

ACIL Research Programme

The Role of Law in Armed Conflict and Peace Operations (2013-2016)

Programme leader: Terry Gill

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1. Introduction

This document contains the research programme on the Rule of Law in Armed Conflict and Peace Operations (2013-2015), carried out within the Amsterdam Center for International Law (ACIL).

The document provides a general description of the research programme (section 2), and explains the main research themes and specific research activities carried out within its framework (section 3).

2. General Description of the Research Programme

2.1 Problem statement

The research programme on the Role of Law in Armed Conflict and Peace Operations has as its primary aim the investigation of the increasing and changing nature of the role that law plays in relation to situations of armed conflict and a wide variety of peace operations, including post-conflict transitional situations.

The primary focus will be upon the role of public international law, as befits a research centre for international law such as the ACIL; but attention will also be devoted to the relationship of international law to other branches of law such as military operational law, conflict and security law and arms control law as well as to disciplines other than law, including international relations, military operational art and science, military history and conflict studies and strategy where this is relevant for assisting in attaining the goals of the various projects which together make up the overall programme.

These projects will focus upon various themes which have received widespread attention in both practice and legal discourse in recent years and will serve as a platform to channel the research activities of researchers who are attached to a number of different institutes, combining a variety of backgrounds and occupational perspectives, including legal advisors from within the Netherlands Armed Forces. This intra-disciplinary and interdisciplinary focus and participation should serve to contribute to the analytical and practical value of the research output and make the research programme unique in its kind within the Netherlands.

2.2 Orientation and method

International orientation

The research programme has both a national and an international orientation and networks of cooperation. At the national level, it is conducted in partnership with the TMC Asser Institute for Public International Law, Private International Law, European Law and the Law of Commercial Arbitration, with the Netherlands Defence Academy (NLDA) and with the Centre for Conflict and Security Law of Utrecht University, Faculty of Law, Economics and Governance in the field of conflict and security law. These institutions cooperate in the identification and development of research objectives and through joint individual research projects.

The programme coordinates and shares projects with related programmes and research platforms, specifically the 'Interuniversity Research Platform for International Humanitarian Law and International Criminal Law' set up in June 2010 and the NLDA Research Programme 'Dynamics of War & Peace Making', also initiated in June 2010. The former brings together researchers in the fields of international humanitarian and criminal law from the ACIL, the Asser Institute, Leiden University and the Free University of Amsterdam. The latter is an interdisciplinary research programme within the Faculty of Military Sciences at the NLDA involving researchers from the fields of military operational science, international relations, military history and strategy and military law.

Cooperation is further enhanced and strengthened within the context of the Research Forum on the Law of Armed Conflict & Peace Operations (LACPO), established in 2007, which brings together researchers from the ACIL, the NLDA, the Asser Institute, the Netherlands Red Cross (section international humanitarian law) and a number of other universities and institutions, both inside and outside The Netherlands. There are currently some 30 members of the forum.

The forum pursues the objective to enhance the synergy and cohesion of the research being conducted in the Netherlands in those fields of international law most relevant to the regulation of armed conflict and peace operations. It is designed as a meeting place and platform to explore topics of current and fundamental interest, develop research proposals and projects, and provide a framework for peer review of ongoing and completed research

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papers and draft publications. Periodic meetings are held approximately every three months to discuss ongoing research, recent developments and other subjects of topical interest. The activities within the forum are closely related to the research conducted within this research programme.

At the international level, intensive links are maintained with leading researchers and institutions in a number of countries. These include researchers from universities and defence colleges and academies in a number of countries inside and outside Europe as well as with a number of institutions such as the International Red Cross, the International Institute of Humanitarian Law (San Remo) and the International Society for Military Law and the Law of War (Brussels). A number of projects such as the development of the *Handbook of the International Law of Military Operations* and the development of a manual on the application of international law to cyber warfare have been and are the product of intensive cooperation between researchers from inside the research programme with researchers and institutions located abroad.

The research within the programme is published in both Dutch (in relation to military operations in which the Netherlands is involved) and English including publications in leading international journals and by leading international publishers.

Disciplinary nature and methodology

The legal orientation focusing upon the role of international law in relation to armed conflict and military operations naturally implies an emphasis upon traditional legal methodology combining legal analysis and interpretation as befits an institution devoted to international legal research such as the ACIL. However, attention is also devoted to other branches of the law, such as military operational law, criminal law, constitutional law, and to non-legal disciplines where this has specific relevance, such as international relations, conflict studies, military operational science, philosophy and ethics and legal and military history.

