

Publication Series

National Military Manuals on the Law of Armed Conflict

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Military Manuals on the Law of Armed Conflict and the Challenge of Multinational Peace Operations

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1. As a result of the reaffirmation and further development of international humanitarian law during the recent decades, considerable efforts were made to increase implementation of that law by means of military manuals.¹ Military manuals are designed to describe legal and policy rules applicable in armed conflicts. They might not suffice to prove state practice as evidence of customary international law; nevertheless, among the various means available to ensure respect for international humanitarian law, military manuals have an important role to play.

2. Implementation efforts during these decades were challenged by armed conflicts characterised by asymmetries between rich and poor parties, states and non-state actors, and technologically advanced forces and those lacking even rudimentary equipment and logistics. Many countries and their populations have witnessed unlimited methods of fighting by the poor as well as excessive acts by the rich even during precision strikes. This development has led to new vulnerabilities of technologically advanced societies. Military manuals have been put to the test in these conflicts.

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¹ For a list of military manuals on international humanitarian law, see *ICRC Customary Law Study, op. cit.*, Vol. II, part 2, pp. 4196-207.

3. One important additional challenge for many armed forces concerns their involvement in various forms of peace operations for which the law of armed conflict was not designed and in which the applicability of its rules is a matter of debate. Many of those gathering experience in peace operations today have not participated in an armed conflict for a long time. Many soldiers would consider training in peace operations much more relevant for their daily work than training in the law of armed conflict.

4. Peace operations as such have undergone considerable developments in the practice of states, the United Nations and regional organisations. The term "peace operation" as it is used here comprises all forms of military (peace support and peace enforcement) operations conducted in support of diplomatic efforts to establish and maintain peace. This concept deliberately goes beyond traditional peacekeeping, as it combines elements of peacekeeping with peacemaking and post-conflict peace-building. A strict distinction between traditional peacekeeping and peace enforcement has often proven impossible.

5. The extent to which peacekeepers may enjoy rights and must fulfil obligations under international humanitarian law cannot be defined in general terms. The very fact that most rules of international humanitarian law have been developed for the conduct of hostilities during an armed conflict should caution attempts at extending the application of these rules hastily to peace operations – operations that are designed to avoid fighting, *i.e.*, to stabilise a situation, rather than to engage in active hostilities.

Nevertheless, important principles and rules of international humanitarian law apply both in armed conflicts and peace operations alike, irrespective of whether peacekeepers are in fact engaged in an armed conflict or not.² These principles and rules may be included in ROEs for peace operations.³

² Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edition, Oxford University Press, 2008, §§208, 1309.

³ See, *e.g.*, "General Report", *Recueil XVII The Rule of Law in Peace Operations*, International Society for Military Law and the Law of War, 2006, pp. 109-57; "Recommendations", *ibid.*, pp. 416-7.

6. In modern peace operations, a complex legal regime comprising peacetime rules of international law, international law of armed conflict and national law must be respected and effectively implemented.

7. The genuine task of peacekeepers is connected more closely to law enforcement than to the conduct of hostilities. Law enforcement demands that a strict "capture rather than kill" rule be observed, *habeas corpus* respected and each case of death by force formally investigated. None of these principles are normally applicable in the conduct of hostilities. Conversely, there may be situations where police forces may employ means that are prohibited in the conduct of hostilities, such as the feigning of civilian status and use of tear gas or even dum-dum bullets. With the exception of these very special provisions, international humanitarian law is more liberal in its limitations for the conduct of hostilities. It has a *lex specialis* function *vis-à-vis* the corresponding provisions of human rights law during international and non-international armed conflicts.⁴

Armed forces and the police must observe these differences both in training and in field operations.

