of the UN Organization. Within the UN system, the initial draft ROE set is written by the Office of Military Affairs (specifically the Military Planning Service) within the Department of Peacekeeping Operations (DPKO) of the United Nations Secretariat and then submitted for advice and approval to the Military Adviser. The ROE set is subsequently submitted to the Under-Secretary-General for Peacekeeping for formal approval, after which the ROE are issued, either directly or via the Special Representative who is the overall head of the UN operation as a whole, to the Force Commander of the military part of the UN operation in question. It should be noted that there is no formal involvement of the Troop Contributing Nations in the UN ROE process, although nations may issue caveats to limit specific ROE for their contingent.

IV. Function and Use

The Standing Rules of Engagement issued by the Chairman of the Joint Chiefs of Staff of the United States state that the purpose of rules of engagement is “to provide implementation guidance on the application of force for mission accomplishment and the exercise of the inherent right and

⁵¹ For a description of the EU decision making process regarding EU military operations, see Naert, F., “The Application of Human Rights and International Humanitarian Law in Drafting EU Missions’ Mandates and Rules of Engagement,” *Institute for International Law Working Paper*, No. 151, Katholieke Universiteit Leuven, October 2011, pp. 7 – 10.

obligation of self-defense.”⁵² The United States Department of Defense Dictionary of Military and Associated terms defines ROE as “directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”⁵³ In the Somalia Inquiry Report, the Canadian commission of inquiry stated that ROE “perform two fundamentally important tasks for Canadian Forces (CF) members undertaking an international mission: they define the degree and manner of the force to which soldiers may resort, and they delineate the circumstances and limitations surrounding the application of that force. They are tantamount to orders.” NATO does not consider the ROE limited to issues regarding the application of force, but extends (or rather correctly identifies) the use of ROE to govern actions which may be deemed to be provocative as well. In the Netherlands, finally, the doctrine for the armed forces is set forth in the Netherlands Defense Doctrine (NDD) and in subordinate doctrine documents issued by each of the armed forces services. The NDD defines ROE in the more limited approach, by stating that ROE are rules for the commander of deployed forces in an operation and that ROE set forth the formal framework regarding the nature and methods of using force.⁵⁴ The subordinate Royal Netherlands Navy doctrine defines ROE as “the formal framework within which a commander carries out his duties. ROE indicate the level of restrictions or authorizations for a commander and those under his command in carrying out assigned tasks. [...] ROE do not only address the use of force, but every action which can possibly be construed as provocative.”⁵⁵ The Royal

⁵² United States Joint Chiefs of Staff, Chairman of the Joint Chiefs of Staff, *Standing Rules of Engagement for US Forces*, Document CJCSI 3121.01A, 15 January, 2000, p. A-1, paragraph 1.a.

⁵³ United States Department of Defense, Joint Publication 1-02, “Department of Defense Dictionary of Military and Associated Terms,” 8 November, 2010.

⁵⁴ Netherlands Defense Staff, *Nederlandse Defensie Doctrine*, 2013, paragraph 3.6, p. 67. Oddly, the text in question also quotes the NATO MC 362/1, containing the wider NATO definition of ROE.

⁵⁵ Royal Netherlands Navy, *Grondslagen van het maritieme optreden: Nederlandse maritiem-militaire doctrine*, 2014, paragraph 10.6.1., p. 314. Translation by the present author.

Netherlands Army doctrine defines ROE as “rules or guidance for commanders regarding the use of force and for military conduct in general.”⁵⁶ The Royal Netherlands Air Force doctrine rather surprisingly contains no definition of ROE and only refers to ROE once, in connection with the tasks of the so-called “red card holder.”⁵⁷

Given the various definitions stated above and taking into account the overall contents of ROE, including the political guidance in the ROE and the rules not related specifically to the use of force, it is clear that the main purpose of ROE is to control actions and behavior which (directly) relate to or influence the behavior of (potential) hostile forces and thereby (attempt to) maintain control over, or influence, the overall conduct of the parties and the use of force in the theatre of operations. In other words, ROE are a tool for achieving or maintaining escalation dominance.⁵⁸

It should be noted, in keeping with the observations made above regarding the role of military commanders in the ROE process, that this principal purpose and role of ROE exemplifies and underlines the principally military operational nature of ROE in general, as well as supporting the earlier observations regarding the relationship between military operations and political objectives. While this also emphasizes the observation that the law element in ROE should be seen in the proper perspective in relation to the other two main elements in ROE, it also clarifies the importance of the function of the legal element in providing the

⁵⁶ Royal Netherlands Army, *Landoperaties: Doctrine Publicatie 3.2*, footnote 33 on p. 3-20, translation by the present author. Paragraphs 3714 and 3715 of the DP 3.2 contain observations on rules of engagement in the context of military (multinational) operations.

⁵⁷ Royal Netherlands Air Force, *Nederlandse Doctrine voor Air & Space Operations, DP-3.3*, 2014, paragraph 3.5, p. 72. A “red card holder” is an official who monitors all commands or tasks issued to Netherlands Armed Forces units in an international operation to ensure compatibility with the national political mandate, the rules of engagement and any other national guidance. The red card holder carries out this task under the command of the Netherlands Chief of Defense and thereby outside the chain of command of the international operation.

⁵⁸ The term “escalation dominance” refers to the ability to control the development of the intensity of the use of force in a given area of operations.

maximum lawful bandwidth within which the use of force and actions which may be construed as provocative must remain.

V. Rules of Engagement document types

A distinction should be made as to what is actually meant by the term “rules of engagement.” In military operations, the guidance on the use of force and actions which may be considered provocative is set forth in a combination of documents. The overall operational plan (OPLAN) of the commander of the force in question will usually contain some guidance or military command policy regarding the use of force in the execution of the mission. Such general policy, sometimes part of the OPLAN section containing the concept of operations (CONOPS), does not set forth specific rules but instead contains the general approach envisioned by the commander. As such, it is more closely related to the political policy regarding the operation as normally set forth in the “political policy indicator” (PPI) in the actual ROE themselves.⁵⁹

The central document on the use of force and actions which may be construed as provocative is the actual ROE set itself, usually consisting of a set of numbered rules containing authorizations and prohibitions regarding specific types of actions to be taken. This document generally also contains a section containing operation-specific guidance for the commander, definitions or explanations of core concepts, a PPI and, in some cases, a brief political policy statement outlining the object and

⁵⁹ The PPI is used in NATO and EU ROE, as well as some national ROE (including in the Netherlands), and consists of a single designator that indicates how the ROE should be read and applied in the operation. PPI X-ray means that the ROE should be read with a view to de-escalating the situation and such a ROE set would not normally contain ROE authorizing robust offensive action. PPI Yankee means that the overall aim of the operation is to maintain the status quo and that while escalation should be avoided in applying the ROE, the force in question is authorized to stand its ground. PPI Zulu, finally, means that the force should take the initiative and that escalation is an accepted outcome of military action. ROE authorizing attack on enemy forces, as discussed in more detail in chapter 4, are usually part of such a ROE set. MC 362/1, *supra* note 6, paragraph 14.

purpose of the operation for which the ROE set has been issued. As the ROE contain all the rules on the use of force for a given operation, including the use of weapon systems or activities requiring (higher) command level authorization or decision making, the ROE document is normally intended for the commander of an operation. While the ROE may be disseminated to any level of command the overall commander deems advisable or suitable, the actual ROE document itself is not commonly issued below the company level (in land operations) or to non-commissioned officers or enlisted personnel.

Military personnel at lower levels of command can be issued an Aide-Memoire for Commanders (AMC), containing a simplified set of instructions based on the ROE and overall use of force policy. Such cards, when used, contain the authorizations which are relevant to the level of command exercised by the personnel in question but leave out the rules regarding weapon systems or activities requiring authorization from higher levels of command. Finally, all personnel in an operation may be issued a Soldier's Card (SCD), containing a very basic, simplified version of the ROE.⁶⁰ The SCD may also contain rules or instructions regarding the use of force in self-defense, regardless of the fact that almost all ROE sets contain a statement specifying that nothing in the ROE negates or limits the inherent right of self-defense.⁶¹ The SCD is therefore not only a simplified version of the ROE as relevant at the level of the individual serviceman, but can also be used to issue instructions or guidance on other matters that are relevant to know at that level but which are based on other documents or (legal) sources than the ROE.

The differences in these documents and the levels at which they are used is relevant. As was stated above, ROE may contain rules which are not contained in the AMC or SCD, for example rules regarding the relative

⁶⁰ For an example of the application of this layered approach to ROE documents, see Létourneau, G., *Dishonoured Legacy: The Lessons of the Somalia Affair; Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, 1997, <http://publications.gc.ca/site/eng/9.646634/publication.html> (last accessed on 5 April, 2016).

⁶¹ For a more detailed discussion of this, see chapter 3.

positioning of forces, geographic limits of the theatre of operations or the use of theatre-level assets, because such rules are not relevant at the levels at which the AMC and SCD are used. This is relevant as regards the role and function of the different documents, including their relevance in the context of criminal law.⁶² Similarly, while the ROE will normally contain a brief summary of the politically desired overall force posture to be applied by the military force, that is the PPI discussed above, the AMC and SCD do not normally contain political guidance, although they may contain a brief statement on the main operational objective of the operation in question. Consequently, ROE cover considerably more topics concerning the operation than just the use of force, while the AMC and SCD will generally be limited to clear, concise instructions as to when the units may open fire, detain persons, or otherwise use force. Although the term “ROE” is frequently (and erroneously) used to refer to the SCD, in this study the term ROE is used exclusively to refer to the actual set of numbered rules with accompanying guidance as drafted and employed at the strategic and operational level of a given operation. Where all of the types of documents are intended, the more generic term “rules on the use of force” will be used.

VI. Special types of Rules of Engagement

In drafting and applying ROE, a few special ROE types and ROE mechanisms may be employed in order to ensure that the ROE set not only meets the requirements imposed by political and legal considerations, but also meets the needs of military commanders in terms of maintaining control over the use of force and in terms of creating flexibility to respond to identifiable threats that have not yet materialized. Finally, the special ROE types and mechanisms allow commanders to ensure, as a minimum, a unified response from the force under their command in response to actual attacks or imminent attacks requiring the use of force in self-defense.

⁶² For a more detailed discussion of this, see chapter 6.

A. Dormant ROE

During the negotiations within NATO at the time of redrafting the MC 362 document on NATO rules of engagement, a new concept was introduced. A recurring concern as regards ROE was that ROE sets are specific to the operation for which they are issued and that drafting and authorizing a ROE set can be a time-consuming process.⁶³ Since some contingencies, whether in a specific mission or in terms of more general, strategic geopolitical processes, can be identified in advance as at least possible contingencies requiring the deployment of military forces and the use of force, the idea was put forward that some ROE could be processed in the normal ROE drafting and authorization process but, in essence, be kept “on hold” until the contingency in question actually arose. Such ROE would then be considered “dormant” ROE. Such ROE are, however, subject to a number of conditions and requirements.⁶⁴

In order for dormant ROE to be authorized, the “trigger event” or contingency for which they are intended must be described or designated in unequivocal and precise terms, leaving no room for generous or creative interpretation. As a specific example, a trigger event consisting only of “country A invades country B” would not be specific enough and would require explanation as to what is meant by “invade” and which specific acts, or geographic positioning, would constitute an invasion.

Secondly, as dormant ROE are fully authorized ROE which may be implemented by the commander in question as soon as the contingency in question arises, and given the possibility that this contingency may take place some (considerable) time after the ROE in question were authorized, the commander implementing such ROE must immediately inform higher command, ultimately resulting in informing the Council, that the ROE have

⁶³ It should be noted that this normally applies only to new ROE sets, which are evaluated and negotiated as part of the overall discussions on the merits of the (new) operation, including the legal basis for the operation, the political aspects of the operation, etc. Once an operation exists, however, modifications to the ROE set, while following the same procedures as the initial set, can be processed and implemented in far less time.

⁶⁴ MC 362/1, *supra* note 6, paragraph 24.

been “activated”. This allows the highest political command authority to override application of the ROE if necessary, or issue further instructions specific to the situation which has arisen.

Finally, and for the same reasons as stated above regarding the potential lapse of time between authorizing dormant ROE and their possible activation, all ROE sets containing dormant ROE must be reviewed periodically to ensure they are still appropriate, suitable and, most importantly, politically acceptable in the light of geopolitical developments and strategic views and opinions. This requirement prevents a situation in which the military forces in question take action which, although authorized on the basis of the ROE in question, is no longer in keeping with the overall political views, strategies and intentions of the Alliance.

B. ROE retention and the ROE Release Authority Matrix

In the section above regarding the ROE drafting process, it was indicated that after the ROE set has been authorized, the commander who receives the formal authorization then implements the ROE set down the chain of command. This implementation takes place all the way down to the lowest level of command to which the actual ROE set is issued, as was discussed in the section on ROE documents above. It should be noted, however, that each level of command is authorized to retain any of the ROE in the set in question at his or her level, thus only implementing those ROE to the lower levels of command as seems appropriate to that commander. Subordinate commanders must, of course, be informed of the existence of the retained ROE as well as the level of command at which those ROE have been retained.

While required or desired changes in the ROE can be requested up the chain of command through a ROEREQ message, including the rationale why the requested ROE are necessary for the execution of the mission, requests to release a retained ROE need only be addressed to the level of command which has retained the ROE in question. While such release requests must still, normally, include a rationale why release of the ROE is being requested (or a mission or operation plan detailing the purpose for which the ROE in question will be used), the decision making and authorization process takes place at the level at which the ROE was retained

rather than at the higher command or political levels. In order to facilitate this process, a ROE Release Authority Matrix (or ROERAM) is sometimes drafted, providing a simple chart or matrix indicating the level of release authority for each ROE in the ROE set for a given operation. Where a ROE has not been retained, it is normally listed as “unrestricted” in the ROERAM.

The reasons for retaining ROE at a specific level of command vary and can be either military operational or political in nature. In the author’s personal experience, a clear (although by now antiquated and therefore usable in this study) example of retained ROE involved the retention by the Commander of the NATO-led Stabilization Force (SFOR) in Bosnia-Herzegovina authorizing the use of chemical riot control agents in the context of crowd and riot control. The SFOR Commander in question quite understandably was of the opinion that the use of such agents was potentially provocative or controversial from a political, legal and public opinion perspective and therefore required a detailed release request, including rationale and intended modus operandi for the situation for which release of the ROE was being requested, each time the ROE was required.

C. Confirmatory ROE

Since the relationship between self-defense and ROE is discussed in greater detail in chapter 3, only a few minor, introductory remarks will be made at this point regarding the EU use of confirmatory ROE. As will be discussed in chapter 3, the national statutes, case law and interpretations of the right of (personal) self-defense vary greatly between States. Since, however, self-defense is an inherent right (in some States) or may be invoked at the personal discretion of the individual serviceman (in other States), some level of uniformity of response is desirable in multinational operations in order to ensure that threats against the force do not lead to (wildly) diverging responses from the various national contingents.

In the EU, this issue is addressed by authorizing and implementing ROE from a specific section of the EU Use of Force Policy document. While mostly following the MC 362/1 format, the compendium portion of the EU document contains at least one specific serial which is unique to the EU. These ROE authorize the use of force in response to specific threats or

actions by external parties. For most Member States, the use of force in those situations would be authorized already on the basis of their national laws and regulations on self-defense, such as using force to defend oneself against an attack or imminent attack. In some situations, however, States with restrictive views on (personal) self-defense and lacking authorization to use force on the basis of their national statutes may require the authorization and implementation of ROE from this serial in an EU mission in order to have a legal and lawful authorization to use force in the circumstances in question. An example of such a situation would be the use of force in defense of property, which is one of the divisive issues regarding (personal) self-defense as regards the various national views.⁶⁵

In essence, States for which the use of force in question is already authorized on the basis of their national laws, views, etc., regarding the (inherent) right of self-defense do not need the ROE in question, but are not hindered or hampered by these ROE either.⁶⁶ For those States requiring an authorization in such cases, the ROE provide the legal framework for the use of force. As the right to use force in self-defense is derived either from the inherent right of self-defense or from the inherent right of a force to defend itself, as will be discussed in greater detail in chapter 3 below, these specific EU ROE are referred to as “confirmatory” ROE, as they confirm the right of the force, or its individual military personnel, to use force in self-defense.⁶⁷

⁶⁵ A more detailed discussion of this issue, as well as the legal bases for a force to defend itself, is provided in chapter 3. This section is merely intended to be descriptive of the special type of ROE known as “confirmatory” ROE within the EU ROE system.

⁶⁶ Given that, as will also be discussed in chapter 3, each ROE set generally contains a statement specifying that nothing in the ROE limits the inherent right of self-defense, the ROE in question do not affect that inherent right for those States for whom the action in question is already authorized on the basis of their national laws, etc., regarding (personal) self-defense.

⁶⁷ It should be noted that given the object and purpose of confirmatory ROE, it would be highly undesirable for States to issue caveats on these specific ROE in an EU ROE set.

VII. Conclusion

This chapter explained and illustrated the basic principles of ROE, including the classic model describing their creation or interaction at the interplay between the constituent components of ROE. Additionally, this chapter illustrated some of the procedural aspects related to the drafting and promulgation of ROE and, perhaps most importantly, their primary function from a military operational perspective. Since ROE serve, and exist as part of, the military operational context in which they are issued and applied, the next chapter will illustrate that context in order to explain the position of ROE within that context. This explanation is intended to put the ROE in perspective as regards the greater context in which they exist and are applied, as well as explain a number of concepts used in the later chapters. Those later chapters, finally, will provide the main analysis of the interaction between the law and ROE.

Chapter 2

The Military Operational Context

I. Introduction

The previous chapter introduced the basic principles of rules of engagement, including the theoretical model commonly used in relation to such rules and the basic components, or constituent elements, of ROE in general. Before discussing the most relevant elements of (international) law and their relationship with ROE in the next chapters, it is necessary to illustrate and explain the relationship between ROE and the overall operational planning and command and control systems applicable to military operations. This step is important first of all to demonstrate that ROE do not exist in isolation in the context of a given operation but are, instead, an integral part of a larger process and a constituent element of the sum of operational processes, documents and instructions to a military force. Secondly, determining the influence of, and relationship governing, (international) law and ROE is dependent to a significant degree on the legal basis of a military operation, as well as the mandate and concept of operations for the military operation in question.

In light of the above, this chapter will first examine some of the legal bases for initiating and conducting military operations, also referred to as the *jus ad bellum* (law governing the initiation of the use of force). Next, the basic principles of command and control will be discussed, including the various command levels and their implementation in the North Atlantic Treaty Organization, the European Union and the United Nations. This part of the discussion is not only relevant for understanding some of the comments and observations in later chapters, but also helps to understand why certain parts of the ROE process function as they do. Finally, as a synthesis between these two topics, a brief explanation will be given on the operational planning process, including the place of ROE development and promulgation as part of that overall process.

II. Legal bases for military operations (*jus ad bellum*) in brief

Many publications exist on the topic of the *jus ad bellum*, some of which are even dedicated entirely to that topic.¹ It is by no means the intention, nor would it be relevant, to provide a comprehensive overview or study of the *jus ad bellum* in the context of the present study. However, some observations on the various bases in international law for the conduct of military operations are warranted, since the question as to the legal basis for a (planned) military operation is not only the starting point for any legal discussion (or legal advice to operational and policy decision making) regarding that operation, but also determines the legal “bandwidth” for the ROE for that operation. Consequently, the legal bases most commonly recognized as lawful will be discussed below, as well as a minor few of the issues frequently associated with this topic.

The right of States to defend themselves against an (imminent) armed attack is one of the oldest and most fundamental elements of the *jus ad*

¹ See, *inter multos alia*: Gardam, Judith, *Necessity, Proportionality and the Use of Force by States*, Cambridge, 2004; Gill, T.D., “The Forcible Protection, Affirmation and Exercise of Rights by States Under Contemporary International Law,” in *Netherlands Yearbook of International Law*, Vol. XXIII, 1992; Martyn, Angus, “The Right to Self-Defense under International Law: The Response to the Terrorist Attacks of 11 September”, Parliament of Australia Current Issues Brief 8, 12 February 2002; Maxon, Richard G., “Nature’s Oldest Law: A Survey of a Nation’s Right to Act in Self-Defense”, in *Parameters: U.S. Army War College Quarterly*, Autumn 1995; O’Connell, M.E. “The Myth of Preemptive Self-Defense”, in *American Society of International Law Task Force on Terrorism Papers*, August 2002; Randelzhofer, A., ‘Article 2(4)’ and ‘Article 51’, in Simma, B. [ed.], *The Charter of the United Nations: A Commentary*, Oxford, Oxford University Press, 2nd ed., 2002; Schnabel, Albrecht, and Thakur, Ramesh [Eds.], *Kosovo and the Challenge of Humanitarian Intervention*, New York, 2000; Waldock, C.H.M., “The Regulation of the Use of Force by Individual States in International Law”, in *Recueil des Cours*, Vol. 81 (1952-III). The Netherlands government’s views regarding legitimate legal bases for international military operations can be found in the policy document submitted to parliament on 22 June, 2007, “Notitie rechtsgrondslag en mandaat van missies met deelname van nederlandse militaire eenheden,” parliamentary document 29 521 nr. 41.

bellum.² This right is confirmed in Article 51 of the Charter of the United Nations, although that Article should be seen as a recognition or affirmation of this right³ rather than as the source of this right. Regional or specific treaties related to the right of (collective) national self-defense, such as the North Atlantic Treaty (Article 5) and the Treaty on European Union (TEU, Article 42, paragraph 7), refer back to Article 51 of the United Nations Charter in their wording and may be seen as both implementation of the right of collective self-defense and a reminder of the procedural aspects of Article 51, such as the obligation to notify the Security Council upon exercising the right of national self-defense. These provisions also acknowledge and implement, through their wording, the threshold requirement for application of the right of (collective) national self-defense as set forth in the Charter, meaning the existence of an (imminent) armed attack.

The exercise of collective national self-defense is not dependent, however, on the existence of (prior) treaty arrangements to that effect between the States in question and in terms of the right of collective self-defense such treaties merely serve as a structure or decision *ex ante* for the exercise of this right. Any State which is the subject or victim of an (imminent) armed attack may request the assistance of any other State in exercising its inherent right of national self-defense. A contemporary example of this mechanism is the request by the Republic of Iraq for assistance in its national self-defense against the ongoing attacks by the terrorist organization known variably as ISIS, ISIL or Da'esh.⁴ On the other

² Waldock, *op. cit.* note 1; Randelzhofer, *op. cit.* note 1. The topic of national self-defense is discussed in somewhat more detail in chapter 3, on the relationship between self-defense and ROE. The comments in this chapter are intended more as a general overview.

³ As well as incorporating this right into the United Nations collective security system.

⁴ The request from the Government of Iraq to the Security Council can be found online at: <https://www.muckrock.com/foi/united-states-of-america-10/iraqi-request-for-military-assistance-state-department-12862/> (last accessed on 5 April, 2016). Requests were also made by the Government of Iraq to individual States, such as the United States. See, for example:

hand, the terrorist attacks in Paris in November of 2015 prompted the government of France to invoke, for the first time in the history of either the WEU or the EU, the collective self-defense provision of Article 42, paragraph 7, of the TEU.⁵ A more hybrid example concerns the response following the attacks on the United States on September 11, 2001, which was cause to invoke, for the first time in the history of NATO, Article 5 of the North Atlantic Treaty.⁶ However, the actual military response by NATO was initially limited, as the attack on Afghanistan in response to the 9/11 attacks and the ensuing operation against Al Qa'ida and the Taliban (known as operation *Enduring Freedom*) was carried out by a “coalition of the

<http://edition.cnn.com/2014/06/18/world/meast/iraq-crisis/> (last accessed on 5 April, 2016).

⁵ See, for example: Traynor, I., “France invokes EU’s Article 42.7, but what does it mean?”, *The Guardian*, 17 November, 2015, available online at <http://www.theguardian.com/world/2015/nov/17/france-invokes-eu-article-427-what-does-it-mean> (last accessed on 5 April, 2016). Article 42.7 of the TEU is the successor to the prior Article 5 of the Treaty on the Western European Union. While in the case of Da’esh the United States has stated that the use of force against Da’esh is based on the right of national self-defense, this line of reasoning is based on the historic background of Da’esh in relation to the American views as regards a continuing right to use force against those who “planned, authorized, committed or aided” the attacks on the United States of September 11, 2001. See the statement made by Preston, S.W., “The Legal Framework for the United States’ Use of Military Force Since 9/11”, delivered at the Annual Meeting of the American Society of International Law, April 10, 2015, available online at: <http://www.defense.gov/News/Speeches/Speech-View/Article/606662> (last accessed on 5 April, 2016). The AUMF referred to in the speech is Public Law 107-40 of September 18, 2001 (115 Stat. 225). For the historical background of Da’esh and its prior connections and integration in relation to Al Qa’ida, see Weiss, M. and Hassan, H., *ISIS: Inside the Army of Terror*, New York, 2015. Whether the right of national self-defense as a basis for military action against any terrorist or terrorist organization anywhere in the world, provided some link can be established with the 9/11 attacks, is legally tenable (or remains tenable fifteen years after the attack) is subject to considerable debate. See also Gill, T.D., “When Does Self-Defense End?” in Weller, M. [ed.], *Oxford Handbook of the Use of Force in International Law*, Oxford, 2015, pp. 737 – 751.

⁶ See, *inter alia*, the statement by the North Atlantic Council on October 2, 2001, available at <http://www.nato.int/docu/speech/2001/s011002a.htm> (last accessed on 5 April, 2016).

willing” under overall command and coordination of the United States in the exercise of collective self-defense. The later operations in Afghanistan carried out under command and control of NATO, known as the International Security Assistance Force (ISAF), were based on United Nations Security Council resolution 1386. The only NATO operation established on the specific basis of Article 5 in response to the 9/11 attacks was the naval operation *Active Endeavour*, established to monitor and patrol shipping in the Mediterranean.

The examples given above regarding the collective exercise of self-defense in the context of Iraq’s defense against Da’esh and the NATO and EU responses to attacks by Al Qa’ida and Da’esh demonstrate that the requirement set forth in Article 51 of the United Nations Charter in terms of a prior (or imminent) armed attack can also be met by attacks carried out by non-state actors.⁷ The legal basis for the use of military force in response to such attacks is complex. Domestically, in the attacked nation, the use of force against (suspected) terrorists may either fall within the paradigm of law enforcement, and consequently be subject to the full range of human rights law requirements and the concomitant rules and procedures regarding the use of force in that context,⁸ or within the armed conflict paradigm. In the case of individual terrorist attacks or attacks that are limited in duration and occur in only one locality, application of the human rights paradigm seems more likely. If, however, the non-state actor carries out such extensive actions as to meet the threshold criteria for the existence of a non-international armed conflict, the law of armed conflict paradigm applies.⁹

More problematic and controversial is the use of force in or against another State in response to armed attacks by a non-state actor. The use of force against the other State in this context is possible only if the actions of

⁷ See also, *inter multos alia*, Gill, T.D., “The 11th of September and the International Law of Military Operations”, Inaugural Lecture delivered on the appointment to the chair in Military Law at the Universiteit van Amsterdam, 20 September 2002.

⁸ For a more detailed discussion of these paradigms and the interaction between human rights law and the use of force, see chapter 5.

⁹ See chapter 4 for a further discussion of this.

the non-state actor can be attributed to that other State,¹⁰ while the use of force on the territory of another State, but only directed against the non-state actor, is possible only if a number of criteria are met. The latter possibility is a hotly debated issue, especially as regards the legal basis for such actions and the normative criteria which apply to evaluating the legality of such actions. As regards the legal basis, two basic schools of thought exist. The first school of thought considers actions on the territory of a third State against non-state actors operating from that third State to be a situation of necessity in the sense of that term as used in Article 25 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DARS). In other words, in this line of reasoning the actions are not justified by the right of self-defense in the sense of Article 51 of the UN Charter, but the wrongfulness of the use of force in question is precluded by the state of necessity. One proponent of this view is Ago, whose views on this issue are mentioned only briefly but are a logical derivative of his discussion of national self-defense in general.¹¹ Both Ago and the Commentary to the DARS, in paragraph 5 of the commentary to Article 25, refer to the Caroline case as an example of necessity in this context, while both acknowledge the frequent reference to that case in academic debate as being fundamental for establishing the criteria for the exercise of the right of self-defense.¹²

¹⁰ This issue is discussed in greater detail in chapter 3, in the section on national self-defense.

¹¹ Ago, R., "Addendum – Eighth Report on State Responsibility," A/CN.4/318/Add.5-7, *Yearbook of the International Law Commission*, 1980, Vol. II (1). Interestingly, Ago also appears to reason that national self-defense is not a "right" by following the reasoning in domestic self-defense law in some nations that the recourse to self-defense is a justification in the event that the protective function of higher authority (the State authorities in domestic situations and the international community in international situations) fails to offer effective protection in the face of an immediate and serious danger which cannot be addressed by any other way; p. 53, paragraph 87 – 88. This view is at odds with the later statement by the International Court of Justice in the *Nuclear Weapons* advisory opinion, in which the Court refers to national self-defense as a "fundamental right of every State"; ICJ; *The Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, 8 July, 1996, paragraph 96.

¹² See Chapter 3 for a further discussion of this, including the Caroline case.

The view favoring a state of necessity (not to be confused with the requirement of necessity as a requirement for the exercise of the right of self-defense) as the legal basis for the use of force against non-state actors on the territory of a third State does, however, pose a number of risks. As Koks correctly points out, this view would lower the threshold for the use of force in this context, since the state of necessity does not require a prior armed attack, with all the threshold elements attached to that concept, as is required in the context of the right of self-defense.¹³ Furthermore, as Koks points out, Article 25 of the DARS specifies that action taken pursuant to a state of necessity may not contravene a peremptory rule of international law, while the prohibition on inter-State use of force can be considered to qualify as such a rule.¹⁴ Given that status of this prohibition, an (additional) exception to Article 2, paragraph 4, of the Charter cannot easily be presumed to exist or readily be accepted, especially in the absence of considerable State practice. Ago's views on this aspect, however, reflect the time at which his Addendum was written, as he views limited actions on foreign soil, referring to a number of situations derived from the practice of rescuing nationals abroad, as not being in contravention of the *jus cogens* norm prohibiting inter-State use of force.¹⁵ Clearly Ago had not anticipated, nor had any reason to anticipate, the rather more devastating attacks carried out by non-state actors in later years or the large-scale use of force, rising well into the level of armed conflict, in response to such attacks and including extensive military operations on foreign soil.

The alternative line of reasoning as regards the legal basis for the use of force against non-state actors on the territory of a third State generally views a response to attacks by non-state actors which rise to the level of an

¹³ Koks, F.M., “Zelfverdediging tegen niet-statelijke entiteiten” (*Self-Defense Against Non-State Actors*), Master's Thesis written at the University of Leiden and the University of Amsterdam, May 2004, on file with author; p. 32. Koks also points out, on p. 35, that using the state of necessity as a basis would rule out the possibility of assistance by other States, as the rules in question only allow action by the affected State and would not support collective action in defense against attacks by non-state actors from the territory of a third State.

¹⁴ *Ibid.*, p. 32.

¹⁵ Ago, *op. cit.* note 11, p. 44.

armed attack as being justified on the basis of the right of national self-defense. In addition to the simple observation that this view is supported in State practice by the invocation of Article 5 of the North-Atlantic Treaty in response to the 9/11 attacks and by the invocation of Article 42, paragraph 7, of the TEU in response to the 2015 attacks, other responses by the international community to actions taken by affected States in reaction to such attacks also support this line of reasoning. As Trapp points out, the right of self-defense (regardless of international views, including criticism, as to *how* that right was exercised in practice) was recognized by the United Nations in response to operation *Enduring Freedom* in the form of supportive texts in the relevant United Nations Security Council resolutions and in response to the use of force by Israel against Lebanon in 2006.¹⁶ More recently, the Security Council has received official notifications from a number of States supporting Iraq in its exercise of self-defense against Da'esh, without any resulting denial of this right by the Council or, in fact, any apparent inclination on the part of the Council to take any actions “as it deems necessary in order to maintain or restore international peace and security” as referred to in Article 51 of the Charter. While inaction on the part of the Council or the lack of denial of the right of self-defense need not necessarily indicate endorsement, it should be noted that the UN has, in fact, adopted resolutions encouraging States to act against Da'esh (albeit with a vague and general injunction to comply with international law).¹⁷

Self-defense as a basis for the use of force against non-State actors consequently seems to be the basis preferred in State practice, but State practice regarding the use of force on the territory of a third State in cases where the actions of the non-state actor were not attributed (or in fact attributable) to that third State also show application of additional criteria or considerations.¹⁸ The discussion of these considerations, commonly

¹⁶ Trapp, K.N., “Can Non-State Actors Mount an Armed Attack?” in Weller, M. [ed.], *Oxford Handbook of the Use of Force in International Law*, Oxford, 2015, p. 690.

¹⁷ See, for example, UN Security Council Resolution 2249 of 20 November, 2015.

¹⁸ Deeks mentions a number of examples of States applying the “unable or unwilling” rule or test; Deeks, A.S., “‘Unwilling or Unable’: Toward a Normative

referred to as the “unwilling or unable test”, can be divided into two elements. The first element addresses the legal basis or source of the test and ensuing authority (or at least non-illegality) of the use of force on the territory of a third State as a result. This element is essentially a continuation of the debate presented above as regards the legal basis for transnational use of force against non-state actors and sets forth a refinement or nuance on the right of self-defense as the basis for such use of force. The second element addresses the normative aspects of the test and the criteria to be applied.

In her careful analysis and discussion of the “unable or unwilling” test, Deeks refers to the law of neutrality as the legal foundation or source of the test.¹⁹ This view has subsequently been criticized by Heller, who emphasizes that neutrality law only applies between States and who refers, *inter alia*, to the *Nicaragua* ruling of the ICJ.²⁰ On that issue, Trapp points out that the ICJ rulings can (or perhaps should) be read in a more restrictive manner as being related to the specific factual context of the cases being adjudicated and warns that some care is required when applying the rulings to a wholly different factual context.²¹ As regards the contentious issue under discussion between Heller and Deeks, the present author takes an intermediate view on the applicability or founding role of neutrality law as

Framework for Extra-Territorial Self-Defense,” in *Virginia Journal of International Law*, Vol. 52, 2012, p. 486 – 487.

¹⁹ *Ibid.*, p. 488 and 497 – 501, including examples of State practice.

²⁰ Heller, K.J., “Ashley Deeks’ Problematic Defense of the ‘Unwilling or Unable’ Test”, available online at <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> (last accessed on 5 May, 2016). It should be noted that Heller (strongly) criticizes the argument that neutrality law should be seen as the legal source, but commends Deeks on the article as a whole and even seems to recommend her normative framework as something to be considered *de lege ferenda*. As regards the reference to the *Nicaragua* case, see chapter 3 and the criteria for attribution of acts of non-state actors to States.

²¹ Trapp, *op. cit.* note 15, p. 686. It might additionally be noted that the case in question was centered on the accusations by Nicaragua against the United States, not on whether attribution is required in all cases of transnational activities by non-state actors. Given the nature of the claims by Nicaragua, it goes without saying that the Court had to establish whether the acts of the rebels were attributable to the United States.

regards the “unable or unwilling” test in the context of actions against non-state actors on the territory of a third State.²² While Heller is, of course, correct that the law of neutrality addresses States and exists²³ as part of the regulation of the relationships between States during an armed conflict, there is no logical reason to exclude that law in an era in which it is accepted, at least in unequivocal State practice, that non-state actors can carry out armed attacks in the sense of Article 51 of the UN Charter. In other words, if the current developments, both factual and legal, regarding the use of force against non-State actors continue in a direction essentially and effectively elevating such non-state actors to the level of States as regards applying the law on the use of force in the context of national self-defense, it would stand to reason that the law of neutrality, as part of the international law on the use of force, would be included in that development. As regards Heller's sharp distinction between *lex lata* and *lege ferenda*, the present author, perhaps pessimistically, considers the current global developments, in particular the fight against Da'esh, as indicative that the international community has already moved much further towards such an elevation of the status of certain kinds of non-state actors than Heller appears to think.

Setting aside for now the neutrality law basis for the “unable or unwilling” test as being academically “under dispute,” an additional and, in view of the dispute just discussed perhaps more “neutral”, basis for this test and, concomitantly, for the use of force against non-state actors on the territory of a third State can be found in the criteria applicable to the

²² It should be noted that the debate centers on the source of the test. The application of the test in State practice has already been clearly demonstrated on multiple occasions, as also shown by the many examples given in the various works cited in this section and as will also be shown below as regards the views of the Netherlands in the context of the use of force on the territory of Syria in response to the attacks by Da'esh on Iraq.

²³ While it has sometimes been argued that the law of neutrality has become defunct as a result of the prohibition on inter-State use of force under the Charter of the United Nations, it should be noted that paragraph 5 of the commentary to Article 21 of the DARS quite correctly and clearly points out that neutrality law is still relevant and applicable, referring also to paragraph 89 of the ICJ ruling in the *Nuclear Weapons* advisory opinion.

exercise of the right of national self-defense. No debate is reasonably possible that necessity and proportionality are the central criteria to be applied in the exercise of this right and that their status under international law is that of being part of (binding) customary law.²⁴ As regards the necessity criterion, Deeks,²⁵ Trapp,²⁶ and Koks²⁷ point out that this criterion provides the basis and determinative framework for the use of force on the territory of a third State in response to attacks by non-state actors which are not attributable to that third State. In its simplest and most brief form, this approach basically considers the use of force against a non-State actor on the territory of a third State as falling within the ambit of the right of self-defense to the extent that such use of force is necessary, as evidenced by the third State being unable or unwilling to address the threat posed by the non-state actor on that third State's territory. This approach, albeit without explicit reference to the necessity criterion or the arguments presented above, was also applied by the Netherlands in its considerations as to whether the use of force against Da'esh on the territory of Syria was justified as part of the (collective) defense of Iraq.²⁸

Notwithstanding the solid legal analysis and firm basis for this approach, using this approach still requires some normative framework to delineate the criteria and tests to be applied in order to arrive at the conclusion that the third State is unable or unwilling. To that end, the extensive framework and carefully analyzed criteria proposed by Deeks seem not only particularly helpful, but also reflective of State practice.²⁹ As

²⁴ ICJ; *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua vs. United States), 27 June, 1986, paragraphs 176 and 194, and ICJ; *Nuclear Weapons* case, *op. cit.* note 11, paragraph 41 *et seq.*

²⁵ Deeks, *op. cit.* note 18, p. 494.

²⁶ Trapp, *op. cit.* note 16, p. 694 – 695.

²⁷ Koks, *op. cit.* note 13, p. 41 – 43.

²⁸ See especially the Additional Advisory Opinion of the External Adviser on International Law as submitted to parliament as an annex to the letter by the government of 26 June, 2015.

²⁹ Deeks, *op. cit.* note 18, pp. 519 – 545. These criteria or test elements will not be discussed in any further detail here, as they are not relevant for the rules on the use of force themselves. In brief summary, Deeks discusses six normative elements for the “unable or unwilling” test: (1) a preference or emphasis on

regards the normative framework, a final comment and contribution to the law of neutrality debate in this context would be the observation that while the “necessity” approach just discussed provides a more solid legal basis for the use of force against non-state actors on the territory of third States, the normative framework and criteria to be used in making that assessment show clear similarities to the framework and criteria set forth in neutrality law. In other words, even if neutrality law were to be rejected as the legal basis for the use of force in this context as such, it may still at least be seen as a distinct contributing factor to the norms to be applied in the actual use of force in this context.

No less controversial than the discussion just described is the legal basis for the use of force in the context of rescuing nationals abroad. Here, too, the same two foundations as were just discussed may be referred to as a legal basis. However, contrary to the use of force against non-state actors pursuant to a prior armed attack by those non-state actors, a great many more factors come into play in the context of rescuing (or protecting or evacuating) nationals abroad, and neither legal basis can be ruled out or considered to be the preferable basis in all such cases exclusively. The right of national self-defense has on a number of occasions been invoked as the legal basis for such actions,³⁰ and would certainly appear to be a clear basis in the event that the nationals to be rescued or protected are diplomatic

cooperation with the third State; (2) examination of the nature of the threat posed by the non-state actor; (3) a request to the third State to take action and a reasonable timeframe for the third State to respond; (4) a reasonable assessment of the capabilities of the third State to exercise control over the situation; (5) a reasonable assessment of the measures proposed by the third State to control the situation; and (6) prior experiences with the third State.

³⁰ See *inter alia* the letter to parliament from the government of the Netherlands delineating the legal bases recognized by the Netherlands as adequate legal bases for the deployment of the Netherlands armed forces, parliamentary document 29 521 no. 41, 22 June, 2007, p. 7. See also Ronzitti, N., *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, Dordrecht, 1985, pp. 63 – 64; and Raby, J., “The Right of Intervention for the Protection of Nationals: Reassessing the Doctrinal Debate,” in *Les Cahiers de Droit*, Vol. 30, no. 2, 1989, p. 473.

agents or members of the armed forces.³¹ In the event that the nationals in question are not State agents, however, this basis becomes slightly more problematic. If the threat in question is either attributable to the host State or in fact caused or posed by the host State, self-defense may still provide a legal basis, although a debatable one, as it is not unequivocally apparent that such actions by the host State in question would constitute an armed attack in the sense of national self-defense. In the event that the threat is posed by the local population, whether as a result of specific or directed attacks or as a result of random acts of violence following a partial or total collapse of effective (exercise of) authority in the host State, or if the threat is posed by criminal elements, national self-defense becomes untenable as a legal basis. As Raby points out, such situations would not only fail to meet the “armed attack” criterion, but would also run into considerable difficulties as regards attribution to the host State.³² In such cases, the state of necessity as discussed above and as referred to in Article 25 of the DARS would appear to provide the more solid basis for the use of force.³³ In any case, there appears to be consensus that actions taken in this context, regardless of the legal basis, require a considerable degree of restraint, not only in terms of deciding whether to carry out such actions but also in terms of the scope and degree of force to be used in this context. The restraints commonly invoked include (elements of) the “unable or unwilling” test as well as limiting the actions to what is absolutely necessary to carry out the rescue in question, limiting the use of force to defensive actions only and not becoming involved in the local situation as a whole.³⁴ Consequently, such actions require rules on the use of force which are tailored to the specific circumstances of the individual operation in question and which reflect the restraints just discussed while leaving enough recourse to act in self-defense as well as in defense of the nationals being rescued or evacuated. In the present author’s experience, such rules are commonly

³¹ See also chapter 3 as regards unit self-defense as part of the right of national self-defense.

³² Raby, *op. cit.* note 30, pp. 478 – 479.

³³ Raby, *op. cit.* note 30, pp. 486 – 490; Koks, *op. cit.* note 13, p. 35.

³⁴ See, *inter alia*, the letter to parliament from the government of the Netherlands, *op. cit.* note 30.

tailor-made, although a generic (and usually very restrictive) set may be available for emergency use.

A final³⁵ and, in this case, uncontroversial basis for the use of force is provided, of course, in Chapter VII of the Charter of the United Nations. Stated simply, the Security Council may, in the event of a threat to, or breach of, international peace and security, authorize member States to use force to enforce decisions of the Security Council with a view to restoring international peace and security. Alternatively, the Security Council may authorize the establishment of a military operation under United Nations command and control to that effect. As this legal basis for the use of force is uncontroversial and unequivocally clear, it will not be discussed further here.³⁶

III. Command and control of military operations

Throughout this study, reference is made to the terms “command and “control” as regards the direction of military forces in the conduct of military operations or assigned duties. While the basic, linguistic, meaning of these terms is clear, a few observations are in order as regards the

³⁵ It should be noted that while “humanitarian intervention” is often discussed in this context, there does not at present appear to be any solid basis in international law to view such actions as being *legal* as opposed to, for example, “*justified*” on moral or political grounds. See *inter alia* the letter to parliament of the government of the Netherlands, *op. cit.* note 30, as confirmed later in the letters to parliament of 2013 (parliamentary document 32 623 no. 110) and 2014 (parliamentary document 27 925 no. 518). Similarly, the “Responsibility to Protect” which was developed on the basis of the same considerations and concerns and which is set forth in the World Summit Outcome document of the United Nations (United Nations General Assembly resolution A/RES/60/1 of 24 October, 2005) in paragraphs 138 – 140 does not convey any authority to use force to protect the populations of other States from genocide or other grave humanitarian risks or threats but imposes a duty on the international community as a whole to address such issues. As also confirmed by the Secretary-General of the United Nations, the use of force in this context requires authorization by the Security Council on the basis of Chapter VII of the Charter; Report of the Secretary-General, UN Document A/63/677 of 12 January, 2009.

³⁶ For a discussion of the interaction between humanitarian law and human rights law and such UN operations, see chapters 4 and 5 respectively.

specifics of military command and control and the associated concepts to the extent that they are relevant in the context of the present study. These concepts include the differences and overlap between military command and political or civil authority, the levels of command commonly identified, and the rudimentary basics of command and control as used by NATO, the EU and the UN. It should be noted that this section is primarily descriptive and explanatory in nature and does not necessarily address the various legal or conceptual issues related to these concepts, as those do not have a direct relevance to the study of the rules regarding the use of force. Instead, this section is intended to ease understanding of the more military operational observations in the later chapters in this study.

A. Command and authority: divergences and convergences

In this study, the term “command” is used to indicate the authority or power to issue orders, assign missions, tasks and duties, impose military operational restrictions or issue military operational instructions to military personnel or forces under the command of the person or entity in question (whether an officer, an on-scene commander, etc.). The term “authority” in connection with military operations or command relationships is used to refer to the legal power to take certain actions and therefore indicates both the legal basis for a command relationship (such as being a commissioned officer in the armed forces or the formal “transfer of authority” document used in the formation of multinational forces) and the legal basis to take the action in question in terms of the substance of the action. Put more simply, “command” refers to the hierarchical structure of the armed forces or the composite military force in question and to the relationship between the elements of that structure, while “authority” refers to the substantial aspects and contents of that relationship. At the risk of over-simplifying these concepts, “command” can be seen as the power to issue orders *as such* while “authority” can be seen as the power to issue orders *with that specific content*.

The difference between the two concepts is more than semantical. In looking at the various orders and assignment of missions, tasks, duties, etc., in a military force or the regular military structure of a given State, both elements need to be addressed in order to understand each of the various

relationships within that force or structure. While basic military hierarchy dictates that a commanding officer can issue commands to military personnel under his command, that does not *ipso facto* mean that he can order actions which are not within his legal authority. This aspect is relevant both in terms of military criminal and disciplinary law, which is discussed in chapter 6, and in terms of the political and legal control over the use of force. As was discussed in chapter 1, all military operations ultimately serve political goals and must observe the legal framework within which the operation takes place. The concept of “authority” therefore reflects the political and legal control and regulation of the military forces in question, regardless of the hierarchical command relationships within those forces.

In terms of the rules on the use of force, the command relationship dictates who may issue such rules, or place restrictions on such rules, in regards to whom. The authority element dictates the substance of those rules. This observation may also serve as further explanation or illustration of the prior comments on caveats and restrictions placed on the official set of Rules of Engagement, in the sense that the prohibition on expanding the ROE at any level other than the promulgating entity is reflective of the lack of authority to issue wider permissions on the use of force, regardless of the command relationship which may exist between a sending nation and the national contingent placed under the command of an international commander or international organization. Should the sending nation consider itself authorized, on a national basis, to carry out actions which would go beyond the limitations set by the international organization or international force commander, it must then exercise that authority through a purely national chain of command (and under national responsibility), as sometimes happens in the context of more complex multinational operations in which divergent opinions on the nature and scope of the mandate may exist between the participating nations.

B. Levels of command

In theory, the number of levels of command is unlimited. This observation is based on the simple fact that in describing command relationships, each relationship represents a level in the hierarchical structure. For example, as regards land operations the command relationship between a soldier and his

squad leader is one level, the relationship between the squad leader and the platoon commander is another level, and so on and so forth. In the interest of ease of understanding, however, three general and very broad levels of command are used in this study and will be discussed below: the strategic, operational and tactical levels of command. Subsequently, the application of these command levels in the context of NATO, the EU and the UN will be discussed.³⁷

1. Strategic, Operational and Tactical

Strategic level of command

The highest level of command over the armed forces of any nation is the strategic level, which includes the national command authorities.³⁸ The strategic level determines, alone or in concert with other States, the national security and policy objectives of that State and applies national resources to achieve them. In terms of military operations, the strategic level determines whether and how to deploy military forces, as well as assessing the (acceptable levels of) the risks involved and the objectives to be achieved by those forces. The plans issued or ordered at the strategic level include national defense plans, standing national doctrine, strategic plans and plans for specific operations down to the level of the general theater of

³⁷ It should be noted that this discussion focuses on levels of command, not the substance or type of command relationship. While NATO and the EU share a common terminology as regards the types of command relationship (such as “Operational Command”, “Operational Control”, etc.), the UN uses different terminology and national systems may use still other terms, concepts and definitions. These types of terminology will consequently not be used in this study.

³⁸ This term is an American term used to refer to the President, the Secretary of Defense and their “duly deputized alternates or successors”. See Joint Publication 1-02, “Department of Defense Dictionary of Military and Associated Terms,” 12 April 2001 (As amended through 9 January 2003), issued by the United States Department of Defense. While other nations may not use this term as such, it is used in this discussion to refer to whichever authority exercises the highest level of national authority over the armed forces of the nation in question as well as the highest military commander of those forces. See also the discussion on political control over the armed forces in chapter 1.

operations.³⁹ These last plans serve as the blueprint for the theater commander to draft his own plans and instructions. In short, the strategic level broadly encompasses the national political level, the national military command levels and the highest command level in the theater of operations for a specific operation, although this last command level overlaps with the operational level discussed below. As regards international organizations, the strategic level encompasses the organizations' political decision making bodies and the highest military command levels under direct instruction and control of those political bodies.

Operational level of command

At the intermediate level of command, that is the operational level, campaigns or large-scale military operations are planned and executed in furtherance of the strategic objectives set out by the strategic level of command. Such campaigns or operations are limited in scale to a specific, assigned theater of operations or a similar geographically defined area of operations. In essence, the operational level translates strategic objectives into operational plans to guide and command the forces in question and allocates the resources necessary to enable or sustain the activities to be carried out at the tactical level.⁴⁰ Put simply, the operational level provides the nexus between the strategic level and the tactical level. As used in this discussion and in terms of unit sizes, the operational level encompasses the theater commander and his staff down to the battalion level. In naval and air operations, the operational level encompasses the theater commander down to individual task force or squadron commanders.⁴¹

³⁹ Joint Publication 1-02, *op. cit.* note 38.

⁴⁰ Joint Publication 1-02, *op. cit.* note 38.

⁴¹ Since the word "squadron" is sometimes also used in the naval context, what is meant here is a naval task force or an air force squadron. While a squadron can be considered an operational level unit, a flight, that is a number of aircraft from that squadron carrying out an actual mission, would be a tactical level unit.

Tactical level of command

The lowest level of command, the tactical level, plans and carries out specific tasks, operations or (combat) engagements in furtherance or achievement of the objectives set by the operational level. The tactical level encompasses the actual combat units and is mostly responsible for operations and actions which are limited in time and geography and govern the positioning, movement and engagement of units relative to each other and relative to the enemy.⁴² In other words, the tactical level most directly carries out the operation in question and most directly applies the rules on the use of force in question.

These levels of command apply equally to multinational forces carrying out international operations, although international and national levels of command may operate side by side at each of the three levels outlined above. The precise relationships between the highest authorities of the international organization responsible for the operation and the national governments as well as between international commanders and the commanders of national contingents is dependent on the specific command and control structure established for the operation and the level of military command and control transferred by the parent nation of the unit or serviceman in question.⁴³

2. NATO, EU and UN Command Levels

Both NATO and the EU apply the classic division of command levels into the three levels just discussed in their approach to command and control of NATO and EU led operations. As regards NATO, this structure is reflected in the standing organization as such, while the EU, not having a standing military organization, applies this structure on a case by case basis when initiating and carrying out military operations. The UN, on the other hand,

⁴² Joint Publication 1-02, *op. cit.* note 38.

⁴³ As noted previously and elsewhere in this study, the term “serviceman” is used to denote an individual member of the armed forces and refers equally to male and female military personnel. No gender-bias is intended or should be inferred.

not only lacks a standing military organization but applies rather different approaches and concepts to the topic at hand.

The strategic level of command in NATO is represented on the political side by the North-Atlantic Council, advised by the Military Committee and such other elements of the organization as may be relevant. The military strategic level of command in NATO is represented by the Allied Command Operations under command of the Supreme Allied Commander Europe (SACEUR), supported by the Supreme Headquarters Allied Powers Europe (SHAPE).⁴⁴ The operational level of command within NATO is represented by two of the Joint Force Commands: JFC Brunssum and JFC Naples. One of these JFC headquarters is normally assigned the operational command over a given NATO operation. For example, the ISAF operation was carried out under the command of JFC Brunssum, while the NATO (residual) headquarters in Sarajevo is under command of JFC Naples. Finally, the tactical command level in NATO is represented by the land, air and maritime component commands who also command the in-theater commander of the NATO operation. These component commands are located in Izmir (land), Ramstein (air) and Northwood (maritime). The command of NATO operations which are limited in scale and complexity can also be assigned to the component commands directly, rather than to a JFC. For example, the NATO anti-piracy operation *Ocean Shield* takes place under command of the maritime component command in Northwood.

Although the EU does not, as was observed above, have a standing military structure or organization, it largely copies the basic NATO

⁴⁴ While the official name is Allied Command Operations (ACO), this term is also used to refer to the entire command structure as a whole and the (older) names of SACEUR and SHAPE are still used to refer to the strategic levels specifically. A summary overview of the structure can be found at http://www.shape.nato.int/military_command_structure (last accessed on 5 April, 2016). It should be noted that the Allied Command Transformation (ACT) is not involved in the actual conduct of military operations but instead is responsible for innovation, doctrine and concept development, etc..

command structure concepts.⁴⁵ The basic principles of EU command and control relationships are described in the document “EU Concept for Military Command and Control.”⁴⁶ The political strategic level within the EU is officially vested in the Council and the High Representative of the Union for Foreign Affairs and Security Policy, but in accordance with Article 38 of the TEU the “political control and strategic guidance” of EU missions is exercised by the Political and Security Committee (PSC). To this end, the PSC receives advice from the EU Military Committee and is supported by the EU Military Staff as part of the EU External Action Service. The military strategic level of command in EU operations is represented by the EU Operational Commander and his or her EU Operation Headquarters, located outside the area of operations.⁴⁷ The operational level of command is represented by the EU Force Commander and his or her headquarters, deployed to the theater of operations.⁴⁸ Finally, the tactical level of command is represented by the component commanders designated by the Force Commander. This final level, however, represents a level of complexity of the military operation as a whole which is not commonly seen in EU military operations.

Contrary to NATO, the EU has two additional features of command and control, one of which is similar to the UN structure to be discussed below. First, since the EU is not primarily a military organization, arrangements have been made between NATO and the EU to provide possibilities for the EU to use certain elements of the NATO structures in support of an EU military operation. These so-called “Berlin Plus”

⁴⁵ An observation shared by Mattelaer; see Simón, L. and Mattelaer, A., “EUnity of Command – The Planning and Conduct of CSDP Operations,” *Egmont Paper 41*, Egmont Royal Institute for International Relations, January 2011, p. 19.

⁴⁶ EU document 5008/15 of 5 January, 2015, available online at <http://data.consilium.europa.eu/doc/document/ST-5008-2015-INIT/en/pdf> (last accessed on 5 April, 2016).

⁴⁷ It goes without saying that the terminology used by the EU in this context can give rise to considerable confusion, both intrinsically by naming the strategic commander the “Operational Commander,” and in comparison to the NATO structure.

⁴⁸ This terminology and approach more closely matches that of the United Nations, to be discussed below.

arrangements, which consist of a series of agreements reached at the 1999 Washington Summit, enable the EU to carry out operations more quickly and efficiently, since they make available the specialized resources of NATO. Currently the EU force in Bosnia carrying out operation *EUFOR Althea* makes use of these “Berlin Plus” arrangements, to which end a special EU cell has been established within SHAPE and the Deputy SACEUR acts in the official capacity of EU Operational Commander. It should be noted that application of these arrangements does not alter the EU nature of the operation or the EU contents of the applicable concept of operations, ROE, etc. A second additional feature of EU command and control is that the EU, similar to the United Nations, can also plan, initiate and carry out civilian missions, which sometimes can take place in parallel to the EU military operations. Such civilian missions have their own decision making process and command and control structures, which differ in certain regards from the military system just described. As such missions in principle limit the use of force to self-defense and the rules on the use of force for such missions are therefore limited, these missions will not be discussed further in this study.⁴⁹

As regards the United Nations, finally, the distinction made in several parts of this study as regards UN authorized operations on the one hand and operations under UN command and control on the other hand is equally necessary in the context of the present discussion. Military operations authorized by the UN, specifically through a Security Council resolution to that effect under Chapter VII of the Charter, but carried out by a coalition of the willing or by NATO or the EU, follow either the standing command and control structure of the international organization in question or the command and control structure as set up specifically by the coalition of nations in question. The following discussion and description therefore focuses on military operations under command and control of the UN itself.

⁴⁹ The present author provided the input and comments for the Netherlands on the draft versions of the EU CIVCOM document in question.

Since the UN does not normally delineate the various levels of direction and control⁵⁰ as regards UN operations in terms of strategic, operational and tactical levels, describing the UN levels along these lines and concepts requires a certain level of interpretation and comparative analysis as regards the roles and tasks of the various entities involved. This leads to the observation that the political strategic level within the UN is represented by the Security Council and the UN Secretariat. The Council authorizes the establishment of the operation and sets forth its mandate, tasks, etc., and requests the Secretary-General, assisted by the Secretariat, to establish the operation.⁵¹ Contrary to NATO and the EU, the UN does not have an entity which carries out any role comparable to that of a military strategic commander. While the UN does have a Military Adviser at the level of a three-star general, that official advises the Secretary-General (and more commonly the Under-Secretary-General for Peacekeeping Operations) and directs the military component of the Secretariat's Department of Peacekeeping Operations but does not, officially, assume military command and control over the military component of a UN operation. While unusual from a military command and control perspective, this situation does reflect the practice of the UN to view UN military operations as part of a UN operation, but not as "the" UN operation in question, as will be discussed below.

The operational level of direction and control in UN operations is complex in the sense that the overall direction of UN operations is vested in the Special Representative of the Secretary-General, who directs and

⁵⁰ As was observed above, the UN uses different terminology and concepts as regards the command relationships within UN operations. Consequently, to emphasize that difference, slightly different terminology will be used here as well.

⁵¹ As also observed by Naert, this leads to observing a significant difference between the UN and the EU (and NATO). While all of the member States are represented in the Council of the EU and in the North Atlantic Council, the Security Council is composed of five permanent members and ten temporary members, thus leading to fifteen member States representing the political will of the organization as a whole. Naert, F., "The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement," *Institute for International Law Working Paper*, No. 151, Katholieke Universiteit Leuven, October 2011, p.12.

supervises all of the various components of a UN operation. Such components include humanitarian aid, reconstruction and peace-building efforts (that is, diplomacy, reconciliation and negotiation between the various parties and entities involved in the local conflict or situation), etc., as well as the actual military component of the UN operation. That military component is under the command of the UN Force Commander, who, contrary to the Special Representative, is a military officer and therefore from a military perspective represents the operational level of command. It should be noted, however, that the Force Commander only commands the military component, or Force, and reports to the Special Representative as the overall entity in charge of the UN operation as a whole.

Finally, the tactical level of command in UN operations is represented by the regional commanders in the area of operations and the commanders of the various (specialized) contingents as may be assigned to the operation.

IV. The Operational planning process

While this study is focused on the rules on the use of force, especially the Rules of Engagement (ROE), it is worth noting and making a few observations on the fact that such rules are drafted and promulgated as part of a much more complex and multi-faceted system of planning, involving many elements and resulting in a number of operational documents. In order to ease understanding of the position of ROE in the general system of operational planning and direction, consequently, a general overview and explanation of the military operational planning process will be presented below.

The operational planning process differs between international organizations and each nation has its own specific planning process, whether derived from the processes of the international organizations of which they are members or based on national preferences, customs or systems. While the command and control structures were discussed separately above, the same approach will not be taken as regards the operational planning process. The reason for this is that while the command and control structures have a direct bearing on the promulgation and implementation of ROE, including the authority to retain any of the ROE, issue release authority, etc., the same does not apply to the planning

process. Regardless of the specific structure, organization or steps in the planning process applied, at some point in that process the ROE will be drafted⁵² and promulgated in the chain of command. The main focus of this study commences at that moment and the preceding or following steps in the operational planning process are not directly relevant. Therefore, a more generic description of operational planning processes will be presented below.⁵³

As a first step in operational planning, both the political and military strategic levels must achieve a sufficient level of situational awareness as to allow them to make the initial decisions and plans regarding the operation in question. This means that through the use of intelligence assets, open source information and diplomacy, a sufficient level of information about the area of operations must be achieved, including all relevant information on the parties involved in the situation, their motivations and interests, etc.. This also allows an initial estimation as to the “level of permissiveness”, meaning that an initial threat assessment can be made. This assessment is directly relevant for the later drafting of the ROE, as the threat level obviously has a direct bearing on the type and level of (defensive or offensive) force which may become necessary to carry out the operation in question.

On the basis of the situational awareness attained in the first steps of the process, a strategic military and political assessment is made as to the

⁵² See chapter 1 for a discussion on the ROE drafting process and procedures.

⁵³ The discussion presented uses, for the sake of practicality, the general steps and stages as described in the NATO Comprehensive Operations Planning Directive without going into the NATO-specific details. An interim version of this document can be found online at <https://info.publicintelligence.net/NATO-COPD.pdf> (last accessed on 5 April, 2016). Some nations, including the Netherlands, use the COPD as a general framework for their own national planning processes, whether the planning of participation in (NATO or other) international military operations or the planning of purely national military operations. A similar approach may be taken to other NATO planning doctrine, as evidenced by the United Kingdom application of NATO’s AJP-5 Operational Planning Doctrine, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/393699/20141208-AJP_5_Operational_level_planning_with_UK_elements.pdf (last accessed on 5 April, 2016).

situation at hand. This leads, at the political level, to identification of desired goals and objectives and, at the military level, to a military advisory document outlining options, risks, required assets, costs and achievability. In other words, the political level at this stage identifies what should be achieved, while the military level provides advice as to whether that is actually possible and what it will cost to do so. The subsequent political decision making on the basis of this military advice normally takes place at the strategic political level and results in the principal decision as to whether the operation will take place.⁵⁴

Based on the information and decisions resulting from the stages in the process as just described, the commander in charge of planning the operation or the commander who is to be placed in command of the military force in question will draft his or her Concept of Operations (CONOPS), outlining how the operation needs to be carried out in order to fulfill the objectives or reach the goals as dictated by the political strategic level. This CONOPS forms the nucleus and directing element for the further operational planning process and normally includes general observations on the use of force which may be required to carry out the operation. Consequently, the CONOPS, in combination with the legal basis for the operation and the political context in which the operation is to take place, provides an essential element in drafting the ROE for the operation in question.

The CONOPS is subsequently subsumed into the overall Operational Plan (OPLAN) for the operation, which is developed next in the operational planning process. The OPLAN outlines all of the elements required in order to carry out the operation and covers all relevant topics, whether in the

⁵⁴ In those nations requiring parliamentary consultation (such as the Netherlands) or even formal parliamentary approval (such as Germany), this decision triggers such parliamentary processes. In the Netherlands, the prior stages of gaining situational awareness or, even more so, the initial planning and advisory stages also require informing parliament if those activities are the result of an (at this stage usually informal) request from an international organization to contribute to an international operation.

OPLAN itself or in its annexes.⁵⁵ It is during this OPLAN phase of the process that the ROE for the operation are drafted, after which they can be promulgated as part of the OPLAN or as a separate document.⁵⁶ After the OPLAN is approved and implemented at the strategic level, lower levels of command can then begin the process of drafting their own implementations of the OPLAN at their level, with the level of specific detail required commensurate with the operational and tactical levels of command. In other words, while the OPLAN will outline in strategic terms what must be achieved and how to achieve it, the operational and tactical levels of command must then draft and implement plans detailing the specific responsibilities, tasks, operations, etc., as regards the actual forces assigned to carry out the operation.

As was indicated above, the ROE are only part of the overall operational (planning) process and only one aspect affecting the conduct of the operation, including the use of force during the operation. The ROE are also only one, albeit the leading and principal, document regulating the use of force as part of, or in the context of, the operation in question. In addition to the ROE and the derivative instruction cards as were discussed in chapter 1, operational directives of various kinds can affect either how the ROE are to be applied or work alongside the ROE to direct or control the use of force in the operation in question. The most relevant of these documents are targeting directives and Special Instructions (SPINS).

Targeting directives, sometimes issued as such and sometimes issued in the form of “tactical instructions” or “tactical directives” or specific instructions on the use of certain weapon systems, provide specific guidance or (binding) instructions as regards targeting, including restrictions on targeting certain objects or persons or restrictions related to

⁵⁵ Within NATO, OPLAN documents follow a set structure in which the Annexes always refer to the same topic. For example, the ROE for NATO operations can be found in Annex E.

⁵⁶ See chapter 1 as regards the ROE drafting, promulgation and implementation procedures. It should be noted that even when the ROE are promulgated as part of the OPLAN, they are still subject to specific review and authorization as described in chapter 1.

avoiding or minimizing collateral damage.⁵⁷ SPINS, finally, are the set of instructions issued to (combat) pilots which, in addition to a very large number of other topics, also contain a summary of the ROE. Contrary to targeting directives, however, the SPINS commonly follow the ROE and summarize them, rather than replace or augment them. On the other hand, SPINS, like targeting directives, may contain specific instructions regulating the use of force or targeting by the weapon system in question.⁵⁸

V. Conclusion

While chapter 1 outlined the basic principles of ROE, including the constituent elements of ROE, this chapter placed the ROE in their proper perspective as regards the operational context. This overview was intended not only to facilitate understanding of some of the military operational concepts and terminology used in the later chapters, but also to illustrate how ROE fit into the larger operational procedures and elements. The following chapters will outline in greater detail the various elements of international and national law and how they affect and interact with the ROE.

⁵⁷ See, for example, the tactical directive issued by ISAF HQ in Afghanistan in 2009, of which certain (unclassified) sections are available online at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (last accessed on 5 April, 2016). For a further discussion of targeting in relation to ROE and the role of such directives, see chapter 4 below as well as Boddens Hosang, J.F.R., “Targeting and ROE,” in Ducheine, P., Osinga, F.P.B. and Schmitt, M. [eds.], *Targeting: The Challenges of Modern Warfare*, The Hague, 2016.

⁵⁸ See, inter alia, Center for Law and Military Operations (CLAMO), *Legal Lessons Learned from Afghanistan and Iraq*, Vol. I (Major Combat Operations, 11 September 2001 – 1 May 2003), 1 August 2004, which discusses the interaction (and sometimes confusion) between the ROE and the SPINS in the operations in question.

Chapter 3

Rules of Engagement and Self-Defense During Military Operations

I. Introduction¹

As was also observed in the previous chapters, military forces are ultimately an instrument of government authority and are deployed and employed to achieve what are essentially (international) political goals set out by their national government's policies.² The use of force within the context of such military operations is based on, or in any case influenced by, the system of legal principles and guidelines which outlines both the circumstances under which force may legitimately be employed to achieve an objective, as well as the limitations or restraints on any such use of force. In practice, however, the interaction between the (international) legal framework for the use of force and governmental expectations or intentions as regards the use of force can occasionally lead to potential sources of friction.

The most common source of such friction are situations in which the law is, quite simply, more restrictive than the political goals or ambitions involved, in which case the politically desired results may not be legally achievable through the use of military force within the established international legal framework. This may be the result either from the illegality of the use of force *in toto* under the given circumstances, or from the illegality of the type or degree of military action envisaged. While of course political decision makers can, in such situations, choose to deliberately overstep, or at least apply a "creative" interpretation to the boundaries of (international) law, this option is clearly not without risk.

¹ This chapter is an (extensive) modification of an article by the present author previously published as "Self-Defense in Military Operations: The Interaction between the Legal Bases for Military Self-Defense and Rules of Engagement", in *Military Law and the Law of War Review*, Vol. 47 (2008, Issue 1).

² The best-known expression of this principle is by Carl von Clausewitz in *On War*. See, for example, the version of this work as translated and edited by Michael Howard and Peter Paret and published by Alfred A. Knopf, Inc., Toronto, 1993, p. 99.

Apart from concerns regarding ethics and legal prudence, decision makers must take into account that such a course of action will, regardless of the outcome of the particular military operation, set a precedent not only for the initial nation(s) involved but also for any other nation(s) which may wish to carry out similar activities. In other words, while political expedience may be a compelling motive, the international use of force contrary to the law may well lead to long-term incidental effects or developments which are significantly different from the short-term effects anticipated during the decision-making process.

International law, however, is ultimately a system developed on the basis of international (political) consensus and therefore a dynamic rather than static area of law.³ Consequently, decisions taken or endorsed by a relevant and representative part of the international community as regards extant (or prior) views on international law may, over time, lead to more fundamental effects as regards developments in the law in question, such as the law governing the use of force (*jus ad bellum*).⁴ Whether such decisions can lead to a change in the law, and thereby remove the source of the friction as discussed above, is of course dependent on a number of factors which fall outside the scope of the present study. It should be noted however, that

³ See, for example, Brownlie, I. *Principles of Public International Law*, Oxford, 1998, pp. 1-2, and Shaw, M., *International Law*, Cambridge, 1986, pp. 1-12. While describing the development of international law as being subject to reaching political consensus may seem cynical from a legal point of view, it is clear that political agreement is required to develop or adopt a new legal instrument or to apply an emergent principle of customary law.

⁴ A prime example of such a discussion on international legal views, although it has not (yet) led to a change in the law, concerns the concept of humanitarian intervention as invoked by NATO in the campaign against the Federal Republic of Yugoslavia in response to the Kosovo crisis. A wealth of publications is available on this issue. See, for example: Simma, B., "NATO, the UN and the Use of Force: Legal Aspects," in *European Journal of International Law*, Vol. 10, 1999, pp. 1-22; Bring, O., "Should NATO Take the Lead in Formulating a Doctrine on Humanitarian Intervention?" in *NATO Review*, Autumn 1999, pp. 24 – 27 and the report of the Netherlands parliament's temporary commission on the decision-making regarding military deployment abroad (Rapport van de Tijdelijke Commissie Besluitvorming Uitzendingen van de Tweede Kamer der Staten-Generaal, parliamentary document no. 26 454, nr. 8), 2000.

not every decision to contravene the law, no matter how tempting as a means to remove the friction in question, is necessarily the starting point for changes in the law and most are simply violations of the law.⁵

A less obvious, or at least less commonly recognized, source of friction between political goals and the legal framework regarding the use of force consists of situations in which the law allows greater leeway on the use of force than may be politically desirable. Two main sources can be identified for such a situation. The first of these is based on the observation that the laws applicable in situations of armed conflict, which are discussed in chapter 4, or, under certain circumstances, international law in general may authorize the military use of force in ways which, for whatever reason, may not be acceptable from a political point of view, either *ratione temporis*⁶ or *ratione materiae*.⁷ Although such cases will normally lead to restrictions on the use of force to meet political considerations and such restrictions are a logical extension of the inherent political control over military forces, such cases nonetheless show that the popular notion that the law is by its very nature more restrictive than political desirability is false.

⁵ See, for example, the judgment by the International Court of Justice on the merits in the case of *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 27 June 1986 (Nicaragua case), § 186: “instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule”.

⁶ One example of time-related political limitations would be the differences between the “Rolling Thunder”, “Linebacker I” and “Linebacker II” operations in the Vietnam War. See, *inter alia*, Parks, W.H. “Linebacker and the Law of War,” in *Air University Review*, January-February 1983. These operations were discussed in greater detail in the introduction.

⁷ For example, during the operations *Allied Force* and *Noble Anvil*, the use of a blockade as a legally authorized instrument under the applicable legal framework in order to enforce the oil embargo against the Federal Republic of Yugoslavia was abandoned in the face of especially Russian (political) threats. See ‘NATO Seeks Embargo Solution’, *BBC News*, 25 April 1999, and ‘Kosovo: Operation ‘Allied Force’’, United Kingdom House of Commons Research Paper 99/48, 29 April 1999. As regards the applicability of international humanitarian law to the operations, see, *inter alia*, Kovács, P., “Intervention armée des forces de l’OTAN au Kosovo: Fondement de l’obligation de respecter le droit international humanitaire,” in *International Review of the Red Cross*, Vol. 82, No. 837, 2000, pp. 103-128.

A second source, or situation, in which the law allows greater latitude than may be desirable politically, as well as a potential source for significant political challenges, exists as a result of legal possibilities for autonomous decisions regarding the use of force by (members of) the armed forces that do not require prior authorization and which are not (legally) subject to (higher) political direction or control. This source of conflict results from the inherent differences between the object and purpose of the law on self-defense on the one hand and the politically desirable control over the actions of the armed forces on the other hand. These differences can, in a worst-case scenario, lead to conflicts between the law on self-defense and the rules of engagement (ROE) governing the use of force by the armed forces in the given operation.

The spectrum of conflicts described above not only serves to identify differences between the law and politics, but also identifies a shift from Governmental, and therefore national, decisions, actions and responsibility on the one hand and individual decisions, actions and responsibility on the other hand. Governmental decisions on initiating military operations primarily affect the legal responsibility or liability of the State in question but may in exceptional circumstances result in individual criminal responsibility.⁸ On the other hand, autonomous decisions on the use of force by an individual serviceman⁹ in principle invokes the individual criminal responsibility of that person but may also result in State responsibility or liability.

This leads to the observation that while the responsibilities involved in the decision-making process at the Governmental level may be assumed to be apparent or knowable to those responsible (or at least to those advising them), it is not entirely clear whether individual servicemen are aware of the responsibilities and risks inherent in autonomous decisions regarding

⁸ If the actions in question fall within the definition of acts of aggression as set forth in the Statute of the International Criminal Court, those responsible for ordering such actions may be prosecuted individually by the International Criminal Court.

⁹ The term “serviceman” refers to an individual member of the armed forces and refers equally to male and female military personnel. No gender-bias is intended or should be inferred.

the use of force in the context of self-defense, especially in the context of complex military operations. Nonetheless, as will be discussed below, the ROE for military operations invariably stress the right to self-defense and emphasize that nothing in the ROE limits or negates that right. Although that approach is commendable from the perspective of the individual's right to self-defense, it simultaneously (and perhaps not always directly obviously) places a significant burden of judgment on the shoulders of the individual serviceman, who may not have recourse to the information required to make an educated evaluation of the merits and risks involved. Emphasizing the right to self-defense consequently leads to a concomitant moral duty to promote or develop that serviceman's understanding of the legal requirements, conditions and, ultimately, the potential consequences of the use of force in the exercise of the right to self-defense.¹⁰

The legal (or factual) consequences of the individual serviceman's decision to use force in self-defense as regards that serviceman alone is, however, only one of the possible repercussions in this context. At the political level, decision makers may be unaware of the potential consequences of the standard exclusion contained in ROE as regards the right of self-defense. The consequences at the national level of a recourse to self-defense by individual servicemen can consist of national (torts) liability for damages inflicted, as well as political or military operational consequences. For example, while the rules and directives governing the operation in question may have been carefully adjusted to suit the geopolitical sensitivities in the given context, an individual serviceman's exercise of the right of self-defense may trigger military or political reactions which fall outside those carefully balanced considerations and thus affect the entire operation.¹¹

¹⁰ For example, the 2000 version of the Chairman, Joint Chiefs of Staff Standing Rules of Engagement for US Forces (CJCS SROE, document CJCSI 3121.01A, 15 January 2000) specifies in Enclosure A, § 5.e. and 7.d. that "commanders have the obligation to ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense."

¹¹ Taking the CJCS SROE discussed *supra* note 10 as an example, imagine a situation in which a US serviceman along the demarcation line separating North Korea from South Korea is fired upon from the North Korean side of the line and

In order to address the complexities and potential conflicts just discussed, an analysis must first be made of the meaning of “self-defense,” including the legal context of that concept and the extent to which the right of self-defense can or may be exercised by military personnel. Next, the current practice of specifically including a reference to (or perhaps reminder of) the right of self-defense in the ROE is analyzed. Finally, the line of demarcation between the right of self-defense and ROE will be discussed, including suggestions on how misconceptions regarding the interaction of the two can be avoided.

II. The Right of Self-Defense

The right to, or concept of, self-defense is one on which almost every person asked will have some opinion or idea as regards its meaning or legal status or requirements. It is, however, a meaningless concept in any legal discussion on the use of force unless a specification is provided as to which of the distinct forms in which this concept exists is being referred to. These forms are national self-defense, “extended” self-defense, unit self-defense and personal self-defense. Each of these forms will be discussed below. In addition, the UN concept as regards self-defense for forces under UN command and control will be discussed separately.

A. National Self-Defense

The right of nations to defend themselves is an inherent right associated with the nature of Statehood.¹² The clearest recognition of this right in

subsequently exercises his right of self-defense. While the professionalism of the armed forces will normally prevent such a scenario, the increasing complexity of modern military operations leads to an equal increase in the potential risk of accidents or errors being made.

¹² For an extensive discussion of national self-defense, its antecedents and its relationship to the United Nations (as well as the earlier League of Nations) see Waldock, C.H.M. “The Regulation of the Use of Force by Individual States in International Law,” in *Recueil des Cours*, Vol. 81, 1952-II, pp. 451-517. See also Randelzhofer, A., “Article 2(4)” and “Article 51,” in Simma, B., [ed.], *The Charter of the United Nations: A Commentary*, Oxford, 2002, 2nd ed., esp. pp. 112-136 and

codified international law is Article 51 of the Charter of the United Nations, representing one of only two exceptions in the Charter to the general prohibition on the (threat of the) use of force in international relations as set forth in Article 2, paragraph 4.¹³ Of the two exceptions, Article 51 is the only one to which State may resort unilaterally without prior authorization from the Security Council. As was discussed in chapter 2, the right of national self-defense may be exercised individually or by nations acting collectively,¹⁴ but must meet three conditions:

- a. a (prior) armed attack must have taken place against the nation(s) exercising the right of national self-defense;¹⁵
- b. the nation(s) exercising the right of national self-defense must notify the Security Council immediately;¹⁶

788-806; and ICJ, *The Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, 8 July, 1996, paragraph 96.

¹³ The other exception is, of course, the authority of the Security Council on the basis of Article 42 of Chapter VII of the Charter to maintain or restore international peace and security, including the use of military means to do so. Note that while Article 53 recognizes the possibility of enforcement action by regional organizations, such action must first be authorized by the Security Council and may not be undertaken *proprio motu*.

¹⁴ Note that Article 5 of the North-Atlantic Treaty, which was also discussed in chapter 2, does not state that an attack on one or more NATO members will automatically result in the use of (military) force by all the member nations. Instead, it states that in such cases each member nation will assist the attacked nation(s) by taking “such action as it deems necessary.” While it seems likely that such action would include the use of force, Article 5 does not dictate the type of action to be taken in assistance to the attacked nation. Compare this to Article 42, paragraph 7, of the TEU, which does state that the other Member States are obligated to help the attacked State “by all means at their disposal.”

¹⁵ Note that the other nations assisting the attacked nation in the exercise of collective self-defense need not have been attacked themselves, but that a request (or at least permission) by the attacked nation is required for the exercise of collective self-defense.

¹⁶ See, for example, the letters by the United States of America and the United Kingdom to the Security Council at the start of operation *Enduring Freedom* against Afghanistan in response to the terrorist attacks of 11 September, 2001 (resp. UN documents S/2001/946 and S/2001/947).

- c. the right of national self-defense does not affect the authority of the Security Council to take “such action as it deems necessary in order to maintain or restore international peace and security”.¹⁷

Of these elements, the concept of “armed attack” deserves closer examination, as it is also relevant to the discussion of personal self-defense and ROE. The concept of “armed attack” as a requirement for the recourse to national self-defense is arguably one of the most extensively analyzed and most heavily discussed criteria regarding the right of self-defense. The meaning and scope of this concept appear to be more restrictive than the related concept of “aggression”¹⁸ or the concept of “the threat or use of

¹⁷ Some debate is possible as to the meaning of the word “necessary” in this context. For example, the resolutions adopted by the Security Council after the start of operation *Enduring Freedom*, calling upon all Member States to adopt measures to eliminate terrorism, were certainly not “necessary measures” in the sense that they effectively replaced the exercise of the right of national self-defense by the parties involved by relevant alternatives to restore international peace and security. The same can be said as regards the Security Council resolutions adopted since the beginning of the campaign against Da’esh in Iraq and Syria. Nonetheless, the phrase in question is normally understood to mean that should the Security Council so desire (and assuming the resolutions in questions can be adopted), it can decide to take measures intended to be effective at restoring international peace and security, thus removing the need for unilateral, purely national use of force, such as by authorizing the use of force through a Security Council mandate. See, as regards the difficulties regarding the word “effective” in this context: Maxon, R.G., “Nature’s Eldest Law: A Survey of a Nation’s Right to Act in Self-Defense,” in *Parameters: US Army War College Quarterly*, Vol. 25, Autumn 1995, pp. 55-68. See also, for a more extensive discussion of the “effectiveness” criterion in relation to Security Council measures in this context, Gill, T.D., “Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter,” in *Netherlands Yearbook of International Law*, Vol. 26, 1995, especially pp. 90-106.

¹⁸ See UN General Assembly Resolution 3314 (XXIX), 14 December 1974. It is interesting to note that the French version of the Charter refers to “une *agression armée*” (emphasis added) in Article 51 and not to “*attaque*” or “*attentat*”. In the French version of UN Security Council Resolution 1368, the terrorist attacks of 11 September, 2001, on the United States are condemned as “*attaques terroristes*.” The French version of the North-Atlantic Treaty, finally, uses the term “*attaque armée*” in Article 5. As Article 5 of that treaty refers back to Article 51 of the UN Charter, it may be assumed that the use of “aggression” in the French version of the Charter

force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations” as used in Article 2, paragraph 4, of the Charter.¹⁹ However, there is no clear definition of the term “armed attack,” nor true agreement as regards the precise criteria which actions taken by one State against another must meet in order to satisfy the threshold requirement of an “armed attack”.

Given the extensive destructive power of modern weapons and other technology which can be used in offensive operations,²⁰ it is clear that for the concept of national self-defense to have any relevant meaning, the concept of “armed attack” cannot be limited to attacks which have already taken place or have already commenced but also includes imminent attacks. This observation, however, requires closer examination of the meaning of “imminent.” While Article 51 of the Charter does not prohibit anticipatory self-defense, it does not justify pre-emptive action. In academic writing on this topic, various writers use the terms “anticipatory” and “pre-emptive” with different definitions in relation to the concept of self-defense. O’Connell cautions against confusing the two terms and uses “pre-emptive”

does not necessarily imply greater latitude than the English term “attack” in the same Article.

¹⁹ See, *inter alia*, Randelzhofer, “Article 51,” in Simma, *op. cit.* note 12, pp. 794-803.

²⁰ For a discussion of the concept of “armed attack” in relation to cyber warfare, see Schmitt, M.N. [ed.], *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge, 2013, pp. 42 – 62, especially the criteria for evaluating whether a cyber operation constitutes an armed attack as discussed in paragraph 9 of the commentary to rule 11, pp. 48 – 51. See also the advisory report by the Advisory Council on International Affairs and the Advisory Committee on Issues of Public International Law to the government of the Netherlands, of which the English language version is available at <http://aiv-advies.nl/download/da5c7827-87f5-451a-a7fe-0aacb8d302c3.pdf> (last accessed on 6 April, 2016). In short, and without doing justice to the extensive analysis and the nuances in the works just referred to, a cyber operation can constitute an armed attack if it results in certain degrees of physical damage, injury or death or certain degrees of damage to vital infrastructure. As regards attribution, actual practice has demonstrated that attribution of cyber operations presents significant challenges, above and beyond attribution of “regular” attacks, including “regular” attacks by non-state actors.

to refer to the (illegal) use of force in cases where a threat is not specific or immediate, and “anticipatory” to the (legal) use of force to defend against attacks “that are on the brink of launch, or where an enemy attack has already occurred and the victim learns more attacks are planned.”²¹ Murswiek, on the other hand, uses “pre-emptive” to refer to the use of force in defense against an imminent attack.²² Although neither author denies the legality of the use of force in self-defense against an imminent attack, it is suggested that the terminology used by O’Connell more effectively avoids confusion between legal and illegal use of force in national self-defense. In this study, therefore, the word “anticipatory” is used to denote the (legal) use of force against an imminent attack, while “pre-emptive” is used to refer to the (illegal) use of force against threats that have not yet reached the requisite level of specificity or immediacy to qualify as an imminent attack.

Notwithstanding the observation made above, Murswiek’s analysis of the criteria for exercising the right of self-defense against imminent attacks warrants closer examination. Murswiek states that such use of force is legal, provided that the State in question “can demonstrate that the threat of a hostile attack is both immediate and overwhelming, ruling out a lengthy search for peaceful means of resolution, provided no defense other than military force is available.”²³ As Murswiek points out as well, these criteria are derived from the case of the vessel *Caroline* and indicate that the standards set by Webster in the context of that case may still be considered to be at the core of understanding the law of national self-defense today.²⁴ Finally, both O’Connell and Murswiek are clear as regards the requirement

²¹ O’Connell, M.E., *The Myth of Preemptive Self-Defense*, American Society of International Law Task Force on Terrorism Papers, August 2002, p. 2 in footnote 10 on that page.

²² Murswiek, D., *The American Strategy of Preemptive War and International Law*, Universität Freiburg Institute of Public Law Papers, March 2003, p. 6.

²³ *Ibid.*, p. 6.

²⁴ See the enclosure to the letter by Webster to Lord Ashburton of 27 July 1842. For a discussion of the *Caroline* incident and the rules of self-defense identified and established by the ensuing diplomatic exchanges see, *inter alia*, Waldock, *op. cit.* note 12, pp. 462 – 464. See also chapter 2, p. 50, as regards the view that the *Caroline* case should be seen as an example of necessity rather than as a case of self-defense.

that the threat must be specific and real and may not be “hypothetical”²⁵ or based on “mere assumptions or circumstantial evidence, however plausible.”²⁶ This view is supported as well, on the basis of a comprehensive analysis of the right to use force in anticipatory self-defense, by Tibori Szabo, who identifies three criteria: (1) the existence of a real or expected attack, (2) an immediate necessity to act, and (3) a degree of moderation in the response to that attack.²⁷ She then analyses that the first two criteria constitute the element of “necessity,” while the third criterion is commonly referred to as the element of proportionality.²⁸ As regards the immediacy criterion of the element of necessity, Tibori Szabo states quite clearly that “self-defence does not allow use of force against dangers that do not create a present and inevitable need to war them off.”²⁹ Dinstein makes a similar observation by stating that “a far-off peril cannot be deemed to be ‘imminent.’ Still, if an act is ‘certain and inevitable,’ there is no doubt it qualifies.”³⁰

Applying the Caroline criteria to modern threats or situations has met with criticism from Sofaer, who states that these criteria “cannot rationally be claimed to apply *in haec verba* to the possibility of an attack with modern

²⁵ O’Connell, *op. cit.* note 21, p. 11.

²⁶ Murswiek, *op. cit.* note 22, p. 7. A complete exclusion of circumstantial evidence seems, however, to set a higher threshold for the lawful recourse to the use of force in self-defense than required by the law. It would seem that a significant amount of circumstantial evidence, if reasonably amounting to overwhelming evidence, could be considered proof of an imminent attack. The amount and type of circumstantial evidence required will, of course, depend on the specific circumstances of the case. Similarly, the probative value of such circumstantial evidence will necessarily depend on the extent to which it can serve to prove intent as well as preparations to attack on the part of the (alleged) aggressor.

²⁷ Tibori Szabo, K., *Anticipatory Action in Self-Defence: The Law of Self-Defence – Past, Present and Future*,” thesis written at the University of Amsterdam, p. 121. In her analysis, she also points out that anticipatory self-defense is an integral part of the right of self-defense itself and not a separate right or legal entity; p. 123.

²⁸ *Ibid.*, p. 121.

²⁹ *Ibid.*, p. 192.

³⁰ Dinstein, Y., *War, Aggression and Self-Defence*, 5th Ed., Cambridge, 2012, p. 205.

technology and advanced weapons of mass destruction, launched by terrorists acting secretly with States support.”³¹ He offers four alternative criteria to ascertain the necessity to act in self-defense:

- a. the nature and magnitude of the threat;
- b. the likelihood that the threat will be realized in the absence of, in essence, pre-emptive action;
- c. evaluating whether alternatives to the use of force exist and have been exhausted;
- d. consistency with the terms and purposes of the United Nations Charter.³²

Although Sofaer explains these criteria extensively and with considerable nuance in support of his premise that Article 51 allows (or must allow) a greater scope of action than the Caroline criteria, his views do not, in fact, deviate entirely from those principles.³³ Instead, the analysis presented by Sofaer can be seen as reaffirmation of Webster’s criterion that the threat should be “instant and overwhelming”, while taking into account the obvious differences between the weapon technology of Webster’s time and that of today. In other words, given the threat posed by modern weapon technology, the criteria of “instant” and “overwhelming” should be interpreted with the latitude required to accommodate that threat, rather than changing or replacing these criteria in their entirety. This means that Webster’s principles need not be rejected or replaced, but must instead be interpreted to take into account and allow for the (significant) changes in the context in which they are used today as compared to Webster’s time.³⁴

³¹ Sofaer, A.D., “On the Necessity of Pre-emption,” in *European Journal of International Law*, Vol. 14, 2003, p. 214.

³² Sofaer, *op. cit.* note 31, p. 220.

³³ Note that the relationship between the Caroline principles, developments in weapons technology and the right of anticipatory self-defense was already discussed by Waldock in 1952. Waldock, *op. cit.* note 12, p. 498. Contrary to Sofaer, Waldock sees the development of weapons technology as a reason to maintain the Caroline principles (although not limiting or restricting the right of self-defense beyond those principles either) rather than as a reason to expand the right of national self-defense beyond those principles.

³⁴ A similar observation can be made as regards national statutes or laws which still apply today even though they may have been written many decades ago

As was also discussed briefly in chapter 2, it is clear, especially since the terrorist attacks on the United States of 11 September, 2001, and the recent attacks by Da'esh on Iraq and on France, that “armed attacks” in the meaning of Article 51 of the Charter can also be committed by non-state actors. While chapter 2 discussed situations in which such attacks cannot be attributed to a State, including more recent developments in the law, there is considerably less room for debate, and the law is far more clear, as regards cases in which the actions of non-state actors can be attributed to a State.³⁵ As such cases provide a clear basis for the use of force in national self-defense, the criteria by which the acts of non-state actors can be attributed to a State deserve closer examination in this context.

The degree of interaction required between non-state actors and their supporting or host State to justify the use of force in self-defense against that State for the actions of those non-state actors has been the subject of extensive academic analysis and has been scrutinized by, *inter alia*, the International Court of Justice (ICJ)³⁶ and the International Criminal Tribunal for the former Yugoslavia (ICTY).³⁷ The ICJ’s criteria for attributing the actions of non-state actors to their sponsor State are set forth in the *Nicaragua* case and are somewhat confusing.³⁸

In determining whether attribution was possible, the ICJ applied two tests: the “agency test” and the “control and dependence test.”³⁹ That the

(including most statutes and laws on self-defense). Changes in the social context in which the law is applied do not necessarily mean that the law itself needs to be changed, but obviously require changes in how the law is interpreted and applied.

³⁵ It should be noted that the comments in this section refer to attribution in the context of the right of national self-defense. Attribution in the sense of State responsibility is, of course, an entirely separate issue, although discussed briefly below as well.

³⁶ See, *inter alia*, ICJ; *United States Diplomatic and Consular Staff in Tehran* (United States of America vs. Iran), merits, 24 May, 1980 (Iran case), and the *Nicaragua* case (*op. cit.* note 5).

³⁷ See especially *Prosecutor v. Dusko Tadic*, IT-94-1, Appeals Chamber, 15 July 1999.

³⁸ In the *Tadic* case (*op. cit.* note 32), the Appeals Chamber commented that the ICJ “did not always follow a straight line of reasoning” (§ 108) and that “the distinctions made by the Court might at first sight seem somewhat unclear” (§ 114).