In this context, a number of complementary methodologies are applied including: identification and interpretation of the *lex lata* regulating the legal bases and applicable legal regimes in the conduct of military operations; participating in the scientific discussion relating to the development of legal regimes for new types of armed conflict, such as transnational armed conflicts between States and organized armed groups operating across

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international borders, and cyber warfare; intradisciplinary research into the relationship between international legal sub-disciplines, such as those between humanitarian law and human rights law, between legal paradigms such as those governing law enforcement and the conduct of hostilities and between the specific branches of international law applicable to armed conflict and military operations and general international law including the law relating to customary law formation, the participants in the international legal system and questions of accountability and responsibility; some degree of interdisciplinary research into questions such as how new technologies (cyber war and defence, unmanned weapons systems) and military strategies (counterinsurgency) impact upon the law and *vice versa*.

Quality control

The programme applies the performance criteria defined by the Faculty of Law, and where relevant, those of the other affiliated institutions alongside these. Most publications are, moreover, subject to some form of peer review and many draft publications are discussed internally within the LACPO forum before submission for publication.

2.3 Relevance

Scientific

The programme analyzes both existing legal regimes relevant to armed conflict and peace operations and engages in research into the ongoing development of these and of new regimes incorporating elements of traditional international law as well as innovative proposals for expanding and improving the scope of legal regulation. It also addresses important and topical questions relating to the relationship and hierarchy of legal regimes in relation to each other, taking into account methods of interpretation which are widely recognized in general international law, such as the notion of complementarity between legal regimes and the general principle of *lex specialis derogat legi generali*.

The programme plays specific attention to the identification of potential gaps and areas of dispute in both existing and newer areas of the law and to the development of a comprehensive sub-discipline of the international law relating to military operations, which aims to bring together into a coherent system a number of core and secondary areas of international law which are crucial to the legal regulation of complex and multinational contemporary military operations.

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Societal

The programme aims to contribute to providing authoritative legal guidance to policy makers, military planners and legal advisors and others involved in providing humanitarian assistance and protection in armed conflict and to promote respect for existing legal standards and best practices in the planning and conducting of military operations.

The relevance of this from a political, social and humanitarian perspective would seem to be axiomatic and virtually self-evident. Since its inception, international law has been deeply involved in identifying the circumstances under which resort to armed force is justified and in laying down a legal framework for the conduct of hostilities, the treatment of persons affected by war, or who find themselves in the custody or power of an adverse party and in attempting to mitigate the effects that armed conflict inevitably has upon ordinary human beings and their surroundings. This is at least as important today as it was in bygone eras in view of the greater destructive effects of armed conflict upon civil society and the increased interdependence of the international community.

Education

The research conducted is directly relevant to the graduate level academic programmes at the Faculty of Law at the University of Amsterdam (Master Programme Military Law, Master Programme Public International Law and Master Programme International Criminal Law) and with the undergraduate and graduate level programmes in War Studies (*Krijgswetenschap*) at the NLDA, including in the newly accredited Master Military Strategic Studies which was initiated in 2013.

It also supports academic programmes at the institutions joined in cooperation through the abovementioned Interuniversity Research Platform in International Humanitarian Law and International Criminal Law under the general coordination of the Asser Institute. Last, but not least, the courses offered at the Faculty in the area of military law, humanitarian law and international criminal law form a required part of the legal training and formation of military legal advisors in the Legal Service of the Netherlands armed forces.

2.4 Organisation and vitality

The research programme is carried out by a research group with internationally recognized scholars in the field of public international law and international humanitarian law (see overview of participating researchers in **Annex 01**). The overall responsibility of the research programme rests with the programme leader, Terry Gill. Professor Gill has an established reputation inside and outside the Netherlands in the areas of law covered in the programme.

3. Research Themes

The research programme focuses on four research themes.

1) Legal bases for the use of force and military operations: old law and new challenges

This research theme examines the legal bases for the use of force in both situations of armed conflict and in other situations. The latter, other than (traditional) armed conflict, include, in particular, Peace Operations and military operations in a mixed international and domestic legal setting and context.