8. Whereas general observance of international humanitarian law in all armed hostilities has long been established as a matter of law⁵ and best practice,⁶ the UN Secretary-General's Bulletin formally requires that all members of UN forces engaged as combatants in an armed conflict observe "[t]he fundamental principles and rules of international humanitarian law set out in the present bulletin".⁷ This

⁴ See International Court of Justice, *Nuclear Weapons Advisory Opinion*, *op. cit.*, para. 25; *ibid.*, *Palestinian Wall Advisory Opinion*, *op. cit.*, paras. 102-42.

⁵ See, *e.g.*, Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged, resolution adopted by the Institute of International Law (1971), printed in Schindler and Toman, *op. cit.*, pp. 903-5; Conditions of Application of Rules, Other Than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged, resolution adopted by the Institute of International Law (1975), printed in *ibid.*, pp. 907-8.

⁶ See, *e.g.*, *German Handbook*, *op. cit.*, para. 208.

⁷ Secretary-General's Bulletin, *op. cit.*, §1.1.

regulation is clearly limited to the conduct of hostilities. For this purpose, the bulletin gives a summary of the main rules of international humanitarian law. But this should not be understood as implying that UN forces are not subject to the entirety of international humanitarian law.

The bulletin states the obvious for those peacekeepers who are engaged in the conduct of hostilities. Its content is declaratory in nature and relevant not only for forces established by the United Nations but also for those under regional, multinational or national control and operating with the authority of the Security Council (*e.g.* the Gulf conflict of 1990-1991).

9. It would be erroneous to interpret the UN Secretary-General's Bulletin as advising peacekeepers to act as combatants conducting hostilities, when in fact they must adhere to law enforcement principles. The bulletin clearly states that it applies to UN forces engaged as combatants in situations of armed conflict and stresses that it applies to them only "to the extent and for the duration of their engagement".⁸ It is in the same context that the bulletin refers to "enforcement actions"⁹ and "peacekeeping operations when the use of force is permitted in self-defence".¹⁰

Given the fact that a policeman acting in self-defence would still be bound to the law enforcement paradigm, and any resort to a "conduct of hostilities" mode might be judged excessive, the text of the bulletin leaves some room for doubts. Such doubts must be resolved through ROEs and standing orders in accordance with applicable rules of international law and the law of the sending state.

The functional immunity of peacekeepers as organs of their sending state,¹¹ their accountability under national and international

⁸ *Ibid.*

⁹ *Ibid.* The context of this term is *peace* enforcement, not *law* enforcement.

¹⁰ *Ibid.*

¹¹ See Dieter Fleck, *The Handbook of the Law of Visiting Forces*, Oxford University Press, 2001, pp. 3-6.

law, and the responsibility of states for any wrongful conduct of their military and civilian personnel, all remain applicable.¹²

10. The UN Secretary-General's Bulletin also states that it does not affect the protected status of members of peacekeeping operations under the UN Safety Convention¹³ nor their status as non-combatants "as long as they are entitled to the protection given to civilians under the international law of armed conflict".¹⁴ This provision refers to Article 2(2) of the convention,¹⁵ a very unfortunate provision which, if taken seriously, would have the effect that, as Christopher Greenwood has put it, "the threshold for the application of international humanitarian law is also the ceiling for the application of the Convention".¹⁶

11. Both the UN Safety Convention and the UN Secretary-General's Bulletin may be criticised for neglecting the obvious differences between law enforcement and the conduct of hostilities. Members of peace operations and their commanders must now fill this

¹² See Draft Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UN Doc. A/RES/56/83 as corrected by A/56/49 (Vol. II)/Corr. 4.

¹³ Convention on the Safety of United Nations and Associated Personnel, printed in Roberts and Guelff, *op. cit.*, p. 627 *et seq.*

¹⁴ UN Secretary-General's Bulletin, *op. cit.*, §1.2.

¹⁵ Article 2(2), UN Security Convention, provides:

This Convention shall 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.