³⁹ *Nicaragua* case, *op. cit.* note 5, §§ 109-115.

meaning of these tests can be considered confusing was demonstrated by the difference of opinion which arose when the ICTY applied the ICJ's criteria. In the view of the Office of the Prosecutor and Judge McDonald, the ICJ in the *Nicaragua* case first tested whether the actions of the contras could be attributed to the United States as a result of the (complete) dependency of the contras on the assistance and aid of the United States and the resultant control by the United States over the contras. Such a relationship would render the contras "de facto agents" of the United States. Once the ICJ determined that such a relationship could not be adequately proven, the ICJ determined whether specific, individual acts or operations carried out by the contras could be attributed to the United States on the grounds that the United States had effective control over the contras as regards those operations. The other judges of Trial Chamber II and, more expressively, the Appeals Chamber of the ICTY did not share this view. In their interpretation of the *Nicaragua* case, the ICJ first determined whether the various actors involved were actual agents of the United States. This was the "agency test" applied by the ICJ and was not related to an analysis of (the level of) dependency and control, but rather to the official status of the actors in question. As an outcome of this test, the ICJ found that the contras were not agents of the United States and subsequently proceeded to "test" whether they could be considered "de facto agents" by nature of their relationship with the United States. This test analyzed the dependency of the contras on the United States and the level of control exercised by the United States as a result of that dependency. Finally, the ICJ determined that all of the various forms of assistance and influence of the United States as regards the contras were not sufficient to attribute the acts of the contras to the United States, unless it could be proven that the United States exercised effective control over the contras. Consequently, the "effective control" test was in fact part of the "dependency and control" test and not a separate test.

The interpretation of the *Nicaragua* case as set forth by Trial Chamber II and the Appeals Chamber of the ICTY seems legally sound and is supported by the separate opinion of Judge Ago in the *Nicaragua* case, as

well as by the ICJ ruling on the merits of the *Iran* case⁴⁰ (to which Judge Ago refers as well) and by Article 8 and the commentary thereto of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts.⁴¹ Consequently, as regards attributing the acts of non-state actors to their sponsor or host State, and therefore establishing the legal basis for actions against that State, the criteria retain their applicability and usefulness.

Following a determination as to the necessity to use force in the context of national self-defense, whether on the basis of an armed attack by another State or following the attribution of an attack by a non-state actor to another State, a determination must be made as to the type and level of force to be used in responding to the (imminent) armed attack. The ICJ has made it clear that both necessity and proportionality are components in determining the legality of the use of force in national self-defense and that these rules are part of customary international law.⁴² As proportionality in the context of national self-defense does not affect the rules on the use of force, however, this concept will not be discussed further here.

Finally, it follows from the observations above that the use of force in the context of national self-defense is governed by rules of international law related to the conduct of States (or conduct attributable to States). Consequently, decisions as to such use of force are ultimately political decisions to be made by the national command authorities. The autonomous

⁴⁰ ICJ, *op. cit.* note 36. See especially §§ 58-62, 66 and 70-74.

⁴¹ One final observation can be made as regards the ICTY's application of the tests from the *Nicaragua* case. The main problem with applying the tests in the context of a (criminal) trial by the ICTY is not the interpretation of the tests themselves, but how to interpret the purpose of those tests. As Meron points out, the tests applied by the ICJ were intended to determine the liability of the United States for the acts carried out by the contras. Determining the status of an armed conflict, one of the purposes for which the ICTY applied the tests, is not a part of, nor the purpose of, these tests, nor were they designed as a tool for determining individual criminal responsibility. See Meron, T., "Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout," in *American Journal of International Law*, Vol. 92, 1998, pp. 236-242.

⁴² *Nicaragua* case, *op. cit.* note 5, §§ 176 and 194, and *Nuclear Weapons* case, *op. cit.* note 12, §§ 41 et seq..

use of force by individual servicemen, that is the use of force not authorized in (standing) ROE or other (standing) orders cannot be justified by reference to the right of national self-defense. Put simply, it is not up to the individual serviceman, regardless of rank, to determine whether the actions taken by (the agents of) another State require or authorize a response on the basis of national self-defense unless that serviceman was explicitly and clearly authorized to do so by the national command authorities.⁴³

B. “Extended” Self-Defense and Force Protection

The term “extended self-defense” is used by NATO to describe the right of military units of a Member State to assist in the defense of units from another Member State in the event of an (imminent) attack against the latter units. This principle can be considered an operational level reflection of the right to collective self-defense, which is the basis for the Alliance. In effect, Alliance solidarity and mutual assistance at the strategic level thus carries through to the operational and tactical levels of military action. In order for this right to apply, however, all of the units in question must be participating in a NATO-led operation or otherwise be under NATO command.⁴⁴ The right of extended self-defense does not exist outside of that context.

The condition just described as regards the exercise of the right of extended self-defense is logical on the basis of two observations. Firstly, the right in question is indelibly linked to the NATO status of the units in question. Units from NATO Member States which are not assigned to, or under the command of, NATO do not (necessarily) have that NATO status and are not in a “more special” relationship towards each other as compared to any other units.⁴⁵ While this may at times be hard to accept for units trained extensively to operate and interact together in the context of NATO, it is important to emphasize that until forces are assigned to NATO or placed under NATO command, they remain national forces and,

⁴³ See below, however, as regards unit self-defense.

⁴⁴ NATO document MC 362/1, used by permission (Military Committee decision IMSM-0417-04, on file with the author).

⁴⁵ See below, however, as regards force protection as an alternative source of mutual assistance in operations other than NATO operations.

consequently, subject to national policy. This is especially relevant when forces from another NATO Member State may be, or become, involved in national military operations which are not necessarily (politically) supported by other NATO Member States, even in the same area of operations.

A second reason for limiting the right of extended self-defense to NATO operations can be found in the discussion above regarding national self-defense. A unit from one NATO Member State stationed in another NATO Member State cannot automatically assist the units of the host nation in a (national) self-defense situation. In spite of the purpose and scope of Article 5 of the North-Atlantic Treaty, not all national issues involving the use of force, even in a case of national self-defense, necessarily become Article 5 situations or automatically activate NATO procedures or command structures.⁴⁶ In other words, the situation may be a purely national issue in which the command authorities of the sending State may not wish to become involved.

The legal basis or structure as regards the right of NATO units operating under NATO command to defend each other in the context of Article 5 situations is clear and is based on Alliance solidarity and the exercise of collective national self-defense as set forth in both Article 5 of the North Atlantic Treaty and as referred to in Article 51 of the UN Charter. It seems logical that units participating in such operations have the right to assist each other in self-defense situations. In non-Article 5 operations⁴⁷

⁴⁶ Furthermore, see the discussion above as regards the wording of Article 5 and the scope for national decision making as regards the forms of assistance which may be offered to the attacked nation. In the example given, the sending State of the units in question may not wish to become militarily involved. One exception to these observations is the standing NATO integrated air (and missile) defense structure, in which assigned units do have the right (and duty) to respond to any threat to NATO territory. Given the word “assigned”, however, it is arguable whether this can be considered a true exception, as the forces in question must first be assigned to NATO on the basis of a transfer of authority (TOA) to the NATO commander in question. The decision to do so, as well as the decision to participate in this structure at all, remains a national command decision.

⁴⁷ This refers to military operations carried out by, or under command of, NATO on the basis of, for example, a UN Security Council mandate. An example

carried out by NATO, however, the legal basis for the right of extended self-defense is more complex. The right to use force in such operations is derived from the mandate or legal basis for the operation as such. While in these operations the right to extended self-defense will therefore be indistinguishable from the right of force protection as discussed below, the NATO status of the military force carrying out the operation has its own relevance. In NATO operations or operations under unified NATO command, the military force in question operates as a specific structure in accordance with established NATO doctrine, procedures and command and control arrangements and thus with a specific NATO identity, to which the same principles apply as discussed above in terms of solidarity and mutual assistance, even though in non-Article 5 operations the legal basis for the use of force in question, that is in mutual defense of the units involved, overlaps (or is even subordinate to) the legal basis for the operation in question. In short, the NATO concept of extended self-defense is not a new or different right but is instead an operational level expression of the principles on which NATO is based in Article 5 situations and in non-Article 5 situation the legal basis for the use of force in this context becomes identical to that regarding the non-NATO version of this form of self-defense.

As was already indicated above, the right of mutual self-defense of units operating within the same operation exists outside NATO as well, but under a different name. In other words, units of a multinational force deployed in an international operation have the right to defend other units forming part of that same force, as well as, usually, the right to defend force property and camps or bases. The concept on which this right is based is normally referred to as “force protection”. In its simplest form, force protection is the collective exercise of personal self-defense or unit self-defense, both of which will be discussed further below. As will also be discussed below, personal self-defense ordinarily extends to others in the (immediate) vicinity of the person using force on this basis, thus allowing a member of a multinational force to defend other members of that force in

would be the ISAF operation in Afghanistan, carried out pursuant to Security Council resolution 1386.

his or her vicinity. However, the concept of force protection usually extends beyond that notion and ordinarily finds its legal basis in the mandate or other legal basis for the operation in question.

The legal basis for the use of force in the context of force protection varies according to the type of operation and the mandate or legal basis on which it is based.⁴⁸ The clearest basis in this context is a mandate by the UN Security Council.⁴⁹ While some mandating resolutions specify the authority of the force to protect itself, such as the mandating resolutions for the Stabilization Force (SFOR) in Bosnia and its successors,⁵⁰ in other cases the authority needs to be inferred from the language of the resolution as a whole, in particular the elements constituting the actual mandate itself. Generally, and logically, if a force is authorized to use “all necessary means” to achieve the objectives set out in the mandate, it can readily be concluded that the force is (therefore also) authorized to use such force as necessary to protect itself.⁵¹

In operations not based on a United Nations mandate, the basis for force protection would appear to be less relevant. In the case of (international) armed conflicts, the armed forces of the parties to the conflict are clearly authorized to carry out combat operations, including such operations as necessary to defend or assist units from allies in the

⁴⁸ Note that the legal basis for force protection differs from the legal basis for the concept of unit self-defense, as will be discussed below. The use of force in defense of other personnel or units participating in the same operation may consequently fall within several different regimes regarding (mutual) self-defense. Which of these regimes is the most appropriate for evaluating the actions in question will depend on the specific context and specific circumstances.

⁴⁹ This analysis only relates to military operations other than those under UN command and control. UN operations will be discussed below as a special case of force protection.

⁵⁰ See, for example, UN Security Council Resolution 1088, § 20.

⁵¹ See, for example, UN Security Council Resolution 1386, § 3, authorizing the ISAF mission in Afghanistan to use all necessary means. The conclusion that the authority to use “all necessary means” also covers force protection is also based on logic: if the force is not authorized to protect itself, it cannot logically be expected to achieve the mandate issued by the Security Council.

conflict in question.⁵² As regards operations based on less clearly defined, or controversial, bases for military operations under international law, such as humanitarian intervention and national evacuation or rescue operations, the lack of clarity regarding the exact criteria for their legal status extends to the use of force during such operations as well.⁵³

C. Special Case: United Nations Forces

Discussing the right of self-defense applicable to United Nations forces first requires clarification as regards the meaning of the terms “United Nations forces” and “United Nations operations” as used in this discussion. As was discussed in previous chapters and above as well, a distinction must be made between forces operating under the command and control of the United Nations, and those operating in a “coalition of the willing,” that is a group of States willing and able to carry out a United Nations mandate but under the command and control of a State or of an international organization other than the UN (such as NATO or the EU). The United Nations policies and legal structures as discussed below apply only to the former, that is to forces operating under the command and control of the United Nations. A second distinction which needs to be made is between UN forces operating under a “purely” peacekeeping mandate, commonly referred to as “Chapter VI½” operations, and those carrying out a peace enforcement mandate adopted under Chapter VII of the Charter of the

⁵² Note that such assistance may be subject to restrictions imposed by the parent State, in cases in which the States in question apply different legal interpretations of the situation at hand or in situations in which, whether on the basis of legal opinion or otherwise, the participating States adhere to different geographical limitations to the area of operations. For example, not all of the States participating in the operations against Da’esh in Iraq consider (or at least initially considered) themselves authorized to operate in Syria as well. Even though the operations are carried out by the same coalition, units from a nation restricting its operations to Iraq would not be authorized to assist units from other coalition States in Syria.

⁵³ For a discussion of the legal basis for the use of military force to rescue nationals abroad, see chapter 2 as well as, *inter alia*, Waldock, *op. cit.* note 12, pp. 459, 467 and 503.

United Nations. Although the right to self-defense applicable to UN forces applies in both cases, the authority for the use of force in enforcement operations is an integral part of the very nature of the operation itself. Consequently, the present discussion focuses primarily on peacekeeping operations.

Traditionally, peacekeeping forces were only authorized to use force in self-defense and were under clear instructions never to take the initiative in the use of (armed) force.⁵⁴ However, even as early as the beginning of the UN operation in Cyprus (UNFICYP), the definition of “self-defense” as applicable to UN peacekeeping forces included elements not normally associated with the concept of self-defense. In his aide-memoire of 10 April 1964, as well as his report of 10 September of that year, the Secretary-General of the United Nations, stating the principles on the use of force in self-defense by UNFICYP, included the authorization for the forces in question to use force (*inter alia*) against “attempts by force to prevent them from carrying out their responsibilities as ordered by their commanders.”⁵⁵ In the Report of the Secretary-General on the Implementation of Security Council Resolution 340 (1973),⁵⁶ detailing the operation UNEF II, this element of the right of self-defense was repeated in the statement that self-defense for UNEF included “resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council.”

The right of UN peacekeepers to use force in self-defense to counter attempts by forceful means to prevent them from carrying out their mandate

⁵⁴ For an overview of the development of the use of force by peacekeeping forces, see Cox, K.E., “Beyond Self-Defense: United Nations Peacekeeping Operations & The Use of Force,” in *Denver Journal of International Law and Policy*, Vol. 27, 1999, and Chesterman, S., *The Use of Force in UN Peace Operations*, External Study for the UN Department of Peacekeeping Operations Best Practices Unit, 2004.

⁵⁵ Cox, *op. cit.* note 54, p. 254. The full text of the aide-memoire is available in: United Nations, *Juridical Yearbook*, 1964, pp. 174 – 177. The principle under discussion is set forth in paragraph 18 under (c) on p. 176.

⁵⁶ UN Doc. S/11052/Rev.1, 27 October 1973.

is now part of the standard concept regarding UN peacekeeping.⁵⁷ Since some confusion can easily arise regarding this issue, especially its relationship with the authority of peace-enforcement operations under Chapter VII of the Charter to use force to prevent or defeat interference with the mission, some additional comments are in order. From a legal point of view, the main, or most significant, difference between peacekeeping operations and operations carried out under a mandate adopted under Chapter VII of the Charter is that the latter are authorized to enforce the mandate as a whole and at all times, regardless of the views and opinions of the local parties, while the former operate on the basis of the consent (or even at the request of) the local parties. The enforcement authority of units participating in a peace-enforcement operation is therefore not limited to defending the force against armed interference, but also includes the authority to enforce any other element or objective set forth in the mandating resolution. In the case of peacekeeping operations, however, the consent of the local parties is essential. As was stated briefly above, peacekeeping operations can only be set up, and peacekeepers can only carry out their tasks, with the (continued) consent of the (former) parties to the conflict. Consequently, the extent of their legal authority to act is a different issue as compared to the question whether it would be opportune or advisable for such forces to exercise that authority to its full extent or to apply the full range of authorized actions available to them. Operational or policy limitations may therefore be imposed on the way peacekeepers carry out their mission, in the interest of emphasizing the neutral status of the force or to maintain the support of the local parties. This complex relationship between the authority to use force and the necessity to maintain good relations with the local authorities has prompted some writers in the

⁵⁷ The UN Department of Peacekeeping Operations states in paragraph 35 of its 1995 General Guidelines for Peace-Keeping Operations: “Since 1973, the guidelines approved by the Security Council for each peace-keeping force have stipulated that self-defense is deemed to include resistance to attempts by forceful means to prevent the peace-keeping force from discharging its duties under the mandate of the Security Council.” See also Bothe, M., “Peace-Keeping,” in Simma, B. [ed.], *The Charter of the United Nations: A Commentary*, Oxford, 1994, p. 589.

past to emphasize the need for peacekeeping forces to restrict the use of force to “traditional” forms of self-defense.⁵⁸

The Report of the Panel on United Nations Peace Operations⁵⁹ in paragraph 48 seems initially to support this view, stating that “[t]he Panel concurs that consent of the local parties, impartiality and use of force only in self-defense should remain the bedrock principles of peacekeeping,” and “Experience shows [...] that in the context of modern peace operations dealing with intra-State/trans-national conflicts, consent may be manipulated in many ways by the local parties. [A party may] withdraw consent when the peacekeeping operation no longer serves its interest.” In paragraph 49, however, the Panel recommends:

“Once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission mandate,”

followed in paragraph 50 with the admonition that

“[...] impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement. In some cases, local parties consist not of moral equals but of obvious aggressors and victims”

thus creating a need for peacekeepers to act, in accordance with the principles of the UN, in order to carry out their mandate. Similarly, and in part using the same phrases as the Brahimi report, the “United Nations Peacekeeping Operations: Principles and Guidelines” document, frequently referred to as the “capstone document,” issued by the United Nations in 2008 emphasizes the impartiality of peacekeeping operations but also states clearly (on p. 33) that impartiality “should not be confused with neutrality or inactivity” and that “even-handedness towards the parties should not become an excuse for inaction in the face of behavior that clearly works

⁵⁸ See, for example, Von Grüningen, M., “Neutrality and Peace-Keeping,” in Cassese, A. [ed.], *United Nations Peace-Keeping: Legal Essays*, Alphen aan de Rijn, 1978, p. 138.

⁵⁹ UN Doc. A/55/305 – S/2000/809, frequently referred to as the “Brahimi Report.”

against the peace process.” Given, however, that the document equally emphasizes, and repeats at several points, the need to maintain the consent of the local parties, it is questionable whether the latitude for the exercise of the right of self-defense by UN forces is any greater today than it was prior to these reports and guidelines.

In conclusion, therefore, the right of self-defense for UN peacekeeping forces as defined and authorized by the United Nations is an extensive right, covering not only the defense of personnel and mission equipment, but also granting the right to use force against attempts by forceful means to prevent the peacekeeping units from carrying out their mission. Whether the exercise of that right is opportune or advisable in all cases, however, is somewhat doubtful.

D. Unit Self-Defense

It is commonly accepted that the commander of a military unit has the right (and in the view of the United States also the obligation) to take all necessary action to defend the unit against an (imminent) attack. Although this right is not generally disputed,⁶⁰ the legal basis for this right is not expressed clearly in literature. In the discussion, below, four possible sources in law commonly suggested as being the basis for this right will be analyzed. Before doing so, however, a few general observations on the right of unit self-defense seem warranted.

Unit self-defense is a right exclusive to military units, regardless of whether that unit is a platoon, a single ship, an aircraft or even a

⁶⁰ Roach, J.A., “Rules of Engagement,” in *Naval War College Review*, Vol. 36 (1), 1983, p. 49; Stephens, D. “Rules of Engagement and the Concept of Unit Self Defense,” in *Naval Law Review*, Vol. 45, 1998, pp. 126-151; and Duncan, J.C., “The Commander’s Role in Developing Rules of Engagement,” in *Naval War College Review*, Vol. 52, No. 3, 1999, pp. 76-89. See also Tibori Szabo, who points out that the Caroline incident involved units and rebels and that self-defense situations need not always involve (all of) the armed forces of the States in question; Tibori Szabo, *op. cit.* note 27, p. 122.

multinational task force operating as a single unit.⁶¹ Next, the use of force in the context of the right of unit self-defense is restricted to responses to (imminent) attacks on the unit exercising the right of unit self-defense⁶² and must meet the requirements of necessity and proportionality.⁶³ As is frequently stipulated in the rules of engagement (ROE),⁶⁴ finally, the right to unit self-defense is inherent and applies regardless of the contents of the ROE or the mission in which the unit may be operating at the time.

1. Sovereign Right

The first potential legal basis for the right of unit self-defense is to view military units as representations (or in any case official representatives) of the sovereign State to which they belong. In this classical approach to military forces, attacks on the military units of a State equate to attacks on the (honor of the) sovereign State itself. In other words, in this theory the right of unit self-defense represents a small-scale version, or tactical (or operational) level expression, of the right of national self-defense. However, linking unit self-defense to national self-defense makes a closer examination of two specific aspects essential.

Firstly, it follows from the prior discussions on national self-defense, to the extent that it is not in fact already self-evident, that it is generally undesirable from a political and strategic point of view to delegate authority regarding activation of nation-wide responses, potentially resulting in international political and legal ramifications, to the level of individual

⁶¹ Examples would include a naval task force or a fighter wing. The essential attribute is the operation or maneuvering as a single unit, the size or composition of the unit is less relevant.

⁶² Roach, *op. cit.* note 60, p. 49.

⁶³ Stephens, *op. cit.* note 60. See also CJCS SROE (*op. cit.* note 10), § 5.f. of Enclosure A, and Dinstein, *op. cit.* note 30, p. 244.

⁶⁴ CJCS SROE (*op. cit.* note 10) § 6.b. of the main body, § 2.a., 5.a. and 5.d. of Enclosure A. The inherent nature of this right is also set forth in the standing ROE for naval forces issued by the Netherlands, although the commander's guidance section of those ROE does set forth criteria and definitions in order to assist commanders in evaluating whether a situation warrants the use of force on this basis.

units. Decisions to declare the right of national self-defense applicable *in toto* to a given situation are strategic political decisions based on national security policy considerations and international relations. Military commanders are not usually trained or equipped to make such decisions. Furthermore, while the professionalism of the armed forces, in combination with the possibility of issuing clear ROE and associated guidance, generally ensures that military commanders make prudent decisions, unit commanders may not always have the strategic or geopolitical information required to assess a tactical or operational level threat from a (national) strategic point of view. Consequently, unit self-defense should strictly be seen as a localized exercise of the right of self-defense and not necessarily as a starting point for the (full) exercise of the right of national self-defense.

Secondly, if unit self-defense is seen as being based on, or derived from, the right of national defense, the concept of “armed attack” as used in relation to the right of national self-defense requires further discussion. As Stephens points out, incidents which do not rise to the level of armed attacks in the sense of national self-defense may necessitate a response at the unit level.⁶⁵ Similarly, units operating in a multinational task force may need to respond in the context of unit self-defense to defend other nations’ units, without necessarily being (first) attacked themselves.⁶⁶ Consequently, if the right of unit self-defense is seen as the small-scale

⁶⁵ Stephens, *op. cit.* note 60. Stephens supports this valid reasoning with what appears to be a misreading of the *Nicaragua* case (*op. cit.* note 5) by stating that the ICJ had no consideration of the tactical or operational needs of unit self-defense in its ruling regarding armed incidents which do not rise to the level of armed attack. However, the ICJ had no reason to consider such needs, as the case was concerned with national self-defense as a justification for the acts being judged and not with other forms of self-defense or lower level forms of national self-defense such as unit self-defense.

⁶⁶ Stephens, *op. cit.* note 60. Here, too, Stephens is correct in his views that such cooperation in (especially) naval task forces is essential, but appears to misread the *Nicaragua* ruling (*op. cit.* note 5). In that case, the ICJ ruled that collective self-defense, as recognized by Article 51 of the UN Charter, could not be invoked if the nation to be defended had not actually been the subject of an armed attack. The ICJ did not (for the same reasons as stated in note 65 above) refer to, or have reason to refer to, mutual defense at the operational or tactical level, nor can the ruling be interpreted to make it relevant at that level.

representation of the right of national self-defense a modification or, at least, different interpretation of the requirements for the exercise of that right is required, adjusting for the difference in scale which is at the core of this approach to the right of unit self-defense. In other words, as the level of response decreases from the national level to the unit level, the trigger requirement for the right of self-defense similarly decreases from an armed attack in the sense of that term in (inter alia) Article 51 of the UN Charter to an attack in the simple sense as meaning the use of (illegal) force against the unit defending itself.⁶⁷

2. “Collective Personal Self-Defense”

Perhaps the simplest approach to establishing the legal basis for unit self-defense is to view the unit as a collection of individuals and to view unit self-defense as a collective exercise of personal self-defense, as was also mentioned above in connection with force protection.⁶⁸ However, as will be discussed below in the more detailed analysis of the right of personal self-defense, the limitations, criteria and interpretations related to the right of personal self-defense under national criminal law and the differences between legal systems as to permissible actions under that right make personal self-defense an unstable (or even outright untenable) basis for military operations or the use of force beyond the level of the individual

⁶⁷ As was observed above in the discussion of national self-defense, the concept of armed attack is more restrictive than the concept of aggression. However, it is interesting to note that the UN General Assembly in its definition of aggression (see note 18, above) includes in paragraph 3(d) the attack on the land, sea or air forces of another nation. This inclusion in the definition of aggression implies that in this case the concepts of aggression and armed attack coincide, which would support the reasoning that such attacks, and concomitantly unit self-defense, are part of the right of national self-defense. See also Randelzhofer, *op. cit.* note 12, pp. 670-672.

⁶⁸ The previous observations regarding force protection are also relevant if the unit in question is part of a larger operation. When operating in the context of an international operation, the concept of unit self-defense becomes somewhat irrelevant, as the legal basis and context for the use of force will be the right of force protection (or NATO extended self-defense). What is at issue here are units operating outside such a context.

serviceman. Conversely, as was observed above, the right to unit self-defense is indelibly linked to the military nature of the unit in question and the legal basis for this right must therefore be relevant and applicable to military operations. The approach to unit self-defense as a form of “collective personal self-defense” is therefore at least questionable, if not entirely untenable.

3. Human Rights⁶⁹

At least one author has suggested that the right to unit self-defense, and perhaps by extension the right to personal self-defense of individual servicemen, is a human right based on the right to life as found in Article 6 of the International Covenant on Civil and Political Rights (ICCPR).⁷⁰ However, as will be demonstrated in the discussion below, this view is untenable regardless of whether this view is interpreted as viewing the right of unit self-defense as a human right itself, or as an analogy between the right of self-defense in general and human rights.

At the outset of this discussion, it should be emphasized that there can be no doubt that human rights, including the right to life, apply equally to military servicemen. What is at issue here, however, is viewing the use of force in self-defense as a form of human rights in connection with the meaning of the right to life under international human rights law and the difficulties as regards its use as a legal basis for military action. The right to life as set forth in Article 6 of the ICCPR⁷¹ is not absolute, in that it

⁶⁹ The interaction between international human rights law and ROE is discussed in detail in chapter 5. The present discussion focuses exclusively on the theory of human rights law as a basis for the right of self-defense.

⁷⁰ Stephens, *op. cit.* note 60 and Stephens, D., “Human Rights and Armed Conflict – The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case,” in *Yale Human Rights & Development Law Journal*, Vol. 4, 2001, pp. 1-24. See also Maxwell, M.D., “Individual Self-Defense and the Rules of Engagement: Are the Two Mutually Exclusive?” in *The Military Law and the Law of War Review*, Vol. 41 (1-2), 2002, pp. 39-53.

⁷¹ The right to life as set forth in Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) differs from the protection of the right to life as set forth in Article 6 of the ICCPR and is more

prohibits *arbitrary* deprivation of life. As was also specified by the ICJ, the legal framework applicable to the circumstances in question must be used to determine whether a death was arbitrary.⁷² This means that deaths resulting from lawful actions, such as the use of force by (enemy) combatants in the context of an armed conflict, are therefore not violations of the right to life as protected by human rights instruments.

As a general observation regarding international human rights law, that law aims to protect individuals from specific acts by Governments or their agents.⁷³ Consequently, the relevant provisions are generally formulated as prohibitions preventing Governments from committing certain acts. This observation already puts into question the view that unit self-defense could achieve (or has achieved) the status of a human right. Firstly, the aspect that human rights protect the individual is not easily reconciled with a conceptual (new) right that only attaches to a unit.⁷⁴ Secondly, as was observed above, unit self-defense is indelibly linked with the military status of the unit. Military units, however, operate on behalf of the State and in the interest of the State. That governmental status cannot easily be reconciled with the object and purpose of human rights law as protecting individuals against abuse of power by the State.

precise as regards the (limitative) list of lawful exceptions to the right to life. Article 2, paragraph 2, of the ECHR states that the deprivation of life does not violate the Convention if it is the result of the absolutely necessary use of force in (a) defense of any person, (b) in order to effect the arrest or prevent the escape of a person lawfully detained or (c) in action lawfully taken to quell a riot or insurrection. Although Article 15 of the ECHR, similar to Article 4 of the ICCPR, does not allow derogation of the right to life, Article 15, paragraph 2, of the ECHR makes an exception for deaths resulting from “lawful acts of war.”

⁷² ICJ, *Nuclear Weapons* case (*op. cit.* note 12), especially §§ 24-25.

⁷³ See also chapter 5 as regards the difference between civil and political rights on the one hand and economic, social and cultural rights on the other hand. Given that the focus of this discussion is on the right to life, the observations in this discussion are limited to the former.

⁷⁴ Of course certain human rights adhere to groups, such as the rights of indigenous peoples and the right of self-determination. Such “group rights” are, however, related to the identity of the group on the basis of criteria not relevant or applicable to military forces.

Finally, if the right of unit self-defense were to be based on the right to life, there is a remaining difficulty in deriving a (positive) right to take action in the form of the use of force in self-defense from provisions formulated as (negative) prohibitions on (arbitrary) deprivation of life and aimed at the protection of individuals against the abuse of power by a State. The present author submits that this derivation is not legally tenable. Just as the right of freedom of speech, as similarly protected in the relevant instruments, does not lead to a corollary right of (forced) access to the media, neither does the right not to be (arbitrarily) deprived of one's life lead to a corollary right to use force in self-defense.⁷⁵

4. Sui Generis

As was observed above, there appears to be little dispute in academic writing that the right of unit self-defense exists, regardless of the lack of

⁷⁵ This discussion was also held in the public and parliamentary debates in the Netherlands in the context of the considerations by the government to allow private military companies to protect civilian shipping against the threat of piracy. Without discussing the details of that subject, what is relevant to the present discussion is that one of the (non-profit) organizations involved in the discussions requested Professor Knoops, in his capacity as a lawyer and not in his capacity as a professor, to provide legal advice on the issue. The advisory report submitted by Knoops was made available online by the Netherlands Association of Captains in the Merchant Marine (*Nederlandse Vereniging van Kapiteins ter Koopvaardij*) at http://www.nvkk.nl/files/7313/6223/9626/advies_GJ_Knoops_29_aug_2011.pdf (last accessed on 6 April, 2016). While most of the views expressed by Knoops in his advisory report are correct, his conclusion as regards the case law of the ECtHR in relation to the right to life is somewhat surprising and appears to be legally untenable. In his view, the right to life as set forth in the ECHR and the concomitant obligations on the State lead to the conclusion that if the State is unable to protect the right to life, this leads to an automatic concomitant right for the persons in question to use force in self-defense. Apart from the observation that this conclusion is legally flawed from the outset for the reasons stated in the main text above, the case law of the ECtHR places strict limitations on the obligations of States to protect individuals from threats to their life. Such obligations exist only if there are clear indications of a concrete and specific threat to an individual's life and are limited to the measures the State in question can reasonably be expected to take to protect that individual. See ECtHR, *Osman v. United Kingdom*, 87/1997/871/1083.

clarity as regards its legal basis. Although some of the legal bases which have been identified provide partial support for this right, no legal basis by itself fully satisfies every aspect of the right of unit self-defense without requiring at least some adaptation or interpretation of the legal principles on which it is founded. Consequently, it could be argued that the right of unit self-defense exists as a right *sui generis* under international law.⁷⁶ Such an approach, however, avoids the underlying and concomitant legal questions and deprives the right of unit self-defense of a solid, defined legal basis and is therefore *ipso facto* unsatisfactory.

Based on the analyses above, it would appear that the approach by which the right of unit self-defense is viewed as an operational or tactical level application of the right of national self-defense, but without invoking the nation-wide, geopolitical or international legal consequences or criteria usually associated with that concept, is the most legally tenable approach.⁷⁷ Finally, as regards the criteria applicable to the actual exercise of the right of unit self-defense, Stephens quite accurately proposes that the Caroline criteria apply to any use of force in this context.⁷⁸ This means that the right of unit self-defense is a valid option only as a last resort (referring to the concept of imminence as part of the requirement of necessity) and that the use of force is restricted to that which is required to counter the threat to the unit in question (proportionality).⁷⁹

E. Personal Self-Defense

The inherent right of individuals to defend themselves is well-established in almost all national laws. Regardless of the historical legal, or perhaps philosophical, origins of this right, its present form places it firmly in the

⁷⁶ Stephens initially reaches the same conclusion. Stephens, *op. cit.* note 60.

⁷⁷ This view is shared by, *inter alia*, Dinstein (*op. cit.* note 30, pp. 242 – 244), who refers to unit self-defense as “on-the-spot reactions” in the exercise of the right of national self-defense and who considers the difference between unit self-defense and (full) national self-defense as “a quantitative but no qualitative difference.”

⁷⁸ Stephens, *op. cit.* note 60.

⁷⁹ As similarly observed by Dinstein, *op. cit.* note 30, p. 244.

realm of criminal law. Within that body of law, it is commonly seen as a justification⁸⁰ subject to a number of restrictions and conditions which vary between legal systems. The discussion below and the analysis of the right of personal self-defense is by no means meant to be an exhaustive comparative law analysis, but is intended to give a general overview of the most relevant aspects of that law in relation to the discussion of the interaction between self-defense and rules of engagement.⁸¹

Similar to the other forms of self-defense discussed above, the two main principles which apply as regards personal self-defense are the principles of necessity (including the necessity of a prior (imminent) attack) and proportionality. Of these principles, the criterion of necessity presents unique and complex challenges when the criminal law meaning of this term is applied in a military operational environment.

Personal self-defense can be seen as, essentially, an officially sanctioned form of self-help allowing, as an ultimate remedy, persons to protect themselves in the event that the protective system normally applicable in society, which relies on the police and the court systems to deal with criminal behavior, is unable to provide the necessary safety in a

⁸⁰ A justification under criminal law is a factor submitted in defense of the accused, intended to lead to acquittal. It does not deny that the criminal act was committed, but offers a reason why the accused was justified in committing that act under the given circumstances. A justification is therefore distinct from an excuse, which is submitted to prove that the accused did not have the necessary knowledge or intent (in common law systems: the *mens rea*) to commit the criminal act. In the criminal law system of the Netherlands, for example, self-defense is a justification, while the emotional or mental state of the accused, resulting from the situation that gave rise to the need to use force in self-defense, can be entered as an excuse if the accused applied excessive force during the exercise of the right of self-defense. See, for a discussion of defenses and their constituent parts in relation to offences: Gardner, J., "Fletcher on Offences and Defenses," in *Tulsa Law Review*, Vol. 39, 2004.

⁸¹ There is a great wealth of academic writing available on the subject of self-defense in the context of criminal law. The present study is not, however, written from a criminal law point of view but rather from an international law point of view. The criminal law elements discussed in the text are therefore intended primarily to support the international law discussion.

specific situation.⁸² Given this nature of self-defense and its exceptional function in the context of society, great emphasis is normally placed in applicable statutes as regards the necessity criterion for the exercise of personal self-defense and the statute texts and case law of many jurisdictions have generally established additional criteria related to the necessity element of self-defense. A few of these criteria and considerations, to the extent that they are relevant to the interaction between self-defense and the rules on the use of force, will be discussed below.

The evaluation as to whether the use of force in personal self-defense was justified in a given situation, similar to many other criminal law evaluations of (potentially) criminal behavior, focuses on comparing the actions of the defendant with those of a “reasonable person”.⁸³ There are significant differences, however, between an average “reasonable person” and trained military servicemen engaged in operational situations.⁸⁴ What

⁸² See chapter 2, footnote 11, on p. 64 as regards this aspect in the reasoning of Ago regarding national self-defense and its relationship with the international community.

⁸³ For a discussion of reasonableness and the relationship between justifications and excuses in criminal law, see Kazan, P., “Reasonableness, Gender Difference and Self-Defense Law,” in *Manitoba Law Journal*, Vol. 24, No. 3, 1997. For a discussion of the “average person” element from a Dutch criminal law perspective, see De Jong, F., “Onbeschermde seks; Op de grens tussen opzet en onachtzaamheid,” *Delikt en Delinkwent*, Vol. 33, No. 8, 2003.

⁸⁴ See, *inter alia*, United Kingdom, High Court of Justice, Queen’s Bench, Leeds District Registry: *Mohamet Bici and Skender Bici vs. Ministry of Defense*, Case No. LS 290157, EWHC 786 (QB), 7 April 2004, §§ 42 – 58. It is important to note the distinction between the US system of military justice and the military justice systems of other nations, many of which are based on “regular” civilian justice systems or on mixed systems. In entirely military systems, the standard of “reasonableness” is more likely to be interpreted in a military fashion or to be influenced by military norms. In other systems, that is not necessarily automatically the case unless the input of military experts is guaranteed. In the Netherlands, for example, the Military Chamber of both the District Court and the Court of Appeals in Arnhem, which rules on all military cases, consists of two civilian judges and one military judge. The public prosecutor’s office in Arnhem consists entirely of civilian prosecutors, but does have a Military Expertise Center at its disposal. As regards the criminal law aspects of the special training, status, etc., of military personnel in terms of evaluating culpability, see chapter 6.

may be considered reasonable (and necessary) action in self-defense situations in a military context will therefore be influenced by, and need to be evaluated on the basis of, the operational circumstances prevailing at the time. Such an evaluation can, however, lead to difficulties if that operational context is compared to common non-military criminal law elements of the right of personal self-defense, especially as regards provocation and the related concepts of *culpa in causa* or even *dolus in causa*.⁸⁵

Provocation is generally recognized as a factor negating the justification for the use of force in self-defense.⁸⁶ When applied to a military context, this presents difficulties as many of the tasks and duties carried out in the context of a military operation could be construed as provocations. For example, during deployments in the context of operations other than situations of armed conflict, the mere presence of armed military personnel can have a provocative effect on the local population or (former) warring parties. In the context of NATO operations, the ROE extend to actions which may be deemed to be provocative.⁸⁷ As self-defense applies regardless of, or as a right independent of, the ROE, as was mentioned above and as will be discussed further below, the effect of ROE authorizing provocative action in relation to the exercise of personal self-defense becomes relevant. It would seem logical that responses by the other side to such provocations would then not give rise to a personal self-defense

⁸⁵ The difference between *culpa* and *dolus* is the level or type of intent. *Culpa* refers to fault or (criminal or culpable) negligence, whereas *dolus* refers to criminal intent or fault by intent. Either one can be found *in causa*, meaning that fault or intent can be deduced from the circumstances in which the defendant willingly or intentionally placed himself or herself. See the decision by the Supreme Court of the Netherlands HR 31 October 2000 (LJN AA7960) as regards *mens rea* and *culpa/dolus in causa*.

⁸⁶ See, for example, the statutes on self-defense in Arizona (13.404), Connecticut (Section 53a, paragraph 19, subsection (c)), Delaware (paragraph 464 subsection (c) (1)), Georgia (section 16-3-21, subsection (b) (1)), Indiana (35-41-3-2, subsection (c) (2)). In the Netherlands, provocation is not part of the code itself (Article 41 of the Criminal Code) but recognized in case law and taken into consideration as part of the evaluation of the necessity criterion.

⁸⁷ See chapter 1, p. 49.

situation in the criminal law sense, although the use of force by that other side would certainly justify (defensive) use of force by the serviceman who initially took the “provocative” action. In other words, such a situation would fall outside the aegis of personal self-defense. Similarly, as regards *culpa in causa*, while the terminology varies and the concept may be subsumed under the general concept of provocation, many criminal law systems consider actions by which a defendant knowingly and willingly put himself or herself in harm’s way in order to instigate a self-defense situation as negating the justification of personal self-defense. It may be argued, however, that placing oneself in harm’s way, or at least willingly and knowingly entering into situations of considerable risk, is at the very core of the military profession and an indelible part of most military operations. While this does not mean that personal self-defense is not relevant for military servicemen, it does mean that the type of situations in which personal self-defense is applicable or relevant in the military context is limited.

Most national or state statutes regarding personal self-defense extend the right to use force in that context to the defense of others as well in some form.⁸⁸ Since, as will be discussed below, ROE do not negate or limit the inherent right of self-defense, the right to defend others in combination with the observation just made as regards the ROE can (at least in theory) lead to situations in which force may legitimately be used outside the context of the ROE in the defense of others. In the author’s professional experience, this conclusion was suggested by military personnel in at least two operational deployments as possibly justifying military use of force which

⁸⁸ In the US, some state laws only allow the use of deadly force in this context in situations of defending close relatives or persons in the household. See, for example, the Oklahoma penal code, Title 21, Chapter 24, section 733 and the case of *OWM v. State* (1997 OK CR 49, 946 P.2d 257) and the California Code, Section 197, subsection 3. The Canadian Criminal Code limits defense of others to persons under the protection of the actor (Section 37, paragraph 1). European laws tend to be less restrictive in this aspect, such as the laws in the Netherlands (Wetboek van Strafrecht, Article 41: “eigen of andermans”); France (Code Pénal, Article 122-5: “legitime défense d’elle-même ou d’autrui”); Belgium (Wetboek van Strafrecht, Article 416: “van zichzelf of van een ander”); and Germany (Strafgesetzbuch, § 32, subsection 2: “von sich oder einem anderen”).

the personnel in question wished to engage in, but which was specifically prohibited under the ROE. In both situations, the other persons to be “defended” were units from another (allied) nation, operating in a different (but proximate) area of operations in which those units were authorized to carry out operations (on the basis of a national operation of the State in question) while the personnel suggesting this approach were not authorized to operate in that other area of operations. This approach was consequently rejected, on the basis that such a situation was not a personal self-defense situation as meant by the phrase in question in the ROE. There can be little doubt, after all, that combat operations, intended to result in the use of force against enemy forces, are not comparable to the context for which personal self-defense is intended, while applying the civilian criminal law criteria to such operations would render those operations prime examples of intentionally provoking the need for the use of force in self-defense, or at the very least knowingly and willingly entering into a dangerous situation, and thus negating the justification for (the criminal law form of)⁸⁹ personal self-defense. Acting contrary to the ROE in such situations cannot therefore be justified by invoking personal self-defense (in this case in the form of defense of others) and the fact that the prohibition in the ROE would have been openly violated in this case could, in fact, have had probative value as regards an intent to commit a criminal act.⁹⁰

⁸⁹ As was discussed in the introduction of this section of this chapter, the term “self-defense” can have many different meanings. The same can, in theory, be true for personal self-defense. While it is possible to identify, and some criminal law systems implicitly recognize, a difference between “civilian” personal self-defense and “military” personal self-defense, the present discussion is focused on the “normal” (i.e. civilian) criminal law sense of the concept of personal self-defense. It may also be argued that “military personal self-defense” is less related to the concept of self-defense as such and more closely related to the (functional) use of force to achieve certain military objectives as part of the operation or task to which the personnel were assigned.

⁹⁰ See chapter 6 as regards the accusatory and probative role of ROE in the context of criminal law. As regards the issue of intent, it should be noted that while there may not have been any “true” intent to commit a criminal act, it may be argued that had the use of force actually taken place, there would have been sufficient criminal or culpable negligence. Under the criminal law of the Netherlands, intent can be assumed if “conditional intent” (“voorwaardelijk opzet”)

Another criterion applied in many statutes and case law regarding the necessity element of the justification of personal self-defense, and one that even more clearly poses difficulties in combination with military operations, is the duty to retreat.⁹¹ In general terms, the duty to retreat requires persons facing a threat to retreat if it is reasonable⁹² or safe to do so, rather than using force in self-defense. In jurisdictions where this duty exists, the right to use force in personal self-defense arises only if retreat is not (or is no longer) a valid option. In some jurisdictions, the duty to retreat is related exclusively to the use of deadly force in self-defense, although judges may take possibilities for retreat into consideration in evaluating the necessity to use non-deadly force as well.⁹³ One exception to the duty to retreat recognized in some jurisdictions, although not one that is particularly relevant or helpful for military operations, is the so-called “castle doctrine”⁹⁴ which excuses a person from the duty to retreat if the person faces a threat within the person’s own home. Here, too, legal systems vary as to whether, and to what extent, the “castle doctrine” is recognized or accepted.

was present. Such “conditional intent” exists if the perpetrator knowingly and willingly accepted the more than considerable likelihood that the (criminal) results would occur as a normal or expectable result of the act in question. This form of intent is a mixture of criminal or culpable negligence and true intent and can best be compared to the British concept of “subjective negligence.” See Smith, P., *Strafbare voorbereiding: Een rechtsvergelijkend onderzoek*, Ph.D. dissertation, University of Groningen, 2003, which discusses the criminal liability standards of the Netherlands, Germany, Switzerland and the United Kingdom. For a more detailed discussion of “conditional intent” and the relationship between *culpa* and *dolus* in the criminal law of the Netherlands, see Jong, *op. cit.* note 83.

⁹¹ See, for an extensive discussion of the duty to retreat, Aggergaard, S.P., “Criminal Law – Retreat From Reason: How Minnesota’s New No-Retreat Rule Confuses the Law and Cries for Alteration – State v. Glowacki,” in *William Mitchell Law Review*, Vol. 29, No. 2, 2002, pp. 657-693. See also the decision by the Supreme Court of the Netherlands of 11 June 2002 (LJN AE 1316).

⁹² The Texas penal code, Chapter 9, paragraph 32, subsection (a) under (2), is an example of the “reasonable” test in the context of the duty to retreat.

⁹³ Obviously this will vary according to the applicable legal system. For example, European legal systems tend to emphasize the “absolute last resort” status of the use of force in self-defense more than various US state systems tend to do.

⁹⁴ Aggergaard, *op. cit.* note 91, p. 665 – 666.

Finally, the requirement that the threat is imminent (to the extent that the attack has not already in fact commenced) is normally considered to be part of the element of necessity as regards personal self-defense. While some statutes or codes set forth the imminence requirement in the text of the code itself,⁹⁵ other systems have established an imminence requirement in case law.⁹⁶ The requirement itself relates back to the Caroline criteria, of course, requiring that the need for self-defense be “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” In terms of the military context, it would seem that this requirement at least provides little difficulties.

One final element of personal self-defense that warrants emphasis in the context of this discussion is that the use of force in personal self-defense is only permissible against illegal or unauthorized use of force against the defending party. Although this restriction is commonly understood to mean that invoking self-defense is not a valid justification for the use of force against law enforcement officials acting in their lawful capacity, such as by suspects resisting arrest, this restriction has relevance for the military

⁹⁵ Most of the states in the US have set forth an imminence requirement in their self-defense statutes, although some set forth this requirement only in the statute texts regarding the use of deadly force in self-defense. In European codes, the imminence requirement is often part of the self-defense statutes themselves, such as in the Netherlands (“ogenblikkelijke”), Belgium (“ogenblikkelijke”), France (“dans le même temps”) and Germany (“gegenwärtigen”).

⁹⁶ While sections 34 through 37 of the Criminal Code of Canada do not contain any specific reference to “imminence,” the necessity of imminence has nonetheless been confirmed in the case law of the Supreme Court of Canada, although exceptions are acknowledged. See Kazan, *op. cit.* note 83 for a discussion of *R. v. Lavallee*, [1990] 1 S.C.R. 852. In its summary of this case in the case of *R. v. Pétel*, [1994] 1 S.C.R. 3, the Supreme Court of Canada appears to suggest, in reference to *Lavallee*, that the imminence requirement was rejected and was no longer applicable, except as a “common sense assumption”. In *R. v. Charlebois*, [2000] 2 S.C.R. 674, 2000 SCC 53, however, the Supreme Court stated that in *Lavallee* it had merely “relaxed the requirement of imminency [sic] of the threat in the self-defense analysis particular to battered women, on the basis of expert evidence outlining the unique conditions they face” but found no basis in the *Charlebois* case to extend that exception. As regards the case law in the Netherlands, see, *inter alia*, the ruling by the Supreme Court of 11 June 2002 (LJN AE1316) concerning the difference between fear of an attack and imminent attack (annotation, § 3.6).

context as well. In the context of military operations, this restriction renders personal self-defense as a basis for the use of force irrelevant in combat situations during armed conflicts. The use of force by the enemy under such circumstances is, after all, legal and justified if it is directed against valid military targets, including combatants. The use of force in response by those combatants must consequently comply with the law (particularly international humanitarian law) and the ROE and cannot be justified by recourse to the criminal law concept of personal self-defense.

F. Summary

The diagram below summarizes the levels and types of self-defense discussed above, in relation to the issues set forth in the introduction to this chapter.

Level	Type	Source	Accountability
State	National / Collective	International law/ Article 51 UNCH and customary international law	State
Military force	Force Protection	Mandate	Mixed State/ Individual
	Extended Self- Defense	NATO doctrine in combination with the mandate for the operation	
	UN Self-Defense	UN regulations	
	Unit Self-Defense	Inherent / sovereign right (customary international law)	
	Personal Self- Defense	National criminal law	
Individual			Individual

III. Self-Defense and Rules of Engagement

As was stated already in the discussion above, ROE normally contain a phrase which specifies that the ROE do not limit the inherent right of self-defense. These statements in the ROE require closer analysis, in particular as regards their relationship with the concepts of “hostile act” and “hostile intent”.

A. “Nothing in these ROE negates...”

The statement in the Chairman Joint Chiefs of Staff Standing Rules of Engagement (SROE) as regards the purpose and scope of those ROE, as discussed in chapter 1,⁹⁷ includes, as part of their purpose, providing “implementation guidance on the application of force for [...] the exercise of the inherent right and obligation of self-defense”. Page A-3 of the SROE states that they are intended (*inter alia*) to “implement the right of self-defense, which is applicable worldwide to all echelons of command.” However, the same document states in several locations that the rules do not limit the inherent authority to use force in self-defense. Apart from the apparent logical contradiction between these statements,⁹⁸ the SROE seem to imply that the manner in which force is to be used in self-defense can be the subject of specific ROE. Such ROE, and the requirement to adhere to them, would appear to be at odds with the “inherent” nature of the right of self-defense and with the implied authority to use “all necessary means” in self-defense. This approach consequently has the potential to result in

⁹⁷ See page 48 – 49.

⁹⁸ The apparent contradiction can be mitigated by interpreting “implementation” as providing guidance instead of restrictions or regulations. Such an interpretation does not, however, remove the apparent contradiction between the clear intent to make the SROE mandatory and binding while at the same time indicating that the inherent right of self-defense is a right (and obligation) that supersedes all other considerations.

confusion for military personnel in exercising their inherent right of self-defense in combination with the ROE.⁹⁹

As was observed above, however, the SROE are not the only document to state that the ROE do not limit the (inherent) right of self-defense. In Australia, for example, the right of self-defense is considered a “non-derogable right”.¹⁰⁰ According to some sources, the ROE used by Joint Task Force Six, that is the military agency in Texas which (*inter alia*) coordinates anti-drug operations in the region, similarly contain (or at least at the time contained) the authority to use (deadly) force in self-defense and are (or were) based on the SROE.¹⁰¹ Finally, all of the ROE and derivative cards drafted or reviewed by the present author have contained a statement in some form expressing the inherent right of self-defense, while at the same time regulating the use of force for the operation in question. Consequently, all of these ROE share the same source for potential confusion for military personnel as was described in relation to the SROE.

One possible explanation for this similarity in the various ROE and statements on self-defense in that context is the observation made in the introduction that many ROE and related documents have been inspired by the United States practice and doctrine on ROE and the related (military) publications on this topic. A second possible explanation is that the general recognition of the right of self-defense as discussed above will, when combined with the various components of the ROE, almost invariably lead to the desire (or even necessity) to combine both concepts in the same document. Although the underlying goal behind that practice is generally to provide a maximum level of clarity, guidance and assistance to military units, the end result could be quite the opposite.

⁹⁹ This conclusion is shared by Parks in Parks, W.H., “Deadly Force is Authorized,” in *Naval Institute Proceedings*, January 2001; and by Maxwell, *op. cit.* note 70.

¹⁰⁰ Stephens, *op. cit.* note 60, quoting the Australian Defense Force Publication 3, 1st Edition.

¹⁰¹ Parks, *op. cit.* note 99; Maxwell, *op. cit.* note 70 and Associated Press, “Pentagon: ‘Premature’ to judge border shooting involving Marines,” *Abilene Reporter – News*, 4 July 1997.

B. The Problem with Hostile Act and Hostile Intent

In addition to the source of confusion identified above as regards the interaction between ROE and the statement on self-defense contained in the ROE, another source of (considerable) confusion exists as regards two concepts commonly addressed in ROE: the concepts of “hostile act” and “hostile intent.” Confusion as regards these concepts can arise in situations in which American terminology is used by some nations but not by others in multinational operations, as well as in situations in which units trained in the context of NATO or EU doctrine and terminology regarding ROE are deployed in the context of operations under UN command and control.

The definition of the “inherent right of self-defense” given in paragraph 5.a. of the SROE identifies the acts against which force may be used in exercising this right as “hostile acts” and “demonstrated hostile intent.” The term “hostile act” is subsequently defined in paragraph 5.g. as “[a]n attack or other use of force [...]”,¹⁰² while “hostile intent” is defined in paragraph 5.h. as “[t]he threat of imminent use of force.” In the Netherlands, this definition of self-defense and the use of “hostile act” (“vijandige daad”) and “hostile intent” (“vijandige bedoelingen”) in connection with self-defense was incorporated in the past in the definition of self-defense given in the Royal Netherlands Army Doctrine Publication on combat operations (issued in 1998).¹⁰³ The Doctrine Publication on peace operations issued in 1999, however, explains that the use of force in self-defense will not always be applicable in response to hostile acts or

¹⁰² The secondary definition of “hostile act” is “force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel and vital US Government property.” This addition to the definition is also included in the definition of “hostile intent”, with the addition of the word “imminent”. As Stephens correctly points out: “These additional threshold factors exceed those which are properly contemplated under international law, that is, armed attack or the threat of armed attack. This expansive scope is not presently supportable.” Stephens, *op. cit.* note 60.

¹⁰³ Royal Netherlands Army, *Landmacht Doctrine Publicatie II-A: Grondslagen voor gevechtsoperaties (LDP II-A)*, 17 March 1998. See paragraph 0206.

hostile intent. The explanation continues by stating that the use of force other than in self-defense must be based on the ROE for the operation.¹⁰⁴

The difference in approach as regards the topics of self-defense, hostile act and hostile intent in comparing these two Doctrine Publications can only partly be explained by the differences in the topics of these Publications. While it is generally true that the authority to use force will be greater in the context of combat operations, and therefore the ROE will be less restrictive, as compared to military operations other than combat operations, the link between ROE and the concepts of hostile acts and hostile intent in the later publication and the disconnection between self-defense and the concepts of hostile act and hostile intent can also be attributed to discussions held in the years between the two publications in the context of drafting the NATO document MC 362.¹⁰⁵

While the concepts of hostile act and hostile intent have been used to indicate actual attacks and imminent attacks, and related threats, as part of the “trigger criteria” for the exercise of (personal) self-defense in the United States and some other nations for some time, a significant number of nations participating in the NATO Military Committee working group on ROE, which negotiated the initial text of MC 362 between 1996 and 1998, were accustomed to completely different definitions and scopes as regards these terms. For these nations, the concept of self-defense was strictly related to situations meeting the Caroline criteria of imminence, instantaneousness and (the necessity for) immediate response. Self-defense, in this view, was authorized only in response to an actual attack or an imminent attack. The concept of “hostile act”, on the other hand, was considered by these nations to be a different category that encompassed (military) acts of a nature to threaten or harm the operations (or the force) in question but not rising to the level of self-defense. Hostile intent, finally, was simply considered to refer to activities or intelligence information indicating preparations for a

¹⁰⁴ Royal Netherlands Army, *Landmacht Doctrine Publicatie III: Vredesoperaties (LDP III)*, 1999. See paragraph 0444.

¹⁰⁵ See footnote 44.

hostile act.¹⁰⁶ In other words, in this view the concepts of “hostile act” and “hostile intent” described acts adjacent to the limits of self-defense, in terms of the level of threat, immediacy, proximity, etc., and the use of force in response to such acts could not be based on self-defense but required specific authorization in the ROE (and, consequently, a different legal basis, such as the mandate for the operation or the more general notion of force protection).

Given the different relationships between self-defense and the concepts of hostile act and hostile intent as discussed above, as well as the use by the members of the working group of the same terminology but with different meanings, the negotiations on the text relating to these issues proved challenging at first. Once the different interpretations and understandings of the terms in question became clear, however, the work on MC 362 could continue. More important, however, was the greater understanding of the relationship between self-defense and the concepts of hostile acts other than actual attacks and hostile intent other than an imminent attack, in combination with the realization that the ROE for NATO operations would need to address the differences in national views on self-defense in order to achieve unity of response to a given threat in the context of a given operation.

The relationship between the terms discussed above consists of two components: a temporal component and a situational component. The temporal component consists of an evaluation of the imminence of the threat in question. If the threat is an actual attack or an imminent attack, then the use of force in response to that threat is authorized on the basis of the inherent right of self-defense. Threats (or acts) which are not sufficiently imminent to authorize a response in self-defense, but which are

¹⁰⁶ These observations are based on the present author’s participation in the MC working group in question. As is customary within NATO, opinions of national experts and the national positions of delegations are not attributed by name or nationality. A minor exception was made in the text in identifying the United States as the source of the concepts of hostile act and hostile intent and the American interpretations thereof, because the United States has effectively set the standard for ROE analysis and development. Differing views or interpretations are consequently by necessity compared to that US standard.

nonetheless hostile in nature, are classified as hostile acts other than actual attacks. The use of force in response to such acts requires authorization in the applicable ROE. Finally, acts, or designations based on intelligence information, indicating preparations for such hostile acts are classified as hostile intent other than an imminent attack. In this case, too, ROE authorization is required for the use of force in response.

Placing these concepts on a timeline, the concepts of attacks and imminent attacks would be placed at, or near, the “now” end of that timeline, while the concept of hostile intent, in the meaning indicated above, would be placed at the far end. Finally, hostile acts in the meaning given above would be placed somewhere in between. It became clear during the negotiations, however, that national views differ as to the level of imminence required before the right of self-defense applies.¹⁰⁷ In other words, the “trigger point” for self-defense cannot be placed on the timeline just described in any position that would satisfy the national legal or political requirements of every nation. As a result, the need for ROE authorizing the use of force in response to threats will arise sooner for some nations than for others. Careful attention is therefore required for this issue in drafting coalition ROE if unity of action is to be attained in response to threats falling into any of the categories discussed above.¹⁰⁸

Finally, as regards the situational component of the relationship between self-defense, hostile acts and hostile intent, this component qualifies and modifies the result of the temporal evaluation discussed above. Put simply, an act which triggers a self-defense situation in one operational context may be considered a hostile act (in the meaning used

¹⁰⁷ It also became clear that national views differ as to whether the defense of property is authorized under the right of self-defense. This issue therefore needs to be addressed in the ROE as well.

¹⁰⁸ As was discussed in chapter 1 in relation to the EU system of confirmatory ROE, nations which do not require ROE authorization are not affected if the ROE in question are issued. On the other hand, nations which do require ROE authorization cannot act if these ROE are not issued. The safest, but not necessarily the most politically acceptable, course of action is therefore to always authorize the relevant ROE regarding hostile acts and hostile intent, or to adopt the EU system of confirmatory ROE.

here) in a different operational context or simply be irrelevant in yet another context. In other words, the placement of an act on the timeline discussed above will depend on the geopolitical context of the operation or situation, as well as on the tension levels in the area of operations, based *inter alia* on assessments of prior activities of the opposing party, patterns of behavior, and other similar factors. As regards the concept of hostile intent, it should be noted that responses based on an evaluation of the (probable) intent of the (potential) foe, rather than on actual threatening behavior, are even more dependent on this situational component. Consequently, military commanders and national or international command authorities need to constantly review and, if necessary, modify the ROE profile for an operation to reflect relevant changes in the theatre of operations.

IV. Conclusion

As was demonstrated and discussed above, the term “self-defense” has several different meanings within the law and while each of these meanings is subject to some extent to the criteria and conditions set forth in the Caroline case, the legal framework and the application and interpretation of the various legal criteria differs for each version of self-defense. To speak of an inherent right of self-defense without specifying which of the versions of this right is being referred to can consequently lead to confusion, as well as incorrect assumptions as to the (inherent or ROE) authorization to use force.

Nonetheless, ROE sets invariably emphasize that the ROE do not limit or negate the inherent right of self-defense. Yet the ROE are also, as was discussed in chapter 1, the primary tool for establishing escalation dominance within a theatre of operations and the ROE are normally intended to reflect the maximum permissible use of force in the area of operations. It is not surprising, therefore, that questions regarding the (meaning of the) relationship between self-defense and ROE present (military) lawyers with some of the greatest challenges in the context of ROE training and operational advice. Valid practical suggestions have been made in the past for improving the instructions on self-defense and for clarifying the relationship between ROE and self-defense. Parks recommends using elements of the instructions on self-defense as used by

the Justice Department for its personnel in the training of military personnel.¹⁰⁹ Maxwell makes a similar suggestion, as well as suggesting that the ROE and the guidance on the use of force in self-defense be issued as two separate documents.¹¹⁰ As regards the first suggestion, however, given the inherently different (and usually more restrictive) mandate and authorization to use force for law enforcement officials, it is questionable whether adopting the Justice Department approach to the use of force in self-defense would be advisable for all of the forms of self-defense as discussed above, with the possible exception of personal self-defense by military personnel. As regards the suggestion of separating the topics into separate instruction cards, two potential difficulties can be identified. Firstly, the interests of clarity and simplicity of use are not served by issuing multiple cards to operational units if both of those cards are to be applied in the same operation or area of operations. Secondly, while separating the guidance on self-defense from the ROE document would clarify which rules regarding the use of force apply in which situation, this approach does not offer a solution for the difficulty of correctly identifying a situation as either self-defense or as one requiring ROE and therefore which card to consult. In other words, while pragmatic solutions can help to some extent, more fundamental steps are required to address the underlying uncertainties as to which type of self-defense applies in which operational circumstances, which criteria or conditions apply to the lawful and legitimate recourse to the use of force in self-defense, and how the transition from self-defense to the use of force as authorized in ROE is to be achieved.

A first step towards resolving these issues consists of clearly differentiating between the use of force in self-defense and the use of force for mission accomplishment. While Maxwell understandably warns against over-emphasizing restraint in the use of force for mission accomplishment to avoid (also) unduly restricting responses in self-defense situations,¹¹¹ it would seem equally dangerous (and undesirable) if a lack of guidance on these issues would result in situations being improperly identified as

¹⁰⁹ Parks, *op. cit.* note 99.

¹¹⁰ Maxwell, *op. cit.* note 70.

¹¹¹ Maxwell, *op. cit.* note 70.

authorizing the use of force in self-defense beyond the ROE for the operation. In other words, while the limitations on the use of force for mission accomplishment should not be allowed to limit the inherent right of self-defense, neither should misconceptions regarding the right to use force in personal self-defense jeopardize the mission objectives or lead to the use of force beyond legal constraints.

Leaving aside national self-defense as the (exclusive) domain of national command authorities,¹¹² the interaction between mission accomplishment and self-defense is most significantly a factor in situations in which extended self-defense and force protection are concerned. As the right to use force in these contexts is derived from the mandate or legal basis for the operation and linked to the overall objectives of the operation, the authority to use force in extended self-defense or force protection will generally be more extensive than national regulations regarding the use of force in personal self-defense and, as a result, recourse to personal self-defense will most likely be unnecessary in this context. On the other hand, as extended self-defense and force protection are directly related to the specific operational nature and tasks of the force, the use of force in the exercise of the right of extended self-defense or force protection will be regulated by (as well as being authorized by) the ROE for the operation in question.

For units operating outside the context of an operation, the right of unit self-defense can be applied. This right, however, is more restrictive as regards the use of force and is subject to specific (legal) conditions. Stephens correctly points out in this context that the relevance and importance of the Caroline principles cannot be overstated.¹¹³ In addition, as regards multinational units, careful attention is required as to whether the platform intending to use force in unit self-defense is authorized to do so in defense of another platform from another nation. While the use of force in such situations can, in the context of an operation, be part of extended self-

¹¹² In addition, the specific case of United Nations self-defense will not be discussed further in this conclusion, as it is related exclusively to the specific conditions applicable to forces under UN command and control.

¹¹³ Stephens, *op. cit.* note 60.

defense or force protection, national rules and national political considerations may preclude such use of force in situations outside the context of an (international) operation.

Finally, in situations not covered by any of the above and in the rare cases in which the ROE for a given operation fail to offer adequate authorization for the use of force in response to threats,¹¹⁴ and truly as a last resort, the right of personal self-defense applies to military servicemen in the same way as it does to anyone else. While, as was discussed above, it is not possible to consider this right as a “human right” in the ordinary meaning given to that term in international law, the right of personal self-defense is undeniably inherent. It is also, however, subject to extensive restrictions and conditions under the law, especially when compared to the other forms of self-defense discussed above. In addition, many of these restrictions and conditions are derived from national laws and national interpretations of this concept. Consequently, the right of personal self-defense will not be the same for each member of an international military force.

In the discussion above, the various restrictions and conditions governing the right of personal self-defense were presented. Many of these conditions, including the duty to retreat, are not easily reconcilable with military operations. Similarly, restrictions may apply for some servicemen as regards the use of force in defense of others or in defense of property. Personal self-defense is therefore a complex issue not easily applied in a military operational environment. Consequently, military commanders and operational planners should not rely on personal self-defense as (part of) the legal basis for the operation as a whole, nor as part of their operational

¹¹⁴ As was already mentioned above, given the extensive scope of the rights of extended self-defense and force protection, it can reasonably be expected that most situations requiring the use of force in self-defense will be covered by the applicable ROE. While it is, of course, possible that a serviceman is threatened by an (imminent) attack while he or she is off duty, such as during a “rest and recuperation” (or “rest and relaxation”) leave in the area of operations, it is arguable whether the military status of that person is relevant from a legal point of view and the recourse to personal self-defense in that situation would not legally be different from similar situations in a “normal” civilian setting.

planning for specific missions. In addition, proper training and instruction should be made available to servicemen in order to ensure that they understand this right, including its restrictions and conditions, as well as its legitimacy only as a last resort.

Generally speaking, the goal of military operations is to achieve the stated political objectives with the least amount of casualties or costs. In furtherance of those political objectives, the political authorities ordering or authorizing such operations rely on the armed forces to carry out their tasks without exacerbating the complex geopolitical context in which the operations take place. While the autonomous use of force can be considered a threat to the political objectives in that context, it is an essential element of military operations. Conversely, while limiting the rights or possibilities of military personnel to protect themselves is ultimately disastrous, inappropriate use of force beyond the political contours of an operation diminishes the usefulness of military forces for achieve potentially delicate political goals. Ultimately, therefore, communication and understanding between the political and military authorities, combined with adequate training and education, are required to maintain the careful balance between the inherent right of self-defense and political control over military operations.

Chapter 4

Rules of Engagement and the Laws of Armed Conflict

I. Introduction

As was stated previously,¹ the legal element of rules of engagement (ROE) incorporates elements and influences from both national and international law. While the relationship between ROE and national law is discussed elsewhere,² this chapter and chapter 5 will examine the relationship between ROE and two specific areas of international law: the laws of armed conflict and human rights law. In this chapter, the focus will be on the laws of armed conflict. The interaction between human rights law and the laws of armed conflict, including the question of the *lex specialis* relationship between them, will be discussed in chapter 5.

While the terms “laws of armed conflict” and “humanitarian law” can essentially be used as synonyms for the same body of law,³ a historical conceptual distinction can be made between them. Traditionally, the rules governing the conduct of hostilities were focused on the presence of a state of war between the belligerent parties and could therefore be referred to as the “laws of war.”⁴ Following the adoption of common Article 2 in the Geneva Conventions of 1949, the scope of application of the law was extended to armed conflicts in general, regardless of whether a formal state of war exists between the parties to the conflict, and regardless of whether

¹ See chapter 1, pp. 32 – 38.

² See chapter 1 (briefly) and chapter 6 as regards (national) criminal law.

³ United States Naval War College, *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations*, 1997, Section 5.1, note 4, p. 5-2; United States Army Judge Advocate General’s Legal Center and School, *Law of Armed Conflict Deskbook*, 2012, p. 8 (see especially note 5); International Committee of the Red Cross Advisory Service on International Humanitarian Law, “What is International Humanitarian Law?”, 2004, available at http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf (last accessed on 14-4-2014).

⁴ Pictet, J. *Commentary on the Geneva Conventions of 12 August 1949: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, ICRC, 1952, p. 28.

the parties acknowledge the existence of a state of war. Consequently, since the adoption of the Geneva Conventions the term referring to these laws can more accurately be described as the “laws of armed conflict.”⁵

But the shift in application of the law from declared wars to all situations involving the factual existence of an armed conflict was not the only change brought by the Geneva Conventions. As will be discussed below, post-World War II focus in the laws governing the conduct of hostilities expanded from a more combatant-oriented view to a concern for protecting specific categories of persons and objects from the effects of the hostilities. The term “humanitarian law” is consequently the more common term used today for these laws, reflecting the (contemporary) focus on the humanitarian role of the law.⁶ In this chapter, the term “international humanitarian law” (IHL) will be used, without intending any substantial delineation or choice between IHL and the laws of armed conflict, although substantive and normative differences exist between the various instruments that make up this body of law.

As the primary focus of this study is the rules of engagement, this chapter will focus primarily on the interaction between IHL and ROE and therefore does not provide a comprehensive study or analysis of IHL as such, beyond what is considered most immediately relevant for the study of the interaction between ROE and law. A vast wealth of literature is available on IHL, in which more comprehensive discussions on the law as such can be found and the references in the footnotes may serve to provide some guidance towards that literature. However, where particular aspects of IHL impact more directly on the ROE, such elements of the law will be discussed in somewhat greater detail. Since acknowledging the existence of an armed conflict may be politically sensitive, as will be discussed below,

⁵ Ibid., p. 32; see also the references mentioned in note 3 above. Note that the statement refers to the terminology and not to the applicability of the law to the various types of armed conflict, nor to a distinction as to which rules or parts of the law apply in which types of armed conflict.

⁶ Kalshoven, F. and Zegveld, L., *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 3rd edition, ICRC, 2001, p. 11.

direct reference to IHL in the ROE is rare,⁷ making the study of the interaction between IHL and ROE somewhat complicated at first sight. The influence of IHL on the ROE is not so rare, however, and as will be discussed below, many elements of ROE are derived from IHL even without such direct references. Consequently, while many parts of the greater body of IHL are not directly reflected in the ROE, several core principles and elements certainly are so reflected.

Finally, it should be noted that the applicability of the rules of IHL, whether *de jure* or *de facto* (as a matter of policy),⁸ to the operation as a whole does not depend on the inclusion of direct references to, or specific rules of, IHL in the ROE; IHL applies independently from the ROE and needs to be taken into consideration in all aspects of the operation, regardless of the ROE. This aspect will be discussed in greater detail below and is due in part to the observation that not all of the elements or rules of IHL are suitable for inclusion in the ROE. For example, while the authority to detain persons may be included in the ROE, the specific and detailed rules on the treatment of prisoners of war are not normally included. Some very basic and fundamental elements of IHL, such as the prohibition on attacking civilians not taking a direct part in hostilities and the prohibition on attacking medical installations, are not addressed in the ROE directly⁹ but are instead reflected in the interplay between specific ROE on targeting and the interplay between the ROE and other operational directives and

⁷ In the author's professional experience, national ROE and associated instructions on the use of force issued by the Netherlands Ministry of Defense have only rarely included a direct reference to (the applicability of) IHL. Such examples include the Netherlands Armed Forces participation in operation *Enduring Freedom*, in which both the ROE for the maritime component (2002 – 2003) and those for the land component (2005 – 2006) contained such a reference, the self-defense oriented instructions on the use of force for the International Mission for the Protection of the Investigation in the Ukraine, following the MH-17 disaster, and the ROE for the Netherlands forces operating in and over Iraq to combat ISIS/Da'esh (Air Task Force Middle East and the Capacity Building Mission in Iraq).

⁸ See below in Section II.B.

⁹ Such issues may, however, be addressed in the soldier's cards derived from the ROE.

instructions.¹⁰ The interaction between IHL and ROE is therefore a combination of specific ROE derived from IHL and application and interpretation of (all of) the ROE within the context of IHL.

II. General observations on the laws of armed conflict

A. Sources of the law

International humanitarian law, as a distinct body of law within the wider realm of public international law, is composed of a number of treaties, as well as rules of customary law. Without seeking to present a comprehensive list of all treaties which may be considered part of IHL, it is safe to say that the core of current IHL is formed, of course, by the four Geneva Conventions of 1949, the two Additional Protocols of 1977 and the Additional Protocol of 2005. But IHL, and the elements of IHL relevant to the study of ROE, extends well beyond the Geneva Conventions and their Additional Protocols.

In discussing the component treaties and rules of IHL, a theoretical differentiation can be made between “Hague law” (for which the term Laws of Armed Conflict is more appropriate) and “Geneva law”. The former refers, albeit with a somewhat erroneous name, to the pre-1949 laws of armed conflict and emphasizes the laws and customs of war as pertaining to the conduct of armed forces towards and against each other. Put simply, the focus of “Hague Law” treaties and rules is on the conduct of hostilities, emphasizing humane methods and means of warfighting and regulating the conduct of armed forces in their treatment of the enemy.¹¹ The other category, referred to as “Geneva Law”, is focused primarily on the principle of humanity and the protection of those affected by the effects of armed conflict. This term, of course, refers to the Geneva Conventions and their Additional Protocols, but also encompasses later sources of IHL. Broadly speaking, this part of IHL primarily emphasizes the conduct of hostilities with an aim to limit the effects of war on those not, or no longer, taking part

¹⁰ See below in section III.A. and chapter 2, pp. 66 – 67.

¹¹ *Law of Armed Conflict Deskbook*, *op. cit.*, note 3, p. 19.

in the hostilities.¹² Ultimately, however, this division into categories is primarily of theoretical interest and has very little relevance to the application of IHL. The essential core of IHL, regardless of the subject or object to which it is applied, is that the law recognizes and maintains a careful and delicate balance between military necessity, or the reality of armed conflict and war, and humanitarian concerns.

Among the earliest components of IHL are the 1863 Lieber Code, also known as the “Instructions For The Government Of Armies Of The United States In The Field,”¹³ the 1868 “Declaration of St. Petersburg Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight”, the 1899 “Hague Declaration (IV,3) Concerning Expanding Bullets” and the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Annex thereto containing the Regulations with the same name. These early treaties set forth several of the principles and rules that are at the core of IHL and are reflected in later, more detailed rules found in the post-World War II treaties.

The relationship between IHL and disarmament treaties is discussed below, but it should be noted that while several of the earlier treaties primarily address specific means of warfare (such as the 1868 and 1899 Declarations), their contents go well beyond the prohibition of the means of warfare that is their main subject matter. The Declaration of St. Petersburg, for example, contains one of the earliest statements of the limitations on the choice of belligerents as regards the methods and means of warfare and the exclusion of means of warfare which cause unnecessary suffering:

¹² Ibid., p. 20.

¹³ Text available (inter alia) at http://avalon.law.yale.edu/19th_century/lieber.asp (last accessed on 7 April, 2016); the International Committee of the Red Cross describes the Code as “the first attempt to codify the laws of war” (<http://www.icrc.org/ihl/INTRO/110?OpenDocument>; last accessed on 7 April, 2016). Since the Instructions are a purely national American document and not a treaty, the Lieber Code is not technically part of IHL in terms of being international *law*. It is, however, the source of several rules in later treaties and indicative of the early stages of IHL.

“That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity.”¹⁴

The 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land and the Annex thereto containing the Regulations concerning the Laws and Customs of War on Land, as well as its (nearly identical) successor, the 1907 Hague Convention (IV) mentioned above, contains in its preamble one of the fundamental clauses of IHL. Normally referred to by the name of the Russian delegate whose declaration inspired the clause, the “Martens Clause” states:

“Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.”¹⁵

This clause, the essence of which also appears in Article 1, paragraph 2, of the First Additional Protocol to the Geneva Conventions, essentially states that in cases not covered by the Convention, the protection offered

¹⁴ Text available (inter alia) at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C> (last accessed on 7 April, 2016).

¹⁵ Text available (inter alia) at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=9FE084CDAC63D10FC12563CD00515C4D> (last accessed on 7 April, 2016). The clause appears in slightly modified form in the 1907 Hague Convention (IV), without changing its meaning or essence.

by (other sources of) international law as well as “the laws of humanity” shall nonetheless be applied. Although the clause does not, in itself, create any (new) laws or regulations, it serves as a reminder of the obligations derived from other sources of international law as well as an obligation to apply the principle of humanity (even) in the conduct of war.¹⁶

Central to any discussion of IHL are, of course, the four Geneva Conventions of 12 August, 1949 and their Additional Protocols: Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention III Relative to the Treatment of Prisoners of War; and Convention IV relative to the Protection of Civilian Persons in Time of War); the two Additional Protocols of 8 June, 1977 (Protocol I Additional relating to the Protection of Victims of International Armed Conflicts and Protocol II Additional relating to the Protection of Victims of Non-International Armed Conflicts). A third Additional Protocol was added in 2005, “relating to the Adoption of an Additional Distinctive Emblem”. As Additional Protocol III relates exclusively to the additional emblem and does not contain any further (substantive) rules or regulations on the conduct of hostilities, it will not be discussed further here.

The distinction between focusing on the conduct of belligerents towards each other and focusing on the protection of those not or no longer participating in hostilities against the effects of armed conflict does have some significance for the interaction between IHL and ROE. As will be discussed below, the necessary limitations on the use of force, including

¹⁶ Interestingly, Hoffman refers to the clause in support of his argument that IHL should be applied by UN forces whenever they engage in combat. The application of IHL to peacekeeping and peace-enforcement operations is discussed further below, but as regards the clause itself, it is interesting to note that while the clause is usually understood to ensure (continued) protection in cases not covered by (the specific instrument of) IHL, Hoffman invokes the clause to argue the applicability of IHL itself where such application may not be self-evident. Hoffman, M.H., “Peace-enforcement actions and humanitarian law: Emerging rules for ‘interventional armed conflict’” in *International Review of the Red Cross*, No. 837, 2000.

mandatory precautions prior to any use of force, require, in addition to adequate IHL education for military forces,¹⁷ clear and understandable instructions to military personnel. While ROE are not the only operational document to contain such instructions, the most clearly “legal” restrictions¹⁸ contained in ROE are frequently derived from the protective (principles) of IHL.

In addition to the main sources of IHL discussed above, a separate category of treaties can be identified, although these treaties are a bit more difficult to categorize. This group consists of treaties aimed at regulating or banning specific categories or types of weapons. While some of these treaties aim strictly at regulating (or outright prohibiting) the development or possession of the weapons in question, at least some of these treaties were created specifically to protect civilians from the effects of war.¹⁹ Consequently, a distinction can be made between “pure” disarmament or arms reduction treaties²⁰ and those with a more “hybrid” approach. In the present discussion, the former category will not be discussed and the latter category will be grouped under IHL in general.

¹⁷ As also required by, inter alia, Article 83 of Additional Protocol I. See also Varga, A.F., “Rules of Engagement *vis-à-vis* International Humanitarian Law” in *AARMS: Academic and Applied Research in Military Science*, Vol. 11, No. 1 (2012), which provides a useful overview of the topic of IHL in relation to ROE, as well as the need for proper education in both fields.

¹⁸ As opposed to restrictions based on political or operational considerations; see chapter 1, pp. 30 – 33.

¹⁹ Examples being the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, the Protocol (V) on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and the Convention on Cluster Munitions. The Ottawa Convention and the Cluster Munitions Convention specifically refer to the civilian population in their preambles, while Protocol V refers in its preamble to “post-conflict humanitarian problems” caused by these weapons.

²⁰ Such as the 1990 Treaty on Conventional Armed Forces in Europe and the nuclear disarmament and arms control treaties. The former addresses a wide range of weapons and weapon systems, while the latter aim to reduce the number of weapons without banning them.

Finally, in addition to the treaties mentioned above and in the footnotes, IHL consists of customary law. Although not entirely uncontroversial,²¹ the ICRC study on customary humanitarian law²² provides an (authoritative) analysis of contemporary customary international humanitarian law at the time of writing, and sets forth a number of categorized rules considered to be part of customary law.²³ The role of customary law in IHL is important, given that not all nations are party to all of the IHL treaties. However, establishing a rule as being part of customary law is never an easy process, especially in those cases where clear, official statements expressing an *opinio iuris* or persistent objection regarding a particular rule are absent.²⁴ While ROE can be seen as examples

²¹ See, for example, Erakat, N., “The US v. The Red Cross: Customary International Law & Universal Jurisdiction”, in *Denver Journal of International Law & Policy*, Vol 41, No. 225 (Winter 2013), and Bellinger, J.B. and Haynes, W.J., “A US government response to the International Committee of the Red Cross study ‘Customary International Humanitarian Law’” in *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, p. 443.

²² Henckaerts, J.M. and Doswald-Beck, L., *Customary International Humanitarian Law*, ICRC/Cambridge University Press, 2005.

²³ While customary law is not exactly “dynamic”, given the time required for a rule to be truly accepted as customary law, it is nonetheless far more fluid than treaty law. Consequently, any study of customary law and contemporary rules of that body of law inherently suffers from being time-sensitive and will more readily become incomplete or inaccurate over time.

²⁴ An example of persistent (re)statement of the national legal opinion regarding a rule of (customary) IHL is the position of the United States of America on the prohibition on expanding bullets. See, for example, Henckaerts, *op. cit.*, note 22, p. 269; the memoranda referred to in the footnote on that page are available online from a number of sources. Interestingly, the United States views on expanding bullets appear to be in the process of becoming the more accepted view, rather than as an exception to the previously accepted total prohibition of such bullets (regardless of their intended use during armed conflict). See, for example, Boothby, W.H., *Weapons and the Law of Armed Conflict*, Oxford, 2009, pp. 149–150. Most notably, the final document of the 2010 Review Conference of the Rome Statute of the International Criminal Court held in Kampala expands the prohibition on expanding bullets to non-international armed conflicts while at the same time expressing that the crime is only committed (both in international and non-international armed conflict) if the bullets are used “to uselessly aggravate suffering or the wounding effect upon the target” and that this interpretation of the

of state practice, inclusion of a rule of customary IHL in ROE or distilling a (new) rule from the fact of its consistent and repeated inclusion in a nation's ROE does not necessarily reflect an expression of *opinio iuris* on the part of that State. Such rules in the ROE may, after all, be a matter of political policy or operational expediency rather than an expression of adherence to, or formation of, a (new) rule of customary law or (an expression of) any legal requirement to adhere to that rule as a matter of law.²⁵

B. Applicability to military operations

Before discussing the interaction between (elements of) IHL and ROE, some general remarks regarding the general applicability of IHL are required. Since ROE are always custom-made and tailored for the operation for which they are implemented, it is important to examine the (*de jure*) applicability of IHL and the types of situations in which IHL must (as opposed to *should*²⁶) be taken into account when drafting and promulgating ROE.

At first glance, the expansion of the applicability of IHL to all situations of armed conflict, regardless of whether a state of (formal) war was declared or recognized by the parties, as briefly mentioned in the introduction to this chapter, would seem to have made the determination whether IHL applies *de jure* to a given situation of armed violence much easier. In practice, however, this is not necessarily the case. Considerable debate is possible as regards the criteria for *de jure* applicability of IHL and, concomitantly, policy-driven discussions exist as to whether IHL applies in (multinational) military operations, especially those pursuant to a United

law is “reflected in customary international law.” In other words, the mere use of such bullets as such is not sufficient for the crime in question to have been committed. The final document can be found at http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf (last accessed on 7 April, 2016), the resolution in question is at pp. 13 – 14.

²⁵ Additionally, given that ROE are generally classified, identifying any form of state practice on the basis of ROE would be limited to only those who have access to the ROE or at such a time as the ROE are declassified.

²⁶ See below, pp. 184 – 185.

Nations Security Council mandate. While clearly from a legal point of view the mandate or purpose of an operation does not determine whether IHL applies, policy views can give rise to extensive debate on this topic as well as being a significant factor in the instructions given to military forces. Consequently, some attention to this issue is required in the context of the present discussion.

In discussing the applicability of IHL and the existence of an armed conflict, a distinction should be noted between IHL as it applies to international armed conflicts and IHL as applicable to non-international armed conflicts. Even just limiting the scope of study to the Geneva Conventions and their Additional Protocols, thus leaving aside the other instruments of IHL, it is apparent that until 1977, the only rules of IHL applicable to non-international armed conflicts were those set forth in common Article 3 to the four Geneva Conventions of 1949. This Article, sometimes referred to as the “mini convention”, sets forth the most basic, fundamental rules applicable in armed conflicts not of an international character. In spite of that, however, it is extremely limited as regards contents and the rules are somewhat broad and general in nature. In 1977, the Second Additional Protocol made a significant contribution to expanding the body of law applicable to non-international armed conflicts. However, in spite of its contribution to IHL, the Protocol still cannot overcome the significant difference, in volume and detail, between the law applicable to international armed conflict and the law applicable to non-international armed conflict.²⁷ Finally, apart from this difference in specificity and volume, which is of significance once IHL applies, there is also a difference as regards the criteria for applicability of the law to a given situation.

Starting with non-international armed conflict, common Article 3 of the Geneva Conventions applies during “armed conflict not of an international character” but does not define that term, thus leading to

²⁷ Henckaerts, *op. cit.* note 22, p. xxxiv – xxxv.

possible debate as to its applicability to a given situation of conflict.²⁸ Article 1 of Additional Protocol II, on the other hand, is highly detailed and specifies both criteria for the application of the Protocol and the types of disturbances or incidents which are excluded from the concept of non-international armed conflict and (thus) do not meet the threshold for application of the Protocol.²⁹ It should be noted, however, that the criteria set forth in Article 1 define the threshold for (*de jure*) application of Additional Protocol II but do not affect the application of common Article 3 of the Geneva Conventions. In other words, in situations of non-international armed conflict which do not meet the threshold criteria of Additional Protocol II, common Article 3 of the Geneva Conventions still applies (albeit with a considerably lower level of specificity on required conduct). Most relevant for the present discussion is that the threshold for application of Additional Protocol II (but not for application of common Article 3) requires, *inter alia*, a certain level of intensity of the conflict at hand.³⁰ This can be derived from two elements of Article 1. Firstly,

²⁸ Sandoz, Y. [ed.] et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, 1987, p. 1348 (paragraph 4448).

²⁹ See Sandoz, *op. cit.* note 28, pp. 1349 – 1350, and the *Final Report on the Meaning of Armed Conflict in International Law* of the International Law Association, 2010, available at <http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87> (last accessed on 7 April, 2016), which also refers to the political reason for the higher threshold of application of Additional Protocol II (p. 12 – 13). See also Sandoz, *op. cit.*, note 28, p. 1350 (paragraph 4457). This obviously does not resolve the issue of what is meant by “armed conflict not of an international character” as the field of application of common Article 3.

³⁰ The other threshold requirement, relating to the level of organization of the armed groups engaged in the conflict, will not be discussed in great detail here. For a more detailed explanation of that threshold, see Sandoz, *op. cit.*, note 28, pp. – 1351 – 1353. See also Ducheine, P.A.L., “ISAF en oorlogsrecht: ‘Door het juiste te doen, vreest gij niemand’,” in *Militair Rechtelijk Tijdschrift*, 2009, nr. 6, esp. pp. 287 – 288. Put simply, Article 1, paragraph 1, of Additional Protocol II requires that the armed groups be under “responsible command” and that the armed groups exercise sufficient control over part of the territory of the State in question as to enable them to implement the Protocol and to carry out “sustained and concerted military operations”. The last part of that requirement will be discussed in the main

paragraph 2 of Article 1 excludes “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.” None of these terms is defined, leaving room for interpretation. All of these terms, however, clearly indicate a desired differentiation between armed conflict, and thereby the application of IHL, and situations which would normally fall within the ambit of domestic law enforcement and local, national criminal law.³¹ Secondly, apart from the organizational requirements applicable to armed groups on the basis of paragraph 1 of Article 1, the armed groups must also be in “such control over a part of [the] territory as to enable them to carry out *sustained and concerted military operations*” [emphasis added]. While these terms are not defined in Additional Protocol II either, the authoritative ICRC commentary to the

body of this chapter in connection with the intensity threshold for application of IHL. While the organizational requirements are relevant and important, and can give rise to governments denying the existence of an internal armed conflict by referring to the armed groups as “rebels” or “terrorists”, it may be argued that the reasons normally put forward for denying the existence of an internal armed conflict more commonly consist of references to the excluded types of situations, such as civil unrest, internal disturbances or sporadic or incidental acts of violence or, in combination with those references, by denying that the intensity of the situation has risen to the threshold level. Finally, the discussion on the intensity threshold is related to both non-international armed conflicts and international armed conflicts (and transboundary non-international armed conflicts).

³¹ While IHL does not apply in such situations, human rights law does, of course, apply, as well as other sources of protection under applicable national and international law. Interestingly, the European Court of Justice, in ruling on the interaction between refugee law and European Community law, stated that IHL and European Community law seek different kinds of protection for different circumstances and provided a specific European law definition of “internal armed conflict” as being a separate and different state of affairs as compared to “armed conflict not of an international character” or non-international armed conflict. European Court of Justice, Case C-285/12 (Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides), 30 January, 2014. Judgment available at: <http://curia.europa.eu/juris/liste.jsf?num=C-285/12> (last accessed on 7 April, 2016). While the reasoning of the Court is legally correct in stating that IHL and European Community law (including refugee rights) serve different purposes, it is debatable whether differentiating between, and providing diverging definitions of, “internal armed conflict” and “armed conflict not of an international character” contributes to legal clarity in these matters.

Protocols explains this to mean an emphasis on “continuity and persistence”, but without an element of intensity, which was deliberately omitted to avoid a “subjective element”.³²

The reasoning behind the criteria contained in Article 1 of Additional Protocol II is consistent with the intent of making applicability of IHL fact-based rather than subject to national (political) interpretation of a situation or subject to political whim, but apart from the resultant inherent risk of conflicting with political views on the situation at hand, this approach may also present difficulties as regards certain specific situations of domestic unrest. Continuous and persistent rioting, for example, which is localized and consists of either unarmed resistance or very little violence but nonetheless requires deployment of the national armed forces,³³ would meet the “continuity and persistence” criterion but could hardly be qualified as an armed conflict in the sense of Additional Protocol II.³⁴ If, therefore, the element of intensity is considered “subjective” and therefore excluded from the determination as to whether a situation qualifies as one resulting in *de jure* applicability of IHL, the question as to what constitutes an “armed conflict” is not easily resolved since the remaining elements either seem

³² Sandoz, *op. cit.*, note 28, p. 1353 (paragraph 4468 – 4469).

³³ Military assistance to civilian authorities, in those States that allow such use of the armed forces, is not limited to situations in which the level of violence exceeds the ability of the police forces to resolve the situation. In the Netherlands, for example, the armed forces (including the Royal Marechaussee as a military police force with (civilian) law enforcement authority), are also deployed if specialized equipment or expertise is required or, simply, when deployment of police units is required for such an extended period of time or on such a large scale that augmentation by military units is required simply to increase the volume of available manpower.

³⁴ Obviously, such situations would in most cases fail to meet the organizational requirements included in Article 1 and thus not qualify as an armed conflict in the meaning of the Protocol. However, if one were to apply the continuity and persistence test to situations which do not rise to the level of application of Additional Protocol II but which would, then, require application of common Article 3, it may be argued that something is still missing and that an additional criterion is required in order to label a situation as an armed conflict. As an aside, the example provided would meet the definition of an “internal armed conflict” as provided by the European Court of Justice as referred to in footnote 31.

insufficient by themselves to make such a determination or lead to qualifying situations as armed conflicts where such a qualification is not realistic (and certainly would meet with considerable political opposition).

Turning to international armed conflicts, it must be noted that the term “armed conflict” is not defined in the body of IHL applicable to international armed conflicts at all, and similar concerns as discussed above can arise in determining the existence of an armed conflict in international settings. Consequently, the question as regards the existence or desirability of threshold criteria applies equally to both international and non-international armed conflicts. Put simply, the question may be asked whether there is an intensity-related threshold for applicability of IHL.³⁵

The question as to the intensity threshold for application of IHL is a divisive issue in the academic world. The ICRC and most academic writers are firmly of the opinion that there is no such threshold and that IHL applies immediately upon the commencement of hostilities, regardless of their intensity. In the Commentary to the First Geneva Convention, for example, it is stated that:

“Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbrous machinery. It all depends on circumstances. If there is only

³⁵ It should be noted that this question concerns the trigger criteria for *de jure* application of IHL, not whether IHL should be applied once a situation of armed conflict unequivocally exists (such as on the basis of other criteria or on an evaluation of the situation as a whole). The obligation to observe IHL “in all circumstances” (as stated in common Article 1 of the Geneva Conventions and Article 1, paragraph 4, of Additional Protocol I) rules out selective application of IHL once an armed conflict exists. The question at hand, however, is whether every situation involving the use of force in or between nations and involving either the armed forces or (organized) armed groups is automatically and instantly to be considered an armed conflict.

a single wounded person as a result of the conflict, the Convention will have been applied as soon as he has been collected and tended, the provisions of Article 12 observed in his case, and his identity notified to the Power on which he depends.”³⁶

The Commentary to the Additional Protocols adds that “humanitarian law also covers any dispute between two States involving the use of their armed forces. Neither the duration of the conflict, nor its intensity, play a role”.³⁷ Finally, in its opinion paper of March 2008, the ICRC reasserts this view, although accepting that an intensity threshold does apply in the case of non-international armed conflicts.³⁸ This view is shared by a number of authors, including Kleffner, who refers to this approach as the “first shot theory”.³⁹

The ruling by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case supports the proponents of the “first shot” or “single shot” theory, including the ICRC⁴⁰ and Vité,⁴¹ by stating that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁴² Although in the same decision (and in fact in the same paragraph) the Appeals Chamber also states, in applying the law to

³⁶ Pictet, *op. cit.*, note 4, p. 32 – 33.