Challenges are implied by new ways of warfare (cyber operations), by operations against new adversaries (terrorism), by renewed military strategies (such as counterinsurgency), by new techniques on the battlefield (drones en information techniques). These challenges are analysed in the light of the 'old law', such as human rights law, humanitarian law and the *jus ad bellum*. It has to be seen whether these challenges can be met by the old laws, or whether adjustments or even new laws are necessary.

Specific projects within this theme have included and will continue to include the content and application of the traditional *jus ad bellum* to the changing nature of armed conflicts (such as the fight against terrorism and non-state groups or cyber attacks), the legal basis for peace support operations, which have undergone rapid development and encountered new challenges in recent years. These include the impact of the use of force by and against non-State actors upon the law relating to the use of force, questions relating to the threshold of an armed attack in relation to cyber attacks and the temporal dimension of self-defence. This theme has connections with aspects of other themes in the programme, such as the legal aspects and impacts of the participation of non-State actors, the relationship of the law relating to the use of force with other branches of international law and post-conflict transitions.

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Specific research projects have included a doctoral dissertation by an external Ph.D. candidate affiliated with the UvA (Hijmans scholarship) on the limits of pre-emptive and preventive self-defence, which was successfully defended in late 2010 and was awarded the Francis Lieber Prize by the American Society of International Law in 2012, along with an ongoing series of articles and presentations by participating researchers on the use of force in international law and the legal bases for various types of Peace Operations.

Between February 2010 and March 2013 it also included participation in an international research project engaged in preparing an authoritative annotated manual on cyber warfare. In the context of this theme, the question of the applicability of the law regulating the use of force to 'computer network attacks' received specific and detailed attention. The Manual also examines the applicability and application of international humanitarian law to cyber warfare (see below under Research Theme 2). The Manual was published in March 2013 by Cambridge University Press.

In addition, one of the PhD projects presently underway examines the notion of proportionality as a general principle of international law and its legal content and continuing development as an underlying principle in both the law relating to the use of force and the humanitarian law of armed conflict.

2) International humanitarian law and human rights law in contemporary armed conflicts: challenges, dilemmas and prospects

This research project will analyse a number of specific developments and challenges relating to the application of humanitarian and human rights law to contemporary armed conflicts. Specific activities in the past have included the participation of two researchers from within the programme in the ICRC expert conferences on 'Direct Participation in Hostilities', which resulted in the publication of the ICRC Interpretive Guidance on Direct Participation in Hostilities in May 2009.

The abovementioned research project on cyber warfare investigates the applicability and application of the law of armed conflict to one of the most recent developments in military operations and technology and addresses the interpretation and where necessary adaptation of existing rules of humanitarian law to this new phenomenon. The project includes researchers from ACIL, other European and North American Universities and Defence

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Colleges, in cooperation with the NATO Centre of Excellence for Cyber Warfare (CCD COE) in Tallinn Estonia. After completion of this project in March 2013, a new project was initiated by the NATO Cyber Centre of Excellence aimed at producing a multi-authored book by a number of leading international experts on the application of international law to cyber operations below the threshold of armed conflict, such as cyber espionage, cyber intervention and cyber surveillance. One of the members of the Programme is participating in this project, which is due for completion and publication in 2014.

Present areas of research include a number of PhD dissertations currently underway at various stages of progress involving research into a number of key legal questions and developments within, and challenges to international humanitarian law.

These include a PhD project on the application of international humanitarian and human rights law to contemporary counter-insurgency conflicts and its relationship to human rights law and counter insurgency doctrine in that context. This project is due for completion in 2013.

A second PhD project focuses on the principle of proportionality as one of the guiding principles of international humanitarian law and the legal significance of fundamental legal principles in generating norm creation and as an independent source of legal obligation. This project also addresses the distinction between proportionality *ad bellum* and *in bello*. This project is due for completion in the course of 2015.

A third PhD project investigates the question of the applicable legal regime under international humanitarian law to armed conflicts between States and organized armed groups across international borders referred to in the literature as “transnational armed conflicts” and addresses the question whether the existing legal regimes of international and non-international armed conflict are capable of being applied to such conflicts or whether there is a need for a new legal regime to adequately address this new type of armed conflict. This project was initiated in 2011 and will continue through 2015.

A fourth new PhD project which was started in July 2013 by an external ACIL researcher at the NLDA will examine the application of international humanitarian law in relation to military cyber operations other than attacks, such as information operations, psychological

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warfare, and military intelligence activities. This project aims to fill a gap in legal research on cyber warfare, which has hitherto primarily been focused upon the conduct of hostilities in the cyber domain. This project will take three- four years to be completed.