¹⁶ Greenwood in Fleck, *op. cit.*, § 208, para. 4:

It seems highly unlikely that those who drafted this Convention intended it to cease application as soon as there was any fighting, however low-level, between members of a UN force and members of other organized armed forces as this would reduce the scope of application of the Convention to almost nothing.

gap, hopefully supported by their sending states and competent UN organs.¹⁷

12. Peace operations have an inherent role in the protection of human rights and the restoration of justice, whether expressly declared or not. The relationship between international humanitarian law and human rights law has been shaped as part of a development which started after the Second World War and is expressed in the adoption of major human rights principles in Article 75 of Additional Protocol I. Legally speaking, this relationship may be characterised by mutual complementarity¹⁸ and by the *lex specialis* principle.

However, the *lex specialis* principle should not be misunderstood as being applicable to the general relationship between the two branches of international law as such. It should rather be seen in relation to specific rules in specific circumstances. Whether a sending state's human rights obligations apply extraterritorially depends on the terms of the human rights treaty in question. In many cases, a decisive factor will be whether the individual comes within the jurisdiction of the state concerned.

The practical relevance of human rights for peace operations cannot be underestimated. It is underlined by the fact that some subject-areas are dealt with more fully in human rights law than in humanitarian law (e.g. freedom of opinion, right to recognition as a person before law, right to participate in government, treatment in detention, disappearances, destruction of homes).

¹⁷ See, e.g., *Uniting against terrorism: recommendations for a global counter-terrorism strategy*, Report of the Secretary-General, UN Doc. A/60/825 (this report can be downloaded from <http://www.un.org/unitingagainstterrorism/sg-terrorism-2may06.pdf>); *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, UN Doc. A/59/2005 (this report can be downloaded from <http://www.un.org/largerfreedom/>); High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility*, United Nations, 2004 (this report can be downloaded from <http://www.un.org/secureworld/report3.pdf>).

¹⁸ Human Rights Committee, General Comment No. 31, paras. 2, 10, 11. Also, see *ibid.*, General Comments Nos. 15, 18, 28. All General Comments can be accessed at <http://www.unhchr.ch/tbs/doc.nsf>.

13. In peace operations, the significance of human rights obligations may be seen under three different aspects:

- (a) Ideally, there would be an express mandate by the Security Council and/or a regional organisation requesting not only all parties to the conflict but also the peacekeeping force to protect human rights;
- (b) Even where such a commitment has not been expressly stated, peace operations are to respect the law of the receiving state including its international law obligations of which human rights are an important part; and
- (c) Finally, human rights obligations of the sending state apply extraterritorially for acts committed within its jurisdiction.

14. Despite their differences, law enforcement operations in peacetime and the conduct of hostilities in armed conflicts have very much in common. The fundamental principles of distinction, avoidance of unnecessary suffering and humanity are quite similar in both types of operations. The same is true for secondary principles such as proportionality and effectiveness.

Existing differences in the implementation of these principles under the paradigms of law enforcement and the conduct of hostilities are a matter of graduation; they do not affect their full applicability as such.

15. Convincing solutions cannot be achieved at the national level alone. As with any effective peace operation, manuals on the law of military operations should be developed through international cooperation and promulgated as a multinational document or at least after close consultation. The ICRC, as the guardian of international humanitarian law, and other competent international agencies such as the UN Department of Peacekeeping Operations, should be duly involved in this process.

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States are duty-bound to disseminate and ensure respect for the law of armed conflict (LOAC) among their personnel. A number of national military LOAC manuals have been issued to this end. But what are they exactly? What do they do? Is such a manual really necessary for a state that does not have one yet? What are the experiences of those states which already issue manuals? What areas of law should a good manual cover? These and other questions were considered at an international seminar held under the auspices of the Forum for International Criminal and Humanitarian Law (FICHL) in Oslo, Norway, on 10 December 2007. This publication records the seminar's deliberations and findings. It also contains an introductory article and a checklist prepared by the editor for the benefit of those considering writing a new manual.

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