³⁷ Sandoz, *op. cit.*, note 28, p. 40 (paragraph 62).

³⁸ ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, March 2008, available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (last accessed on 7 April, 2016). See pp. 2 – 3 and 5 for international armed conflicts and pp. 3 – 5 for non-international armed conflicts.

³⁹ Kleffner, J.K., “Scope of Application of International Humanitarian Law,” in Fleck, D. [ed.], *The Handbook of International Humanitarian Law*, Oxford, 2013, p. 44 – 45. See also Vité, S., “Typology of armed conflicts in international humanitarian law: legal concepts and actual situations” in *International Review of the Red Cross*, Vol. 91, Nr. 873, March 2009, pp. 69 – 94 (esp. p. 72)

⁴⁰ ICRC opinion paper, *op. cit.*, note 38, p. 2.

⁴¹ Vité, *op. cit.*, note 39, p. 72.

⁴² ICTY, Appeals Chamber, *Tadić (IT-94-1) “Prijedor”*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October, 1995, paragraph 70.

the facts of the case, that “[t]hese hostilities exceed the intensity requirements applicable to both international and internal armed conflicts,”⁴³ that passage appears to be a summary of the previous observations that the requirements for the existence of an armed conflict have been met, with the requirements for the existence of an international armed conflict being different from those for the existence of a non-international armed conflict. Consequently, the ICTY appears to support the “first shot theory”.

It may furthermore be argued that a threshold requirement for the applicability of IHL would not only be in contrast to the (authoritative) commentary by the ICRC to the Geneva Conventions and Additional Protocols but would also lead to undesirable gaps in legal protection and would reintroduce the same “legalistic [and] overly technical” requirements that were removed by making IHL applicable in armed conflicts rather than in declared wars.⁴⁴ In presenting these arguments, Blank and others have turned to the case of Navy Lieutenant Robert Goodman as an example of state practice. In that case, the United States demanded that the captured Lieutenant would be treated as a prisoner of war following his capture by Syrian armed forces and his transfer to Damascus, even though there was no official or recognized state of war or armed conflict between the United States and Syria at the time.

⁴³ Ibid. It should be noted that the (perhaps somewhat selectively quoted) part of the statement referred to by the ICRC already contains the word “protracted,” indicating at least a certain level of intensity.

⁴⁴ Blank, Laurie R. “Ukraine’s Crisis Part 2: LOAC’s Threshold for International Armed Conflict” in *Harvard Law School National Security Journal* (online), available at <http://harvardnsj.org/2014/05/ukraines-crisis-part-2-loacs-threshold-for-international-armed-conflict> (last accessed on 7 April, 2016). In addition to the arguments presented above in the main text, Blank also presents the argument that Ukraine would have no means to enforce application of human rights law (as an alternative to IHL) and that IHL is therefore required to “ensure that foundational level of protection” for detained persons. Blank does not explain, however, how Ukraine would have the means to enforce application of, or adherence to, IHL or how the issue as regards human rights law differs from IHL in that respect.

The contrast between a threshold criterion and the commentary to the Geneva Conventions cannot be denied, as that contrast clearly and unequivocally exists. What is at issue, however, is whether the views expressed in that commentary are (still) valid or whether at least some nuance may be applied. The two additional arguments presented above, and the case of Lieutenant Goodman, are less convincing. First of all, it is not entirely clear why a gap in the law would, *ipso facto*, be evidence that a certain body of law “must” apply. While it may be desirable or even advisable to apply a certain body of law to prevent gaps in the law, that would appear to be more a case of interpretation and desirability rather than *de jure* applicability of the law in question. While the gap argument cannot resolve the issue either way, it is in any case not in itself a convincing argument that a threshold for the application of IHL in international armed conflicts is legally unsound.

Furthermore, it may be questioned whether there is really a gap if application of IHL in an international context is subject to a threshold. Human rights law, as will be discussed in the next chapter, may well fill that gap and provide not only for protection of those harmed by the use of force or taken into captivity, but also provides individual complaints mechanisms absent in IHL. While the United States has consistently (and notoriously) denied extraterritorial applicability of human rights obligations, that is a national position of the United States and not necessarily reflective of the views of other nations, nor in fact of the law itself.⁴⁵ As will be discussed in the next chapter, certainly all the States Parties to the European Convention on Human Rights and Fundamental Freedoms would have to apply the protection offered by that Convention to

⁴⁵ In addition to the discussion on extraterritorial applicability of human rights obligations in the next chapter, see Van Schaak, B., “The United States Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change,” in *United States Naval War College International Law Studies*, Vol. 90 (2014), pp. 20 – 65. See also the views of the Human Rights Committee as regards extraterritorial applicability of the Covenant on Civil and Political Rights in relation to the United States position in United Nations General Assembly Document A/50/40, para. 284 (3 October 1995).

any situation of detention, as would, in fact, all the States Parties to the International Covenant on Civil and Political Rights.⁴⁶

It may also be argued that application or interpretation of the law, especially (specific bodies of) public international law, in a political vacuum or without at least some acknowledgment of political practice and opinion is not realistic. While it is worth repeating the earlier observation that application of IHL is not, and should not be, subject to political choices or considerations of expediency, it is also worth observing that State practice and policy considerations should at least be taken into account and analyzed when interpreting and applying the law. In that context, the Goodman case mentioned above is, as far as State practice is concerned, not an authoritative example. Firstly, the case occurred in 1983 and there have been many incidents since then with far different outcomes in terms of the “injured” State demanding application of IHL.⁴⁷ The capture of Royal Navy servicemen by Iran in 2007, for example, did not lead to demands by the

⁴⁶ Human Rights Committee, General Comment 31, paragraph 10. Note that this would also depend on whether the situation meets the criteria discussed in the next chapter for extraterritorial applicability of human rights. Certainly in instances of detention or other forms of captivity, those criteria will be met. In cases not involving detention or captivity and not involving occupation or other forms of effective control over territory, human rights law would not necessarily apply. In those cases, either a “first shot” approach to applicability of IHL is required or acceptance of a legal vacuum.

⁴⁷ It is also worth pointing out that Lt. Goodman’s aircraft, a Grumman A-6 Intruder attack aircraft operating from the aircraft carrier USS Independence (CV 62), was part of the wing deployed in a bombing attack against Syrian anti-aircraft positions when it was shot down. It may be safely assumed that even for proponents of a threshold approach to international armed conflicts, such use of force would meet that threshold and would therefore entitle Lt. Goodman to prisoner of war status under those circumstances. That context is significantly different from the context of the other examples given below, which include small-scale, localized and highly temporary uses of force across borders between nations involved in long-term territorial disputes or the capture of personnel in situations of contested circumstances and facts, some (e.g. the Iranian capture of British Royal Navy personnel) involving disparate views on jurisdictional or territorial boundaries at sea.

United Kingdom to treat the captured personnel as prisoners of war.⁴⁸ Similarly, in a breach of the cease-fire between Pakistan and India in the Kashmir region in 2015, in which a civilian child was killed, an investigation was called for but neither side considered the incident to have given rise to (a renewal of) an international armed conflict.⁴⁹ Similarly, in a border incident between Thailand and Cambodia in 2014, in which civilians were killed, the incident was not considered to have sparked an international armed conflict and the payment of damages to the families of the victims was openly considered as an appropriate remedy.⁵⁰ In a border shooting incident in October of 2014 between Algeria and Morocco, the incident was described by the authorities as “a grave incident” requiring those responsible to face judicial investigation and prosecution, but was not considered the start (or temporary existence) of an international armed conflict.⁵¹ Finally, there is the case of Ukrainian Air Force officer Nadia Savchenko, who was captured by the organized armed groups of the self-proclaimed Luhansk People’s Republic in Eastern Ukraine in June, 2014, and, according to one side of the events, transferred to the custody of Russian authorities. The Russian authorities, however, have stated that she crossed the border on her own volition and she has been convicted in Russia for her alleged role in the deaths of two Russian journalists. While

⁴⁸ See, inter alia, http://news.bbc.co.uk/2/hi/uk_news/6514567.stm (last accessed on 7 April, 2016), in which United States president Bush describes the captives as “hostages”, <http://www.un.org/press/en/2007/sc8989.doc.htm> (last accessed on 7 April, 2016), in which the United Nations Security Council calls for “an early solution of this problem” without assigning a specific status to the captured personnel, and http://news.bbc.co.uk/2/hi/uk_news/6494289.stm (last accessed on 7 April, 2016), in which the United Kingdom authorities merely refer to the captured personnel as “detainees”.

⁴⁹ See <http://www.aljazeera.com/news/asia/2015/01/pakistani-teen-shot-dead-indian-forces-20151364054593623.html> (last accessed on 7 April, 2016).

⁵⁰ See <http://www.phnompenhpost.com/national/bangkok-admits-shooting-civilians> (last accessed on 7 April, 2016).

⁵¹ See <http://english.alarabiya.net/en/News/africa/2014/10/20/Algeria-Morocco-tensions-flare-over-border-shooting.html> (last accessed on 7 April, 2016).

Savchenko's lawyer stated at the time that she was a prisoner of war,⁵² Savchenko filed a complaint with the European Court of Human Rights, claiming violation of her right to liberty and of her right to a fair trial.⁵³ Apart from the issue of whether there is a basis for detention in humanitarian law as it relates to non-international armed conflict and the question as to the nature of the conflict in Ukraine, the Savchenko case brings the discussion as regards protective mechanisms and applicable law in cross-border incidents into sharp focus and will make the ruling of the European Court in this case especially significant in the light of the present discussion.

Political realism, therefore, and recent state practice indicate that there is at least some merit to considering the possible existence of an alternative approach, which is that there is an intensity threshold and that it applies to both international and non-international armed conflicts, or at least allowing room for a more nuanced approach than the “single shot” or “first shot” theory. Moreover, assuming that such a threshold exists for international armed conflicts can be based on the same reasoning and approach as applies to the reason for the existence of an intensity threshold for non-international armed conflict: the reluctance of States to classify a situation as an armed conflict. The author's experience is that the political reluctance to acknowledge the existence of a non-international armed conflict⁵⁴ is matched by a political reluctance, at least as regards more recent military operations, to classify an operation as an international armed conflict or to acknowledge the existence of such a conflict.⁵⁵ This view is supported by Gioia, who states that “[f]rom a purely political point of view,

⁵² See http://www.washingtonpost.com/opinions/russias-illegal-prisoners-of-war/2014/12/24/d68fc5ae-8ad7-11e4-9e8d-0c687bc18da4_story.html (last accessed on 7 April, 2016). Note that Savchenko was released on May 25, 2016, as part of an exchange of prisoners and is no longer in Russian captivity.

⁵³ See <http://www.ejiltalk.org/the-case-of-russias-detention-of-ukrainian-military-pilot-savchenko-under-ihl/#more-13125> (last accessed on 7 April, 2016).

⁵⁴ See footnote 31. See also Pictet, *op. cit.* note 4, pp. 43 – 44 for a description of the discussions during the drafting of common Article 3 and the concerns regarding the introduction of legal rules applicable to non-international armed conflicts.

⁵⁵ Hoffman, *op. cit.*, note 16.

the reluctance of states to admit that their military forces abroad are involved in an international armed conflict, let alone one involving the belligerent occupation of foreign territory, or (indeed, even more so) that an internal situation amounts to a civil war is notorious”.⁵⁶ Ducheine similarly points to political reasons as a cause for reluctance to classify an operation as an armed conflict, as well as to psychological effects.⁵⁷ Where

⁵⁶ Gioia, A., “The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict,” in Ben-Naftali, O., *International Humanitarian Law and International Human Rights Law*, Oxford, 2011, p. 220.

⁵⁷ Ducheine, op. cit., note 30. The political reasons are referred to on p. 281 while the psychological effects, including the impact of the criminal law consequences of the applicability of IHL (i.e. that crimes can be prosecuted as war crimes) on the military psyche, are discussed on pp. 285 – 286. Ducheine also points to the position taken by the government of the Netherlands as regards the ISAF operation, for which it was argued that the level of hostilities could temporarily and locally rise to a level requiring *de jure* applicability of IHL, apart from the (policy-based) *de facto* application of IHL by Netherlands armed forces in all operations. The present author made a similar statement, see Boddens Hosang, J.F.R., “Aandachtspunten in de ISAF ROE vanuit het strategisch-juridische kader,” in *Militair Rechtelijk Tijdschrift*, 2009, nr. 5, p. 219-226. It should be noted that while the present author avoided labelling the ISAF operation either way (although pointing out that operation Enduring Freedom was, without question, in any case an armed conflict), the government position went somewhat further and stated that the ISAF operation was not an armed conflict. See parliamentary document 27 925, nr. 287 (Combatting international terrorism (Bestrijding Internationaal Terrorisme), List of Questions and Answers (Lijst van vragen en antwoorden)), 19 december 2007, p. 121. The government adds, on the same page, that even where IHL applies *de jure*, this does not necessarily make the entire ISAF as a whole a party to the conflict. This point of view was based in part on the fact that the situation in the north of Afghanistan was significantly different from the situation in the south and the fact that the Provincial Reconstruction Teams in the north of Afghanistan, although part of the ISAF operation, carried out significantly different duties as compared to the task force units in the south. Notwithstanding the present author’s own admittedly ambiguous statement in 2009 (although referring specifically to the relation between *de facto* and *de jure* applicability of IHL), an approach whereby IHL is applicable *de jure* to the actions undertaken by a force without labelling that force a party to the conflict, and an approach limiting applicability of IHL to a temporary and localized use of force within a larger and on-going operation or situation involving the use of force, is a political interpretation that, although understandable in certain circumstances, is

political reluctance to acknowledge a situation of non-international armed conflict gave rise to a threshold in the Second Additional Protocol, including an intensity threshold, for the applicability of IHL, it stands to reason that the same reluctance as regards international armed conflicts would, at least from a political realism perspective, equally give rise to an intensity threshold for applicability of IHL to international armed conflicts.

The possible existence (or acceptance) of an intensity threshold for the applicability of IHL to international armed conflicts is supported by a number of authors, including Ducheine⁵⁸ and Zwanenburg.⁵⁹ It is also supported by state practice, as examined in the Final Report by the International Law Association.⁶⁰ The report states that: “[t]he assessment here of state practice and *opinio juris*, judicial opinion, and the majority of commentators support the position that hostilities must reach a certain level of intensity to qualify as an armed conflict,” and differentiates between armed conflict on the one hand and “border clashes” and other similar incidents on the other hand.⁶¹

However, in view of the observation presented several times above that application of IHL is not and should not be made subject to political expediency, but without discounting the views and the examples of State practice just set forth, a more nuanced approach to the threshold issue may

not easily reconcilable with the commonly accepted legal interpretation of the law. The law is clear, after all, that once IHL becomes applicable, the parties involved become parties to the armed conflict and IHL remains applicable until the cessation of hostilities (and, where applicable, the cessation of belligerent occupation of territory).

⁵⁸ Ducheine, *op. cit.*, note 30, pp. 285 – 286.

⁵⁹ Zwanenburg, M.C., *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations*, Leiden, 2004, p. 197. Zwanenburg also indicates that States do not readily explain their decisions to classify a situation as being an armed conflict or not. In the author’s experience this is true as regards public statements, since the political reasoning behind such choices would normally be of a certain level of sensitivity precluding public explanation.

⁶⁰ International Law Association, *Use of Force*, The Hague, 2010, available at <http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87> (last accessed on 7 April, 2016).

⁶¹ *Ibid.*, pp. 28 – 29.

offer a modest form of reconciliation between the “first shot” approach and the “absolute threshold” approach as regards the existence or acknowledgment of international armed conflicts. In seeking such nuance, the contributions made by Greenwood⁶² to this issue can provide valuable guidance. Firstly, as regards the Goodman case discussed above, Greenwood observes that the “very broad definition applied in the Goodman incident might be reconsidered today.”⁶³ More importantly and more generally, however, Greenwood observes that:

“[i]t is not clear, however, that countries always take such a broad view of what constitutes an armed conflict; many isolated incidents, such as border clashes and naval incidents, are not treated as armed conflicts. It may well be, therefore, that only when fighting reaches a certain level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply.”⁶⁴

Greenwood furthermore differentiates between actions by state agents and those of a private person⁶⁵ and thus, in addition to his observations on differentiating between “incidents” and armed conflicts, also provides a differentiation as regards the rationale of the person using force or initiating detention of other persons. These observations then lead to two preliminary conclusions. Firstly, incidents, even those involving the use of force or detention, which are considered “merely” incidents by all of the (State) parties involved and which are limited in time and intensity do not amount to the existence of an armed conflict or the application of IHL, but should be resolved through diplomatic means and by application of other (public international) law. Secondly, acts undertaken by an actor in his or her capacity as a private person do not (necessarily) trigger the existence of an armed conflict or (*de jure*) applicability of IHL. It may be safely suggested

⁶² Greenwood, C.J., “Scope of Application of Humanitarian Law”, in Fleck, D. [ed.], *Handbook of International Humanitarian Law in Armed Conflict*, Oxford, 1999/2008 (2nd ed.). Sadly, Greenwood’s valuable observations are missing in later editions of the Handbook.

⁶³ *Ibid.*

⁶⁴ Greenwood, *op. cit.*, note 62, p. 48.

⁶⁵ *Ibid.*

that acts carried out in error (of fact) would fall under the latter category. If these observations are presented in matrix form, the following observations on the applicability of IHL in a more nuanced “half threshold” approach could be considered:

Actor ∨ Subject -->	Civilian	Organized Armed Group	Military ⁶⁶
Civilian	Criminal law	Criminal law	Criminal law
Organized Armed Group ⁶⁷	Criminal law	NIAC rules ⁶⁸	NIAC rules
Military a/p ⁶⁹	Human rights law/ IWA ⁷⁰	Human rights law/IWA (but may lead to NIAC)	Human rights law/IWA (but may lead to IAC if not “incident”)
Military o ⁷¹	Human rights law/IHL if not “incident”	NIAC rules	IHL ⁷² if not “incident”

⁶⁶ Since this row sets forth the subject or victim of the use of force or detention, the distinction between official acts and accidental or personal acts does not apply.

⁶⁷ This category refers to civilians engaged in direct participation in hostilities, whether as part of a “continuous combat function” or *ad hoc*. What is at issue is the difference between a civilian “acting in a private capacity” and civilians carrying out activities directly related to hostilities in the context of an armed conflict.

⁶⁸ NIAC rules means that the threshold criteria for the existence of a non-international armed conflict must be met. If those criteria are not met, then “peacetime law”, such as (inter alia) criminal law will apply.

⁶⁹ “A/p” indicates the act was committed either accidentally or as a private act, that is not ordered or sanctioned by the government in question. Of course a truly private act, such as acts committed outside of official duty, would relegate these acts to the level of “civilian” and therefore subject to criminal law. What is meant here are acts committed on a military person’s own volition, such as *ultra vires* exercise of powers or authority.

⁷⁰ “IWA” stands for “internationally wrongful acts”, meaning the incident would need to be resolved between the governments in question in accordance with the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission.

⁷¹ This row covers official State acts, meaning the military personnel were acting under orders of, or their actions were sanctioned by, the government in question.

⁷² While international humanitarian law would apply *de jure*, there is the possibility (or, in fact, currently more common practice) of States resolving minor issues involving the inter-state use of force or detention by application of principles or rules of other (international) law or denying that an armed conflict (however limited and short) arose, such

Concomitant to national, domestic, political reasons for State reluctance to classify a situation as an (international) armed conflict, it may be politically tempting to view the existence of an authorizing resolution by the United Nations Security Council (as legal basis or mandate for a military operation) as an additional reason to classify military engagements as situations other than armed conflict. Given that operations authorized by the UN and mandated in furtherance of protecting or re-establishing international peace and security are meant to be expressions of the will of the international community, and given that UN-led operations are meant to be impartial, it is understandable that this would cause political reluctance to accept that those operations can be classified as an armed conflict and that the multinational forces involved can be parties to that conflict, especially as regards operations under UN command and control.⁷³ However, this reluctance, or this approach, blends *jus ad bellum* with *jus in bello* to a degree that would reintroduce the concept of “just war” and is legally untenable.

When nations act individually or collectively but outside UN command and control (UN-led operations are discussed below), there seems little legal argument why, provided the hostilities reach the threshold of an armed conflict, IHL should not apply, regardless of whether the operation is based on a mandate by the UN Security Council. While the intensity threshold is, as was discussed above, controversial and not accepted by all, it is uncontroversial that the intentions or purpose of military operations cannot by themselves give cause for non-applicability of IHL. The reason or legal basis for initiating armed force, covered by the *jus ad bellum*, is a (legal) issue separate from the determination which law

as by dismissing the situation as an “incident”. See the main text for further explanation of this.

⁷³ Hoffman, *op. cit.*, note 16. See also (inter alia) the keynote address by Dr. Jakob Kellenberger, President of the ICRC, presented at the International Institute of Humanitarian Law on 4 September, 2008, available at <http://www.icrc.org/eng/resources/documents/statement/peace-operations-statement-040908.htm> (last accessed on 8 April, 2016) and Zwanenburg, *op. cit.*, note 59, p. 201.

applies to the use of force itself during the conduct of the subsequent military engagement (the *jus in bello*).⁷⁴ The obligation to observe IHL (once applicable) under all circumstances precludes a purpose or intention oriented differentiation, in addition to the observation that such a differentiation would result in a highly undesirable subjective and political influence on the applicability of IHL, something which was deliberately removed from the discussion by the introduction of the concept of “armed conflict” rather than “war”.⁷⁵ Even if the military operation is mandated by the Security Council and serves a purpose supported by the international community, in other words, there is no legal reason why the conduct of the operation should not be governed by IHL once the intensity threshold is reached.⁷⁶

⁷⁴ See, inter alia, Kleffner, *op. cit.*, note 39, p. 48.

⁷⁵ Such an approach would reintroduce the concept of “just war” and create separate categories of armed conflict, with – following this logic – separate requirements as regards the applicability of IHL, something that clearly runs counter to the object and purpose of the Geneva Conventions and their Additional Protocols. While the obvious differentiation between international and non-international armed conflicts already creates a concomitant difference between the applicable rules, both sets still fall under the overall concept of IHL and the differences between them have no bearing on whether IHL as such is applicable to an armed conflict. However, some authors have argued that modern operations, aimed at peace enforcement (rather than conquest or similar “traditional” reasons for warfare) and with a strong focus on post-conflict redevelopment and reconstruction, call for an additional category of conflicts with its own set of IHL rules. While there is clear merit in that concept and its inherent recognition that modern operations are rarely of the types envisaged in the Geneva Conventions and Additional Protocols, no state practice or *opinio iuris* as yet exists as to the recognition of such a distinct category, nor as regards the rules that would apply to such a distinct category. At present, therefore, and regardless of the inherent difficulties involved in the discussion, the question remains whether and when military operations, regardless of their intentions or mandate, rise to the level of armed conflict and thus trigger *de jure* applicability of (current) IHL. See Hoffman, *op. cit.*, note 16 and Stahn, C., “‘Jus ad bellum’, ‘jus in bello’... ‘jus post bellum’? – Rethinking the Conception of the Law of Armed Force,” in *European Journal of International Law*, Vol. 17 no. 5, 2007.

⁷⁶ A view supported by, inter alia, Garraway, C.H.B., “Applicability and Application of International Humanitarian Law to Enforcement and Peace Enforcement Operations,” in Fleck, D. and Gill, T.D. [eds.], *The Handbook of the*

A conceptually more difficult and controversial question is the applicability of IHL to operations directly under UN command and control. Three arguments may be considered to call into question whether IHL applies to such operations. Firstly, the United Nations was, of course, established as a neutral, supranational, organization with the purpose to (inter alia) “maintain international peace and security.”⁷⁷ Such an auspicious role seems difficult to reconcile with the status of party to an armed conflict. Secondly, there is the legal difficulty that the UN is not a party to IHL instruments.⁷⁸ Finally, the obligations under international law, including IHL, of the member States providing military forces to the UN may be superseded by their obligations towards the UN under the United Nations Charter.⁷⁹

The arguments just presented can be countered, however. The status, purpose and *raison d'être* of the United Nations certainly put the

International Law of Military Operations, Oxford, 2010, pp. 129 – 133. See also the Report on the Expert Meeting on Multinational Peace Operations organized by the ICRC in 2003 (available at http://www.icrc.org/eng/assets/files/other/irrc_853_fd_application.pdf (last accessed on 8 April, 2016)), which states “The question of the mandate entrusted to the force by the Security Council may have *jus ad bellum* consequences, but is irrelevant in determining the applicability of humanitarian law, which is a question of *jus in bello*.” The report also points to the conceptual differentiation sometimes made between peacekeeping (in which a law enforcement paradigm would apply, as also argued by Garraway) and peace enforcement operations. However, such differentiation is less related to the purpose of the operation or the applicability of IHL, than to the expectation that it is simply less likely that the intensity threshold will be reached in “pure” peacekeeping operations carried out with the consent of the (local) parties.

⁷⁷ Article 1, paragraph 1, of the Charter of the United Nations. See also Article 2, paragraph 5, and Article 25 which sets forth the obligation of the member States to assist the UN “in any action it takes in accordance with the present Charter”, the prohibition on assisting States against which the UN is carrying out (peace) enforcement action, and the obligation to carry out decisions of the Security Council.

⁷⁸ It may be argued that the UN, in fact, cannot be a party to the instruments either. See Zwanenburg, *op. cit.*, note 59, p. 140 – 143.

⁷⁹ Article 103 of the UN Charter. See also Zwanenburg, *op. cit.*, note 59, esp. p. 147.

organization in a unique and exalted position, but are nonetheless, as far as the use of force by operations under UN command and control is concerned, arguments related to the authority to use force and to the purpose and intentions behind that use of force. As was argued previously, such (subjective) arguments are unrelated to the objective determination as to whether the threshold for application of IHL has been reached during the conduct of the operation. While the UN is indeed not a party to the instruments of IHL, great portions of those instruments, including the Geneva Conventions, the majority of Additional Protocol I and parts of Additional Protocol II, are considered customary law and apply regardless of whether the state (or organization) in question has ratified these instruments.⁸⁰ Finally, as regards the relationship between the obligations under the Charter and other obligations under international law, while the obligation of the Member States to carry out Security Council decisions and to adhere to the Charter of the United Nations takes precedence in case of conflicts with obligations under other instruments of international law,⁸¹ and the Security Council may, legally, set aside rules of international law,⁸² it is at the very least debatable whether that would include authority to set aside peremptory norms of (customary) international law. It also seems highly unlikely, to say the least, that the UN would choose to set aside or overrule obligations under IHL, since it may safely be argued that derogating from (customary) IHL runs counter to the object and purpose of

⁸⁰ In so far as necessary, for the customary law status of the (Hague and) Geneva Conventions, see (inter alia) the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, 8 July, 1996, paragraph 79; for Additional Protocol I, see (inter alia) Pocar, F., “To What Extent Is Protocol I Customary International Law?” in *U.S. Naval War College International Law Studies*, Vol. 78, 2002; as regards Additional Protocol II, see (inter alia) ICTY, Appeals Chamber, *Tadić (IT-94-1) “Prijedor”*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October, 1995, § 117, and ICTR, Chamber I, *Prosecutor versus Jean-Paul Akayesu* (ICTR-96-4-T), 2 September, 1998, § 609 (referring back to the ICTY’s *Tadić* Decision of 2 October 1995.).

⁸¹ Articles 25 and 103 of the Charter of the United Nations.

⁸² For an extensive analysis of this issue, including derogation from customary law and even *jus cogens* by the UN, see Zwanenburg, *op. cit.*, note 59, pp. 144 – 152.

the UN's role in maintaining peace and security. It would, in any case, clearly have a highly negative impact on the credibility of the organization. An additional argument against such a situation arising is that the troop contributing nations are, of course, bound by IHL once it becomes applicable. Notwithstanding the fact that operations under UN command and control are (temporary) subsidiary organs of the UN, the national contingents remain bound by the domestic law of, and the international law applicable to, their sending states. This is also due to the fact that national contingents, although enjoying certain privileges and immunities and remuneration by the UN and under the injunction not to accept national instructions while under UN command and control, do not become employees of the UN. Moreover, they remain under the criminal jurisdiction of their sending State. Should a member of such a national contingent commit an act that violates IHL (assuming IHL would objectively be applicable to the situation in which the act was performed), the national courts would be faced with a complex challenge as regards the applicability of IHL to that "UN soldier". Barring an explicit statement or instruction from the UN excluding adherence to IHL for the operation in question (which would appear to be a purely hypothetical situation), it seems likely that the national courts would apply IHL in their determination in such a case.⁸³

⁸³ The most complex question is, however, which law applies to UN personnel (i.e. those who are employees of the UN itself) during a situation of armed conflict. For the differences in status, privileges and immunities of UN staff and national contingents, see the status of forces agreements concluded between the UN and host nations; an example (in this case for UMISS) is available at <http://unmiss.unmissions.org/LinkClick.aspx?fileticket=gpHXyf3LQ0k%3D&tabid=5100&language=en-US> (last accessed on 8 April, 2016). See also the Convention on Privileges and Immunities of the United Nations, Articles V and VI. For the responsibilities of troop contributing nations, including disciplinary and criminal investigations and prosecution of national contingents, see the Contingent Owned Equipment manual, including the standard Memorandum of Understanding between the UN and troop contributing nations, available at http://www.un.org/en/peacekeeping/sites/coe/referencedocuments/COE_manual_2011.pdf (last accessed on 8 April, 2016).

While the UN itself has not made any definitive or clear statements on the issue, the fiftieth anniversary of the Geneva Conventions did provide an opportunity for the UN to give some indication as to the applicability of IHL to UN operations. The Secretary General's Bulletin on "Observance by United Nations forces of international humanitarian law"⁸⁴ sets forth the UN's interpretation of basic principles of IHL to be observed by forces under United Nations command and control. While the majority of the rules contained in the Bulletin are straightforward and reflect basic principles of IHL, some variances exist between the text in the Bulletin and the original IHL provisions.⁸⁵ The Bulletin was also not uncontroversial when it was initially promulgated.⁸⁶ Furthermore, the provision in the Bulletin on its scope of application is, to put it mildly, somewhat unclear. Paragraph 1.1 of the Bulletin states that it is applicable "to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants." That, in itself, appears to be a clear statement. The paragraph continues, however, by stating that such applicability exists "to the extent and for the duration of their engagement." It is not entirely clear what is meant by this part of the statement, as this seems to imply only temporary applicability, a concept that runs counter to basic IHL.⁸⁷ Finally, the paragraph states that the rules set forth in the Bulletin "are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defense." This part of the paragraph is even less clear. While it may give fuel to the fire as regards the view that lawyers over-analyze textual subtleties, the comma between "actions" and "or in

⁸⁴ UN Document ST/SGB/1999/13 of 6 August, 1999.

⁸⁵ See Zwanenburg, M.C., "The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: A Pyrrhic Victory?" in *Military Law and Law of War Review*, Vol. 39, 2000, which provides a comprehensive analysis of the differences between the provisions in the Bulletin and the source provisions in IHL.

⁸⁶ *Ibid.*, pp. 17 and 28.

⁸⁷ See footnote 57 as regards applicability of IHL until the cessation of hostilities. The wording of the Bulletin appears to make an exception to this principle of IHL and appears to indicate that the UN advocates temporary and local applicability of IHL, similar to the position taken by the government of the Netherlands in the context of the ISAF operation.

peacekeeping operations” is part of the problem. Taken literally, the wording suggests that the Bulletin applies to enforcement actions *per se*, as well as to peacekeeping operations which allow the use of force in self-defense. Since self-defense is an inherent right,⁸⁸ this is an odd statement and would suggest that the Bulletin always applies to all peacekeeping operations as well as all enforcement actions, making the distinction in the statement seem superfluous. Given the complexities and lack of clarity of the paragraph as such, an interpretative or perhaps teleological approach to the paragraph would seem suitable, leading to the conclusion that the Bulletin applies to UN forces whenever the objective circumstances in the operation at hand lead to the conclusion that the forces in question have become a party to the conflict and are engaged therein as combatants. This view is supported by Garraway, among others⁸⁹ and is in keeping with the general principle of IHL that IHL applies once the objective criteria have been met, regardless of any political or policy considerations.

The ICRC, on the other hand, is less circumspect about its views on applicability of IHL to UN forces and has stated consistently that it considers such forces to be subject to IHL when they are a party to a conflict.⁹⁰ The view that UN forces can be considered parties to a conflict is shared by others⁹¹ and would seem to be inevitable at least in certain operations. Historically, the extensive combat operations of the *Opération des Nations Unies au Congo* (ONUC) in the context of the Katanga secession in the Congo in the early 1960s would make it very difficult to deny the existence at that time of an armed conflict to which the UN force in question was a party. More recently, the creation of a combat brigade

⁸⁸ See Chapter 3.

⁸⁹ Garraway, *op. cit.*, note 76, p. 130; Zwanenburg, *op. cit.*, note 85, pp. 20 – 22.

⁹⁰ Palwankar, U., “Applicability of international humanitarian law to United Nations peace-keeping forces,” in *International Review of the Red Cross*, No. 294, 1993; Zwanenburg, *op. cit.*, note 85, p. 15.

⁹¹ See, for example, Khalil, M., “Humanitarian law & policy in 2014: Peacekeeping missions as parties to conflicts,” available online at <http://phap.org/thematic-notes/2014/february/humanitarian-law-policy-2014-peacekeeping-missions-parties-conflicts> (last accessed on 8 April, 2016).

under UN command, the first in the history of the UN, to augment the UN efforts in – again – Congo would seem to support the concept or at least the possibility that UN forces can become engaged in combat operations of such a nature and intensity that *de jure* applicability of IHL cannot be denied.⁹²

A number of UN or UN-related documents at the very least seem to indicate that the UN also accepts the possibility that the UN can, in principle, become a party to a conflict. Apart from the Secretary-General's bulletin discussed above, the Convention on the Safety of United Nations and Associated Personnel can be mentioned in this context. While the Convention prohibits (inter alia) attacks on UN personnel and carries the obligation on States to criminalize such attacks, Article 2, paragraph 2, states that the Convention does not apply "to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies." Furthermore, Article 20, subparagraph (a), states that the Convention does not affect "[t]he applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards." It goes without saying that these provisions clearly recognize at least the possibility that UN operations can become parties to the conflict and are obligated to apply IHL.⁹³

⁹² See, inter alia, Reuters, "U.N. combat brigade fires on Congo rebel positions," available at <http://www.reuters.com/article/2013/08/23/us-congo-democratic-fighting-idUSBRE97M0O420130823> (last accessed on 8 April, 2016).

⁹³ Some debate is possible as to the curious wording of Article 2, paragraph 2, which appears to exclude peacekeeping operations as being possible parties to a conflict. While it is, of course, less likely that a traditional peacekeeping operation will become a party to the conflict than that an enforcement operation would find itself in that situation, it is not impossible. See Zwanenburg, *op. cit.*, note 59, pp. 178 – 179. It should be noted that the Secretary-General's Bulletin does not make such a distinction and includes peacekeeping operations.

Finally, apart from the discussion above on *de jure* applicability of IHL, a number of nations have taken a pragmatic, safe approach to the issue of applicability of IHL and quite simply apply IHL as a matter of policy, regardless of whether IHL formally applies to the operation in question. These nations include the United States⁹⁴ and the Netherlands.⁹⁵ As the Netherlands document indicates, this policy is aimed at applying the restrictions, including the protective provisions, of IHL as a safe margin for operations, while recognizing that the ROE and other directives for operations not rising to the level of an armed conflict will likely be even more restrictive than the IHL obligations. It should be noted, of course, that notwithstanding the laudable intent of such *de facto* application of IHL, policy choices are without prejudice to determinations as regards *de jure* applicability of IHL. It should also be noted that a distinct criminal law difference remains between *de facto* and *de jure* application of IHL: in the case of the former, a violation of the ROE and directives will be “normal” crimes, in so far as such violations amount to a crime,⁹⁶ while in the latter case a violation of IHL may constitute a war crime and therefore lead to far graver (criminal law) consequences.⁹⁷

III. Elements of the laws of armed conflict as reflected in Rules of Engagement

Whether IHL is applied *de jure* or *de facto*, IHL as a whole has an inevitable effect on, and interaction with, the ROE for international⁹⁸ military

⁹⁴ Law of Armed Conflict Deskbook, *op. cit.*, note 3, p. 27 – 28.

⁹⁵ Parliamentary document 30 300 X nr. A, Letter by the Minister of Defense of 25 November, 2005, p. 4 – 5.

⁹⁶ See chapter 6 for an extensive discussion on the criminal law aspects of ROE.

⁹⁷ See Ducheine, *op. cit.* Note 30.

⁹⁸ In principle, the ROE applicable to armed forces in national operations would, in situations amounting to a non-international armed conflict, be influenced by IHL as well, along the same lines as outlined in the main text regarding international operations. However, it seems more likely that in such situations, the ROE would be equally influenced by considerations of human rights law, as will be discussed in the next chapter.

operations. While the ultimate objectives may be different,⁹⁹ both IHL and ROE dictate permissible conduct as regards the use of force during military operations, including the engagement of specific targets, both persons and objects. Consequently, some types of ROE directly reflect, and are directly influenced by, correspondent rules of IHL. This is especially the case for ROE derived from the IHL principles of distinction and proportionality and for ROE related to specific methods and means of warfare.¹⁰⁰ Finally, this section will present some observations on how the IHL principles of necessity and humanity influence the ROE as a whole.

⁹⁹ See chapter 1, p. 50, as regards the objectives and purposes of ROE in the context of escalation dominance. While ROE seek to control the conduct of hostilities in order to serve primarily operational and political objectives, IHL seeks to control the conduct of hostilities in order to protect specific categories of persons and objects and to promote humane conduct during the course of hostilities.

¹⁰⁰ Arguably ROE related to detention may be influenced by the rules of IHL regarding the treatment of prisoners of war. In practice, however, the ROE themselves rarely contain detailed instructions on the treatment of detainees and only indicate when persons may be detained at all, as well as which (category of) persons may be detained. The actual treatment of detainees is commonly set forth in more specific guidelines, directives, etc. This topic will also be discussed further in chapter 5, on the relationship between human rights and ROE.

A. Principle of distinction¹⁰¹

One of the core principles of IHL is that in applying force, a distinction must be made between legitimate military objectives on the one hand, and persons or objects which enjoy protection under IHL on the other hand. The clearest statement of this principle can be found in the combination of Articles 48, 51 and 52 of the First Additional Protocol. While the principle itself is part of customary law, the definition of valid military objectives as set forth in Article 52 is not interpreted in the same way by all states.¹⁰² The

¹⁰¹ While distinction (also referred to as discrimination) is one of the four core principles of IHL, along with humanity, necessity and proportionality, some care must be taken in distinguishing between these principles of IHL and the normative, prescriptive rules of IHL themselves. See inter alia Schmitt, M.N., “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis” in *Harvard National Security Journal*, Vol. 1, 2010, pp. 40 – 41. Acting contrary to the principles of IHL does not necessary lead to a violation of IHL or to a (war) crime unless a (concomitant) violation of the actual rules of IHL (or other law) based on those principles occurs. While it is somewhat difficult to consider a situation in which a violation of the principles does not automatically lead to a violation of the rules, what is important to emphasize – as is apparent in the discussion, below, on the topic of direct participation in hostilities and the controversy surrounding certain views expressed by the ICRC in that context – is that the principles have been reflected and expressed in the (black letter) rules of IHL and are not themselves rules as such. As regards the wording of the principle under discussion, while “discrimination” is still commonly used in certain contexts (e.g. “target discrimination”), the negative connotation to that word and the potential for confusion with its other meaning in (international) law has led the present author to prefer using the term “distinction” to describe this principle.

¹⁰² The customary law nature of the principle of distinction is expressed, inter alia, in the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons referred to in footnote 62; the Judgment of the Supreme Court of Israel 769/02 Public Committee Against Torture in Israel v. Government of Israel (Targeted Killings Case) [2006] IsrSC 57(6) 285, § 23; the judgment of ICTY Trial Chamber III, *Prosecutor v. Dragomir Milošević*, 12 December, 2007, § 940 – 941; and Henckaerts, *op. cit.* note 22, specifically Chapters 1 and 2. Apart from its role in the discussion on direct participation in hostilities discussed below, the Supreme Court of Israel’s ruling is included here, as establishing the customary law nature of a rule illustrated by reference to the First Additional Protocol is made more relevant by reference to the *opinio juris* of nations not a party to that Protocol, such as Israel and the United States, since the

issues regarding the interpretation of the concept of “military objective” will be discussed below. IHL is clear, however, as regards application of the principle of distinction and forbids, inter alia, attacks which are not directed at a (specific) military objective, including attacks with weapons or systems that cannot be so directed,¹⁰³ and attacks which treat several separated and distinct military objectives within an area containing civilians and civilian objects as one single military objective.¹⁰⁴

One of the reasons to avoid oversimplification of the principle of distinction is that the rules of IHL reflect a careful balance between the protective purpose of the rules and the reality of military operations. As a result of this balance, the rules allow for exceptions. For example, the prohibitions on attacking civilians only apply if the civilians do not directly participate in hostilities. As regards civilian objects, the prohibition on attack comparably only applies if the object does not through its use, location, purpose or nature make an effective contribution to military action.¹⁰⁵ These exceptions make a direct and literal translation of the principle of distinction into clear and concise ROE difficult, especially as ROE are intended to be concise and simply worded, but to nonetheless apply throughout the operation for which they are implemented.

In general, the implementation of the principle of distinction in the ROE is achieved through the specific ROE related to targeting.¹⁰⁶ While

opinio juris of nations which are a party to the Protocol will, *ipso facto*, reflect the rules of the Protocol itself. This point is also made by Boothby in Boothby, W., “‘And For Such Time As’: The Time Dimension to Direct Participation in Hostilities”, in *Journal of International Law and Politics*, Vol. 42, 2010, p. 763. The definition of valid military objectives and the different opinions thereon are discussed further below in connection with the targeting of objects.

¹⁰³ Article 51, paragraph 4, of the First Additional Protocol.

¹⁰⁴ Article 51, paragraph 5 under a, of the First Additional Protocol.

¹⁰⁵ The additional requirement regarding the definite military advantage to be gained from the destruction, capture or neutralization of the object will be discussed below.

¹⁰⁶ Boothby, *op. cit.* note 102, on page 741 states: “Critical to the law of targeting is the principle of distinction.” In this chapter, the term “targeting” is used for the selection of persons and objects as being the valid or legitimate subject of the action authorized by the ROE. In modern operations, such actions are frequently not limited to the use of force (“kinetic” actions) and include non-lethal

ROE are always tailor-made for the operation for which they are implemented, every ROE set will by necessity always contain specific ROE on targeting. This is an inherent result of the fact that ROE, and the military operation for which they are implemented, quite simply exist due to the basic assumption that force may have to be used to achieve the objective of the operation. The authority to use force in the context of the operation must consequently be directed and regulated to ensure compliance with both the law and the political parameters for the operation.¹⁰⁷ Such regulation begins by determining who and what may be made the subject of any use of force in the operation in question.

Targeting instructions in the ROE consist of two types. The first type is the category of ROE authorizing the use of force or other “provocative” action against specific (categories of) objects and persons. These ROE are specific for the operation in question, for two reasons. Firstly, ROE

actions or actions which have no relationship with the use of force at all (“non-kinetic” actions). Such non-kinetic actions can involve methods or means aimed at enhancing or maintaining local support for an operation or at building local capacity with a view to post-conflict development and reconstruction. Examples include so-called “key leader engagement” operations. See, for example, the United States Department of the Army *Field Manual FM 3-24 (MCWP 3-33.5) Counterinsurgency*, Headquarters of the Department of the Army, 2006, which states that ‘Nonlethal targets are usually more important than lethal targets in COIN; they are never less important.’ See also Hull, Jeanne F., “Iraq: strategic reconciliation, targeting, and key leader engagement,” U.S. Army War College Strategic Studies Institute, 2009. Available at: <http://www.strategicstudiesinstitute.army.mil/pdf/files/pub938.pdf> (last accessed on 8 April, 2016). Carrying out such key leader engagement actions requires specific ROE, such as those authorizing the type of engagement (such as ROE for information operations or psychological operations), as well as supporting ROE, such as those authorizing entry into specific geographic areas in order to facilitate the engagement. While, consequently, non-kinetic operations and non-kinetic targeting (selecting the key leaders or other groups or individuals to be considered valid subjects of such non-kinetic operations) are intrinsically related to ROE, they are not normally related to IHL. Consequently, such non-kinetic targeting will not be discussed further here. See also Boddens Hosang, J.F.R., “Rules of Engagement and Targeting,” in Ducheine, P., Osinga, F.P.B., and Schmitt, M.N. [eds.], *Targeting: The Challenges of Modern Warfare*, TMC Asser, 2016, chapter 10.

¹⁰⁷ See chapter 1, pp. 41 – 46 for a discussion of the political component of ROE.

authorizing actions against specific objects or persons based on their nature (in terms of objects) or identity (e.g. belonging to a specific group or (opposing) force or faction in the area of operations) are inherently related to the mandate, objective and purpose of the operation in question. Secondly, ROE authorizing the attack, other use of force or other (non-violent) action against certain more generic categories of targets¹⁰⁸ will need careful scrutiny to ensure compliance with the mandate or (other) legal basis for the operation. While both types of ROE are obviously related to IHL in some degree (and neither can authorize actions which would exceed IHL constraints), the first type of targeting instructions in the ROE is most closely related to and derived from the IHL principle of distinction since it specifies valid targets by their identity. The second type of ROE, which is related more to the behavior of the intended target, also incorporates other concerns apart from IHL rules on targeting.¹⁰⁹

In addition, however, ROE sets commonly contain a second type of targeting instructions, consisting of specific ROE containing the rules regarding target acquisition, including the requirements for establishing positive identification.¹¹⁰ These kinds of instructions do not themselves

¹⁰⁸ For example, ROE authorizing attack on persons carrying out a hostile act or demonstrating hostile intent (see chapter 3, pp. 129 – 133) or other such ROE which specify subjects on the basis of their behavior or other (similar) characteristics not related to their identity as members of a specific group or organization. As regards objects, these types of ROE relate to the element of “use” or “purpose” as set forth in Article 52 of the First Additional Protocol.

¹⁰⁹ See chapter 3 as regards the role and purpose of ROE related to the concepts of hostile act and hostile intent and the interaction between ROE and self-defense. What is meant here is the difference between ROE authorizing attacks on objects due to their identity (i.e. their nature, etc.) and persons due to their status regardless of their actual activities at the time of the attack, and ROE authorizing attacks on persons due to their behavior or actions at the time of the attack and regardless of their status (although arguably engaging in hostile actions against the force in question could mean that the person was directly participating in hostilities). The first type of ROE is directly derived from principles of IHL and is more closely related to combat, while the second type of ROE could also be applicable in law enforcement settings.

¹¹⁰ Meaning the identification of an intended target (regardless of the intended subsequent action) to such a degree of certainty as regards its status, identity, location, etc., that an engagement decision can be made.

authorize the use of force or the engagement of any target, but instead provide guidance and criteria for the application of the first type of targeting-related ROE discussed above. While these targeting instruction ROE must (obviously) also be scrutinized for compliance with the mandate or legal basis for the operation, they are commonly phrased in more general terms, such as requiring a certain combination of available methods of target identification and the number of methods which must be applied before the target may be considered positively identified. Consequently, as regards this type of ROE, the compliance with the mandate or legal basis for the operation is more related to the level of certainty required prior to engagement rather than the specific contents of the ROE as such.¹¹¹ These ROE are consequently derived from a blend of legal requirements regarding precautions in attack and political policy requirements regarding more stringent restrictions as regards (politically acceptable levels of) collateral damage. For example, while IHL requires that the expected collateral damage must be reasonable in comparison to the direct and concrete military advantage anticipated from the attack, in politically sensitive operations a higher standard of target discrimination and higher levels or assurances of accuracy in attacking targets may be imposed before force may be used. As this type of ROE can also be used to contribute to efforts to prevent fratricide¹¹² and thus serves operational interests as well, this type of ROE is an example of a “classic ROE” in which all three influences on ROE development are combined.¹¹³

Because ROE which authorize actions against specific, identity-based (categories of) objects and persons are so intrinsically mission-specific, the various ROE compendia generally contain a “fill in the blank” element in the actual ROE text.¹¹⁴ Once this element has been filled in, the objects or

¹¹¹ See, for example, the 31-series ROE in the San Remo ROE Handbook: Cole, A., et al. [eds.] *Rules of Engagement Handbook*. International Institute of Humanitarian Law, San Remo, 2009, pp. 38 – 39.

¹¹² Also called “blue on blue engagement” or “friendly fire”, the term refers to accidental use of force against one’s own units or allies.

¹¹³ See Chapter 1.

¹¹⁴ The San Remo Handbook, for example, uses the word “SPECIFY”, while NATO uses the word “DESIG” for this purpose. Cole, *op. cit.* note 111, p. 7; North

persons so indicated become valid targets for the action authorized in such ROE throughout the entire operation. This means that filling in this element requires careful scrutiny to ensure compliance with the mandate and applicable law, or great specificity, such as adding circumstances or additional criteria to be met prior to applying such ROE.¹¹⁵ Additionally, and as was observed previously, even when the ROE authorize the use of force against such specifically indicated targets, the actions so taken must be lawful, meaning they must comply with applicable (international) law, including the rules and elements of the law, including IHL, not specifically or explicitly included in the ROE.¹¹⁶ Declaring certain categories of persons “hostile,” and therefore valid targets, does not, for example, authorize the use of force against persons belonging to those “authorized” categories who have become *hors de combat*. Furthermore, given that interpretations as to the legality of targeting specific persons or objects may vary, as was stated previously, filling in the targeting element in multinational ROE can be a challenge. Finally, once the ROE have been implemented, diverging views

Atlantic Treaty Organization, Military Committee document MC 362/1 (Military Decision), *NATO Rules of Engagement*, 2003, p. 8 (used by specific permission to the present author as set forth in International Military Staff Memorandum IMSM-0417-04, on file with author).

¹¹⁵ The ROE compendia also provide this option, by including ROE in which the action to be authorized is not only specified as regards the subject of the action in question (e.g. “against DESIG persons”) but also as regards circumstances (“under DESIG circumstances”).

¹¹⁶ In view of the previous discussion as regards thresholds for applicability of IHL, or policy-driven reasons for reluctance to acknowledge that applicability, the requirement to adhere to the law in conjunction with applying ROE makes the policy of applying the restrictive or protective elements of IHL at all times regardless of their *de jure* applicability even more important. This policy was discussed above on p. 172. While, as was stated in that discussion, distinct and fundamental criminal law differences exist as regards policy violations in operations other than armed conflict on the one hand and IHL violation in cases in which IHL applies *de jure* on the other hand, training armed forces to apply the protective provisions of IHL at all times and incorporating those provisions into the basic drills, tactics, etc., not only reduces instruction and training requirements (since the same set of training requirements applies to all operations) but also reduces the risk of (accidental) IHL violations, especially in operations whose nature is subject to political or policy interpretations.

on the definition of valid military objectives remain of particular concern in situations where the targeting is carried out by a different unit than the one using force against the target in question.¹¹⁷

While this dilemma of diverging views can, of course, be resolved by simply implementing the strictest interpretation of the law into the ROE, such an approach is not likely to lead to ROE which will be acceptable to all participating nations. It is unlikely, after all, that nations which are not bound by a particular treaty or which adhere to a more generous interpretation of certain IHL provisions¹¹⁸ will consent to be bound by such treaties or by more restrictive interpretations of IHL in the context of a specific military operation. The alternative approach of adopting the wider interpretation of the law and leaving it up to the nations subject to the stricter rules to issue national *caveats*¹¹⁹ is therefore more commonly applied. However, since this solution runs the risk of diverging responses and actions by the various units in a multinational operation, this approach requires additional operational measures in order to avoid disintegration of the unity of effort, especially as regards the deployment of scarce operational assets. This is particularly the case for close air support assets,

¹¹⁷ In some cases, especially when aircraft deploy weapons upon the request and guidance of ground forces engaged in combat (commonly referred to as close air support), the principle that the targeting unit (commonly a *Joint Terminal Attack Controller*, or JTAC) “buys the bomb” is applied. This principle means that the JTAC is responsible for the targeting decision and that the aircraft simply becomes a “dumb” system applying force as a distant weapon directed (but not physically operated) by the JTAC. However, precisely because the JTAC does not operate the weapon, the pilot of the aircraft is still ultimately responsible for his or her decision to use force (and is still able to refuse weapon deployment) and is under an obligation to comply with the rules of IHL to which he or she is subject. This means that the pilot must, at the very least, make a reasonable effort to verify that the target he or she is about to engage is a valid military objective before releasing the weapon.

¹¹⁸ See the discussion below on the differences in interpretation as to what objects constitute valid military targets.

¹¹⁹ See chapter 1, p. 47, as well as Cathcart, B., “Force application in enforcement and peace enforcement operations,” in Gill, T.D. and Fleck, D. [eds.] *The handbook of the international law of military operations*, Oxford, 2010, p. 115.

which require both air assets and (qualified and certified) JTAC¹²⁰ capacity, both of which are commonly limited. Given the observation made in footnote 120, above, and given that it would be operationally (and politically) undesirable to withhold close air support entirely between nations with diverging legal views, a practical “work-around” has been implemented in certain recent operations. This approach consists of requiring that, in cases in which the engaging unit (i.e. the aircraft providing close air support) is subject to stricter interpretation or rules of IHL than the targeting unit (i.e. the JTAC),¹²¹ the engaging unit “uses” the targeting unit as, effectively, a “remote (human) sensor” by asking the JTAC additional questions, such as describing the target and the circumstances of the situation in greater detail, in order to allow the pilot to gain sufficient information to make an independent determination as to the legality of engaging the persons or objects as requested by the targeting unit. In other words, in addition to the (electronic) sensors available to the pilot (including electro-optic systems such as camera systems, infrared systems, etc.), the pilot uses the JTAC as his “eyes on the ground” to look for and describe the details that the pilot needs to make his or her own evaluation as regards the legality of engaging the target in question. While this

¹²⁰ As was discussed briefly already above in footnote 117, a Joint Terminal Attack Controller (JTAC) guides and directs the use of air-to-ground weapons by aircraft engaged in close air support (CAS). Given the inherent dangers involved in CAS, including the risk of “friendly fire”, as well as the complexities of targeting and guiding modern weapon platforms (as well as operating the special equipment used by JTAC personnel), JTAC certification requires extensive education and training. While less highly trained personnel can provide some guidance to aircraft engaged in CAS, the absence of fully certified JTAC capacity normally means the pilot must take greater precautions by applying a wider margins of error to (and therefore greater restraint in applying) the information passed on by non-JTAC personnel.

¹²¹ Clearly the reverse situation does not lead to a dilemma, since if the targeting unit is subject to stricter rules or interpretations of IHL than the engaging unit, the targeting unit can only legally target and request engagement of objects or persons in accordance with the law applicable to that unit. While, in this scenario, the engaging unit could attack targets which are lawful for the engaging unit but not for the targeting unit, the targeting unit cannot, as a matter of law, request such engagement.

approach may cause a fraction more delay between the request for CAS and actual weapon deployment, it ensures that the pilot can verify whether the target is a legal target according to the rules applicable to the pilot. Without this approach, a pilot subject to stricter rules could not engage targets designated by a JTAC subject to less restrictive rules without risking attacking an object which (for the pilot) would be unlawful to attack. Consequently, this approach ensures that weapon deployment is only denied in the specific cases where the engaging unit is legally barred from attacking the target in question and avoids completely withholding support to units from the other nations.

1. Targeting persons

Following the more general observations on the ROE on targeting provided above, some specific observations are warranted concerning the influence and role of the principle of distinction as regards targeting persons and objects and the implementation thereof in the ROE.

In an armed conflict, the right of combatants to engage enemy combatants is limited by the law, particularly IHL. Consequently, among several of the prohibitions set forth in IHL, it is illegal for combatants to engage an enemy who is *hors de combat*, including those who clearly express the intent to surrender, those who are incapacitated due to injury or illness, and those who are “in the power of” the party in question. In all such cases, the protection of the person *hors de combat* is conditional on that person abstaining from hostile acts and from attempting to escape.¹²² It is similarly illegal for combatants to declare that no quarter will be given.

The reason for specifically stating these prohibitions among the many rules applicable to the conduct of combatants in an armed conflict is that they are closely related to the controversy to be discussed below, in section b., regarding additional limitations proposed by the ICRC on the use of force towards enemy combatants. But the rules regarding combatants (or

¹²² Article 41, paragraph 2, of the First Additional Protocol.

fighters¹²³) who are in the power of their enemy, as well as all other cases in which prisoner of war status or IHL rules on the treatment of detained persons may be applicable, deserve a few observations in their own right. In the complex environments of modern military operations, it may be difficult to determine which enemy fighters should be classified as combatants and which legal regime applies to which detainee. This is particularly the case in transboundary non-international conflicts¹²⁴ in which (non-state) armed groups are among the parties to the conflict.

As was stated previously, ROE do not normally specify the required treatment for detainees to any great detail, but only set forth the situations in which detention of persons is authorized. Some of those situations may be related to security considerations, closely related to self-defense or force protection situations, and in such cases the ROE may authorize the (temporary) detention of persons who pose a threat to a force, regardless of their (subsequent) status and regardless of which body of law (subsequently) applies to them, such as IHL, human rights law or (local) criminal law.¹²⁵ Since the detainee's status will, however, dictate the further requirements once detention commences, it is essential that before

¹²³ The term "combatants" only applies in international armed conflicts (i.e. conflicts between States). The term "fighters" is intended to denote persons participating in hostilities in non-international armed conflicts.

¹²⁴ While international armed conflicts are armed conflicts between States and non-international armed conflicts are armed conflicts between a State and (a) non-state actor(s), "transboundary conflicts" are armed conflicts in which other States have become involved on the side of the State engaged in a non-international armed conflict. Examples would include the International Security Assistance Force (ISAF), in which NATO nations supported the government of Afghanistan in re-establishing control over the territory of Afghanistan, as well as the current operations in Iraq, in which coalition forces are supporting the government of Iraq in its fight against the organization known (variably) as ISIS or Da'esh.

¹²⁵ While obviously criminal law detention must meet human rights standards as well, detention under criminal law will normally carry its own set of authorizations, requirements, etc. Criminal law detention also requires jurisdiction, however, as well as probable cause (or its equivalent notion in local criminal law). Actions by a combatant in the context of an armed conflict which do not violate IHL would not give rise to probable cause and the right to prisoner of war status cannot be denied or refused by reference to criminal law.

promulgating ROE authorizing detention, prior consideration is given to ensuring that a system or process is in place to properly assess and determine each detainee's status as well as ensuring that the systems, facilities, etc., required for the subsequent treatment of the detainee in accordance with his or her status under applicable law are available. The deciding factor as to a detainee's status is the law, not policy or operational decisions.¹²⁶

The difficulty in determining the status of a detainee in complex operational environments is matched by the difficulty in determining whether a person can be legally targeted with the intent to use (lethal) force against that person, in situations beyond self-defense.¹²⁷ Given that such decisions frequently lead to irrevocable consequences, yet may have to be taken in (extremely) short time frames, determining which persons enjoy protection under IHL and which persons do not can become a challenge, especially when facing opponents who may not, or at least not under all circumstances, be recognizable as enemy forces. While education and training in IHL is part of the answer, properly implementing the applicable rules of IHL in the ROE for the operation, especially the ROE related to targeting, can at least to some extent simplify this decision making process.

a. *Civilians and direct participation in hostilities*

While IHL is clear on prohibiting the targeting or use of force against

¹²⁶ Greenwood, C., "The applicability of international humanitarian law and the law of neutrality to the Kosovo campaign," in *U.S. Naval War College International Law Studies*, Vol. 78, 2002, p. 54. See also Waxman, M.C., "The law of armed conflict and detention operations in Afghanistan," in *U.S. Naval War College International Law Studies*, Vol. 85, 2009, pp. 345 – 347, discussing the "illegal combatant" reasoning in the United States and the applicability – as a minimum – of the standards of common Article 3 to detained Taliban and Al Qaida fighters.

¹²⁷ Self-defense is not only an inherent right, as discussed in greater detail in chapter 3, but is also a response to an (imminent) attack by the other party. Consequently, the rules of IHL regarding "attack" and targeting do not apply to self-defense and the actions taken in self-defense are instead governed by the law of self-defense, specifically criminal law.

civilians,¹²⁸ the relevant provisions of the two Additional Protocols do not define the term “civilian”. An *a contrario* approach, similar to the one required to define the term “civilian objects,”¹²⁹ would yield the conclusion that civilians are those who are not combatants in international armed conflict, or members of the armed forces or organized armed groups in non-international armed conflict.¹³⁰ As regards international armed conflict, however, two additional nuances are required. The first nuance is that members of the armed forces who enjoy specific protection under IHL, such as medical and religious personnel,¹³¹ are not combatants and may not be attacked.¹³² The second nuance is that members of a *levée en masse*, while civilians in a technical sense, are nonetheless combatants under the law. Consequently, in keeping with applicable law, the ICRC defined civilians in international armed conflicts as “persons who are neither members of the armed forces of a party to the conflict or participants in a *levée en masse*”, while defining civilians in non-international armed conflicts as “persons who are not members of State armed forces or organized armed groups of

¹²⁸ The prohibition is stated most clearly in Article 51 of the First Additional Protocol and in Article 13 of the Second Additional Protocol. The ICRC has identified this prohibition as also being part of customary law. See Henckaerts, *op. cit.* note 22, p. 3 – 8.

¹²⁹ See below in section 2 as regards Article 52 of the First Additional Protocol.

¹³⁰ As was mentioned above, the term “combatant” does not exist in the treaty provisions applicable to non-international armed conflict. The Expert Meeting on the Notion of Direct Participation in Hostilities stated that the term was avoided in such treaties because “States are loath to grant the privilege of the combatant [...] to insurgents.” ICRC, Second Expert Meeting on the Notion of Direct Participation in Hostilities, The Hague, 25 / 26 October 2004, submitted by Michael Bothe, p. 4 – 5.

¹³¹ The protection of medical and religious personnel will not be discussed in any detail here. In the author’s professional experience, ROE do not normally specify permitted or prohibited actions related to such categories of (enemy) personnel. The rules of IHL related to these specific categories are moreover generally taught in the context of lessons on IHL and while reference may be made to such categories in certain ROE lessons or vignettes, they are not generally a relevant topic for ROE themselves.

¹³² Unless, of course, they directly engage in hostilities. Such action does not affect their status, but temporarily negates their protection.

a party to the conflict”.¹³³

The protection of civilians under IHL is not absolute, however. As will be discussed in the section on proportionality and precautions in attack, IHL accepts a certain degree of incidental loss of life to civilians and damage to civilian property in the context of military operations. More important to the discussion of targeting persons specifically, however, is the fact that civilians enjoy protection from attack “unless and for such time as they take a direct part in hostilities.”¹³⁴ This phrase, while seemingly clear at first glance, has given rise to extensive debate as to its precise meaning. In an effort to facilitate the debate and provide further guidance, the ICRC consequently organized a series of expert meetings to discuss the various aspects of direct participation in hostilities. Following these meetings, the ICRC published its Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law.

The Interpretive Guidance was met with considerable criticism, although the strongest criticism was directed at Part IX of the publication, which will be discussed below. As regards the ICRC’s guidance on direct participation in hostilities (hereafter DPH) itself, the document nonetheless provides some useful elements for determining when loss of protection occurs for civilians as a result of DPH. A full analysis of the Interpretive Guidance and the criticism it received would unfortunately go beyond this discussion of the interaction between ROE and IHL, but a few comments that directly affect how ROE may designate persons subject to (kinetic) engagement are in order.

The first question addressed in the discussion of DPH was the meaning of the concept of “civilian”. The definitions provided by the ICRC were already stated above. Focusing attention first on international armed conflicts, the ICRC definition clearly divides members of the armed forces and members of a *levée en masse* from civilians. This classic and clear

¹³³ ICRC (Melzer, N.), *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, Geneva, 2009, p. 20 and p. 27.

¹³⁴ Article 51, paragraph 3, of the First Additional Protocol and Article 13, paragraph 3, of the Second Additional Protocol.

division renders DPH an incidental phenomenon, carried out by individuals (or at most small groups) from the category “civilians”. However, since recent military operations mostly fall into the category of transboundary non-international armed conflict, this clear division is only rarely applicable, since operations in such conflicts involve, or in fact are directed against, (large) groups of non-state actors, such as certain international terrorist organizations.¹³⁵ Furthermore, modern military operations are to a large extent dependent on the deployment of an increasing number of civilian contractors, experts, etc., carrying out crucial tasks for the regular armed forces, many of which blur the lines between “military” tasks and “civilian” tasks.¹³⁶

The easier category in the definitions and discussions regarding DPH is that of “armed forces,” which may include “paramilitary or law enforcement agencies” once those are incorporated into the armed forces,¹³⁷ in addition to “all organized armed forces, groups and units which are under

¹³⁵ See also the discussion on the possible status of well-organized and well-armed criminal organizations in Schmitt, M.N., “The status of opposition fighters in a non-international armed conflict,” in *U.S. Naval War College International Law Studies*, Vol. 88, 2012, pp. 121 – 123.

¹³⁶ Ipsen explains that contractors are not combatants and do not share in the combatant privilege, so that their direct participation in hostilities, as may arise as a consequence of their tasks or functions, can expose them to legal consequences upon capture. See Ipsen, K., “Combatants and non-combatants” in Fleck, *op. cit.* note 39, p. 105. Ipsen also refers to the Montreux document, which, while not providing a clear answer to the question as to the status of contractors under IHL, does provide guidance on IHL obligations in relation to the employment of contractors. The document can be downloaded at https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf (last accessed on 8 April, 2016). Christensen and Heaton provide an extensive analysis and discussion of the role of contractors in modern operations in relation to the difficulties of defining DPH. It should be noted, however, that Heaton’s analysis predates the publication of the ICRC Interpretive Guidance. See Christensen, E., “The Dilemma of Direct Participation in Hostilities,” in *Journal of Transnational Law and Policy*, Vol. 19, nr. 2, 2010, p. 285; and Heaton, J.R., “Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces,” in *Air Force Law Review*, Vol. 57, 2005, pp. 155 – 208.

¹³⁷ Article 43, paragraph 3, of the First Additional Protocol.

a command responsible to that Party for the conduct of its subordinates.”¹³⁸ As some of these categories match the provisions on entitlement to prisoner of war status as set forth in Article 4 of the Third Geneva Convention, it may be tempting to utilize those provisions in the targeting process. While those provisions may provide commanders in the field some basis for categorization, it should be noted that there are more categories of persons entitled to prisoner of war status than the categories included in the concept of “armed forces” for the purposes of distinction between civilians and armed forces.¹³⁹ The Interpretive Guidance makes this observation as well, pointing out that the provisions on prisoner of war status, while (to some extent) indicative of which categories should be considered part of the armed forces, are primarily directed at the treatment of individuals following their capture and not necessarily relevant for the division between armed forces and civilians in the context of DPH.¹⁴⁰

It should also be noted that the definition of “civilians” in the context of DPH merely serves to differentiate between civilians and those falling into a separate category and does not, in itself, imply or indicate combatant status for those who are not civilians. In other words, as was indicated briefly above, the definition of civilians in the context of DPH does not affect the status of, or provisions regarding, members of the armed forces who are not combatants, such as medical or religious personnel. Instead,

¹³⁸ Article 43, paragraph 1, of the First Additional Protocol.

¹³⁹ See, for example, Article 4, sub A under (4), and Articles 3 and 13 of the Hague Regulations of 1907. “War correspondents” or embedded journalists may have a right to prisoner of war status on the basis of these provisions, but would not normally be considered combatants, nor are they members of the armed forces. Consequently, following the ICRC definition, they are civilians and while they may run an increased risk of incidental injury or death due to their proximity to valid military targets, they are not, themselves, valid targets under this reasoning unless they directly participate in the hostilities. The same applies to the civilian contractors mentioned above, although some categories of civilian contractors are considerably more likely to engage in DPH as part of their primary role, such as members of private security firms. As regards armed groups, in order to qualify for prisoner of war status armed groups other than the regular armed forces must meet the criteria set forth in Article 4, sub A, under (2) of the Third Geneva Convention. Those criteria do not seem relevant, however, from a targeting point of view.

¹⁴⁰ ICRC (Melzer, N.), *op. cit.* note 133, p. 22.

the definitions are tools to create clear and mutually exclusive categories of persons, in order to facilitate determining when a civilian loses protection as a result of DPH. In drafting targeting ROE, therefore, it is not possible to merely differentiate between civilians and member of the armed forces as such, as intentionally targeting non-combatant members of the armed forces may be a violation of IHL, depending on the circumstances and the actions of that non-combatant at the time. This means that targeting ROE require a significant level of specificity and attention to detail.

In non-international armed conflicts, including transboundary non-international armed conflicts, the ICRC differentiates between State armed forces, organized armed groups of a party to the conflict, and, of course, civilians. As regards organized armed groups, the ICRC limits the term to the “armed or military wing” of the non-State party to the (non-international) conflict and considers such groups to be, in essence, the armed forces of that non-State party.¹⁴¹ To the extent that these organized armed groups of (non-State) parties to a conflict consist of “dissident armed forces,” that is members or entire units of the armed forces of the State in question who have turned against their own State, the differentiation between such forces and civilians is readily apparent. The greater challenge, however, is differentiating, and the approach taken by the ICRC to that end, between organized armed groups recruited from the civilian population and the civilian population as such.

Distinguishing between members of organized armed groups and civilians presents (at least) two difficulties. The first difficulty is that members of organized armed groups may choose not to wear (or may not have access to) uniforms or similarly distinguishing clothing or other marks, emblems, patches, etc., to identify themselves.¹⁴² This difficulty

¹⁴¹ ICRC (Melzer, N.), *op. cit.* note 133, p. 32.

¹⁴² Article 44, paragraph 3, of the First Additional Protocol requires combatants in an international armed conflict to distinguish themselves or, at the very least, to carry their arms openly during military engagements and while visible to the opposing party during a deploying prior to an attack. Apart from the observation that this rule only applies in international armed conflicts, the open carrying of arms is also a difficult or at least dangerous distinguishing feature in cultures in which the open carrying of arms is permitted or customary for the

applies equally to identifying a “regular” civilian who carries out DPH, however, and will be discussed below. The second difficulty is defining the term “membership”, which is necessary to distinguish between persons who lose protection for such time as they engage in DPH and persons who, on the basis of such membership of an organized armed group, lose (or do not enjoy) protection for such time as they are members of that group, regardless of their actual activities at the time they are targeted.

The ICRC recognizes that membership of an organized armed group can, depending on the nature of the group or the nature of the context in which the conflict takes place, be based on various affiliations, family or clan relations or other similar considerations and warns that such criteria are “prone to error, arbitrariness or abuse.”¹⁴³ Consequently, the ICRC proposes that, for the purpose of establishing a person’s membership of such a group in the context of loss of protection against attack, the determination should be based on the continuous functioning of that person as part of the group in the sense of carrying out combat or hostilities on behalf of that group, a concept termed “continuous combat function.”¹⁴⁴ According to the Guidance, determining the existence of such a function must be based on reliable information available to the relevant parties and can be related to the wearing of uniforms, distinctive signs or weapons, as well as “conclusive” behavior establishing repeated direct participation in hostilities, provided that the participation is “a continuous function rather than a spontaneous, sporadic, or temporary role.”¹⁴⁵ Members of armed groups who do not have such a function remain civilians and may only be attacked for such time as they meet the criteria for DPH. Such “civilian members” include those supporting or accompanying the armed group. The Guidance provides a number of examples on pages 34 – 35 of tasks or

civilian population. It also does not help determine membership of an organized armed group, since the (incidental) open carrying of arms is not by itself sufficient to determine such membership and the concomitant more permanent loss of protection against attack, as against incidental loss of protection due to either DPH or in self-defense situations.

¹⁴³ ICRC (Melzer, N.), *op. cit.* note 133, p. 33.

¹⁴⁴ *Ibid.*, p. 33.

¹⁴⁵ *Ibid.*, p. 35.

functions which may be carried out by such “civilian members” without the loss of protection, including recruitment, financing, smuggling, and manufacturing weapons. The relationship between such activities and DPH, as opposed to the continuous combat function of members of armed groups, will be discussed further below, in relation to the direct causation criterion for DPH.

This functional approach, rather than membership by association or other criteria, has met with some criticism and does not reflect the approach taken by some nations.¹⁴⁶ As a simple preliminary observation, the continuous combat function approach in any case runs counter to the ICRC’s attempt to distinguish between separate and mutually exclusive categories, that is between the armed forces, organized armed groups, and civilians. Since members of organized armed groups without such a function remain, according to the ICRC, “normal” civilians under IHL, the distinction between civilians and members of organized armed groups is no longer mutually exclusive. Instead, it must be read as a distinction between civilians and certain specific members of organized armed groups, i.e. those with a continuous combat function. As also pointed out by Schmitt, such a distinction between members of the same group is not only difficult in practice, but also creates an odd differentiation in the law between members of organized armed groups, who may only be the subject of attack if they have a continuous combat function, and combatant members of the regular armed forces, who may be attacked regardless of their actual function, such as cooks, clerks, and similar personnel.¹⁴⁷ While the Guidance does

¹⁴⁶ Boothby states that this approach “narrows excessively the class of those who lose protection on a continuous basis and the result is a distortion of the balance inherent in international law”; Boothby, *op. cit.* note 102, p. 753. Christensen points out that the United States Military Commissions Act definition of unlawful enemy combatants follows a more general membership approach; Christensen, *op. cit.* note 136, p. 291.

¹⁴⁷ Schmitt, *op. cit.* note 101, p. 23; Schmitt, *op. cit.* note 135, pp. 132 – 133, also pointing out that the objective of the ICRC’s approach, that is distinction between civilians and members of armed groups, does not require this rule since many organized armed groups can be readily distinguished or identified by other means. It is arguable, however, whether the principle of distinction is the ICRC’s only (or main) reason for proposing the continuous combat function, since it can

(attempt to) specify, specifically on p. 32 and p. 33, that only individuals with a continuous combat function are *members* of the organized armed group (all others being merely *associated* or *affiliated* with that group and remaining civilians), the text is at the very least somewhat unclear.

Translating the ICRC's "continuous combat function" rule into ROE precludes the inclusion of the organized armed group as such in the targeting ROE and instead requires a function-based set of criteria for authorizing engagement. This approach differs considerably from ROE authorizing the use of force, or attack on, enemy armed forces. Given that, as was stated above, ROE must always be applied within the confines of IHL, ROE authorizing attack on enemy armed forces do not normally distinguish between combatant and non-combatant members of those armed forces. The prohibition against attacking medical personnel, for example, applies regardless of what is written in the ROE and is included in IHL training (although it may be included in ROE training as well, in the form of specific vignettes). In other words, ROE authorizing the attack on enemy armed forces will not normally lead to any assumption that such authorization includes permission to attack non-combatant members of those armed forces. That may not be the case, however, as regards distinguishing between members of organized armed groups with a

equally be argued that the objective is simply to reduce the number of persons subject to continuous loss of protection. The present author does agree, however, with Schmitt's statement (as also referred to by others) that the requirement set forth in Article 50, paragraph 1, of the First Additional Protocol to treat persons as civilians when in doubt as to their status already provides a degree of protection against targeting persons as (alleged) members of armed groups without properly establishing the facts. It should be noted, however, that the Second Additional Protocol does not have an equivalent provision. While Schmitt states that the rule is reflective of customary law for both international and non-international armed conflicts (*op. cit.* note 135, p. 133), the ICRC does not indicate that status unequivocally as regards non-international armed conflicts, merely stating that "[i]n the case of non-international armed conflicts, the issue of doubt has hardly been addressed in State practice, even though a clear rule on this subject would be desirable as it would enhance the protection of the civilian population against attack. In this respect, the same balanced approach as described above with respect to international armed conflicts seems justified in non-international armed conflicts." Henckaerts, *op. cit.* note 22, p. 24.

continuous combat function and those without such a function, since not only is that distinction less visible¹⁴⁸ but the possible tasks, functions and activities of persons without a continuous combat function are not only controversial but also far more varied than those of non-combatant members of the armed forces. Consequently, as regards organized armed groups, the targeting ROE must specify criteria related to the individual rather than mere membership of a group, if the ROE are to be in compliance with the ICRC's approach. Given the criteria used by the ICRC, it seems unlikely that the concept of "continuous combat function" can be easily translated into ROE that would still meet the criteria of simplicity and ease of understanding. Unfortunately, the same might be true for the rules regarding the determination of DPH discussed below.

Civilians, including persons accompanying or associated with organized armed groups but who do not have a continuous combat function, lose their protection from attack in both international and non-international armed conflict for such time as they directly participate in hostilities. In contrast to (combatant members of) armed forces and members of organized armed groups with a continuous combat function, this loss of protection is temporary and conditional. In order to facilitate making this determination, the ICRC, in its Interpretive Guidance, has set forth three cumulative "threshold criteria" (referred to by the ICRC as the "constitutive elements" for DPH) as well as providing guidance on the temporal aspect of DPH. The three "threshold criteria" are the threshold of harm, the direct causation criterion and the belligerent nexus between the act and the armed conflict. The temporal aspect gives further interpretation of the words "for such time as", as used in the relevant provisions of IHL.

The threshold of harm requires that the act carried out by the civilian must be likely to have an adverse effect on either the military operations or the military capacity of the opposing party, or to cause the death, injury or

¹⁴⁸ Non-combatant members of the armed forces, particularly medical personnel, normally wear the distinctive emblem and can be more readily identified as a result. It seems unlikely, to say the least, that individuals accompanying organized armed groups but who do not have a continuous combat function will be so readily identifiable.

destruction of protected persons or objects. As indicated by the wording of the criterion (or element), the act does not actually have to result in such harm, but the harm or effects must be objectively likely to result from the act in question. Furthermore, as regards the military operations or capacity of the opposing party, the ICRC does not propose a level of (physical) damage or harm, as long as the harm is military in nature, including, among physical examples of death, injury and sabotage, examples such as computer network attacks and computer network exploitation as acts fulfilling this criterion. The threshold is not met, however, by refusing to do something that would benefit the opposing party, so that, for example, refusing to give information would not fulfill the criterion.¹⁴⁹

While the threshold of harm did not lead to significant criticism, the direct causation criterion did give rise to substantive concerns. This criterion or element requires a direct causal link between the act in question and the harm likely to result and provides guidance on interpreting the concept “direct” in the phrase “direct participation in hostilities”. In an effort to differentiate between actual hostilities and the more general notions of supporting or sustaining the “war effort” in general, the criterion requires a direct causal link between the act and the likely harm to result. More controversial is the explanation by the ICRC that this means that there must be only one causal step between the act and the (likely) harm. This requirement rules out a number of activities that are clearly too distant from the concept of “hostilities,” including providing financial or other non-combat services, supply activities, research and recruitment.¹⁵⁰

¹⁴⁹ Arguably, the reverse of this example, that is providing false information to the enemy, would fulfill the criterion and lead to DPH provided the other two criteria are fulfilled as well and providing such actions would (be likely to) lead to harm. Given the broad definition of “harm”, however, it would seem that frustrating a military operation by providing disinformation would fulfill the criterion. It should be noted that the absence of a requirement for a certain level of physical harm and the inclusion of other harm than strictly harm to the equipment and personnel of the enemy forces makes this element much broader than the explanation of the concept of harm in the commentary to Article 51, paragraph 3, of the First Additional Protocol; Sandoz, *op. cit.* note 31, pp. 618 – 619.

¹⁵⁰ While it may be tempting to view several of these activities as direct participation when viewed in the context of (global) terrorism, it is important to

Additionally, the Interpretive Guidance states, as a further example, that the production and transport of weapons is not considered direct enough, except if they are carried out as “an integral part of a specific military operation designed to directly cause the required threshold of harm.”¹⁵¹ That “integral part” approach also applies to operations which require a combination of activities and actors, meaning that even though the individual actions of a person by themselves might not meet the direct causation criterion, those actions are still considered to satisfy the direct causation element if they are an integral part of a “concrete and coordinated tactical operation which directly causes such harm.”¹⁵² Among the examples given for this approach are actions comparable with those of a JTAC¹⁵³ as discussed above. Finally, the Guidance also makes it clear that the proximity requirement is one of causal proximity and that temporal or geographic proximity are neither requirements nor, as such, indicative of causal proximity.¹⁵⁴ This approach

distinguish between acts constituting DPH in the context of an armed conflict and within the scope of IHL from acts which are illegal or provide sufficient association (including aiding and abetting) to terrorism as a criminal act. Notwithstanding the term “global war on terror,” the system of rules and provisions of IHL as they apply to an actual armed conflict are clearly distinct from the rules and concepts within (extraterritorial application of) criminal law. Consequently, while it is, for example, illegal to finance terrorism (and there are treaties expressing that illegality), that does not mean that financing an organized armed group in the context of an armed conflict necessarily should have any effect on the protection of civilians against attack under IHL.

¹⁵¹ ICRC (Melzer, N.), *op. cit.* note 133, p. 53. The Guidance gives the example of a civilian ammunition truck driver. If he drives the truck to deliver ammunition to troops engaged in actual fighting on the front line, the direct causation requirement is met. If he is merely driving the ammunition from the factory to a storehouse or to a place for further transportation (such as by rail or ship), then the direct causation criterion is not met and he may not be targeted. In all cases, however, the truck itself is a valid military target. Although this legal distinction is probably of little comfort to the truck driver if the truck is targeted while he is still inside it, this distinction is essential in the context of targeting objects and the distinction between targeting a person directly or taking the person’s presence into account in evaluating the proportionality of the attack on the object being targeted.

¹⁵² ICRC (Melzer, N.), *op. cit.* note 133, p. 54 – 55.

¹⁵³ See especially footnote 117, above.

¹⁵⁴ ICRC (Melzer, N.), *op. cit.* note 133, p. 55. Consequently, a booby-trap or other device that is detonated some (considerable) time after it is placed and causes

takes into consideration relatively recent developments in modern operations.

Two of the examples given in the Guidance in the context of direct causation gave rise to greater criticism, which the present author shares. The first of these controversial examples is the manufacturing and storage of improvised explosive devices, or IEDs. In the ICRC's view, these activities do not meet the single step causation test because they, "unlike the planting and detonation of that device, do not cause harm directly."¹⁵⁵

At first glance, a parallel between IED manufacturing and the manufacture of ammunition in an ammunition plant seems legitimate. As will be discussed in greater detail below, ammunition plants are valid military targets but their employees are not.¹⁵⁶ It might seem logical, therefore, to apply the same approach to the manufacturer of IEDs, at least until such time as he also becomes the person actually planting the explosive. However, as Schmitt points out, this analogy is flawed, since the proximity of IED manufacturing to IED placement, both in terms of space and time, is almost always much greater than the proximity between manufacturing a bullet or bomb and the actual use on the battlefield.¹⁵⁷ In the present author's opinion, the ICRC's own example of the ammunition truck driver¹⁵⁸ and the reasoning by which he would or would not be directly participating in hostilities would lead to the conclusion that the IED manufacturer would similarly be considered to be directly participating in hostilities, since practice has shown that the geographical and temporal proximity between their manufacture and their actual use is comparable to the delivery of ammunition to troops fighting on the frontline.

harm to the enemy would meet the direct causation requirement, as would a remotely piloted armed unmanned aerial vehicle (UAV) which is used to kill an enemy combatant. This is particularly relevant in the context of hiring contractors to operate UAV's.

¹⁵⁵ ICRC (Melzer, N.), *op. cit.* note 133, p. 54.

¹⁵⁶ See also footnote 151, above.

¹⁵⁷ Schmitt, *op. cit.* note 101, p. 30 – 31; Schmitt, M.N., "Deconstructing direct participation in hostilities: the constitutive elements," in *Journal of International Law and Politics*, Vol. 42, 2010, p. 731 – 732. The views expressed by Schmitt are supported by Boothby, *op. cit.* note 102, p. 749.

¹⁵⁸ See footnote 151, above.

The second controversial example given by the ICRC concerns voluntary human shields, that is the decision by civilians to place themselves on or near objects which are valid military targets, in order to deter enemy attack on those objects.¹⁵⁹ According to the ICRC, civilians who engage in these activities can meet the direct causation and the threshold of harm criteria, but whether that is the case depends on the specific circumstances and whether the context is a ground attack (in which case the criteria would be met) or an air or artillery attack (in which case the criteria would not be met).¹⁶⁰ In discussing this example, the Guidance explains that in the former case the shielding is a physical effect, while in the latter case the shielding is a legal effect, since the attacking party can still target the object in question (firing or flying over the human shield) but must now factor the effects of the attack on the civilians into the proportionality evaluation as required by the rules on precautions in attack and may, as a result, have to call off the attack on the basis of that evaluation.

The ICRC's line of reasoning in this example is flawed on several levels. The fact that shielding an object from attack is due to a legal effect rather than a physical effect has no relevance to the fact that the civilians are themselves still engaged in a physical act – their voluntary presence at the object – and that their physical act has a negative effect, that is causes harm, to the enemy's military actions or operations. Since the intent on the part of the civilians is the same and the effect on the enemy's military operations is the same, there seems to be no reasonable explanation why the difference between the physical cause and the legal cause for that effect should be relevant. If the criterion is the physical act, then there is no

¹⁵⁹ It should be emphasized that this example focuses on *voluntary* human shields and the question as to whether civilians who voluntarily take on this role are directly participating in hostilities. The deliberate use by combatants of civilians (or other protected persons) to shield military objects is a violation of IHL, specifically (as regards civilians) Article 28 of the Fourth Geneva Convention and Article 51, paragraph 7, of the First Additional Protocol. These rules are considered part of customary law, both for international and non-international armed conflicts. See Henckaerts, *op. cit.* note 22, pp. 337 – 340.

¹⁶⁰ ICRC (Melzer, N.), *op. cit.* note 133, p. 56 – 57.

difference between the two situations: the physical act consists of the voluntary presence near the object. The line of reasoning that in the latter case the enemy is not physically blocked and that therefore the civilian activity is somehow different is also flawed from a purely operational perspective, at least in modern operations. Other methods of targeting, such as by using a drone, would allow a unit not supported by air-to-ground attack assets or artillery to attack an object using any means of force allowing ballistic trajectories to fire over the civilians, for example by using grenade launchers or light mortars (assuming those do not fall under the category of “artillery” as that term is used by the ICRC). This would equally remove the physical effect of the shielding by the civilians. Consequently, there does not seem to be any logical or legal reason why in the case of a ground unit using such weapons to attack the object the civilians would lose their protection due to their direct participation in hostilities, while if the object is attacked by aircraft or (heavy) artillery, the civilians do not lose

their protection and must be factored into the proportionality evaluation.¹⁶¹ Similar concerns and criticisms were raised by Schmitt as well.¹⁶²

The third constitutive element or threshold criterion requires that there be a connection, or nexus, between the activities undertaken by the civilian and the armed conflict in question. This approach is neither controversial nor new. For example, in the system of the International Criminal Court, every set of elements of crime for the crimes listed in Article 8 of the Statute contains such a nexus as one of the required elements. While some concern is possible over the ICRC's requirement that the acts harmed one party to the conflict to the benefit of the other, or another, party to the conflict, this

¹⁶¹ A different line of reasoning applies to the example frequently cited in this context, which involves civilians voluntarily present on a bridge or other strategic position to block the actual physical advance of the enemy. In the ICRC's line of reasoning, these civilians would lose their protection under IHL due to DPH. As Schmitt also point out, however, the military operational principle of economy of force would normally lead the force in question to find other means than the use of (deadly) force to cope with this situation. See Schmitt, *op. cit.* note 101, p. 33. Where the ICRC appears unreasonably restrictive in the case of artillery or air power, the ICRC appears to err on the other side in the example of the bridge. Incidentally, economy of force should not be confused with the legal concept of proportionality under IHL. The former concept is defined as meaning "that no more – or less – effort should be devoted to a task than is necessary to achieve the objective. This implies the correct selection and use of weapons and weapon systems, maximum productivity from available weapons platforms, and careful balance in the allocation of tasks." Naval War College, *op. cit.* note 3, p. 5 – 6, footnote 9. Proportionality in the legal sense under IHL, on the other hand, means that the incidental (that is collateral) loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, may not be excessive in relation to the concrete and direct military advantage anticipated from the attack (paraphrased from Article 51, paragraph 5 under b, and Article 57, paragraph 2 under b, of the First Additional Protocol, as also reflected in customary law in both international and non-international armed conflicts; see Henckaerts, *op. cit.* note 22, pp. 46 – 50). Consequently, while the principles have a certain degree of overlap and may yield the same conclusions as regards whether or not to launch an attack (or whether to launch it in a certain way), the underlying reasoning is different. In economy of force, the reasoning is based on operational (and economic, given the relative cost of ammunition types) efficiency, while the principle of proportionality is clearly grounded in humanitarian concerns.

¹⁶² Schmitt, *op. cit.* note 101, p. 31 – 33; Schmitt, *op. cit.* note 157, p. 732 – 735.

does not seem to be an unreasonable requirement. In modern operations there may be (groups of) civilians opposed to all of the parties to the conflict and consequently carry out acts of hostility for their own benefit or towards all the parties. However, if such activities were carried out in an organized or coordinated fashion by a group, that group would thus become an organized armed group and its own party to the conflict. If they are carried out by individual disgruntled civilians, then a distinction must be made between DPH, which ultimately revolves around civilians participating in the armed conflict, and individual criminal acts or attacks. In the former case, the civilian loses his or her protection under IHL, while in the latter case the individual may become the subject of (lethal) use of force in the context of self-defense by the attacked party or subject to arrest and prosecution.

Finally, civilians whose actions meet all of the threshold criteria lose their protection under IHL “for such time as” they directly participate in hostilities. The recommendation itself makes it clear that preparatory measures for an act of DPH and the deployment and return from the place where the act of DPH took place all form integral parts of that act. This is consistent with the commentary to Article 51, paragraph 3, of the First Additional Protocol and Article 13, paragraph 3, of the Second Additional Protocol.¹⁶³ The recommendation specifically addressing the beginning and end of individual acts of DPH (part VI of the Guidance) is supplemented by the recommendation on the temporal aspects of loss of protection (part VII of the Guidance), which has a wider scope and emphasizes the distinction between civilians engaged in DPH and members of organized armed groups with a continuous combat function. This recommendation also appears to be clear and uncontroversial, essentially summarizing statements made earlier in the Guidance in relation to the continuous combat function concept. Put simply, members of organized armed groups with a continuous combat function lose their protection under IHL for as long as they have that status or function, while civilians, including persons associated with or accompanying organized armed groups but not having a continuous combat function, only lose their protected status for as long as

¹⁶³ Sandoz, *op. cit.* note 28, pp. 618 – 619 and p. 1453 (paragraph 4788).

they directly participate in hostilities. As was the case with some of the constitutive elements, the recommendations provided by the ICRC appear less problematic than the examples provided in the accompanying text. However, since those examples show the intentions of the ICRC behind the recommendation and how to interpret it, they are more than mere illustrations and therefore deserve careful scrutiny.

The problems with the examples, or rather the interpretation, offered by the ICRC as regards the temporal aspect of DPH revolve around the sum of the examples of activities which do or do not amount to preparatory measures, the interpretations of the concepts of “deployment” and “return,” and the ultimate effect of all of these interpretations on the duration of loss of protection. As regards the concept of preparatory measures, the ICRC distinguishes between acts related to a specific act of combat¹⁶⁴ and acts related to a “general capacity to carry out unspecified [...] acts.”¹⁶⁵ As with the direct causation element, temporal or geographic proximity to the act being supported or prepared is not required, instead the requirement is that the preparatory activities are “indispensable” for the act. The first example given by the ICRC of loading bombs onto a combat aircraft versus loading bombs from the factory to further means of storage or shipment to the area of operations seems clear and uncontroversial. The discussion becomes more problematic, however, in the subsequent distinction between “preparation, transport and positioning of weapons” on the one hand, as being examples of preparatory acts, and “purchase, production, smuggling and hiding of weapons” as being examples of more general activities not amounting to preparatory acts. The problem with these examples stems from the effects of the interpretation of “deployment” and “return” as well as to the interpretation of the temporal aspect in part VII of the Guidance. In the interpretation of the ICRC, deployment begins “only once the

¹⁶⁴ The ICRC uses the term “hostile act”, but given the specific meaning of that term in the context of self-defense law and ROE, the present author prefers avoiding use of that term in this case. What is meant is an act of hostility in the context of the armed conflict. As regards the meaning of this term in the context of self-defense and ROE, see chapter 3.

¹⁶⁵ ICRC (Melzer, N.), *op. cit.* note 133, p. 66. See footnote 164 as regards the terminology used by the ICRC for the acts in question.

deploying individual undertakes a physical displacement with a view to carrying out a specific operation” and the return “ends once the individual in question has physically separated from the operation, for example by laying down, storing or hiding the weapons [...] and resuming activities distinct from that operation.”¹⁶⁶ Part VII of the Guidance further explains that the loss of protection under IHL as a result of DPH lasts only during the participation (including deployment and return) and that “civilians lose and regain protection [...] in parallel with the intervals of their engagement in direct participation of hostilities (so-called ‘revolving door’ of civilian protection),” stating that this “revolving door” effect is an integral part of IHL.¹⁶⁷

Taken together, the interpretations, examples and definitions of the ICRC mean that a civilian who assembles, smuggles and hides weapons only loses protection from the moment he physically moves towards the use of those weapons until he leaves the place of use of those weapons, enjoying the protection of his civilian status again at all other times, including when he returns home and once again prepares and stores or hides the weapons for their next use. This equally applies to the person assembling and hiding IEDs and their components, since the Guidance (in this case understandably) makes no distinction as to the type or nature of the weapons in question. Understandably, this part of the Guidance was subject to some criticism. Schmitt, for example, supports an approach based on a “chain of causation” and, pointing specifically to the IED example, includes the acquisition of the parts, the assembly of the device and its final placement as being part of DPH.¹⁶⁸ Boothby points out that the “proximate” aspect and the need that the act be “recognizable” as preparatory, referring to the text of footnote 182 on p. 67 of the Guidance, may lead to an interpretation that is too narrow and that an approach based on the nature or character of the act in question seems more appropriate.¹⁶⁹ In his view, the person who hides a weapon, then uses it and then hides it again in

¹⁶⁶ ICRC (Melzer, N.), *op. cit.* note 133, p. 67.

¹⁶⁷ *Ibid.*, p. 70.

¹⁶⁸ Schmitt, *op. cit.* note 101, p. 36 – 37.

¹⁶⁹ Boothby, *op. cit.* note 102, p. 748 – 749.

preparation of the next use in combat performs a continuous act of DPH, a view with which the present author agrees. It would also be difficult to explain how such activities differ from those establishing the existence of a continuous combat function, leading to a continuous loss of protection.

As regards the “revolving door” issue, the ICRC states that the loss of protection for civilians as a result of DPH is related to individual acts of DPH and that even though the acts may be repeated regularly, the civilians do not pose a threat during the intervals between those acts. During such intervals, “the use of force against [such civilians] must comply with the standards of law enforcement or individual self-defense.”¹⁷⁰ As Schmitt correctly points out, however, the “threat” criterion is related to a different concept and body of law than DPH under IHL and is itself already part of self-defense law and a basis for the use of force separate from the loss of protection under IHL.¹⁷¹ Furthermore, both Schmitt and Boothby point out that several of the examples in the Guidance of activities which amount to DPH do not necessarily by themselves make the civilian carrying out such activities a (direct) threat to enemy forces. The reasoning used by the ICRC in the Guidance also appears to be at odds with the commentary on Article 51, paragraph 3, of the First Additional Protocol, which refers to “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces,” thus advocating an approach based on the nature of the act similar to that advocated by Boothby, and expresses that the loss of protection ends only “[o]nce he ceases to participate,”¹⁷² supporting the view that the loss of protection is related to the civilian’s decision to become part of the hostilities and lasts

¹⁷⁰ ICRC (Melzer, N.), *op. cit.* note 133, p. 70 – 71. It should be noted that the Guidance emphasizes on pp. 72 – 73 that this principle does not apply to members of organized armed groups with a continuous combat function, whose loss of protection begins once they become such members and ends only once the person in question no longer exercises such a function, providing examples for establishing that situation.

¹⁷¹ Schmitt, *op. cit.* note 101, p. 37.

¹⁷² Both quotations are from Sandoz, *op. cit.* note 28, p. 619 (paragraph 1944).

for as long as the civilian chooses to do so, a view supported by both Schmitt and Boothby.¹⁷³

The views of the ICRC on these issues also received some support in academic writing. For example, Christensen likens the revolving door approach to civilians and DPH to the role played by reserve forces in the armed forces of States, including the United States national guard units.¹⁷⁴ This view seems somewhat flawed, however. While reserve forces do, indeed, become civilians after they undergo their (basic) training until they are called into active duty,¹⁷⁵ that situation is not comparable to civilians who continually switch between combat duties and civilian life within (very) short periods of time, frequently and commonly described as being a farmer by day and a warrior by night. In the operations more commonplace today, in which members of opposing forces carry out attacks, or at the very least prepare and support such attacks, against armed forces in an armed conflict and then blend back into the civilian population, repeating the process over and over for the duration of the conflict, the restrictive approach taken by the ICRC seems unworkable in practice and eventually runs the risk of eroding, at least at the tactical level, the incentive and understanding for compliance with the principle of distinction as a fundamental component of IHL.¹⁷⁶

Two final comments are in order as regards DPH. First, leaving aside the controversy and the various discussions on the examples of what does or does not constitute DPH, once a civilian carries out an act of DPH he or she does not gain combatant privilege and may be prosecuted under the

¹⁷³ Schmitt, *op. cit.* note 101, p. 37; Boothby, *op. cit.* note 102, p. 756.

¹⁷⁴ Christensen, *op. cit.* note 136, p. 288 – 289.

¹⁷⁵ This point is also made by the ICRC in distinguishing between members of organized armed groups with a continuous combat function, who lose their protection under IHL after they are trained and equipped to carry out that function even if they have not yet carried out any act of DPH, from members of reserve forces. ICRC (Melzer, N.), *op. cit.* note 133, p. 34.

¹⁷⁶ This observation is based on the present author's experiences in teaching IHL to members of the armed forces who were involved in combat operations in Afghanistan and is also supported by, amongst others, Boothby; Boothby, *op. cit.* note 102, p. 768.

local law for the acts that were committed.¹⁷⁷ Furthermore, if captured, a civilian who has engaged in DPH will not meet the criteria for prisoner of war status as set forth in the Third Geneva Convention or the Additional Protocols to the Geneva Conventions, although certain (protective) standards do, of course, still apply to that person's captivity, whether on the basis of common Article 3 in the case of a non-international armed conflict or, in international armed conflict, on the basis of the Fourth Geneva Convention or Article 45, paragraph 3, of the First Additional Protocol in combination with Article 75 of that Protocol. Additionally, as will also be discussed in greater detail in the next chapter, human rights law will also most likely be applicable.

Finally, as regards implementation of the rules and recommendations on DPH into ROE, it was already observed above that translating the distinction between civilians enjoying protection under IHL from civilians directly participating in hostilities into simple and understandable ROE suitable for use in the operation as a whole would be nearly impossible. Given the discussion above on the various subtle distinctions and exceptions to the rule on loss of protection during DPH, and the complexities resulting from the ICRC's Interpretative Guidance on the issue, it is not likely that DPH will be included in the ROE for any given operation within the actual ROE authorizing the use of force or attack on specified (categories of) individuals. While a reference to DPH can be included in the "commander's guidance" section of a ROE set, it is far more likely that the ROE will take a functional or action-based approach to authorizing the use of force against individuals other than enemy combatants, including, for all practical purposes, "true" members of organized armed groups (meaning those with an unequivocal "continuous combat function"). Consequently, the ROE relating to the use of force against individuals who are not such combatants will be more similar to the rules and guidance regarding self-defense and the ROE related to force protection.¹⁷⁸ As regards members of organized armed groups, it would seem, based on the present author's experience, that it is unlikely that the

¹⁷⁷ See, inter alia, Sandoz, *op. cit.* note 28, p. 619 (para 1944).

¹⁷⁸ See chapter 3.

ROE will be able to make a distinction between persons with a continuous combat function and persons who actively support combat (or otherwise hostile) activities carried out by the group. While support activities, including those related to financing or otherwise (indirectly) supporting the combat operations of the group, can more readily be distinguished and excluded from the authorization to use force in the ROE, the evaluation of whether a person has a continuous combat function or continually commits DPH will be more likely to be based on a practical approach rather than the intricate subtleties of the ICRC's revolving door approach.¹⁷⁹ In short, while the ICRC's Guidance contains a number of valuable and valid contributions to the overall understanding of the concept of DPH, its theoretical and at times idealistic approach may render many elements and subtleties of the Guidance nearly impossible to implement in the actual practice of modern military operations.

b. Capture or kill?

The concluding observations in the previous paragraph regarding the part of the Interpretive Guidance related specifically to the concept of DPH apply to an even greater extent to the most controversial part of the Guidance, which goes well beyond the concept of DPH. Part IX of the Guidance, which several of the experts who had previously participated in the preparatory work on the Guidance have stated was added without due consultation and which led to those experts withdrawing their support for the Guidance,¹⁸⁰ applies to all use of force against any person not entitled

¹⁷⁹ The determination as to which individual falls into which category also depends on the nature of the group in question. Certain modern armed groups, particularly those classified as international terrorist organizations, adhere to a dogmatic agenda that essentially expects every member of the group to be willing to take up arms or to lay down their lives in, to all extents and purposes, combat operations. The ISIS/Da'esh group and its armed attack on Iraq would be an example of such an organization and such operations for which it is nearly impossible to distinguish between "combatant" members of the group and "normal" members without a continuous combat function.

¹⁸⁰ Parks, W.H., "Part IX of the ICRC 'Direct participation in hostilities' study: no mandate, no expertise, and legally incorrect," in *Journal of International Law*

to protection under IHL. Consequently, the recommendation it contains not only applies to civilians who lose protection as a result of DPH and to members of organized armed groups who have a continuous combat function, but also applies to the use of force against combatants in any armed conflict. This aspect in itself already makes the recommendation curious in the context of the specific scope of the Interpretive Guidance. The recommendation and accompanying interpretive text is even more curious.

The recommendation itself is worded somewhat cryptically, but when read in conjunction with the accompanying guidance it becomes clear that the ICRC, in essence, suggests that in addition to the restraints and limitations imposed on the use of force by the specific rules of IHL, the use of force is further limited by the principles of military necessity and humanity. Consequently, according to the ICRC, if it is possible to capture rather than wound, there is an obligation to capture; if it is possible to wound rather than kill, then there is an obligation to wound. The ICRC points to several (real) rules of IHL as indications of how the principles of military necessity and humanity can be seen as meta-rules, providing the bandwidth within which the rest of the rules of IHL should be interpreted and applied. The prohibitions on unnecessary suffering and on superfluous injury are named in this context, as well as the prohibition to deny quarter. The ICRC points out that “the absence of an unfettered ‘right’ to kill does not necessarily imply a legal obligation to capture rather than kill” and that “[c]onsiderations of military necessity and humanity neither derogate from nor override the specific provisions of IHL.”¹⁸¹ However, the Guidance continues by explaining how the principles of humanity and military necessity prohibit, beyond the rules of IHL themselves, any use of force not necessary for achieving a legitimate military purpose. The commentary

and Politics, Vol. 42, 2010, pp. 783 – 785; Boothby, W.H., *The Law of Targeting*, Oxford, 2012, p. 526.

¹⁸¹ ICRC (Melzer, N.), *op. cit.* note 133, p. 78. It should be noted that the introduction of the Guidance also states that “the 10 recommendations made by the Interpretive Guidance, as well as the accompanying commentary, do not endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC’s institutional position as to how existing IHL should be interpreted.” (p. 9).

provides three examples of situations in which persons who are legitimate targets under IHL could be either captured or removed from the scene of action without the use of deadly force.

Part IX of the Guidance provoked considerable debate in academic circles, most of which goes beyond the scope of this study of the relationship between ROE and law. However, since limitations on the use of force do affect the authorizations which may or may not be promulgated through the ROE, a number of observations are in order. One of the authors most clearly in support of the ICRC's views on this issue is Goodman, who states that the rule in question "has a solid foundation in the structure, rules, and practices of modern warfare."¹⁸² In support of his arguments, Goodman points to the rules of IHL concerning superfluous injury and unnecessary suffering, the prohibition on harming persons who are *hors de combat* and to the restrictions on certain weapons and means of warfare. As regards the rules regarding persons who are *hors de combat*, Goodman especially emphasizes the expansion of those rules in the First Additional Protocol, in which the category of persons who have fallen into the power of the enemy (Article 4 of the Third Geneva Convention) was expanded to persons who are in the power of the enemy (Article 41, paragraph 2 under (a) the First Additional Protocol), thus, in the view of Goodman and referring to the Commentary to the Protocol, emphasizing that the category is not limited to persons who have been captured but also includes persons who are factually, under the prevailing circumstances, in the power of the enemy. Goodman lists a number of examples in which the rule would (or should) apply and then points to state practice of application of the rule in modern operations. As regards that state practice, Goodman notes that other authors have pointed out that such application is based on practical and policy-based decisions rather than on recognition of a legal obligation to do so. In that context, Goodman puts forth the argument that while state practice is not in itself sufficient to establish a rule as being part of customary law, there does not appear to be any state practice to the contrary and, in section 3 of his Article, points to the codification (and the views expressed by States

¹⁸² Goodman, R., "The power to kill or capture enemy combatants," in *European Journal of International Law*, Vol. 24, no. 3, 2013, p. 820.

in that context) of the rules of IHL mentioned above, as well as views expressed by noted scholars and authorities in the field of IHL, including Pictet and Kalshoven.

Notwithstanding the careful and well-researched nature and structure of Goodman's article and arguments, his views are not convincing nor legally correct in some cases. The argument that there is a basis for assuming a rule of customary law restricting the use of force beyond the actual rules of IHL fails on the basis of the absence of a *communis opinio juris* to that effect. Referring to the codification process for the 1977 Additional Protocol(s) first of all does not necessarily reflect modern legal opinion of the States involved. Furthermore, the argument mistakenly assumes that the principle that was reflected in the rules of the Protocol has a normative effect outside of those rules, existing in parallel to the rules of IHL themselves. Instead, it seems more reasonable to argue that the principle was the inspiration for the rules and that the rules reflect and implement the principle. Consequently, the rules as codified in the Protocol apply, not the principle as a normative rule by itself. Finally, the views and opinions of scholars, no matter their undisputed status as preeminent experts in the field of IHL, do not reflect the official positions of States regarding a legal obligation to abide by an unwritten rule of international law. As regards the examples offered by Goodman, most (if not all) of those seem to be examples of interpretation of the rule regarding persons *hors de combat* in the sense of persons in the power of the enemy. Since that is a ("black letter") rule of IHL, set forth in Article 41, paragraph 2, of the First Additional Protocol, proper application of that rule does not reflect adherence to the rule as envisaged by the ICRC in part IX of the Interpretive Guidance. While nearly all of the examples also reflect situations in which the strategic or policy considerations referred to above would, in the present author's experience, lead to an outcome consistent with the rule under debate,¹⁸³ that does not mean that such an outcome is based on a (perceived) legal obligation to adhere to that rule, nor that there is, at present, an official State opinion that such a rule is part of (customary) IHL.

¹⁸³ See chapter 1 for a discussion of the operational and political, as well as media-related, influences on rules of engagement.

A carefully balanced analytical approach to the rule and its possible basis in international law was presented by Kleffner, who identifies the rule as “part of a trend, mainly in doctrine and some case law, towards a ‘least harmful means’ requirement.”¹⁸⁴ In building his analysis, Kleffner points out that the debate presupposes a preliminary choice between seeing IHL as authorizing, thus rendering everything not authorized as being prohibited, or seeing IHL as prohibiting, leaving anything not so prohibited as being authorized. In the careful and precise manner used throughout the article, Kleffner suggests that IHL is aimed more towards latter.¹⁸⁵ This approach is in line with the observations made above and, as will be discussed below, also made by other authors, rejecting the application of the principles of humanity and military necessity as being restricting rules outside and above the written rules of IHL.¹⁸⁶ Finally, Kleffner analyzes the rules prohibiting superfluous injury and unnecessary suffering and human

¹⁸⁴ Kleffner, J.K., “Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: the end of *jus in bello* proportionality as we know it?” in *Israel Law Review*, Vol. 45, 2012, p. 36.

¹⁸⁵ *Ibid.*, p. 39. The present author agrees with this observation, but would also suggest, on the basis of personal observations in the context of political and legal debates surrounding national decisions on participation in international military operations, that a further level of abstraction is possible as well. The choice between interpreting the law as an authorizing instrument, leaving all else as being prohibited, or seeing the law as a restraining instrument, and thus leaving all else as authorized, can be related to a choice between seeing the use of (military) force as an inherently undesirable option that must reluctantly be tolerated under strict conditions and only in exceptional circumstances or seeing the use of (military) force as a valid and rational instrument. While obviously it is always essential to preserve the careful balance between humanity and military reality, and while it should be equally obvious that the use of military force may never be an objective in itself, nor should it be considered lightly or as the first (or only) answer to (international) threats or difficulties, the nature of the threat or (international) situation may necessitate a more Clausewitz-oriented approach and treat military operations as a necessary tool in the toolbox of international relations.

¹⁸⁶ Kleffner also presents an interesting argument that accepting an additional or meta-application role of these principles could, in the case of military necessity, also lead to an opposite effect in leaving room for using military necessity as an excuse to deviate from the (written) law, in essence a return to the doctrine of “*Kriegsraison*”. Kleffner, *op. cit.* note 184, p. 41.

rights law as possible foundations for the rule set forth in Part IX of the Guidance and explains that neither can be so used. In the case of superfluous injury and unnecessary suffering, Kleffner points out that the presently accepted interpretation of those rules does not provide a basis for the rule in Part IX, while human rights law as a basis leads to a number of conceptual, legal and structural problems, including the *lex specialis* relationship between IHL and human rights law, which will be discussed in the next chapter, as well as the complexities of extraterritorial applicability of human rights law and the differences between States and non-State actors as regards the status of subject (or recipient) and actor under human rights law. Consequently, Kleffner concludes that the rule proposed in Part IX of the ICRC's Interpretive Guidance does not represent current international law, including IHL.

Other authors have similarly rejected the rule in Part IX as representing current law, in various degrees of criticism. Boothby states that the legal arguments supporting the rule are “suspect” and that “state practice and the lessons of history suggest that they are misconceived,”¹⁸⁷ rejecting the existence of a rule requiring capture rather than the use of lethal force against a legitimate target under IHL. Schmitt, referring to the reasoning used in Part IX as “flawed logic,”¹⁸⁸ explains that the principles of military necessity and humanity are indeed fundamental principles in the context of IHL, but that those principles have been implemented in the rules of IHL themselves and do not have an extra, independent function, citing several examples of rules of IHL where the principles have been so implemented. Schmitt also points out that the requirements proposed by Part IX exist in human rights law, but, similar to Kleffner, points to the difficulties caused by the *lex specialis* relationship between IHL and human rights law as regards introducing a rule based on the latter into the legal structure and application of the former.¹⁸⁹ The most vehement rejection of the rule proposed in Part IX of the ICRC's Interpretive Guidance, however, is

¹⁸⁷ Boothby, *op. cit.* note 180, p. 526.

¹⁸⁸ Schmitt, *op. cit.* note 101, p. 41.

¹⁸⁹ *Ibid.*, pp. 42 – 43.

presented by Parks.¹⁹⁰ Referring to the history of the law as well as to State practice, Parks rejects the reasoning presented in the Guidance and presents numerous and well-documented arguments as to why the rule presented in Part IX does not have a basis in present IHL. Parks also refers to case law¹⁹¹ and examples of modern military operations as arguments why the reasoning and conclusions in the Guidance are flawed and inaccurate. Finally, Parks correctly points out that the ICRC's interpretation of the concept of military necessity is erroneous and that the principle in any case does not apply at the tactical level of the individual serviceman.¹⁹²

Based on the arguments presented both in favor and against the existence in IHL of a rule as proposed by the ICRC in Part IX of the Interpretive Guidance, it may be concluded that there is no such rule in current IHL.¹⁹³ A clear distinction must be made between voluntary or policy-based actions reflecting behavior consistent with the rule from a

¹⁹⁰ Parks, *op. cit.* note 180. It should be noted that the article by Goodman (*op. cit.* note 182) was written in response to this article by Parks.

¹⁹¹ Both the ICRC's Interpretive Guidance (p. 81, footnote 220, of the Guidance) and several of the authors mentioned (Goodman, *op. cit.* note 182, p. 826; Kleffner, *op. cit.* note 184 pp. 38 and 49; Parks, *op. cit.* note 180 pp. 788 – 793) refer to the Judgment of the Supreme Court of Israel referred to *supra*, note 102. The judgment in question incorporates and reflects elements of IHL, the law of occupation, human rights law and, obviously, the national laws of Israel. Consequently, taking any statement of that judgment out of its overall context, as well as interpreting the applicability of any individual statement of the judgment outside the rather specific context and legal complexities of Israeli operations in Gaza and the West Bank carries considerable inherent risks. The present author therefore agrees with Parks that the “circumstances at issue in the Israeli case are unique to that nation's geography, history, circumstances, and threats” and that it is not possible to derive conclusions as regards a legal basis for the rule set forth in Part IX of the Interpretative Guidance on the basis of the Israeli Supreme Court ruling. Parks, *op. cit.* note 180, p. 793.

¹⁹² Parks, *op. cit.* note 180, pp. 803 – 804. See also *supra* footnote 161.

¹⁹³ A view shared by, among the authors already discussed, Lesh, M., “Interplay as Regards Conduct of Hostilities,” in Wet, E., and Kleffner, J.K., [eds.], *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations*, Pretoria, 2014, pp. 104 – 105.

legal obligation to act accordingly. Considerations of (personal) ethics¹⁹⁴ or simply political expediency, as well as considerations of a military strategic or operational nature, may inspire such behavior, but that must not be confused with the existence of a legal rule requiring such behavior, with concomitant (criminal) law effects if the rule is not adhered to. Finally, a degree of realism is needed, acknowledging that the careful balance between humanitarian concerns and the reality of war, which is an intrinsic and integral element of IHL, is already reflected in the law itself. Moreover, the law under discussion and to which the Interpretive Guidance relates is IHL, not the wider concept of the international law of military operations, which encompasses a far wider area of law as it applies to modern military operations in general and including human rights law, (local) criminal law, etc. In conclusion, therefore, current IHL does not contain an obligation to capture rather than kill those persons who are valid military targets and such restrictions or limitations need not be introduced into ROE intended for operations to which IHL applies.¹⁹⁵

It should also be noted that, as was mentioned before,¹⁹⁶ caution is needed when looking at ROE as indications of an *opinio juris* on the part of the nation in question. In addition to observations already stated as regards other (most notably policy and strategic) influences on the substance of the ROE, restrictions in the ROE reflecting a “capture rather than kill” approach may also be the result of human rights law influences, as will be

¹⁹⁴ See also the analysis by Gill as regards the role of chivalry in the conduct of warfare and as an element in, and as a principle applicable in addition to, IHL and the possible role of this principle in bridging the differences of opinion in the “kill or capture” debate. Gill, T.D., “Chivalry: A Principle of the Law of Armed Conflict?” in Matthee, M. *et al.* [eds.], *Armed Conflict and International Law: In Search of the Human Face*, Liber Amicorum in memory of Avril Macdonald, Springer, 2013, pp. 33 – 51.

¹⁹⁵ The statement is intended to reflect the absence of any *legal* obligation to include such restrictions in ROE for military operations to which IHL applies *de jure* and may not be applicable or appropriate for operations in which nations decide to apply IHL as a matter of policy. Since ROE are based on policy and operational considerations as well as on legal requirements, there may also be policy reasons to require personnel to act in a manner consistent with the disputed rule.

¹⁹⁶ See pp. 147 – 148.

discussed in the next chapter. It is furthermore necessary to differentiate between ROE and the derivative cards, as those derivative cards may, due to their nature and purpose, be more restrictive than the actual ROE.¹⁹⁷ In the Netherlands, for example, such cards commonly contain an emphasis above and beyond the requirements of IHL as regards the criterion of necessity as a prerequisite for the use of force, as well as containing injunctions on limiting the use of force as much as possible. That does not mean, however, that The Netherlands is of the opinion that there is a legal requirement under IHL to impose such restrictions.

2. Targeting objects

Although not without their own sources of dissension, the rules of IHL related to the targeting of objects present far fewer sources of controversy, or rather less heated debate, as compared to the discussion above on the targeting of persons. Nonetheless, some issues deserve closer examination as they may have an impact on the drafting and implementation of ROE. These issues are the definition of “military objectives” set forth in the First Additional Protocol, the status of infrastructure and (other) dual-use objects in the context of that definition, and the protection of cultural property.

The basic rules under IHL as regards the targeting of objects can be found in Article 48 of the First Additional Protocol, which sets forth the principle of distinction, in combination with Article 52 of the same Protocol. On the basis of the principle of distinction as set forth in Article 48, the parties to a conflict must limit their attacks to military objectives, a requirement repeated in the first sentence of Article 52, paragraph 2. Attacks against civilian objects are prohibited, as is stated clearly in Article

¹⁹⁷ See chapter 1 for a discussion of the derivative soldier’s cards in relation to ROE. Since the soldier’s cards only contain those rules which apply for the individual soldier, leaving out such weapon systems as artillery, etc., the cards are frequently more self-defense oriented instead of being reflections of the authorization to use force in the operation as a whole. However, since the soldier’s cards are declassified more often than the actual ROE and can be found in the public domain, it is an easy misconception to view such instructions as the ROE for the operation.

52, paragraph 1. In defining these terms, the focus is on military objectives, as civilian objects are, on the basis of an *a contrario* definition, all objects which are not military objectives. The question as to what, then, constitutes a military objective is answered in paragraph 2 of Article 52. According to that provision, determining whether an object is a valid military objective requires evaluating whether the object meets two cumulative criteria. Firstly, the object must by its nature, location, purpose or use make an effective contribution to military action. Secondly, the total or partial destruction, capture or neutralization must offer a definite military advantage under the circumstances ruling at the time.

As is immediately evident, this definition offers a host of interpretative issues. According to the commentary, the word “nature” refers to “all objects directly used by the armed forces”, including all weapons, depots, headquarters, etc., and seems uncontroversial.¹⁹⁸ Among such objects are also the ammunition production factories of the adversary supplying the combat troops with ammunition,¹⁹⁹ although, as was discussed above, the workers in those factories are not themselves valid military objectives. This means that the (civilian) workers in such factories are at considerable risk of suffering death or injury as a collateral effect of legitimate attacks on the factories, but outside their place of work may not be attacked on the mere basis of their employment in those factories.

The term “location,” however, raises the first of the controversial issues. Some of these issues will be discussed below in relation to cultural objects, but the reference in the commentary to bridges²⁰⁰ raises an issue in itself. The rules regarding the status of objects as military objectives by nature of their location refer to objects which do not have an intrinsic

¹⁹⁸ Sandoz, *op. cit.* note 28, p. 636 (para. 2020).

¹⁹⁹ The extent to which ammunition factories are valid military objectives depends on the nature and scope of the conflict. In a large-scale international armed conflict such as World War II, ammunition plants would certainly be a legitimate target, as it is certain that the nation’s weapons and ammunition production would be entirely and directly related to the military operations of that nation’s armed forces. In armed conflicts of a smaller scale, or with more clearly defined geographical limits, this is not automatically the case.

²⁰⁰ Sandoz, *op. cit.* note 28, para 2021.

military value by themselves (contrary to those covered by the word “nature”) but which, due to their location, make an effective contribution to military action. Focusing on the word “effective” in combination with the secondary criterion (to be discussed below) that destroying, capturing or neutralizing the object must offer a “definite” military advantage, has led Bothe to argue that bridges and infrastructure do not in or by themselves necessarily meet the criteria for military objectives.²⁰¹ While Bothe acknowledges that such structures can meet the criteria if they are being used to transport troops or supplies to the frontline, he argues that if there is no real front line and the general movement of (military) goods and personnel does not have any real or direct effect on the military actions of the adversary, as was the case during operation Allied Force in his opinion, then the bridges and (other) infrastructure are not military objectives. Consequently, Bothe stresses an evaluation based on the use of the bridges. Dinstein, on the other hand, disagrees with this limitation and explains that bridges are valid military objectives by their very nature, as well as by their purpose or location.²⁰² Given not only the specific reference to bridges in the Commentary as mentioned above, but also given the inherently strategic value of bridges,²⁰³ the views expressed by Dinstein appear to be the more realistic and more in keeping with the accepted interpretation of IHL, at least as regards certain bridges depending on their purpose, location or actual use. However, that would seem to apply only as regards bridges spanning major geographical obstacles and connecting strategic lines of communication. Minor bridges which can easily be by-passed or which serve no strategic value would not, by their nature of being a bridge, be a

²⁰¹ Bothe, M., “The protection of the civilian population and NATO bombing on Yugoslavia: comments on a report to the prosecutor of the ICTY,” in *European Journal of International Law*, Vol. 12 no. 3, 2001, p. 534.

²⁰² Dinstein, Y., “Legitimate military objectives under the current *jus in bello*,” in *U.S. Naval War College International Law Studies*, Vol. 78, 2002, p. 147 and more extensively pp. 150 – 151, citing the comments by Bothe specifically as being incorrect.

²⁰³ The experiences of British and American forces in the failed operation *Market Garden* during World War II would be a prime example of the strategic nature of bridges.

valid military objective by that nature alone. Other exceptions to treating all bridges automatically as military objectives are not only possible as well, but also advisable, such as in the context of the protection of cultural objects as discussed below. As regards other infrastructure, the same approach applies, meaning that such infrastructure may be a valid military objective, provided such infrastructure, including railways, highways, etc., serves a strategic purpose.²⁰⁴

The word “purpose” in relation to (civilian) objects being regarded as military objectives is not self-evident in its meaning. According to the Commentary, the word refers to “the intended future use” of an object, as opposed to the word “use,” which refers to the actual use of the object in the present.²⁰⁵ Given that the text of the Commentary continues by expanding on the concept of “use,” the further analysis by Dinstein that the “future use” must be limited to situations in which the intended future use can reasonably be known, for example on the basis of solid intelligence or as a logical extension of the nature of the object, is valuable, thus ruling out hypothetical or “worst case scenario” designations of objects as valid targets.²⁰⁶ Given the discussion above as regards bridges and infrastructure, it may be argued that the designation of such objects as military objects might be related to “purpose” as much as to “location”, in the sense that their intended (future) use as strategic points in the lines of communication of the enemy are what makes them valid targets (to the extent that they are not already being so used).

Finally, as regards the word “use” in the first criterion, the test appears to be relatively simple and requires an objective determination that the object in question is being used by the adversary in a way that makes an effective contribution to military action. This in any case includes using the object as a military base or headquarters, as well as using civilian objects for billeting combatants or as a location from which force can be used, such as by placing snipers in a tower or otherwise opening fire from the cover of (or from within) the object. It should be noted that the use of a civilian

²⁰⁴ A view shared by Dinstein, *op. cit.* note 202, p. 147.

²⁰⁵ Sandoz, *op. cit.* note 28, p. 636 (para. 2022).

²⁰⁶ Dinstein, *op. cit.* note 202, p. 148.

object for such military purposes in some cases overrides specific protection as well, and may for that reason be a violation of IHL, as will be discussed below in relation to cultural objects. Such military use of civilian objects also requires (some degree of) military necessity, given the general injunction that parties to a conflict must, “to the maximum extent feasible,” take precautions to protect civilian objects from the effects of warfare.²⁰⁷ Somewhat related to that injunction is the observation that while the use of a civilian object for military purposes may, in terms of IHL, render such an object a valid military target, other considerations may preclude targeting such objects and the ROE may contain restrictions on the use of force against such objects. Such considerations include policy and strategic evaluations as regards public support (both locally and in the sending nations) for the operation.

As regards the second criterion, the focus in interpretation is on the word “definite.”²⁰⁸ As the Commentary explains, the wording of this criterion rules out hypothetical advantages or “potential or indeterminate”

²⁰⁷ Article 58 under (c) of the First Additional Protocol. The words “some degree” are intended to reflect that the latitude for military use of civilian objects varies according to the circumstances ruling at the time as well as the nature of the object. The use of a school or a hotel for military purposes is mentioned in the Commentary to Article 52, paragraph 2, of the First Additional Protocol as an example of “use” and the use of private homes for military purposes (assuming the civilian population or occupants of the house have been led to safety in keeping with the obligations under IHL) is similarly undisputed. Hospitals, places of worship and cultural objects are of a decidedly different nature, however.

²⁰⁸ The words “circumstances ruling at the time” are related to a number of declarations upon ratification of the First Additional Protocol, of which eleven encompass Article 52 (as well as other articles in the Protocol) and which state, in various wordings, that the decisions made by military commanders have to be judged on the basis of the information reasonably available to those commanders at the time that the relevant decision was made. For a further discussion of these (and other) declarations in relation to the Additional Protocols, see Gaudreau, J., “The reservations to the Protocols additional to the Geneva Conventions for the protection of war victims,” in *International Review of the Red Cross*, No. 849, March 2003, available at https://www.icrc.org/eng/assets/files/other/irrc_849_gaudreau-eng.pdf (last accessed on 8 April, 2016). The declarations referred to above are discussed on pp. 14 – 15.

advantages.²⁰⁹ In this context, two controversies can be mentioned. The first concerns the targeting of sources of propaganda or other, similar, media channels intended for, and used to, express the views of a party to a conflict and, in some cases, to incite support for the war effort and military actions of a party to a conflict. An example of such a target in relatively recent operations is the tower of the Serbian television and radio station in Belgrade (RTS), which was attacked in April of 1999 during the air campaign against the Federal Republic of Yugoslavia in the context of the Kosovo crisis. Leaving the human rights aspects for the next chapter, the question remains whether such objects meet the criteria of Article 52 of the First Additional Protocol. Dinstein, referring inter alia to Article 8, paragraph 1 sub (a), of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, appears to favor the position that such (civilian) broadcasting stations can be viewed as military objectives.²¹⁰ The Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, however, states that the bombing of the RTS tower was “legally acceptable” if it was, as stated by NATO, attacked because it was part of the Serbian command, control and communications (C3) network, but that the legality of an attack on the tower for being “part of the propaganda machinery” would be “more debatable.”²¹¹ The status of

²⁰⁹ Sandoz, *op. cit.* note 28, p. 636 – 637 (para. 2024 – 2028). While the Commentary states that “there must be a definite military advantage for every military objective that is attacked” (para 2028), ten States have made declarations that state that the term “military advantage” as used in this context as well as in the context of precautions in attack (discussed below) refers to “the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.” Gaudreau, *op. cit.* note 208, p. 16. Consequently, while an attack may not always have an apparent advantage in itself, if it is part of a larger attack (for example being a diversion) the advantage of the overall attack taken as a whole becomes the deciding factor.

²¹⁰ Dinstein, *op. cit.* note 202, p. 157.

²¹¹ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, paragraphs 71 – 76. Available at: <http://www.icty.org/sid/10052#IVB3> (last accessed on 8 April, 2016). It should be noted that in addition to the issues discussed above (see especially footnote 117) as regards combined targeting and

(civilian) broadcasting stations which are not part of the enemy's C3 network remains a controversial issue. Notwithstanding the inclusion of "broadcasting station[s]" as being examples of "important military objectives" in the 1954 Convention, it would seem that contemporary views on the issue differ from that approach and that propaganda in and by itself does not make such a clearly effective and direct contribution to the military action of the enemy that the use of force against such installations would offer a definite military advantage.²¹² On the other hand, as the role played by Radio Télévision Libre des Mille Collines in the context of the genocide in Rwanda demonstrates, the impact of propaganda is very much dependent on the specific context of the situation. It would seem, therefore, that the legality of targeting (civilian) broadcasting stations will similarly be dependent on the specific context in which that decision is made and a determination as to the role played by the broadcasting station in question in relation to the armed conflict in question.

The second controversy regards objects of an economic nature, such as production facilities, factories, etc., other than those producing clearly military goods or those directly contributing to the military actions of the adversary. It has long been (although perhaps not always with consistent

divergences in interpretation of IHL, the target selection and approval process within NATO in the context of operation *Allied Force* was a complicated process. Most of the targets were put forth for approval by the United States as part of operation *Noble Anvil*, subsumed into operation *Allied Force*, but the targets were subject to further scrutiny by the other NATO allies, with the North Atlantic Council reserving final approval of certain target categories. See, inter alia, the United States General Accounting Office Report to Congressional Requesters, *Kosovo Air Operations: Need to Maintain Alliance Cohesion Resulted in Doctrinal Departures*, July 2001, p. 2 and p. 8 – 9; Peters, J.E. et al. (Rand), *European Contributions to Operation Allied Force: Implications for Transatlantic Cooperation*, 2001, p. 25 – 29; United States Department of Defense, Report to Congress, *Kosovo/Operation Allied Force After-Action Report*, 31 January 2000 (unclassified edition).

²¹² It is interesting to note that many nations, including most European nations, at least at some point made a reservation to the prohibition on propaganda as set forth in Article 20, paragraph 1, of the International Covenant on Civil and Political Rights, although those reservations were related to the freedom of expression rather than any consideration related to IHL or the role of propaganda in war.

clarity), and still is, the view of the United States that such objects are legitimate military objectives if they provide a, direct or indirect, effective contribution to the war-sustaining capabilities of the enemy, that is the ability of the enemy to continue its military action.²¹³ Dinstein does not support this view, considering the “war-sustaining” approach to targeting as being “too broad” and emphasizing the need for a “proximate nexus” between the object and the “war fighting” aspect of the concept of military action in the context of the definition of valid military objectives under IHL.²¹⁴ While the reasoning behind classifying such economic objects which make an effective contribution to the enemy’s war-sustaining abilities seems logical from a (military) strategic perspective, the present author agrees with Dinstein that this approach would, eventually, give rise to including an excessively large scope of civilian objects under the category of valid military objectives. It may consequently be concluded that economic objects which do not make an effective contribution to the military action of the enemy as those terms are understood in the context of Article 52 of the First Additional Protocol but merely provide a contribution to the war-sustaining ability of the enemy are not valid military objectives under current IHL.

It is important to note that the controversy regarding economic objects as just discussed is an issue of interpretation of the rules set forth in Article 52, paragraph 2, of the First Additional Protocol. The rules themselves are considered part of customary law, including by the United States, in both international and non-international armed conflicts.²¹⁵ A less controversial (or at least less disputed) question of interpretation of these rules is the declaration made by several states that specific areas of land can be valid military objectives if they meet the criteria set forth in the rules themselves,

²¹³ See, for example, the Annotated Supplement, *op. cit.* note 3, p. 8-3, including footnote 11 on that page; and Schmitt, *op. cit.* note 157, pp. 717 – 718. The observation that the United States still adheres to this view is furthermore based on the author’s professional experience. It should be noted, however, that the United States has not always been completely consistent in this view.

²¹⁴ Dinstein, *op. cit.* note 202, p. 145 – 146.

²¹⁵ Henckaerts, *op. cit.* note 22, p. 29 – 32. The United States position is discussed specifically on p. 31.

a policy which has been described as “reasonable.”²¹⁶ While this is in keeping with the “location” element of Article 52, which was discussed above, the policy is noteworthy in the sense that it applies not to a specific object, but to an area of land in itself.

The definition and rules regarding military objectives are among the principal rules of IHL to be directly applied in the drafting and implementation of ROE or, if they are not reflected in the ROE themselves, in the directives and (operational) guidance issued to military personnel in the context of military operations. Although most pre-planned targeting, that is the determination of an object as a valid (and worthwhile) military objective with a view to tasking a unit to attack that object, takes place outside the ROE process,²¹⁷ the engagement of targets of opportunity or the engagement of objects as part of the overall use of force in the context of the given operation must meet the criteria discussed above. Consequently, whether through instruments such as “targeting guidelines” or in the ROE themselves (or in the derivative instruction cards), the rules identifying which objects constitute valid military objectives must be implemented in the rules regarding the use of force in operations in which IHL applies *de jure* or is applied as a matter of policy.

²¹⁶ Sandoz, *op. cit.* note 28, p. 636 – 637 (para. 2025 – 2026), adding that such an area can only be of limited size and that the targeting of such an area can only apply in a “combat area”; and Gaudreau, *op. cit.* note 208, p. 16.

²¹⁷ In such pre-planned targeting, the process usually takes place at the staff level in a special targeting cell and can be concluded some time in advance of the actual engagement of the target. Nonetheless, and regardless of the apparent “disconnect” between this process and the actual use of force during the engagement itself, the ROE (as well as, obviously, IHL) must be taken into account during this targeting process. Without adherence to the ROE, after all, the targeting process could lead to the selection of targets which cannot be attacked under the applicable ROE and thus be useless. The ROE to be taken into account in the pre-planned targeting process include both the target identification ROE and the ROE which authorize the engagement of specified persons and objects, as was discussed above.

a. Cultural property and religious buildings

Since, quite obviously, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict predates the 1977 Additional Protocols to the Geneva Conventions, many of the objects of cultural value and significance to which the 1954 Convention applies now also, at the very least, enjoy the protection offered by Article 52 of the First Additional Protocol to the extent that they are civilian objects.²¹⁸ Consequently, some of the rules of normal protection applicable to cultural property under the 1954 Convention are either covered by, or subsumed under, the rules applicable to all civilian objects. Nonetheless, given their special nature and purpose, the rules regarding protection of cultural property, including the rules on the regime of special protection and the rules introduced by the Second Protocol to the 1954 Convention, deserve separate discussion. In this discussion, given the focus on ROE and concomitant rules on the use of force, the rules applicable to the party owning the cultural property, including the rules on precautions in defense and on proper care for the property, will not be discussed. Similarly, the First Protocol to the 1954 Convention, which sets forth the rules applicable in situations of occupation, will not be discussed here.

As regards rules related to (precautions in) attack or the use of force, the 1954 Convention describes two types of protection: the normal regime applicable to all cultural property and the special regime applicable to specifically designated cultural property under special protection. The “normal” regime seeks to ensure protection and respect for cultural property and prohibits, inter alia, the theft, pillage, destruction, etc. of such property. Article 4, paragraph 4 specifically prohibits reprisals against such property. The general prohibition on hostile acts against cultural property as set forth in Article 4, paragraph 1, does, however, permit exceptions if “military necessity imperatively requires” such an exception. As Henckaerts points

²¹⁸ For a history of the protection of cultural property in times of armed conflict under international law, see Bugnion, F., “The origins and development of the legal protection of cultural property in the event of armed conflict,” in *International Review of the Red Cross*, available online at: <https://www.icrc.org/eng/resources/documents/article/other/65shtj.htm> (last accessed on 8 April, 2016).

out, the “imperative” element of this provision is not defined in the Convention but seems derived from the wording of Article 23 under g of the 1907 Hague Regulations Concerning the Laws and Customs of War on Land.²¹⁹ Referring to the Second Protocol, which will be discussed below, as well as to Article 57, paragraph 3, of the First Additional Protocol to the Geneva Conventions, Henckaerts points out that the term should be interpreted as meaning that military necessity can only provide an exception to the protection of cultural property if there is no alternative available.

The 1954 Convention also allows the designation of special refuges for cultural property, which may be placed under the regime of special protection.²²⁰ The regime of special protection under the Convention sets forth specific rules on the location of such refuges and does not allow for any military purposes attached to the places under special protection. However, similar to the normal regime, the regime of special protection does recognize the possibility that military necessity may dictate the use of force against such objects. The exception is limited, however, to “exceptional cases of unavoidable military necessity” and may only be invoked “for such time as that necessity continues.”²²¹ Such an exception may furthermore only be invoked by officers in command of a unit of division size or larger and the opponent must, whenever the circumstances allow, be given advance warning and reasonable time in advance of any use of force against the object.

In 1999, the Second Protocol was added to the 1954 Convention. Just like the Convention itself, the Protocol applies in all situations of international armed conflict. However, the Protocol also specifies in Article 22, paragraph 1, that it applies in situations of non-international armed

²¹⁹ Henckaerts, J.M., “New rules for the protection of cultural property in armed conflict,” in *International Review of the Red Cross*, No. 835, 1999. Text available at <https://www.icrc.org/eng/resources/documents/article/other/57jq37.htm> (last accessed on 8 April, 2016).

²²⁰ The register maintained by UNESCO of such refuges can be found at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Special-Protection-Register_en.pdf (last accessed on 8 April, 2016).

²²¹ Article 11, paragraph 2, of the 1954 Convention.

conflict, while, similar to Article 1, paragraph 2, of the Second Additional Protocol, ruling out situations which do not rise to the threshold of a (non-international) armed conflict (paragraph 2) and reaffirming (paragraph 3) the principles of non-intervention as also contained in Article 3 of the Second Additional Protocol. In addition to introducing a system of “enhanced protection,” the Protocol provides rules regarding the application of the 1954 Convention’s rules on “normal” protection of cultural property. In that regard, as was already indicated above, Article 6 of the Second Protocol states that the exception of “imperative” military necessity as used in Article 4, paragraph 2, of the Convention requires that “no feasible alternative [is] available to obtain a similar military advantage”²²² Furthermore, the object to be made the subject of the use of force must “by its function” have been made into a military objective. The term “function” differs from the terms used in Article 52, paragraph 2, of the First Additional Protocol. Henckaerts explains that this term was the result of a compromise during the negotiations on the Second Protocol, resolving a debate on whether to include “location” in addition to “use” as regards grounds for loss of protection of cultural property.²²³ Although somewhat wider than the term “use,” Henckaerts warns against excessive latitude in interpretation of this term, pointing out that the term in any case assumes active functioning as a military objective, and against too easily including “location” as an acceptable element of this term.²²⁴ While Article 4 of the Convention did not, contrary to Article 11 of the Convention regarding special protection, specify the level of command required to authorize the use of force against cultural property under normal protection, Article 6 of the Second Protocol requires that such a decision be made by a commander of a unit of battalion size or larger, but that it may be made by

²²² Article 6 under a sub ii of the Second Protocol. Note that contrary to the explanation offered by Henckaerts, the Protocol itself speaks of a “feasible” alternative and is not as absolute.

²²³ Henckaerts, *op. cit.* note 219.

²²⁴ *Ibid.* As regards the discussion on bridges as military objectives examined above, Henckaerts points out that, at least as regards historic bridges which qualify as cultural property, the element of “use” is the decisive and definitive factor for determining their loss of protection.

the commander of a smaller unit if the circumstances do not permit seeking authorization from a higher command level. Finally, the Second Protocol makes it mandatory for attacking forces, to the extent that circumstances allow, to provide “effective” warning prior to attack. It should be noted that this term also appears in Article 57, paragraph 2 under c, of the First Additional Protocol.²²⁵ Finally, and equally similar to the provisions contained in Article 57 of the First Additional Protocol, Article 7 of the Second Protocol to the 1954 Convention requires the parties to a conflict to, *inter alia*, verify that objects they intend to attack are not cultural property, avoid or at least minimize (incidental) damage to cultural property and to refrain from an attack, or to stop an attack already underway, if the expected (incidental) damage to cultural property would be excessive in relation to the concrete and direct military advantage anticipated from the attack.

The Second Protocol, finally, introduces the concept of “enhanced protection” for specific cultural objects which are part of the “cultural heritage of the greatest importance for humanity.”²²⁶ As Henckaerts points out, the requirements regarding the treatment and protection of such special or unique cultural objects primarily address the State to whom those objects belong.²²⁷ As regards the rules related to the use of force against such objects, Article 12 of the Second Protocol makes it clear that such rare objects are, in principle, immune from attack. Nonetheless, even the special regime of enhanced protection allows for exceptions. Article 13, paragraph 1 under b, specifies that the object may be attacked if it has become a

²²⁵ Although the Commentary does not provide a great deal of explanation as regards the word “effective,” the reference in the commentary to Article 26 of the 1907 Hague Regulations, which speaks of the commander having to “do all in his power,” indicates that a certain degree of effort must be made to ensure that the warning reaches the intended recipients. The Commentary also provides historical examples, such as radio broadcasts and the dropping of pamphlets from aircraft. Sandoz, *op. cit.* note 28, p. 686 – 687.

²²⁶ The system of enhanced protection has not seen much national implementation to date. The (very limited) register of such objects can be found at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/19542P-enhanced-protection-list-en_20140320.pdf (last accessed on 8 April, 2016).

²²⁷ Henckaerts, *op. cit.* note 219.

military objective through its use, thus ruling out exceptions based on nature, location, purpose or “function,” and the attack is the only feasible means of terminating such use and all feasible precautions are taken to avoid or in any case minimize the damage to the property in question. The Protocol also allows an additional exception, in the event “immediate” self-defense so requires, provided that, to the extent that circumstances allow, the order to attack is given by “the highest operational level of command,” an effective warning is given to the adversary and reasonable time is granted to the adversary to “redress the situation.”²²⁸

The rules regarding the protection of cultural property are most commonly found in the cards derived from the ROE themselves, such as the “aide-memoire for commanders” and “soldier’s cards,” as well as in specific directives and instructions related to targeting. Nonetheless, ROE authorizing the use of force against objects must take these rules into account. Furthermore, given the requirements as regards the level of command necessary to authorize attacks on cultural objects, considering the “if circumstances allow” elements as allowing certain exceptions rather than treating such exceptions as the rule, ROE and the related ROE release authorization matrix²²⁹ may well be the most appropriate document in which to ensure these requirements, rather than (pre-)authorizing such use of force in the lower level instruction cards.

Although frequently used in the same line of reasoning as regards cultural property, and often included in the same rules in the instruction cards mentioned in the previous paragraph, churches and other places of worship which are not cultural property do not enjoy specific protection under IHL on the (sole) basis of their nature or function as places of

²²⁸ The relation between self-defense and ROE is discussed in chapter 3. As regards the provisions of the Second Protocol, however, it is not entirely clear how a situation of immediate self-defense, also taking into account the requirements of immediacy already inherent in the right to use force in self-defense, would allow prior consultation of “the highest operational level of command,” even leaving aside the question what is meant by that phrase. It is nonetheless clear that the decision to use force against such rare artifacts of cultural heritage should not be taken lightly, even in the event of a necessity to use force in self-defense.

²²⁹ See chapter 1, p. 56.

worship. To the extent that they are cultural property, such as most churches in certain older cities, they of course enjoy the protection discussed above. In all other cases, they in any case enjoy protection as being civilian objects, subject to the same exceptions as all other civilian objects. Article 52, paragraph 3, of the First Additional Protocol requires that in case of doubt as to whether an object is a civilian object or is, through its use, a military objective, the object shall be assumed to be a civilian object. Places of worship are specifically included in the examples of objects “normally dedicated to civilian purposes.”

b. Other objects²³⁰

Although not subject to the same level of specific or extensive protection as regards cultural property, certain objects or buildings represent such a significant threat to (civilian) life and property in the event of attack that they are subject to special precautions on the part of the attacking party. This category of objects is referred to in the context of IHL as “works and installations containing dangerous forces” and these objects are the subject of the provisions of Article 56 of the First Additional Protocol. Examples of such objects are dams or dykes, which prevent the flooding of the land behind them, and nuclear power plants. According to the provisions of Article 56, such objects, as well as objects in their vicinity, may not be attacked if the attack would result in the release of the dangerous forces involved and such release would lead to “severe” losses among the civilian population. While emphasizing the protection of the civilian population, paragraph 2 of Article 56 does set forth exceptions to the prohibition in the first paragraph if the objects provide “regular, significant and direct support” to the military operations of the adversary and there is no feasible alternative to attacking the object. The Commentary to Article 56 explains that “severe” is synonymous to “important” or “heavy” and must be applied “in good faith” and on the basis of common sense.²³¹ Although the ICRC considers this rule to be part of customary law in both international and

²³⁰ On the basis of the same reasoning as set forth *supra* note 131, medical installations and facilities will not be discussed here.

²³¹ Sandoz, *op. cit.* note 28, p. 669 – 670 (paragraph 2154).

non-international armed conflict,²³² Boothby does not agree with that and points to a number of reservations by States which have ratified the Protocol as well as pointing out that this rule was a novel concept first introduced in the Protocol.²³³ For those States which are a party to the Protocol, or which, subject to reservations and declarations, consider these rules to be part of customary law, the rules set forth by Article 56 establish a specific and very restrictive regime, distinct from and extending beyond the proportionality requirements which are part of the general rules on precautions in attack to be discussed below. Consequently, in drafting ROE for operations in areas in which such objects are located, the precautions and specific provisions of Article 56 must be taken into account.

Objects indispensable for the survival of the civilian population are also subject to a specific regime, which is set forth in Article 54 of the First Additional Protocol. Such objects include “foodstuffs, crops, livestock, drinking water installations” and similar objects and may not be made the object of attack or destruction, nor may they be removed or rendered useless. Article 54, paragraph 2, contains two exceptions to this prohibition. The first exception is an absolute exception, lifting the prohibition if the objects are exclusively used by, or exclusively provide sustenance for, the armed forces of the enemy. The second exception is provisional and lifts the prohibition if the objects in question provide (or are used in) direct support to military action, but only if attack or other action against the objects does not leave the civilian population with insufficient food or water to the extent that it either causes starvation (which is specifically prohibited as a method of warfare in paragraph 1 of this Article) or forces the civilian population to move elsewhere. The ICRC considers the rules and prohibition set forth in Article 54 to be part of customary law in both international and non-international armed conflicts.²³⁴ In view of the discussion above on the legality of attacking war-sustaining (economic) objects, it is interesting to note that the United States equally considers the rules and prohibitions regarding objects indispensable for the survival of

²³² Henckaerts, *op. cit.* note 22, p. 139 – 142.

²³³ Boothby, *op. cit.* note 180, p. 246.

²³⁴ Henckaerts, *op. cit.* note 22, pp. 189 – 193.

the civilian population to be part of IHL, although limiting the prohibition to attacks intended specifically to deprive the civilian population of the use of such objects.²³⁵ Although in the present author's experience the rules and prohibitions in question are not normally included in ROE or their derivative instruction cards, the legality (or illegality) of destroying sources of food and water, or (other) objects indispensable for the survival of the civilian population, is addressed in IHL training for military forces.

Finally, while schools and other places of education are listed in Article 52, paragraph 3, of the First Additional Protocol as examples of objects "normally dedicated to civilian purposes,"²³⁶ IHL does not provide specific or special protection for such objects beyond their status as civilian objects. An international effort is nonetheless currently underway to encourage states, without changing existing rules of IHL, to refrain from both the military use of and the attack on schools and other places of (higher) education.²³⁷ Such encouragement takes the form of draft guidelines intended to express so-called "best practices" to effectuate such protection for schools. At present, however, such rules or guidelines are not part of existing IHL.

²³⁵ Annotated Supplement, *op. cit.* note 3, p. 8-4, including footnote 15 on that page. Boothby points out that the motives for the attack are, indeed, "of vital importance" and refers to the interpretative statement by the United Kingdom upon ratifying the First Additional Protocol with similar effect as the United States specification. Boothby, *op. cit.* note 150, p. 110. Henckaerts also refers to the United Kingdom interpretative statement and states that France adheres to the same interpretation. Henckaerts, *op. cit.* note 22, p. 190.

²³⁶ Obviously this statement, and the remainder of the paragraph, refers only to civilian schools, not to military academies and training facilities for the armed forces.

²³⁷ Further information regarding the Global Coalition to Protect Education from Attack and the draft Guidelines can be found at: <http://www.protectingeducation.org/draft-lucens-guidelines-protecting-schools-and-universities-military-use-during-armed-conflict> (last accessed on 8 April, 2016).

B. Precautions in attack and proportionality

As a logical corollary to the prohibitions on the use of force against certain categories of persons and objects as discussed above, IHL contains a number of provisions which require the parties to a conflict to take certain precautions prior to an attack as well as on maintaining a balance between the military necessity to take certain actions and the needs of the persons and objects not inherently (legitimately) subject to attack. Although not usually directly implemented into ROE,²³⁸ several of the ROE normally included in every ROE set are directly derived from, or closely related to, these principles. The prime example of such ROE are the ROE which set forth the requirements (as a minimum) for establishing positive identification. While (obviously) higher levels of verification or identification are permitted, positive identification must at least meet the requirements set forth in the ROE. The ROE which set forth the identification requirements also specify which (types of) systems may be used to establish certainty as regards the identity, nature, etc. of the intended target. In combination with directives on, and methods for, determining the collateral damage estimate for a given use of force, and of course proper training in IHL, these ROE assist in effectuating the required precautions in attack and assist in ensuring that the principle of proportionality is implemented. Examples of such ROE can be found in the 31 series in the San Remo Handbook,²³⁹ although the system is common to almost all of the ROE compendia as discussed in chapter 1. The strictest version of these ROE requires visual identification of the target prior to engagement,²⁴⁰

²³⁸ Certain rules regarding precautions in attack as well as regarding proportionality are, however, directly included in some nations' guidelines on targeting, such as the (classified) targeting directives issued by the Netherlands, which closely implement multiple provisions from Articles 52 – 57 of the First Additional Protocol.

²³⁹ Cole, *op. cit* note 111.

²⁴⁰ In the context of these types of ROE, the term “visual” in any case includes identification using image magnification through purely optical devices, such as binoculars. It may include electro-optical systems, such as camera systems, or image enhancing devices such as forward-looking infrared (FLIR) and similar systems, if the systems meet certain criteria as regards reliability and image quality.

while less restrictive versions of these ROE also allow identification by at least two or more, or, in the least restrictive version, one or more non-visual means of identification. As stated previously, the choice between these ROE is predicated on the level of sensitivity or complexity of the mission. Nonetheless, even in applying the most lenient version of these ROE, the rules regarding precautions in attack must be adhered to prior to engagement.

The concept of taking proper precautions in attack in order to spare, to the maximum extent possible, certain categories of persons and objects is an old concept and principle of IHL, with early versions of rules to that effect appearing in the 1863 Lieber Code as well as in, inter alia, the 1907 Hague Regulations.²⁴¹ Apart from specific references to precautions in attack as set forth in, inter alia, the provisions on the protection of cultural property, such as Article 7 of the Second Protocol to the 1954 Convention, the most detailed and clear codification of the principle can be found in Article 57 of the First Additional Protocol. While no such detailed provision can be found in the Second Additional Protocol, the principle of precautions

Electro-optical systems in general are, however, also included in the examples of systems which may be used in the “two or more” and “one or more” ROE on identification allowing non-visual identification. ROE sets may also include rules regarding the systems which may or may not be used to designate targets, such as fire control radars. Such ROE can be used to regulate the effect of (active) targeting on the adversary, since some systems are more readily detected by the enemy, which may lead to enemy action in response. It should be noted that “identification” in the context of these ROE is related to determining the identity, characteristics, etc., of the target, while “designation” is related both to the status of the target (that is, whether it is eligible for engagement or not) and to the actual directing or aiming of weapons and weapon systems at a target in order to enable the engagement.

²⁴¹ In the Lieber Code, see, for example, Articles 34 – 36, although these rules can equally be said to be early examples of the protection of cultural property. In the 1907 Regulations, see, for example, Articles 26 and 27, with the latter being an amalgamation of rules now set forth as separate rules in IHL relating to cultural property, medical units and facilities, and precautions in attack. See also Article 2 of the 1907 Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War.

in attack is considered part of customary law applicable in both international and non-international armed conflicts.²⁴²

Before examining the specific rules related to precautions in attack, it should be noted that Article 49 of the First Additional Protocol defines “attack” as referring to both offensive and defensive use of force against the adversary. Consequently, as the Commentary also explains, the term refers to all combat action, including counter-attacks or other use of force related to defensive actions.²⁴³ Acts related to fending off an enemy attack or in response to the (prior) use of force by the adversary are therefore also subject to the rules regarding precautions in attack.

In addition to the general rule requiring taking feasible precautions to ensure that the objects and persons to be attacked are valid military objectives,²⁴⁴ the rules set forth in, especially, Article 57 of the First Additional Protocol also set forth other specific precautions which must be observed. One of these is the duty to give “effective advance warning” prior to attacks which may affect the civilian population, to the extent that

²⁴² Henckaerts, *op. cit.* note 22, pp. 51 – 55, although the entire chapter in question (chapter 5) deals with precautions. As evidence of the close relationship between the rules regarding precautions in attack and the rules on proportionality, several of the rules in chapter 5 reflect (or in fact repeat) the rules in chapter 4, regarding proportionality in attack.

²⁴³ Sandoz, *op. cit.* note 28, p. 603 (paragraph 1880). Due to the inherently different nature of the rules regarding attack and those regarding (precautions in) defense and the fact that the latter are not related to ROE for military operations, the rules regarding mandatory precautions in defense (including those applicable to protecting cultural property against the effects of enemy action) will not be discussed here. However, it is important to bear in mind that the rules regarding precautions which will be discussed, equally apply to defensive use of force. Consequently, apart from the specific situations of the use of force in exercising the inherent right of personal self-defense as discussed in chapter 3, all use of force pursuant to ROE in the context of military operations, including the use of force in the context of force protection, must comply with the rules regarding precautions in attack.

²⁴⁴ As stated most clearly in Article 57, paragraph 2 under (a)(i), of the First Additional Protocol.

circumstances allow.²⁴⁵ While IHL does not prohibit surprise attacks, and such strategies can be considered an example of a situation where circumstances do not allow prior warnings,²⁴⁶ it is nonetheless clear that careful consideration should be given, to the maximum extent possible, to issuing a prior warning if such a precaution can serve to minimize (or ideally to avoid) causing civilian loss of life or injury, or destruction of, or damage to, civilian property. A recent example of application of this device, including discussion as regards the concept of “effective” warnings, was the defense of Chora by Netherlands armed forces units in the context of the International Security Assistance Force (ISAF) operation in Afghanistan. As part of the efforts to defend Chora and to drive off the attacking forces, NATO forces used a combination of artillery and air support to augment the efforts of the ground troops in Chora itself. Prior to the use of these support measures, a warning was issued to local authorities as to which areas would be made subject to attack and urging the authorities to ensure that the civilian population was evacuated from those areas.²⁴⁷ The defense of Chora was also, due to the extensive use of force and the intensity of the combat involved, reviewed by the Afghanistan Independent Human Rights Commission and by the United Nations Assistance Mission in Afghanistan. As regards the warnings, the report issued criticism that the decision to issue the warnings was taken “at the last minute,” but acknowledges that the rapidly deteriorating situation and the lack of decisive action by the Afghan government were contributing factors.²⁴⁸ The

²⁴⁵ Article 57, paragraph 2 under (c), of the First Additional Protocol. See also footnote 224 as regards the interpretation of the requirement to give an “effective” warning.

²⁴⁶ Sandoz, *op. cit.* note 28, p. 686 (paragraph 2223).

²⁴⁷ See, inter alia, ANP, “Van Middelkoop prijst troepen om strijd bij Chora,” in *Volkskrant*, 6 July, 2007. A more extensive description of the actions taken to defend Chora, including the issuing of warnings, was included in an annex to a letter from the government to parliament, Parliamentary document 27 925 nr. 272, Letter from the Ministers of Foreign Affairs, of Defense and for Development Cooperation of 24 September, 2007. See especially p. 19 as regards the warnings issued repeatedly to the civilian population.

²⁴⁸ AIHRC and UNAMA, Final Report of the AIHRC and UNAMA joint investigation into the civilian deaths caused by the ISAF operation in response to

fact that the warnings did not reach all of the civilian population in time, or that they were not entirely effective in ensuring the departure of (all of) the civilian population, was furthermore related to the inability of local leaders to extend or disseminate the warnings to their own constituencies as well as to certain miscommunications or misunderstandings among the local authorities.²⁴⁹ Following an examination of other aspects of precautions in attack and of the principle of proportionality, and issuing a number of recommendations, the report concludes that “the findings of the investigation suggest that in the specific circumstances ISAF forces were not responsible for any serious violations of international humanitarian law.”²⁵⁰

As was stated previously, and as is also clear from the structure of the analysis in the Chora report, the relationship between precautions in attack and the principle of proportionality is such that the two principles often intertwine in the course of their application during military operations. In discussing the principle of proportionality, however, it should first be emphasized that this principle has a distinctly different definition in the context of IHL as compared to the meaning of this concept in the context of (personal) self-defense or in human rights law. As was discussed in chapter 3, in the latter context the concept of proportionality is related to a comparison between the force used in self-defense and the (level of) force to be defended against. In IHL, however, the concept refers to the balance between (incidental) loss of life or injury to civilians, or destruction of or damage to civilian property, and the concrete and direct military advantage anticipated from the attack or use of force. This means that in the theoretical or hypothetical situation in which opposing forces engage in combat in a location completely devoid of any civilians or civilian properties, or any other categories of protected persons or objects such as cultural property and works or installations containing dangerous forces, the principle would

a Taliban attack in Chora district, Uruzgan, on 16th June 2007, pp. 10 – 11. The (English language) report is available online at: <https://zoek.officielebekendmakingen.nl/kst-27925-272-b1.pdf> (last accessed on 8 April, 2016).

²⁴⁹ Ibid.

²⁵⁰ Ibid., p. 14.

not be relevant or need to be applied under current IHL.²⁵¹ In more realistic scenarios, however, the principle nearly always plays a significant role in the conduct of military operations and is usually reflected in the ROE²⁵² and in targeting and related guidelines and directives.

The clearest expression of the principle of proportionality, and in wording repeated in various other provisions of IHL, can be found in Article 57, paragraph 2 under (a)(iii) and under (b), of the First Additional Protocol. Put simply, the principle prohibits any use of force if the anticipated incidental loss of life or injury to civilians or damage to civilian objects, or a combination of both, is excessive in relation to the “concrete and direct” military advantage anticipated from that use of force.²⁵³ This rule or principle is considered part of customary law, applicable in both international and non-international armed conflict.²⁵⁴ The Commentary explains that the words “concrete and direct” must be interpreted as referring to military advantages that are “substantial” and temporally close to the use of force,²⁵⁵ thus ruling out advantages that are merely theoretical, insubstantial or remote, including advantages that may occur in the (far) future.

In this context, it is useful to recall the discussion above as regards the targeting of civilians and the discussion as regards voluntary human shields in the context of DPH. Where civilians are not directly participating in hostilities, and may therefore not be attacked as such, their presence in or

²⁵¹ Given the rules of IHL on protection of the environment, which were not discussed here, this statement is hypothetical only and is intended merely to emphasize the difference between proportionality in the context of self-defense and the meaning of the same term under IHL. The statement also obviously runs counter to the intentions behind the ICRC’s recommendation in part IX of the Interpretive Guidance as discussed above in the context of DPH.

²⁵² In the present author’s experience, references to proportionality and expressions of the specific rules are more commonly included in the commander’s guidance section of ROE, as well as in the targeting guidelines and directives, than in the actual numbered ROE themselves.

²⁵³ The same principle applies in the context of specifically protected objects as well, in which case the terms “civilians” and “civilian objects” can be replaced by, for example, cultural objects.

²⁵⁴ Henckaerts, *op. cit.* note 22, pp. 46 – 50.

²⁵⁵ Sandoz, *op. cit.* note 28, p. 684 (paragraph 2209).

near a valid military objective becomes part of the proportionality assessment required prior to any attack or use of force against that objective. In some cases, that assessment can more easily lead to accepting the risks (or inevitable death and destruction) faced by those civilians, for example in the case discussed above as regards ammunition factories. In other cases, the assessment is not as easy to make and while the rule is intended to facilitate an objective assessment by military commanders, actual practice may not be quite as simple. As was stated previously, the military commander making such an evaluation must take into account all the information reasonably available to him at the time. But in spite of the vast amounts of information available in modern military operations, making the final assessment as to what constitutes acceptable risks to, or loss of life and injury of, civilians in the context of military operations will always remain a difficult task, in part because “[o]ne cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.”²⁵⁶ As was also stated in the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, the values assigned to civilian life and to military advantages will differ depending on which person assigns those values, including the person’s background, training, and motives. Ultimately, and similar to the use of such terminology in the context of criminal law, the evaluation whether the decision by a military commander as regards the proportionality of a given use of force was legitimate will depend on assessing what a “reasonable commander” would have done.²⁵⁷

²⁵⁶ Final Report, *op. cit.* note 248, paragraph 48.

²⁵⁷ *Ibid.*, paragraph 50. Bothe, however, does not agree with this approach and states that in a democratic society this approach can only be valid if the military commander is able to apply civilian standards. Moreover, he states that “[t]he value system on the basis of which the military is operating has to conform to that of the civil society, not vice versa.” Bothe, *op. cit.* note 201, p. 535. While the present author does agree with Bothe that the level of restrictions placed upon military targeting and the use of force is related to the nature of the operation, it would seem that this is more the result of policy considerations than legal requirements based on IHL. In operations to which IHL applies, it applies entirely and as such, without leaving any room for “more” or “less” applicability of the rules of IHL from any

While, as was stated above, the rules and principle of proportionality are commonly addressed in the commander's guidance section of ROE or in accompanying directives on targeting or collateral damage estimates, it is important to realize that in operations in which IHL applies *de jure* as well as where IHL is applied as a matter of policy, the rules and principle of proportionality dictate how the ROE themselves must be applied. In other words, even in cases in which the ROE contain unrestricted authorization to use force against specified targets, the actual use of force pursuant to those ROE must be based on a proper assessment of the proportionality between the concrete and direct military advantage anticipated from that use of force and the expected incidental loss of life, injury, damage or destruction to civilian life and property.

C. Methods and means of warfare

Finally, IHL has long recognized the principle that the choice of methods and means of warfare which may be used by combatants in the context of an armed conflict is subject to certain restrictions. This principle was stated clearly already in Article 22 of the 1907 Hague Regulations, which was repeated almost verbatim in Article 35, paragraph 1, of the First Additional Protocol. The principle is the basis for two general rules regarding methods and means of warfare as well as, in combination with certain specific arms-related treaties, for specific restrictions on specifically identified weapons.

The two main rules prohibit the use of methods and means of warfare "of a nature" or which may be expected to cause superfluous injury or unnecessary suffering²⁵⁸ or to cause "widespread, long-term and severe

legal point of view. Furthermore, while the statement by Bothe as regards civilian norms and democratic society are understandable and laudable, it is respectfully suggested that most members of civilian society would not be capable of, or in any position to, properly assess the strategic or operational military advantage of a given or intended operation or use of force.

²⁵⁸ Article 35, paragraph 1, of the First Additional Protocol.

damage to the natural environment.”²⁵⁹ An example of the latter, at least as far as “methods” are concerned, was the setting on fire of oil fields and equipment by Iraqi forces during the Gulf War in 1991.²⁶⁰ Fortunately, such incidents are relatively rare and specific means of warfare designed to have such environmental effects are even more rare.²⁶¹ As environmental effects are not commonly addressed in the ROE, they will not be discussed further here.²⁶²

The prohibition on causing superfluous injury or unnecessary suffering, in combination with specific treaties and provisions based on this prohibition, has, however, given rise to ROE specifically related to those

²⁵⁹ Article 35, paragraph 2, of the First Additional Protocol. This principle is also the basis for the more detailed and extensive Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

²⁶⁰ See, for example, Chilcote, R., “Kuwait still recovering from Gulf War fires,” CNN, January 3, 2003, available at <http://edition.cnn.com/2003/WORLD/meast/01/03/sproject.iq.kuwait.oil.fires> (last accessed on 8 April, 2016).

²⁶¹ The present author is aware of the controversial nature of this statement, also given that the Commentary explains that the prohibition covers not only intentional environmental damage but also expected damage as a result of the use of “normal” methods and means of warfare (Sandoz, *op. cit.* note 28, pp. 418 – 419, paragraph 1458 and footnote 127 on p. 419). However, as the Commentary also specifies that a method or means of warfare only becomes illegal under these provisions if it cumulatively fulfills all of the criteria in paragraph 2 of Article 35 (Sandoz, *op. cit.* note 28, p. 418, paragraph 1457), the statement still seems valid. Notwithstanding discussions such as those related to the use of depleted uranium ammunition, it would seem that such ammunition may fulfill some of the criteria but not all of them cumulatively.

²⁶² That does not mean that such effects are not considered at all in the context of military operations or weapons procurement. For example, in implementing the required review as described in Article 36 of the First Additional Protocol of new methods and means of warfare in relation to international law, the Netherlands includes environmental and hazardous materials considerations as part of that review process. Should a method or means of warfare be found to cause, or be likely to cause, results that would violate the prohibition in Article 35, paragraph 2, of the First Additional Protocol, such a method or means of warfare would either not be approved or at the very least be made subject to strict rules regarding its use, including precautionary measures or follow-up requirements.

rules.²⁶³ The ROE compendia used to assist in the drafting of ROE sets for specific operations in fact contain sample ROE to that effect.²⁶⁴ Examples of specific restrictions, regulations or outright prohibitions expressed in, or in the context of, ROE include the use of antipersonnel land mines,²⁶⁵ cluster munitions,²⁶⁶ and riot control agents (RCA). As regards RCA, it should be noted that Article 1, paragraph 5, of the 1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction specifically prohibits using riot control agents as a method of warfare. While the prohibition is intended to avoid situations in which the use of riot control agents in the conduct of hostilities may lead the other party to mistakenly assume chemical weapons were used, and thus lead to retaliatory use of such weapons,²⁶⁷ it also causes complications as regards conventional, well-intentioned operations. RCA can be an effective less lethal²⁶⁸ instrument which can be used to avoid or

²⁶³ Although not yet the case in the experience of the present author, the changing views on the use of expanding ammunition as discussed in footnote 24, above, may give rise to specific ROE related to the (authorization level for the) use of such ammunition.

²⁶⁴ In the San Remo Handbook, see for example ROE series 80 – 82, 92, 100 – 101 and 120 – 121. In the NATO and EU compendia, the ROE for restricting or authorizing specific weapons or weapon systems are contained in a single, distinct ROE series.

²⁶⁵ In the context of NATO operations, nations which are a party to the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction commonly issue a uniform and by now standardized *caveat* to the ROE indicating that their forces are not authorized to use such devices.

²⁶⁶ Similar to the observation made in footnote 265, nations which are a party to the 2008 Convention on Cluster Munitions may need to issue a *caveat* in the event that the ROE for a specific operation authorize the use of such weapons or in relation to the ROE in general.

²⁶⁷ An outcome which would, were the Convention to be truly implemented fully, be impossible, given that this would in any case violate the prohibition on the use of such weapons and inherently be proof of violating the prohibition on stockpiling such weapons.

²⁶⁸ In view of the fact that virtually no weapon or instrument is truly “non-lethal” and almost all weapons and instruments can, under certain circumstances, lead to lethal effects or at least to serious (and sometimes permanent) injury, the term “less lethal” is the preferred term.

at least minimize injury or death to civilians when the use of force against civilians becomes inevitable, including riot control situations within the context of a military operation. Consequently, careful evaluation is required as to whether intended use of RCA in the context of a military operation constitutes “warfare” in the sense of the prohibition or whether the use is legitimate, for example as part of implementing a specific mandate. In some operations, the specific ROE authorizing the use of RCA may therefore be retained at a relatively high level of military command, while in other operations it may be sufficient to add an amplification to the ROE in question specifying the prohibition on using RCA as a method of warfare.

Finally, advances in the field of cyber operations may give rise to a need to examine specific ROE related to the methods and means of warfare used in that context. The Netherlands Advisory Committee on Issues of Public International Law and the Advisory Council on International Affairs have concluded that IHL applies to cyber operations and cyber warfare.²⁶⁹ Consequently, it may be safely stated that all of the rules and principles discussed above apply equally (albeit with, in some cases, considerable interpretative challenges) to the cyber domain. Nonetheless, given the speed at which cause and effect take place in the cyber domain and the inter-related and interconnected nature of military and civilian systems, architecture, etc., in the cyber domain, it may safely be anticipated that specific guidance on the use of certain defensive and offensive cyber systems and their targeting will, whether from a policy perspective or legal concerns, become necessary or desirable.²⁷⁰

IV. Conclusion

As was stated in the introduction and in the more detailed discussion above, IHL is a specific body of (international) law that applies *de jure* in situations

²⁶⁹ The English language version of the report is available at <http://aiv-advies.nl/download/da5c7827-87f5-451a-a7fe-0aacb8d302c3.pdf> (last accessed on 6 April, 2016).

²⁷⁰ Nakashima, E. “In cyber warfare, rules of engagement still hard to define,” in *Washington Post*, 10 March, 2013.

of armed conflict, as well as on the basis of national policy in other military operations for those nations which have adopted such a policy. The main objective of IHL is to provide protection from the effects of armed conflict for those who do not, or no longer, take part in hostilities, while maintaining a delicate and fragile balance between the interests of humanity and the reality of military necessity during the conduct of hostilities. In other words, IHL seeks to regulate the conduct of hostilities rather than to prohibit or ban such conduct. Since the combination of *de jure* applicability and *de facto* applicability on the basis of policy essentially results in applicability of IHL to all operations, and given the objective of IHL to regulate the conduct during such operations, it is not surprising that IHL has a significant influence on the ROE for any given operation.

The principal influence of IHL on the ROE concerns the implementation of the IHL principle of distinction in the ROE which authorize the use of force against persons and objects. While restrictions on target engagement may be derived from policy considerations, military strategic concerns or other sources of law, the (application of the) ROE which authorize the engagement of persons and objects must as a minimum meet the requirements set forth in IHL. Where such requirements cannot be set forth in the ROE themselves, extra caution is required to ensure that the forces in question understand that the ROE must always be applied within the parameters set forth by IHL. This observation will be discussed further below.

Distinction as required by IHL covers a number of obligations and restrictions set forth in more specific rules of IHL, but in its essence requires military forces to distinguish between lawful military objectives, whether persons or objects, and those who do not, or no longer, participate in the conduct of hostilities. Since the word “attack” as used in IHL covers both offensive and defensive actions, the influence of the principle of distinction on the ROE is not limited to the ROE addressing attack in the more commonly used meaning of that word in the context of military

operations.²⁷¹ Authorizing the use of force²⁷² against persons or objects in the ROE consequently requires careful scrutiny of the ROE in question in order to ensure their compatibility with IHL under all circumstances.

The ROE regarding the use of force against persons provide a number of complications in the context of IHL applicability. Targeting members of enemy armed forces in an international armed conflict provides the least challenge and addresses the clearest category of persons who may be targeted. While clearly not all members of the armed forces are valid military targets, since, for example, medical and religious personnel not taking part directly in hostilities enjoy protection under IHL, the exceptions to the authorization to attack enemy armed forces can be resolved simply in the ROE. One approach is to limit the ROE to “enemy combatants,” since that term only applies to armed forces in international armed conflicts and the military personnel enjoying protection under IHL are not combatants. Provided the education and training programs in IHL for the armed forces are adequately addressed and guaranteed, it may also be possible simply to ignore these exceptions while drafting the ROE and to consider respect for

²⁷¹ In the NATO MC 362/1 system, and the comparable EU system, these ROE can be found in the 42X series. It should be noted that a distinct conceptual difference exists between the NATO approach, in which “attack” in this series is not in all cases considered an offensive action for mission accomplishment, and the EU approach, which does consider these ROE to be offensive in nature. As was discussed in chapter 3, the main difference lies in the interpretation of the ROE on responding to a hostile act or to hostile intent. The San Remo Manual, on the other hand, has structured the ROE series on the basis of the intent behind their application. While this emphasizes the difference between the use of force for defensive purposes and the use of force for mission accomplishment, using this system requires additional caution and instruction to ensure that forces using this system realize the applicability of IHL to both sets of ROE.

²⁷² Since in the author’s professional experience this issue can sometimes lead to misunderstandings, it should be emphasized that what is at issue here is the use of force as authorized in the ROE and not the use of force in personal self-defense. The interaction between ROE and self-defense and the issues regarding personal self-defense in the military operational context are discussed in chapter 3.

the protection of the special categories as being part of the overall responsibility to adhere to IHL while applying the ROE.²⁷³

Members of organized armed groups in a non-international armed conflict provide a greater challenge in drafting ROE authorizing the use of force against persons. Apart from the difficulties in identifying such members, which cannot be resolved in the ROE themselves,²⁷⁴ the distinction advocated by the ICRC between members with a continuous combat function (who may be attacked) and other members of such groups (who may only be attacked on the basis of the rules regarding DPH) may prove to be unworkable from an ROE perspective. Contrary to regular armed forces, the number of categories of members of organized armed groups who do not have a continuous combat function, based on the ICRC's criteria, is much larger and is not limited to medical and religious personnel. Moreover, it should be noted that while non-combatant members of the armed forces will generally be identifiable on the basis of the distinctive emblems, the same will not apply to members of organized armed groups without a continuous combat function. Given these difficulties, the ROE cannot simply authorize attack on members of an organized armed group but must instead either specify which members may be so attacked, or take a more behavior-oriented approach.

Specifying which members of an organized armed group may be attacked in the ROE cannot follow all of the criteria set forth by the ICRC, since that would run counter to the requirement that the ROE need to be simple, easy to apply and applicable throughout the operation as a whole. Instead, it may be possible to authorize attacks on persons labelled

²⁷³ It should be noted that understanding the distinction between combatants and other members of the armed forces would similarly require adequate and guaranteed education and training in IHL.

²⁷⁴ The ROE cannot take into account every distinguishing feature which might apply to members of armed groups. Such an approach would either yield ROE which are too cumbersome and detailed to be practically usable or ROE which would become outdated and inapplicable the moment the armed group makes any change to its "uniform" (or other distinguishing characteristics). Consequently, information which can be used to identify members of armed groups should be provided through other means, such as intelligence briefings, and updated regularly.

“fighters” and belonging to the organized armed group in question, while leaving the explanation as to what constitutes a “fighter” to the intelligence briefings and the training on ROE applicability for the operation in question. Such an approach straddles the dividing line between a functional approach (i.e. based on the continuous combat function) and a behavioral approach. While in this approach it is the person’s behavior that determines the categorization as to whether the person may be attacked, once the person is so identified he or she may be attacked at any time due his or her function within the organized armed group. Such an approach does, however, require that labelling a person a “fighter” takes place with due regard to the distinction between such members of organized armed groups and civilians who directly participate in hostilities on a more incidental basis. The extent to which ROE can authorize attack on “fighters” belonging to an organized armed group in a non-international armed conflict will therefore greatly depend on the nature of the group in question and the context of the armed conflict.

The behavioral approach to authorizing attacks on persons in the ROE ignores the membership or affiliation discussion entirely and simply authorizes attacks on persons exhibiting certain types of behavior. Since the types of behavior in question will obviously be related in some way to participation in hostilities by these persons, whether against the force applying the ROE in question, its allies or against protected persons under IHL,²⁷⁵ behavior-based targeting ROE are more closely related to the issue of DPH than to membership of an organized armed group. Furthermore, from the perspective of the military personnel applying such ROE, the behavior-based ROE straddle the legal distinction between application of

²⁷⁵ ROE commonly authorize the use of force to prevent or to stop criminal acts taking place in the vicinity of personnel to whom the ROE apply if the criminal act is of sufficient gravity, the intervention is strictly necessary and there are no other ways to resolve the situation. Attacks on civilians in the proximity of a force to which such ROE apply would fall into the category of sufficiently grave criminal acts. Since compatibility between such ROE and the mandate of the force may be an issue, such ROE may need to be applied within the context of (and concomitant rules and restrictions regarding) the use of force in defense of others as part of personal self-defense. See chapter 3.

IHL and its influence on ROE and the relationship between ROE and personal self-defense.

Continuous Combat Function	Direct Participation in Hostilities	Personal attack
“Membership” ROE (“Attack” ROE)	“Behavior” ROE (incl. Force Protection ROE)	Personal self-defense

Direct participation in hostilities temporarily negates the protection of civilians under IHL, for such time as the civilians in question engage in such activities. The criteria set forth by the ICRC in its interpretative guidance on this topic as regards the three thresholds for establishing DPH are useful tools, although elements of their interpretation and application gave rise to some debate, especially as regards the direct causation threshold element. Of the three threshold elements, the requirement for a nexus between the activities and the armed conflict in question provides the least controversy and, as regards application in ROE, the least concerns. Leaving aside ROE which authorize interference in civilian activities for specific reasons in certain specific operations,²⁷⁶ activities which have no nexus or relation with the conflict (or with operations other than armed conflict in which IHL is applied as a matter of policy) would not normally be relevant from a ROE perspective. Since, as was discussed in chapter 1, ROE do not assign tasks but delineate the authorization to use force while carrying out assigned tasks, activities which do not constitute a threat would not normally become the subject of the ROE unless the mandate for the operation in question specifically requires the force to carry out tasks

²⁷⁶ Such ROE may be authorized in missions more closely related to assistance to civilian authorities or other “policing” type missions and can include the authority to detain persons for acts not related to the conflict (e.g. suspicion of criminal activity), search of property and houses for contraband articles or enforcing a curfew, for example.

related to those activities. Such mandates serve purposes and goals beyond the resolution of the armed conflict, however, and will be subject to other (and possibly more restrictive) legal and political concerns and guidance.²⁷⁷

The threshold of harm as a requirement for DPH does not provide great legal controversy, although the precise interpretation and application may provide discussion, but sets forth a number of subtleties and interpretative nuances which cannot be easily transcribed into comprehensible ROE. As a result, this threshold element can more easily be integrated into the ROE regarding the targeting of persons by application of the behavior-based ROE related to hostile acts and hostile intent. Through careful explanation of, and training in applying, the two concepts and integrating the threshold of harm into the concepts of hostile act and hostile intent, this threshold criterion can be implemented in the ROE in a practical manner without specifically addressing the DPH terminology itself.

As regards the direct causation threshold, it should be noted first of all that this criterion did give rise to some debate as to its validity and interpretation. While this criterion may similarly be addressed through integration of the concept of DPH into the concepts of hostile act and hostile intent, the debate regarding the causation threshold requires due diligence on the part of those drafting the ROE and even greater diligence on the part of those providing training and education in the ROE in question, in order to ensure that this concept is properly understood.

Finally, as regards DPH, the temporal aspect provides significant challenges as regards the integration of this element in the ROE. In the event that a person has so consistently and continuously participated

²⁷⁷ It is important to note that the discussion is focused on the interaction between IHL and ROE and the implementation of the concept of DPH in that context. While, as was also noted in footnote 275, above, the ROE may authorize various actions and various levels of the use of force against civilians in specific circumstances and subject to specific restrictions, such ROE are not related to targeting persons as lawful targets under IHL but are instead related to specific mission objectives on the basis of the applicable mandate. As a practical example, actions taken against suspected pirates in the context of the NATO operation *Ocean Shield* and comparable EU operation *Atalanta* are not authorized on the basis of any IHL designation of the suspected pirates but on the basis of their (suspected) participation in criminal activities.

directly in hostilities that he or she may be considered a valid target on the basis of the continuous combat function concept, the authorization to attack such a person will be dealt with in accordance with the target designation and concomitant ROE as discussed above. A greater difficulty is presented by the interaction between the “revolving door” approach to (loss of) protection under IHL and the requisite simplicity and clarity in the ROE. In translating the temporal aspect of DPH into ROE, this aspect may need to be divided into three elements. The preparatory phase of DPH would then be the first element and would most readily be associated with the ROE concept of hostile intent. As such, this element may be addressed in the explanation (and perhaps definition) of that concept in the ROE guidance and instruction. The actual acts of hostilities can be identified constitute the second element and are clearly related to the ROE concept of hostile act. Such acts may also, depending on their nature, fall under other ROE as well. Finally, the redeployment phase of DPH can be integrated into the ROE in two ways. Firstly, standard ROE systems include a ROE authorizing the use of force against persons who have previously attacked but are no longer actively engaged in an attack against the force in question. By restricting this ROE to the redeployment phase of DPH (and rescinding the authority to use force once the redeployment phase ends, as described in the DPH concept), the ROE can be used to address this element of DPH without automatically labelling a person who has directly participated in hostilities a permanent target (in the sense of the continuous combat function as was discussed above). The second approach to the redeployment phase in connection with the ROE is to integrate the redeployment phase in the definition, explanation and guidance on the ROE concept of hostile act. Similar caution as regards the distinction between redeployment following an act of DPH and the more permanent categorization as a valid target applies here as well.

Consequently, it can be seen from the above that integrating the rules of IHL as regards the use of force against persons into the ROE will only result in “membership” based ROE, or ROE which authorize the use of force against a person regardless of that person’s behavior, in very few cases. In most cases, the rules of IHL which authorize the use of force against persons will result in ROE which focus on the behavior of a person,

thus automatically limiting the authority to use force to “such time as” the person engages in that behavior.

The rules of IHL regarding the targeting of objects provide fewer challenges both in terms of their interpretation and application and in terms of their relationship with ROE. The latter part of that observation is due in no small amount to the practical observation that these rules are rarely, if ever, directly implemented in the ROE themselves but are instead normally integrated in related documents on the use of force for the operation in question, such as targeting guidelines. In such documents, the rules regarding the determination as to whether an object constitutes a valid military objective can be set forth in some detail. Additionally, or alternatively, objects to be attacked may be designated in a separate targeting process, yielding specific orders to the units in question to attack a specific object. In both cases, the instructions or orders in question must be applied in conjunction with the ROE, to which end the ROE normally contain specific ROE regarding target identification.

Apart from their role in interacting with the instructions or orders to attack specific objects, the ROE regarding target identification also play a role in integrating the IHL principle of taking proper precautions in attack.²⁷⁸ By specifying the level of certainty required on the part of the attacking unit prior to the use of force, the target identification ROE can be used to enforce the requisite level of precision as regards the use of force. It should be noted, however, that while these ROE can, by their nature, be part of implementing the requirement of precautions in attack as that concept is used in IHL, these ROE are more commonly used from a policy or, to a lesser extent, a military strategic perspective to prevent accidental death, injury or destruction in the interest of maintaining public support for the operation. Additionally, these ROE provide the nexus or context for establishing the responsibility for establishing positive identification in the event the targeting unit and the unit which actually applies force, such as through weapon release, are not the same unit. Such situations can arise, for example, if the targeting unit is a ground-based unit or (other) aircraft with

²⁷⁸ While IHL also requires precautions in defense, those rules are related to the placement of military objects rather than use of force.

eyes on target and the engaging unit is to engage the target on the basis of the direction and instructions of that targeting unit without itself being able to identify (or see) the target directly.²⁷⁹ Such situations can pose difficulties if the targeting unit is subject to different (interpretations of the) rules of IHL as compared to the engaging unit. In such cases, the engaging unit may need to apply additional safeguards to ensure that the target to be engaged is a valid military objective under the rules of IHL applicable to the engaging unit. One method to do so, is to require the targeting unit to provide sufficient (and sufficiently detailed) information to enable the engaging unit to make its own determination as to the legality of the requested attack. Such additional safeguards are most commonly included in the ROE through national amplifications or restrictions in the ROE for the operation in question and are the most directly recognizable integration of IHL in the ROE.

As was stated several times, IHL can apply *de jure* or *de facto*. In either situation, the military personnel in question are obligated to apply IHL to their conduct in carrying out the operation. The legal consequences of violating the applicable rules differ significantly, however, depending on the nature of applicability of IHL. In the case of *de facto* application of IHL on the basis of policy decisions, a violation of the relevant ROE will result in either a specific military crime (such as a violation of superior orders) or a “common” crime (such as murder, manslaughter, etc.), or both. These issues are discussed in greater detail in chapter 6. In the case of *de jure* applicability of IHL, however, the same violation of the relevant ROE can

²⁷⁹ In implementing the concept of network-centric warfare, this issue can also arise if a targeting unit labels an enemy unit or object as “hostile,” thus authorizing attack on that enemy unit or object by any other friendly unit connected to the same network and able to see that designation. For example, if the targeting unit is equipped with the LINK-16 system (or its later versions), any connected LINK-16 units, such as, in the Netherlands, the F-16 MLU aircraft or the air-defense and command frigates (LCF-class), can decide to engage that target, including by employing beyond visible range or over the horizon weapon systems. The observations made in the context of the simpler example in the main text as regards the responsibility of the attacking party to establish whether the target is a valid military objective apply in the more complex versions of this type of situation as well.

result in a war crime, with, normally, a concomitant increase in the severity of the penalty imposed upon conviction and, in any case, a concomitant increase in legal, political and public scrutiny and impact of the case in question. Consequently, the discussion as to the threshold of applicability of IHL to military operations is relevant in discussing rules on the use of force in the context of military operations. While the existence of such a threshold is clear as regards the applicability of Additional Protocol II in the event of a non-international armed conflict, there is some debate as to the existence of a threshold for applicability of IHL in other cases, especially international armed conflicts. While state practice seems to indicate that many states accept (or even apply) such a threshold, there are legal and ethical reasons to accept that approach too readily or too expansively. Since such considerations take place at levels of decision making far removed from the battlefield, and in order to ensure that, in any case, military forces on the battlefield “err on the side of caution” as regards actually applying IHL, *de facto* applicability of IHL should not be taken too lightly. Put simply, while the criminal law effects differ between *de jure* and *de facto* applicability of IHL, proper training for military forces should be aimed at establishing a mindset in which such legal considerations are irrelevant and IHL is applied as a natural and inherent element of conduct during military operations and adhering to the rules of IHL becomes second nature.

Such training in IHL is not only a legal requirement under the Geneva Conventions and a necessity on the basis of the prior observations, but is also a distinct requirement on the basis of the simple observation that not all rules of IHL can be captured or enshrined in either the ROE or the various concomitant documents. While even principles such as proportionality can be described or set forth in plain language in the operational documents on the use of force, the actual application of such principles cannot be so easily transcribed into simple, clinical, and objective rules. The humanitarian goals of IHL can only be achieved through a combination of proper drafting and review of the rules on the use of force and proper training and education in IHL for all military forces. Humanity is, after all, not a rule in the rule book, but a higher principle and goal that transcends such documents.

Chapter 5

Rules of Engagement and Human Rights Law

I. Introduction

Whereas the influences of international humanitarian law on rules of engagement was discussed in the previous chapter and the influences of (national) criminal law are discussed in the next chapter, this chapter focuses on the influences of international human rights law on the rules of engagement. The reason for placing that subject in the context of the previous and the next chapter, is that international human rights law interacts with both of the other fields of law in several ways. Those interactions, in turn, affect both the substance and the application of the rules of engagement for international military operations.

Human rights law and the responsibilities of States as part of that law are primarily a territorially oriented matter, in the sense that those responsibilities and the interactions between individual persons and the State in the context of human rights generally arise or occur within the State in question. Consequently, as will be discussed below, considerable academic debate exists as to whether human rights obligations have extraterritorial effect and thereby have the potential to influence international activities such as military operations.¹ This chapter will therefore, after a few introductory general observations on international human rights law and the sources of the law, begin with a discussion of the applicability of the law to military operations and the extraterritorial effect of human rights law.

As was discussed extensively in the previous chapter, military operations can be subject to international humanitarian law either *de jure* in the context of an armed conflict or *de facto* on the basis of policy decisions. Where international humanitarian law applies *de jure*, the possible

¹ Obviously military operations can take place domestically as well, either in the context of military assistance to civilian (law enforcement) authorities in such States that allow such operations, or in the context of armed conflicts of a non-international nature. What is meant here are international military operations regardless of their nature.

interaction with human rights law becomes a topic of specific interest. Here, too, considerable academic debate exists. Such interaction can occur nationally, such as in the case of a non-international armed conflict, as well as internationally, whether in the context of a belligerent occupation or (other form of) international armed conflict. In both cases, the conceptual aspects regarding, and the methods of reconciling, the simultaneous applicability of both fields of law are important, not least because both fields of law can influence the rules of engagement. The observations on these issues are followed by some brief observations regarding derogations from human rights obligations. Since derogations do not directly influence rules of engagement,² these observations will be brief and are included principally due to recent judgments by the European Court of Human Rights in relation to (the rules of engagement in) international operations.

Following the more theoretical aspects of international human rights law and in keeping with the object and purpose of this study, the chapter will next focus on certain specific human rights obligations in relation to specific influences on rules of engagement and related rules on the use of force in military operations. These observations focus on the right to life, detention operations and the right to privacy and family life. Of these three human rights topics, clearly the right to life is the most immediately relevant to the study of rules on the use of force. However, as the right to detain persons is normally included (where applicable under the given mandate) in the rules of engagement, certain procedural aspects of detention and capture require discussion in this context. As regards privacy and family life, it should be noted that the searching of private homes and interference in local civilian life are topics which can be included in the rules of engagement for a given operation. Furthermore, the relationship between the actions and tasks of intelligence agencies and the rules of engagement (or related directives) for an operation is complex and the relationship between such actions and tasks and international human rights law is no

² Once a derogation has been notified and established, the affected obligations under international human rights law cease to apply temporarily and would therefore not be reflected in, and have only minor influence on, the rules of engagement for the duration of the derogation.

less complex. Given recent views³ that intelligence activities undertaken in the context of international operations should be subject to rules of engagement, a few observations on both the relationship between intelligence activities and rules of engagement and the relationship between such activities and human rights law are warranted.

Although this study is primarily focused on military operations, since those are the main subject of rules of engagement, a few observations will be made in this chapter on the interaction between human rights and the rules on the use of force for law enforcement personnel. Although such rules are different from rules of engagement, as will be discussed below, their effect and interpretation matches those of rules of engagement once military personnel carry out tasks in the context of law enforcement, either directly or in support of civilian law enforcement personnel.

In discussing and referring to judgments and interpretations of human rights obligations in the case law of international human rights bodies in this chapter there will be an unavoidable emphasis on the case law of the European Court of Human Rights, although obviously other case law will be included as well. The emphasis on the European Court is admittedly due in part to the influence of that case law on the professional work of the present author, but more relevant is the fact that the European Court has, especially recently, been the most active as regards the application of human rights law to military operations, including peace operations and armed conflicts. As such, it is at the forefront of studying the interaction between human rights law and the international law of military operations. Nonetheless, the observations in this chapter are not purely European, nor is the relevance of those observations restricted to European nations.

Finally, as was also stated in the other chapters, this chapter is not intended to give an exhaustive overview or explanation of the law in question. Given the specific subject of this study, the focus of this chapter

³ Answers by the Minister of Defense of the Netherlands to questions from Parliament, parliamentary document number 29 924 no. 78 (2012) and the Report by the Supervisory Committee for the Intelligence and Security Agencies (*Commissie van Toezicht betreffende de Inlichtingen- en Veiligheidsdiensten*) of a conference on intelligence activities abroad, 18 October 2007, p. 4.

will be on those elements of human rights law which are relevant to rules of engagement and the general discussion on human rights law will be similarly focused on the relationship between the law and rules of engagement.

II. General observations on human rights law

A. Sources of the law

As an element of public international law, international human rights law is a relatively young system of law. In its essence and substance, the concept of human rights finds its origins in the philosophical writings and the national, domestic developments in society and politics in the eighteenth and nineteenth century, based on the notion of equality of men, basic rights of human beings (whether divinely inspired or based on natural law) and the concept of a “social contract” between governments and their subjects.⁴ The step from national laws, especially constitutional law, to international law was made following the Second World War as part of the foundation of the United Nations, with the adoption in 1948 of the Universal Declaration of Human Rights⁵ which, although not a treaty but a declaration of the United Nations General Assembly, may be regarded as the foundation on which the subsequent treaties were based and the source by which they were inspired.⁶

⁴ For a discussion of the developments in human civilization in this respect, see *inter multa alia*, Clark, K., *Civilization: A Personal View*, London, 1984 (esp. pp. 262, 272 – 274 and 293 – 320). See also Doswald-Beck, L., and Vité, S., “International Humanitarian Law and Human Rights Law”, in *International Review of the Red Cross*, no. 293, 1993.

⁵ The text of the Declaration and a brief overview of its drafting history is available online at <http://www.un.org/en/documents/udhr/index.shtml> (last accessed on 8 April 2016).

⁶ Doswald-Beck and Vité also point to the establishment of the International Labor Organization in 1919, which was set up to protect the rights of workers. Doswald-Beck, *op. cit.* note 4. While this is, technically, an example of the development of human rights and certainly illustrates the conceptual development from the “social contract” theory towards the concept of modern human rights, the present author respectfully submits that this development differs from the

Following the adoption of the Universal Declaration, a number of treaties were created, both within the United Nations and in regional settings. Treaties established under the aegis of the United Nations include the two core human rights treaties, being the International Covenant on Civil and Political Rights⁷ (ICCPR) and the International Covenant on Economic, Social and Cultural Rights⁸ (ICESC) of December 16, 1966, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁹ (CAT) of December 10, 1984. At the regional level, treaties promoting and protecting human rights include the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰ (ECHR) of November 4, 1950, the American Convention on Human Rights¹¹ of November 22, 1969, and the African Charter on Human and Peoples' Rights¹² of June 27, 1981.

It is interesting to note that two of the United Nations treaties mentioned above, namely the ICCPR and CAT, establish a committee

development of human rights as an overall concept. The ambit of the ILO and related system of rights was specific to workers and their relationship with the owners and managers of industries and companies, rather than related to fundamental rights and freedoms of all persons as reflected in the Universal Declaration and later treaties and as exist in the relationship between citizens and (their) governments.

⁷ Text available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last accessed on 8 April, 2016).

⁸ Text available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (last accessed on 8 April, 2016).

⁹ Text available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (last accessed on 8 April, 2016).

¹⁰ Text available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (last accessed on 8 April, 2016).

¹¹ Text available at <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm> (last accessed on 8 April, 2016).

¹² Text available at <http://www.achpr.org/instruments/achpr/> (last accessed on 8 April, 2016).

entrusted with considering and rendering non-binding opinions in response to communications from individuals who believe their rights under the respective treaties have been violated¹³, but that the third treaty, the ICESCR, does not.¹⁴ On the other hand, each of the regional human rights treaty systems mentioned above has established a judicial body empowered to pass binding judgments on (alleged) violations of the human rights contained in those treaties on the basis of complaints by persons within the jurisdiction¹⁵ of the States Party to those treaties.

In addition to the distinction between treaties established under the auspices of the United Nations and regional treaties, a second distinction can be made between categories of human rights in general. This distinction is most clearly illustrated by the distinction between the two Covenants mentioned above and concerns the differences, both conceptually and substantively, between civil and political rights on the one hand and economic, social and cultural rights on the other hand. This distinction is relevant in the context of the present discussion, since, as will be discussed below, the relationship between rules of engagement and human rights is primarily concerned with the first category of human rights.

Examining the distinction between the two categories of human rights may be facilitated by applying the dimensional approach described by Kleffner.¹⁶ This approach identifies three “dimensions” as regards the obligations undertaken by the States Parties to the various human rights instruments: the obligation to “respect” means an obligation for the State

¹³ This is also the case for the Committees established under the Convention on the Elimination of All Forms of Racial Discrimination (December 21, 1965) and the Optional Protocol of October 6, 1999 to the Convention on the Elimination of All Forms of Discrimination against Women (December 18, 1979).

¹⁴ The ICESCR does, however, contain the obligation for States Parties to submit reports on the implementation of the Covenant. See Part IV of the Covenant. This also applies to the Committee set up pursuant to the Convention on the Rights of the Child of November 20, 1989.

¹⁵ See below as regards the meaning of this term, especially as regards extraterritorial application of human rights.

¹⁶ Kleffner, J.K. “Human Rights and International Humanitarian Law: General Issues”, in Gill, T.D. and Fleck, D. [eds.] *The Handbook of the International Law of Military Operations*, Oxford, 2010.

not to interfere “directly or indirectly” with the enjoyment by individuals of the right in question; the obligation to “protect” means an obligation for the State to ensure that third parties do not interfere with the enjoyment by individuals of the right in question; and “fulfil” means an obligation for the State to enact the requisite legislation and other measures necessary to enable the enjoyment of the right in question.¹⁷ Applying this model to the categories of human rights mentioned above, the civil and political rights, including the right to life, the prohibition on torture, etc., would fall under the “respect” and the “protect” dimensions and the economic, social and cultural rights, including the right to housing, to education, etc., would fall under the “fulfil” dimension.

Doswald-Beck and Vité take a somewhat similar conceptual approach, but limit the distinction to two dimensions. In their description, civil and political rights “require instant respect”, while economic, social and cultural rights place an obligation on the State to implement such measures as necessary to ensure “progressive realization” of the rights in question.¹⁸ Here, too, the distinction is essentially one between abstaining from (proscribed) action as regards the civil and political rights and a more long-term, institutional, and legislative obligation as regards the economic, social and cultural rights. As will be discussed below, however, several of the human rights instruments and provisions aimed at the protection of civil and political rights (and thus aimed at abstention from proscribed actions) identify positive obligations as a corollary to the “respect” obligation.¹⁹ While part of these corollary obligations are covered by Kleffner’s “protect” dimension, such as the obligation regarding protection against acts of private parties,²⁰ others are aimed at the government itself (instead

¹⁷ Ibid., p. 66.

¹⁸ Doswald-Beck, *op. cit.* note 4. Kleffner also refers to the progressive realization of the ESC rights; Kleffner, *op. cit.* note 16, p. 66. The phrase in question can be found in Article 2, paragraph 1, of the ICESCR.

¹⁹ See below as regards the discussion of the right to life in sections II.B.1 and III.A.

²⁰ ECtHR, *Osman v. United Kingdom*, 87/1997/871/1083. The Court observes in paragraph 115 that “Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive

of the third parties covered by the “protect” dimension) but are reparative rather than preventative. The prime example of this is the duty to investigate,²¹ which is aimed more at providing a remedy for violations of human rights that have already occurred²² and at accountability and implementing safeguards (aimed at preventing repetition of the violation of human rights).²³

In addition to the specific provisions of treaty law on human rights, certain of the rights thus protected may be considered peremptory norms of international law and the criminal nature of violations of those rights,

operational measures to protect an individual whose life is at risk from the criminal acts of another individual.” The Court then limits that obligation, however, in the following paragraphs, taking into account both realistic possibilities for the authorities to prevent criminal threats to life and the limitations resulting from the other obligations of the Convention, such as those regarding privacy and due process. Consequently, the obligation exists only if “the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party.” In such cases, a violation of the obligation will only be considered to have occurred if the authorities subsequently “failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.” The obligation is recognized to some extent by the Human Rights Committee as well, as regards the obligations under the ICCPR. See Human Rights Committee, General Comment 31 (CCPR/C/21/Rev.1/Add. 13), paragraph 8: “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.”

²¹ This duty will be discussed further in section III.A., below, but reference may be made *inter multa alia* to: ECtHR, *Jaloud v. Netherlands*, application no. 47708/08, paragraph 186; ECtHR, *Al-Skeini and others v. United Kingdom*, application 55721/07, paragraph 163; Human Rights Committee, General Comment 31 (CCPR/C/21/Rev.1/Add. 13), paragraph 8; Human Rights Committee, *Evangeline Hernandez v. The Philippines*, CCPR/C/99/D/1559/2007, paragraph 7.2; Human Rights Committee, *Vadivel Sathasivam and Parathesi Saraswathi v. Sri Lanka*, CCPR/C/93/D/1436/2005, paragraph 6.4; IACtHR, *Vargas-Areco v. Paraguay*, Judgment of September 26, 2006, paragraph 74.

²² As specifically indicated by the Human Rights Committee in the cases referred to in footnote 21, above.

²³ As indicated by the ECtHR in the cases referred to above in footnote 21.

including torture, slavery and crimes against humanity, can be considered part of *jus cogens*.²⁴ The list of human rights with this status is limited, however. While the various regional human rights treaties contain protective provisions from which the States Parties may not derogate, even in times of emergency,²⁵ such non-derogable rights create obligations for the States Parties in question but do not as such fall under the category of *jus cogens* as indicative of universal and peremptory norms of international law.²⁶ Moreover, the existence of various regional treaties and the

²⁴ Cherif-Bassiouni, M., “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*”, in *Law and Contemporary Problems*, Duke University, Vol. 59, nr. 4, 1996, p. 68. A difficulty exists as regards categorizing the crime of genocide, which equally falls in the *jus cogens* category. While the crime is aimed at “a denial of the right of existence of entire human groups” and “such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity [...] and is contrary to moral law and to the spirit and aims of the United Nations” (United Nations General Assembly Resolution 96 (1), December 11, 1946), and thus appears closely related to the concept of human rights, the crime of genocide is generally in a separate and distinct category. The *jus cogens* nature of the crime of genocide has, however, been recognized by the International Court of Justice; ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), 28 May, 1951, p. 23.

²⁵ See, for example Article 27, paragraph 2, of the American Convention on Human Rights and Article 15, paragraph 2, of the European Convention on Human Rights. It should be noted that the African Charter on Human and Peoples’ Rights does not contain a derogation provision. As the Commission has stated: “limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27(2), that is that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'. The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained. Even more important, a limitation may never have as a consequence that the right itself becomes illusory.” African Commission on Human and People’s Rights; *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), paragraphs 67 – 70.

²⁶ This observation is shared by Zenović as part of his analysis of *jus cogens* in relation to human rights obligations. See Zenović, P., “Human rights enforcement via peremptory norms – a challenge to state sovereignty,” *Riga Graduate School of Law Research Papers* no. 6, 2012. The observation in question

development of independent case law by each of the regional judicial systems makes identification, much less the promotion to the level of *jus cogens*, of (developing) universal customary law regarding human rights complex, at least as regards the precise meaning and application of the rights in question.²⁷ Consequently, in this chapter the discussion will be related to the provisions of the treaties in question and, where available and relevant, the related case law of the judicial body or committee in question.

B. Applicability to military operations

The discussion as regards applicability of human rights law to military operations focuses on four main topics. First, academic writing on the use of force and the legal regimes applicable to the use of force tends to

is made on p. 35. See also Human Rights Committee, General Comment 24, CCPR/C/21/Rev.1/Add.6 (1994), paragraph 10.

²⁷ It should be emphasized that this observation is related to the scope of this chapter and not indicative of the existence or absence of customary human rights law. Clearly certain human rights and related norms are part of customary law and some also form part of *jus cogens*, including the examples already stated in the text above. See also Human Rights Committee, General Comment 24, CCPR/C/21/Rev.1/Add.6 (1994), paragraphs 8 – 10, and, as regards the customary law status of the right to life: International Committee of the Red Cross, Report on the Expert Meeting on The Use Of Force In Armed Conflicts: Interplay Between The Conduct Of Hostilities And Law Enforcement Paradigms, November 2013 (available at <https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf>, last accessed on 8 April, 2016), p. 4. Apart from the extraterritorial applicability of human rights obligations to the forces in question discussed below, military operations in areas or countries not party to the human rights instruments under discussion do not, of course, take place in a legal vacuum as regards human rights law and would be subject at least to customary human rights law. Similarly, military operations under United Nations command and control, in which acts carried out by such forces would generally be attributed to the United Nations which is itself not a party to any of the treaties in question, are equally governed by (at least) customary human rights law. It would be difficult to imagine otherwise, given the provisions of Article 1, paragraph 3, of the United Nations Charter. See also United Nations, *International Legal Protection of Human Rights in Armed Conflict*, 2011, pp. 112 – 113 (available at http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf, last accessed on 8 April, 2016).

distinguish, as conceptual models, between two distinct paradigms: the law enforcement paradigm and the war fighting paradigm.²⁸ This section will therefore first examine these paradigms in brief, including some observations related to recent practice in terms of rules of engagement. Next, since military operations tend to be of an international nature,²⁹ the possibility of human rights obligations to apply extraterritorially will be discussed. The analysis of the paradigm model in combination with the analysis of extraterritorial applicability of human rights obligations leads to the conclusion as to the applicability of human rights law to military operations, and thus to its (potential) influence on rules of engagement. This also logically leads to the question as to whether derogations of human rights obligations can provide alternative outcomes and which procedures or restrictions apply to such derogations. Finally, if human rights law does apply to military operations, the interaction between that law and the laws of armed conflict needs to be discussed, including the effects thereof on the rules of engagement.

1. Applicable paradigms

Regardless of the nature of the government entities applying force, the use of force can traditionally be roughly divided into two categories.³⁰ Each of

²⁸ See, *inter alia*, Shany, Y., “The International Struggle Against Terrorism – the Law Enforcement Paradigm and the Armed Conflict Paradigm,” Israel Democracy Institute, available at <http://en.idi.org.il/14005.aspx> (last accessed on 8 April, 2016), and International Committee of the Red Cross, *op. cit.* note 27, pp. 4 – 9.

²⁹ Similar to the comment in footnote 1, above, it should be emphasized here that while military operations can obviously be of a purely national nature, such as in the case of “traditional” non-international armed conflicts, the majority of contemporary military operations are international operations pursuant to an international mandate or are related to, or part of, situations which can be described as “transboundary non-international armed conflicts”.

³⁰ See, *inter alia*, Pouw, E., *International Human Rights Law and the Law of Armed Conflict in the Context of Counterinsurgency*, NLDA (Breda), 2013, pp. 10 – 12; Gill, T.D., “Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law: A Plea for Mutual

these categories is subject at least to its own set of laws, criteria, definitions, etc., although, as is implied by “at least”, other fields of law may apply to both categories and, as will be discussed below, overlap of applicable law can occur as well. In situations which meet the criteria and thresholds to be considered an armed conflict, as discussed in chapter 4, the principal applicable law is international humanitarian law. This category, with its own set of concepts, laws and definitions, can be referred to as the war fighting paradigm. In the dichotomous model of use of force paradigms, situations which are not armed conflicts and involve the use of force by government personnel are the category referred to as the law enforcement paradigm. In this category, the principal applicable law is human rights law. It should be noted that the choice of entity, that is the choice between deploying military personnel or police forces, is not decisive as regards the applicable paradigm, nor is the choice of means at their disposal.³¹ Military forces acting in support of police forces in the context of law enforcement may, for example, have the full range of military equipment and weapons at their disposal, but would, in situations not rising to the level of an armed conflict, still be operating within the law enforcement paradigm. Instead, the context or nature of the situation and the object and purpose of the use of force are determining factors regarding the applicable paradigm.³²

The discussion in chapter 4 regarding the threshold criterion for the existence of an armed conflict not only leads to the contentious issues discussed there as regards the (non-) existence of an intensity threshold for international armed conflict, but can also complicate the dichotomous paradigm model discussed here if the conceptual framework of that model

Respect and a Common Sense Approach”, in *Yearbook of International Humanitarian Law*, 2013, pp. 260 – 261.

³¹ It should be emphasized that this observation refers to the choice of means only. Clearly the actual use of those means could, depending on intensity and scale or the subject of the use of force, be determinative as to which of the paradigms applies.

³² As was discussed in chapter 4, the object and purpose of the use of force is not relevant in determining the existence of an armed conflict. It is relevant, however, in determining whether the law enforcement paradigm applies (including the exercise of law enforcement duties in the context of, but not related to, an armed conflict).

is not applied with due caution. While it may be tempting to view military use of force that rises above “ordinary” police action but does not meet the criteria for constituting an armed conflict as a “grey area” or third paradigm, that approach would not find solid ground as far as a legal analysis is concerned.

In situations short of armed conflict, the intent on the part of government agents to impose their will on others through the use of force (in the broadest sense of that word) will, barring obvious exceptions such as private criminal acts,³³ fall under the law enforcement paradigm. This follows from the purpose of the use of force and the interaction between the entities involved. In an armed conflict, the purpose of the use of force is to defeat the enemy and in this context combatants are equal as regards the law.³⁴ The purpose of defeating the enemy must be pursued (or achieved) within the limitations and rules set forth in international humanitarian law, which, as was discussed in chapter 4, limits the list of possible subjects of the use of force to persons and objects which are legitimate military objectives. The use of force by government (military) forces or other State agents in situations other than armed conflict is aimed at imposing the will of the government in question on the subjects of that use of force on the basis of (at least assumed) lawful authority to do so, with the intent of restoring or maintaining (international) public order or (the rule of) law.³⁵

³³ What is meant here are criminal acts committed by such individual agents of their own volition which, regardless of any ensuing issues of State responsibility and liability, are not covered by the international law on the use of force by government forces or State agents.

³⁴ Meaning that combatants from all parties involved in the conflict are equally entitled to participate in hostilities and the use of force by combatants is equally legitimate on all sides of the conflict, regardless of the legitimacy of (initiating) the armed conflict itself. See chapter 4 as regards the distinction between *jus ad bellum* and *jus in bello*.

³⁵ Pouw, *op. cit.* note 30, p. 10. Pouw describes the relationship in question as a “vertical relationship” between the State in question and the subjects of the government actions.

Such use of force is subject to the legal parameters of the law enforcement paradigm, leaving no grey area or third paradigm.³⁶

As will be discussed below, the paradigmatic approach to the use of force is not always relevant for the practical application of the rules in question, since overlap of paradigms can occur and the rules may thus end up being blended at the operational and tactical level, but it is useful for academic analysis of applicable law and for identifying certain specific differences between the legal systems in question. These differences include both conceptual differences and differences in meaning of similar concepts between the two systems. As this study is concerned with the rules on the use of force, the observation by Scobbie that “of all the matters regulated by both the law of armed conflict and international human rights law, the greatest differences are found in the rules which govern the use of force” is particularly relevant.³⁷

The differences between the two paradigms cover a wide area of subjects, some of which are instantly obvious, such as the differences between the rules regarding prisoners of war under international humanitarian law and the rules regarding arrest, detention and due process under human rights law. Other differences touch on the fundamental principles of the two systems of law and some of those can be confusing as a result of differences in the definitions of, or normative frameworks regarding, identical or at least similar terminology. Taking the description above of the differences between the two paradigms as regards the object and purpose of the use of force as a starting point, a significant difference

³⁶ As reflected in the footnotes above, whether applicable law was violated is not relevant for determining which law was applicable. The fact that initiating an armed conflict can later be regarded as an illegal act of aggression does not impact on the applicability of international humanitarian law during the course of that conflict. In the same vein, a (later) ruling that a particular use of force in effecting an arrest violated human rights law does not impact on the applicability of human rights law during the arrest (and, it may be argued, in fact demonstrates that applicability).

³⁷ Scobbie, I., “Human Rights Protection During Armed Conflict: What, When and for Whom?” in Wet, E. de, and Kleffner, J.K. [eds.], *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations*, Pretoria, 2014, p. 8.

can be observed between the fundamental status of the right to life in human rights law³⁸ and the status of combatants as legitimate objectives under international humanitarian law. Where the right to life is non-derogable under human rights law³⁹ and deprivation of life is only permissible under strict conditions in that system of law, there is no prohibition on killing enemy combatants in combat as such under international humanitarian law.⁴⁰ This distinction applies equally to members of organized armed groups in the context of a non-international armed conflict who have a continuous combat function. Given the challenges discussed in chapter 4 as regards identifying such persons, or rather distinguishing them from civilians, the observed distinction between the right to life under human rights law and the rules of international humanitarian law has led some to advocate consistent applicability of (parts of) the former in the context of “low intensity” non-international armed conflicts.⁴¹

As regards terminology, closer examination is necessary of two terms that appear in both systems of law but which have significantly different meanings in each of the two systems. The first of these terms is the concept of proportionality. As was discussed in chapter 4, the concept of proportionality in international humanitarian law involves an evaluation of the (strategic or military operational) value of the attack or the intended target in comparison to the anticipated collateral damage, in terms of

³⁸ See footnote 27 as regards the customary law status of the right to life.

³⁹ Barring the exception of lawful acts of war as set forth in Article 15, paragraph 2, of the European Convention on Human Rights. The right to life and the meaning of “arbitrary” as used in the ICCPR will be discussed in greater detail below in section III.A.

⁴⁰ See also the discussion on concurrent applicability of IHL and HRL below in section II.4. and the discussion on Part IX of the ICRC’s Interpretative Guidance on Direct Participation in Hostilities in chapter 4. The legitimacy of killing an enemy combatant is also, of course, subject to adherence to applicable rules of IHL, including the rules regarding methods and means of warfare, etc. This observation and the interaction between combatant privilege and the right to life under HRL are also discussed in Rowe, P., *The Impact of Human Rights Law on Armed Forces*, Cambridge, 2006, p. 135.

⁴¹ Lubell, N., “Challenges in Applying Human Rights Law to Armed Conflict,” in *International Review of the Red Cross*, Vol. 87, no. 860, 2005, p. 748 – 750. The interaction between HRL and IHL is discussed below in section II.4.

incidental loss of life or injury to protected persons or damage to, or destruction of, civilian property. In the hypothetical situation that an enemy combatant were to be engaged in the middle of uninhabited terrain,⁴² the principle of proportionality would not be relevant under international humanitarian law.⁴³ Under human rights law, on the other hand, the concept of proportionality refers to an evaluation between the threat posed by the intended target of the use of force on the one hand and the choice of methods and means to be used against that target on the other hand. In this approach, there is a requirement for a certain degree of equality as regards the threat to life, although not a true equality of methods and means.⁴⁴ In this approach persons who do not pose an immediate threat may not be killed, regardless of whether there are any collateral damage risks involved or even if there are no collateral damage risks involved.

A similar distinction exists as regards the concept of necessity, which also appears in both systems of law. Under international humanitarian law, the principle of (military) necessity “consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”⁴⁵ This

⁴² And, of course, assuming all other rules of IHL are adhered to, including the prohibitions on attacking an enemy *hors de combat*, on weapons causing superfluous injury or unnecessary suffering and on causing widespread, long-term and severe damage to the natural environment.

⁴³ See chapter 4 as regards the discussion on Part IX of the ICRC’s Interpretative Guidance on Direct Participation in Hostilities.

⁴⁴ The human rights concept of proportionality is closely related to the human rights concept of necessity, which is discussed in this section. See also chapter 3 as regards the (criminal law) concepts of proportionality and necessity in the context of self-defense. As regards the differences in meaning and normative effect of proportionality between HRL and IHL, see also Lubell, *op. cit.* note 41, pp. 745 – 746; Scobbie, *op. cit.* note 37, p. 13; ICRC, *op. cit.* note 27, p. 8 – 9.

⁴⁵ Article 14 of General Orders No. 100 (The Lieber Code, 1863) “Instructions For The Government Of Armies Of The United States In The Field.” A more modern definition is: “The principle whereby a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws of war.” Department of Defense Joint Publication 1-02, *Dictionary of Military and Associated Terms*, 12 April 2001, as amended through 9 January 2003.

concept of necessity presupposes an inherent necessity (and expectation) as regards the use of (deadly) force against enemy forces and enemy military objectives.⁴⁶ Under human rights law, however, the concept of necessity as regards the use of force takes on the meaning of absolute necessity, meaning the use of (deadly) force becomes a measure of last resort and may only be applied if no other reasonable alternatives are available.⁴⁷ While this approach would still obviously allow the use of force in response to the use of (deadly) force by the other person, it rules out the use of force against another person on the sole basis of that person's status or identity.

Clearly the differences between the two paradigms have a significant impact on the rules on the use of force by military personnel, including the rules of engagement. Establishing which paradigm applies, or establishing whether both paradigms apply and in which manner the rules then interact, is therefore crucial for ensuring that the rules on the use of force remain within the legal parameters of the operation. The difficulties in making those determinations may be part of the reason for the controversy surrounding the issue of extraterritorial applicability of human rights law, including application to military operations. This controversy will be discussed next.

2. Extraterritorial application of human rights law

Given the objective of human rights law to protect the rights of individuals and groups and given the intrinsic relationship underlying human rights law between government authority and government acts on the one hand and the rights of individuals and groups on the other hand, the observation presented above that human rights law is primarily territorial in nature follows from the structure of the law. The European Court of Human Rights has also repeatedly stated that the obligations set forth in the Convention

⁴⁶ ICRC, *op. cit.* note 27, p. 8.

⁴⁷ Article 2, paragraph 2, of the ECHR. See also ICRC, *op. cit.* note 27, p. 8; ECtHR, *McCann v. United Kingdom*, paragraph 149; ECtHR, *Jaloud v. The Netherlands*, paragraph 199.

are principally territorial in nature.⁴⁸ This also follows from provisions establishing the field of application of the various instruments, which contain language that, at first reading, appear to limit the obligations of the State Parties to their own territory. In the case of economic, social and cultural rights, which by their nature require legislation to enable the governments to ensure those rights, this is perhaps most prominently the case.⁴⁹ But the International Covenant on Civil and Political Rights,⁵⁰ the American Convention on Human Rights,⁵¹ and the European Convention on Human Rights⁵² refer to “jurisdiction” as the deciding factor as regards

⁴⁸ For example, ECtHR, *Bankovic v. Belgium and others*, application no. 52207/99, paragraph 59; ECtHR, *Behrami v. France and Saramati v. France, Germany and Norway*, applications no. 71412/01 and 78166/01, paragraph 69.

⁴⁹ This observation refers to the obligation for States to “take steps [...] with a view to achieving progressively the full realization of the rights” as set forth in Article 2, paragraph 1 of the ICESCR. Obviously, that does not mean that the rights protected by the ICESCR exist solely as obligations for States to take steps within their own territory. As set forth in Article 5 of the ICESCR, the Covenant’s provisions may not “be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.” For a discussion of the extraterritorial effect of the ICESCR and the relationship between ESC rights and actions by States with extraterritorial effect, see Coomans, F., “Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights,” in Coomans, F., and Kamminga, M.T. [eds.], *Extraterritorial Application of Human Rights Treaties*, Antwerp, 2004, pp. 183 – 199.

⁵⁰ Article 2, paragraph 1, carries the obligation for States to “ensure” the rights in the ICCPR to “all individuals within its territory and subject to its jurisdiction.”

⁵¹ Article 1, paragraph 1, carries the obligation for States to “respect” and to “ensure” the rights in the Convention to “all persons subject to their jurisdiction.”

⁵² Article 1 carries the obligation for States to “secure” the rights to “everyone within their jurisdiction.” It should be noted that earlier drafts of the Convention did include references to territory, domicile and residency as determining factors, those elements ultimately being left out in order to “widen as far as possible the categories of persons who are to benefit by the guarantee contained in the Convention.” Council of Europe, “Preparatory work on Article 1 of the European Convention on Human Rights (Travaux préparatoires de l’article 1er de la Convention européenne des Droits de l’Homme),” p. 34, available at <http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART1-COUR%2877%299-EN1290551.PDF> (last accessed on 8 April, 2016).

the persons whose enjoyment of the rights in question are at stake, while the Convention Against Torture⁵³ refers to jurisdiction over the territory in question as the deciding factor.⁵⁴ Both the references to “jurisdiction,” which is primarily territorial in nature, and the specific reference to territory in some instruments support the view that human rights obligations are primarily territorial in nature. But jurisdiction is not, of course, always limited to the territory of the State in question and some of the provisions deserve closer examination.

a. Conceptual aspects of jurisdiction

In the criminal law sense of the word, jurisdiction refers to the prescriptive, judicial and enforcement authority of the government to enforce the law in question against the suspect or perpetrator in the given case. Even in this classical approach to jurisdiction, however, the term is not necessarily limited to the territory of the State intending to enforce the law. Apart from national legislation establishing extraterritorial jurisdiction on the basis of national interests or objectives,⁵⁵ various treaties either carry an obligation to establish extraterritorial (or even universal) jurisdiction or allow for the existence of such jurisdiction. For example, the 1982 United Nations Convention on the Law of the Sea requires flag states to establish

⁵³ Article 2, paragraph 1, contains the obligation for States to take the necessary measures to prevent torture “in any territory under its jurisdiction.”

⁵⁴ The difference between the field of application of the ICCPR and the field of application of the CAT as regards territory and jurisdiction will be discussed below. In addition, it should be noted that while the CAT is specific as regards the obligations to prevent torture and as regards the extent and substance of the right to be protected against torture, the ICCPR also, in more general terms, prohibits torture in Article 7.

⁵⁵ Such nationally inspired extraterritoriality clauses need not be controversial and can be introduced simply to avoid a lapse or gap in jurisdiction. For example, a State may establish jurisdiction over its own nationals for certain (or all) crimes, regardless of where the crime was committed. Obviously the extraterritorial *enforcement* of jurisdiction on another State’s territory is only permissible with the consent of the territorial State (such as through a bilateral or multilateral treaty or ad-hoc permission) or on the basis of a United Nations Security Council resolution.

jurisdiction over vessels sailing under their flag⁵⁶ and authorizes universal jurisdiction over acts of piracy,⁵⁷ the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft establishes the jurisdiction of the State of registration of an aircraft over acts committed on board,⁵⁸ and, the Geneva Conventions require the States Party to the Conventions to establish jurisdiction over persons committing any of the grave breaches of those Conventions.⁵⁹

In addition to the classical criminal law concept of jurisdiction and the (limited) examples of extraterritorial jurisdiction in that context, there is growing recognition in the academic world, reflected in (and based on) the interpretative statements and case law of several of the human rights bodies, that human rights obligations are not limited to that classic interpretation of the concept of jurisdiction and its territorial limitations. Instead, the human rights oriented concept of jurisdiction extends the obligations under the relevant treaties to actions taken by the States Parties outside their own territory and, as regards the regional treaties, beyond the region defined by the territories of the States Parties as a group. As some of the case law has shown, this brings the conduct of military personnel during operations abroad within the reach of human rights law.

The distinction made above as regards the obligations to respect and protect on the one hand and the positive obligations on the other hand can facilitate examining the extraterritorial application of the human rights obligations. The obligations to respect and protect, in other words the obligations on States to refrain from certain actions, can perhaps more readily be understood to extend to actions undertaken by States outside their own territory. Given the object and purpose of these human rights obligations, it would, in any case, not be legally or logically reasonable to limit such obligations to the territory of the State in question. As Hampson has stated, it would certainly appear “self-evident that a State should not be

⁵⁶ Articles 92, paragraph 1, and 94, paragraphs 1 and 2 sub (b).

⁵⁷ Article 105.

⁵⁸ Article 3.

⁵⁹ For example, Article 49 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August, 1949.

allowed to do extraterritorially what it is prohibited from doing within its own borders.”⁶⁰ Where such human rights obligations are part of *jus cogens*, this is also legally self-evident. Where such obligations are not part of *jus cogens*, however, the meaning of the concept of jurisdiction becomes relevant again, as well as its trigger mechanisms.

This need to examine the triggers and extent of the concept of jurisdiction in relation to human rights obligations is even more relevant as regards the positive obligations under human rights law. It seems clear that where such positive obligations are contingent on the adoption of specific legislation in the geographic area of application of the right in question, the possibility for States to carry out such obligations are limited to certain very specific circumstances.⁶¹ But the extraterritorial application of other positive obligations, such as the duty to investigate the use of force by government agents, are not contingent on legislative authority and present their own difficulties and challenges.

In order for jurisdiction to exist, the State in question must have a certain level of control. In the case of traditional criminal law jurisdiction, the control element is territorial in nature and the requisite control is

⁶⁰ Hampson, F.J., “Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law”, in *U.S. Naval War College International Law Studies*, Vol. 87, 2011, p. 189. This view is reflected also in the case law of the European Court of Human Rights, which has stated that “the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.” See ECtHR, *Issa and others v. Turkey*, application 31821/96, paragraph 71.

⁶¹ See, for example, Articles 64 and 65 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War as regards the authority of an Occupying Power to enact, in a limited way and subject to specific restrictions, penal law in occupied territory. Another example would be a situation in which, on the basis of specific authorization by the United Nations Security Council, the administration of an area is to be carried out *in toto* by a State or ad-hoc international organ, such as the United Nations Interim Administration Mission in Kosovo. See, in that regard, UNMIK Regulation No. 1999/I of 25 July, 1999, establishing the legislative authority of UNMIK, and operative paragraph 11(j) of United Nations Security Council Resolution 1244 which sets forth the obligation for UNMIK to protect and promote human rights.

extensive, including control of (law) enforcement, judicial authority and, at least for certain aspects, legislative authority. The human rights concept of jurisdiction also essentially centers on the ability of the State in question to exercise control. Following the earlier observation as regards the “self-evident” nature of extraterritorial application of the protective or “negative” obligations of States, Hampson observes that it is “obvious” that States cannot be held responsible for what takes place in situations beyond their control.⁶² However, as will be shown below in the discussion of the case law of the various human rights bodies the mechanism by which State control may be established differs from the more traditional approach (that is, territorial control of a comparable level as domestic government authority).

While control may be established *ratione loci*, that is on the basis of (extensive) control of the area in question, the human rights concept of jurisdiction also recognizes State control, and thereby applicability of a State’s human rights obligations, *ratione personae*. In this approach, a State’s obligations under human rights instruments may be triggered on the basis of the relationship between the person and the State’s agents, meaning the level of control exercised by the State’s agents over the person in question, even absent any control by those agents over the area in question. Since it is without question that a State is responsible for the actions of its organs and agents,⁶³ the test under human rights law is consequently

⁶² Hampson, *op. cit.* note 60, p. 189. See also Lubell, who also contrasts situations of (belligerent) occupation from other situations and who states that “a key consideration is whether a violation resulted directly from circumstances over which the State had control, whether or not it also had overall control of the territory in which the violation occurred”. Lubell, *op. cit.* note 41, p. 740.

⁶³ As recognized *inter alia* in Article 4 of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts. Since this study is concerned with the interaction between rules for the use of force and (international) law, the applicability of human rights obligations to non-state actors will not be discussed in detail here. For an extensive discussion and analysis of the (possible) applicability of human rights obligations to organized armed groups in the context of a non-international armed conflict, see Kleffner, J.K., “The Applicability of the Law of Armed Conflict and Human Rights Law to Organized Armed Groups”, in Wet, E., and Kleffner, J.K., [eds.], *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations*,

whether the victim of a human rights violation fell within the jurisdiction of the State in question.⁶⁴ As will be shown below, the mechanism by which jurisdiction may be established includes situations of detention, as well as other actions establishing “effective control” over the person in question.

Notwithstanding the promulgation of extraterritorial applicability of obligations under the human rights instruments by the relevant international bodies and its recognition in academic writing, at least two States have consistently and openly denied such extraterritorial applicability. The United States has, in its periodic reports to the Human Rights Committee under the ICCPR, consistently stated that it interprets Article 2, paragraph 1, of the ICCPR as a cumulative criterion, that is requiring the subject to be both within the territory and within the jurisdiction of the State. While the 2012 periodic report appears to be more subtle, by also stating that the government has taken note of, or is aware of, alternative views on this issue, the main position appears to be unaltered.⁶⁵ The Human Rights Committee, however, does not share this view,⁶⁶ as will also be discussed in greater detail below, and this view is also criticized in academic literature.⁶⁷ Israel has taken a position similar to that of the United States and, for reasons specific to that State, appears to still maintain that position.⁶⁸ While the

Pretoria, 2014; and Kleffner, J.K., “Human Rights and International Humanitarian Law: General Issues”, in Gill, T.D. and Fleck, D. [eds.] *The Handbook of the International Law of Military Operations*, Oxford, 2010, p. 67 (paragraph 34).

⁶⁴ Hampson observes that the law “does not require the alleged perpetrator to be within the control of the State. It requires that the victim should be within the jurisdiction of the respondent State.” Hampson, *op. cit.* note 60, p. 190.

⁶⁵ Human Rights Committee, Consideration of reports submitted by States parties under Article 40 of the Covenant, Fourth Periodic Report by the United States of America, CCPR/C/USA/4, 22 May, 2012, paragraph 504 – 505.

⁶⁶ Human Rights Committee, Report of the Human Rights Committee, United Nations General Assembly document A/50/40, 3 October 1995, paragraph 284.

⁶⁷ See, for example, Schaak, B. Van, “The United States Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change,” in *U.S. Naval War College International Law Studies*, Vol. 90 (2014).

⁶⁸ Human Rights Committee, Consideration of reports submitted by States parties under Article 40 of the Covenant pursuant to the optional reporting procedure, Fourth periodic reports of States parties due in 2013, Report by Israel, CCPR/C/ISR/4, 14 October, 2013, paragraph 48; ICJ, *Legal Consequences of the*

positions taken by the United States and Israel would appear, on the basis of the case law presented below, to be untenable, the two States have in any case been consistent in their position and have at least been open and transparent in their views on the issue.

b. Case law

The extraterritorial application of human rights obligations has been expressed in a number of general comments and individual cases by the various human rights bodies. A selection of these comments and cases is presented below. In the interest of maintaining the focus of this study, only those comments and cases will be presented which either contain significant elements of the extraterritorial applicability of human rights obligations or are related to (or relevant for) the conduct of military operations.

(i) Human Rights Committee

The Human Rights Committee established under the ICCPR has expressed its views on the extraterritorial applicability of the ICCPR in a number of ways. In its General Comment number 31,⁶⁹ the Committee emphasizes in paragraph 3 that the obligations under the Covenant must be fulfilled by the States Parties in good faith, referring to Article 26 of the Vienna Convention on the Law of Treaties. In paragraph 10 of the same General Comment, the Committee clearly expresses its view that Article 2, paragraph 1, of the Covenant must be read as containing alternative criteria rather than cumulative requirements as propounded by the United States. The Committee makes it clear that the rights protected by the ICCPR must be guaranteed “to all persons who may be within their territory and to all persons subject to their jurisdiction.” In the same paragraph, the Committee then emphasizes that, as regards persons outside the territory of the States Parties, the States Parties “must respect and ensure the rights laid down in

Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion), 9 July, 2004, paragraph 110.

⁶⁹ Human Rights Committee, General Comment 31, CCPR/C/21/Rev.1/Add.13, 26 May, 2004.

the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”

The views expressed by the Committee in General Comment 31 can also be found in the considerations of national reports, such as those of the United States⁷⁰ and Israel,⁷¹ and in the views of the Committee in response to communications. In addition to reiterating its views that the Covenant applies to persons within the effective control of a State, even outside the State’s territory,⁷² the Committee has also considered the Covenant to apply if a person is transferred from such effective control to the jurisdiction of another State, if the (subsequent) violation of the person’s rights by the receiving State was a “necessary and foreseeable consequence” of that transfer.⁷³ In so doing, the Committee has established a rather low threshold for activating the responsibility of States under the Covenant, as the Committee considers such responsibility to be present if the actions of the State (or its agents) were the “link in the causal chain that would make possible violations in another jurisdiction.”⁷⁴

(ii) Committee Against Torture

The Committee established under Part II of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has expressed its views on the extraterritorial application of the Convention in both a General Comment and in its views on communications submitted to the Committee. However, it should be noted that the provision regarding the scope of application of the Convention is more specific, and more limited, than the provisions of other human rights instruments. Article 2, paragraph 1, of the Convention requires the States Parties to take

⁷⁰ Human Rights Committee, Report of the Human Rights Committee, United Nations General Assembly document A/50/40, 3 October 1995, paragraph 284.

⁷¹ Human Rights Committee; Concluding observations of the Human Rights Committee: Israel, CCPR/CO/78/ISR, 5 August, 2003, paragraph 11.

⁷² For example: Human Rights Committee, *Burgos v. Uruguay*, Communication No. 52/1979, paragraph 12.2 – 12.3.

⁷³ Human Rights Committee, *Mohammad Munaf v. Romania*, CCPR/C/96/D/1539/2006, paragraph 7.5.

⁷⁴ *Ibid.*, paragraph 14.2.

“effective” measures to prevent torture “in any territory under [their] jurisdiction.” Contrary to the ICCPR and the regional instruments, consequently, the focus in the CAT is on territorial applicability rather than jurisdiction *ratione personae*.

However, the Committee has made it clear that the territorial applicability is not limited to the national, domestic territory of the States Party but also extends to “all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law”⁷⁵ As, within such areas, the rights under the Convention must be “applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party,”⁷⁶ the *de facto* applicability of the Convention is no less extensive than that of other instruments. Certainly as regards detention, the Convention appears to operate in a similar manner as the ICCPR would apply to such situations.⁷⁷

(iii) *Inter-American system*

While the Inter-American human rights bodies⁷⁸ have not expressed their views as regards the extraterritorial applicability of the Convention in the form of general comments, but reports on specific issues and the case law

⁷⁵ Committee Against Torture, General Comment No. 2, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, paragraph 16. As examples of such areas, the Committee includes “a ship or aircraft registered by a State party” and “military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control.”

⁷⁶ *Ibid.*, paragraph 7.

⁷⁷ See, for example: Committee Against Torture, *J.H.A. v. Spain*, CAT/C/41/D/323/2007, 21 November, 2008, paragraph 8.2, in which the Committee “considers that such jurisdiction must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.”

⁷⁸ The American Convention on Human Rights of 22 November, 1969, refers to the Inter-American Commission on Human Rights in Chapter VII (although the Commission was created prior to the Convention) and establishes the Inter-American Court of Human Rights in Chapter VIII of the Convention.

provide clear indications of such extraterritorial applicability. Article 1, paragraph 1, of the Convention extends its application to “all persons subject to [the] jurisdiction” of the States Parties. As Hathaway has observed, the views expressed by the Inter-American human rights bodies, in particular the Inter-American Commission on Human Rights, indicate that this provision should be interpreted as applying to any situation in which a State Party exercises “authority and control” over a person.⁷⁹ This observation is based in part on the views of the Inter-American Commission on Human Rights in its reports on Terrorism and Human Rights⁸⁰ and on Access to Justice as a Guarantee of Economic, Social, and Cultural Rights.⁸¹ These views are also supported by the case law of the Inter-American system, in which the “authority and control” criterion has been consistently applied.⁸²

⁷⁹ Hathaway, O., “Human Rights Abroad: When do Human Rights Treaty Obligations Apply Extraterritorially?” in *Arizona State Law Journal*, Vol. 43, 2011, pp. 413 – 415.

⁸⁰ IACHR, *Report On Terrorism And Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, of which paragraph 374 sets forth the paramount importance of “the principles of necessity, proportionality, humanity and non-discrimination in all circumstances in which states purport to place limitations on the fundamental rights and freedoms of persons under their authority and control.”

⁸¹ IACHR, *Access To Justice As A Guarantee Of Economic, Social, And Cultural Rights. A Review Of The Standards Adopted By The Inter-American System Of Human Rights*, OEA/Ser.L/V/II.129, Doc. 4, 7 September 2007, of which paragraph 194, footnote 144, emphasizes the right to judicial review of detention of “individuals falling within the authority and control of a state.”

⁸² See, for example, IACHR, *Rafael Ferrer-Mazorra et al.v. United States*, Report N° 51/01, Case 9903, April 4, 2001, paragraph 235, extending the right to judicial review of detention to “individuals falling within the authority and control of a state”; IACHR, *Armando Alejandro Jr., Carlos Costa, Mario De La Peña, and Pablo Morales v. Cuba*, Report N° 86/99, Case 11.589, September 29, 1999, in which the Commission explains its jurisdiction in paragraph 23: “In terms of its competence *ratione loci*, clearly the Commission is competent with respect to human rights violations that occur within the territory of OAS member states, whether or not they are parties to the Convention. It should be specified, however, that under certain circumstances the Commission is competent to consider reports alleging that agents of an OAS member state have violated human rights protected

(iv) *African Charter*

Contrary to the other human rights instruments, the African Charter on Human and Peoples' Rights does not contain any reference to jurisdiction or territory. Instead, Article 1 of the Charter sets forth the obligation for States Parties to "recognise the rights, duties and freedoms" as set forth in the Charter and to "undertake to adopt legislative or other measures to give effect to them." While the legislative measures would seem to indicate a territorial limitation, given the limits of States to enact legislation extraterritorially or with extraterritorial (enforcement) effect, Article 2 of the Charter extends the rights and freedoms of the Charter to "every individual" and does so "without distinction of any kind".

While the wide range of effect of the Charter does not, of course, extend beyond the scope of its foundational background,⁸³ the Commission set up under the Charter has made it clear that the obligations under the Charter extend beyond the States Parties' own territory in certain cases. For example, Viljoen points out that the Commission has extended the application of the Charter to international armed conflicts, ruling that the States Parties in question were responsible under the Charter for the actions

in the inter-American system, even when the events take place outside the territory of that state. In fact, the Commission would point out that, in certain cases, the exercise of its jurisdiction over extraterritorial events is not only consistent with but required by the applicable rules" and "Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control."

⁸³ Bulto points out that early applications to the Commission did not even reach the merits stage, as the complaints involved non-African States which were beyond the jurisdiction of the Commission. Bulto, T.S., "Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System," in *South African Journal on Human Rights*, Vol. 27, No. 2, 2011, p. 257.

of their armed forces in another State's territory⁸⁴ and (thus) to actions undertaken in territory under the effective control of a State Party as well as to conduct against persons over whom the State Party has effective control.⁸⁵ Bulto, however, has pointed out that the Commission has also ruled on the merits of at least one case in which there was no effective control, but the actions of the States in question had effect on the human rights of individuals in another State.⁸⁶ Consequently, it may be concluded that the African Charter and the concomitant case law of the Commission establish extensive jurisdictional range as regards the States Parties' obligations beyond their own territories.

(v) *European Court of Human Rights*

There is little doubt that the most prolific source of case law concerning the extraterritorial applicability of human rights obligations is the European Court of Human Rights (ECtHR) in interpreting and applying the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). While even some of the Court's own judges have considered the issue of interpreting Article 1, which sets forth the scope of application of the Convention, as being "problematic" and have noted that the Court's views on this issue contain "contradictions,"⁸⁷ the case law does contain a number of consistent concepts and criteria to determine whether the

⁸⁴ Viljoen, F., "The Relationship Between International Human Rights and Humanitarian Law in the African Human Rights System: An Institutional Approach", in Wet, E., and Kleffner, J.K., [eds.], *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations*, Pretoria, 2014, p. 313.

⁸⁵ *Ibid.*, p. 314. See also African Commission on Human and People's Rights, *Democratic Republic of Congo v. Burundi, Rwanda, Uganda*, 227/99, May 29, 2003, paragraph 79 – 81.

⁸⁶ Bulto, *op. cit.* note 83, p. 262 – 263. The case in question is African Commission on Human and People's Rights, *Association Pour la Sauvegarde de la Paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, 157/96, 29 May, 2003.

⁸⁷ Concurring opinion of Judge Motoc, annexed to the judgment of the ECtHR, *Jaloud v. Netherlands*, application no. 47708/08.

Convention applies in a given military operation or to specific acts within such operations.

Already in 1995, the Court ruled that the concept of “jurisdiction” as used in Article 1 of the Convention “is not restricted to the national territory of the High Contracting Parties” and that the jurisdiction of the States Parties may be established, *inter alia*, by “acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.”⁸⁸ Even more relevant to the present study, the Court found in the same case that “the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory.”⁸⁹ Conversely, however, if a State loses control over part of its territory as a result of the military actions of another State, the occupied State’s responsibilities do not automatically and *ipso facto* cease to apply as a result of that occupation. As the Court points out, in such cases the occupied State is still under the responsibility to “take all appropriate measures which it is still within its power to take.”⁹⁰

⁸⁸ ECtHR, *Loizidou v. Turkey*, application no. 15318/89, paragraph 62. The other situations the paragraph refers to include extradition, which will not be discussed here as it is irrelevant to the rules on the use of force. The ruling on effective control as a result of military action was repeated in later case law of the Court, such as ECtHR, *Ilaşcu and others v. Moldova And Russia*, application no. 48787/99, paragraphs 314 – 316.

⁸⁹ *Ibid.*

⁹⁰ ECtHR, *Ilaşcu and others v. Moldova And Russia*, application no. 48787/99, paragraph 313. It should be noted that as regards responsibility for the actions of State agents, the *Ilaşcu* case also sets forth the Court’s ruling that *ultra vires* acts by a State’s agents are still the responsibility of the State in question under the Convention’s strict liability approach (paragraph 319). Finally, a State is also responsible under the Convention for the acts of private individuals, in the event of “acquiescence or connivance” by the authorities in those private acts (paragraph 318). While these elements of the case are of considerable significance for establishing extraterritorial responsibility for States under the Convention, they will not be discussed further here as they have little relevance for the military rules on the use of force, which only apply to State agents and do not normally extend to (or provide authorizations for) private contractors, etc.

The primarily territorial interpretation of the concept of jurisdiction was emphasized by the European Court in 2001, at which time the Court also pointed out, while applying the Vienna Convention on the Law of Treaties to its interpretation of Article 1, that in subsequent practice in applying the Convention⁹¹ in relation to military operations “no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogation pursuant to Article 15 of the Convention.”⁹² The Court then stated that extraterritorial jurisdiction is not triggered merely by persons being the subject (or victim) of acts by a State Party outside its jurisdiction, but that there must be effective control for such extraterritorial jurisdiction to be established.⁹³ Since in the case in question there was no effective control over the territory by the States Parties in question, there was no jurisdiction.⁹⁴

The restrictive approach taken by the Court in the cases discussed above as regards triggering extraterritorial jurisdiction as a result of effective control over a territory has not been matched, however, by an equally restrictive approach as regards jurisdiction resulting from the acts of agents of a State in the context of military operations. The fact that jurisdiction can be derived from the acts of State agents even in areas where the State does not exercise effective control has been part of the case law of the Court for some time.⁹⁵ Returning to the operations in Kosovo, once the United Nations authorized a ground force, implemented by the North Atlantic Treaty Organization (Kosovo Force, KFOR), and instituted a

⁹¹ As set forth in Article 31, paragraph 3 under (b), of the Vienna Convention.

⁹² ECtHR, *Bankovic and others v. Belgium and others*, application no. 52207/99, paragraph 62.

⁹³ *Ibid.*, paragraph 75.

⁹⁴ The case centered on the air campaign carried out by the United States and NATO against Serbia and parts of Kosovo in 1999 under the name Noble Anvil (United States) and Allied Force (NATO). Until the creation of KFOR, however, there were no ground troops involved and the operation consisted only of air operations.

⁹⁵ In addition to the cases already mentioned above, see also ECtHR, *Issa and others v. Turkey*, application no. 31821/96, paragraph 71, and ECtHR, *Isaak and others v. Turkey*, application no. 44587/98, pp. 19 – 21.

United Nations temporary administration over Kosovo (United Nations Interim Administration Mission in Kosovo, UNMIK), the question arose whether (alleged) violations of the Convention were to be attributed to the member States involved or to the United Nations. In these cases, the Court ruled that UNMIK was a subsidiary organ of the United Nations and that actions carried out by UNMIK were therefore attributable to the United Nations itself.⁹⁶ As regards KFOR, the Court ruled that the wording of resolution 1244 left the “ultimate authority and control” over the operation with the Security Council, even though certain powers were “delegated” to NATO in carrying out the operation.⁹⁷ Consequently, the Court also considered actions undertaken by KFOR to be attributable to the United Nations and declared the case inadmissible.⁹⁸

Although basing its later rulings primarily on various differences in the factual circumstances between those later cases involving military

⁹⁶ ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, applications 71412/01 and 78166/01, paragraph 142 – 143. The approach taken by the Court seems entirely logical and correct, given that the United Nations does indeed consider operations under direct command and control of the UN to be subsidiary organs of the Organization. This is reflected also in the wording of the relevant resolutions, in which UN operations are “established” (e.g. UN Security Council Resolution 2100, which establishes the MINUSMA operation in Mali in operative paragraph 7) and operations which are carried out under command and control of another organization or of a “coalition of the willing” are “authorized” (e.g. UN Security Council Resolution 1386, which authorizes the ISAF operation in Afghanistan in operative paragraph 1).

⁹⁷ *Ibid.*, paragraph 133 – 136. It is interesting to note that the retention of certain influence and of jurisdiction by the troop contributing nations over their national contingents did not, in the Court’s views expressed in paragraph 139 of this judgment, detract from the overall command by NATO as delegated to NATO by the UN Security Council. This contrasts (very) sharply with the controversial views of the Court expressed in the later *Jaloud v. Netherlands* case, discussed below, as regards the Court’s interpretation of the concept of “Full Command”.

⁹⁸ Compare this approach to the approach taken by the Supreme Court of the Netherlands, discussed below, in which the Supreme Court ruled that while the actions of Dutchbat as part of the UN Protection Force (UNPROFOR) in the former Yugoslavia (under direct command of the United Nations) were attributable to the UN, that did not rule out that those actions could also be attributable to the Netherlands as troop contributing nation.

operations and the facts in the earlier *Bankovic* and *Behrami/Saramati* cases, the Court appears to have broken with at least some parts of its previous approach to extraterritorial jurisdiction resulting from the acts of military operations abroad. In a series of four judgments of particular relevance to this study, the Court has instead introduced a detailed set of criteria which lead to an expansive application of extraterritorial responsibility, based on the concept of jurisdiction under the Convention. In the 2011 case of *Al Jedda*, the Court dismissed both its previously restrictive view of extraterritorial application of the Convention and the previously wide view as regards attribution to the United Nations in the event of authorizations in Security Council resolutions under Chapter VII of the Charter of the United Nations. It did so on the basis of the reasoning that the United Kingdom (and the United States, which was obviously not involved in the case nor a party to the Convention) was part of the Coalition Provisional Authority which exercised the authority and obligations of Occupying Power after the invasion of Iraq in the meaning of that concept under international humanitarian law. Although the United Nations subsequently authorized a Stabilization Force in Iraq (SFIR) through United Nations Security Council resolution 1511, the Court found that the wording of that resolution did not indicate any intention on the part of the Security Council to accept control over the operation to the extent that it had (in the view of the Court) in regards to KFOR.⁹⁹ Next, in considering the detention that was at issue in the case, the Court ruled, in essence, that the authorizations to detain as set forth in the resolution were not obligations to do so and that consequently the authority to detain, no matter how specifically worded or set forth as a required element of the operations in Iraq, did not create an obligation setting aside the obligations under the Convention.¹⁰⁰ This observation is particularly relevant in the context of the

⁹⁹ ECtHR, *Al Jedda v. United Kingdom*, application 27021/08, paragraph 80 – 83.

¹⁰⁰ The question at issue was whether there was a conflict of obligations, such as could be created by Article 103 of the Charter of the United Nations. However, the Court's ruling as regards such a conflict was inconclusive, since it was determined that there was no obligation to detain and therefore no conflict of obligations (*Al Jedda*, paragraphs 101 – 109). It should be noted that, as regards

application of rules of engagement, since the authorizations set forth in such rules are similarly not obligations to carry out the acts which are authorized (apart from the observations made elsewhere that the rules of engagement are not sources of law in the first place).

Following parts of the reasoning introduced in the *Al Jedda* judgment, the European Court next set forth, or specified, all of the criteria for determining extraterritorial obligations under the Convention in the case of *Al Skeini*.¹⁰¹ While, as will be discussed below, certain details of the criteria set forth in the *Al Skeini* case were further clarified (and expanded) by the Court in subsequent cases, the *Al Skeini* judgment is the principal statement in which the Court clearly and systematically specified the full set of criteria, supported to a large extent by its previous case law, by which the Court evaluates whether applicants came within the jurisdiction of the State Party in question and thus were subject to the protective obligations of that State Party.

Following the same order as used by the Court in its extensive discussion of these criteria in paragraphs 130 – 140, the European Court considers State Party jurisdiction under Article 1 of the Convention to exist first and foremost, obviously, in the territory of the State Party itself. This principally territorial approach has been stated in most of the case law of the Court involving extraterritorial jurisdiction,¹⁰² although the common wording as regards the exceptional nature of the extraterritorial effect of the Convention has become somewhat meaningless in the light of the subsequent criteria for establishing such extraterritorial effect.

The next criterion discussed by the Court focuses on extraterritorial jurisdiction and consists of “State agent authority and control.” In brief, this

conflicts of obligations, the Court has also ruled that an obligation to transfer a detainee on the basis of international (or locally applicable national) law does not set aside obligations under the Convention if there is reason to suspect that the detainee will suffer treatment contrary to the protections and rights under the Convention; ECtHR, *Al Saadoon and Mufdhi v. United Kingdom*, application 61498/08, paragraphs 123 and 126 – 128.

¹⁰¹ *Al Skeini*, *supra* note 21.

¹⁰² For example, *Bankovic*, *supra* note 92, paragraph 59; *Behrami/Saramati*, *supra* note 96 paragraph 69; *Ilaşcu*, *supra* note 90, paragraph 312.

criterion holds that, as was already referred to above and also in other human rights systems, State jurisdiction in the sense of its human rights obligations may be established through the acts of its agents acting outside the territory of the State. The Court provides three sub-criteria by which State agent authority and control may exist, beginning with the acts of diplomatic or consular agents.¹⁰³ This sub-criterion is not controversial and is reflected in other human rights systems as well, as was discussed above.¹⁰⁴

More controversial, or at least more complex, is the second sub-criterion, which concerns the exercise by a State Party “through the consent, invitation or acquiescence” of the government of another State of “all or some of the public powers normally to be exercised” by the government of that other State.¹⁰⁵ While belligerent occupation would seem to fit the category of effective control over an area, which will be discussed below, this category encompasses operations which are carried out with the consent of the host nation and would thus include operations which fall within the concept of transboundary non-international armed conflicts as discussed in the previous chapter. Recent and current operations in this category include the ISAF operation in Afghanistan and the coalition operations in support of the Iraqi government’s fight against the organization known variably as ISIS or Da’esh.¹⁰⁶ Given the facts of the *Al Skeini* case itself, it also includes the operations in Iraq following the

¹⁰³ *Al Skeini*, paragraph 134. See also *Bankovic*, *supra* note 92, paragraph 73.

¹⁰⁴ See, for example, Human Rights Committee, *Samuel Lichtensztejn v. Uruguay*, Communication No. 77/1980 paragraph 6.1; Human Rights Committee, *Munaf*, *supra* note 73, paragraph 14.2. As diplomatic and consular agents clearly represent the government of their own State, the reasoning that acts committed by such agents can invoke the responsibility of that State is of course a quite logical aspect of State agent authority and control.

¹⁰⁵ *Al Skeini*, paragraph 135 and 149. See also *Jaloud*, *supra* note 87, paragraph 149; and ECtHR, *Hassan v. United Kingdom*, application 29750/09, paragraph 75.

¹⁰⁶ Although at present (April 2016) the coalition involved in the fight against Da’esh is only employing air support and air interdiction, which would, following the reasoning of the Court in *Bankovic*, be insufficient to establish jurisdiction in the sense of the ECHR.

transition of authority from the occupying powers to the government of Iraq, as evidenced as well by the *Jaloud* case discussed below.

To the extent that the operations referred to above are carried out in furtherance of a United Nations Security Council resolution, such as was the case for the ISAF operation and is quite clearly the case for the current United Nations operation in Mali (MINUSMA), the attribution of acts carried out in such operations to the United Nations is still somewhat subject to conjecture. As was discussed above, the European Court did attribute the acts of KFOR and of UNMIK to the United Nations, with such attribution as regards acts by UNMIK being considered almost self-evident.¹⁰⁷ In the *Al Jeddah* case, the Court did not consider the acts carried out by the United Kingdom in furtherance of the United Nations Security Council resolution in that case to be attributable to the United Nations, although it related that decision to, *inter alia*, the specific role of the United Kingdom prior to that resolution and to the wording of the resolution itself. As regards the acts of UNPROFOR in the former Yugoslavia, the Court did consider those acts to be attributable to the United Nations.¹⁰⁸ In view of the specific wording of that case, it may be concluded that in any case operations under command and control of the United Nations do not establish jurisdiction on the part of the States Parties engaged in such operations.¹⁰⁹ Whether the Court will follow its reasoning in the *Behrami and Saramati* case as regards KFOR in future cases involving operations carried out pursuant to a United Nations resolution but under command and control of other organizations or coalitions of States, or whether it will apply the *Al Jeddah* reasoning in a wider interpretation remains to be seen.¹¹⁰

¹⁰⁷ See *supra*, note 96.

¹⁰⁸ ECtHR, *Stichting Mothers of Srebrenica and others v. Netherlands*, application 65542/12, paragraph 154.

¹⁰⁹ *Ibid.* The Court refers to operations established by the Security Council. See *supra*, note 96, as regards the difference between this wording and the wording in resolutions authorizing an operation.

¹¹⁰ Miko expresses distinct and strong concerns regarding the European Court's approach, particularly in the *Al Jeddah* case and fears a (further) "fragmentation" of international law as, in her view, the European Court appears to be moving towards a situation in which European human rights law becomes a "separate legal order" potentially rendering decisions by the Security Council

The final sub-category of “State agent authority and control” is not controversial and exists in other human rights systems as well and concerns acts by which State agents exercise effective control over a person, such as during arrest or detention.¹¹¹ As the Court has pointed out, this category encompasses more than official arrest or detention in specific facilities and, instead, involves all cases in which a person is effectively deprived of his or her “physical liberty”, taking into account factors such as “type, duration, effects and manner of implementation.”¹¹²

Finally, the Court set forth in the *Al Skeini* judgment a third criterion for determining the existence of extraterritorial jurisdiction, being the

subject to review (and possibly at least partial rejection) by the European system. See Miko, S.A., “Norm Conflict, Fragmentation, and the European Court of Human Rights,” in *Boston College Law Review*, Vol. 54, issue 3, 2013. The present author does not share those concerns, as the Court essentially only pointed out that authorizations are not synonymous with obligations and that carrying out operations authorized by the Security Council does not mean that the way in which such operations are carried out can *ipso facto* set aside the obligations of States Parties under the Convention. Such an approach leaves the Security Council’s authority to authorize operations intact, as well as the obligation of States Parties to adhere to the decisions of the Security Council. Instead, States Parties must be careful in their choice of means and methods while carrying out those decisions. See also the statement by the Court in the *Al Jeddah* case, stating that “there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights” (paragraph 102). Finally, as was demonstrated in the *Mothers of Srebrenica* case (*supra* note 108), it would appear that there is no real intent on the part of the European Court to ignore the special and specific status of the United Nations in the system of international law and the international legal order.

¹¹¹ *Al Skeini*, *supra* note 21, paragraph 136 – 137. See also ECtHR, *Öcalan v. Turkey*, application 46221/99, paragraph 91; ECtHR, *Medvedyev and others v. France*, application no. 3394/03, paragraph 67; *Al Jeddah*, *supra* note 99, paragraph 85 and paragraphs 105 – 109; *Jaloud*, *supra* note 87, paragraph 152; and *Hassan*, *supra* note 105, paragraph 76.

¹¹² *Medvedyev*, *supra* note 111, paragraph 73. In the case in question, the deprivation of liberty involved the boarding and taking control of a suspect vessel by French special forces.

effective control over an area outside the State's territory.¹¹³ This category would in any case include belligerent occupation of (part of) the territory of another State. Whether other situations would fall under this category may be questioned, since the (military or otherwise) presence in another State's territory with the consent of that State would more likely fall under the category of exercising "all or some of the public powers" of the other State, as explained above.

The Court's systematic explanation of its criteria for determining whether a person came within the jurisdiction of a State Party to the Convention outside that State's territory received two modifications or additions in two subsequent cases. In the case of *Hassan*,¹¹⁴ the Court explained, or perhaps clarified and emphasized, that in its determination of the grounds for establishing jurisdiction in the *Al Skeini* case, it had not needed to determine whether the United Kingdom was in effective control of the area as the jurisdiction was established on the basis of the "exercising all or some of the public powers" criterion.¹¹⁵ In other words, whether the State in question exercises effective control over the area in question is irrelevant for establishing jurisdiction under the (wider) "public powers" criterion and jurisdiction may be so established even if the State did not, in fact, have any control over the area.¹¹⁶

Finally, in the case of *Jaloud*,¹¹⁷ the Court appears to have expanded its application of the sub-criterion of the effective control by State agents over a person to include situations intended to bring a person under such effective control.¹¹⁸ Whether this interpretation will be applicable by itself in future cases remains to be seen, however, since the specific wording of the judgment in the relevant part leaves some doubt whether the Court

¹¹³ *Al Skeini*, *supra* note 21, paragraph 138 – 139. See also *Loizidou*, *supra* note 88, paragraph 52; *Bankovic*, *supra* note 92, paragraph 71; *Ilaşcu*, *supra* note 90, paragraph 314; and *Issa*, *supra* note 95, paragraph 70.

¹¹⁴ *Hassan*, *supra* note 105.

¹¹⁵ *Ibid.*, paragraph 75.

¹¹⁶ *Ibid.*; the Court even points out that "the United Kingdom was far from being in effective control of the south-eastern area which it occupied."

¹¹⁷ *Jaloud*, *supra* note 87.

¹¹⁸ *Ibid.*, paragraph 152.

established the existence of jurisdiction on the basis of the “public powers” criterion, the “effective control over a person” criterion or rather a blend and combination of both. If applied by itself, however, this approach would expand the concept of “effective control over a person” dramatically.

Even more problematic, however, is the Court’s approach to the concept of Full Command and to the role of the sending State regarding rules of engagement as expressed in the *Jaloud* judgment.¹¹⁹ The Court appears to consider the existence of a Full Command relationship to be indicative of such a level of control by the sending State over the actions of its military personnel engaged in a multinational operation, that it engages *ipso facto* the jurisdiction of the sending State in terms of its obligations under the Convention. While this approach has been hailed by some as an important positive development,¹²⁰ the present author does not share that enthusiasm. Sending States always retain Full Command over their forces, which means that this approach by the Court effectively removes *in toto* the defense that the units were placed at the disposal of another State or international organization and renders moot both Article 6 of the International Law Commission’s Draft Articles on the Responsibility of States (DARS) and Article 7 of the International Law Commission’s Draft Articles on the Responsibility of International Organizations (DARIO). As regards the latter provision, it should be pointed out that the national units of sending States participating in an operation under command and control of the United Nations also remain under Full Command of their sending State. It is consequently difficult to reconcile the Court’s approach in the *Jaloud* case on this issue with its previous judgments in the cases of *Behrami and Saramati*¹²¹ and the *Srebrenica* case.¹²² Moreover, it is

¹¹⁹ *Ibid.*, paragraphs 146 – 151.

¹²⁰ Sari, A., “Untangling Extra-Territorial Jurisdiction from International Responsibility in *Jaloud v. Netherlands*: Old Problem, New Solutions?” available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554951, last accessed on 8 April, 2016, pp. 5 – 6.

¹²¹ See *supra* note 96. Sari applauds this effect and considers the *Jaloud* judgment to be a welcome break with the previous line of reasoning in the *Behrami* judgment. Sari, *op. cit.* note 120.

¹²² See *supra* note 108.

difficult to reconcile this approach by the Court with the contents of, and the commentary to, Article 7 of the DARIO in combination with the statements on this issue made by the United Nations itself.¹²³ Consequently, the present author shares the views expressed by the United Kingdom in its intervention in the *Jaloud* case as regards the potential risk a broad interpretation of extraterritorial jurisdiction may have on the willingness of States to contribute troops to international operations at the request of the United Nations.¹²⁴

Finally, as regards the role of sending States in drafting and promulgating rules on the use of force for their national contingents, regardless whether those are full sets of rules of engagement or the derivative soldier's cards, the same concerns apply as were stated above in regards to the concept of Full Command. Since the rules on the use of force are, if the sending State does not simply issue its own national rules and instead adopts the international rules of engagement, commonly translated (and then re-issued) by the national contingents, whether *in toto* or summarized in the soldier's cards or "Aide-Memoire" cards, and States may issue national restrictions (but not expansions) on the rules, there is always some degree of national influence and some national role as regards the rules of engagement for an operation.¹²⁵ Consequently, it will be interesting to see how the Court applies its approach in the *Jaloud* case in future cases involving military operations.

¹²³ As discussed in the commentary to Article 7 of the DARIO, the United Nations has, in a letter by the United Nations Legal Counsel in 2004, clearly expressed that acts carried out by peacekeeping forces are in principle attributable to the United Nations since such operations are a subsidiary organ of the United Nations.

¹²⁴ *Jaloud*, *supra* note 87, paragraph 126.

¹²⁵ Personal experience of the author. See also Cathcart, B., "Force Application in Enforcement and Peace Enforcement Operations," p. 118, paragraph 5.22 (7) as regards national caveats, and Cammaert, P.C. and Klappe, B., "Application of Force and Rules of Engagement in Peace Operations," p. 156, paragraph 6.12 (2) as regards the duty to translate, both in Gill, T.D. and Fleck, D. [eds.], *The Handbook of the International Law of Military Operations*, 2010.

(vi) *National courts*

Two¹²⁶ judgments by national courts deserve attention in this context, since they directly address the issue of extraterritorial human rights obligations in connection with the conduct of military operations. The first of these judgments is the case of *Serdar Mohammed v. Ministry of Defense* in the United Kingdom.¹²⁷ As regards the extraterritorial application of the European Convention, the Court begins by establishing the primarily territorial nature of the concept of jurisdiction as used in the Convention, turning to the *travaux préparatoires* as well for this purpose. Next, the Court examines case law from both national courts and the European Court, including the *Al Skeini* case. In applying that case law to the case in question, concerning the detention of Serdar Mohammed in a United Kingdom detention facility in Afghanistan, the Court concludes that Serdar Mohammed came within the jurisdiction of the United Kingdom on the basis of the effective control exercised by the British forces over Mr. Mohammed.¹²⁸

A somewhat more controversial and complicated judgment, which actually consists of two conjoined judgments, concerns the Supreme Court

¹²⁶ While admittedly the judgment by the Supreme Court of Israel in the case of the *Public Committee Against Torture in Israel v. Government of Israel* also deals with the applicability of human rights norms, as discussed in the previous chapter, that case will not be discussed further here due to the specificity of the applicable body of facts of that case (including the status of the occupied territories and the question of their Statehood) and the relationship between that judgment and the distinct laws and legal system of Israel.

¹²⁷ High Court of Justice Queen's Bench Division, *Serdar Mohammed v. Ministry of Defense*, [2014] EWHC 1369 (QB), 2 May, 2014.

¹²⁸ *Ibid.*, paragraph 147. The Government argued that the situation in Afghanistan was different from the situation in Iraq in the case law of the European Court, since the United Kingdom did not exercise the same degree of authority in Afghanistan. The High Court of Justice dismissed that argument, however, as control of the area was not relevant for determining the existence of effective control over a person, thus applying the *Hassan* clarification of the earlier *Al Skeini* judgment as regards the “public powers” criterion to the “effective control over a person” criterion; see *supra* note 116 as regards the *Hassan* and the *Al Skeini* cases on this clarification issue.

of the Netherlands in the cases of Hassan Nuhanovic and the Mustafic family and the responsibility of the government of The Netherlands for (specific elements of) the fall of Srebrenica and its aftermath.¹²⁹ In determining the liability and responsibility of the government for the fate of the relatives of the plaintiffs, as well as the extraterritorial obligations of the government under the European Convention, the Supreme Court considered, *inter alia*, the DARS and the DARIO. In doing so, the reasoning of the Supreme Court took a, at least from the perspective of the government, surprising turn. On the basis of the contents and commentary to the DARIO, especially Articles 7 and 48 and the commentary under Part II, Chapter II, paragraph 4, the Supreme Court ruled that dual attribution was possible and that therefore attribution to both the United Nations and the government was possible for the acts carried out by (the Dutch battalion, “Dutchbat,” in) UNPROFOR. The Supreme Court then ruled that the situation in Srebrenica at the time of the acts in question was completely different from the normal situation, including normal command and control, during United Nations operations, since the operation had in fact broken down and the United Nations were no longer in effective control of the situation. On the basis of the lines of communication between the government and Dutchbat, including telephone calls and other communications, the Supreme Court was also of the opinion that the government did exercise effective control over Dutchbat, although the Supreme Court indicated that this control existed in addition to the command and control by the United Nations over Dutchbat. Consequently, the Supreme Court ruled that the government was responsible and moreover

¹²⁹ Supreme Court of the Netherlands, 6 September 2013, JB 2013/197 and RvdW 2013/1036. Note that these cases are distinct from the *Mothers of Srebrenica* (also known as *Fejzic*) case mentioned *supra* note 108. The present two cases are related to the decision by Dutchbat to force the relatives of the plaintiffs to leave the (UN) compound, after which the relatives were killed by the Bosnian Serb forces. The specific (employment) relationship between the relatives of the plaintiffs and UNPROFOR made their cases distinct from the more general responsibility for all of the events at Srebrenica as claimed by the foundation “Mothers of Srebrenica” in the other case.

ruled that the plaintiffs came within the jurisdiction of the government in the sense of the European Convention.

The judgment by the Supreme Court of The Netherlands in the Nuhanovic and Mustafic cases is troublesome for a number of reasons, but the most directly relevant cause for concern is that it effectively means that in the event that the United Nations loses control over the situation in an operation under United Nations command and control, the government of the sending State automatically becomes responsible.¹³⁰ While that is problematic from an operational and political perspective, from a legal perspective this is troubling because the judgment appears to equate effective control over the operation or situation in question with effective control over the units participating in that operation. Those are two entirely different issues, however, and the concept of effective control of the situation not only runs counter to the conceptual framework behind the DARIO and the DARS but also elevates success of the operation to a determinative factor in establishing jurisdiction in the sense of human rights law. These observations, in combination with the inherent complications related to dual attribution and the specific wording (in Dutch) of parts of the judgments may indicate that the Supreme Court was ruling *de lege ferenda* rather than on the basis of *lex lata*, especially as it had already established that the immunity of the United Nations was absolute and compensation from the United Nations could not be sought through the Dutch courts.¹³¹

¹³⁰ Granted, it must first be established that the government exercised effective control of the forces in the situation in question. If, however, one combines this judgment with the *Jaloud* judgment of the European Court and the rather extensive interpretation therein of the concept of Full Command, the government's responsibility in such situations does become automatic.

¹³¹ Supreme Court of the Netherlands, 13 April 2012, NJ 2014, 26. This judgment was the final national outcome of the question raised in the *Fejzic/Mothers of Srebrenica* case as regards the immunity of the United Nations and was followed by the judgment of the European Court to the same effect; see *supra* note 108. The main litigation in this case, concerning the liability of the government of the Netherlands, is currently still ongoing.

3. Derogation of human rights obligations

Since it was clearly established above that human rights obligations apply extraterritorially, including their applicability to (international) military operations, the question may be raised regarding the possibilities and effect of derogation from those obligations under the instruments in question. The question is raised here primarily from an academic legal point of view and will only be discussed in broad terms, since the effects on public support and opinion, and therefore the political impact, of formal derogation from human rights instruments in connection with an international military operation make this an instrument that is not likely to be used often.¹³²

Kleffner points out that derogation provisions such as Article 4 of the International Covenant on Civil and Political Rights, Article 15 of the European Convention on Human Rights and Article 27 of the American Convention on Human Rights are subject to a number of limitations and requirements, listing five such considerations.¹³³ The first consideration is the limitation resulting from the fact that the instruments in question do not allow derogation for some of the rights and obligations set forth in those instruments. While the provisions in question¹³⁴ do not match entirely, due in part to the different structures and wording of the protective provisions to which they are related, there are a number of common non-derogable

¹³² While derogations have been declared on a number of occasions in the European system alone, a distinction must be made between derogations in times of national emergencies, such as those filed by the United Kingdom and by Ireland in the past, and applying the system of derogation to an international military operation.

¹³³ Kleffner, "Human Rights and International Humanitarian Law: General Issues," in Gill, T.D. and Fleck, D. [eds.] *The Handbook of the International Law of Military Operations*, Oxford, 2010, p. 68, paragraph 4.01 (35). The same considerations are discussed by Pouw, although in a slightly different order and grouping of concepts; see Pouw, *op. cit.* note 30, pp. 73 – 75.

¹³⁴ ECHR Article 15, paragraph 2; ACHR Article 27, paragraph 2; ICCPR Article 4, paragraph 2.

rights. These include the right to life,¹³⁵ the prohibition of *nulla poena/nulla crimen sine lege*, the prohibition on torture and the prohibition on slavery.

The second consideration or requirement as regards derogation is the requirement that the derogation must be absolutely necessary, as evidenced by the provisions in question and the limitative set of circumstances they contain in which derogations are permitted.¹³⁶ Rowe has pointed out that this restriction may render derogation impossible for (international) military operations that do not rise to the level of armed conflict (or, by extending his argument, for participation in armed conflicts in another country), since those situations do not “threaten the life of the nation” and thus do not allow invoking the derogation.¹³⁷ As will be discussed below in regards to the available case law, however, that argument may no longer be valid. In addition to the necessity element as related to the circumstances of the derogation, the provisions in question also require that the derogation be limited to that which is “strictly required,” as is the common wording of the instruments under discussion here, under those exceptional circumstances. In other words, a blanket derogation from all of the (derogable) obligations is not permitted and the State must be able to explain why the derogations are strictly necessary under the circumstances.

The third consideration is the limitation that derogations may not be discriminatory. While this consideration is explicitly stated in both the International Covenant on Civil and Political Rights and the American

¹³⁵ It should be noted that the ECHR does allow an exception in the case of lawful acts of war. The other instruments do not contain this exception. While paragraph 2 of Article 2 of the ECHR also lists exceptions, it may be argued that those are exceptions to the protection offered by Article 2, paragraph 1, and are therefore conceptually different from Article 15, paragraph 2, of the ECHR.

¹³⁶ ICCPR, Article 4, paragraph 1: “In time of public emergency which threatens the life of the nation;” ACHR, Article 27, paragraph 1: “In time of war, public danger, or other emergency that threatens the independence or security of a State Party;” ECHR, Article 15, paragraph 1: “In time of war or other public emergency threatening the life of the nation.” It may safely be concluded from the wording of these provisions that it was the intent of the drafters of the instruments to limit derogation to the most serious circumstances in which the “life” of the State was at risk.

¹³⁷ Rowe, *op. cit.* note 40, pp. 248 – 249.

Convention on Human Rights, it is noticeably missing from Article 15 of the European Convention on Human Rights. Moreover, Article 14 of the European Convention (containing the prohibition on discrimination) and Protocol 12 to the Convention (which sets forth further steps towards the elimination of discrimination) are not listed as non-derogable provisions under Article 15. However, apart from the arguably safe estimation that it would, at the very least, be difficult to substantiate the necessity of discriminatory acts in the context of an emergency allowing derogation, it should be noted that in any case the Convention on the Elimination of All Forms of Discrimination Against Women and the International Convention on the Elimination of All Forms of Racial Discrimination do not contain derogation clauses.

The fourth consideration is that derogations under the relevant instruments may not be inconsistent with the State Party's other obligations under international law. This wording is consistent in all three instruments under discussion. It is furthermore commonly understood that this consideration includes, as far as is relevant in the present discussion, the obligations of the State Party under international humanitarian law.¹³⁸

The fifth and final consideration is the procedural requirement that derogations must be properly proclaimed or made known to the other States Party to the instrument in question, including a statement on the (expected) duration of the derogation, the measures affected by the derogation and the reasons for the derogation. As will be discussed below in relation to the case law of the relevant human rights bodies, this requirement would appear to be no longer fully applicable in the case of the European human rights system, at least as far as adjudication by the European Court is concerned, notwithstanding the requirements in this regard as set forth in Article 15, paragraph 3, of the European Convention.

As was already stated briefly above, the instrument of derogation is not one that is used lightly or that frequently. Rowe has pointed out that the United Kingdom, which has derogated from its obligations under the European Convention in a few domestic situations (including the situations

¹³⁸ Kleffner, *op. cit.* note 133; Pouw, *op. cit.* note 30, p. 74.

in Northern Ireland), did not derogate during the Falklands war.¹³⁹ Rowe also points out the lack of derogation in a number of other armed conflicts, although he relates that to the observation that the conflicts in question took place in States which were (and are) not a Party to the European Convention, concluding that this fact may have been the reason why European States did not feel the need to derogate.¹⁴⁰ As was demonstrated above, however, this conclusion is no longer valid in the face of the expanding (and expansive) extraterritorial applicability of the European Convention on the basis of the case law of the European Court.¹⁴¹ Bethlehem, on the other hand, questions whether derogations are even necessary in the event of an armed conflict but bases his argument on the interaction and relationship between human rights law and international humanitarian law, which will be discussed in greater detail below.¹⁴²

As regards case law, it should be noted first that the African human rights system was not mentioned above in the discussion of derogations. The principal reason for this is that the African system quite simply does not contain a derogation provision. As the Commission pointed out in the *Media Rights Agenda and others v. Nigeria* case, “[i]n contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances,” and “[t]he only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27(2), that is that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.”¹⁴³

¹³⁹ Rowe, *op. cit.* note 40, p. 120.

¹⁴⁰ *Ibid.*, p. 120 – 121.

¹⁴¹ It should be noted that Rowe made these observations and drew these conclusions in 2006, predating such cases as *Behrami/Saramati*, *Al Jeddah*, *Al Skeini*, etc.

¹⁴² Bethlehem, D., “The Relationship Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”, in *Cambridge Journal of International and Comparative Law*, Vol. 2, nr. 2, 2013, p. 191 – 192.

¹⁴³ African Commission on Human and People’s Rights, *Media Rights Agenda and Others v Nigeria (2000)*, AHRLR 200 (ACHPR 1998), paragraphs 67 – 68. It

The Human Rights Committee has issued a specific General Comment on derogations from the obligations under the International Covenant.¹⁴⁴ In that comment, the Committee discusses, *inter alia*, the relationship between the obligations under the Covenant and situations of armed conflict, to be discussed below, and further clarifies the considerations already discussed above as regards derogations in general. It also points out that in addition to the non-derogable rights explicitly mentioned in the Covenant, it is not possible to derogate from “peremptory norms of international law.”¹⁴⁵

As regards the European human rights system and the case law of the European Court of Human Rights, two cases are specifically relevant. In the *Al Jedda* case,¹⁴⁶ the Court refers to some of the requirements for derogation under Article 15 of the Convention, but points out that the United Kingdom did not, in that case, intend to derogate but instead based its arguments on a conflict of obligations.¹⁴⁷ The *Hassan* case,¹⁴⁸ on the other hand, contains a significant and, in light of the discussion above as regards procedural requirements for derogations, even somewhat controversial statement in the sense that the Court states that “the Court does not consider it necessary for a formal derogation to be lodged” and that the Court will interpret and apply the obligations under the Convention “in the light of the relevant provisions of international humanitarian law” to the extent that, and in the circumstances where, such application and interpretation is part of the arguments or pleadings of the respondent State.¹⁴⁹ This would seem to indicate that where a State feels the need to

should be noted that, consistent with the observations made above in respect to the other systems, the Commission in paragraph 69 of the same case points out that “[t]he reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.”

¹⁴⁴ Human Rights Committee, General Comment 29 (CCPR/C/21/Rev.1/Add.11).

¹⁴⁵ *Ibid.*, paragraph 11.

¹⁴⁶ See *supra* note 99.

¹⁴⁷ *Ibid.*, paragraph 100. See also *supra* note 100 as regards the outcome of that alleged conflict of obligations.

¹⁴⁸ See *supra* note 105.

¹⁴⁹ *Hassan*, *supra* note 105, paragraph 107.

derogate from obligations under the Convention (and assuming such derogation meets the other requirements discussed above), it may do so in the course of a case before the European Court even in the absence of meeting the obligations for notification and declaration as set forth in Article 15 of the Convention.

Finally, as regards national cases, the United Kingdom High Court of Justice, Queen's Bench Division, ruling in the *Serdar Mohammed* case includes a significant ruling on the application of Article 15 of the European Convention. In that case, the Court observed the application of the Convention has extended beyond the originally envisaged national (territorial) application of the obligations under the Convention.¹⁵⁰ Consequently, the Court concluded that Article 15 must be interpreted in the same light.¹⁵¹ This means that as regards military operations undertaken in support of the local government, such as those in Iraq, this must lead to an interpretation of Article 15 of the European Convention in which "interpreting the phrase 'war or other public emergency threatening the life of the nation' [includes], in the context of an international peacekeeping operation, a war or other emergency threatening the life of the nation on whose territory the relevant acts take place."¹⁵² In other words, where the Convention's protective provisions have been increasingly considered to apply extraterritorially, so must the ability of States to derogate from their obligations by applying Article 15 of the Convention be considered to apply extraterritorially as well. However, notwithstanding the admirable reasoning and valid conclusions in this judgment, this does not detract from the earlier observations as regards the likelihood or appeal of derogations from a political or public opinion point of view, although it may be a significant and relevant consideration in the light of the procedural consequences of the European Court's ruling in the *Hassan* case, allowing essentially *ex post facto* derogation during the submissions to, and pleadings before, the Court in the event of an application to the Court.

¹⁵⁰ See *supra*, note 127, paragraph 155.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*, paragraph 156.

4. Laws of armed conflict and human rights law

In the previous chapter, the influence of international humanitarian law on the rules of engagement was discussed and it was demonstrated that several elements of that body of law have a significant impact on the rules on the use of force. It has been demonstrated above that human rights law also applies to (international) military operations and, as will be discussed below, several elements of that law have equally significant influences on the rules on the use of force. Applying the paradigmatic approach discussed above in a pure form, this should not lead to conflicts, since international humanitarian law applies in the war-fighting paradigm while on the other hand the law enforcement paradigm is governed by human rights law. However, such a pure approach is not tenable in practice. Firstly, as was shown above and as will be demonstrated in the discussion of the case law below, some of the rules of human rights law continue to apply even during an armed conflict. This applies in any case to the non-derogable rights, but also applies to a certain degree to other rights. Secondly, the dichotomous paradigmatic model is primarily an academic model and does not always exist in the context of military operations. It may even be observed that modern military operations increasingly combine elements of both paradigms or exist in a conceptual zone that overlaps both paradigms.¹⁵³

Given the observations above, it is necessary to examine the interplay between international humanitarian law and international human rights law.

¹⁵³ Of the current large-scale international military operations, only the coalition operation in support of the government of Iraq in the fight against ISIS (or Da'esh) can be qualified as a clear (transboundary non-international) armed conflict. At the other end of the spectrum, the NATO and EU operations *Ocean Shield* and *Atalanta*, aimed at piracy off the coast of Somalia, are clearly law enforcement operations and operate mostly under application of the United Nations Convention on the Law of the Sea and national criminal law. As regards the other missions, in Afghanistan the new NATO operation Resolute Support is primarily a training mission, but carries the potential of use of force (in self-defense) against insurgents and therefore displays hybrid characteristics, while the United Nations missions in Mali (MINUSMA) and the Congo (MONUSCO) have hybrid mandates, combining both a rule of law element and a robust mandate to counter hostile actions by insurgents.

As a great wealth of literature exists on this topic, and in the interest of maintaining the focus of this study on the rules on the use of force, the discussion of this interplay will be brief. The references in the footnotes, however, may serve to provide modest guidance towards the more detailed and extensive discussions of this topic. It is clear from the literature that discussions regarding the interplay of humanitarian law and human rights law can be divisive, with advocates of humanitarian law expressing concerns over the influence of human rights law on the conduct of hostilities and advocates of human rights law seeking further “humanization”¹⁵⁴ of armed conflicts and restrictions on the use of force based on a desire to further (or better) protect the victims of violence. As there is considerable merit in both points of view, the following discussion will attempt to maintain a neutral stance in the ongoing debate and approach the issue from a purely academic viewpoint.

In discussing the interplay between international humanitarian law and human rights law, Doswald-Beck and Vité point out that the two systems of law share a number of common ideals and objectives, thus emphasizing

¹⁵⁴ See Pouw, *op. cit.* note 30, pp. 101 – 109, for an extensive discussion on this issue. As Pouw points out, the debate on humanization of international humanitarian law centers on the balance between military necessity and humanity, which was discussed in the previous chapter. Pouw also points to the influence and role of non-State actors, especially non-governmental organizations, in this process, an observation matched by Rowe. See Rowe, *op. cit.* note 40, p. 117. Rowe points out that greater media coverage of military operations may serve to make it easier to locate witnesses of events, which can facilitate actions by non-governmental (human rights) organizations to initiate (legal) action in response. Pouw differentiates between “traditional” humanization, which is the process by which developments in international humanitarian law are “initiated by, and with the consent of States” (p. 103) and “innovative” humanization, meaning the process by which sources not connected to international humanitarian law, such as (non-governmental) human rights organizations, seek to influence the development of the law towards a more restrictive system. The present author shares the concerns discussed by Pouw regarding the “innovative” side of humanization (pp. 108 – 109), in the sense that, as was discussed in the previous chapter, a development in which the law shifts too far from the careful balance of humanity and military necessity and loses sight of the realities of military operations will run the distinct risk of rendering such abstract legal systems a purely academic institution to be mostly ignored in practice.

the convergence rather than the conflicts between the two systems of law.¹⁵⁵ Bethlehem similarly observes that the perceived conflict between the two systems of law is often exaggerated.¹⁵⁶ Nonetheless, such conflicts can arise in a situation in which international humanitarian law applies *de jure*, as was discussed in the previous chapter, and human rights obligations apply either because the armed conflict takes place in the territory of a State Party to the relevant human rights instrument, such as during an (transboundary or “regular”) non-international armed conflict, or on the basis of extraterritorial applicability of the obligations as was discussed above.

As an initial general observation, it should be emphasized that where normative conflicts do arise, the resolution of that conflict is aimed at determining which of the conflicting norms takes precedence under the circumstances. An approach by which one body of law takes precedence *in toto* over the other body of law runs counter to the system as it stands, since human rights law cannot “overrule” the *de jure* applicability of humanitarian law in the relevant circumstances (which were discussed in the previous chapter), nor can humanitarian law set aside human rights law in its entirety, especially where non-derogable (or *jus cogens*) obligations are at stake.¹⁵⁷

¹⁵⁵ Doswald-Beck, L., and Vité, S., “International Humanitarian Law and Human Rights Law”, in *International Review of the Red Cross*, no. 293, 1993, available online at

<https://www.icrc.org/eng/resources/documents/misc/57jmrt.htm> (last accessed on 8 April, 2016). The choice of words by the present author is in respect to the volume by Wet and Kleffner that extensively deals with the interplay between humanitarian law and human rights law; Wet, E., and Kleffner, J.K., [eds.], *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations*, Pretoria, 2014.

¹⁵⁶ Bethlehem, D., “The Relationship Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”, in *Cambridge Journal of International and Comparative Law*, Vol. 2, nr. 2, 2013, p. 189.

¹⁵⁷ International Court of Justice, Advisory Opinion in the *Wall* case, see *supra* note 68, paragraph 106. See also Zwanenburg, M.C., “The Interplay of International Humanitarian Law and International Human Rights Law in Peace Operations,” in Wet, E., and Kleffner, J.K., [eds.], *Convergence and Conflicts of*

Following that general observation, the first element to be determined in a possible situation of normative conflict is whether the norm(s) in question apply, both to the State in question and to the situation, taking into account such issues as derogations, ratification, etc.¹⁵⁸ Both Kleffner and Pouw identify three scenario's once a norm has been established to apply: where the norm exists in humanitarian law but not in human rights law, humanitarian law can be seen as "filling in the gaps" of human rights law; where the norm exists in international human rights law but not in humanitarian law, the reverse situation arises; finally, where norms exist in both systems of law, a potential normative conflict ensues.¹⁵⁹

In the event of a normative conflict, Zwanenburg identifies three subsequent scenarios or options.¹⁶⁰ First, it may be possible that the norms simply regulate the same issue in the same (general) manner and no conflict arises at all.¹⁶¹ The second option involves an apparent conflict, but one that can be resolved through the interpretation (or "reading down") of one of the norms, in which case Zwanenburg suggests that in armed conflict situations, "the norm that must be read down will usually be the human rights norm."¹⁶² Another perspective is offered by Kleffner and by Pouw, who leave aside which norm must be "read down" as a general rule and instead point out that the rule of *lex specialis*, that is the rule that the more specifically applicable legal norm takes precedence over the more general norm, can be applied in these cases as an interpretative tool (*lex specialis complementa* rather than *lex specialis derogata*).¹⁶³ As Pouw explains, in this approach the general rule sets forth the ends to be achieved and the

Human Rights and International Humanitarian Law in Military Operations, Pretoria, 2014, p. 166- 167.

¹⁵⁸ Zwanenburg, *op. cit.* note 157, p. 162 – 163; Pouw, *op. cit.* note 30, pp. 121 – 122.

¹⁵⁹ Kleffner, *op. cit.* note 16, p. 73; Pouw, *op. cit.* note 30, p. 129; ICJ, *supra* note 68, paragraph 106.

¹⁶⁰ Zwanenburg, *op. cit.* note 157, pp. 163 – 168.

¹⁶¹ This observation follows the observations made by Doswald-Beck, as regards the "hard core" rights; Doswald-Beck, *op. cit.* note 155.

¹⁶² Zwanenburg, *op. cit.* note 157, p. 163.

¹⁶³ Kleffner, *op. cit.* note 16, p. 74, paragraph 4.02 (4); Pouw, *op. cit.* note 30, p. 133.

specific rule or norm provides the (more) detailed means by which to achieve that end, for which Kleffner provides the example of the requirement for sentences by regularly constituted courts for the passing of sentences (as required by common Article 3 of the Geneva Conventions) and the greater detail in human rights law as to what is required for a “regularly constituted court.”¹⁶⁴

The third and final scenario involves a “true” conflict, in which interpretation cannot provide a solution and adherence to one norm will mean a violation, or at least non-observance, of the other norm. This may be the case where the actual conduct of hostilities during an armed conflict make it impossible to adhere to the peacetime-oriented rules of human rights law. In his thorough and systematic analysis of the interplay between the two bodies of law, Bethlehem provides a very useful categorization of the stages or elements of an armed conflict, from strategic planning to the actual conduct on the battlefield itself. Comparing (principally) civil and political rights under human rights law to these “sub-divisions” of armed conflict, Bethlehem concludes that “the closer one gets to the battlefield the less amenable to reasonable application are most provisions of the ICCPR.”¹⁶⁵ In such cases, conflict resolution becomes inevitable and the *lex specialis* tool becomes applicable in the sense of *lex specialis derogat lex generalis*. In such cases, Zwanenburg points out the need to take into account the specificity and specific meaning of the words used in the norms in question, the level to which the State in question is able to exercise control,¹⁶⁶ and, of course, State practice.¹⁶⁷

As Pouw points out as well, the *lex specialis* rule in its *derogata* role meets with some concern from primarily non-governmental organizations whose interest is aimed more towards the “humanization” of armed conflict, or of international humanitarian law, as was discussed above.¹⁶⁸ While such concerns are understandable from that specific perspective, Doswald-Beck

¹⁶⁴ Ibid.

¹⁶⁵ Bethlehem, *op. cit.* note 156, p. 191.

¹⁶⁶ Thus essentially applying the criteria for extraterritorial applicability of human rights as discussed above.

¹⁶⁷ Zwanenburg, *op. cit.* note 157, pp. 167 – 168.

¹⁶⁸ Pouw, *op. cit.* note 30, p. 130.

points out, in addition to emphasizing the convergence and, in many cases, common goal of the two bodies of law, that contrary to human rights law, there is no possibility for derogation under international humanitarian law.¹⁶⁹ Consequently, even in the event of derogation from human rights obligations, whether on the basis of application of the relevant provisions on derogation or as a result of the *lex specialis* rule, several of the same types of obligations continue to apply during an armed conflict.

While advocates of the two bodies of law have repeatedly and sometimes heatedly debated the issue of conflicts and conflict resolution between humanitarian law and human rights law, perhaps the most sensible approach to the issue is the one proposed by Gill, who, quite simply, appeals to a more common sense approach and provides a number of examples of situations in armed conflict in which clearly human rights law would (also) apply without detracting from the strategic or operational interests at stake in the conduct of an armed conflict.¹⁷⁰ At the same time, he points out that the *lex specialis* approach is quite simply “prevailing opinion and practice.”¹⁷¹ Gill also points out the danger that if the law becomes either too constrictive or inconsistent, the law may be ignored in practice.¹⁷² This risk is manifestly present in the event that human rights bodies issue judgments or opinions in situations which may be either outside their specific area of expertise or even outside their mandate.¹⁷³

Notwithstanding the observation just made, it is worth examining some of the case law in which the interplay between human rights law and humanitarian law was at issue. In its Advisory Opinion in the *Nuclear Weapons* case, the International Court of Justice has states that “the protection of the International Covenant on Civil and Political Rights does

¹⁶⁹ Examples of such obligations include the treatment of prisoners and interned persons, equating civil and political rights, and the treatment of the civilian population in occupied territory, which Doswald-Beck compares to (a form of) what human rights law would consider economic and social rights. Doswald-Beck, *op. cit.* note 155.

¹⁷⁰ Gill, *op. cit.* note 30.

¹⁷¹ *Ibid.*, p. 255.

¹⁷² *Ibid.*, pp. 256 and 265.

¹⁷³ Lubell, *op. cit.* note 41, p. 743; Bethlehem, *op. cit.* note 156, p. 192.

not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency,” pointing out that the right to life was a non-derogable right.¹⁷⁴ Applying the *lex specialis complementa* rule, the Court subsequently noted that the right not to be arbitrarily deprived of one’s life, as protected under the Covenant, required interpreting the term “arbitrarily” and that such interpretation “falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”¹⁷⁵ The Court reaffirmed these views in later case law.¹⁷⁶

The Human Rights Committee has addressed the interaction between human rights law, specifically the International Covenant on Civil and Political Rights, and humanitarian law in both its General Comment 29 (regarding derogations) and its General Comment 31 (regarding the General Obligation on States Parties). As regards derogations, the Committee pointed out that derogations under the Covenant “may [not] be inconsistent with the State party’s other obligations under international law, particularly the rules of international humanitarian law.”¹⁷⁷ As regards the General Obligation, the Committee points out that “the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive,” thus indicating at the very least a preference for application of the *lex specialis complementa* rule.¹⁷⁸

The Inter-American human rights bodies have judged on a number of cases involving the interaction between human rights law and humanitarian law. In the *Abella* case, the Commission first of all had to determine

¹⁷⁴ ICJ, *The Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 8 July, 1996, paragraph 25.

¹⁷⁵ Ibid.

¹⁷⁶ ICJ, *supra* note 68, paragraphs 105 – 106.

¹⁷⁷ Human Rights Committee, *op. cit.* note 144, paragraph 9.

¹⁷⁸ Human Rights Committee, *op. cit.* note 20, paragraph 11.

whether the situation amounted to an armed conflict. This threshold determination was discussed in the previous chapter. After determining that the situation at issue was an armed conflict,¹⁷⁹ the Commission first pointed out the convergence of the two bodies of law, similar to some of the views expressed above.¹⁸⁰ More importantly, at least in terms of the present discussion, the Commission emphasized that the human rights obligations continue to apply during armed conflict and turned to humanitarian law as guidance in interpreting the relevant obligations under the specific circumstances.¹⁸¹

In the *Coard* case, the Commission first emphasized the extraterritorial applicability of the Convention.¹⁸² Next, the Commission reiterated the approach it had taken in the *Abella* case by pointing out the convergence and the common goals of human rights law and humanitarian law, in any case as regards certain “core guarantees.”¹⁸³ Finally, as regards the interaction between the two and its own competence in this regard, the Commission, using language similarly used by the European Court on several occasions,¹⁸⁴ pointed out that the rules to be applied were not “designed to apply [...] in a vacuum” and must be interpreted and applied in the context of other applicable international law, including humanitarian law.¹⁸⁵ Finally, noting that the human rights rules in question were not designed specifically for application in situations of armed conflict, the Commission indicated that the applicable standard in the given situation had to be determined on the basis of applying the *lex specialis* and used the

¹⁷⁹ IACHR; *Juan Carlos Abella v. Argentina*, Case 11.137, Report N° 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997), paragraphs 154 – 156.

¹⁸⁰ The Commission stated that “human rights instruments, and the 1949 Geneva Conventions share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity.” IACHR, *Abella*, see *supra* note 179, paragraph 158.

¹⁸¹ IACHR, *Abella*, *supra* note 179, paragraphs 158 and 161.

¹⁸² IACHR, *Coard et al. v. United States*; REPORT N° 109/99, CASE 10.951 (1999), paragraph 37.

¹⁸³ *Ibid.*, paragraph 39.

¹⁸⁴ See, *inter multos alia*, ECtHR, *Hassan*, *supra* note 105, paragraph 77.

¹⁸⁵ IACHR, *Coard*, *supra* note 182, paragraph 41.

lex specialis complementa approach to interpret the term “arbitrary” in relation to the detention in question.¹⁸⁶

The Inter-American Court, finally, has clarified its views on the interaction between human rights obligations and humanitarian law in a series of judgments, two of which deserve closer attention. In the *Las Palmeras* case, the Commission had ruled that it was competent to establish a violation of the Convention by establishing a violation of a “coextensive” norm of international humanitarian law, but was overruled by the Court, which held that neither the Commission nor the Court was competent to establish violations of treaties which did not specifically confer that competence upon the Commission or Court.¹⁸⁷ However, later that same year the Court, in its judgment in the *Velasquez* case, applied some nuance and further clarification to its ruling in the *Las Palmeras* case. In the *Velasquez* case, the Court ruled that:

“Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3”

and

“This Court has already indicated in the *Las Palmeras* Case (2000), that the relevant provisions of the Geneva Conventions may be taken

¹⁸⁶ *Ibid.*, paragraph 42.

¹⁸⁷ IACtHR, *Las Palmeras v. Colombia*, Judgment on Preliminary Objections, Inter-Am. Ct. H.R. (Ser. C) No. 67 (2000), paragraphs 28 – 33. It should be noted that the Court did consider both Commission and Court competent to rule on the *compatibility* of State conduct in relation to a rule of a different body of law with the requirements under the Convention. In other words, the Court emphasized the requirement for both the Commission and the Court to focus on the Convention as regards any violations, regardless of whether other rules of (international) law were used to determine whether the Convention had been violated (and regardless of whether those other rules were violated).

into consideration as elements for the interpretation of the American Convention.”¹⁸⁸

In other words, while reaffirming the possibility to interpret the Convention by application of other rules of international law, the Court also made it clear that it is competent to “observe” whether a violation of the Convention also constitutes a violation of another rule of international law. In combination with the *Las Palmeras* judgment, this means that the Court simply cannot “establish” such a violation of another rule of international law, nor use that violation to establish violations of the Convention without specifically addressing the Convention itself.

In the sections above, it was demonstrated that international human rights law is applicable extraterritorially, including applicability to military operations, and that it continues to apply during armed conflicts (regardless of the paradigmatic approach explained above). Furthermore, it was demonstrated that where the norms applicable under human rights law conflict with the norms of humanitarian law, resolution of the normative conflict can be achieved and has been applied in case law. Since this clearly establishes applicability of human rights law to military operations, it is now necessary to examine some elements of human rights law which especially affect the rules on the use of force during such operations.

III. Elements of human rights law as reflected in the Rules of Engagement

A. The right to life

As was stated above, the right to life is non-derogable under the human rights instruments, although the European Convention does recognize an exception in the case of “lawful acts of war” as well as the limitative list of exceptions in Article 2 itself.¹⁸⁹ This means that in drafting and

¹⁸⁸ IACtHR, *Bámaca-Velásquez v. Guatemala*, Judgment of November 25, 2000, paragraphs 208 – 209.

¹⁸⁹ These are: self-defense, effecting a lawful arrest or preventing the escape of a lawfully detained person, and lawful actions for “quelling a riot or insurrection.” The ICCPR (Article 6), the American Convention on Human Rights (Article 4) and the African Charter on Human and Peoples’ Rights (Article 4) do

promulgating rules of engagement authorizing the use of (deadly) force, the nature of the operation must first be evaluated.

In situations of armed conflict, whether international or non-international, the use of force in conformity with international humanitarian law, as was described in the previous chapter, would legally preclude violation of the protective element of the right to life.¹⁹⁰ Whether the human rights bodies discussed above would agree with that conclusion is not entirely clear given the expanding views on extraterritorial and increasingly *omni tempore* applicability of human rights law, particularly as regards the European Court. The case law on this issue is divisive, as was clear in some of the cases already discussed above. The European Court has so far judged on a number of cases involving belligerent occupation and, in those cases, has ruled that jurisdiction in the sense of the Convention was established (also) as regards the right to life, but subsequently has only ruled as regards the duty to investigate.¹⁹¹ On the other hand, the judgments by the Inter-American Commission and Court discussed above as regards non-international armed conflicts show a greater restraint and instead appear to favor the *lex specialis complementa* approach by using humanitarian law to

not contain such specific exceptions and prohibit the “arbitrary” taking of life (without defining that term). It may be assumed, however, that adherence to the more detailed regulations of the European Convention will qualify the act in question as not being “arbitrary” and thus not constituting a breach of the Covenant, Convention or Charter. Lesh indicates that “arbitrary” can be assessed by factors such as the nature of the threat against which force was used, whether the force used was necessary under the circumstances, and whether non-lethal means to resolve the situation were available. These factors, however, seem more appropriate to “normal” contexts, rather than to applicability of the right to life in armed conflict situations. See Lesh, M., “Interplay as Regards Conduct of Hostilities,” in Wet, E., and Kleffner, J.K., [eds.], *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations*, Pretoria, 2014, p. 106.

¹⁹⁰ See below as regards the procedural, or “positive,” element in terms of the duty to investigate.

¹⁹¹ ECHR, *Al Skeini*, *supra* note 21, paragraphs 162 – 165. Note that the Court states in paragraph 164 that the procedural obligation continues to apply during armed conflict. Whether the protective aspect of the right to life continues to apply as well, in the Court’s opinion, remains to be seen.

interpret the term “arbitrary” in respect to the right to life. While several of the judgments and opinions of non-European human rights bodies appear to be inspired by, or in fact based on, judgments by the European Court, it is to be hoped that in return the European Court will be inspired by its non-European counterparts on this issue.

In military operations not rising to the level of armed conflict, there is far greater likelihood that human rights law will be applicable to the conduct of the operation. Consequently, in such operations the authorities responsible for drafting and promulgating the rules of engagement or other rules on the use of force must take into account a number of factors. First, the use of force must be based on an unequivocal rule of (international) law in order for such use of force not to be considered “arbitrary.” In the absence of relevant case law, it remains to be seen whether the authorization to use force as expressed in a resolution by the United Nations Security Council will suffice for this purpose, or whether the use of force must be related to concepts such as self-defense in operations carried out by individual nations or by a “coalition of the willing.”¹⁹² Where the operation is carried out under (direct) command and control of the United Nations itself, it would appear that human rights bodies will be more reluctant to declare that jurisdiction was established.

Where the use of force is subject to human rights obligations, additional requirements arise as regards the elements of necessity and proportionality in the rules on the use of force. As was discussed above, both concepts have significantly different meanings under human rights law than they do under humanitarian law.¹⁹³ As the necessity requirement under human rights law is one of “absolute necessity,”¹⁹⁴ the rules on the use of force must reflect the requirement that the recourse to (deadly) force is a last resort and is only authorized if lesser means of resolving the situation

¹⁹² Note that the discussion above as regards the interplay between Article 103 of the United Nations Charter and the detention operations in Iraq focused primarily on the method by which those detention operations were carried out. There has been no case law yet in which the authority to use force itself has been subject to scrutiny by the human rights bodies in question.

¹⁹³ See *supra* pp. 208 – 209.

¹⁹⁴ See *supra* note 47.

are not available or manifestly unreasonable. Finally, as regards proportionality, the rules on the use of force must in these cases reflect the requirement that the force to be used is reasonable in response to the nature and level of the threat against which the force is to be used, rather than applying the humanitarian law test of evaluating the value of the target to be attacked against the incidental loss of life, injury or damage to property as a result of the attack.

In practice, in the author's experience, the elements of necessity and proportionality in the sense indicated above regularly appear in the "soldier's card" version of the rules on the use of force, at least in the Netherlands. This applies regardless of the operation for which such cards are issued, which would tend to make them overly cautious in situations of armed conflict, but suitable in situations in which human rights law applies unequivocally. As rules of engagement (in the sense of the higher, command-level document) do not directly address issues of necessity and proportionality, this implementation of human rights obligations, whether intentional or on the basis of cautious approaches to the use of force, would seem to be sufficient. Alternatively, the section in the rules of engagement commonly called the "commander's guidance" could be used to point out the applicable legal paradigm and interpretations of necessity and proportionality in the given operation. A final option would be to draft each of the rules in the given ROE set authorizing the use of force against persons using the DESIG element¹⁹⁵ to specify the required interpretations of necessity and proportionality when drafting and promulgating ROE sets for operations which take place primarily within the human rights law paradigm.¹⁹⁶

¹⁹⁵ See above, pp. 191 – 192.

¹⁹⁶ Obviously if the operation takes place in a situation in which both paradigms operate side by side or if a significant risk of escalation of the situation into one of armed conflict can be anticipated, such ROE sets would then also need to include instructions on how to interpret and apply the ROE once the IHL paradigm becomes the applicable legal context. Since this would render the ROE rather complex, this would seem to be an inadvisable approach from an operational point of view. While dormant ROE, as discussed above (see pp. 54 – 55) may also be used, in terms of simplicity and ease of understanding it would appear best to

Finally, whether through the rules on the use of force or (more likely) the other directives and orders for the operation, the duty to investigate must be enforced, as well as the requirements as regards impartiality and thoroughness as expressed in the case law of the human rights bodies. The European Court has especially judged that even under difficult operational circumstances, States remain obligated to carry out this duty to the best of their abilities.¹⁹⁷ Consequently, the duty to investigate following the use of force by any government agent, including military personnel, must be implemented.¹⁹⁸

B. Capture and detention

Contrary to the observations made above as regards the right to life (more specifically the elements of necessity and proportionality), the

maintain neutral wording in the ROE and, in operations where the HRL paradigm is the predominant paradigm, focus on the wording of the soldier's cards to reflect the necessary terminology and restrictions. Since soldier's cards only reflect the authorizations at the level of the individual serviceman, as opposed to unit-level actions and missions, this would leave the opportunity to apply the IHL paradigm as applicable when issuing unit-level orders and instructions. This possibility is implemented through the use of specific wording, as regularly used in the soldier's cards in the Netherlands, authorizing the use of force as set forth in the card or "upon the orders of your commander." It is then up to the commander to establish which paradigm applies when issuing specific orders on the use of force.

¹⁹⁷ See, *inter alia*, ECHR, *Al Skeini*, *supra* note 21, paragraph 164.

¹⁹⁸ One element of such implementation is the injunction commonly included in the soldier's cards or otherwise promulgated through standing orders to report every use of force up the chain of command. In the Netherlands, such reports, drafted in the form of "After-Action Reports" are evaluated by the commander in question and a copy of the report, including the commander's assessment whether the use of force was justified and fell within the applicable rules on the use of force, is submitted to the military police (Royal Marechaussee). The military police then makes an initial assessment and evaluates whether there is a *prima facie* necessity for further (criminal) investigation. In such cases, the military police reports to the Public Prosecutor's Office which then makes the further determination whether an investigation and, ultimately, prosecution is required. All subsequent investigations and law enforcement activities are then directed by the Public Prosecutor's Office. See also chapter 6 for a more detailed discussion of the criminal law aspects of rules of engagement.

authorization to capture and detain persons is an authorization normally set forth in the rules of engagement themselves rather than in the derived soldier's card or "Aide-Memoire." Moreover, the applicability of human rights obligations to situations of detention is clear and has been established in several judgments by human rights bodies, as was discussed above. Even when applying the *lex specialis* principle, it is clear that with the exception of prisoners of war, as defined and regulated by the Third Geneva Convention, and internment as set forth in the Fourth Geneva Convention, both of which only apply to international armed conflicts, human rights law is far more detailed, and therefore more readily the *lex specialis*, as regards the procedures, safeguards and conditions applicable to detention of persons.¹⁹⁹ Consequently, although the procedural and substantive aspects of detention are not commonly included in the rules of engagement themselves, those drafting or promulgating rules of engagement which authorize the detention of persons must ensure that the consequential obligations can be met.²⁰⁰

A clear distinction must be made as regards persons detained on the basis of a suspicion that they have committed a criminal act, to which the full range of human rights obligations would apply, and persons detained for reasons of security in general. Here, too, the European Court has been the most specific and expansive in its case law.²⁰¹ The interpretation and

¹⁹⁹ It should be noted that considerable debate exists as regards the legal basis for detention in non-international armed conflict. While that debate goes well beyond the focus of this study, it should be pointed out that while the rules of international humanitarian law are specific as regards prisoners of war and as regards internment in the context of international armed conflict, the rules regarding non-international armed conflict merely set out minimum guarantees for detained persons without specifying any authority to detain or establishing criteria for detention.

²⁰⁰ For a discussion of the minimum guarantees, see *inter alia*, Oswald, B., "The Interplay as Regards Dealing With Detainees in International Military Operations," in Wet, E., and Kleffner, J.K., [eds.], *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations*, Pretoria, 2014, pp. 76 – 79, in which the majority of human rights instruments and their applicability to detention are discussed.

²⁰¹ Oswald argues that a literal reading of the ICCPR, the African Charter and the American Convention supports the conclusion that the concept of security

explanation given by the Court as regards the lawfulness of detention in relation to the right to liberty as set forth in Article 5 of the Convention is clear: the detention must conform both with the “substantive and procedural” aspects of the legal basis for the detention and the purpose of the detention must be one of the purposes set forth in paragraph 1 of Article 5 of the Convention.²⁰² As regards armed conflicts, the Court has judged that in international armed conflicts the rights of belligerents to take prisoners of war or to intern civilians who pose a security risk are not incompatible with the Convention, even though such detention is not specifically mentioned in Article 5, provided that the concomitant obligations under international humanitarian law are met.²⁰³ While the Court has not ruled on the issue of detention in non-international armed conflict as such, the specific choice of words in the applicable case law seems to indicate that the Court does not consider security detention in non-international armed conflict to be compliant with Article 5 of the Convention.²⁰⁴ This means that in military operations which take place in the context of a non-international armed conflict, detention is limited to situations in which the person in question is suspected of having committed a criminal act under applicable criminal law. In operations which take place in the context of such an armed conflict, as well as in operations which do

detention is not prohibited by those instruments. Absent relevant case law on this issue, it is not possible to predict whether the human rights bodies in question would agree. Oswald, *op. cit.* note 200, page 89

²⁰² See, *inter alia*, ECHR, *Öcalan v. Turkey*, application no. 46221/99, paragraph 83. Note that the obligations set forth in the subsequent paragraphs of Article 5 apply once arrest or detention commences but do not themselves contain (additional) purposes or authorizations for initiating detention.

²⁰³ ECHR, *Hassan*, *op. cit.* note 105, paragraphs 104 – 105.

²⁰⁴ See the observation *supra* note 199. Note that the *Al Skeini* and *Hassan* cases concern situations that arose in the period when the United Kingdom was still one of the occupying powers in Iraq. The *Al Jedda* case concerns facts which took place after the transfer of authority to the new government of Iraq, and would thus concern a situation qualifiable as a transboundary non-international armed conflict. Since, however, that case was concerned with the relationship between the (method of) detention and the authorizations in the relevant Security Council resolution, the issue of the right to detain in non-international armed conflicts was not addressed as such.

not amount to (participation in) an armed conflict, this limitation must be reflected in the relevant rules authorizing detention by filling in the relevant DESIG elements in the ROE-set rather than issuing generic or “blanket” authorizations to detain.

In situations of detention other than prisoners of war or internment in compliance with the rules of international humanitarian law, the authorization to detain persons must also be accompanied by proper procedural and substantive guidance,²⁰⁵ as well as the physical means to implement such guidance, prior to the promulgation of rules of engagement authorizing such detention. The legal basis for such rules of engagement cannot override this requirement.²⁰⁶ In addition to issues such as review by a judge or court, this includes access to, and assistance by, legal counsel even during the initial investigative stage.²⁰⁷ Finally, regardless of the specific relationship to the host nation, any transfer of detainees to the host nation authorities, even if required under local law, is subject to a determination whether the person to be transferred will, as a result of that transfer, suffer treatment contrary to the obligations under the Convention and, if such a risk exists, no such transfer should be authorized.²⁰⁸

²⁰⁵ In preparing such guidance, inspiration may be found in the Copenhagen Guidelines, which incorporate many of the obligations discussed above. The Guidelines and the explanation behind them can be found online at http://um.dk/en/politics-and-diplomacy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations/~/_media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf (last accessed on 8 April, 2016).

²⁰⁶ For example, the authorization to detain as set forth in a resolution by the Security Council does not preclude the requirement to (subsequently) apply the relevant human rights obligations and safeguards. ECHR, *Al Jeddah*, *supra* note 99.

²⁰⁷ ECHR, *Salduz v. Turkey*, application no. 36391/02, paragraph 54 – 55.

²⁰⁸ See *supra* note 100. See, for examples of implementing human rights obligations in transfer agreements, the Exchanges of Letters between the EU and Kenya and between the EU and the Seychelles in the context of the anti-piracy operation *Atalanta*. The Exchanges of Letters are available at: <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=7883> (regarding the EoL with Kenya) and

C. Privacy and family life

While relatively uncommon, rules of engagement occasionally authorize interference in civilian life. When authorized, such interference is usually associated with activities related to search and seizure of private property, freedom of movement, security of transportation or (temporary) military areas, etc., or in connection with detention operations. Where such rules of engagement involve the right to search or seize private property or to enter and search the private homes of persons, human rights issues can arise. As regards search and seizure, the rights related to private property and ownership are at issue as well as, in many cases, the right to privacy. Consequently, such rules of engagement must be supported by prior considerations of necessity and proportionality, as well as by safeguards preventing abuse and procedural guarantees ensuring complaints are properly addressed and impartially adjudicated.²⁰⁹ As was discussed above regarding the right to life, the requirements or restrictions related to necessity and proportionality may be set forth in the applicable rules in question. While a general statement may be included in the ROE set or the soldier's card that all of the authorizations set forth within those documents are subject to the requirements of necessity and proportionality, in cases in which specific attention to, or a specific meaning of, those requirements are at issue, the relevant rules themselves can be drafted in such a way as to reflect this.

Finally, authorization may be granted for activities related to intelligence operations which may interfere with the right to privacy and

<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=8101> (regarding the EoL with the Seychelles). Both last accessed on 8 April, 2016.

²⁰⁹ As with detention review, the human rights system is, of course, based on the assumption of impartial review by judicial authorities. Since that may not always be possible in the context of military operations, all feasible efforts must be made to ensure impartiality by other means, such as by appointing review officers who are in a different (or under a higher) chain of command, etc.

the right to family life.²¹⁰ While these issues have not been specifically addressed by the human rights bodies in connection with military operations, the views of some human rights bodies as regards intelligence activities,²¹¹ the extraterritorial applicability of human rights obligations, and the duty to observe such obligations even during times of crisis or armed conflict, must lead to the conclusion that adequate safeguards and accountability must be ensured as regards intelligence activities during military operations as well. While intelligence activities are not commonly addressed in rules on the use of force, the ongoing debate as regards intelligence activities in relation to the right to privacy must be taken into account when authorizing such activities in the context of a military operation. The same observations as were stated above regarding the legal basis and the procedural safeguards apply in the case of these activities.

IV. Brief observations on the rules on the use of force for law enforcement authorities

While the scope of this study is primarily restricted to rules of engagement and associated rules on the use of force for military operations, the relationship between such rules and human rights law warrants a few, limited observations and comments regarding the rules on the use of force by law enforcement authorities. Such rules are particularly relevant where, as has been discussed as well elsewhere in this study,²¹² military forces are deployed in support of civilian law enforcement authorities in those States that allow such use of the armed forces.²¹³ In such cases, the rules on the

²¹⁰ See *supra* note 3 and the accompanying main text in the introduction as regards the relationship between rules of engagement and intelligence activities.

²¹¹ See, for example: ECHR, *Case Of Telegraaf Media Nederland Landelijke Media B.V. And Others V. The Netherlands*, application no. 39315/06.

²¹² See especially Chapter 6.

²¹³ In the United States, the armed forces may not be deployed to “enforce the laws,” as specified in the Posse Comitatus Act (U.S. Code Title 18, Section 1385). However, a number of (complex) exceptions exist, especially as regards counter-drug operations (see especially U.S. Code Title 10, section 371 – 377 as regards the armed forces and U.S. Code title 32, section 112 as regards the National Guard while not under Federal service). The deployment of the armed forces in such cases

use of force may be either specifically drafted and promulgated for the deployment in question,²¹⁴ or consist of applying the standard law enforcement rules on the use of force to the military personnel so deployed.²¹⁵

Apart from legal or national constitutional complexities or sensitivities regarding the use of the armed forces for law enforcement (support) tasks, there can be little doubt that in such cases the law enforcement paradigm applies and that consequently the full range of obligations under human rights law must be taken into account. This means that, in addition to ensuring that the rules on the use of force comply with those human rights obligations,²¹⁶ the mindset of the military personnel involved must similarly comply with the applicable paradigm.²¹⁷ Obviously, where the standard law

excludes “search, seizure, arrest, or other similar activity” except where authorized by law (U.S. Code Title 10, section 375). The fine line between support such as, *inter alia*, surveillance on the one hand and direct participation as a result of unfolding events on the other hand, is shown by cases such as the Banuelos case discussed in Chapter 6.

²¹⁴ In the Netherlands, case-specific rules on the use of force have been drafted by the present author in a number of cases involving military support to civilian authorities, especially in the Caribbean parts of the Kingdom.

²¹⁵ In the Netherlands, the rules on the use of force by law enforcement personnel are set forth in a general instruction (*Ambtsinstructie*) based on Article 9, paragraph 1, of the Police Act 2012. That instruction, as specified in the text itself and in Article 9, paragraph 2, of the Police Act 2012, also applies to military personnel deployed in support of civilian authorities. The authorization to use force is itself based on Article 7 of the Police Act 2012, which specifies in paragraph 7 that the authorizations set forth in that Article also apply to military personnel deployed in support to civilian authorities.

²¹⁶ Parks observes that the Joint Chiefs of Staff Standing Rules of Engagement are not compatible with the legal and Constitutional context of the “war on drugs” deployment of military personnel. While his arguments and concerns are not related to human rights issues (but instead with undue restrictions on the use of deadly force in self-defense by military personnel), his observations are nonetheless valid in this context as well. See Parks, W.H., “Deadly Force is Authorized,” in *Naval Institute Proceedings*, January 2001, p. 34.

²¹⁷ As regards the difficulties faced by military personnel in making such a shift in mindset and the use of force, see (*inter alia*), Dunlap, C.J., “The Police-ization of the Military,” in *Journal of Political and Military Sociology*, 1999, Vol. 27 (Winter), pp. 223 – 224.

enforcement rules on the use of force are applied to military personnel, this requires proper training of such personnel in understanding and applying those rules (apart from the necessity to have such rules comply with human rights obligations in the first place).

In addition to ensuring that the rules on the use of force must comply with the obligations under human rights law, and that military personnel are properly trained in the use of such rules, the authorities responsible for planning the deployment of military personnel in support of law enforcement tasks must also take into account the specific and special methods of operation, training, standards practices, etc., of the units being deployed and take into account all alternative options, available intelligence and (other) information and incorporate such information in their plans. In view of the case law of the European Court, this is especially (or at least no less) the case when special forces are deployed in the context of antiterrorist operations in support of law enforcement, even when the rules as such are in conformity with human rights standards.²¹⁸

V. Conclusion

It follows from the discussion and observations presented above that human rights law is a serious factor of influence on the rules on the use of force for military personnel. Although the debate continues in some nations as to whether human rights law has extraterritorial applicability, the case law of the various human rights bodies, not just the European one, makes it clear that such debate may ultimately prove to be a case of “fighting the problem” rather than facing the solutions. As regards domestic use of the armed forces and situations of non-international armed conflict, the applicability of human rights law to military operations is beyond question. This means that the rules and obligations which stem from this body of law must be kept in mind when drafting the rules of engagement.

In practice, the obligations derived from human rights law, at least as concerns the use of (deadly) force, can be most clearly and specifically

²¹⁸ ECHR, *McCann and Others v. the United Kingdom*, application no. 18984/91, paragraphs 156, 201 212 – 213.

implemented in the soldier's cards and "Aides-Memoire" derived from the actual rules of engagement.²¹⁹ In such cards, it is common to find rules which require the exhaustion of alternative means and methods prior to the use of deadly force, the requirement to limit the use of force to what can be considered proportional in relation to the threat perceived and limitations on the use of force which, as regards necessity, would generally meet the requirements of "absolute necessity" as required under human rights law.²²⁰ As regards the higher level rules of engagement themselves, which are aimed more at the higher command levels of the operation, such obligations must be part of the mindset and perspective in which the rules of engagement are drafted and promulgated and, more importantly, the way in which the rules of engagement are applied in the operation in question. While the relevant restrictions and considerations are not generally included in the ROE themselves, both the "commander's guidance" section of the ROE set and the use of DESIG elements in specific rules within the ROE set may be considered as well.

Consequently, it seems that the intent and purpose of the obligations derived from human rights law are generally adhered to in practice, at least at the individual soldier's level. Nonetheless, caution is required at two levels as regards the interaction between human rights obligations and the rules on the use of force. At the drafting, promulgating and implementation level, caution is necessary to ensure that in those operations which are clearly or at least possibly susceptible to human rights obligations, those obligations are properly taken into account in the applicable rules on the use of force and in the overall mindset of both planners and operators in the operation in question.

However, caution is also required on the part of the human rights bodies evaluating and, in the end, judging the conduct of military

²¹⁹ See, for example, the sample ROE cards – more accurately Soldier's Cards – included in the Center for Law and Military Operations (CLAMO), *Rules of Engagement Handbook for Judge Advocates*, Virginia, 2000, Annex C and the emphasis on "minimum force," warnings prior to the use of force and overall limitation of the use of force to situations comparable to, or specifically indicated as, self-defense situations.

²²⁰ See *supra* note 47 and accompanying observations in the main text.

operations. Military operations are very rarely similar to police actions in the “normal” peacetime civilian context in democratic societies for which the human rights instruments were originally drafted. This means that the human rights bodies must ensure that they have the requisite knowledge and expertise regarding the actual conduct of military operations in order to be able to properly evaluate whether the actions undertaken were reasonable and, more importantly, whether full compliance with the “normal” expectations as regards compliance with human rights obligations could reasonably be expected under the circumstances. In some nations, judicial review of military actions is supported by input or insight gained from military experts or military members of the court in the judicial process. No such guarantees or expert advice are available in the human rights system as yet.²²¹

In addition, the civilian peace-time context for which the various human rights instruments were originally designed is vastly different from the military operational context in which the armed forces may be deployed and the contexts in which, on the basis of decisions and orders of the international community, military forces are expected to carry out their duties. This requires, as a minimum, that the “normal” interpretation of several human rights concepts, including the interpretations of “necessity” and “proportionality” in relation to the right to life, be abandoned when judging actions carried out in such operations, in favor of a more contextual

²²¹ The European Court of Human Rights has judged on the impartiality of military members of regularly constituted courts and the compatibility of such systems with Article 6 of the Convention. In one such case, the Court ruled that, based on the specific nature of the case in question and the criminal charges against the applicant in question before the national courts, the inclusion of a serviceman on active military duty in the composition of the court in question constituted a violation of Article 6 of the Convention (ECHR, *Incal v. Turkey*, application no. 41/1997/825/1031, paragraphs 65 – 73). In the *Jaloud* case, on the other hand, the Court ruled that there were sufficient safeguards to ensure the impartiality of the military member of the Military Chamber of the Court at Arnhem (ECHR, *Jaloud*, *supra* note 87, paragraphs 195 – 196. It is assumed that where the Court refers to Article 2 of the Convention in paragraph 196 it meant Article 6). It should be noted that in the *Incal* case, the applicant was a civilian sentenced by the court in question while the Military Chamber in the *Jaloud* case was responsible for judging military personnel.

approach in keeping with the principle of *lex specialis complementa*. The conceptual framework of an overly strict, almost binary dichotomous paradigmatic model such as appears to be favored by the European Court, in which an operation is considered to be either exclusively an armed conflict or exclusively a law enforcement operation, must in all reasonableness be either abandoned or at least relaxed in the face of modern operations, at least as far as interpreting the basic human rights concepts is concerned. Failure to do so will ultimately lead to either unbridled derogation from the human rights obligations in general or to a marginalization of human rights law as a nuisance rather than a factor to be taken into account when drafting and promulgating rules on the use of force.

As regards the States Parties themselves, the observations made above lead to two general considerations. Firstly, it is important for States to avoid or at least limit contesting the existence of jurisdiction in the sense of the human rights instruments in their submissions before the human rights bodies and to focus instead on the contents and merits of a case. The case law of the human rights bodies makes it clear that there is an expanding view as regards extraterritorial applicability and focusing on that aspect appears to be a lost cause, barring exceptional cases. As an alternative, States would do well to focus their attention on the legal basis, justification and reasonableness of the actions undertaken by military forces, as well as of the rules, procedures and orders issued to those forces in the context of a military operation. In other words, rather than arguing whether a human rights body has jurisdiction over a specific case, it is important for States to explain why the actions in question were legally valid and justified. Apart from the observation that fighting the extraterritorial application of human rights norms may ultimately be pointless, this approach may also actually assist the human rights bodies in expanding their own understanding of the conduct of military operations.

Finally, whether chosen as an approach *ab initio* or as a litigation strategy once a case is brought before a human rights body,²²² States may need to re-evaluate their political views as regards derogations or, as a minimum, recognizing and acknowledging the existence of an armed

²²² See *supra* note 149 and accompanying observations in the main text.

conflict and their own role in that regard. In this aspect at least, human rights law may serve as a means to resolve the issue of the threshold discussion regarding the existence of an armed conflict as discussed in the previous chapter.

Chapter 6
Rules of Engagement and (International) Criminal Law

I. Introduction and scope

A. Introduction

In this chapter, the relationship between rules of engagement (ROE) and criminal law in general will be analyzed in order to ascertain the role the rules on the use of force can play in the context of criminal law, including criminal proceedings, whether at the national or international level. In doing so, the two principal roles such rules can play in the criminal law context will be discussed: as an accusatory device and as an exculpatory device. The analysis and discussion will be supported by case law, with special focus on the principal criminal case in the Netherlands regarding the rules on the use of force and their function from a criminal law perspective.¹

As part of the analysis and discussion, a number of questions will be addressed. On the accusatory side, the issue of the status of rules of engagement as a legal instrument will be discussed, in order to address the question as to whether ROE can, by themselves, be a source of (criminal) law. Subsequently, an analysis will be made of the relationship between *mens rea* and the combined prosecution of “ROE crimes” and other crimes, in order to address ROE violations in relationship to knowledge and (specific) intent. Finally, the question of the expediency of prosecuting violations of ROE as a separate criminal act *per se* will be discussed. This question is of particular relevance where multiple criminal charges may be brought, including the violation of the ROE itself, but also holds relevance where the only criminal charge conceivable in a given situation is the ROE violation.

As regards the possible exculpatory role of ROE, a comparison will be made between the status, role and function of ROE as military instruments in relation to (and compared with) the justifications and excuses generally recognized under criminal law. In so doing, special emphasis will be placed

¹ See the discussion below on the “Eric O.” case.

on the issue of the defense of superior orders, including a more detailed analysis of the specific exculpatory provision in the Military Criminal Code of the Netherlands. Finally, the analyses outlined above will be followed (and illustrated) by a selection of relevant case law, in order to present a number of conclusions on the general issue of the interaction between ROE and criminal law.

B. Scope

This chapter is written primarily from the point of view of the international law of military operations, albeit in a criminal law context. Consequently, this chapter is not in any way intended to be exhaustive in terms of exploring the various aspects of criminal law specifically, but only discusses those elements of criminal law which are considered relevant for the topic at hand and the main focus of this chapter: the role and function of rules on the use of force in the context of (military) criminal law. Similarly, while certain aspects of international criminal law as a specific and separate body of criminal law will be included in this analysis, those aspects will only be discussed to the extent that they contribute to the discussion at hand. Finally, as criminal law systems and (especially) criminal law terminology differs rather extensively between continental and common law systems, a modest attempt at comparative analysis has been made as regards the concepts from those systems which are most relevant to this analysis.

C. The importance of the “Eric O.” case

On 4 May, 2005, the Military Chamber of the Court of Appeals in Arnhem acquitted sergeant-major Eric O.² of the Royal Netherlands Marine Corps of all charges. O. had been charged, both in the case in first instance and in the appeal case, with violating the rules on the use of force as set forth in

² In the Netherlands, suspects and acquitted persons are only referred to by their first name and the first letter of their last name in order to protect their right to privacy.

the aide-memoire for commanders and the soldier's card for the Netherlands forces participating in the Stabilization Force in Iraq (SFIR) and thereby causing the death of an Iraqi civilian during an incident on 27 December, 2003. The case not only sparked extensive debate in the social, political and legal arenas, but also led to an extensive review of the military legal system in the Netherlands, ultimately leading to the inclusion of a (new) specific provision in the Military Criminal Code³ excluding criminal liability for military personnel who use force in the lawful execution of their duties and in accordance with the rules and orders issued to them for those duties.

Although the O. case is in many ways a unique case in the history of military criminal law in the Netherlands, criminal cases revolving around rules of engagement or their derivative instruction cards have appeared more often in case law around the world and quite frequently lead to some degree of controversy. The O. case is unique, however, in that the controversy in this case led to an actual change in the law. That ROE, and the derivative cards based on the ROE, can cause such controversy in a criminal law setting is not entirely surprising. On the one hand, the rules seem so clear that it is tempting to consider apparent violations of these rules as self-evident cases of criminal culpability. On the other hand, that same apparent clarity would also seem to make such rules ideal instruments to exculpate military personnel using force in accordance with those rules. Yet both approaches need to take into account a number of questions that can have considerable influence both on the validity of using those rules in a criminal law context and on the ultimate role such rules might play in specific criminal cases.

³ Article 38, paragraph 2, of the Military Criminal Code (*Wetboek van Militair Strafrecht*) of 27 April, 1903. The provision in question was inserted by the Act (amending the Military Criminal Code) of 14 October, 2010. It should be noted that the previous provisions of Article 38 (now set forth in paragraph 1 of Article 38) already excluded criminal liability for acts committed in wartime, if those acts were lawful under the laws of armed conflict and did not exceed the serviceman's authority. The new paragraph 2 of Article 38 is not limited to war or armed conflict. The provision in question is discussed in greater detail below in connection with the defense of superior orders.

II. Accusatory Role of Rules of Engagement

A. The concept of “ROE Crimes”

In addressing the accusatory role of ROE, that is the role ROE can play in prosecuting criminal acts perpetrated by the military personnel subject to those ROE, a distinction can be made between the violation of the ROE as a criminal act in itself, and (concurrent) criminal acts resulting from a violation of the ROE but which are separate and specific criminal acts themselves. An example may serve to illustrate this distinction. If a soldier kills another person in a manner inconsistent with the ROE, he conceptually commits (at least) two concurrent criminal acts. In many (military) criminal law systems, the violation of the ROE can itself already be classified as a criminal act in itself, such as the violation of a (standing) military order. This aspect will be discussed in more detail below. At the same time, the killing of the other person may, depending on the circumstances and relevant facts, be classified as manslaughter, murder, or any of the other crimes involving violence upon another person. This distinction is relevant, as most criminal law systems require or at least allow the prosecution to choose which criminal act to include in the charges against a suspect if more than one crime has been committed.⁴

The concept of “ROE crimes” refers to the violation of ROE as a criminal act in itself, separate from any concomitant crimes that may have been committed as a result of the same act. Prosecution of ROE crimes leads to two legal difficulties. Firstly, the question must be addressed as to the legal status of ROE in general. Since the principles of *nulla crimen sine lege* and *nulla poena sine lege* require a legal basis for criminalizing behavior and for prosecuting and punishing crimes, it is important to establish how a violation of the ROE can legally be classified as a crime. Secondly, as most criminal law systems require both an objective or

⁴ See, for example, the United States Attorney’s Manual, Title 9, Chapter 27 (Principles of Federal Prosecution), section 320 (USAM 9-27.320). For the United Kingdom, see chapter 6 of the Code for Crown Prosecutors.

“external” (physical) element (in some systems referred to as the *actus reus*) as well as a mental element (*mens rea*) covering such issues as intent and knowledge, the specific nature and purpose of ROE requires an analysis of the interaction between ROE crimes and the *mens rea* aspect.⁵ Following these two analyses, some observations will be presented on the choice between prosecuting ROE crimes or only the concomitant crimes, as well as the interaction between this choice and the requirements under the European Convention on Human Rights.

B. Status of ROE

1. ROE as a source of (criminal) law

As was discussed in chapter 1, ROE are operational orders or directives which set forth the rules on the use of force or actions which may be considered provocative. Their primary purpose is “escalation dominance”, which is (the attempt at) controlling the extent to which a given operational situation will escalate to higher levels of violence, can be de-escalated to lower intensity confrontations (or no confrontation at all) or will remain in its present status quo. They are drafted, issued and promulgated in and by the military chain of command. Although the derivative instruction cards are sometimes made public⁶ and, in the interest of public relations, at least some general information is often provided on the use of force policy in a given operation,⁷ the actual mission-specific ROE are normally classified

⁵ It may be argued that the *actus reus* in ROE crimes is self-evident, provided it can be proven that the acts committed were objectively a violation of the applicable ROE and the person was subject to those ROE.

⁶ See, for example, United States Army Field Manual FM 100-23 (Peace Operations), Appendix D.

⁷ For example, NATO issued a public document on the tactical directive for the International Security Assistance Force (ISAF) in Afghanistan in 2009 (http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (last accessed: 8 April, 2016)) as well as several press releases referring to the rules on the use of force, such as <http://www.isaf.nato.int/article/news/isaf-scr-address-military-roe-and-tactical-directives.html> (last accessed: 8 April, 2016).

and not released to the public.⁸ Finally, the ROE are normally not subject to review by the legislature.⁹

The reason for presenting these specific observations is to illustrate the significant differences between ROE and the process surrounding them on the one hand, and the legislative process as it is commonly structured in democratic countries on the other hand. These differences, in combination with a number of additional issues related to the requirements for criminal legislation, create difficulties for viewing ROE as a source of (criminal) law in and of themselves.

Absence of review or confirmation by the legislature is the first impediment for a possible status as (a form of) law for ROE, as legislation by the executive rather than the legislative branch of government runs

⁸ It should be pointed out that the “Standing Rules of Engagement for US Forces” (CJCS 3121.01A) issued by the Chairman of the Joint Chiefs of Staff on 15 January, 2000, and widely available on the internet are not mission-specific ROE. Instead, the document is a generic use of force policy for the United States Armed Forces on which mission-specific ROE (such as the ROE for operation *Enduring Freedom*, operation *Iraqi Freedom*, etc.) can be based. In the author’s professional experience, the United States does not release current mission-specific ROE, either publicly or to other (allied) forces.

⁹ In the Netherlands, ROE have been disclosed to parliament on very rare occasions and subject to the strict rules governing confidential disclosure of information to parliament. Such rules prohibit further disclosure by parliament as well as prohibiting any use of such information in any document, debate or session open to the public. As a general policy, however, ROE are not released to parliament even confidentially. In recent years, this policy has been adhered to more strictly. For examples of confidential disclosure, see the letters to parliament of 28 November, 2000 (on the ROE for UNMEE, parliamentary document 22 831, nr. 17) and 20 March, 2008 (on the deployment of national vessel protection detachments to defend World Food Programme ships against piracy off the coast of Somalia, parliamentary document 29 521, nr. 57). For examples of adherence to the policy of non-disclosure, see the letters to parliament of 10 March, 2009 (on the procurement of a replacement for the F16, parliamentary document 26 488, nr. 152) and 9 February, 2010 (on the report of the investigation into the decision making regarding the invasion of Iraq (see enclosure 10, question 5), parliamentary document 31 847, nr. 18). It should be noted that even where ROE were (confidentially) disclosed to parliament, this did not make them subject to parliamentary review but served only to inform parliament on specific aspects of the deployment of the armed forces abroad.

counter to the principle of the separation of powers derived from the concept of the *trias politica* and set forth in the constitutional system of many governments.¹⁰ While systems providing for emergency legislation by the executive branch exist, of course,¹¹ such systems tend to be restricted to emergencies or other exceptional circumstances and allow for subsequent review by the applicable legislative body.¹² ROE, on the other hand, are not restricted to emergencies in this sense of that word¹³ and are themselves not submitted for review by the legislature at all.

The principle of legality as part of the concept of the rule of law requires, especially as regards criminal legislation, that the law conforms to the requirements of clarity and knowability (*lex certa*) and that acts are only considered crimes, and are only punishable, on the basis of prior legislation (*nullum crimen sine lege* and *nulla poena sine lege*).¹⁴ Both elements pose

¹⁰ For example: Articles 81 and 127 of the Constitution of the Kingdom of the Netherlands; Article 1, Section 1 of the Constitution of the United States of America; Articles 91 and 92 of the Constitution Act, 1867, of Canada; Article 24 of the Constitution of 4 October 1958 of France.

¹¹ In the Netherlands, for example, the Municipality Act (*Gemeentewet*) vests legislative authority primarily in the city council (Article 147), but allows the mayor to implement ordinances in exceptional circumstances to protect or restore law and order (Article 175 and 176). Such ordinances must, however, then be submitted without delay to the city council for approval and are rendered void if the council does not approve them in its next session in which a quorum is present and voting.

¹² For an example of such review (and concomitant automatic lapse of emergency legislation in the absence of confirmation by the legislature), see Part 2, Section 27, of the Civil Contingencies Act 2004 of the United Kingdom.

¹³ In the Netherlands, for example, the Chief of Defense has issued ROE applicable to Royal Netherlands Navy vessels for use of force outside the context of specific military operations. The use of force authorized by these ROE is based on several forms of self-defense, including unit self-defense and personal self-defense, as well as being based on other sources of law such as the right of naval vessels to seize pirate vessels as set forth in Article 105 of the United Nations Convention on the Law of the Sea.

¹⁴ Although these principles are so basic to criminal law that they may be considered beyond question, a number of references are relevant. These include the Report by the Secretary General of the United Nations to the Security Council on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616): “[The rule of law] refers to a principle of governance in which all

potential difficulties for viewing ROE as a form of law, in regards to which the latter element, that is the element of *nullum crimen/nulla poena*, is the most clear in terms of its relationship to ROE: ROE documents do not themselves contain provisions establishing the criminal nature of violations of the ROE as such nor any resulting (forms of) punishment.¹⁵ The principle of *lex certa*, however, is a more difficult issue. While the requirement of clarity generally refers to a sufficiently clear description in the law of the behavior or acts which are to be considered criminal, such as in the elements of crime for a specific crime, in order to enable anticipation of criminal

persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.” The European Court of Human Rights stated these principles as follows in the cases of *S.W. v. United Kingdom* and *C.R. v. United Kingdom* (22 November, 1995): “Article 7 [of the European Convention on Human Rights] is not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgment the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable. The Court thus indicated that when speaking of ‘law’ Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability.” For an extensive analysis of the principle of *lex certa*, including the historical and philosophical background, see chapter 3 of Nan, J.S., *Het lex certa-beginsel*, 2011. The *nullum crimen* and *nulla poena* principles are, of course, also set forth in human rights instruments (e.g.: Article 7, European Convention on Human rights; Article 15, International Covenant on Civil and Political Rights) and in various national Constitutions (e.g.: Article 16 of the Constitution of the Kingdom of the Netherlands; Articles 12 and 14 of the Constitution of Belgium; Article 11 of the Canadian Charter of Rights and Freedoms).

¹⁵ Possible references in the ROE to criminal liability for ROE violations on the basis of other legal principles, including IHL or military criminal statutes relating to violations of orders or directives, are discussed below. What is at issue here is whether ROE can be considered an autonomous source of (criminal) law.

liability, the absence of criminal provisions in the ROE does not entirely preclude a discussion of clarity in relation to ROE. Two observations are relevant in this context. Firstly, ROE are intended to be clear and understandable for the personnel to which they are issued. Consequently, the ROE are worded in precise terms and as a general rule avoid the use of ambiguous or overly “legal” language. On the other hand, ROE are intended to be applicable under all circumstances which may arise in a given operation or during the performance of certain duties, such as guard duties. Consequently, the ROE by necessity allow a certain level of interpretation and are by necessity worded in general terms, describing general authorizations on the use of force and acts which may be considered provocative. The level of detail applied to these authorizations varies in accordance with the scope, complexity and level of sensitivity of the operation or duty for which they are promulgated. Whether the ROE can meet the clarity requirement of the *lex certa* principle will therefore depend on the level of specificity of the individual ROE in question, but cannot be assumed (either positively or negatively) as a general rule for all ROE.

Finally, as regards the knowability requirement of the *lex certa* principle, it was already observed above that ROE are normally classified and are not published. In some views, this fact is sufficient to establish incompatibility between ROE and the principle of legality.¹⁶ The Supreme Court of the Netherlands has even gone so far as to equate knowability (although more in connection with *nullum crimen*) not only with the law being published, but also being accessible in Dutch,¹⁷ an aspect equally incompatible with ROE – especially the ROE for multinational operations, which are invariably promulgated in English. In the Eric O. case mentioned in the introduction, however, the Court of Appeals of Arnhem stated that the ROE are sufficiently made known to the military personnel to which they apply and that the personnel in question is also made aware of the

¹⁶ Ubeda-Saillard, M., “L’Invocabilité en droit interne des règles d’engagement applicables aux opérations militaires multinationales,” in *Revue Générale de Droit International Public*, Vol. 108, April 2004, p. 156.

¹⁷ Hoge Raad, 24 June, 1997 (LJN: ZD0773) at § 5.6.

importance of the ROE.¹⁸ The Court consequently did not consider the classified nature of the ROE or the language in which they were promulgated as incompatible with the principle of legality.¹⁹

As was stated previously, the knowability requirement in criminal law serves *inter alia* to make criminal liability foreseeable, in order that persons may reasonably foresee whether their (intended) actions may make them subject to criminal prosecution. Consequently, it may be argued that the knowability requirement is met if the individual risking criminal liability is able to know the law or provision in question himself or herself, regardless of whether that law or provision is (also) knowable to others or to the general public. This in turn leads to the observation that as long as the ROE are knowable (and understandable) for the military personnel subject to those ROE, the knowability requirement is sufficiently satisfied. Similarly, the classified nature of the ROE does not in itself constitute incompatibility

¹⁸ Gerechtshof te Arnhem, 4 May, 2005 (LJN: AT4988). The Court was, however, referring to the status of the ROE as a military order and not as a law in and of themselves. The statements are nonetheless relevant in terms of their views on the legality requirements.

¹⁹ Interestingly the Court thereby deviated from the Supreme Court decision (*supra*, note 17), by stating that the use of the English language is a necessity concomitant to the international nature of the type of military operations in question, that military personnel are expected to be sufficiently well-versed in the English language and that the ROE were also explained orally in Dutch. The language of the ROE was therefore not considered a legally relevant issue. Whether the level of competency in the English language within the Netherlands armed forces in general is indeed sufficient to meet the legality requirements of criminal law in all cases is a matter of some conjecture. Where there is reasonable doubt in individual cases whether the serviceman truly understood the foreign language ROE, it may be argued that the Courts should apply this in his favor, in keeping with the *in dubio pro reo* principle. Dolman *et al.* similarly emphasize that the essence is whether the serviceman understood the regulation or order and states that English may generally be considered an understandable language within the Netherlands armed forces, as well as pointing out that it would be impractical (if not impossible) to translate all operational documents into Dutch in the context of a military operation. Dolman, M.M., Ducheine, P.A.L., Gill, T.D. and Walgemoed, G.F., “Functioneel geweldgebruik in internationale operaties: een spiegel van rechtspraak en praktijk,” in *Militair Rechtelijk Tijdschrift*, 2005 nr. 10.

with the principle of *lex certa* in regards to the personnel to whom the ROE are promulgated.

Based on all of the observations above, however, it may be safely concluded that, with the possible exception of the classified nature of ROE, the intrinsic characteristics of ROE and the process surrounding them are incompatible with any status of ROE as a source of (criminal) law in and of themselves. Prosecution of ROE crimes is therefore dependent on a different status of ROE, such as the status of ROE as military (standing) orders or directives, and the criminal law provisions related to violations of such orders or directives.²⁰

2. ROE as military (standing) orders or directives

In the definitions and explanations of ROE and the ROE process presented in chapters 1 and 2, mention was already made of ROE as being “directives” or “orders” given to the military forces subject to those ROE and that they are drafted, approved and promulgated within the military chain of command. In principle, therefore, violations of the ROE could be considered violations of (standing) orders or directives and be subject to criminal prosecution or disciplinary action in the same way as any other disobedience to superior orders and directives under the given military criminal and disciplinary system. Two elements require attention in this context, however: are ROE considered “orders” in the same way as (other) superior orders, and are ROE which are promulgated by foreign

²⁰ Ubeda-Saillard, *op. cit.* note 16, combines her observation that the criminal nature of ROE violations is founded in the military criminal code of the country in question and not in the ROE themselves with the conclusion that “[l]a crainte du « ROE crime » [...] n’a pas véritablement lieu d’être.” The validity of that conclusion depends, of course, on the definition of “ROE crime.” While Ubeda-Saillard links the concept to an individual legislative function of the ROE themselves, in this study the concept is given a wider definition to encompass any prosecution of ROE violations as a separate criminal act, regardless of the statute on which that prosecution is based. See also Stafford, W.A., “How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force,” in *The Army Lawyer*, November 2000, who simply states that “[a] military directives, the rules of engagement are not law.”

commanders, such as in a multinational operation, considered superior orders in the context of the applicable (military) criminal and disciplinary law?

In preparation for its 2006 international conference, the International Society for Military Law and the Law of War distributed a questionnaire which inter alia addressed the status of ROE in terms of being (legally) binding orders and the role of ROE in multinational operations.²¹ The national reports on which the general report was based showed significant differences in national levels of experience with (participation in) multinational operations and applicable ROE, as well as with ROE in general. They also demonstrated some divergence as to the status of ROE within the national (military) criminal legal system. While some nations regarded ROE as binding orders,²² others stated that they were binding only in so far as the ROE did not contravene national or international law.²³ Some nations did not consider ROE to be “orders” at all by themselves, but merely guidelines or a code of conduct, unless they were incorporated into a (higher) official military order.²⁴

In spite of the divergences observed in the responses as a whole, those nations with a relevant level of experience with ROE, mostly due to a significant history of (recent) military operations and especially as part of a multinational force, were consistent in viewing ROE as binding military orders. This is significant, as disobeying such orders normally constitutes a

²¹ The questionnaire, the general report and the national reports were published in: International Society for Military Law and the Law of War, *Recueil*, XVII, Brussels, 2006.

²² For example: Australia, Denmark, the Netherlands, United States.

²³ For example: Germany, Norway.

²⁴ Most notably Belgium. This aspect was also addressed by the Belgian courts in the case of *Koralid Kalid v. Paracommando Soldier* concerning an incident involving a Belgian UNOSOM serviceman in 1993. As Gossiaux explains, however, the phrase “code of conduct” may have been an unfortunate choice of words and the status and role of (international) ROE is a bit more complex than that. See Gossiaux, C., “Les Règles d’Engagement: Norme Juridique Nouvelle?” in *Military Law and Law of War Review*, Vol. 40 (2001, Issue 1-2) pp. 161 – 207. The case itself is discussed in the Belgian national report in response to the 2006 questionnaire; see footnote 21.

(military) crime.²⁵ Some statutes, such as those of the United States, the United Kingdom and the Netherlands, differentiate between standing or general orders and other commands or orders, although violation of either one is punishable.²⁶ The Military Criminal Code of the Netherlands also differentiates between maximum sentences, based on a differentiation as regards the severity of the consequences of the violation of the (standing) order.²⁷

In those countries, including the specific examples above, that view ROE as (standing) orders and in which disobedience to such orders is punishable, ROE violations could be subject to prosecution and punishment as a crime *per se*, regardless of whether the actions committed might simultaneously be considered as (or satisfy the elements of) a different, separate crime. This may result in prosecution of the ROE crime by itself, or the ROE crime may be included as a (lesser) charge if multiple charges are brought against a defendant. This was also the approach taken by the Public Prosecutor's Office in the Netherlands in the aforementioned Eric O. case.

²⁵ See, for example: Article 28 of the Belgian Military Criminal Code (*Wet houdende het Militair Strafwetboek*); Articles 12 and 13 of Chapter 52 of the United Kingdom Armed Forces Act 2006; Articles 91 and 92 of the United States Uniform Code of Military Justice; and Articles 125 – 127 and 130 – 138 of the Military Criminal Code of the Netherlands (*Wetboek van Militair Strafrecht*).

²⁶ The differentiation is relevant due to differences between the authority to issue general or standing orders on the one hand, and 'other' orders on the other hand. The first category is usually reserved for certain specific categories of officers and/or reserved for certain specific kinds or categories of orders, whereas the latter category may normally be issued by any superior to any subordinate.

²⁷ It should be noted that the Military Criminal Code only applies if the disobedience to a (standing) order resulted in, as a minimum, danger to persons or property or a direct and immediate threat to the operational preparedness of (part of) the armed forces to carry out an actual (imminent) operation or exercise (i.e. not just theoretically). Mere disobedience to a (standing) order as such, not involving any danger, threat, damage, etc., falls under the Military Disciplinary Code and is dealt with by means of non-judicial punishment. Since it may be assumed, given the nature of ROE and the topics that they address, that ROE violations will always at least carry an inherent danger or threat to persons or property, the lesser category and the non-judicial system will not be discussed here.

Given the observations made in chapter 1 as regards the “law” element of ROE, including the required verification that the ROE are not more permissive than applicable law, the statement in some of the national reports submitted in response to the questionnaire that the ROE may not be more permissive than the (national or international) law appears at first sight to be superfluous or a self-evident statement. What is most likely referred to, however, is the observation that international ROE, that is ROE drafted and promulgated by an international commander or international organization, may not necessarily be in agreement with the national laws of the States participating in a multinational operation and may deviate from specific international law obligations of individual nations.²⁸ In such cases, as was already discussed previously, the nations in question can either reconsider participation in the operation in question or, less drastically, issue so-called “caveats”, or reservations, on specific ROE and exclude their application for their national contingents. Some nations opt for a third approach and issue national sets of ROE for their contingents participating in the operation, separate from (although possibly similar to) the ROE issued by the international commander or organization.²⁹

For those nations which do not issue their own national set of ROE, the question arises whether the international ROE can be considered (standing) orders in the context of the applicable national (military) criminal law system by themselves. In the Netherlands, for example, this is not the case, since the Military Criminal Code limits, by Article 75a, the requisite “superior – subordinate” relationship to members of the Netherlands armed forces.³⁰ Although not as clear in all cases, this

²⁸ The issue of differing obligations under international law in relation to multinational ROE can occur, for example, in relation to specific arms treaties, such as the conventions banning antipersonnel landmines and cluster weapons. See chapter 4, especially p. 240.

²⁹ For example, see the United States Army’s “Operational Law Handbook”, Chapter 5, section IV, and the Australian Defense Doctrine Publication ADDP 00.3, Chapter 1, paragraph 1.27. It should be noted that while this allows for a clear set of ROE for the national contingent in question, it does cause some complications as regards multinational unity of command and unity of force.

³⁰ Technically Article 75a sets forth the theoretical possibility for foreign military personnel to be appointed as superiors or as subordinates in the sense of

reservation to the national chain of command appears to apply in other nations as well.³¹ In such cases, some form of “translation” of the international ROE into a national (standing) order is required. This approach is used, inter alia, by Austria,³² Belgium,³³ and the Netherlands.³⁴ Given the nature and purpose of national reservations on the international ROE as discussed above, it can similarly be argued that any national caveat on the international ROE in any case serves as a national (standing) order in this context. Violations of the ROE in such approaches essentially becomes identical with violations of, or disobedience to, the national (standing) orders by which the international ROE were “translated” into the national legal system or were limited, through caveats, in their applicability to the national contingent in question.³⁵

the Military Criminal Code by special appointment. To the author’s knowledge, however, this method has never been applied. Vink makes a similar observation in footnote 12 in his article: Vink, A.F., “Grenzen aan geweldgebruik binnen de Rules of Engagement: de Tactical Directive,” in *Militair Rechtelijk Tijdschrift*, Vol. 103 – 2010, nr. 2, p. 89.

³¹ See, for example, the United States Manual for Courts Martial (2012 edition), p. IV-24 as regards Article 92 of the UCMJ, in conjunction with p. IV-18 as regards the superior – subordinate relationship.

³² National report in reply to the questionnaire, *op. cit.* note 21.

³³ National report in reply to the questionnaire, *op. cit.* note 21. See also the discussion of the Belgian parliamentary inquiry into Rwanda in Gossiaux, *op. cit.* note 24.

³⁴ The explanatory memorandum accompanying the introduction of the specific exculpatory provisions into the Military Criminal Code (as discussed below), explained that international ROE are “confirmed” by the Chief of Defense and promulgated in a national operations order. This approach “forms the link between the international and the national legal order and safeguards the extension of the legitimacy of the use of force on the basis of the Rules of Engagement into the legal system of the Netherlands” (translation by author). During that process, any applicable national caveats on the international ROE can also be implemented. Parliamentary document 31 487 (R1862) nr. 3, p. 6.

³⁵ It should be noted that, at least in the Netherlands, disobeying an order by a foreign superior which has not been so “translated” into the national chain of command can theoretically still lead to disciplinary action in the context of the perpetrator’s job status. While this is not a likely scenario, and has never been tested, the provision in Article 12j, paragraph 1, of the Military Civil Servant’s Act

3. ROE as standing orders under the military criminal law of the Netherlands: The Eric O. Case examined

Although some of the more significant criminal law cases related to ROE will be discussed in section IV, below, the Eric O. case mentioned above deserves a separate and closer examination at this point in the discussion because it bears direct relevance to understanding the role of ROE in the military criminal law of the Netherlands, both as an accusatory device (as discussed in the present section) and as an exculpatory device (as discussed in section III, below). In addition to the views of knowledgeable authors, this discussion of the Eric O. case is also based in part on the personal experiences of the present author.³⁶

Sergeant Major Eric O. of the Royal Netherlands Marine Corps was in command of the Quick Response Force (QRF) unit of the Marine detachment stationed in As-Samawah province of Iraq as part of the Stabilization Force in Iraq (SFIR) when on 27 December, 2003, the QRF was dispatched to the site of a roadside incident on main supply route "Jackson." At that location, a semi-trailer belonging to coalition forces had toppled, spilling its container onto the side of the road. The military personnel present at the scene were to be relieved by the QRF, which would stay on location to provide security during the salvage of the container (the semi-trailer was considered lost). Due to other operational circumstances, the QRF unit under the command of Eric O. consisted of only one rifle company squad (8 men) and two Patria armored vehicles, one of which was a medic unit (including medic personnel). Prior to the arrival of the QRF,

of 1931 requiring servicemen to carry out "to the best of their abilities" all duties and tasks assigned in the performance of the duties of the armed forces could be understood to include carrying out orders given by foreign superiors in the context of a multinational operation, provided such orders are not manifestly unlawful. Punishment could include dismissal or discharge from the armed forces, even though criminal prosecution is not possible in connection with this provision.

³⁶ The present author was, as the author of the soldier's cards under discussion in the case, called as a witness, as well as being called as an expert witness on the topic of ROE in general, both in the case in first instance and on appeal.

warning shots had been fired into the air by the on-scene military unit in order to keep looters away from the container.³⁷

Upon arriving at the scene, the QRF set up a perimeter to guard the scene. The situation was somewhat chaotic, as large numbers of on-lookers and potential looters were surrounding the accident site. Furthermore, a convoy of pre-fab units was intending to pass the scene but was partly blocked by the situation on the road. It was also known that a convoy of prisoners was scheduled to pass the incident location shortly. After the container had been recovered and placed on a replacement flatbed, the local people present at the scene began to move forward. According to some testimonies, this was because they believed that since the salvage work was finished, they were now at liberty to take parts from the abandoned semi-trailer. Regardless of the reasons for the crowd's movement, Sergeant Major O. testified that he was concerned that his unit was about to be overrun and that his men would become separated by the crowd. In order to discourage the crowd from coming any closer, he demonstratively cocked his rifle and, when that failed to have the desired effect, fired a warning shot into the air. When that also failed to discourage the crowd, he aimed deliberately at a point well forward and to the side of the leading edge of the crowd and fired a shot into the ground.³⁸ The crane operator on the scene testified that he saw a plume of sand or dirt fly up in a spot

³⁷ Testimony delivered during the trial by military personnel involved. Looting was a very common problem along the supply routes, although sometimes goods or vehicles considered irrecoverable were also deliberately yielded to the looters by coalition forces.

³⁸ Testimony by Eric O. during the trial. He also demonstrated his actions in the courtroom, showing how he had determined which spot on the ground was, in his estimation, a safe point of aim. As part of the many ancillary complexities of the case, it should be noted that O. was an experienced serviceman and had previously been decorated for previous deployments as a member of the antiterrorist special assistance unit of the Royal Netherlands Marine Corps. These issues clouded the public debate surrounding the case because, while they supported the arguments made by the defense that O. had not chosen his actions lightly or through inexperience, they were irrelevant to the question whether the force used was proportional and necessary under the given circumstances.

approximately a third of the way towards, and to the left of, the approaching crowd after the shot had been fired.

Within moments after the shot was fired, a civilian man in the crowd collapsed. Some moments later, the man was brought to the QRF and was observed to be seriously injured. Attempts by the QRF to administer first aid were rejected by the local persons present, and the man was taken away on a civilian pick-up vehicle driven by locals. It was later reported that the man had died in the hospital from a fatal gunshot wound to the back.³⁹ On 31 December, 2003, O. was arrested on the suspicion of murder or, alternatively, manslaughter. These charges were later reduced to intentional violation of a standing order (the “aide-memoire for commanders” and / or the “rules on the use of force” for Netherlands SFIR personnel), resulting in life-threatening danger to persons, or, alternatively, negligent homicide.⁴⁰

In the ensuing case, the counsel for the defense argued (*inter alia*) that the ROE and the derivative instruction cards were not standing orders in the sense of the law. Article 135 of the Military Criminal Code of the Netherlands defines a standing order (“*dienstvoorschrift*”) as a written

³⁹ Additional complications in the case concerned the possible discrepancies between the wound pattern and the facts of the case as well as between the wound pattern and the caliber of the rifle used by O.. The autopsy was performed by a local doctor and the body could not later be re-examined, as the body had already been buried in keeping with Islamic traditions and rites. These issues are relevant for understanding how complex this case was, but are not relevant to the subsequent discussion of the status of ROE as standing orders.

⁴⁰ In the Netherlands, as in many countries, in cases in which multiple criminal charges are possible, the charges are brought in a tiered order of descending severity. If the graver charge(s) cannot be proven or lead to conviction, the lesser charges are subsequently examined, until the suspect is either convicted of one of the charges brought by the Public Prosecutor’s Office or acquitted of all charges. The term “negligent homicide” was chosen by the present author as the closest approximation to the charge in question under Dutch law (“*dood door schuld*”), which consists of a reckless or a grossly negligent action of a nature to establish fault on the part of the perpetrator for the serious injury or death resulting from that action. The issue of “fault” and the relationship with *culpa*, *dolus* and the various forms of intent and knowledge are discussed below in section II.C. on *mens rea* and ROE crimes.

order of a general nature that addresses any topic related to military service and contains an order or a prohibition addressed to the serviceman⁴¹ to whom the general order applies. The defense argued that the ROE and the instruction cards only describe authorizations and that they are operational instructions rather than standing orders. In the view of the defense, the ROE and the instruction cards contained neither orders nor prohibitions and therefore did not meet the requirements set forth in Article 135.

The military chamber of the District Court at Arnhem did not agree. While the court ruled that the ROE themselves were indeed in a different category than the (derivative) instruction cards, it ruled that the cards in question were more than instructions and met all the requirements of Article 135.⁴² The Court then examined the facts in relation to the contents of the cards. Both cards stated that a verbal warning was required prior to firing “aimed shots”. The Public Prosecutor’s Office argued that since O. had aimed his rifle as part of firing the warning shot, the shot was to be considered an “aimed shot” and a verbal warning, which had not been given, would have been required. The Court, however, did not agree. It ruled that the phrase “aimed shot” as used in the cards referred to opening fire on a person. The warning procedure, including the verbal warning and the firing of warning shots, as described in the cards therefore was part of a different use of force concept than the type of warning shot which had actually been fired. The Court then stated that while the cards did not mention such an alternative type of warning shot, the cards referred back to the ROE and stated that in case of discrepancies, the ROE prevailed. It pointed out that the ROE did contain a provision, in Rule 151, which

⁴¹ The term “serviceman” is used throughout this study to indicate an individual member of the armed forces and refers equally to male and female military personnel. No gender bias is intended or should be inferred.

⁴² Decision of the District Court (*Rechtbank*) of Arnhem, Military Chamber, LJN: AR4029, 18 October, 2004, paragraph 4.1. All military cases are tried by the military court at Arnhem. Both the military chamber of the District Court and of the Court of Appeals (*Gerechtshof*) at Arnhem consist of three judges, one of whom is an active duty serviceman of the military legal service (in the District Court in the rank of Colonel or equivalent, in the Court of Appeals in the rank of Brigadier General or equivalent). The other two judges and the Public Prosecutor’s Office’s staff and officials are civilians. See also chapter 3, p. 119, footnote 84 on that page.

authorized warnings by any means if such warnings were necessary for the execution of the mission. Finally, the Court ruled that since the situation was one of potential danger to the unit, or at least in danger of impeding the execution of the mission, and since other attempts at resolving the situation had been ineffective, the warning shot met the requirements of necessity and proportionality. As regards the lesser charge, the Court ruled that since O. had aimed his rifle away from the crowd and, moreover, had applied a safety margin both in the distance and in the direction of fire in order to ensure that he would not hit anyone, he had not acted recklessly or negligently. The Court therefore acquitted O. of all charges.

The Public Prosecutor's Office appealed the decision of the Court. In the appeals case, the Court of Appeals reached the following conclusions, to the extent relevant for the present discussion. As regards the ROE, the Court of Appeals ruled that they met all the criteria stated in the law to be considered a standing order. Since they were an integral part of the Memorandum of Understanding between the United Kingdom, as lead nation, and the participating nations, which had been signed by the Minister of Defense of the Kingdom of the Netherlands, and moreover formed an integral part of the Operations Order no. 100 of the Netherlands Chief of Defense, they had been sufficiently incorporated into the legal order.⁴³ The Court of Appeals agreed with the District Court that the two derivative cards, the aide-memoire for commanders and the rules on the use of force, (also) met the requirements of Article 135 of the Military Criminal Code and were therefore (also) to be considered standing orders in the sense of the law. It then pointed out that the ROE were of a higher order, as being the source of the derivative cards, and that the aide-memoire referred back to the ROE. Since both the ROE and the instruction card addressed the servicemen in question, any use of force which was not authorized (nor prohibited) by the cards but which fell within the limits of the ROE could

⁴³ Ruling of the Court of Appeals of Arnhem, Military Chamber, LJN: AT4988, 4 May, 2005, paragraph b of the section "Legal Context" (Het juridisch kader). See the discussion *supra* notes 30 and 35 and accompanying text as regards the legal status of foreign orders in the Netherlands. See also the discussion *supra* notes 17 and 19 and accompanying text as regards the *lex certa* aspects addressed in this part of the ruling of the Court of Appeals.

not be considered a violation of standing orders since the higher orders (i.e. the ROE) authorized such use of force. As regards the requirements of necessity and proportionality, as well as regarding the issues of recklessness and negligence, the Court of Appeals followed a similar reasoning as previously followed by the District Court. Consequently, the Court of Appeals also acquitted O. of all charges.

The decision and ruling of the District Court and the Court of Appeals that ROE are standing orders in the sense of the Military Criminal Code⁴⁴ is a view not shared by some authors on the topic of military criminal law in the Netherlands, since the practice of “translating” international ROE into national standing orders as described in footnote 34 is a practice that was introduced after the Eric O. case in order to remove any (further) doubts as to whether the ROE are standing orders in the sense of the Military Criminal Code. Consequently, that practice was not available to the Courts as a basis for their ruling. Vink, for example, considers the ruling by the Court of Appeals on this issue as a “far-fetched construction” in his discussion on the legal status of orders issued by foreign authorities.⁴⁵ In his view, the law clearly states which authorities are authorized to issue standing orders and that foreign military personnel are not among them. Consequently, foreign orders cannot readily be considered standing orders in the sense of the military criminal law of the Netherlands. Knoops, who was also Eric O.’s lawyer, similarly disagrees with the Court of Appeals on this issue, although he does so based on the nature of ROE rather than their

⁴⁴ The District Court did not state clearly why or how it considered the ROE to have legal status under the criminal law of the Netherlands, other than to mention the reference to the ROE in the aide-memoire for commanders. From the decision as a whole, it can be argued that the District Court implicitly intended a line of reasoning similar to that followed by the Court of Appeals.

⁴⁵ Vink, A.F., “Blanketwet, Provinciaal geneeskundig gesticht Meerenberg en legaliteit,” in *Militair Rechtelijk Tijdschrift*, Vol. 103 – 2010, nr. 6, pp. 287 – 289. The article is part of a discussion which commenced with Vink’s article referred to *supra* note 30, to which a reply was given by Ducheine, P.A.L., “De status van aanwijzingen van buitenlandse commandanten bij de beoordeling van functioneel geweldgebruik,” in *Militair Rechtelijk Tijdschrift*, Vol. 103 – 2010, nr. 3, pp. 145 – 154.

international source.⁴⁶ Similar to the arguments made in the Eric O. case, he points out that ROE do not always contain orders or prohibitions as required by Article 135 of the Military Criminal Code. Moreover, he points out, illustrating his points with quotations from the British ROE compendium,⁴⁷ that ROE cannot by themselves guarantee the lawfulness of any action taken pursuant to the ROE. He concludes by observing that the status of ROE can therefore differ between directives, on the one hand, and orders or prohibitions, on the other hand, based on the specific nature and content of each ROE. Categorizing all ROE as standing orders runs counter to this observation, according to Knoops.

The discussion as to the legal nature of ROE in an accusatory role was already underway prior to the Eric O. case, however. In a seminar held by the Netherlands Military Law Society in 2003, Coolen addressed the issue of the legal status of ROE under the military criminal law system of the Netherlands.⁴⁸ In his analysis, he differentiates between ROE and the derivative instruction cards. The cards, he states, are not orders of a general nature but contain orders or prohibitions related to a specific operation. Consequently, such cards, including the aide-memoire for commanders and the rules on the use of force, cannot be standing orders in the sense of Article 135 of the Military Criminal Code. In so far as they are issued⁴⁹ by Netherlands armed forces superiors, the instruction cards, in the view of Coolen, can be considered (other) military orders or commands.⁵⁰

⁴⁶ Knoops, G.G.J., “De internationalisering van militair-strafrechtelijke aansprakelijkheden na Eric O.,” in *Militair Rechtelijk Tijdschrift*, Vol. 98 – 2005, nr. 9, pp. 317 – 334; see especially pp. 323 – 324.

⁴⁷ Joint Service Publication 398, referred to in footnote 21 of Knoops’ article, supra note 46. Unfortunately, the British document in question is classified and has not been released to the public and is not on file with the present author. See: <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080513/text/80513w0020.htm> (last accessed on 31 October, 2012), under “Armed Forces: Publications.”

⁴⁸ Coolen, G.L., “Geweldsinstructies vanuit strafrechtelijk oogpunt bezien,” in *Militair Rechtelijk Tijdschrift*, Vol. 96 – 2003, nr. 9, pp. 376 – 390.

⁴⁹ It is assumed that the “translation” procedure, supra note 34, would equally satisfy this criterion.

⁵⁰ Such commands are covered by Articles 125 – 134 of the Military Criminal Code. See also the discussion below in section III.C. as regards possible

From a viewpoint of legal clarity and certainty, it is perhaps unfortunate that the Eric O. case did not proceed to the level of the Supreme Court of the Netherlands, although it was no doubt a relief to the accused that he did not have to face an even longer legal battle. The ruling by the Court of Appeals at Arnhem that ROE and the derivative instruction cards are standing orders in the sense of Article 135 of the Military Criminal Code therefore has to stand as guiding case law as regards this issue. In any case, given the practice that has developed since this case in terms of “translating” all international ROE into standing orders within the Netherlands legal system, there no longer appear to be any grounds for arguing that ROE are not standing orders on the basis of their international source. As regards the arguments based on the contents and nature of ROE, two observations can be made. First, while it is true that ROE are normally specific to a given operation they are nonetheless applicable to all of the actions involving the use of force or actions which may be considered provocative undertaken at any time during that operation. It may be argued that this certainly makes them of a more general nature than, for example, a call to an artillery unit for fire support, an order by a platoon leader to open fire during a combat engagement, or a call to general quarters aboard a warship. Secondly, ROE are indeed normally phrased as authorizations, rarely phrased as prohibitions and never phrased as an affirmative⁵¹ command. This is due to the fact that the principles of necessity and proportionality must be applied in conjunction with the ROE and are completely dependent on the specific circumstances of the situation. Nevertheless, it is a common understanding and inherent in the ROE system that any use of force that exceeds the ROE is prohibited.⁵² The argument therefore appears valid that, based on the observations made above, ROE

exculpatory effects of superior orders in the (military) criminal law of the Netherlands.

⁵¹ The word “affirmative” is used here in the linguistic sense as meaning “non-negative”, that is the opposite of a prohibition or negation. To put it more simply, ROE never state that force must be used or that a specific action must be taken, but only that the force or action is authorized.

⁵² This observation was similarly made by the Court of Appeals in the Eric O. case.

meet the requirements for being standing orders in the sense of Article 135 of the Military Criminal Code of the Netherlands, at least in terms of an accusatory role.

C. *Mens rea* and ROE crimes

One of the most divisive and mutually confusing aspects of criminal law systems around the world is the aspect of the elements that constitute the culpability of the perpetrator apart from the actual physical acts he or she committed. As became very apparent during the negotiations on the elements of crime for the International Criminal Court, the concept of *mens rea*, or the “mental element” establishing culpability, consists of terminology and concepts which not only vary between nations, but also frequently use vaguely similar wording with different legal interpretation and application.⁵³ Given this legal complexity, it should be pointed out at the outset of this section that the following is not intended to definitively resolve these differences, but merely to establish how the aspects of knowledge and attributable fault⁵⁴ as parts of the cognitive or mental element of criminal culpability relate to violations of the ROE and the role such ROE violations can play in the prosecution of military crimes.

⁵³ The present author was a member of the Netherlands delegation at the negotiations on the elements of crime for the International Criminal Court. The topic of *mens rea* became particularly relevant in the debates on the relationship between certain elements requiring knowledge or intent on the part of the perpetrator and the general articles on *mens rea* in the Statute itself (Article 30 especially, but also Articles 31 and 32 were relevant in this context). See also Triffterer, O. [ed.], *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, 1999, at p. 531 (paragraph 12).

⁵⁴ This term already introduces the first aspect of potential discord, as “fault” can have very specific and very different meanings in the different legal systems (both in terms of different national systems and in terms of civil (torts) law versus criminal law). What is meant here is the general concept of *nulla poena sine culpa* and assigning “blame” (for lack of a better, non-controversial term) to the perpetrator for the acts committed, encompassing both the various forms of *culpa* and the various forms of *dolus*. It is also readily admitted that in some cases, knowledge is subsumed in the specific form of intent or culpability (in the widest sense of that word) and need not always be a specific, separate aspect.

The Model Penal Code developed by the American Law Institute states in section 2.02, paragraph (1), that “a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.”⁵⁵ In essence this requires an examination of each material element and establishing a connection between the material acts and the state of mind of the perpetrator. In this approach, culpability is the result of the sum of the physical (elements of the) act committed and the (interconnected) cognitive aspect applicable to the perpetrator at the time. Culpability as a separate entity or concept, distinct from the elements set forth in the relevant criminal statute, does not exist in this system.⁵⁶ In the Netherlands, on the other hand, *mens rea* (or its equivalent concept) does exist as a separate entity or concept. Consequently, whether the perpetrator acted culpably needs to be examined separately, to the extent that the statutory definition of the offence does not require proof of intent or negligence.⁵⁷ Nonetheless,

⁵⁵ Model Penal Code, accessible at http://www1.law.umkc.edu/suni/CrimLaw/MPC_Provisions/model_penal_code_default_rules.htm (last accessed on 8 April, 2016).

⁵⁶ Van Sliedregt, E., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, The Hague, 2003, p. 233. It should be noted, however, that the mental element need not be specified in each specific statute provision but may apply as a general overriding principle to all of the statutes. See, for example, Article 15 of the New York Penal Law; Title 76, Chapter 2, section 102 of the Utah Criminal Code; and Section 20 of the California Penal Code. The requirement of a mental element, such as knowledge and/or intent may also derive from the nature of the crime itself (whether or not in conjunction with an overarching provision such as those in the examples just given). Exceptions to the requirement of a mental element in the criminal law system of the United States are so-called “strict liability” crimes, including various traffic violations and more significant crimes, including statutory rape and selling alcohol or (other) controlled substances to minors. Where strict liability is intended, it must be so reflected in the statutes, although debate is possible as to what is reflected and how clearly it is reflected. See Brown, Darryl K., “Criminal Law Reform and the Persistence of Strict Liability,” in *Duke Law Journal*, Vol. 62, 2012, pp. 285 – 338.

⁵⁷ Noyon, T.J., [et al.], *Het Wetboek van Strafrecht*, Deventer, 7th ed., “Inleiding” pp. 3 – 5. The Supreme Court of the Netherlands ruled in 1916 that even if the statutes themselves do not specifically require a certain form of culpability (e.g. intent, recklessness, etc.), the crime in question can only be

the notion that culpability requires both a physical act and a cognitive or mental element related to that act is similarly inherent in this approach, whether on the basis of specific statutes⁵⁸ or as a general, overarching concept.

The mental element consists of knowledge and some form of culpability, ranging from a specific intent to cause a certain outcome⁵⁹ to acting without the due diligence and care expected from a reasonable person.⁶⁰ Lack of knowledge can lead to either a mistake of fact, if the person was reasonably unaware⁶¹ of the relevant facts in such a way as to preclude culpability, or to a mistake of law. While the former can, under certain circumstances and in certain jurisdictions, lead to a successful defense, the latter normally does not.⁶² Whether ROE violations can give

considered to have been committed if some general culpability could be established on the part of the perpetrator. (HR 14-02-1916, NJ 1916, 681). Strict liability, according to this ruling, can only be applied if the statute in question specifically indicates such applicability.

⁵⁸ See, for example, Article 287 of the Criminal Code of the Netherlands, which requires intent as an element for the crime of (voluntary) manslaughter or homicide other than murder.

⁵⁹ For example, while “murder” generally requires the intent to kill the victim, “genocide” requires that the acts be committed with the specific intent to “destroy, in whole or in part” the national, ethnic, racial or religious group, as such, to which the victim belonged. See the elements of crime for Article 6, under (a), of the Statute of the International Criminal Court.

⁶⁰ Noyon, *op. cit.* note 57, “Culpa” pp. 13 – 25. For a discussion of the complexities of the different terminology and legal concepts relating to *culpa* and *dolus* and their various forms (and combinations) in different legal systems, see Martinez, Jenny S., “Understanding *Mens Rea* in Command Responsibility,” in *Journal of International Criminal Justice*, 5 (2007), pp. 638 – 664, esp. pp. 644 – 647.

⁶¹ Voluntary and irrational blissful ignorance is not readily accepted as a defense. See, for examples of the “reasonable” requirement, the Texas Penal Code, Section 8.02. As a general rule, mistake of fact only serves as a defense if it negates the requisite mental element (or *mens rea*) for the crime in question. See Article 32, paragraph 1, of the Statute of the International Criminal Court. Triffterer argues that this makes Article 32, paragraph 1, somewhat superfluous in light of Article 30 of the Statute. Triffterer, *op. cit.* note 53 at p. 561 (paragraph 11).

⁶² The principle of *ignorantia juris non excusat*, or “ignorance of the law is no excuse,” is based on the premise that it is everyone’s duty to know the law and to

rise to a defense of mistake of fact depends greatly on both the question as to what we mean by “ROE” and on the manner in which the ROE were disseminated and instructed in the operation in question. As was already mentioned previously, the term “ROE” normally refers to the main document containing authorizations on the use of force or actions which may be construed as provocative, but is sometimes also used to refer to the derivative instruction cards issued to the personnel in question. If the term is used in the latter sense, a defense of mistake of fact is more likely to refer to facts other than the (factual) contents of those cards, given that the cards are issued to each individual serviceman, are written in unambiguous and clear language and are normally also instructed as part of the deployment process.⁶³ In other words, while a serviceman might be mistaken as to whether the person he is shooting at is a threat sufficient to warrant the use of deadly force, such as by interpreting a burst of gunfire while, at the same time, an unmarked civilian vehicle drives past a checkpoint and directly at him at high speed, as being a direct attack,⁶⁴ it is not reasonably convincing

act in accordance with the law. Complexities arise, however, when the mistake may be interpreted either as a mistake of fact or as a mistake of law. For a discussion of mistake of fact and mistake of law in relationship to the function of criminal law, see Garvey, Stephen P., “When Should a Mistake of Fact Excuse?” in *Texas Tech Law Review*, Vol. 42, 2009, pp. 359 – 382. As regards one of the possible exceptions to this maxim in the context of international criminal law, see Article 32, paragraph 2, and Article 33 of the Statute of the International Criminal Court. Also in regard to superior orders, but in this context more relevantly discussing the role of legal advice as a basis for a mistake of law, see Hobel, Mark W.S., “‘So Vast and Area of Legal Irresponsibility’? The Superior Orders Defense and Good Faith Reliance on Advice of Counsel,” in *Columbia Law Review*, Vol. III, 2001, pp. 574 – 623 (esp. at pp. 613 – 616). The topic of superior orders will be discussed below, in sections III.B and III.C.

⁶³ For United States servicemen, the question whether ROE are “general orders or regulations” or fall into the category of “other order” is also relevant, as lack of knowledge of the former is not a defense. See also footnote 68 below.

⁶⁴ The example given concerns the facts in the *Jaloud* case before the European Court of Human Rights. See chapter 5, pp. 290 – 292. As regards the review of the incident by the Public Prosecutor’s Office in the Netherlands, the incident was ruled as a case of “putative self-defense,” meaning that while the serviceman in question had made a mistake of fact, the mistake was considered reasonable under

if he claims to be unaware of the rules on opening fire set forth in his soldier's card.⁶⁵

In order to evaluate a claim of ignorance of the higher, actual ROE themselves, the question as to whether the serviceman was at a level of command to which the ROE were disseminated becomes especially relevant. Violation of the ROE without concurrent violation of the derivative cards seems unlikely at first, as the derivative cards by doctrine cannot be more permissive than the ROE. In the theoretical event, however, that a serviceman were to commit an act not described in his soldier's card and which nonetheless violated the ROE, a mistake of fact defense might be available to him if he was at a level of command at which the ROE were not disseminated or instructed.⁶⁶ Servicemen at command levels at which the ROE are disseminated would not have any more recourse to such a defense than would be the case in regards to a violation of the derivative instruction cards.⁶⁷

In addition to the knowledge aspect, culpability (whether general or statute-specific) requires either intent or one of the lesser forms of a culpable mental state. For the prosecution of ROE crimes as a separate criminal act, this aspect may not be relevant in systems requiring a mental element for each of the elements of crime, if the crime of disobeying superior (standing) orders does not specify a *mens rea* component.⁶⁸ The

the circumstances and the use of force in self-defense was considered reasonable and proportional on the basis of his – mistaken – interpretation of the situation.

⁶⁵ Being unaware of the applicable rules could be construed as a mistake of law, which will be discussed below in section III.A.

⁶⁶ One possible example of such a situation would be a prohibition in the ROE against holding exercises in the presence of opposing forces (a ROE sometimes included to prevent provocation and concomitant escalation of tensions in the area). Such a ROE would not normally be included in a soldier's card, as the organization of such exercises is not generally an activity undertaken at the individual soldier level.

⁶⁷ The reverse situation, that is ROE authorizing actions not expressly authorized in the cards and thereby having an exculpatory effect, is a possibility, as was shown in the Eric O. case discussed above.

⁶⁸ For example, the statutes referred to *supra* note 25 in the United Kingdom and the United States do not contain any reference to "intentionally", "knowingly" or "recklessly." As regards the Uniform Code of Military Justice in the United

(concomitant) violation of ROE may nonetheless be relevant for evaluating the culpability component of (other) crimes resulting from the ROE violation. In the absence of a (successful) mistake of fact defense as regards (violation of) the ROE or the derivative cards, the nature and manner of dissemination and instruction regarding the ROE carry a probative value.⁶⁹ In the case of ROE crimes this observation is self-evident: where it can be proven that the ROE were known to the perpetrator, that would appear to be *prima facie* evidence that the perpetrator at least knowingly committing that ROE violation. But that probative effect may also apply to other crimes which may have resulted from that ROE violation, depending on the level of culpability required.

The “strongest” level of culpability provides little source for dissent between legal systems. Specific intent (*dolus specialis*), such as needs to be proven for convicting the crime of genocide, is a rare requirement and most usually associated with specific crimes under international criminal law.⁷⁰

States, the 2012 edition of the Manual for Courts Martial sets forth the elements of crime for the various criminal acts contained in the UCMJ. For Article 92 (Failure to obey order or regulation), the elements, in so far as relevant here, only contain a knowledge requirement for the crime of “Failure to obey other lawful command” but no intent (or lesser form thereof) requirement. For the crime of “Violation of or failure to obey a lawful general order or regulation,” knowledge is not even a specific requirement. The explanation on this part states “[k]nowledge of a general order or regulation need not be alleged or proved, as knowledge is not an element of this offense and a lack of knowledge does not constitute a defense.” The 2012 MCM is available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf> (last accessed on 8 April, 2016). This approach would also appear logical, since criminalizing the *actus reus* referred to in the statutes relating to disobeying orders is indelibly linked to the maintenance of good order and discipline within the armed forces, while only rarely will the intent of the perpetrator be aimed at the actual disobedience to the order but rather be aimed at whatever goal could only be reached by disobeying the order.

⁶⁹ Although arguing the case for an exculpatory effect for ROE, Knoops likewise points to the role ROE can play in determining culpability. Knoops, G.G.J., *The Prosecution and Defense of Peacekeepers under International Criminal Law*, Ardsley, New York, 2004, p. 108.

⁷⁰ While it goes without saying that genocide may (or should) be punishable under national criminal laws as well, what is meant here is that the source of this part of criminal law is vested in international (criminal) law.

Since the ROE would obviously not (need to) contain a prohibition against committing genocide, ROE violations can add very little, if any, probative value in the prosecution of such crimes beyond, perhaps, providing evidence of knowingly committing an act of violence. Proof of the requisite specific intent would, however, need considerable additional evidence.

The next step down the scale already begins to provide some difficulties, at least in terminology, between different legal systems. Intent, in which the perpetrator knew what the (logical) outcome of his actions would be and intended that outcome, which might loosely be translated as *dolus directus*, requires both knowledge of the wrongfulness of the actions and intent on achieving the (logical) outcome of those actions. For crimes requiring a *mens rea* of (true) intent, ROE violations can add probative value in any case to the aspect of knowledge of the wrongfulness of the actions. Proving the intent on achieving the specific outcome of those actions may be aided by a concomitant ROE violation, depending on the nature of the crime and the contents of the ROE in question. If the elements of the crime in question require proof of premeditation,⁷¹ then actions which constitute knowing violations of the ROE may lend evidence of such premeditation. An example would be violating ROE restricting the carrying of weapons in a certain readiness state (i.e., whether the weapons may be loaded and whether the weapons must be carried with the firing selector or safety catch on “safe” or not).⁷²

Below intent as described in the previous paragraph, matters get increasingly complicated between legal systems. Where the perpetrator’s intent was not aimed at the (actual) outcome of his actions but the (actual) outcome was practically certain and the perpetrator willingly carried out his

⁷¹ Take for example Article 289 of the Criminal Code of the Netherlands, which requires premeditation for the crime of murder (as separate from the crime of manslaughter or “other” homicide referred to in Article 287, as referred to *supra* note 58).

⁷² While in the experience of the author ROE only rarely prescribe weapon (readiness) states, such rules can be found in ROE for United Nations operations and certain specific ROE cards for guard duties or, in the Caribbean parts of The Kingdom of the Netherlands, for certain deployments in the context of (emergency) military assistance to civilian authorities.

actions anyway, the perpetrator can be said to have acted knowingly.⁷³ This level of culpability may be loosely, with all attending awareness of the various differences as referred to in the introduction to this section, be translated as *dolus indirectus*. For the purposes of the probative value of ROE violations, *dolus indirectus* does not differ greatly from *dolus directus* except that the existence of specific ROE aimed at preventing the actual outcome may, if those ROE were violated, serve to prove the knowledge and willingness on the part of the perpetrator to accept the actual outcome.

Closely related to *dolus indirectus* is the concept of recklessness or, in the continued attempt at finding common ground between legal systems, the general notion of *dolus eventualis*. In this case, the perpetrator was not practically certain that the undesired outcome would occur as a consequence of his intended actions (or his actions aimed at a different intended outcome), but, in the words of the Model Penal Code, “consciously disregards a substantial and unjustifiable risk” to the extent of a “gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”⁷⁴ In terms of the probative value of ROE violations, it would appear that the probative effect described above for *dolus indirectus* would be almost identical for *dolus eventualis*, or only somewhat stronger in this case.

The step from “knew” or “consciously disregarding a substantial risk” to a situation in which the perpetrator “should have known” introduces the concept of the “reasonable person,” in that, as also set forth in the Model Penal Code in the definition of acting negligently,⁷⁵ the determination of “should have known” is made on the basis of comparing the perpetrator’s (apparent or alleged) knowledge with that of a reasonable person and comparing the perpetrator’s actions with “the standard of care” that such a

⁷³ The Model Penal Code (MPC), *supra*, note 55, contains a definition of “knowingly” in section 2.02 under (b). The principal difference between acting “knowingly” and acting “recklessly” (as described in the MPC in section 2.02 under (c)) is the level of certainty that the (undesired but actually occurring) outcome will occur.

⁷⁴ MPC, section 2.02 under (c).

⁷⁵ MPC, section 2.02 under (d).

reasonable person would have observed under the given circumstances.⁷⁶ Two aspects are relevant to the discussion at hand. First, in the attempts at

⁷⁶ It may be noted that a comparison between the United States legal concepts of acting knowingly, acting recklessly and acting negligently (and the concepts of *dolus indirectus* and *dolus eventualis* presented here as close equivalents for the first two concepts) on the one hand and the forms of intent in the criminal law system of the Netherlands yields a confusing disconnect in both terminology and conceptual approach. Where the perpetrator knew the (unintended) outcome would occur and acted willingly regardless, the fact that the (ultimate) intent was aimed at a different outcome is irrelevant in the Netherlands for nonetheless establishing (true) intent on the part of the perpetrator as regards the actual (unintended) outcome. Noyon, *op. cit.* note 57, “Opzet” p. 6. Where the outcome was not known or certain but nonetheless quite probable under the circumstances (a “considerable” chance of occurrence) and the perpetrator knowingly and willingly accepted that his actions would, in the normal course of events, lead to that outcome, the perpetrator is said to have acted with “conditional intent” (“voorwaardelijk opzet”), which carries a weight essentially equivalent to “normal” intent but below “premeditated” intent. Noyon, *op. cit.* note 57, “Opzet” pp. 6 – 32. See also chapter 3, p. 119, footnote 83 on that page. The determination of whether the chance was “considerable” can be approached from either a quantitative (statistical) approach, or from a qualitative (ethical unacceptability of the risk) approach, although the Supreme Court of the Netherlands appears to favor the former. See, for an extensive analysis of the concept of “voorwaardelijk opzet,” De Jong, F., “Onbeschermde Seks: Op de Grens Tussen Opzet en Onachtzaamheid,” in *Delikt en Delinkwent*, Vol. 33 (2003), nr. 8, pp. 830 – 849. The concept originates from case law involving serious injury or death resulting from traffic violations, but is now also accepted and applicable in other criminal cases. Examples of its application include Supreme Court of the Netherlands cases such as Hoge Raad 5 December 2006 (LJN: AZ1668, NJ 2006, 663) involving a person who, in an attempt to evade the police, knowingly and willingly drove onto a highway the wrong way and into oncoming traffic; but also a series of cases involving knowingly and willingly engaging in unprotected sex by a HIV-positive perpetrator who did not warn the other persons that he was HIV-positive. These cases play a central role in the discussion of “conditional intent” in De Jong, F., *op. cit.* in this note and are also discussed in the explanation of “conditional intent” in Noyon, *op. cit.* note 57, “Opzet”, pp. 20 – 30. The “knowingly” aspect in the concept of “conditional intent” is of crucial importance, as “should have known” or “reasonably could have foreseen” is not sufficient to establish (conditional) intent and “downgrades” the *mens rea* of the perpetrator into the realms of *culpa* (albeit *culpa lata*, see note 77 below); Hoge Raad 15-10-1996 (NJ1997, 199). The extent to which “should have known” differs from “considerable chance” and “the normal course of events” is a subject of considerable interest to academic writers in the Netherlands but falls outside the

translating conceptual terminology, this step marks a conceptual step from *dolus* to *culpa* in the form of *culpa lata*⁷⁷ and thereby a step from requiring purposeful action intending a certain outcome to not taking the due care or applying the due diligence expected from the person in question. The second aspect, deriving from the first aspect just mentioned, is that the expectations regarding a military perpetrator and the definition of what a “reasonable” person is in that context may differ from the expectations and definitions normally applicable in the context of (civilian) criminal law. The level of training, the nature of military duties in general (including the inherent possibility of the use of deadly force) and the specific instructions or training received prior to being assigned to the tasks at hand or to being deployed all may be taken into consideration when determining the culpability of the military suspect of a (military) crime.⁷⁸ The violation of

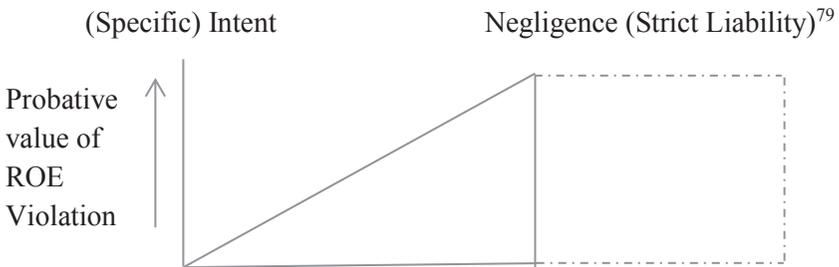
scope of this chapter as it is not salient to the role ROE violations play in the context of criminal law.

⁷⁷ Translating (criminal) negligence as *culpa lata* carries some risk, as it may be argued that *culpa lata* carries a more significant level of carelessness than would be required to prove that a person acted without the due care a reasonable person would have observed. On the other hand, *culpa levis* would appear to be too light a form of negligence to still fall within the realm of criminal culpability and straddles the line between the *culpa* concept as used in criminal law and that used in torts law.

⁷⁸ In the Netherlands, this concept is referred to by the German word *Garantenstellung* and applies outside the military context as well. For example, the Supreme Court of the Netherlands convicted a nurse of negligent homicide (“*dood door schuld*”) in its ruling of 19 February, 1963, for using the wrong medication. The special role medical personnel play in society and the level of trust that is concomitant on that role were important factors in the ruling; Hoge Raad 19-02-1963, NJ 1963, 512. In its ruling of 25 October, 2012, the District Court of ‘s-Hertogenbosch convicted a professional truck driver of culpable causation of a traffic accident (with resulting serious injury to another party), in which the profession and experience of the driver were distinct elements in proving culpability; Rechtbank ‘s-Hertogenbosch 25-10-2012, LJN BY3411. For an example of the role military training and expertise can play in this context, see *Bici and Bici v Ministry of Defense*, 7 April 2004, EWHC 786 (QB) (Case no. LS 290157). For a discussion of the four standards on which “reasonable” can be based (i.e., the objective standard, the subjective standard, the balanced standard which Sliedregt (among others) refers to as “the MPC norm” and the standard relevant to this part of the discussion, in which personal or person-specific characteristics take

ROE relevant to the crime committed (or as a separate crime) in combination with the promulgation of the ROE and the level of training in the ROE will most likely have a significant probative value in such cases and lend considerable weight to the estimation that the suspect should have known the wrongfulness or potential negative outcome of his actions.

In summary, then, while the level to which intent is relevant in prosecuting a ROE crime as a separate criminal act will depend on the role of *mens rea* in the applicable criminal statutes relating to disobeying (standing) orders, knowledge as an element of *mens rea* and a concomitant violation of ROE will have a far more significant interaction that extends beyond the prosecution of ROE crimes themselves and may have a probative value that can increase to significant levels depending on the crime in question and the type of *mens rea* required. A schematic view of this observation would then appear as follows.



D. Prosecuting “ROE crimes”?

Given the observations above on the accusatory role of ROE under criminal law, the question may be asked whether prosecuting ROE crimes as a separate criminal act is expedient or warrants reconsideration. Two aspects

on more significance in determining whether the actor could be said to have acted reasonably under the given circumstances, thus opening the connection with the concept of *Garantenstellung*) see Sliedregt, *supra* note 56, pp. 234 – 238.

⁷⁹ As *mens rea* is not relevant for crimes based on the strict liability approach, the graph is extended using dotted lines. Strict liability was nonetheless included, as ROE violations have a self-evident probative value for establishing that the *actus reus* was committed in the case of ROE crimes based on strict liability.

warrant discussion in examining this question. First, a distinction must be made between cases in which the prosecution can choose between the charges to be brought against a suspect (of which at least one is a ROE crime) and cases in which the only charge possible⁸⁰ is the ROE crime itself. Second, human rights requirements may render it necessary to at least carry out a criminal investigation if the case falls within the reach of the positive obligations derived from Article 2 of the European Convention of Human Rights. While this does not, of course, require prosecution in all cases, the investigation requirement may be of influence in how ROE crimes are perceived.

One of the most outspoken opinions against prosecuting ROE crimes is voiced by Wolusky, who, on the basis of a number of court cases, argues that the prosecution of ROE violations “is unprofitable, unnecessary, and improper.”⁸¹ In support of that argument, he points to the purpose and role of ROE, the effect of such prosecutions on morale and the risk that prosecutions will lead to strict interpretation of the ROE which will lead in turn to a loss of flexibility in carrying out military operations. Instead, court cases should focus on the individual criminal liability of the suspect and on the facts of the case itself, rather than focus on the ROE, so Wolusky argues.⁸² Coolen, on the other hand, argues in favor of prosecuting ROE crimes and states that in the choice between prosecuting a crime of violence and a concurrent ROE crime, he advocates always choosing the latter.⁸³ He supports his argument with a reference to the Clegg case⁸⁴ and points out

⁸⁰ “Possible” can refer to the actual situation, that is the question whether more than one crime actually took place, and to the ability to prove the (other) crimes which may have been committed concurrently with the ROE crime.

⁸¹ Wolusky, G.A., “Combat Crime: Rules of Engagement in Military Courts-Martial,” in *Military Law and Law of War Review*, 1999, p. 105.

⁸² *Ibid.*, pp. 105 – 106 and in discussing the various court cases mentioned in the article. It should be noted that Wolusky is similarly clear in his views that ROE cannot have (absolute) exculpatory effect by themselves either, stating that “adherence to the ROE does not confer immunity.”

⁸³ Coolen, *op. cit.* note 48, p. 384.

⁸⁴ *R. v. Clegg* [1995] 1 AC 482. The case concerned a British soldier who fired on a vehicle in Northern Ireland, killing the driver and a female occupant. The first three shots, which killed the driver of the vehicle, were considered to have been

that if Clegg had been convicted of violating his orders, his sentence would have been more proportionate to the circumstances surrounding the case.⁸⁵ Finally, Jörg points out that the Clegg case is more an argument against minimum sentences than about the choice between prosecuting ROE crimes and prosecuting (concurrent) other crimes and argues that prosecuting ROE crimes can in some cases lead to a disproportionate discrepancy in possible sentences when compared to prosecuting the concurrent violence crime.⁸⁶ Unfortunately, both the arguments by Coolen and by Jörg are based on sentencing effects following from the choice of the charge to be prosecuted, rather than on the question of prosecuting ROE crimes in principle.⁸⁷

The question of which crime to prosecute in the event that a crime of violence occurred concurrently with (or as a result of) a violation of the ROE also played a significant role in the discussions surrounding the Eric O. case discussed above. The initial principal charges of murder and manslaughter resulted in strong reactions in the media and from parliament.⁸⁸ As was stated above, the charges were later changed to

fired in self-defense, as the vehicle had been approaching him (and having ignored a stop sign). The fourth shot, which killed the female passenger, was fired after the vehicle had already passed and was ruled as murder. Clegg was sentenced in 1993 to a life sentence, based on the sentencing rules for such a crime in the United Kingdom, but was released in July of 1995. In the case in appeal(s), forensic and other evidence led to different views on when the various bullets had been fired and at which part of the car they had been fired. At a retrial in 1999 the murder conviction was cleared and in appeal in 2000 the final lesser conviction of “attempting to wound” was also overturned.

⁸⁵ Coolen, *op. cit.* note 48, p. 384.

⁸⁶ Jörg, N., “Een opmerking over de reikwijdte van het beroep op ambtelijk bevel en een opmerking over de delictskeuze van de officier van justitie, in *militaribus*,” in *Militair Rechtelijk Tijdschrift*, 2003, Vol. 96 – 2003, nr. 9, pp. 390 – 392 at p. 392.

⁸⁷ The effect on sentencing may be a deciding factor in relation to the impact the crime(s) in question had on society as well as in relation to other aspects of the case, including the nature of the operation in question. As regards the latter, Wolusky points to the Banuelos case (discussed below) and the law applicable to military personnel serving in (support of) a law enforcement capacity. Wolusky, *op. cit.* note 81, p. 104.

⁸⁸ “Kamer: OM blunderde met militair,” *Volkskrant*, 8 January 2004. “Onvrede om arrestatie marinier,” *Trouw*, 5 January 2004. “Militair in Irak mag

negligent homicide and disobeying (standing) orders resulting in life-threatening danger to others. The continued prosecution on the basis of these two charges was perceived by some⁸⁹ as a sign that the public prosecutor's office was determined to seek a conviction in the case. Leaving aside the extraneous factors, especially the (criticism of the) public handling of the case by the head of the Public Prosecutor's Office, it may be questioned whether prosecuting the charge of disobeying (standing) orders was merely an indication of persistence or tenacity in seeking a conviction, or whether it was actually a wise choice by putting the case in the proper military context.⁹⁰

Obedience to orders is a principal ingredient in maintaining military discipline.⁹¹ Given the role of the armed forces and the concomitant use of armed force, as well as the inherent risks involved in the use of armed force, it may be argued that disobedience to orders related to the use of force is, in both the military context and in a democratic society, a matter of

wel schieten,” *Volkskrant*, 27 February 2004. “Verdenking marinier onbegrijpelijk,” *RTL Nieuws*, 21 January 2004. It should be noted that at least some of the criticism leveled at the Public Prosecutor's Office at the time, especially from members of parliament, was related to the press statements and public appearances surrounding the case by the head of that office.

⁸⁹ Ibid. The Court of Appeals at Arnhem also ruled that the public prosecutor's office had pursued the case with “a certain level of persistence” in its ruling on the admissibility of the case and more extensively in the *obiter dicta* at the end of the decision (translation by author).

⁹⁰ The arguments presented here are intended solely as views on the matter of choosing between possible charges in a military criminal case and are not intended in any way as opinions (with the benefit of hindsight) on whether prosecuting the Eric O. case was expedient in the light of the information and evidence available at the time.

⁹¹ This observation follows *inter alia* from the fact that disobedience to (lawful) orders is considered a criminal act. See also Renault, C., “The Impact of Military Disciplinary Sanctions on Compliance with International Humanitarian Law,” in *International Review of the Red Cross*, Vol. 90, no. 870, June 2008, pp. 319 – 326, in which Renault states “The main aim of disciplinary law is to give the hierarchical principle its effectiveness, by making it possible to punish behaviour that impedes the smooth running of the service. It is primarily a means of ensuring obedience to superiors [...]” (p. 320). The role of superior orders as a defense in criminal cases is discussed below in section III.

sufficient severity to warrant investigation and, where sufficient grounds to do so exist, criminal prosecution. The specific military nature of the crime of disobedience to (standing) orders is, in that approach, entirely appropriate as a grounds for prosecuting, when such prosecution is expedient, acts of violence by military personnel. Moreover, in cases in which the alternative option, which is to focus prosecution (exclusively) on the concomitant “non-military” crime, leads to complications related to proving the requisite *mens rea*, prosecuting the ROE crime may be the only option available to the prosecution.

It may be argued that when the “non-military” crime cannot be proven or is unlikely to lead to successful conviction, the case may not have sufficient severity to warrant (further) prosecution. In a non-military setting, after all, the case would likely not be pursued at that point and the charges against a civilian suspect dropped. Why, then, should the case proceed against a military suspect? Apart from the observations given above on the specific role of the crime of disobeying orders in the context of military discipline, the use of (deadly) force by government authorities, which obviously includes the armed forces, can be viewed as a matter of particular concern from a human rights perspective and that proper investigation of such use of force is an inherent component of the protection of the right to life.⁹² Given the extraterritorial applicability of human rights instruments, there is additionally a legal obligation to carry out an effective and impartial investigation of the use of force if such use of force resulted in a threat to life or to the death of individuals.⁹³ While it is self-evident that a duty to investigate is not synonymous with a duty to prosecute, it may be considered equally self-evident that an effective investigation into the military use of force will have to take into consideration the ROE applicable to the operation or tasks in question.⁹⁴ Should such an investigation give rise to probable cause regarding a ROE violation, the determination whether

⁹² See, *inter alia*, ECtHR, *McCann and others v. United Kingdom*, application 18984/91, at para. 161.

⁹³ See chapter 5, pp. 269 – 295 on the extraterritorial applicability of IHL.

⁹⁴ As was done by the European Court of Human Rights in the *McCann* case, *supra* note 92, at para. 15 and 16.

to prosecute that violation, in addition to other possible concomitant crimes or in isolation, will then have to be made on the basis of the factors discussed above.

In conclusion, then, the accusatory role of ROE can be said to be twofold. First, “ROE crimes” are not a separate, unique type of crime but are a specific manifestation of the (military) crime of violating (standing) orders. Prosecuting such violations should therefore be a decision no more or less problematic or controversial than deciding whether to prosecute any other such violation of (standing) orders. Second, ROE violations may have relevant or even significant probative value for the prosecution of (concurrent) other crimes in connection with, at least, the knowledge component of *mens rea*. Due to the differences in various jurisdictions between the *mens rea* requirements for the crime of disobeying orders and those for other crimes, ROE violations may in some cases be the only possible option for prosecution. The expediency of pursuing such prosecution will have to be determined on the basis of establishing the impact of the criminal acts concerned on either the maintenance of military discipline and order or on society as a whole (or both), also taking into consideration sentencing consequences when being able to choose between criminal charges. The investigation of ROE violations, finally, may in some cases be mandatory and inevitable, in view of the extraterritorial applicability of human rights instruments.

III. Exculpatory role of ROE

A. ROE as justifications or excuses in criminal law in general

Following the discussion above regarding the incriminatory role of ROE, we now turn to the opposite side of the criminal process and examine the exculpatory role ROE can play. What is at issue here is whether ROE can support or, in fact, themselves be a defense under criminal law. A defense can be categorized either as an excuse, if the perpetrator cannot be considered culpable of an otherwise criminal act, or as a justification, if the act committed cannot, under the circumstances, be considered to have been

criminal in nature.⁹⁵ The question that must therefore be addressed is whether ROE can either justify behavior that would otherwise have been criminal in nature, or whether ROE can excuse a suspect who has committed a criminal act.

As was observed at various points in this study, ROE must be drafted in such a way that they are not more permissive than the law applicable to the operation or tasks being undertaken. In section II.B., above, it was established that ROE cannot themselves be a source of law. This means that ROE cannot, in and by themselves, authorize actions which are not in accordance with the applicable law⁹⁶ and cannot, consequently, be a source of justifications for criminal acts in and by themselves. In other words, for ROE to provide a justification or excuse, they must either be a specific form of a lawfully recognized justification, or substantiate a defense based on mistake of fact or mistake of law by negating the *mens rea* requirement for the crime in question.⁹⁷

Leaving aside justifications (and excuses) not specifically related to ROE,⁹⁸ and leaving aside the defense of superior orders to be discussed

⁹⁵ Smith, J.C., “Justification and Excuse in the Criminal Law,” *Hamlyn Lectures*, London, 1989. See pp. 7 – 12 for an introduction on the distinction between justifications and excuses. In the Netherlands, the distinction is between *rechtvaardigingsgronden* (justifications) and *schulduitsluitingsgronden* (excuses). See, for a general introduction on this topic, Mevis, P.A.M., *Capita Strafrecht: Een thematische inleiding*, Nijmegen, 2009, pp. 705 – 707.

⁹⁶ It should be noted that “applicable law” also includes international law. Actions authorized on the basis of a United Nations Security Council resolution (leaving aside the vagueness of the phrase “all necessary means”) may differ from what is normally permitted under the national laws applicable in the country in question.

⁹⁷ Or establish a state of mind recognized as a defense under the statutes; MPC section 2.04 under (1)(b).

⁹⁸ It is submitted that justifications and excuses such as duress, (involuntary) intoxication, automatism, mental defect, etc. are not relevant to a discussion of ROE in the context of criminal law. As regards self-defense, ROE generally specify that self-defense is not limited or negated by the ROE. Consequently, ROE and self-defense, in the sense of personal self-defense, are conceptually considered separate entities. See chapter 3 as well as: Fleck, D. and Gill, T.D. [eds.], *The Handbook of the International Law of Military Operations*, Oxford, 2010, Chapter

below, the nature and form of ROE may lead to the assumption that adherence to the ROE can give rise to a public duty defense or, in the Netherlands, a defense of adherence to a lawful regulation.⁹⁹ In order for that to be the case, however, the ROE would have to be established as a statutory provision. This is not the case, as ROE are not laws themselves.¹⁰⁰ The authority to carry out actions authorized by the ROE is derived from the legal basis for the ROE in question, such as a mandating resolution from the United Nations Security Council, and not from the (derivative) ROE themselves, which merely clarify and delineate the actual application of the authority in question.¹⁰¹ This applies equally to the rules on the use of force for law enforcement personnel and military personnel acting in support of

23 “Personal Self-Defense and its Relationship to Rules of Engagement,” pp. 429 – 443.

⁹⁹ A “*wettelijk voorschrift*” as referred to in the defense contained in Article 42 of the Criminal Code of the Netherlands. While the concept of a public duty defense in the criminal law system of the United States and the defense of a “lawful regulation” under the criminal law of the Netherlands are not identical, the elements of the public duty defense related to statutory provisions are reasonably similar to the “lawful regulation” defense. The aspects in the public duty defense related to assisting a public servant are similar to the defense of “compliance with an order from a public servant” as set forth in Article 43 of the Criminal Code of the Netherlands and are discussed in conjunction with superior orders below.

¹⁰⁰ As was established above, in section II.B.. See also Stafford, *op. cit.* note 20, p. 16. As regards the observation that a public duty defense in this sense requires the provision to be set forth in a law, see for example the Missouri revised statutes, chapter 563, section 563.021 subsection 1 and the Texas Penal Code, Title 2, Section 9.21.

¹⁰¹ The ruling in the Eric O. case discussed in detail above should consequently not be interpreted as stating that O. was justified in firing the warning shot because the ROE authorized warning shots, but instead states that O. did not commit the crime of disobeying a (standing) order because the overarching ROE authorized the actions not specifically authorized (or prohibited) in the derivative instruction cards. While the generic nature of authorizations under mandating resolutions and the precise and specific wording of ROE may make it tempting to view the ROE as the source of the authorization to act, from a legal perspective it is important to maintain clarity as to which is the source of the actual legal authority. See also Coolen, *op. cit.* note 48 at p. 377.

law enforcement.¹⁰² In the Netherlands, the fact that ROE in any case contain authorizations (and possibly prohibitions) but never contain obligations to use force may further support the argument that ROE are not statutory provisions as intended in connection with a lawful regulation defense.¹⁰³

It was argued above that it is unlikely that a mistake of fact relating to the ROE would refer to the factual contents of the ROE themselves, but rather be related to a mistaken assessment as to whether the situation at hand is one to which an authorization given in the ROE applies, as the ROE are (or in any case should be) drafted in such clear terms that they are understood by those to whom they apply.¹⁰⁴ The question may be asked, however, if the serviceman who mistakenly believes he is authorized by the ROE to carry out a specific action, based on the assumption that the ROE provide legal clarity as to what he may lawfully do, can invoke a mistake of law defense. A mistake of law defense is normally only considered valid if the mistake was of such a nature as to negate the *mens rea* required to commit the crime in question.¹⁰⁵ This means the mistake must have been of such a nature that the perpetrator, as a result of that misconception, lacked

¹⁰² There is some disagreement in academic writings in the Netherlands as to whether the instructions on the use of force by the police are a lawful regulation or a form of (superior) order. Jörg states unequivocally that they are a lawful regulation; Jörg, N., *Strafrecht met mate*, 11th edition, Gouda, 2001, p. 126. Cleiren states that they are not a lawful regulation and instead (implicitly) categorizes them under the category referred to in Article 43 of the Criminal Code; Cleiren, C.P.M. and Nijboer, J.F., *Strafrecht Tekst en Commentaar*, Deventer, 2004, p. 301 (annotation 4.a. under Article 42) and p. 305 (annotation 4.d. under Article 43). Timmer seems similarly to view these instructions as orders in the sense of Article 43; Timmer, J., *Politiegeweld: Geweldgebruik van en tegen de politie in Nederland*, Deventer, 2005, p. 46.

¹⁰³ Boddens Hosang, J.F.R., “Bevelen en voorschriften in het strafrecht: het arrest in de zaak O. is geen grondslag voor aanpassing van het militaire strafrecht,” in *Militair Rechtelijk Tijdschrift*, Vol 98 nr. 9, October 2005, p. 336. As also referred to in that article, see additionally Noyon, *op. cit.* note 57, annotation 3 under Article 42; and Cleiren, *op. cit.* note 102, annotation 4.b) under Article 42.

¹⁰⁴ See also Wolusky, *op. cit.* note 81, at p. 94.

¹⁰⁵ See, for example, the MPC, section 2.04; Article 32, paragraph 2, of the Statute of the International Criminal Court; New York Penal Code section 15.20, subsection 2.

either the knowledge or the (type of) intent required for the particular crime in question. ROE could theoretically cause such a mistake in two ways.

In theory, the ROE could contain a legal mistake, authorizing actions which are not permitted under the applicable law. If the serviceman applying the ROE can convincingly claim that he relied on the legal validity of the ROE and that he reasonably could believe that the action was authorized by the government, the serviceman might attempt a defense sometimes referred to as “entrapment by estoppel.”¹⁰⁶ This form of “government authority” or “public authority” defense is a rare exception to the general rule that mistakes (or ignorance) of (the) law do not excuse the defendant. While it is theoretically possible for such a situation to arise, it is hardly likely to occur in practice. First, the ROE authorization process (and subsequent promulgation) normally requires more than one (command) level of approval. It seems unlikely, although not entirely impossible, that a clear legal error in the ROE would not be identified and corrected in the course of that process. Second, ROE are generic for the operation as a whole and do not provide specific legal advice for each and every specific action in the context of that operation. Applying the ROE requires the serviceman to properly evaluate the situation and make a further decision as regards the necessity and proportionality of his intended

¹⁰⁶ United States Attorney Manual (USAM), Criminal Resource Manual Title 9, Section 2055. See also Hobel, *op. cit.* note 62, who discusses “entrapment by estoppel” in relation to the defense of superior orders as well as the specifics of the Detainee Treatment Act 2005 (DTA). It may be argued that the provision in that act regarding “good faith reliance on advice of counsel” is specific to the context of that Act and has no (further) relevance in connection to “entrapment by estoppel” defenses in relation to ROE. If such advice were sought in the context of applying the ROE, however, and affirmative advice was given authorizing the action in question and the serviceman reasonably and in good faith acted on the basis of that advice, such a situation might give rise to an “entrapment by estoppel” defense regardless of specific provisions such as contained in the DTA. This situation would then, however, be centered on the specific advice from legal counsel and the details, etc., of that advice, rather than on the actual contents of the ROE themselves. See also the excuse in Article 43, paragraph 2 of the Criminal Code of the Netherlands, referred to below, which is comparable in nature in that it provides an excuse for following an order if the perpetrator acted on the basis of a good faith belief that the order was justified.

actions, as well as deciding whether the authorizations contained in the ROE adequately cover the situation at hand.¹⁰⁷ That room for personal judgment is both inherent in the ROE system and essential for the necessary operational flexibility in carrying out the mission, but also raises the bar considerably for proving that the defendant, on the basis of the ROE, acted in good faith and relied on those ROE as authority to carry out the actions in questions. Consequently, it is questionable whether the ROE, as such and by themselves, are sufficient to carry an “entrapment by estoppel” defense. The ROE may, however, have significant probative value as regards the frame of mind of the serviceman and thus impact on the assessment of whether the serviceman had the *mens rea* required for the crime in question.

The second possibility is that the ROE themselves do not contain a mistake but that the serviceman applying the ROE mistakenly believes that the ROE authorize the (illegal) action subsequently undertaken. This form of “public authority” defense requires that the authority granted to carry out the action was issued by a public (government) agent¹⁰⁸ authorized to grant that authority to act.¹⁰⁹ Perceived or apparent authority is not sufficient.¹¹⁰ Apart from the equal relevance in this case of the observations made above regarding the room for personal judgment on the part of the serviceman (thus making it questionable that the ROE would be considered specific enough to carry a public authority defense) the requirement of actual authority would appear to block a public authority defense in the case of ROE authorizations, as both higher command levels and (military) legal advisers are not authorized to permit acts violating the laws applicable to

¹⁰⁷ The fact that ROE are authorizations and not “positive” or “affirmative” orders to carry out a specific action is relevant in the context of superior orders, as discussed below, but is not necessarily a decisive factor as regards an “entrapment by estoppel” defense. See USAM, *op. cit.* note 106.

¹⁰⁸ The term “agent” is used here as a general term to indicate someone working for the government and to avoid confusing repetition of the words “authority”, “authorization”, etc.

¹⁰⁹ USAM, *op. cit.* note 106.

¹¹⁰ USAM, *op. cit.* note 106. See also (as referred to in the USAM) *United States v. Anderson*, 872 F.2d 1508 at paragraph 32 (at: <https://bulk.resource.org/courts.gov/c/F2/872/872.F2d.1508.85-5869.html>, last accessed on 8 April, 2016).

the operation in question.¹¹¹ In other words, a public authority defense of this type is far less (if at all) likely to be successful when based solely on the ROE, as compared to the entrapment by estoppel defense discussed above (and requiring an actual mistake in the ROE themselves).¹¹²

B. ROE and the defense of superior orders¹¹³

The public authority defense discussed above is conceptually but a small step removed from what could arguably be considered one of the most hotly debated and controversial topics in terms of defenses under criminal law, that is the defense of superior orders. As was discussed above in relation to the accusatory role of ROE, the concept of obedience is an essential and indelible part of military discipline and disobedience to superior orders is considered a criminal act. From a historical perspective, however, it seems clear that especially since the Nuremberg and Tokyo Tribunals a defense of superior orders cannot, as such, lead to automatically excusing the criminal responsibility of the defendant. This contradiction between duty and individual criminal liability would at first glance appear to place an undue

¹¹¹ If, however, the serviceman acted in good faith on advice from a (military) legal adviser, it could still be said that the serviceman lacked the necessary *mens rea* for the crime thus committed (assuming there was no manifest illegality involved). However, it may be argued that this situation and the adjudication thereof would center more on the advice and the role and status thereof, rather than on the ROE as an exculpatory device by themselves.

¹¹² It should be noted that some debate is possible on whether a public authority defense revolves around a mistake of fact or a mistake of law, which in turn depends on the question as to whether the agent possessed actual authority or whether the defendant thought (mistakenly) that the agent possessed such authority. Reliance on apparent (rather than actual) authority leads to a mistake of law which is not excusable. See (as also referred to in the USAM, *supra* note 106) *United States v. Duggan*, 743 F.2d 59 at paragraphs 134 – 135 (at http://scholar.google.com/scholar_case?case=12445013106107609695&hl=en&as_sdt=6&as_vis=1&oi=scholar, last accessed on 8 April, 2016).

¹¹³ As this chapter focuses on the role of ROE in relation to criminal law, the defense of superior orders as a general concept will only be discussed broadly to the extent relevant for this discussion of ROE in the criminal law context. For more detailed analyses of the defense of superior orders as such, reference may be made to the vast number of publications available on this topic.

burden on the shoulders of servicemen, of course depending on their rank and level of experience and training, to decide whether to risk prosecution for obeying an order when in the face of doubts as to the legality of that order, or to risk prosecution for disobeying an order if the assessment of the illegality of that order turns out to be wrong.¹¹⁴ On both sides of this equation, meaning the accusatory and defense sides, consequently, there are exceptions to the rule which, while they do not fully remove the burden just described, at least provide a reasonable balance as regards the role of superior orders.

From the accusatory side, the exception either consists of provisions in the relevant laws which state that disobeying orders is justified or excused if the order was (perceived to be) illegal or consists of specific references to the requirement of lawfulness of the order as an element of the crime of disobeying orders, or otherwise incorporating elements which have bearing on the *mens rea* required for the crime in question.¹¹⁵

¹¹⁴ Vink describes this as requiring a “very unnatural attitude” on the part of the serviceman, who is expected to carry out his orders obediently at all times, while simultaneously being expected to be critical and to carry out a legal test on the orders he receives. As Vink points out, this may be practicable when the differences in the levels of authority are minimal, but not so practicable when a young and inexperienced serviceman receives an order from a “much older and more experienced serviceman and there is also a significant difference in rank.” Vink, A.F., “Keer de bewijslast om: van ‘niet opvolgen dienstbevel’ naar ‘disobeying a lawful order’,” in *Militair Rechtelijk Tijdschrift*, Vol. 104 nr. 3, 2011, p. 140 (translations by present author). Insko presents a similar argument in discussing the absolute liability approach towards the defense of superior orders and also points to the difficulty faced by many servicemen – even of higher rank and experience – to truly know the intricacies of applicable law. Insko, James B., “Defense of Superior Orders Before Military Commissions,” in *Duke Journal of Comparative & International Law*, Vol. 13, 2003, at pp. 391 – 392.

¹¹⁵ Article 92 of the UCMJ includes the word “lawful” in the statute text regarding disobeying orders. The meaning of the term is discussed in the Manual for Courts Martial on page IV-24 in relation to Article 92 and in more detail on page IV-20 in relation to Article 90 (*inter alia* willfully disobeying a superior commissioned officer). The general approach is that orders are to be inferred to be lawful, except when it concerns “a patently illegal order, such as one that directs the commission of a crime.” Whether the order was, in fact, lawful is left for the courts to determine. In the Netherlands, the Military Criminal Code contains two

Nonetheless, as the Manual for Courts Martial states, disobeying an order is undertaken “at the peril of the subordinate.”¹¹⁶ In other words, while the law does allow exceptions, the main rule is still one of obedience by a subordinate to the orders issued by a superior.

As regards the defense of superior orders, the difficulties inherent in the contradiction between military obedience on the one hand and seeking to exclude a sweeping escape from criminal responsibility on the other hand were also apparent to the United Nations War Crimes Commission. In its discussions on, and examinations of, the defense of superior orders, it found divergent practices, both between nations and in the previous instances in which the defense had been addressed in the context of international criminal law.¹¹⁷ After lengthy deliberations, the Commission concluded that it was unable to issue a guiding principle and instead stated that “having acted in obedience to the orders of a superior does not of itself relieve a

separate provisions containing defenses for the specific crime of disobeying orders. The first, in Article 131, contains a justification for disobeying an unlawful order. The second, in Article 132, contains an excuse for disobeying an order if the defendant in good faith believed the order to be unlawful. The explanatory memorandum to this part of the law explains that the term “in good faith” is to be read as an objective standard, taking into account what a serviceman of the same rank, level of experience, etc., knows or should know. See Bosch, Th.W. van den, *Militair straf- en tuchtrecht*, Deventer, Suppl. 15 (March 1995), annotation 4 to Article 132. It is interesting that the UCMJ does not contain a provision similar to this, although a reasonable misapprehension as to the legality of an order may negate the *mens rea* required for Article 90. As was mentioned above, however, no such justification or excuse appears available under Article 92. This is also reflected in the statements in the MCM that while certain aspects may render certain types of disobedience not a violation of Article 90, the fact may nonetheless be a violation of Article 92 (14.c.(2).(e) on page IV-20). See also below, as regards the defense of superior orders and mistakes as to the legality of the order.

¹¹⁶ MCM, page IV-20, 14.c.(2)(a)(i).

¹¹⁷ United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War, 1948 (available at <http://www.cisd.soas.ac.uk/documents/un-war-crimes-project-history-of-the-unwcc,52439517>, last accessed on 10 April, 2016). The defense of superior orders is discussed in chapter 10, pp. 274 – 288. See especially pp. 274 – 280 as regards the divergent national practices and international examinations of the issue.

person [...] from responsibility.”¹¹⁸ The role and effect to be awarded to such obedience to superior orders was therefore left to the court to decide in individual cases. This approach is reflected in Articles 8 and 6 of the Charters of the International Military Tribunals at Nuremberg and Tokyo, respectively.

The Military Tribunals consequently did not rule out a defense of superior orders entirely, but instead of accepting it as an absolute defense, could take the obedience to superior orders into account as a mitigating factor, taking into consideration all the specific circumstances.¹¹⁹ The Statute of the International Criminal Court takes a somewhat similar approach, albeit differing in one significant aspect. While the main principle that superior orders do not absolve a person of individual criminal responsibility is maintained in Article 33 of the Statute, the Article contains three cumulative criteria which may nonetheless negate criminal responsibility. First, the defendant must have been under a legal obligation to obey; second, the defendant must not have known that the order was unlawful; and third, the order must not have been manifestly unlawful. The second paragraph further specifies that orders to commit genocide or crimes against humanity are in any case manifestly unlawful. In other words, while the Charters of the Military Tribunals favored the “absolute liability” approach to a significant degree, but allowed superior orders to be a mitigating factor and, at least in the case of Nuremberg, also introduced the “moral choice” test, the Statute of the International Criminal Court presents a more balanced compromise between absolute liability on the one hand

¹¹⁸ Ibid, p. 280.

¹¹⁹ Van Sliedregt argues that the Nuremberg Tribunal effectively adopted an absolute liability approach, although the provision allowed for the defense of superior orders as a mitigating circumstance “in conjunction with other facts.” Van Sliedregt, *op. cit.* note 56, at p. 319. As Solis (also) points out, the strict application of rejecting a defense of superior orders as regards the leaders and senior officers of the Nazi regime did not remove the existence of the room offered by the Charter provision. In that context, he points to the “moral choice” test introduced by the Tribunal. Solis, Gary D., “Obedience of Orders and the Law of War: Judicial Application in American Forums,” in *American University International Law Review*, Vol. 15, nr. 2, 2011 at p. 516. See also Hobel, *op. cit.* note 62, at pp. 585 – 586.

and the (very outdated) approach of superior orders as an absolute defense on the other hand.¹²⁰

The brief history of the defense of superior orders presented above and the wording of the Statute of the International Criminal Court create a certain level of doubt as regards a possible role of ROE in connection with the defense of superior orders. The approach used in the Charters of the Military Tribunals at Nuremberg and Tokyo and that used in the Statutes of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda¹²¹ appears to leave little room for ROE as an element in the defense of superior orders, to the extent that such a defense is even accepted at all. Both from the wording and from the application of the relevant provisions, including the “moral choice” test, it is clear that for superior orders to have even only mitigating effect in this approach, the need to obey those orders must be so imperative as to amount to duress or coercion, leaving no room or moral choice to disobey. ROE

¹²⁰ The outdated absolute defense was based on the *respondeat superior* approach to orders, leaving no room (or authority) whatsoever to a subordinate to disobey any order issued by a superior. See, for an example of such an absolute defense of superior orders, paragraph 366 on p. 130 of the 1914 version of the Rules of Land Warfare of the United States, available at http://www.loc.gov/rr/frd/Military_Law/pdf/rules_warfare-1914.pdf (last accessed on 10 April, 2016). For a more in-depth analysis of Article 33 of the Statute and mistake of law in relation to international crimes, see Van Verseveld, A., *Mistake of Law: Excusing Perpetrators of International Crimes*, Ph.D. dissertation, University of Amsterdam, 2011. Article 33 is discussed on pp. 95 – 103.

¹²¹ It should be noted that the provisions in Article 7, paragraph 4, and Article 6, paragraph 4, of the Statutes of the International Criminal Tribunal for the former Yugoslavia and of the International Criminal Tribunal for Rwanda, respectively, follow the same wording as Article 8 of the Nuremberg Charter. In practice, the defense of superior orders may be invoked, at least before the ICTY, as an element of a different defense, such as duress. Sliedregt, *op. cit.* note 56, at p. 322. In his report to the Security Council, the Secretary-General referred to “coercion or lack of moral choice” as examples of defenses in which superior orders could be a factor, thus essentially extending the “moral choice” test. See paragraph 57 of United Nations document S/25704, 3 May 1993, at http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf (last accessed on 10 April, 2016).

cannot fit that description at all, since ROE, as was discussed above in chapter 1 and as was stated repeatedly in other parts of this study, contain authorizations and not affirmative orders to act and therefore leave (considerable) room for personal judgment and decisions on the part of the serviceman applying the ROE. Relying on the ROE as superior orders would thus in any case fail the “moral choice” test and would not support any concomitant defense based on duress, coercion or similar states of mind.

As regards Article 33 of the Statute of the International Criminal Court, ROE may fall under the term “order” if that term is interpreted broadly and actions taken pursuant to the ROE may therefore be interpreted as having been taken “pursuant to an order.” But matters become far more complicated as regards the required “legal obligation to obey.” Sliedregt en Triffterer both take a broad view of the term “order” and indicate that it refers to “orders in general”¹²² and to “all oral or written or otherwise expressed demands,” adding that “[i]t is advisable to keep this definition broad in the sense that any sort of communication between a superior and a subordinated person whatsoever is sufficient.”¹²³ Similarly, both authorities seem to view the connection between the order and the conduct as being relatively loose, in the sense that the causal connection may be satisfied if the conduct was “inspired” by the order.¹²⁴ As regards the legal obligation to obey, however, matters get complicated for the ROE. At first, Triffterer’s explanation of this phrase appears to leave some room, when he states that the phrase “refers to binding orders in general and not to the question of

¹²² Sliedregt, *op. cit.* note 56 at p. 324.

¹²³ Triffterer, *op. cit.* note 53 at p. 582, paragraph 17. As regards the superior – subordinate relationship, it is interesting to note that Sliedregt argues that this relationship must be interpreted strictly as regards the defense of superior orders, as opposed to a broader interpretation in relation to the concept of command responsibility. This appears to be at odds with Triffterer’s approach; Sliedregt, *op. cit.* note 56 at p. 324.

¹²⁴ Triffterer, *op. cit.* note 53 at pp. 584 – 585. Triffterer states that the order need not have been the only motivating factor for the perpetrator. Sliedregt, however, adds to her discussion on the causal relationship that “‘superior orders’ is no defense when the crimes are committed *con amore*.” Sliedregt, *op. cit.* note 56, p. 324.

whether there was a legal obligation to obey this specific order to commit a crime.”¹²⁵ However, applying this principle as an element “presupposes that ‘orders of the government’ may create legally binding obligations for addressees” and that the superior “has the right to impose a legal obligation [...] not only with regard to the specific order demanding him to commit the crime ordered.”¹²⁶ Van Sliedregt emphasizes that the nature of the order is relevant in the context of the defense of superior orders, as opposed to orders accompanied by duress (and thus involving a defense of duress rather than a defense of superior orders). In the case of superior orders, the superior and the subordinate must “operate within the boundaries of their normal / usual competence” and their relationship must be such that the superior “has the right to expect obedience of the subordinate.”¹²⁷ Even though this interpretation and approach leaves far more room than the approach taken by the Tribunals, it does not alter the fact referred to already in that context that ROE do not contain obligations to act.

Consequently, ROE do not appear to fall under the meaning of “legal obligation to obey” in the sense of Article 33 of the Statute of the International Criminal Court. The word “appear” is used here, since the defense of superior orders and the commentaries and authoritative views referred to in this context approach the topic traditionally in connection with orders containing an affirmative obligation or duty to act in a certain way. It is questionable if ROE, containing authorizations, could therefore be a relevant factor in this context or whether adherence to the ROE as a (mistaken) belief that the acts carried out were authorized (but not required) on the basis of superior orders falls under the category of Article 32 of the Statute as either a mistake of fact or mistake of law.¹²⁸

The fact that ROE are not likely to play a role in the context of the defense of superior orders in the context of international criminal law is also

¹²⁵ Triffterer, *op. cit.* note 53 at p. 585.

¹²⁶ *Ibid.*, p. 586.

¹²⁷ Sliedregt, *op. cit.* note 56, p. 325.

¹²⁸ The situation might be different as regards omissions, in the event that the ROE – as rarely but sometimes happens – contained explicit prohibitions against specific actions and adherence to those prohibitive ROE led to the commission of a crime.

understandable if one takes into consideration the nature of the specific crimes within the jurisdiction of the Tribunals and the International Criminal Court. The severity of genocide, war crimes and crimes against humanity make it highly unlikely that ROE would, by themselves, appear to any reasonable serviceman to authorize action that would lead to the commission of such a crime, at least as far as the specific crimes in this context are concerned. The same may not always be said, however, for violations of every (other) rule of international law or for violations of national laws. Whether ROE can constitute a valid defense of superior orders in those cases, will depend on the national statutes and regulations in question.

As was observed in section II.B. above, ROE are observed as binding orders by a number of nations. In section II.D. above, it was observed that violations of the ROE may (consequently) be prosecuted as violations of (standing) orders. This leads to the conclusion that ROE are, at least in those countries, more than mere guidelines and also leads to the suggestion that if violations of the ROE can be prosecuted, good faith adherence to the ROE may similarly be relevant in the context of (national) criminal law. In the United States, the manual on The Law of Land Warfare states in Paragraph 509 that superior orders do not constitute a defense in the case of violations of the laws of war, unless the accused did not know or could not reasonably have known the order to be unlawful.¹²⁹ In the following paragraph, the manual points out that “obedience to lawful military orders is the duty of every member of the armed forces” and points to the impossibility of servicemen to “weigh scrupulously the legal merits of the orders received” under all circumstances.¹³⁰ The Manual for Courts Martial, not referring specifically to IHL, states that “[i]t is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders

¹²⁹ Field Manual FM 27-10, 1956, available at <http://www.aschq.army.mil/gc/files/fm27-10.pdf> (last accessed on 10 April, 2016). If the orders are not to be considered a defense, they can nonetheless be considered in mitigation.

¹³⁰ Ibid.

to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.”¹³¹

This version of the “manifestly unlawful” approach appears to leave more room for a defense of superior orders. Yet in this national context, too, the question needs to be addressed as to whether the “orders” referred to in these rules and regulations are so wide a term that they may also encompass orders such as ROE, which do not contain affirmative orders or obligations to act but instead contain only authorizations to act. Knoops does not support the view that ROE are superior orders in this sense, stating that they are not “an absolute criminal law defense.”¹³² He appears to contradict himself in the following paragraph, however, when he describes ROE as “important interpretative factors in determining individual criminal responsibility,” providing “*prima facie* evidence underlying a defense of [*inter alia*] superior orders.”¹³³ While ROE therefore may not meet the criteria for superior orders in the traditional approach to that defense in all cases, the same military context that provides a basis for accepting at least some form of a defense of superior orders would seem to similarly provide a basis to view ROE, on which the serviceman relies in good faith to determine whether his actions are authorized, as perhaps more than a basis for “entrapment by estoppel” as discussed above.¹³⁴ In the Netherlands,

¹³¹ MCM, Rule 916, subsection (d), p. II-110. The discussion on this rule points out that actions carried out pursuant to a lawful order are justified, while actions pursuant to an illegal order are excused unless the accused knew that the order was unlawful or “a person of ordinary sense and understanding would have known it to be unlawful”. The wording appears to be derived from the Keenan and Calley cases in the context of the Vietnam War.

¹³² Knoops, *op. cit.* note 69, p. 108.

¹³³ *Ibid.* The present author assumes Knoops means that ROE can be used as evidence for the existence of other superior orders and thus support a defense of superior orders indirectly. Knoops also continues by explaining that ROE can be used in determining whether the accused had the required *mens rea* for the crime in question. The relationship between ROE and *mens rea* was discussed above in Section II.C..

¹³⁴ This statement is not intended to detract from the possibility of entering an entrapment by estoppel defense on the basis of the ROE, or to refer to the ROE as a grounds for negating the *mens rea* for a specific crime, but is intended instead as

such deliberations on the nature of ROE as a defense in the context of criminal law led to the creation of a specific, and somewhat confusing, provision in the Military Criminal Code.

C. Superior orders in the (military) criminal law of The Netherlands

The Eric O. case discussed at length above gave rise to considerable debate in the Netherlands, both on the issue of the military criminal law system in general and on the status of ROE and (derivative) instructions on the use of force by military personnel.¹³⁵ The accompanying debates in parliament eventually led to a motion by the members Eijsink (PVDA) and Van Baalen (VVD) requesting the government to appoint a commission of experts to review various aspects of the military criminal law system, including the structure, the procedures and the methods for applying the law towards military personnel deployed abroad, bearing in mind “the high demands and specific circumstances of military operations.”¹³⁶ The motion was adopted by a (large) majority after some editorial changes.¹³⁷ The commission was appointed and began its work under chairmanship of Mr. Borghouts on 20 December 2005.¹³⁸

While the commission evaluated and advised on a number of topics concerning the military criminal law system in the Netherlands, what is of interest to the present discussion is that the commission also evaluated and

food for thought towards strengthening or clarifying the role of military instructions on the use of force in the context of national criminal law systems.

¹³⁵ See, *inter alia*, Burg, F.H. van der, “Militair strafrecht zonder nucleaire paraplu,” in *Nederlands Juristenblad*, 17 september 2004; Knoops, *op. cit.* note 46; Eiting, R.M., “Een klok- en klepel discussie op verschillende golflengten,” in *Carré*, 2004-4/5, pp. 36 – 41 and *Carré*, 2004-6, pp. 32 – 35; Fink, M.D., “Ontwikkelingen rondom het militaire strafrecht naar aanleiding van het strafproces tegen Eric O.,” in *Militair Rechtelijk Tijdschrift*, 2005-7, pp. 237 – 244.

¹³⁶ Parliamentary document 29 800-X nr. 51 of 7 December 2004.

Translation by present author.

¹³⁷ Parliamentary records, *Handelingen Tweede Kamer*, TK 31, pp. 31-2052 – 31-2053.

¹³⁸ Borghouts, H.C.J.L., Daverschot, R.D.E., Gillissen, G.C., *Evaluatie toepassing militair strafprocesrecht bij uitzendingen*, Haarlem, 31 August 2006, p. 6.

provided advice on the question as to whether a specific defense was required in the Military Criminal Code regarding ROE. This issue had previously been debated in academic literature, in which the view appeared to be favored that ROE did not need a specific defense but could be considered as “orders from a public servant” and therefore would fall, in principle, under the defense for following such orders as provided for in Article 43 of the Criminal Code of the Netherlands.¹³⁹ Before continuing the discussion of the findings of the commission, a closer examination of the defense offered by Article 43 is therefore warranted.

Article 43 of the Criminal Code of the Netherlands contains a justification in the first paragraph and an excuse in the second paragraph. The justification covers acts which are performed to carry out an order issued by a public servant who was authorized to give such an order. The excuse covers acts performed to carry out an unauthorized order, provided the person was under a good faith impression that the order was authorized

¹³⁹ Coolen, *op. cit.* note 48, p. 378, but stating that ROE issued by a foreign military commander would not fall under this heading, p. 380 – 381; Jörg, *op. cit.* note 86, leaving the question of whether ROE are orders in the sense of Article 43 aside but stating that orders from foreign commanders can be orders in that sense, p. 391 – 392; Ducheine, P.A.L., and Walgemoed, G.F., “Militair functioneel geweld en de positie van militairen na ‘rake zaken’,” in *Militaire Spectator*, Vol. 174, nr. 2, 2005, p. 66, stating that ROE attain this status (*inter alia*) as a result of the adoption of the ROE in a national directive issued by the Chief of Defense; Boddens Hosang, *op. cit.* note 103, including an analysis that the ruling by the Appeals Chamber at Arnhem contains all the elements required for a (ruling on a) defense on the basis of Article 43 without explicitly mentioning such a defense; Knoops, G.G.J., “De (inter)nationaal strafrechtelijke betekenis en implicaties van geweldsinstructies voor buitenlandse militaire missies,” in *Delikt en Delinkwent*, 2004 nr. 6/45, p.615 – 616; Knoops, *op. cit.* note 46 at p. 331. Knoops appears to be more in favor of a case-by-case and internationally oriented approach to ROE, however, and approaches the issue from a more philosophical approach in a number of his writings, proposing *inter alia* a teleological interpretation of the rules applicable to military personnel. These views are expressed *inter alia* in the articles just referred to, as well as in Knoops, G.G.J., “Strafuitsluitend militair geweldgebruik binnen gewapende conflicten: Nieuwe inzichten en spanningsvelden,” in *Nederlands Juristenblad*, 31 October 2008, nr. 38, pp. 2404 – 2409, also containing an analysis of the pros and cons of the change in the Military Criminal Code on the basis of these views.

and obedience to that order fell within the ambit of that person's duty to obey that public servant.¹⁴⁰ The Article is not aimed at military operations, given that it is set forth in the (civilian) Criminal Code, and covers such cases as orders by police officers to civilians to assist the police officer in the given situation.¹⁴¹ Given its wording and structure, however, it is also applicable in a military operational context.¹⁴² As Cleiren points out, the rationale behind the defense is that persons acting pursuant to an order issued by or on behalf of a government authority should not subsequently be criminally liable for carrying out that duty.¹⁴³

The first requirement for successful recourse to this specific defense is that an "authority relationship"¹⁴⁴ exists between the person issuing the order and the person receiving the order and that this relationship is based on public law.¹⁴⁵ Second, the public servant must be authorized by law to

¹⁴⁰ Since the promulgation of ROE by unauthorized personnel would be rather exceptional, or in any case bear little relevancy to the discussion at hand, the excuse will not be discussed further in this chapter.

¹⁴¹ As such, it may be considered comparable to the public duty defense as set forth, for example, in the Texas Penal Code, Title 2, Section 9.21, subsection (d)(2) and Section 9.51, subsection (a); the Missouri Revised Statutes, Chapter 563, section 563.021, subsection 2 under (2) and section 563.051, subsection 1; and the North Dakota Criminal Code, Chapter 12.1-05, section 12.1-05-02. Contrary to those provisions, however, which are specifically aimed at assisting a public servant or acting under the direction of a public servant, Article 43 of the Criminal Code of the Netherlands can, as will be argued, cover other cases and other orders as well. Consequently, while the statutes listed have little (or no) applicability in the normal military context, Article 43 does have such applicability.

¹⁴² This also follows from the fact that the Military Criminal Code declares the civilian code applicable, except where the law sets forth specific deviations from the civilian code.

¹⁴³ Cleiren, *op. cit.* note 102, annotations 1 and 3 under Article 43.

¹⁴⁴ A "gezagsrelatie" in Dutch, meaning a relationship based on the legal authority of one person to issue commands or orders to another person and a duty for that other person to obey such commands or orders.

¹⁴⁵ Cleiren, *op. cit.* note 102, annotation 4.a. under Article 43; Noyon, *op. cit.* note 57, annotation 2 under Article 43. Cleiren also points out that superior – subordinate relationships based on civil law (e.g. contractual relationships) do not give rise to orders in the sense of this defense, as well as pointing out that disobedience to the order need not be a criminal offense for the authority relationship (and invocation of the defense) to be valid.

issue orders. It may be argued that international law may similarly provide a valid basis for such an authority.¹⁴⁶ Finally, a connection is required between the actions carried out and the contents of the order and the actions must be necessary and proportional for that purpose.¹⁴⁷ It should be noted that “order” in the sense of Article 43 need not be a specific, *ad hoc* command but may also encompass written orders or directives of a more general nature.¹⁴⁸

Given these observations and the requirements for a defense based on Article 43 of the Criminal Code, it may be argued, as was done by the authors previously mentioned in footnote 139, that in spite of the nature of ROE as containing authorizations rather than affirmative commands to act, ROE meet the requirements for a defense under Article 43. The commission evaluating the military criminal law in The Netherlands reached this conclusion as well, although it did consider the fact that international ROE are “translated” into national orders by the Chief of Defense as a relevant factor.¹⁴⁹ Nonetheless, it noted that several of the persons interviewed in the course of the commission’s work had indicated that more clarity and

¹⁴⁶ Hazewinkel-Suringa, D. (continued by Remmelink, J.), *Inleiding tot de studie van het Nederlandse strafrecht*, 1991, p. 316; and Jörg, *op. cit.* note 86, p. 391 – 392. Although this approach is not accepted by all experts on criminal law, this approach would mean that a foreign military commander could, in theory, give orders in the sense of Article 43 to Netherlands Armed Forces personnel placed under his command, contrary to his inability to issue orders in the sense of the Military Criminal Code of the Netherlands as discussed above in section II.B.. This in turn leads to the paradoxical situation that obedience to orders issued by a foreign commander could be covered by the defense under discussion, but that disobedience to such orders cannot be prosecuted under the Military Criminal Code unless such orders are further “translated” into national orders for the Netherlands servicemen (as they are in practice). It should also be noted that in the explanatory memorandum accompanying the addition of the specific defense under discussion in the Military Criminal Code, the government stated that orders by foreign commanders are not automatically orders in the sense of Article 43 but require “translation” into national orders for that purpose as well. Parliamentary Document 31487 (R1862) nr. 3, p. 4.

¹⁴⁷ Noyon, *op. cit.* note 57, annotation 4 under Article 43.

¹⁴⁸ Cleiren, *op. cit.* note 102, annotation 4.a. under Article 43; Noyon, *op. cit.* note 57, annotation 3 under Article 43.

¹⁴⁹ Borghouts, *op. cit.* note 138, pp. 43 – 44 and p. 69.

certainty on this issue was required and that a specific defense pertaining to ROE would serve that purpose. The commission subsequently recommended that the government examine the possibility of including such a provision in the law and provided a suggestion for the wording of such a provision.¹⁵⁰

On 6 June, 2008, the bill proposing the introduction of a specific defense for actions carried out by servicemen pursuant to the rules issued to them was submitted to parliament.¹⁵¹ The wording in the bill differed from that previously suggested by the Borghouts commission, in that the “Borghouts text” was, due to its specific wording, restricted to certain types of military operations, while the text as set forth in the bill (which remained unchanged and is identical to the current statute text) did not contain such a restriction.¹⁵² A second alteration was that the text suggested by the commission included the requirements of necessity and proportionality in the text itself, while the text in the bill does not contain those requirements in the statute text itself. Instead, the requirements are considered inherently applicable.¹⁵³ The provision was, following the parliamentary (legislative)

¹⁵⁰ Ibid., pp. 69 – 70; see especially recommendation 3 on p. 70.

¹⁵¹ Parliamentary document 31487 nr. 1 and 2.

¹⁵² The text suggested by the commission included, after the words “in the lawful execution of his duties,” the text “in the interest of protecting or promoting the international rule of law.” That additional text, which was dropped from the wording used in the bill, is significant because the Constitutional provisions relating to the armed forces (Article 97, including the tasks, and Article 100, regarding information to parliament on certain deployments of the armed forces) differentiate between national and collective self-defense operations on the one hand and operations in the interest of protecting or defending the international rule of law on the other hand. The latter is commonly interpreted as referring to operations such as those carried out under a mandating resolution of the United Nations Security Council and activate the duty of prior information to parliament under Article 100 of the Constitution. The text suggested by the commission would therefore have resulted in the defense not being available in the context of national or collective self-defense operations, which do not necessarily rise to the level of an armed conflict and would therefore also not have been covered by the first paragraph of Article 38 (see also footnote 154, below). Translations by the present author.

¹⁵³ Parliamentary document 31487 (R1862) nr. 3, p. 6.

approval process, adopted as a new paragraph 2 in Article 38 of the Military Criminal Code.¹⁵⁴

In the legislative process in the lower house of parliament, questions were raised (*inter alia*) as to whether the inclusion of this specific defense meant that recourse to Article 43 of the (civilian) Criminal Code would no longer be possible and whether the requirements of necessity and proportionality in this context affected operational decisions regarding weapon systems.¹⁵⁵ In response, the government stated that existing (civilian) defenses would still be available but that the new defense was a specific military addition to the defenses under criminal law and would take precedence in cases which would otherwise have to be based on Article 43 of the (civilian) Criminal Code.¹⁵⁶ As regards necessity and proportionality, the government pointed out that those elements, and an evaluation as to whether those requirements had been met in specific cases, would depend on the specific circumstances in each individual case before the courts.¹⁵⁷

The provision was subsequently, following the required approval by the upper house of parliament and by the legislative bodies of (then) The Netherlands Antilles and Aruba, adopted and is currently part of the law.¹⁵⁸

¹⁵⁴ This placement was considered appropriate, as the original Article 38 (now paragraph 1 of Article 38) contains a defense for servicemen who carry out actions authorized by IHL. That provision, by nature of its contents, applies only in cases of armed conflict, while the new provision applies in all cases in which servicemen carry out duties pursuant to their assigned tasks. Parliamentary document 31487 nr. 3, pp. 3 – 5 and pp. 6 – 7.

¹⁵⁵ Parliamentary document 31487 nr. 4, p. 3.

¹⁵⁶ Parliamentary document 31487 nr. 5, p. 2.

¹⁵⁷ *Ibid.* p. 3.

¹⁵⁸ The debate in the upper house, or Senate, focused more on the other aspects discussed by the commission, such as the required level of expertise within the public prosecutor's office regarding military operations and the methods and recommendations towards achieving and maintaining that level of expertise. Parliamentary documents 31487 (R1862) D and E. Note that following the restructuring of the Kingdom of the Netherlands in 2010, the Kingdom now consist of the Netherlands (in Europe), the islands of Saba, Statia and Bonaire as special municipalities in the Caribbean part of the Netherlands, and of Curaçao, Aruba and St. Maarten as three constituent countries within the Kingdom in the Caribbean. The Military Criminal Code is a Kingdom Act and therefore applies equally in all

While no case law exists as yet on this provision, a few observations are in order as regards the provision itself, its application as a defense and the specific requirements for invoking the defense. The provision states that servicemen are not criminally liable if they use force during the lawful execution of their duties and in accordance with the rules established for the execution of those duties. As was pointed out in the procedure in parliament, the first requirement is that the serviceman used force in the lawful execution of his duties, meaning that the tasks, actions, etc., which led to the use of force must have been part of (lawfully) assigned military tasks.¹⁵⁹ Use of force outside the context of military tasks and duties is therefore not covered by this defense.¹⁶⁰ As regards “rules established for the execution of those duties,” the explanatory memorandum is quite clear that those words refer to the ROE, or rather to instructions on the use of force in general.¹⁶¹ The memorandum explains that it covers not only ROE, but all such instructions, including the derivative instruction cards. Next, the memorandum establishes as a fact (and presumably as a requirement henceforth) that ROE issued in the context of international operations are “translated” into national orders by the Chief of Defense, which creates the “connection between the international and the national legal order” and “guarantees the continuation of the legitimacy of the use of force in conformity with the Rules of Engagement into the Netherlands legal order.”¹⁶² During that “translation” process, any “caveats” required by The

constituent countries within the Kingdom and amendments to such acts must therefore be approved by all constituent countries within the Kingdom.

¹⁵⁹ Parliamentary document 31487 nr. 5, p. 2.

¹⁶⁰ Parliamentary document 32487 nr. 3, p. 5 – 6. This seems a rather obvious requirement, but the wording of this part is identical to the text suggested by the commission and is presumably derived from the similar wording in the statutory provision regarding the authority of law enforcement personnel to use (necessary and proportional) force in the lawful execution of their duties. That provision is currently set forth in Article 7, paragraph 1, of the Police Act 2012.

¹⁶¹ Parliamentary document 32487 nr. 3, p. 5. The reference to instructions on the use of force is contained in the first sentence of the first substantial paragraph explaining the proposed provision.

¹⁶² Parliamentary document 32487 nr. 3, p. 6. Translation by the present author.

Netherlands can be implemented, thus ensuring that the subsequent national order (containing the ROE as well as the caveats) contains the authorizations on the use of force as applicable to the Netherlands armed forces.

A final requirement identified in the explanatory memorandum (and also raised during the parliamentary process) concerns the elements of necessity and proportionality in relation to the application of the ROE. As the memorandum explains, not every action conceivable under the applicable ROE is automatically a legitimate action. Such actions must, additionally, be necessary under the given circumstances and be proportional to the objective for which they are undertaken (and/or, in the case of the use of force, proportional to the threat against which such force is used). In determining whether the actions were necessary and proportional under the circumstances, a number of elements must be taken into consideration, including the age, rank and experience of the serviceman, the specific military task and order which was being carried out, the general circumstances of the situation and the available weapons.¹⁶³ Consequently, it may safely be concluded that mere adherence to the ROE is, as such, not sufficient for successful recourse to this defense.

Given the detailed description above on the contents and background of the specific defense contained in Article 38, paragraph 2, of the Military Criminal Code of the Netherlands, it may be questioned whether the inclusion of the defense was necessary and whether the defense adds any significant legal protection to servicemen who use force in the execution of their duties. As regards the necessity for this provision to be adopted, it should be noted that the debates which ultimately led to the motion requesting the government to appoint the commission focused *inter alia* on the need for clarity for servicemen as regards their legal status in the context of the use of force. Furthermore, this desire for (greater) clarity was also voiced in some of the interviews held by the commission and cannot, admittedly, have been served by the sometimes contradictory and often highly technical debates on this topic in academic literature. Given the general discourse and fall-out from the Eric O. case, it is therefore

¹⁶³ Parliamentary document 32487 nr. 3, p. 6.

understandable that the provision was created, regardless of its legal necessity in the light of the existence of Article 43 of the (civilian) Criminal Code.

As to whether the specific defense adds legal protection, the discussion above on the meaning and interpretation of Article 43 of the Criminal Code and the explanation of the defense now contained in Article 38, paragraph 2, of the Military Criminal Code may lead to the conclusion that the new provision does not require the same (sometimes controversial) interpretations to establish that ROE, under certain circumstances, can have an exculpatory effect. Consequently, it may be concluded that the new provision has added some degree of additional protection or at least legal clarity specific to the military context. At the same time, however, caution is required. As with any defense based on a specific statutory provision, it may be tempting to read the literal text of the provision as providing a far more absolute or sweeping defense than the courts may accept in the application of the provision. The provision in Article 38, paragraph 2, of the Military Criminal Code does not provide an absolute defense for acts carried out in conformity with the applicable ROE (or comparable orders or instructions)¹⁶⁴ but requires an assessment, by the courts, of a number of additional factors specific to the case at hand in order to be successfully invoked. Whether the intended goal of this provision, that is greater protection and clarity for servicemen, will be achieved will therefore remain unclear until the provision has been applied in practice.

IV. Case law

While the Eric O. case centered specifically on the status of ROE and their derivative instruction cards, court cases revolving around ROE are rare. Furthermore, in the cases in which ROE are referred to or in which they play a relevant role, the main issues at hand may not be related to the ROE themselves but rather to other elements (whether accusatory or defenses) under criminal law. In the two British cases previously mentioned in this

¹⁶⁴ And consequently does not constitute a *respondeat superior* approach to such (superior) orders. See the discussion *supra* on the defense of superior orders.

chapter, for example, the issue of ROE was secondary to the question as to whether the defendants had properly applied the right of self-defense as set forth in the ROE. In the *Clegg* case,¹⁶⁵ the ROE and the military context were a relevant point of discussion as to whether the charge should be lessened from murder to manslaughter, but the ROE as such did not play any further role in the decision.¹⁶⁶ The *Bici and Bici v. Ministry of Defense* case referred to in footnote 78, above, similarly focused on whether the British servicemen had properly applied the right of self-defense as set forth in the ROE, rather than on any accusatory, exculpatory or probative role for the ROE as such.

Wolusky¹⁶⁷ discusses a number of American cases in support of his argument that ROE violations should not be prosecuted. However, while his discussion of the cases is relevant and appropriate in the specific context of his arguments, in none of those cases do the ROE appear to have had a decisive (or even significant) role in the final decisions.¹⁶⁸ A possible exception may be found in the *Banuelos* case, which will be discussed below.

Of the three known Belgian cases, the *Marchal* case is sometimes referred to in debates on ROE¹⁶⁹ even though the ROE had little impact on the decision. Rather, the case centered on the responsibility of commanders for the way in which subordinates carry out the orders given (in this case the protection of the Rwandese Prime Minister by Belgian servicemen serving in operation UNAMIR) and whether Colonel Marchal could be held accountable for the deaths of the Belgian servicemen. Discussion of the

¹⁶⁵ See p. 361, especially footnote 84 on that page.

¹⁶⁶ Notwithstanding the excellent discussion of necessity and proportionality in relation to applying ROE (and the right of self-defense in that context), as well as on the status of ROE, provided by Jörg in his annotation to this case in Jörg, N., “De zaak Clegg: noodweer/self-defense en de Rules of Engagement,” in *Militair Rechtelijk Tijdschrift*, Vol. 89 nr. 2, 1996, pp. 45 – 55.

¹⁶⁷ Wolusky, *op. cit.* note 81.

¹⁶⁸ Although that does not detract from Wolusky’s valid arguments regarding the effects of mere prosecution on morale or his arguments regarding the role of ROE and the interaction between ROE and the UCMJ.

¹⁶⁹ For example, Knoops, G.G.J., *Defenses in Contemporary International Criminal Law*, 2nd ed., 2008, p. 179.

ROE was, in fact, not considered necessary in the decision in the case.¹⁷⁰ Two other Belgian cases merit further attention, however. While they, too, are focused more on the proper application of the right of self-defense as set forth in the ROE, the role played by the ROE in those court cases goes beyond an evaluation of self-defense.

The case of *Koralid Kalid v. Paracommando*¹⁷¹ revolved around a Belgian serviceman serving in Somalia as a member of UNOSOM. On August 20 – 21, 1993, the accused was on guard duty at a check point at the entrance to the Belgian unit's base when an intruder was spotted. Both the accused and a fellow serviceman recognized the intruder as a child, but, given the operational circumstances in Somalia at the time, fired a warning shot and then an aimed shot at the child's legs. In its decision on this use of force, the Belgian military court took the ROE into account and established that the ROE had been "translated" into a national order by the superiors of the accused. Consequently, Article 70 of the Belgian penal code applied, providing that no offense has been committed if the acts performed were prescribed by law and ordered by the competent authority. The court then examined whether the ROE met the requirements for a legitimate order and whether the actions of the accused met the requirements of necessity and proportionality¹⁷² and, having found that they did, acquitted the accused. While the provision contained in Article 70 of the Belgian penal code differs somewhat from Article 43 of the Criminal Code of the Netherlands

¹⁷⁰ Decision of the Belgian Military Court of 4 July 1996 as presented (and annotated by N. Keijzer) in *Militair Rechtelijk Tijdschrift*, Vol. 90 nr. 3 (1997), pp. 65 – 80.

¹⁷¹ The ruling has not been officially published but is presented (in the form of a courtesy translation) as Case no. 198A in Sassòli, M., Bouvier, A.A. and Quintin, A., *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, Vol. III, 3rd ed., ICRC, 2011.

¹⁷² While the fact that the victim was a child and the accused was aware of this fact may raise ethical concerns, it should be noted that the use of child soldiers was a wide-spread practice in Somalia at the time. See, *inter alia*, the 2004 *Child Soldiers Global Report* issued by the Coalition to Stop the Use of Child Soldiers, available at https://www.essex.ac.uk/armedcon/story_id/child_soldiers_CSC_nov_2004.pdf (last accessed on 10 April, 2016).

(and certainly from the specifically military nature of Article 38, paragraph 2, of the Military Criminal Code of the Netherlands), in this case the ROE were accorded a role similar to the role referred to in the discussion provided above in section III.C.

The third Belgian case, also involving a Belgian serviceman serving in Somalia, was the case of *Osman Somow v. Paracommando* and also took place in 1993.¹⁷³ The case is comparable to the Eric O. case, in that it centers on the question whether the Belgian serviceman in question was justified in firing a warning shot. Similar to the *Koralid* case just described, the serviceman in this case had been assigned to guard duty in order to protect a military base. To that end, he was stationed at an observation post on Kismayo beach. In the early hours of July 14, 1993, he observed a person in the “forbidden” zone. After issuing warnings, the accused fired a warning shot on the opposite side of the ship hull behind which the person was observed to be hiding. Whether as a result of a ricochet or other causes, the person was hit and killed. The Court subsequently followed a similar line of reasoning as described above in the *Koralid* case, albeit less specific with regard to the ROE in relation to Article 70 of the penal code, and acquitted the accused. Here, too, the ROE appear to have played a role as intended by either the discussion above regarding Article 43 of the Criminal Code of the Netherlands or, in a military context, Article 38, paragraph 2, of the Military Criminal Code of the Netherlands.

The only (known) Canadian case that focuses to some extent on the ROE applicable at the time concerns the case of *R. v. Mathieu*.¹⁷⁴ Lieutenant-Colonel Mathieu was commanding officer of the Airborne Battle Group of the Canadian armed forces stationed in Somalia. After a number of incidents of theft, Mathieu allegedly issued an order authorizing

¹⁷³ The ruling has not been officially published but is presented (in the form of a courtesy translation) as Case no. 198B in Sassòli, *op. cit.* note 171.

¹⁷⁴ Part of the case material is available at <http://decisions.cmac-cacm.ca/site/cmac-cacm/en/d/s/index.do?cont=mathieu> (last accessed on 10 April, 2016).

the troops to fire on fleeing thieves but to aim at the lower legs.¹⁷⁵ After a Somali local was killed on 4 March, 1993, Mathieu prohibited the use of deadly force against (fleeing) looters, unless it could be positively determined that the looters were armed. In the case before the courts, the accused was charged with “negligent performance of a military duty,” in the form of failure to adhere to the ROE in question. Specifically, the initial order allegedly issued by Mathieu was considered beyond the scope of the ROE, especially the very strict and careful wording and procedures set forth in the ROE as regards the use of deadly force. Lieutenant-Colonel Mathieu was acquitted, but the Crown appealed on the basis that an improper instruction had been issued regarding the standard of negligence to be applied in evaluating Mathieu’s actions. In the appeals case, the defense argued that it was unclear what Mathieu had ordered or whether he had, in fact, issued an order at all (or rather, if his words to the troops were an actual order). Mathieu was acquitted in appeal as well.¹⁷⁶ Although this case began as a ROE crime prosecution, the outcome of the case was focused on issues other than the ROE. What is of interest, however, is that a ROE violation can lead to a negligence charge in the Canadian (military) criminal law system and that Mathieu was charged with negligent performance under Article 124 of the Canadian National Defense Act rather than disobeying an order as set forth in Article 83 of that Act.¹⁷⁷

Although once again focusing on self-defense rather than on the ROE themselves, the case of Corporal Banuelos in the United States provides some material for further reflection. On May 20, 1997, Corporal Banuelos

¹⁷⁵ As is apparent from the case material, the nature, contents and even the question as to whether the order existed at all were among the issues before the court. Consequently, the word “allegedly” is used here.

¹⁷⁶ The case is discussed on pp. 339 – 340 in the Report of the Somalia Commission of Inquiry, available at <http://publications.gc.ca/site/eng/9.646634/publication.html> (last accessed on 10 April, 2016).

¹⁷⁷ One explanation could be that Mathieu was considered to have improperly applied the ROE rather than outright violated or disobeyed the ROE. As is indicated in the summary in the Report referred to *supra* note 176, Mathieu was considered to have (negligently) misinterpreted the hostile intent provisions in the ROE as including the criminal intent of the looters.

was on patrol as a member of Joint Task Force 6 in support of the United States Border Patrol along the border between the United States and Mexico. During the patrol, the unit encountered Esequiel Hernandez Jr., who was tending his family's goats. The details of what subsequently took place are contentious, but Banuelos fired on Hernandez on the basis of the right of self-defense, killing Hernandez. Although the Pentagon issued statements which (inter alia) indicated that Banuelos had properly applied the ROE,¹⁷⁸ and therefore had been justified in his actions, some writers point out that domestic law was applicable and not the (military) ROE themselves.¹⁷⁹ Corporal Banuelos was not indicted, following a grand jury investigation, because insufficient evidence could be found that Corporal Banuelos had the necessary *mens rea* to “interfere[] with Hernandez’ constitutionally protected rights.”¹⁸⁰ Whether the ROE played any role in the grand jury’s decision is unclear. What is clear, however, is that the rules applicable to the use of force are context-specific. For the ROE to have a role in the criminal law process, consequently, it must be clear beforehand which ROE, or which (other) rules on the use of force apply. Mere adherence to the ROE may not be sufficient, or have any exculpatory effect, if the ROE lack the proper legal basis or do not properly reflect the applicable law under the circumstances.

As was stated at the beginning of this section, cases centering on ROE as such are rare. Instead, ROE sometimes play a supporting role in cases focused on the (non-ROE) crime which was (concurrently) committed, either in support of the prosecution or as an exculpatory element (although perhaps not as the only exculpatory factor) for the defense. Given the paucity of relevant case law, however, it would be premature to view the few cases available as convincing evidence of the accusatory or exculpatory role of ROE in the criminal law process. Instead, the cases available can be

¹⁷⁸ See, *inter alia*, <http://www.nytimes.com/1997/07/31/us/pentagon-halts-drug-patrols-after-a-killing-at-the-border.html> (last accessed on 10 April, 2016).

¹⁷⁹ Wolusky, *op. cit.* note 81, pp. 103 – 105; Stafford, *op. cit.* note 20, p. 1 – 2.

¹⁸⁰ Statement by the Department of Justice, available at <https://www.justice.gov/archive/opa/pr/1998/February/091.htm.html> (last accessed on 10 April, 2016).

seen as evidence that the interest in the possible role of ROE in that process is increasing.

V. Conclusion

As a result of its specific focus on the interaction between ROE and criminal law, this chapter has perhaps done insufficient justice, to use a contextually appropriate term, to all of the specific complexities and details of (national and international) criminal law as a specific body of law. Nonetheless, a number of observations and (perhaps tentative) conclusions can be drawn from the discussion above.

First, although they are sometimes issued as directives and are in any case formulated as authorizations rather than affirmative commands, ROE can generally be considered orders issued by higher command levels. In some nations, especially as regards international operations and concomitant international commands and directives, this status is achieved only after some form of translation or reconfirmation in a national order by the relevant national authorities. Regardless, however, of whether the ROE attain the status of orders directly or indirectly, the status as binding (standing) orders has significance for the role of ROE in the criminal law context.

On the accusatory side, the status of ROE as orders means that violations of the ROE can give rise to prosecution on the basis of disobeying orders, in addition to prosecution of (other) crimes resulting from the ROE violation itself. While opinions differ in academic writing as to the expediency of prosecuting ROE violations as crimes in themselves, the circumstances of the specific case will ultimately be decisive. In cases in which the other concurrent crimes cannot be prosecuted or proven and the rule of law or the proper administration of justice in a democratic society nonetheless requires further legal action, the possibility of prosecuting ROE violations as crimes in themselves remains valid. In cases where the prosecution instead focuses on the other concurrent crimes, moreover, ROE may still play a role in establishing or disproving the *mens rea* required for the crime in question.

On the exculpatory side, in addition to the role of ROE as a possible element in negating the requisite *mens rea*, ROE may in some cases have

an exculpatory effect in themselves. As the ROE reflect (inter alia) the legal parameters for the use of force, good faith reliance on the ROE, in conjunction with proper application of the principles of necessity and proportionality, may support a public authority defense. As orders, ROE may even in certain circumstances give rise to a defense of superior orders, within the complex and strict limits applicable to such a defense. In nations in which the statutes contain a provision on superior orders, whether specific to the military context or in general, the exculpatory role of ROE as superior orders will be more clear.

As is clear from the careful wording of these conclusions, neither the accusatory role nor the exculpatory role of ROE in the context of criminal law is absolute, nor is the expediency or success of applying the ROE in such roles a certainty. Due to their nature, purpose, contents and intrinsic role as operational directives on the use of force, ROE are neither intended nor, as such, inherently suitable for a leading role in the context of criminal law. While they may, in certain specific circumstances and cases, be useful as either an accusatory or an exculpatory device, and in most cases will provide at least some probative value, it is important to emphasize and realize that ROE are not a criminal law instrument. Consequently, the use of ROE in the criminal law context is an endeavor best embarked upon with great caution.

Finally, in closing, it must be emphasized that given the final conclusion just presented above, proper instruction on the ROE and open and honest guidance on the possible criminal law aspects of applying the ROE in military operations is of vital importance. Given the complexities of modern military operations, the reassuring role of ROE as offering instruction and guidance on the permissible use of force must not be lost as a result of misplaced fear of prosecution, nor be replaced by overconfident reliance on ROE as a “get out of jail free card.” Instead, the ROE should be part of the sum of all the instructions, orders and guidance given to the armed forces in order to ensure proper compliance with, and adherence to, the law and part of the reassurance that such compliance means that the servicemen need not fear the law.

Chapter 7

Conclusions

In the introduction, the observation was made that the realm of academic analysis of the legal aspects of the use of force and the realm of pragmatic application of those rules during the conduct of military operations need to remain connected. Such a connection is necessary for both realms. As regards the academic analysis of the law, understanding the application of the law in practice and awareness of the challenges in that regard is vital in order to ensure that the law develops in ways and directions that allow adherence to, and respect for, the law rather than rendering the law an abstract and theoretical framework. As regards the application of the law in practice and the tools provided to military forces to do so, awareness of the legal background, principles and considerations underlying those tools can increase their effectiveness and can facilitate application of the tools, while promoting (and ideally ensuring) compliance with the law. Although scholars do not need to experience combat to become better lawyers and military personnel need not become lawyers to carry out their tasks and duties, communication between the two realms and a certain level of understanding of each realm can greatly enhance the quality of legal development, both in terms of interpretation of *lex lata* and of development *de lege ferenda*, and can promote or ensure the legitimacy of military operations.

This study has sought to contribute to that communication between both realms by examining whether the rules of engagement can be seen as a “linchpin” between those realms and, if so, how they function in that role.¹ Based on the analyses and discussions in the preceding chapters, a number of conclusions and observations can be drawn, which will be discussed

¹ See also Gill, T.D. and Fleck, D. [eds.], *The Handbook of the International Law of Military Operations*, 2nd Ed., Oxford, 2015, chapter 1, especially p. 13, Rule 1.05 and the commentary thereto. This study was intended to contribute to the analysis of how the ‘horizontal’ function of the international law of military operations connects to the ‘vertical’ function of that body of law by analyzing the role of the rules on the use of force in that context.

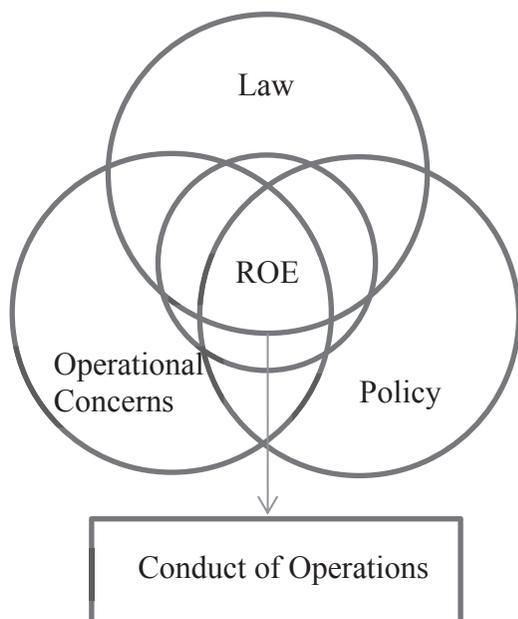
below. Finally, on the basis of those underlying conclusions, the main questions stated in the introduction will be addressed in order to answer the central question of this study: the function of rules of engagement and derivative (or similar) rules on the use of force in the context of the legal framework governing the use of force during military operations.

Conceptual model of ROE: classical model

The first chapter explained the basic principles of rules of engagement and presented and then followed the classical conceptual model based on, and presented in, the initial analysis and presentation by Roach,² used to visualize the interaction between the classic three constituent components of rules of engagement: the military element, the political or policy element and the law element. In this model, ROE ideally are composed of an overlap of these three constituent elements or components and subsequently govern the conduct of operations in order to ensure compliance with the concerns and interests of each of the constituent elements.

Classical Model:

² Roach, J. Ashley, “Rules of Engagement”, in *Naval War College Review*, Vol. 36, no. 1, 1983.



The classical model, or in any case the accompanying analysis by Roach, recognized that the relative influence of each of the constituent components depends on the nature and context of the military operation in question. In a full armed conflict, for example, the military operational component will normally be the primary factor as regards the use of force in furtherance of military (strategic) objectives as well as regards limitations on the use of force in order to ensure unity of effort or control of the overall campaign, and the ROE will tend to reflect the permissions and boundaries as determined by international humanitarian law.³ In military operations other than armed conflict, and especially in operations which are politically sensitive or which enjoy only limited popular support in the media and public debate, political policy concerns will normally be

³ It should be noted that even in a full armed conflict, the policy or political element may still impose more stringent restrictions than the law requires. What is meant here is that in an armed conflict, the ROE will usually approach a greater degree of overlap with the limits allowed by the law, while in other operations the policy element is the predominant factor of influence.

the overriding or deciding factor as regards the use of force or actions which may be considered provocative (and therefore potentially escalatory in nature). As regards the law component or element in ROE, it was observed in chapter 1, as well as elsewhere in this study, that ROE may never authorize actions or use of force beyond the limits imposed by the legal framework for the operation in question.

Both chapter 1 and the classical model of ROE also examined and explained the principal function of ROE as a means to establish escalation dominance.⁴ While this function serves both the military operational and the political policy interests as regards military operations, it has almost no meaning or role as regards the law component or element of ROE. In terms of military operational interests, escalation dominance allows commanders to control the level of violence in the theater of operations and therefore enhances unity of effort, achieving mission objectives and limiting casualties on the commander's own side. As regards political policy interests, escalation dominance is vital for achieving or sustaining necessary or desirable limitations on geographic and temporal aspects of the situation or military operation in question, such as preventing a spill-over into other regions or a deterioration of the situation into a protracted and costly (both in terms of finances and in terms of human lives, post-conflict reconstruction, and popular support) effort.

While (international) law clearly, as was discussed at length in the previous chapters and as will be discussed below, regulates the initiation of the use of force as well as the lawful targets or subjects of that use of force and, to some degree, geographical limits on the use of force,⁵ there are fewer, and more clearly defined, restrictions in the law as regards the level of violence in an extant armed conflict or other military operation than the political or operational concerns may impose.⁶ Put simply, as long as the

⁴ See page 50 and footnote 58 on that page for a full explanation of this concept.

⁵ One example being the law of neutrality, which restricts (or in fact prohibits) expansion of the conduct of hostilities into and onto the territory of neutral States, barring the exceptions set forth in that body of law.

⁶ Notable exceptions are, of course, the principles of necessity and proportionality. Note, however, that proportionality as it applies to the right of

use of force complies with the rules dictated by the law, the law does not prohibit or prevent a military operation from escalating into an armed conflict or prohibit or prevent an armed conflict from escalating into a multinational armed conflict or transboundary armed conflict. It may be derived from this that the function of ROE as regards escalation dominance is a function more closely related to the purpose of ROE in the military operational context, especially from a military or a political view, rather than reflective of, or interfering with, a possible function of ROE as regards (interpretation of and adherence to) applicable law or as a “linchpin” between academic analysis of the law and application of the law.

The role and function of ROE in relation to self-defense

The concept of “self-defense” was shown in chapter 3 to be a potential source of confusion, due to the various meanings of that concept and the distinct variations as regards the legal framework, level of decision making and degree of inherent as opposed to authorized or mandated authority to use force in the context of that concept. Each of these variations has a distinct effect on the role of ROE as regards the law in question, as well as on the function of the ROE as regards regulating the use of force in the given circumstances. Without restating all of the observations made in chapter 3 as regards the specifics of the legal frameworks for each of the

national self-defense and the notion of proportionality in the (criminal law) context of personal self-defense and in the context of international human rights law differ. Proportionality in the context of national self-defense refers to the comparison between the response by the attacked State and the initial (imminent) attack against which that response is directed. It does not dictate that the resulting situation may not escalate into a full armed conflict or that it must remain a low-level military confrontation. As regards human rights law, that law does not prohibit a situation of national unrest, for example, from escalating into a full non-international armed conflict but more specifically directs the use of force in specific situations and circumstances, not the use of force in the theater of operations as a whole. Finally, personal self-defense, as was discussed at length in chapter 3, refers to a specific use of force governed by national (criminal) law and is not a basis for, or the legal framework governing, (international) military operations.

forms of “self-defense,” the role and function of ROE as regards the law and as regards the use of force itself deserve a few concluding observations.

Starting with the right of national self-defense, it is clear that the legal framework is determined by international law and regulated by the Charter of the United Nations, the *jus ad bellum* in general and customary law. The Charter specifies that the right of national self-defense may be exercised individually or collectively, but requires a prior imminent or actual armed attack. While international developments, both factual and in terms of interpretation of international law, point strongly to an acceptance that non-state actors can also carry out an armed attack,⁷ an armed attack by some entity is nonetheless a clear and unequivocal requirement. Similarly, while there appears to be little debate that an imminent attack, meeting the requirements for the concept of “imminence,”⁸ can trigger the right of national self-defense, there does not appear to be any clear acceptance of a right to use force in order to pre-empt an attack that is not imminent or to prevent a potential or possible attack by removing the risk beforehand.⁹

With the exceptions of unit self-defense and the NATO concept of extended self-defense discussed below, the nature and scope of the right of national self-defense clearly lead to the conclusion that the subsequent use of force requires authorization by (the highest) national command authorities and that the use of force will (consequently) be regulated by ROE or similar rules on the use of force. Notwithstanding the standard instruction in every ROE set that nothing in the ROE negates or limits the inherent right of self-defense, it is clear that this phrase does not refer to national self-defense and that ROE regulate the use of force during any

⁷ The notion that armed attacks can be carried out by non-state actors when such acts are attributable to States has been widely accepted since the attacks on the United States of America of September 11, 2001. These types of attacks and their relationship with national self-defense are discussed in chapter 3, pp. 99 – 101. While still controversial and subject to much debate, it may also be argued by now that non-state actors can carry out armed attacks even when such acts are not attributable to States and that this notion has been recognized in State practice. This aspect is discussed in chapter 2, pp. 61 – 70.

⁸ See chapter 3, pp. 95 – 98.

⁹ *Ibid.*

national response to an armed attack against the nation.¹⁰ In other words, the ROE serve to translate and channel the authorization to use force in the context of national self-defense into clear and concise instructions for the armed forces in question. In this process, the various aspects of the law, including such principles as necessity and proportionality, are taken into account and reflected in the ROE in question. The ROE thereby take on the role of conduit between the law on the one hand, and the application of the law in practice on the other hand.

When viewed as a group, the NATO concept of extended self-defense, the notion of unit self-defense and the UN interpretation and application of the right of self-defense in the context of operations under UN command and control are essentially variations of the same legal concept, although the legal basis for each element in this group varies. What these three concepts have in common, however, is that they are inherent rights of certain specific categories of units and that the rights in question are derived from, or granted by, the rights and authority of the organization or State responsible for the units in question. Extended self-defense, as was discussed in chapter 3, is the application of the right of collective self-defense as applies to the NATO member nations, at the level of the NATO force or unit in question.¹¹ Similarly, unit self-defense is the application of the parent State's right of national self-defense at the level of that nation's military units. While in principle the same requirements apply at the operational or unit level as would apply at the national level, including in

¹⁰ While obviously an attack may be directed against more than one nation, it would still be up to each of the nations in question to invoke the right of national self-defense. Aiding a nation in the context of collective self-defense without the consent or request of the attacked nation does not fall within the legal framework of Article 51 of the Charter of the United Nations. Prior treaty arrangements do not alter this aspect, since such treaties would still require the attacked nation (or the attacked nations, individually or collectively) to invoke the relevant provisions. For example, the invocation of Article 5 of the North-Atlantic Treaty requires a decision by the North Atlantic Council, while Article 42, paragraph 7, of the Treaty on European Union requires a decision by the European Council.

¹¹ As also discussed in chapter 3, this right only applies to units from NATO member nations when operating under unified NATO command and control. See chapter 3, pp. 102 – 104.

any case the requirements of necessity and proportionality, the concept of “armed attack” should be interpreted with the same difference in scale in mind. In other words, while there must clearly be an (imminent) attack in order to invoke the right of extended or unit self-defense, the (imminent) attack need not rise to the same level of intensity as would be required to invoke full-scale national self-defense in the sense of Article 51 of the UN Charter.¹² Finally, the UN interpretation and application of the right of self-defense, while covering trigger criteria not included in the other two forms of self-defense just discussed,¹³ derives from the unique status of UN operations as a subsidiary body of the United Nations and the authority of the UN, both explicit and implied,¹⁴ to take the necessary measures to protect or restore international peace and security. While the status of subsidiary organ technically makes the exercise of the right of UN self-defense by forces under UN command and control a direct application of the inherent rights of the UN instead of a derived right, as was the case with extended and unit self-defense, this would appear in practice to be more of an academic approach than a realistic one¹⁵ and does not detract from the

¹² For a discussion of the requirements for unit self-defense, see chapter 3, pp. 110 – 117.

¹³ What is meant here is the right of units under UN command and control to defend against armed attempts to interfere with the execution of the mandate of the force in question. This aspect and its background is discussed in chapter 3, pp. 106 – 110.

¹⁴ See, *inter multos alia*, International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), 11 April, 1949, pp. 12 – 13. The concept also logically follows from the authority of the UN as regards the maintenance or restoration of peace and security, the fact that UN operations are established on the basis of (binding) resolutions of the Security Council (both in the sense of Chapter VII and “Chapter VI ½” operations and, of course, notwithstanding the notable (and sole) exception of the UNEF I operation established on the basis of applying the Uniting for Peace resolution by the General Assembly), and the fact that the right in question has been applied from as early as the original UNFICYP operation in 1964. See chapter 3, p. 107.

¹⁵ In the author’s professional experience, the official conceptual notion that units contributed by nations to operations under UN command and control are under the exclusive authority of the UN is exactly that: a conceptual notion. While the degree to which nations continue to influence or even direct the actions of their national contingents in such operations varies from nation to nation, the fact that

comparable nature of the mechanism by which the inherent rights of the “parent” nation or organization are exercised at the level of the military force or unit in question.

One other element these three forms¹⁶ of self-defense have in common, is that the actual exercise of the right of self-defense in question is normally regulated through the ROE applicable to the force or unit in question.¹⁷ Similar to the observation made above as regards national self-defense, the exception made in ROE regarding self-defense does not appear to apply to these forms of self-defense¹⁸ and the ROE in these cases serve to translate the inherent right in question into clear instructions for the forces and units in question. As such, in the case of these forms of self-defense the ROE similarly act as a conduit between the law, including the various requirements and conditions set forth in that law, and the application of that law in the conduct of actual military operations.

The concept of personal self-defense differs in many aspects from the other forms of self-defense discussed above. The most obvious difference is that instead of applying to specific forces or units on the basis of their special status or identity, personal self-defense, as the name implies, applies

the sending nations remain responsible for disciplinary and criminal matters and the fact that, as was mentioned on p. 48, the UN acknowledges the authority of sending nations to issue caveats on the UN rules on the use of force for a given operation provides clear indication that national influence on the use of force by such contingents exists.

¹⁶ Force protection, as discussed in chapter 3 as a form of self-defense, will not be discussed further here. Since force protection is derived from the authority of the force as such, usually in the form of a UN Security Council resolution, the same mechanism and the same observations regarding the role and function of ROE apply to force protection.

¹⁷ A possible exception is unit self-defense. While the Netherlands and Belgium have issued standing ROE for their naval vessels which include instructions on unit self-defense, the practice of other nations in that regard is not publicly known. See also the discussion on pp. 127 – 128 (and elsewhere) on the SROE in the United States and their relation to self-defense.

¹⁸ Here, too, the right of unit self-defense may be an exception and this form of self-defense may represent the turning point between the role of ROE in relation to self-defense as discussed above and the (lack of a) role of ROE as regards personal self-defense to be discussed below.

to every person individually and is not dependent on any specific status or role, including whether or not the person is even a member of the armed forces. Secondly, while each of the previous forms of self-defense is based on a principle or specific element of international law, personal self-defense is based on the national law of the parent State of the person in question and normally governed by local criminal law.¹⁹ While in some States personal self-defense is a personal (and in that form usually an inherent and inalienable) right, in other States it is a justification or excuse under criminal law. It may be argued that even in States in which personal self-defense is a right, however, its effective function from a criminal law point of view is nonetheless that of a justification. In other words, self-defense negates the illegality of the otherwise illegal act in question, subject to a number of criteria and conditions normally set forth in the criminal law statutes or case law of the State in question.

As was discussed in greater detail in chapter 3, personal self-defense clearly has a different function and status as compared to the other forms of self-defense and cannot be used as a basis for planning or conducting military operations to achieve military (and, of course, ultimately political) objectives. Moreover, since personal self-defense may be invoked by anyone, it is also not a specifically military form or basis for the use of force. In its essence, personal self-defense allows (or accepts as justification) the necessary use of force to defend oneself (and, in many jurisdictions, others in the near vicinity) against an (imminent) attack, provided the attack was unprovoked and constituted an unlawful use of force against the victim invoking self-defense. It is, in other words, a limited and conditional form of authorized self-help as a last resort, allowing the person in question to temporarily ignore the restrictions or sanctions set forth in law which would otherwise prohibit such use of force. Clearly, then, the exception made in ROE sets as regards self-defense refers specifically to this form of self-defense and (the right of) personal self-defense allows

¹⁹ As regards the argument that personal self-defense can also be derived from, or based on, human rights law and specifically the right to life, see the discussion on human rights as a basis for the concept of unit self-defense in chapter 3, pp. 114 – 116.

the person in question to set aside the ROE to the extent necessary to defend himself or herself.²⁰ While ROE or their derivative cards may explain or clarify elements of the law regarding personal self-defense,²¹ ROE, contrary to the other forms of self-defense, do not normally serve to translate the law into instructions on the use of force as regards personal self-defense and do not, in this specific case, act as a conduit between the law and the use of force in question.

Returning to the constituent questions set forth in the introduction, the first of those questions may now be addressed. Constituent question 1 asked whether ROE affect the right to self-defense and, if so, how the ROE affect this right. Conversely, if ROE do not affect this right, the question must be asked as to how the relationship between the right of self-defense and ROE can be described. In all of the forms of self-defense discussed above and in chapter 3, it may be concluded that the ROE do not affect the right of self-defense, in the sense that the ROE do not limit or negate the right of self-defense. As regards the relationship between ROE and self-defense, however, a clear differentiation is necessary between personal self-defense

²⁰ Obviously, and as also expressed in a few of the responses to the 2006 questionnaire of the International Society for Military Law and the Law of War, there are exceptions to the individual exercise of (the right of) personal self-defense in a military context. A classic hypothetical case would be a covert operation by special forces in which stealth is vital for mission accomplishment and unit survival. In such a case, the unit commander would be justified in ordering his unit to hold fire even if a member of his unit were to be threatened by an imminent enemy attack. It should be noted, however, that such a restriction would be a commander's on-scene command and would not be included in the ROE for the mission. As regards the questionnaire, the general report and the national reports were published in: International Society for Military Law and the Law of War, *Recueil XVII*, Brussels, 2006.

²¹ In some nations, including the Netherlands, instruction cards similar to the soldier's cards normally derived from ROE exist which set forth the authorizations and limitations regarding the use of force in self-defense. Such cards are based on, and explain in simple terms, applicable law on self-defense, however, and are not "true" ROE cards or ROE in the normal sense of that term. Moreover, such cards are normally issued to personnel carrying out military duties of some kind and it is debatable whether they reflect "true" personal self-defense in the criminal law sense of that concept or rather set forth instructions related to the military nature of the tasks and duties of the personnel in question.

and the other forms of self-defense. In terms of national, extended, UN and unit self-defense, and other variations on those concepts, the ROE serve as a conduit between the law and the actual application of the use of force in military operations by translating the law into clear instructions regarding the use of force. As regards personal self-defense, the ROE do not serve this purpose and instead may, under specific circumstances and conditions, be set aside to the extent necessary to effectively exercise the right of personal self-defense. As this is clearly an exceptional situation and, furthermore, is in keeping with the overall nature and role of the right of personal self-defense, this does not constitute a “single point of failure” of the ROE system as such, any more than the role of personal self-defense is a “single point of failure” of (criminal) law. This observation is strengthened by the fact that acts which contravene the ROE are, in most jurisdictions, criminal acts as such²² and invoking self-defense as a justification for the ROE violation would on that basis alone require meeting the relevant requirements set forth in (military) criminal law.

The role and function of ROE in relation to international humanitarian law

International humanitarian law (IHL) without question and by its very nature is one of the principal bodies of law governing the use of force. While the provisions of IHL regarding its applicability to military operations are clear in terms of their linguistic content, chapter 4 demonstrated that some discussion is possible in this regard. The influence of IHL on military operations is enhanced, on the other hand, by the practice of some nations to apply, and therefore incorporate in the ROE as well as in other directives or orders regarding the conduct of military operations, the protective elements of IHL as a matter of policy regardless of its applicability *de jure*.

²² This aspect is discussed in chapter 6 and below, regarding the criminal law aspects of ROE.

As regards international armed conflicts (IAC), the law clearly states that IHL applies from the moment that force is used²³ by the armed forces of one State against the armed forces of another State. While, as was discussed in more detail in chapter 4, State practice appears to show reluctance on the part of governments to acknowledge a state of armed conflict and thus appears to favor a “threshold approach” to the applicability of IHL even in IAC, the law and the authoritative commentary by the ICRC thereto, as well as the case law of the International Criminal Tribunal for the former Yugoslavia, do not leave much room for such a threshold criterion. It is clear that a “full threshold” criterion for applying IHL to IAC would undermine the object and purpose of IHL and inherently runs the risk of reintroducing the political and interpretative factors that were eliminated when the concept of “war” was replaced by “armed conflict” in the law. On the other hand, a strict adherence to the “single shot” approach to the applicability of IHL to all inter-state acts of armed force runs the risk of ignoring that some cases appear to be resolved more or less amicably by the States involved (or at least through recourse to diplomatic or political negotiations) and may assign a “label” (that is, the designation of the situation as a *de facto* armed conflict) to a situation that could hinder speedy and low-key resolution of the situation without further recourse to the use of force. Consequently, chapter 4 explored the existence of a “half threshold” criterion, on the basis of which any inter-state use of force which is designated as an “incident” by the States involved would not lead to applicability of (the full corpus of) IHL.²⁴

²³ Or, of course, if any member of the armed forces is taken prisoner by the armed forces of another State or in cases of belligerent occupation (although it is difficult to imagine a case of belligerent occupation without recourse to the use of force). Given the scope and specific topic of this study, however, the emphasis in the main text is placed on the use of force.

²⁴ In addition to the discussion of this aspect in chapter 4 and above, it goes without saying that designating a situation as an “incident” would only be acceptable as a “half threshold” for the applicability of IHL if the “incident” is resolved as quickly as possible and the use of force is not protracted and does not increase in scale.

The applicability of IHL to NIAC is somewhat more complex, due especially to the reluctance of States to acknowledge a domestic situation of violence as being subject to regulation by IHL, at least as regards the acts of State authorities to end the situation of violence, as well as reluctance to grant the non-state actors in question any form of status other than “criminal” or “terrorist”. While the latter concern is mitigated to a large extent by the absence of combatant privilege for non-state actors under IHL applicable to NIAC, the threshold argument for NIAC is reflected clearly in the applicability provisions of the Second Additional Protocol to the Geneva Conventions (AP2). On the other hand, the provisions of common Article 3 of the Geneva Conventions (GC), the sole Article in those conventions addressing NIAC, does not contain any threshold provision and the original ICRC commentary to the GC appears to favor an absence of any threshold criterion for the applicability of common Article 3.²⁵ Nonetheless, the common legal opinion is that a threshold of intensity must be met before a situation of use of force between government agents or armed forces and non-state actors can be qualified as a NIAC and IHL becomes applicable to that situation.

Finally, chapter 4 examined the situation of UN operations, specifically operations under UN command and control. While the opinion of the UN itself on this matter remains somewhat ambiguous, and the various documents relating to this issue are not unequivocally clear, the views of the ICRC are abundantly clear and it seems inevitable, both from a legal point of view and in terms of the legitimacy of UN operations, that IHL applies equally to operations under UN command and control once the

²⁵ The ICRC points out that such an approach to common Article 3 should not meet with any objection from States Parties, since the provisions in question contain obligations which would normally already be applicable in most States. See Pictet, J.S., *Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, 1952, p. 50. This view is not supported anymore, however, at least as regards the absence of any threshold for IHL applicability in NIAC, as also evidenced by the case law of the ICTY. See, for example the Tadić case (*Prosecutor v. Dusko Tadić*, IT-94-1, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction), para. 70, and the Boškoski case (*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, IT-04-82-T) 10 July, 2008, para. 175 – 178.

UN forces in question become combatants in an armed conflict. The nature, purpose or mandate of the operation in question, or for that matter the status of the UN itself, would appear to be irrelevant in that regard.

Whether applicable *de jure* on the basis of the criteria discussed above and in chapter 4, or *de facto* on the basis of national policy, IHL contains a number of principles and (binding) provisions that directly influence the ROE for operations in which IHL applies. The first, and arguably most influential, principle of IHL as regards the contents of ROE is the principle of distinction. Put simply, this principle sets forth the injunction that only military targets may be attacked and, conversely, the prohibition on attacking civilians and civilian objects. In terms of ROE and military operations as a whole, the application of this principle directly influences the concept of targeting, both in terms of targeting persons and targeting objects.

In international armed conflicts, the principle of distinction as regards persons is clear: enemy combatants are lawful targets,²⁶ while those who are not combatants are civilians and, barring one exception discussed below, may not be attacked. As regards the category of “combatants”, the rules are fairly straightforward as well: combatants are all members of the armed forces, with the exception of those, such as medical personnel, who enjoy protection under IHL, as well as civilians who are members of a *levée en masse*.²⁷ Combatants may not be attacked for such time as they are rendered *hors de combat*, but at all other times are lawful targets.

²⁶ As regards the discussion concerning “kill or capture” related to the ICRC interpretative guidance on the notion of direct participation in hostilities, see chapter 4, pp. 206 – 214.

²⁷ It should be noted that Article 43, paragraph 1, of the First Additional Protocol further defines “armed forces” as “all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates” and requires that such forces be “subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.” Furthermore, as specified in Article 43, paragraph 3, of the same Protocol, States may incorporate other agencies or entities into their armed forces, provided they give due notification to the other States Parties.

As regards ROE, the rules of IHL regarding combatants can be, and usually are, incorporated in the ROE authorizing (categorically) the attack on members of enemy armed forces. While it is, in principle, possible to incorporate the exceptions to this rule as regards medical personnel, etc., and as regards combatants who are *hors de combat* into the ROE themselves, this is not common practice. Instead, such core rules of IHL would normally be incorporated in the curriculum of basic military training in IHL.

The rules regarding civilians can be considered a mirror image of the rule regarding combatants, in that while combatants may be attacked unless they are *hors de combat*, civilians may not be attacked unless and for such time as they directly participate in hostilities. While this concept appears clear from a linguistic point of view, it is not as clear in practice and is becoming less clear in the face of modern military operations against non-state actors, including global terrorist organizations which avail themselves of military tactics, weapons and maneuvers in one theater of operations, but disappear among the civilian population and avail themselves of “classic” terrorist attacks in other areas. The attempt by the ICRC²⁸ to clarify the concept of direct participation in hostilities (DPH) has provided a number of useful instruments and criteria, but has also met with quite some criticism.

The concept of DPH can be divided into two main categories: the element of actual direct participation and the element of “for such time as”. In the approach taken by the ICRC, the element of direct participation is addressed by differentiating between civilians who have a continuous combat function,²⁹ essentially likening them to “non-state armed forces,” and civilians who can be said to be directly participating in hostilities if

²⁸ ICRC (Melzer, N.), *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, Geneva, 2009.

²⁹ It should be noted that the continuous combat function concept does not bestow any combatant privilege on such persons and their status is not that of regular armed forces. Instead, such persons may be targeted on the reasoning that their function essentially results in a more or less permanent state of direct participation in hostilities. This approach has met with criticism; see chapter 4, pp. 191 – 192.

three threshold criteria are met. These three criteria can conceptually be linked to the three concepts of “participation”, “direct” and “hostilities”. The first of these criteria is the threshold of harm, which requires that the civilian(s) in question commit an act which is likely to have an adverse effect on either the military operations or the military capacity of the opposing party, or to cause the death, injury or destruction of protected persons or objects.³⁰ The second criterion is the threshold of direct causation, which requires that the act and the (likely) harm are directly related, for which the ICRC proposes that only one causal step separates the act and the harm or that the act is an integral part of an operation which is linked by only one causal step to the (likely) harm in question.³¹ The third and final criterion is the belligerent nexus, requiring that the act(s) are related to, and part of, an armed conflict. While this last criterion appears self-evident, it is nonetheless essential in differentiating between DPH and (random) acts of (criminal) violence and is in fact also, although not necessarily related to DPH, reflected in the elements of crime for all of the war crimes enumerated in the Statute of the International Criminal Court.³²

Apart from the various criticisms and shortcomings of the ICRC interpretation of the concept of DPH as discussed in chapter 4, translating the concept of DPH into workable ROE becomes quite a challenge if the ICRC interpretation is applied *in toto*. Starting with the continuous combat function, this concept cannot be translated into ROE directly as the criteria establishing such a function are too much subject to specific interpretation and are too conditional on the specific circumstances. Instead, ROE for military operations in NIAC would more likely take a functional approach,

³⁰ This can be conceptually linked to the “participation” element of DPH. Note that the harm need not actually arise, but must at least be likely.

³¹ This criterion satisfies the “direct” element of DPH. While criticism is certainly possible as regards the examples given by the ICRC, the concept of direct causation is itself not unreasonable and follows the same principle as one of the requirements for objects being military objectives, as will be discussed below.

³² Specifically the final two elements for each of the war crimes within the jurisdiction of the ICC, with the penultimate element requiring the belligerent nexus and the final element requiring knowledge of the factual circumstances establishing the existence of an armed conflict.

authorizing the use of force against persons exhibiting certain behavior, such as posing an immediate threat or actually using force against the military forces in question. A similar approach can be taken as regards civilians without a continuous combat function, rather than attempting to incorporate the three threshold criteria and all of the related nuances and exceptions in the actual ROE themselves. Alternatively, and in the author's professional experience, the criteria and explanations regarding DPH can be incorporated in the targeting directives and related guidance for military forces, which must be applied in conjunction with the ROE.

Distinction as regards objects is somewhat more straightforward, notwithstanding a few controversial issues involved in applying the dual requirements of Article 52 of the First Additional Protocol to the Geneva Conventions. Objects are military objects, and therefore lawful targets, if they meet the criteria set forth in Article 52 and, as also set forth in that Article, their destruction, etc., offers a definite military advantage under the circumstances ruling at the time. Objects failing to meet these criteria and requirements are civilian objects and may not be attacked. Additionally, IHL prohibits attacking certain specific categories of objects, including cultural property under (enhanced or special) protection or objects containing dangerous forces, such as nuclear power plants and (large) dams, unless certain very strict criteria are met.

Without repeating the explanation and analysis of these criteria and requirements as discussed at length in chapter 4, a few observations are in order as regards the application of these rules in current operations. While the rules of IHL regarding the targeting of objects are clear, the nature of modern operations as described above, especially military operations against global terrorist organizations, can cause increased controversy and debate as regards the precise meaning of the requirement that the object to be attacked makes "an effective contribution to military action." This issue is particularly relevant as regards oil facilities and infrastructure, which by their very nature can be considered dual use objects, providing fuel to enemy forces and providing (significant) revenue allowing the enemy to continue its operations (in addition to, obviously, serving the interests of the local economy). Although facilities providing fuel (directly) to military vehicles, aircraft, etc., clearly meet the requirements of IHL as regards

military objects,³³ facilities which “merely” provide the economic means to continue (enemy) operations do not meet those requirements. While it would be tempting to consider this as an indication that the law is “outdated” and no longer meets the exigencies of modern operations and the new and current threats to international peace and security, that is not necessarily the case and it is perhaps more useful to place the various elements in proper perspective. Taking the operations in Iraq and Syria as one component, the scale and nature of the operations make that component a NIAC (albeit a transboundary one). In that context, the economic benefit of oil revenues for Da’esh is no different from the economic benefit that those same oil revenues provided for States in previous wars in the same region. The fact that the opponent in this case is (also) a global terrorist organization is not relevant for applying IHL to the NIAC component of fighting this organization. When viewed as a source of financing global terrorism, on the other hand, the oil facilities in question do not change in status either and there is no rule in international law authorizing attacks on civilian facilities in order to fight the financing of terrorism.³⁴ The hybrid nature of Da’esh as an opponent in a NIAC being fought through military means on the one hand and as a global terrorist organization carrying out terrorist attacks in other parts of the world, which would be more suitably the subject of law enforcement, on the other hand does not change the law, it “merely” means that each part of the campaign to eradicate this threat must be weighed against the legal framework applicable to that part, rather than blending or confusing the campaign as a whole and thereby blending and confusing the legal framework.

³³ Obviously attacks on such objects would also have to be weighed against the prohibition against causing widespread, long-term and severe damage to the environment, as set forth in Article 55 of the First Additional Protocol. While this would not necessarily mean that such facilities cannot be attacked at all, it does provide additional considerations as regards the methods and means used to carry out the attack.

³⁴ At least not without some form of court order or other legal process. What is meant here is the notion that the global “war” against terrorism is a (global) law enforcement effort, to which the human rights paradigm (to be discussed below) applies.

In terms of implementation of the rules of IHL regarding the targeting of objects into ROE for a given military operation, a similar approach can be applied as was discussed above in relation to targeting persons. In other words, while the ROE may authorize the attack on enemy military objects, the accompanying targeting directives and comparable guidance can (and normally do) serve to implement the additional considerations as regards identifying which objects meet the criteria allowing the attacks authorized in the ROE themselves. Additionally, as was observed above regarding the targeting of persons, training and education in IHL for the armed forces provides essential additional guidance, promoting (or ideally ensuring) compliance with the law regardless of further directives.

Turning next to the IHL principles of proportionality and precautions in attack, IHL specifies that targets, meaning those persons or objects that may be attacked as discussed above, may not be attacked if the expected incidental (collateral) injury, death or damage to civilians or civilian objects would be excessive compared to the concrete and direct military advantage of that attack, as well as specifying a number of additional precautions to be taken prior to any attack.³⁵ The rules regarding proportionality and precautions in attack are primarily set forth in Article 57 of the First Additional Protocol. Additionally, although primarily aimed at the principle of distinction, the rules regarding indiscriminate attacks as set forth in Article 51 of that same Protocol provide additional guidance and restrictions to be taken into consideration prior to launching an attack. For example, but without restating the law *in toto* or repeating the discussion in chapter 4, if circumstances permit an “effective” warning should be given prior to launching attacks which may affect the civilian population and indiscriminate attacks are prohibited. The rules of IHL regarding proportionality and precautions in attack are fairly straightforward, commonly known and not particularly controversial or problematic.³⁶

³⁵ Note that Article 49, paragraph 1, of the First Additional Protocol defines attacks as “acts of violence” regardless of whether they are carried out in offensive or defensive operations.

³⁶ This observation strictly refers to the rules themselves. Clearly, as also evidenced by, for example, media reports regarding the war in Syria, compliance with these rules is another issue. On the other hand, and without any intended irony,

Moreover, due to policy and public support considerations,³⁷ recent operations have shown greater restrictions and higher requirements as regards precision, damage limitation and level of decision making than would normally be required by IHL itself.

Although, as was also observed in chapter 4, the rules regarding proportionality and precautions in attack can, and often are, included in the “commander’s guidance” section of ROE sets, the IHL rules as such are not commonly incorporated into the actual ROE themselves. One exception is the role played by the ROE regarding target identification, which specify the level of certainty required before a target can be considered positively identified. These types of ROE in a given ROE set can vary from visual identification to identification by one (or more) non-visual means, such as radar, sonar, etc., and work in conjunction with the ROE authorizing attacks on specified (categories of) targets. While advances in modern targeting and navigation systems, including the use of GPS in both weapons platforms and the actual weapons themselves, can support discriminate targeting and weapon precision, the deployment of human forward observers, including Joint Terminal Attack Controllers (JTAC),³⁸ is still a prevalent approach for ensuring even greater levels of precision.³⁹

the many reactions to incidents in which States allegedly act in contravention of these rules is indicative of the rules being widely known.

³⁷ See the introduction, p. 17, and chapter 1, pp. 40 – 41, as regards the effect of the media and public opinion on the conduct of military operations.

³⁸ See chapter 4, pp. 180 – 181, as regards the specific complications regarding the use of JTAC assets from different nations in connection with adhering to the requirements of IHL.

³⁹ The fact that targeting can still lead to human error with devastating results in the era of modern electronics was sadly demonstrated by the erroneous attack by US forces on a hospital of the Médecins Sans Frontières organization in Kunduz, Afghanistan. See, *inter alia*, the report by the BBC, “Afghan Conflict: What We Know About Kunduz Hospital Bombing”, 25 November 2015, available online at: <http://www.bbc.com/news/world-asia-34444053> (last accessed on 1 April, 2016). The official statement, released as a press release, by the commander of NATO and US forces in Afghanistan is available at: <http://www.rs.nato.int/article/press-releases/statement-on-the-kunduz-msf-hospital-investigation.html> (last accessed on 1 April, 2016).

Finally, a few observations can be made as regards the IHL principle that the choice of belligerents as to the methods and means of warfare is not unlimited, including the concomitant prohibition on weapons which cause unnecessary suffering or superfluous injury. Firstly, it should be noted that (complete) prohibitions or bans on specific weapons are fairly rare and the rules are more commonly either applied as general rules (or to categories of weapons rather than individual weapons) or in the form of specific rules regulating or restricting the use of specific weapons.⁴⁰ One complete ban on a specific weapon, that is the prohibition on blinding laser weapons, concerned a weapon that was not in production at the time the ban was adopted, and current discussions regarding lethal autonomous weapon systems similarly address a weapon (or weapons platform) that does not (yet) exist. The prohibitions adopted against anti-personnel landmines and against cluster ammunitions are not universal and it would appear that it is unlikely they will become universal in the near future. Finally, as regards bullets which expand or flatten easily, a reverse development can be observed, in which a total prohibition on such ammunition appears to be changing into a relative prohibition more in keeping with the rules of IHL and their intended purpose.⁴¹

Regardless of the discussions concerning specific weapons and weapon systems, the rules of IHL regarding superfluous injury and unnecessary suffering and those regarding methods and means of warfare are clear and appear to be so commonly accepted that they can be

⁴⁰ See, for example, Protocols I and III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 1980.

⁴¹ For a full discussion of this topic, see Boddens Hosang, J.F.R., “Gif, Gas en Dum Dum Kogels: De Wijzigingen in Artikel 8 van het Statuut van het Internationaal Strafhof na de Kampala Amendementen,” in *Militair Rechtelijk Tijdschrift*, 2016, which discusses the Kampala amendments to the ICC Statute as set forth in Resolution RC/Res.5 of the Conference of State Parties. See especially preambular paragraph 9 of that resolution in conjunction with Article 8, paragraph 2(e)(xv) and the concomitant elements of crime. See also the observations made in Boothby, W.H., *Weapons and the Law of Armed Conflict*, Oxford, 2009, p. 149 – 150.

considered part of customary law.⁴² Although the primary method to implement these rules is through the application of the (mandatory) weapons review mechanism as set forth in Article 36 of the First Additional Protocol to the Geneva Conventions, ROE sets, or at least the formats for such sets as can be found in the relevant compendia,⁴³ contain specific ROE types which can be used to restrict or prohibit the use of specific weapons or categories of weapons in a given military operation or to subject the use of such weapons or weapon systems to specific conditions or prior authorizations from a higher level of (military) command.

Turning to the second constituent question of this study, the following answers can be given. The question asked whether the ROE reflect or serve to implement the laws of armed conflict and, if so, how the laws of armed conflict are reflected or implemented in the ROE. On the other hand, if the ROE do not reflect or implement IHL, the question was asked as to how the relationship between IHL and ROE can be described. Based on the observations made above and the discussion in chapter 4, it becomes clear that the relationship between IHL and ROE is a combination of direct and indirect influence, in addition to which IHL influences military operations and the use of force by other means. The direct implementation or reflection of IHL in ROE can be seen in the specific ROE types related to targeting, whether those authorizing attacks on specific targets or those requiring a certain level of certainty regarding target identification, as well as the ROE related to prohibiting, restricting or governing the use of specific weapons. The indirect influence of IHL on ROE is achieved by two ways. Firstly, in the legal review of any ROE set, IHL is clearly and obviously one of the main areas of law against which the ROE for any given operation are compared in order to ensure that the ROE are not more lenient or permissive than the law allows. Secondly, as IHL directly influences, or is directly reflected in, several of the additional directives or instructions issued in the context of military operations, especially the targeting directives, and those directives operate in conjunction with the ROE, the rules of IHL not directly

⁴² Henckaerts, J.M. and Doswald-Beck, L., *Customary International Humanitarian Law*, ICRC/Cambridge University Press, 2005, p. 237.

⁴³ See chapter 1, pp. 45 – 46.

implemented in the ROE themselves nonetheless (indirectly) influence (the application of) the ROE. While education and training in IHL is not only mandatory⁴⁴ but essential to promote adherence to IHL by the armed forces, and most provisions of IHL are implemented by means other than the rules on the use of force (whether the ROE or accompanying directives), IHL is (also) clearly implemented by, and reflected in, the ROE and concomitant rules on the use of force. In such cases, whether directly or indirectly, those rules act as a conduit for the implementation of the law during the conduct of military operations.

The role and function of ROE in relation to international human rights law

While the applicability of international human rights law (HRL) to the conduct of State agents, such as law enforcement personnel, domestically would appear to be self-evident, given the object and purpose of the law in question, the applicability of HRL to military operations, especially military operations abroad, has only more recently become a significant topic and subject of analysis. This development has been stimulated to a large extent by the case law of the various human rights bodies, explaining, clarifying, and in some cases possibly expanding the (geographic) scope of application of the HRL instruments in question. As was discussed at some length in chapter 5, this development has not met with approval or acceptance by all States and gives rise to a number of legal questions and complexities.

The discussion in chapter 5 as regards the applicability of HRL to extraterritorial military operations examined a number of these complexities and explored the conceptual differentiation between two legal paradigms: the war fighting paradigm that applies in situations of armed conflict, to which IHL applies *de jure* and which was discussed at length in chapter 4, and the law enforcement paradigm that applies to the use of force

⁴⁴ Geneva Convention (I), Article 47; Geneva Convention (II), Article 48; Geneva Convention (III), Article 127; Geneva Convention (IV), Article 144; Additional Protocol I, Article 83; and Additional Protocol II, Article 19.

by State agents in situations other than armed conflict and to which HRL applies. While the differences between these paradigms as regards applicable law are clear,⁴⁵ confusion is possible as regards the concepts of necessity and proportionality as these concepts are defined and applied in each paradigm. Where “necessity” in the IHL paradigm refers to military necessity, meaning those actions which are required to achieve the objectives of the operation and which are not in violation of IHL, the same term has a different and more restrictive meaning in the context of the HRL paradigm, in which it refers to a more absolute sense of necessity in which the use of force becomes a measure of last resort, permissible only if other alternatives would not (reasonably) be effective or are simply not available. Similarly, while the concept of proportionality in IHL only addresses the evaluation between potential collateral damage and the military advantage of attacking the target in question, meaning that it has no relevant function in (hypothetical) situations in which no collateral damage would result from the attack, the same concept in HRL is far more restrictive and limits the use of force to that which is reasonable in comparison to the threat against which the force is being used and prohibiting the use of force (whether in terms of intensity or duration or in terms of methods and means) which would, under the circumstances, be excessive in comparison to the threat in question. In combination with the restrictions, injunctions and other specific provisions of each system of law, these different approaches to fundamental concepts employed in each paradigm render the determination as to which paradigm applies in a given situation of prime importance for the conduct of military operations, including the rules on the use of force issued for such operations.

As was demonstrated in chapter 5, however, the paradigms are not mutually exclusive in terms of their scope of application and the extraterritorial applicability of HRL, particularly as regards military operations, has led to a necessity to examine whether reconciliation

⁴⁵ See, for example, the discussion in chapter 5, p. 266 – 269 and (especially) pp. 311 – 315, regarding the right to life and the differences between the two paradigms in this regard, including the influence thereof on military operations and the rules on the use of force.

between the two systems is necessary and, if so, how to reconcile them. As regards the extraterritorial applicability of HRL itself, that applicability follows firstly from the wording of the instruments themselves.⁴⁶ While the provisions regarding the applicability of the instruments may appear to indicate territorial applicability, and the applicability of the instruments in the territories of the States Parties is without question, the wording does not, in fact, specify such territorial restrictions and focuses instead on the word “jurisdiction,”⁴⁷ which has a far wider scope of application.

The meaning of the concept of jurisdiction in relation to extraterritorial applicability of HRL has been clarified and emphasized in the case law of those human rights bodies possessing court authority and in the comments and statements by other human rights bodies. Without repeating the analysis of the case law and comments as was presented in chapter 5, it is clear that the most eloquent and prolific source of interpretation of the law in this regard is the European Court of Human Rights (ECtHR). While it remains to be seen whether the other human rights bodies will follow or share the views expressed by the ECtHR,⁴⁸ the case law in question is not only relevant as a significant source of legal interpretation but also affects all EU Member States and the majority of the Member States of NATO.⁴⁹

⁴⁶ See chapter 5, especially pp. 258 – 260, as regards the differences in extraterritorial applicability of human rights norms when comparing civil and political rights on the one hand and economic, social and cultural rights on the other hand. In the present discussion, only the former will be addressed.

⁴⁷ See, for example, Article 1 of the ECHR and Article 1, paragraph 1, of the ACHR. As for the wording of Article 2, paragraph 1, of the ICCPR, that wording could be read as limiting the scope of application to the territory of the States Parties if the provision is read as being cumulative in nature. As was explained in chapter 5, p. 295 – 296, this is the view of the US. That view is not shared by others, including the Human Rights Committee, which has specified that the criteria in the provision are alternative rather than cumulative. Human Rights Committee, *General Comment 31*, CCPR/C/21/Rev.1/Add. 13, 26 May, 2004, paragraph 10.

⁴⁸ For a more detailed discussion of the views and opinions of the human rights bodies as regards the extraterritorial applicability of the treaties, including the case law of the ECtHR, see chapter 5, pp. 276 – 292.

⁴⁹ More specifically, the only two NATO Member States who are (obviously) not States Party to the ECHR and therefore not subject to the ECtHR are Canada and the United States.

This means that the effects of the case law of the ECtHR on military operations will in any case affect the conduct of (multinational) operations carried out by these two organizations.

The majority of the case law in question, as well as case law and opinions by other human rights bodies, obviously emphasizes that the concept of jurisdiction as contained in the applicability provisions of the various human rights instruments should primarily be considered as territorial. As was observed above, the object and purpose of the human rights instruments make it self-evident that the provisions contained therein apply on the territory of the States Parties. However, in a series of judgments related to international military operations, the ECtHR has set forth the criteria for determining extraterritorial applicability, specifically as regards military operations.

The criteria applied by the ECtHR,⁵⁰ in brief, consist of either effective control over an area or State agent authority or control. The first category appears self-explanatory and can arise, for example, in situations of belligerent occupation. As regards the criterion of State agent authority or control, three sub-criteria can be applied to determine whether the acts in question constitute the exercise of jurisdiction in the sense of the ECHR. The first sub-criterion is less relevant for military operations and consists of acts carried out by diplomatic or consular personnel. This element appears in the case law and opinions of other human rights bodies as well and appears uncontroversial. The second sub-criterion applied by the ECtHR examines whether the State party, or rather its armed forces units in the operation in question, carried out “all or some of the public powers normally to be exercised” by the government of the State in which the operation takes place.⁵¹ This sub-criterion is more complex, but would seem to include in any case operations in which a State deploys military personnel at the request of another State in order to assist that State with a

⁵⁰ See the discussion in chapter 5, especially as regards the *Al Skeini* judgment of the ECtHR on pp. 286 – 290.

⁵¹ ECtHR, *Al-Skeini and others v. United Kingdom*, application 55721/07, paragraph 135 and 149; ECtHR, *Jaloud v. Netherlands*, application no. 47708/08, paragraph 149; ECtHR, *Hassan v. United Kingdom*, application 29750/09, paragraph 75.

non-international armed conflict, such as the current operations in Iraq, as well as any other operation in which military forces carry out local State authority over an area or over persons within the area of operations. Two exceptions to extraterritorial jurisdiction on the basis of this sub-criterion have been identified by the Court. First, if the operations in question consist exclusively of air operations, jurisdiction does not arise over persons on the ground in the (extraterritorial) area of operations.⁵² This would seem logical, since the jurisdiction in the treaties is related to “securing” the exercise of the rights and freedoms set forth in the treaties by the persons within the jurisdiction of the State in question, which would seem impossible through the use of air operations alone. A second exception concerns UN operations. While initially⁵³ the Court appeared to take a rather wide view as regards this exception, later case law⁵⁴ has restricted this exception and it would now appear, although the views of the Court appear to be subject to further refinement and development, to apply only to operations under full UN command and control. As was also discussed in chapter 5, however, this does not prevent or exclude the possibility that national courts may still decide to attribute the actions of the military units in question to their parent State.⁵⁵ Finally, the third sub-criterion applied by the Court is the criterion of effective control over a person, such as in cases of detention. This, too, would appear self-evident, given the object and purpose of the applicability provisions in the human rights treaties, although the ways in which the Court has applied this criterion to establish the existence of effective control over a person have not always been as easy to understand.⁵⁶

Having established the applicability of HRL to military operations, the effects of HRL on the rules regarding the use of force can be seen especially

⁵² ECtHR, *Bankovic v. Belgium and others*, application no. 52207/99.

⁵³ ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, applications 71412/01 and 78166/01.

⁵⁴ ECtHR, *Al Jedda v. United Kingdom*, application 27021/08.

⁵⁵ See chapter 5, pp. 293 – 295, as regards the Supreme Court of the Netherlands decisions in the *Nuhanovic* and *Mustajic* cases.

⁵⁶ See the discussion in chapter 5, pp. 290 – 292, as regards ECtHR, *Jaloud v. Netherlands*, application no. 47708/08.

as regards the right to life, the various rights related to deprivation of liberty and the right to privacy or family life. While the right to life under HRL is a non-derogable right and one of the principal rights protected by the various instruments, it is not an absolute right. Some instruments express this through the prohibition of “arbitrary” deprivation of life, while the ECHR is more explicit and enumerates the permissible exceptions to the right to life. In both cases, however, it is clear that the exceptions to the right to life under HRL are considerably more restrictive than the rules on participation in combat, the rules on targeting and the concept of military necessity in IHL allow. This means that in situations in which HRL is applicable or takes precedence over IHL,⁵⁷ the rules on the use of force may not authorize the use of (potentially) deadly force beyond the exceptions allowed in HRL. In most cases this means that such use of force is restricted to self-defense situations,⁵⁸ and rules of this nature are commonly found in the soldier’s cards or similar derivative cards. As regards the higher level ROE sets, such restrictions would have a significant influence on the ROE regarding targeting and would generally restrict the available ROE

⁵⁷ The discussion in chapter 5, pp. 302 – 311, regarding the interaction between HRL and IHL and the case law regarding that interaction will not be repeated here. In summary, neither body of law can fully exclude application of the other body of law in situations where both are applicable *de jure*. True normative conflicts are rare, however, as in many cases the bodies of law can serve to complement each other or, where an apparent normative conflict arises, a “common sense” approach can serve to clarify which norms are best suited for the situation at hand. As regards the complementary approach, applying the principle of *lex specialis complementa* can help identify how the general norms of one body of law can be served by applying the more specific norms serving the same end as set forth in the other body of law, when both bodies of law serve the same (general) goal in the situation at hand. In those cases in which the norms or obligations set forth in the two bodies of law are truly mutually exclusive, the principle of *lex specialis derogat* is applied and, in cases of armed conflict, IHL should be seen as the *lex specialis*.

⁵⁸ The other exceptions set forth in Article 2, paragraph 2, of the ECHR would appear less relevant in the context of military operations and relate to quelling riots and effectuating a lawful arrest. Although these exceptions would be relevant in cases in which military personnel act in support of (or in the capacity of) law enforcement personnel, usually the rules on the use of force in such deployments would already reflect or be based on, or would in fact consist of, the rules on the use of force by law enforcement personnel in the State in question.

regarding actual use of force to those based on a functional approach, meaning ROE authorizing the use of force in response to (imminent) attacks or hostile acts by the other party.

While IHL is very specific, and without question the *lex specialis*, as regards the treatment of prisoners of war and as regards the internment of civilians during situations of international armed conflict, clearly HRL is the most specific as regards the treatment of all other persons deprived of their liberty. Consequently, as regards such persons and, obviously, in all situations other than armed conflict, HRL provides clear and extensive obligations and restrictions regarding the treatment of persons deprived of their liberty. Such provisions include the right to due process, the right to review of their detention, the right to appeal decisions, etc., as well as strict standards regarding the conditions under which such persons may be kept in detention. All such provisions fall well outside the range of authorizations or restrictions normally covered by ROE as well as the derivative cards related to ROE and are normally set forth in specific directives or instructions to the military forces in question. However, as ROE (and the derivative cards) can include rules regarding the initial detention of persons, the HRL obligations in question mean that prior to promulgating such ROE, the conditions, facilities and mechanisms must be in place to comply with the subsequent or consequent obligations. Furthermore, guidance must be provided, either in the ROE or derivative cards themselves or in accompanying orders or directives, as regards the treatment of detained persons from the moment of detention up to the moment of transfer to a detainee facility or authority in charge of the subsequent processing and handling of detainees. Finally, the rules, whether the ROE set or the specific directives regarding detainees, must clearly indicate the conditions and criteria under which detainees may or may not be transferred to third parties.

Finally, although not readily self-evident, the provisions of HRL regarding privacy and the right to family life are relevant to, and have an influence on, the rules regarding the use of force in the context of military operations. The first category of situations in which this is the case extends from the previous discussion regarding detention, as most ROE sets authorizing detention authorize, as a concomitant or corollary authority, the

right to search persons who are (to be) detained. Such searches are subject to strict rules and restrictions, derived from or directly reflective of, HRL norms. Additionally, as a second category, ROE sets and their derivative cards may authorize searches of persons or vehicles at check points, regardless of whether the persons in question are subject to detention.⁵⁹ Such searches are equally subject to (the same) rules and restrictions which are intended to guarantee adherence to the HRL norms in question. Finally, as a third category, ROE may authorize entry and search of private homes, especially in security operations related to countering insurgencies. Such searches are inherently controversial and, where such searches are authorized, are equally subject to strict conditions and restrictions, most of which serve to implement, intentionally or effectively, the relevant norms of HRL related to privacy and family life.

Applying the observations above, as well as the discussion in chapter 5, to the third constituent question, the following answers can be given. The third constituent question asked whether ROE reflect or serve to implement human rights law and, if so, how human rights law is reflected or implemented in the ROE. Alternatively, if the ROE do not serve this function the question asked how the relationship between human rights law and ROE can be described. As is clear from the discussions on HRL and ROE, in cases in which HRL takes precedence and in situations other than armed conflict, HRL in general has a significant influence on ROE and the provisions most relevant for the conduct of military operations are directly implemented or reflected in the ROE in question. In such cases, the ROE and the accompanying directives or other rules on the use of force act as a conduit for translating the law and its requirements into clear and precise instructions for the military forces in question.

⁵⁹ Although clearly the persons in question may become subject to detention if the searches reveal items, such as weapons or explosives, that would render the persons suspicious.

The role and function of ROE in relation to criminal law

The discussions in the other chapters, especially as regards the role and function of ROE in relation to self-defense law, IHL and HRL, automatically lead to the question as to the effects of violations of the ROE in terms of criminal liability. Moreover, as ROE and concomitant rules on the use of force direct and regulate the conduct of hostilities and military operations in general, their interpretation and application can directly affect the lives (and property) of those in the area of operations, issues and concerns which even under ordinary circumstances are directly of interest from a criminal law point of view⁶⁰ and which, especially in situations of armed conflict, can lead to significant consequences as regards (international) criminal law applicable to military operations. Chapter 6 of this study consequently examined the criminal law aspects of ROE.

The examination of ROE in connection with criminal law was divided into the two basic possible roles of ROE in the context of the criminal law system: the accusatory role, that is in support of, or serving, the prosecution of military personnel for criminal acts committed by such personnel, and the exculpatory role, that is as a basis for justifying, and therefore removing the criminal aspect, of the acts in question, or as a basis for (otherwise) removing culpability from the military personnel in question for the acts in question. Although the analysis and discussion in chapter 6 were illustrated by the Eric O. case in the Netherlands,⁶¹ that case and the accompanying analysis of that case will not be discussed further here.

⁶⁰ Obviously such issues are also highly relevant from a torts point of view. Apart from the general observation that this study is concerned with public law rather than torts law, torts claims resulting from military operations would, generally speaking, be directed more towards the State in question rather than the individual serviceman. Furthermore, given the rather different and distinct requirements for establishing liability under torts law, the role and function of ROE in that context would appear to be negligible. Consequently, torts law was not included in this study.

⁶¹ See *Rechtbank Arnhem, Military Chamber*, 18 October, 2004 (LJN: AR4029) and, in appeal, *Gerechtshof Arnhem, Military Chamber*, 4 May, 2005 (LJN: AT4988).

As regards the (possible) accusatory role of ROE in the context of criminal law, the analysis first examined the concept of “ROE crimes”. This concept treats violations of the ROE as a criminal act in itself, regardless of any concurrent or simultaneous criminal acts resulting from the same act or transaction. Such an approach would enable prosecutors to either prosecute the ROE crime in addition to any other crime resulting from the act in question, or prosecute only the ROE crime.⁶² Prosecuting ROE crimes, however, requires that violations of the ROE constitute *ipso facto* violations of (criminal) law, in order to comply with the principle of *nullum crimen sine lege*. This, therefore, required analysis as to the nature of ROE in that context.

As was discussed in chapter 6, ROE do not meet the requirements commonly applied in democratic societies as regards legislation. This observation is based on the facts that, *inter alia*, in most countries the ROE are not subject to review by the legislative branch, are not published in whatever statutes or gazettes would commonly be used to publish new laws in the various States and are, furthermore, commonly classified and therefore only accessible by those who have the requisite security clearance and “need to know”. The nature of ROE as a military operational tool, the operation-specific nature of ROE (meaning new ROE are needed for each military operation) and the need to be able to modify the ROE as fast and as often as operational necessity dictates would also seem to preclude any “normal” legislative process associated with ROE.⁶³ In short, therefore, ROE are not “law” and prosecution of violations of the ROE requires a different legal basis, or rather a legal basis as such.

Both chapters 1 and 6 discussed the nature of ROE as military directives or orders in the context of the military chain of command, and it

⁶² This aspect becomes particularly relevant in situations in which the other crimes resulting from the act in question cannot (readily) be proven and there is, for whatever reason, a pressing need to prosecute in the case in question.

⁶³ While obviously the legislative process differs from country to country and some countries may have systems which would be able to accommodate such rapid and frequent processes, that does not change the inherently military operational nature of the ROE or the other observations made above precluding a status for ROE as being “law” in the normal sense of the word.

was observed that in most, perhaps all, States the disobeying of orders in the military context constitutes an offense, whether disciplinary or criminal. Consequently, the prosecution of “ROE crimes” is not specific to ROE at all, but is instead a form of prosecution of disobeying orders. It follows from this observation that the same considerations and requirements apply to prosecuting violations of the ROE as would apply to any other prosecution of disobeying orders, including the question as to whether to prosecute that fact alone or prosecute the resultant concurrent criminal acts (or a combination of both).

Finally, as regards the principle of *lex certa* as a requirement for criminal law, the application of that principle would, based on the observations above, be more at issue in regards to the (military) criminal or disciplinary law regarding disobeying orders in the country in question. In terms of the specificity requirement as an element of *lex certa*, it is furthermore questionable whether the language usually applied in ROE sets meets that criterion, given that the ROE are drafted in such a way as to be applicable to all situations in a given operation and inherently require some degree of interpretation in that process.⁶⁴

In terms of the second criterion of *lex certa*, that is knowability, two observations are in order as regards ROE. Firstly, knowability in the sense of being able to predict or know that violating the ROE constitutes a criminal act is also not related to the ROE themselves but rather to a combination of the law regarding disobeying orders and knowledge of the status of ROE as orders within that context. Secondly, knowability in the sense of being able to know the contents of the ROE would not appear to be an issue, as regardless of the classified nature of the documents in question, they are promulgated to the personnel to which they apply.⁶⁵

⁶⁴ The fact that ROE also require application of the (unwritten in the ROE sets) principles of proportionality and necessity seems less relevant to a *lex certa* analysis of the ROE, as application of those principles is equally required in, *inter alia*, the exercise of personal self-defense. Not all statutes on self-defense specify this requirement, but do not necessarily fail the *lex certa* test.

⁶⁵ As was also concluded by the Court of Appeal (Military Chamber) in Arnhem in the Eric O. case, *op. cit.* note 61.

Criminal prosecution requires, among many other factors, criminal culpability on the part of the suspect, which in turn requires, *inter alia*, both that the act in question meets the description or constitutive elements of the crime as specified in the relevant statutes (the *actus reus*) and that the perpetrator acted with (some degree or form of) knowledge and (some degree or form of) intent (the *mens rea*).⁶⁶ As regards the concept of “ROE crimes” as discussed above, the *actus reus* would seem to be self-evident, as establishing simply that the ROE were violated would be sufficient. In cases in which concurrent acts are prosecuted (instead or simultaneously), the *actus reus* would, of course, depend on the relevant statute texts concerning the criminal act in question.

The knowledge aspect of the *mens rea* element addresses the issue of “mistake,” in which mistake of law is not generally accepted as a justification or excuse,⁶⁷ but mistake of fact can be so accepted to the extent that it negates the other aspects of *mens rea*. In the case of ROE, given the ways in which the ROE and, especially, their derivative cards are normally promulgated and disseminated, including specific training in the ROE and, at least in the Netherlands, operation-specific instruction and training in the ROE and cards for the given operation, it would appear that “knowledge” and “mistake of fact” can only refer to knowledge and mistakes regarding other factors relevant for the criminal act in question and not to knowledge of the rules on the use of force themselves.

⁶⁶ With the exception, of course, of crimes for which a strict liability applies, in which case the *mens rea* requirement does not apply.

⁶⁷ Some jurisdictions allow a defense of mistake of law under very strict conditions. The Statute of the ICC, for example, accepts a mistake of law if the mistake negates the *mens rea* requirement for the crime in question or if it is part of a defense of superior orders as specified in, and subject to, the Statute. Triffterer qualifies the provision in question as “enigmatic” and the present author agrees with that evaluation, as the provision itself and the interplay with the other provisions of the Statute and the accompanying elements of crime make it somewhat unclear whether the provision truly addresses mistakes of law, or *de facto* applies to mistakes of fact (apart from the specific case of a defense of superior orders). See Triffterer, O. [Ed.] *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, 1999, pp. 502 – 506.

The intent aspect of *mens rea* is far more complex, and chapter 6 examined a number of forms and degrees of intent as well as attempting a comparative law analysis between the continental approach to such concepts and their common law versions. Although that analysis will not be repeated here, it is important to note that “intent” spans a wide range of (culpable or incriminating) states of mind on the part of the perpetrator. At one end of that range, *dolus specialis* requires intent aimed at a specific outcome of the criminal acts in question, such as applies as regards the crime of genocide in which the acts of killing, etc., although intentional, are not sufficient and the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”⁶⁸ must also be proven. At the other end of the range, strict liability does not require any intent at all and the mere commission of the act in question is sufficient. In between those extremes are the various degrees of intent related to various forms of *dolus* down to (criminal) *culpa*.⁶⁹

Turning back to the concept of “ROE crimes” and the (possible) accusatory role of ROE in general, the aspect of *mens rea* leads to a discussion of two aspects. Firstly, the question may be asked whether in cases of ROE crimes the intent of the perpetrator was aimed at the violation of the ROE as such, or on the concurrent criminal act. While those jurisdictions that accept absolute liability as regards the criminal or disciplinary offense of disobeying orders will not be overly concerned by this question, jurisdictions which do require *mens rea* for such offenses would need to examine this issue more closely.⁷⁰ The second aspect, however, addresses the potential accusatory role of ROE in the context of criminal law more generally and focuses on the role of ROE violations in connection with the *mens rea* requirement for concurrent (other) crimes. Given the observations regarding the dissemination of, and training in, the

⁶⁸ The wording is taken from Article 6 of the Statute of the ICC.

⁶⁹ As was discussed in greater detail in chapter 6, *dolus* refers to various forms and degrees of intent, while *culpa* is more closely related to the concept of “fault” and includes various forms of criminal negligence. While *culpa* is also used in the context of torts law, in this discussion *culpa* refers only to the criminal law forms of that concept. See also footnote 60, above.

⁷⁰ For a further discussion of this, see Chapter 6, footnote 68 on p. 354 – 355.

ROE and derivative cards, ROE violations can in some cases serve as (supporting) evidence of intent as regards criminal acts committed concurrently with such ROE crimes. While clearly the probative value of ROE crimes in cases requiring specific intent would be negligible, the opposite is true as regards crimes requiring lesser degrees of intent or requiring (criminal) negligence. As was expressed in the diagram in chapter 6,⁷¹ in other words, the potential probative value of ROE crimes as regards the *mens rea* element of concurrent crimes increases in proportion to a decrease in the required level of (clear) intent as regards those concurrent crimes.

Following the discussion and analysis of the accusatory role of ROE in relation to criminal law, chapter 6 next analyzed the potential exculpatory role of ROE. In doing so, an analysis was first made of the potential role of ROE as a justification or excuse under criminal law in general terms. This aspect was already discussed in part above as regards the criminal law concepts of mistake of law and mistake of fact. Although, as was already established above, ROE are not law themselves, a mistake of law could in theory arise if a serviceman was under the mistaken belief that the ROE authorized a certain action that was actually prohibited under applicable law. A mistake of fact can arise if a serviceman mistakenly identifies a person or object as a valid target under applicable ROE but the person or object (later) turns out to be of a different nature.

Apart from the limitations, or outright rejection, discussed above as regards mistakes of law as a defense in criminal law in general, it seems unlikely that a mistake of law in connection with the ROE would yield a tenable defense. While it is always possible that ROE contain mistakes, either outright or through a bad choice of wording, the ROE are not “legal advice” to the serviceman in a specific situation nor specific enough generally to result in an entrapment by estoppel defense⁷² outright. Furthermore, the nature of ROE and their application inevitably leaves considerable room for personal judgment on the part of the serviceman applying the ROE, as well as the obligation to make a situation- specific

⁷¹ See p. 360.

⁷² See chapter 6, pp. 369 – 370, especially footnote 106.

evaluation of the necessity (and proportionality, depending on the applicable paradigm, context and situation) to use force in the situation at hand. Part of this personal evaluation revolves around the nature of ROE as being authorizations rather than orders to act (including the use of force) in the manner set forth in the ROE. This inherent room for personal evaluation and decision making weakens the argument for an entrapment by estoppel defense as well as the public authority defense.⁷³ Given, however, the function of ROE as a conduit for the law, as discussed in the previous chapters and as discussed further below, it is nonetheless a theoretical possibility that a serviceman who can convincingly argue that he thought that the ROE provided authoritative legal advice authorizing him to act in a certain way and who subsequently applied the principles of necessity and proportionality correctly, could refer to the ROE in his defense. Whether the resulting argument for the defense could be based securely on an entrapment by estoppel defense or a public authority defense is questionable, but the combination of factors just described would at least offer a contribution towards negating the *mens rea* for the crime in question.⁷⁴

Finally, chapter 6 examined the defense of superior orders and its status in current law, as well as examining whether ROE could be considered as “orders” in the sense of this defense. Here, too, the nature of ROE as being authorizations rather than affirmative orders to act in a certain way or to use force in a given situation provided considerable obstacles. While adherence to the ROE is mandatory, as was discussed above in relation to the accusatory role of ROE and the nature of ROE as (binding) orders, that obligation is normally understood to mean that actions, including the use of force, exceeding the authorizations set forth in the ROE are prohibited but does not change the authorizations set forth in the ROE into affirmative orders to use force in the situations described in the ROE.

⁷³ See chapter 6, pp. 370 – 371.

⁷⁴ As was discussed in chapter 6, the Criminal Code of the Netherlands does contain a form of public authority defense that would provide a more solid defense in situations as discussed here. This is due in part to the greater latitude allowed on the basis of Article 43 of the Code as regards the nature of the “order” given by the public authority in question. See chapter 6, pp. 380 – 385.

Consequently, the obligation to obey, as being one of the requisite elements for a defense of superior orders, cannot be readily interpreted as including the authorizations contained in ROE sets or their derivative cards.

Due almost entirely to the specific context of the Eric O. case as discussed in chapter 6, the Netherlands has provided an exception to the observations just made by changing the Military Criminal Code in the aftermath of that case. In response to political pressure to enhance the legal protection of military personnel, the government added a second paragraph to Article 38 of the Military Criminal Code, which provides a defense for military personnel using force in conformity with the orders and instructions issued to that personnel. Such orders and instructions include the ROE. Although the necessity for this provision was debated at the time, in view of the (form of) public authority defense already contained in the civilian Criminal Code, the new provision undeniably provides indisputable clarity as regards the exculpatory role of ROE in the Netherlands.

If the observations and discussions set forth above and in chapter 6 are applied to the fourth constituent question, the following answers can be given. Constituent question 4 asked whether ROE have accusatory or exculpatory properties under criminal law, and, if so, how these roles are carried out or performed by ROE. Conversely, if the ROE do not have such properties, the question asked how the relationship between criminal law and ROE can be described. Based on the prior observations and discussions, the conclusion seems warranted that ROE are not a criminal law instrument in themselves, apart from the observation that ROE are not law as such either. While violations of the ROE can constitute criminal acts *ipso facto*, that is due more to the nature of ROE as orders than specific to ROE themselves. On the other hand, ROE can, however, have probative value as regards concurrent crimes resulting from ROE violations. As regards an exculpatory role, it can safely be concluded that ROE will not readily meet the criteria for the relevant forms of criminal law defenses, including the (controversial) defense of superior orders, unless such a role is specified, or unequivocally follows from, specific statutes in the nation in question. On the other hand, good faith reliance on the ROE as providing legal (and higher public authority) authorization to act, in combination with a due diligence application of the principles of necessity and proportionality, can

serve to negate the *mens rea* requirement for the crime in question. In other words, the role of ROE as either an accusatory or exculpatory device is not unequivocal and the role of ROE in relation to criminal law is at most as a tool to be used cautiously. Contrary to the role played by ROE in the context of the other bodies (or principles) of law discussed in the previous chapters, ROE do not serve as a conduit between criminal law and the application of that law in the conduct of military operations, but ROE can serve as a pivot between, or as a tool towards, interpreting the conduct of military operations and applying criminal law to specific acts in that context.

The role and function of ROE in relation to (international) law

As was stated in the introduction, the final constituent question does not address the interaction between ROE and a specific body of law, nor does it reflect a specific chapter in this study. Instead, constituent question 5 is a simplified version of the main question on which this study is based. Constituent question 5 asked whether ROE are a source of law, whether ROE are reflective of the law and whether ROE can override or supersede the law. As was discussed in the previous chapters, it is clear that ROE are not a source of law, nor are they “law” in themselves, and that ROE may not exceed the law or authorize actions (including the use of force) in contravention of applicable law. As regards the question whether ROE are reflective of the law, that question can only be answered by addressing the main question of this study: what is the function of rules of engagement and derivative (or similar) rules on the use of force in the context of the legal framework governing the use of force during military operations?

Based on the observations made above and in the previous chapters, it is clear that as regards self-defense other than personal self-defense, international humanitarian law and international human rights law, ROE act as a conduit between the law and the conduct of military operations by reflecting the law or interpreting the law into clear and concise rules on the use of force for the military personnel in question. While the law influences or governs the conduct of military operations by other means as well, including through proper education of the personnel in question, and the law applies regardless of the ROE, it is also clear that the legal element of

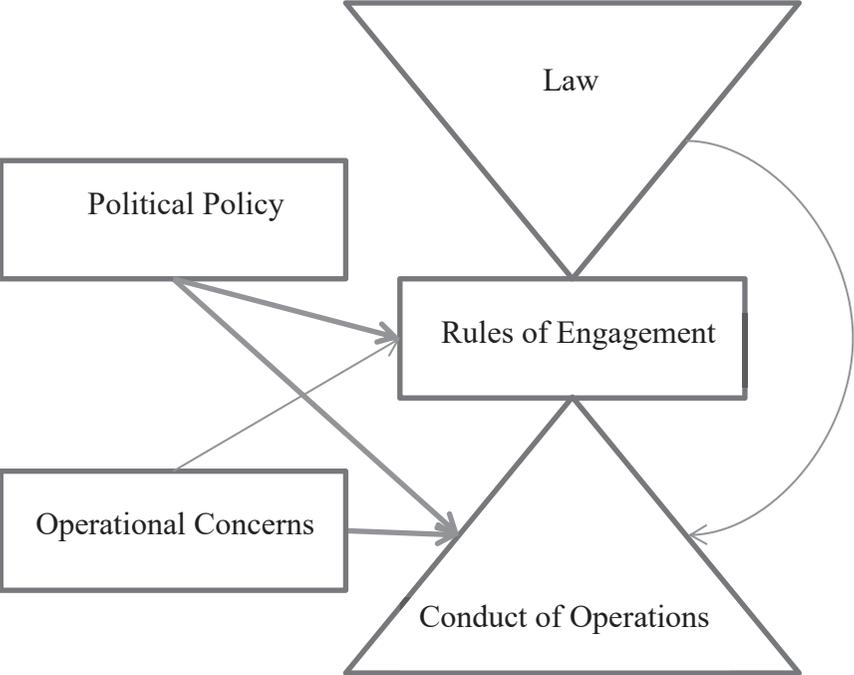
ROE, as discussed in chapter 1, is not limited to the process of legal review to ensure compliance with the law but is a major focal point of the function of ROE themselves. It may even be argued that as military operations become increasingly legally complex, the importance of this function of the ROE will increase accordingly.

As regards criminal law, the ROE do not serve the same function as just described but can be said to serve an opposite function, that is as a conduit between (interpreting) the conduct of military operations or individual actions carried out in that context in relation to the application of criminal law to that conduct or those actions. While in this case the conduit “flows the other way,” the pivotal function between ROE and the law remains, in essence, intact. While, as was observed above in relation to the other relevant bodies of law, criminal law applies regardless of the ROE and is not dependent on the ROE, case law and the criminal process in general would seem to indicate that any investigation or prosecution of the use of force in the context of military operations would by necessity include reference to, and evaluation of, (the application of) the ROE in question.

Finally, as regards personal self-defense, this principle is the one exception to the observations made above in the sense that a necessary and justified recourse to personal self-defense overrules restrictions in the ROE that would otherwise impede the exercise of this right and that ROE do not normally have a role as regards reflecting or acting as a conduit between the law and the use of force in question. It should be noted, however, that personal self-defense is not a military operational concept and exists outside the context of the use of force in conducting military operations. Although personal self-defense can authorize the use of force, and therefore was analyzed in the context of this study, it is not normally part of the military planning process or the legal bases for the use of force in (international) military operations. Finally, it should be noted that the criteria for a justified recourse to personal self-defense are strict and, based on the discussion on the ROE regarding force protection, unit self-defense and the variations thereon, it can safely be concluded that personal self-defense in the context of military operations will normally only arise if the rules on the use of force have failed to a considerable degree.

Applying the conclusions and observations made above to the original model of ROE as presented in chapter 1 and at the beginning of this conclusion, it can be concluded that the model in question has retained its validity as a general model of ROE in general but that it is more reflective of ROE creation and content than as regards the function of ROE in relation to (international) law in practice. Furthermore, developments in the nature and complexity of modern military operations, the increasing role of public opinion and the (social) media, and therefore of politics, in relation to military operations and experience from actual practice lead to a somewhat modified model of ROE if that model is also to reflect the application of ROE and the role and function of ROE in the actual conduct of military operations.

Full model:



Beginning, as was the case in chapter 1, with the military operational element, it would seem self-evident that the entire conduct of military operations is governed by the various components and aspects of this element. As regards the ROE, however, the prior observations made in various chapters that military commanders and military operational personnel (the “operators”) are reluctant or hesitant to be involved in (at least the initial) ROE process still holds true in actual practice today. On the other hand, once the initial ROE set is promulgated, practice shows that “operators” are very capable of offering constructive advice and criticism and become actively involved in subsequent changes or additions to the ROE set for a given operation. In other words, while experiences may vary from country to country or even from service to service within the armed forces of a given country, the responsibility for the initial ROE process still appears primarily to be up to the (military) legal advisers, although the role and input of the “operators” becomes paramount once the conduct of the operation commences. Consequently, in the model presented above, the influence of the military operational component on the conduct of operations is emphasized while the influence on the ROE is smaller in comparison.

As regards the influence of political policy, practice has shown that policy, usually driven by the interests of public support for the operation in question, has a significant influence on both the actual conduct of military operations and on the rules on the use of force for the operation in question. As regards the conduct of the operation, that influence can be seen initially in the (negotiations on the) formulation of the mandate itself, as well as in issues such as geographical limitations for specific forces or types of units even in the overall area of operations and limits, conditions or restrictions on certain types of operations such as special operations or, conversely, highly visible operations in sensitive areas or roles in the region in question. As regards the rules on the use of force, the role of policy considerations is most visible in the form of caveats on multinational ROE, of which the majority, as was discussed *inter alia* in chapter 1, are political in nature. In the model presented above, consequently, the significant influence of political policy on both the conduct of military operations and on the rules on the use of force was presented as being equal.

Finally, as regards the legal element of ROE, it was observed that the law directly influences the conduct of military operations in several ways, including the (mandatory) education of military forces in various elements of international law. Furthermore, it was observed that the conduct of military operations, including the use of force, must always comply with the applicable legal framework, regardless of the rules on the use of force. As this influence is inherent, it was presented in the model above as a thin line between the law and the conduct of military operations. However, it was also observed and may serve as a final conclusion, that the rules on the use of force, as is reflected in the model presented above, act as a conduit between the law and the conduct of military operations.

In other words, therefore, it may be concluded that although Cicero observed that “*silent enim leges inter arma*,” the rules on the use of force prove rather the opposite. Moreover, the conclusions and observations presented in this study, as reflected in the model presented above, show that the rules on the use of force do, in fact, serve as the pivot or linchpin between the law, including the academic study and analysis of the law, and the actual conduct of military operations. In reaching and substantiating that conclusion, perhaps this study has therefore contributed to the necessary communication between the realm of academic analysis and the realm of practical application of the law.

Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter/Commission on Human and People's Rights
ACO	(NATO) Allied Command Operations
ACT	(NATO) Allied Command Transformation
AMC	Aide-Memoire for Commanders
AP	Additional Protocol to the Geneva Conventions
CAT	Convention/Committee Against Torture
CJCS	Chairman Joint Chiefs of Staff of the United States of America
CONOPS	Concept of Operations
DARIO	Draft Articles on the Responsibility of International Organizations
DARS	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
DPH	Direct Participation in Hostilities
DPKO	(UN) Department of Peacekeeping Operations
EEAS	(EU) European External Action Service
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EUMC	(EU) Military Committee
EUMS	(EU) Military Staff
FAC	Forward Air Controller
FC	Force Commander

GC	Geneva Convention(s)
HRL	Human Rights Law
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESC	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
JFC	(NATO) Joint Force Command
JTAC	Joint Terminal Attack Controller
MC	(NATO) Military Committee
NAC	(NATO) North Atlantic Council
OMA	(UN) Office of Military Affairs
OPLAN	Operations (or Operational) Plan
OTP	Office of the Prosecutor (ICTY)
PSC	(EU) Political and Security Committee
RCA	Riot Control Agents
ROE	Rules of Engagement
ROEAUTH	Rules of Engagement Authorization
ROEIMP	Rules of Engagement Implementation (also ROEIMPL)

ROERAM	Rules of Engagement Release Authority Matrix
ROEREQ	Rules of Engagement Request
SACEUR	(NATO) Supreme Allied Commander Europe
SCD	Soldier's Card
SHAPE	(NATO) Supreme Headquarters Allied Powers Europe
SPINS	Special Instructions
SROE	Standing Rules of Engagement
SRSR	(UN) Special Representative of the Secretary- General
TEU	Treaty on European Union
UNCH	United Nations Charter
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General

Operations Abbreviations

IFOR	Implementation Force (Bosnia-Herzegovina)
ISAF	International Security Assistance Force (Afghanistan)
KFOR	Kosovo Force
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MNF	Multinational Force (Lebanon)
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
ONUC	United Nations Operation in the Congo
SFOR	Stabilization Force (Bosnia-Herzegovina)
UNAMIR	United Nations Assistance Mission for Rwanda
UNAVEM	United Nations Angola Verification Mission
UNEF	United Nations Emergency Force (Egypt)
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNMIK	United Nations Interim Administration Mission in Kosovo
UNOSOM	United Nations Operation in Somalia
UNPROFOR	United Nations Protection Force (Bosnia- Herzegovina)

Summary

This study aimed to analyze the role and function of the rules on the use of force for military operations in terms of the interaction between the various bodies of international and national law applicable to such operations and the actual conduct of the operations in question. In doing so, this study focused on examining whether the rules on the use of force could be considered a linchpin between the law, including the academic study of the law, and the actual conduct of military operations in practice. In order to structure this analysis, and following a brief introduction to general concepts related to the rules on the use of force and the process of planning military operations, including a discussion of the classical conceptual model and the constituent military, policy and law elements, a series of questions were developed and subsequently analyzed and answered. These questions reflect the structure of the study and analyzed the role of the rules on the use of force (hereafter referred to as ROE) in regards to the application of (the law of) self-defense, international humanitarian law, international human rights law and international and national criminal law in the context of military operations.

In analyzing the interaction between ROE and self-defense, it was observed that the concept of self-defense has several different meanings depending on the context in which it is used. As each of these meanings is related to a different legal framework, each with its own trigger criteria and conditions, specifying which type of self-defense is at issue is of paramount importance in understanding whether the use of force in response is subject to regulation in the ROE or may be undertaken as an inherent right. In cases in which the use of force in self-defense is an inherent right, the strict criteria and restrictions, which are not military in nature but derived from civil criminal law, must be understood. In the discussion of this form of self-defense, a limited comparative criminal law analysis was presented as regards the various restrictions and conditions set forth in that body of law in relation to the use of force in (personal self-defense). The analyses and discussions in the chapter on self-defense and ROE led to the conclusion that ROE act as a conduit between the law and the use of force in practice, with the exception of personal self-defense.

As one of the most obvious bodies of law regulating the use of force during military operations, international humanitarian law (IHL) was subsequently examined in terms of the relationship between ROE and the law. In order to assess that relationship, an analysis was first made of the elements of IHL most directly related to the actual use of force. In this analysis, the principle of distinction was discussed in terms of the rules governing the targeting of persons and of objects. As regards targeting persons, special attention was paid to the concept of direct participation in hostilities by civilians, as this concept has a direct influence on the ROE related to targeting and the use of force against persons. Next, the rules of IHL related to precautions in attack, the (IHL version of) the principle of proportionality and the rules on methods and means of warfare were analyzed in terms of their relationship with the ROE. The analyses and observations of the interaction between IHL and ROE led to the conclusion that IHL has significant influence on the contents and application of the ROE and that the ROE act as a conduit between the law, including its many complexities, and the actual use of force in (and overall conduct of) military operations in practice.

Although subject to some debates and some controversy, the undeniable influence of international human rights law on the conduct of military operations next led to analyzing the interaction between this body of law and the ROE. In order to carry out that analysis, however, the applicability of human rights law (HRL) to military operations, especially extraterritorial military operations, was first discussed. In order to determine the extent and conditions of the applicability of HRL to such operations, the case law of the various human rights bodies was analyzed. Having determined, on the basis of that analysis, that HRL applies to extraterritorial military operations in most cases, the interaction between HRL and IHL needed closer analysis and discussion, including the application of the various forms of the *lex specialis* principle. Having established the applicability of HRL and the interaction with IHL, an analysis was next made of the various elements of HRL and their effect on the ROE. Once again applying a selection of only the most relevant elements of the law, the interaction between ROE and the right to life, the provisions on detention, and the right to privacy and family life was

examined. The chapter in question also briefly analyzed the rules on the use of force for law-enforcement authorities, as a specific form of ROE and the form most directly subject to HRL norms. The observations in this chapter led to the conclusion that, as was the case with IHL, the ROE act as a conduit between HRL and the use of force in, and conduct of, military operations.

In the final substantive chapter of this study, the interaction between international and national criminal law and the ROE was analyzed. To facilitate that analysis, the chapter was divided into a study of the role of ROE as an accusatory device and the role of ROE as an exculpatory device. On the accusatory side, the concept of “ROE crimes”, that is the violation of the ROE as a crime in and by itself, was discussed. In order to analyze that concept, the status of ROE first required analysis, including a discussion of the *lex certa* principle and the influence of the principle of *nullum crimen sine lege*. This part of the analysis concluded that ROE are not “law” as such, but that violations of the ROE can generally be subsumed under the provisions related to violations of (standing) orders in the military context. The examination of the accusatory role of ROE concluded with an analysis of the *mens rea* element in criminal law in relation to ROE crimes, including a modest comparative analysis of the various forms of *dolus* and *culpa* in criminal law systems. As regards the exculpatory role of ROE, the possible use of ROE as excuses or justifications was examined. This analysis concluded that ROE will not readily serve that purpose, unless the *mens rea* element for the criminal act in question was negated by the mistake of fact (or in rare cases the mistake of law) associated with the interpretation or application of the ROE in the given circumstances. Given the status of ROE as orders, a closer analysis was next undertaken as regards the possible role of ROE in the context of the defense of superior orders, including an examination of that defense in the military criminal law of the Netherlands. Given that ROE contain authorizations, and furthermore require application of the principles of necessity and proportionality, but not affirmative order to use force, this section concluded that ROE do not readily give rise to a defense of superior orders unless (and to the extent that) national statutes so provide. Based on these observations and an overview of available case law, it was concluded that ROE act as a conduit

between criminal law and the use of force in military operations, but that in this case the conduit “flows the other way” in that the ROE facilitate understanding military conduct from a criminal law perspective.

Based on the conclusions and observations of the constituent chapters, the conclusion of this study re-examined the classical conceptual model of ROE and established that the actual interaction between the various constituent elements and the conduct of operations requires a refinement of that model. In the new conceptual model presented in this study, the influence of the operational element of ROE on the actual ROE and on the conduct of operations in practice is shown to be most significant as regards the latter, while its role as regards the ROE itself is limited in the drafting and development stages of the ROE. As regards the political policy element, the influence on both ROE and the conduct of the operation in question is shown to be significant, as is reflected also in the fact that most of the national restrictions (*caveats*) imposed on ROE are political in nature. Finally, as regards the law element of ROE, it was concluded that while the law affects the conduct of military operations directly as well, the ROE serve as a conduit or linchpin between the various elements of the international law of military operations, including academic insight and development of that law, and the actual conduct of military operations. In that sense, ROE serve a central function in the “vertical” role of that body of law.

Nederlandse samenvatting

Deze studie had tot doel om de rol en functie te analyseren van de regels omtrent het gebruik van geweld voor militaire operaties wat betreft de interactie tussen de relevante internationale en nationale rechtsgebieden die van toepassing zijn op dergelijke operaties en de daadwerkelijke uitvoering van die operaties. Als onderdeel van die analyse werd in deze studie met name aandacht besteed aan de vraag of de regels omtrent het gebruik van geweld als spil fungeren tussen het recht, waaronder de academische studie en analyse van het recht, en de praktijk tijdens de daadwerkelijke uitvoering van militaire operaties. Om deze studie van de nodige structuur te voorzien werden een aantal vragen ontwikkeld die, na een korte inleiding over de algemene begrippen en beginselen van de regels omtrent geweldgebruik en van militaire planning, waaronder een bespreking van het klassieke conceptuele model voor geweldsinstructies en de operationele, politieke en juridische elementen daarin, nader werden geanalyseerd en beantwoord. Deze vragen, die de opbouw van deze studie weergeven, waren gericht op de rol en functie van de regels omtrent geweldgebruik (hierna: ROE) in relatie tot de toepassing van (het recht op) zelfverdediging, het humanitair oorlogsrecht, internationale mensenrechten en nationaal en internationaal strafrecht in de context van militaire operaties.

De analyse van de wisselwerking tussen ROE en (het recht op) zelfverdediging gaf aan dat het begrip “zelfverdediging” verschillende betekenissen kan hebben, afhankelijk van de context waarin dat begrip wordt toegepast. Omdat elk van deze betekenissen is gekoppeld aan een eigen, verschillend rechtskader, met elk hun eigen drempelcriteria en voorwaarden, is het specificeren welke vorm van zelfverdediging wordt bedoeld van doorslaggevend belang om te kunnen vaststellen of het gebruik van geweld in die context onderworpen is aan (of afhankelijk is van) regulering in de ROE of als inherent recht bestaat. In de gevallen waarin het gebruik van geweld in zelfverdediging als inherent recht wordt beschouwd, is kennis en begrip noodzakelijk van de strikte criteria en grenzen aan dat recht, die niet militair van aard zijn, die voortkomen uit het civiele strafrecht. In de analyse van deze vorm van zelfverdediging werd in deze studie een bescheiden rechtsvergelijkende analyse gepresenteerd met

betrekking tot de restricties en voorwaarden aangaande geweldgebruik in zelfverdediging onder het strafrecht. De analyses en discussie in het hoofdstuk over zelfverdediging in relatie tot ROE gaven aanleiding tot de conclusie dat de ROE als koppelvlak fungeren tussen het recht en het gebruik van geweld in de praktijk, met uitzondering van het recht op persoonlijke zelfverdediging (of noodweer).

Vervolgens werd het humanitair oorlogsrecht, als zijnde een van de meest voor de hand liggende rechtsgebieden wat betreft de regulering van het gebruik van geweld in militaire operaties, bestudeerd in relatie tot de interactie tussen ROE en het recht. Om die relatie nader te kunnen duiden, werd eerst een analyse gemaakt van de elementen van het humanitair oorlogsrecht (hierna: HOR) die het meest rechtstreeks het daadwerkelijk gebruik van geweld reguleren of beïnvloeden. Deze analyse bestudeerde daartoe het beginsel van onderscheidend optreden in relatie tot de regels aangaande het als militair doelwit aanwijzen van personen of objecten. Wat betreft het aanwijzen van personen als militair doelwit werd in het bijzonder aandacht besteed aan het begrip “rechtstreekse deelname aan vijandigheden” door burgers, aangezien dit begrip een directe invloed heeft op de ROE aangaande doelaanwijzing en het gebruik van geweld tegen personen. Vervolgens werden de regels van het HOR aangaande voorzorgsmaatregelen besproken, evenals (de HOR-versie van) het proportionaliteitsbeginsel en de regels aangaande middelen en methoden van oorlogvoering, allen in relatie tot de interactie tussen deze regels van het HOR en de ROE. De analyses en observaties aangaande de interactie tussen het HOR en de ROE gaven aanleiding tot de conclusie dat het HOR een significante invloed heeft op de inhoud en toepassing van de ROE en dat de ROE als koppelvlak fungeren tussen het recht, met alle complexiteiten daarvan en daarin, en het daadwerkelijk gebruik van geweld in (en de algemene uitvoering van) militaire operaties.

Hoewel onderwerp van discussie en enige mate van controverse kan niet worden ontkend dat mensenrechten en het internationale recht dienaangaande (hierna: HRL) invloed heeft op de uitvoering van militaire operaties. Om deze reden werd in deze studie vervolgens een analyse gemaakt van de interactie tussen dit rechtsgebied en de ROE. Voordat die analyse kon worden gemaakt, was het echter eerst nodig om te analyseren

of en hoe HRL van toepassing is op militaire operaties, met name extraterritoriale operaties. Teneinde de omvang en voorwaarden aangaande deze toepasselijkheid vast te kunnen stellen werd de jurisprudentie en de uitspraken van de verschillende mensenrechten instanties bestudeerd. Nadat die studie tot de conclusie leidde dat HRL in de meeste gevallen van toepassing is op extraterritoriale operaties, was het van belang om de interactie tussen HRL en het HOR nader te analyseren, waaronder de toepassing van verschillende vormen van het *lex specialis* beginsel. Vervolgens werd een analyse gemaakt van de verschillende relevante elementen van HRL en hun invloed op de ROE. Ook hier werd een selectie gemaakt van de meest direct relevante elementen van het recht en op basis van die selectie werd een analyse gemaakt van de interactie tussen de ROE en het recht op leven, de bepalingen omtrent vrijheidsontneming, en het recht op privacy. In het hoofdstuk in kwestie werd ook een korte analyse gepresenteerd van de regels omtrent geweldgebruik door opsporingsambtenaren, als specifieke soort ROE en een soort die het meest direct door HRL wordt beïnvloed. De observaties en conclusies van dit hoofdstuk leidde tot de conclusie dat, net als aangaande het HOR, de ROE fungeren als koppelvlak tussen HRL en het gebruik van geweld in (en de uitvoering van) militaire operaties.

In het laatste inhoudelijke hoofdstuk van deze studie werd een analyse gemaakt van de interactie tussen internationaal en nationaal strafrecht en de ROE. Ter ondersteuning van de overzichtelijkheid van deze analyse werd het hoofdstuk opgedeeld in een analyse van de rol van ROE als beschuldigend element en een analyse van de rol van ROE als strafuitsluitend of rechtvaardigend element. Wat betreft de beschuldigende rol werd het vervolgen van schending van de ROE als zelfstandig strafbaar feit besproken. Om die analyse te kunnen uitvoeren was echter eerst een analyse nodig van de status van ROE, waaronder een bestudering van het *lex certa* beginsel en de invloed van het beginsel van *nullum crimen sine lege*. Deze sub-analyse leidde tot de conclusie dat de ROE geen “recht” zijn in de zin van wetgeving of positieve rechtsbron, maar dat schendingen van de ROE onderdeel zijn van de meer algemene rechtsregels aangaande schendingen van bevelen en voorschriften in de militaire context. De bestudering van de beschuldigende rol van ROE werd afgesloten met een

analyse van het *mens rea* element in het strafrecht in relatie tot de vervolging van schendingen van de ROE, waaronder een bescheiden rechtsvergelijkend onderzoek naar de verschillende vormen van *dolus* en *culpa* in de strafrechtelijke systemen. Wat betreft de strafuitsluitende of rechtvaardigende rol van ROE werd de mogelijke rol van ROE als strafuitsluitingsgrond of rechtvaardigingsgrond bestudeerd. Deze analyse leidde tot de conclusie dat ROE niet snel een dergelijke rol zullen kunnen vervullen, tenzij het *mens rea* element (oftewel de schuld) voor de daad in kwestie komt te vervallen als gevolg van de feitelijke of (in zeer beperkte gevallen) rechtsdwaling als gevolg van de interpretatie of toepassing van de ROE in de gegeven omstandigheden. Omdat ROE echter bevelen of voorschriften zijn, werd in deze context een analyse gemaakt van de mogelijke rol van ROE in relatie tot het opvolgen van hogere bevelen als rechtvaardigingsgrond, waarbij tevens een nadere bestudering werd gemaakt van die rechtvaardigingsgrond in het militair strafrecht in Nederland. Omdat ROE echter autorisaties of toestemmingen bevatten en bovendien toepassing per geval vereisen van de beginselen van noodzakelijkheid (of subsidiariteit) en proportionaliteit, maar nooit opdrachten bevatten tot geweldgebruik, leidde deze analyse tot de conclusie dat ROE niet snel aanleiding zullen geven tot de rechtvaardigingsgrond van het opvolgen van hogere bevelen, tenzij (en voor zover) de nationale wetgeving daartoe bepalingen bevat. Op basis van de observaties en conclusies in dit hoofdstuk en bestudering van de beschikbare jurisprudentie werd geconcludeerd dat ROE fungeren als koppelvlak tussen het strafrecht en het gebruik van geweld in militaire operaties, maar dat in dit geval het koppelvlak “omgekeerd werkt” in de zin dat de ROE het begrip voor militair optreden vanuit strafrechtelijk perspectief kunnen faciliteren.

Op basis van de conclusies en observaties in de verschillende hoofdstukken werd in de conclusie van deze studie een nadere beschouwing gegeven van het klassieke conceptuele model van ROE. Deze beschouwing leidde tot de conclusie dat de feitelijke interactie tussen de verschillende elementen van dat model enerzijds en de uitvoering van militaire operaties anderzijds een nuancering van dat model noodzakelijk maakt. In het nieuwe conceptuele model dat in deze studie wordt gepresenteerd is duidelijk dat de invloed van het operationele element op de ROE en op de uitvoering van

militaire operaties vooral tot uiting komt in het tweede aspect, terwijl de invloed op de ROE met name in de fase van opstelling en ontwikkeling van de ROE beperkt is. Wat betreft het politieke element laat het model zien dat de invloed op zowel de ROE als de uitvoering van militaire operaties significant is, zoals onder andere blijkt uit de observatie dat de meeste nationale beperkingen (*caveats*) op de ROE politiek van aard zijn. Wat betreft het juridische element, tot slot, werd geconcludeerd dat hoewel het recht ook rechtstreeks de uitvoering van militaire operaties beïnvloedt, de ROE als koppelvlak of spil fungeren tussen de verschillende componenten en elementen van het militair operationele recht, waaronder de academische studie en ontwikkeling van dat recht, en de feitelijke uitvoering van militaire operaties in de praktijk. In dat opzicht vervullen de ROE een centrale functie in de “verticale rol” van dat rechtsgebied.

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