A fifth PhD project which was started in 2012 investigates the temporal and geographical boundaries of contemporary armed conflicts and is due for completion in 2016. It will devote attention to the practice of certain States of targeting specific individuals in the context of counter terrorism operations and analyze whether such operations can be reconciled with the temporal and geographic applicability of international humanitarian law and how these relate to other relevant legal regimes , such as international human rights law, and the law of neutrality.

Four of these projects are being conducted by external ACIL researchers located at the NLDA, and are also included in the abovementioned interdisciplinary NLDA Research Programme, 'Dynamics of War and Peacemaking'. The fifth is being conducted in cooperation with the TMC Asser Institute.

A sixth PhD project which commenced in mid-2010 and is being conducted by an external ACIL researcher. This project is aimed at both a theoretical and case study analysis of the obligation under the Geneva Conventions 'to ensure respect for the Conventions' and will examine the obligations upon States in peacetime as well as during and after an armed conflict in the area of dissemination of humanitarian law, provision of military legal advisors in the armed forces and suppression of breaches of humanitarian law. The project is due for completion in 2015-6.

Other areas of research include articles and contributions to books on questions of targeting doctrine and practice, including targeted killing and leadership targeting and the role of international humanitarian and human rights law within this context, on the threshold of (non-) international armed conflict and other areas of topical interest. These projects and research areas have many points of commonality with the abovementioned Interuniversity Research Platform for International Humanitarian Law and International Criminal Law and the interdisciplinary NLDA Research Programme 'Dynamics of War and Peace Making' and some projects form part of these respective programmes alongside this one.

3) The development of international military operational law as a new sub discipline within public international law and its relationship with and contribution to public international law

This research theme aims to explore the relationship between relevant areas of public international law and military operational law. Military operational law governs the legal dimensions of the deployment, and participation of military forces in a variety of types of military operations in both conflict and non-conflict situations. Since such military operations occur most often in an international environment, it is inevitable that both international and operational law are applicable and complementary. Both branches of the law mutually reinforce and influence each other with international law providing the basic framework and guiding principles for operational deployment and the use of force, while military operational requirements will in turn influence the ways international law is applied in practice. This is illustrated in such areas as the agreements whereby States transfer contingents of their armed forces to an international organisation or a multinational command within the context of peace support operations, the status of forces stationed or deployed abroad and the rules of engagement governing the use of force and the execution of a mandate or other legally sanctioned military mission.

Specific activities within this project include a number of Ph.D. dissertations which are at varying stages of completion and which explore some of the most salient aspects of this relationship. These include a PhD project examining the role of international and operational law, national law and diplomatic and policy considerations in the formulation and application of rules of engagement with particular attention for the various categories of self-defence (national, unit level and personal) and their relationship to “rules of engagement”. This project is being developed through a series of articles which have been published or are intended for future publication in leading international publications, which together will be submitted as a PhD dissertation in late 2014 or early 2015.

A second PhD project examines international and operational law in relation to the status of military forces deployed abroad, with particular emphasis on the relationship between international law and operational law and considerations and the balance between the interests of successful mission completion and due regard for respect of the host State’s interests and legal order. This project was completed in September 2012 and will be translated and published in English in 2013.

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A third PhD project explores the complex rules and practices governing maritime interception operations and the maintenance of embargoes and law and order at sea, with reference to countering the dissemination of weapons of mass destruction and to counter terrorism and counter piracy operations.

The researchers in these Ph.D. projects are either serving military officers in the Military Legal Service of the Netherlands Armed Forces, with operational experience or are employed at the Netherlands Ministry of Defence at a senior policy level tasked with drawing up operational law directives incorporating international law.

Another project within this theme was the preparation of a comprehensive annotated *Handbook on the International Law of Military Operations* over the period 2007-2010 which was completed in mid - 2010 and was published by Oxford University Press for use as a (post) graduate level research tool and as an authoritative reference at the senior policy level. This project was carried out with the participation of a team of international and national experts in this field. This handbook sets out the framework for the emerging discipline of international military operational law and provides in depth analysis of the most salient questions confronting the adaptation and application of international law to complex military operations. A second edition is planned for completion in 2015.

Another recently initiated project is the preparation of an annotated manual on the law governing the Conduct of Peace Operations, which has been undertaken at the invitation and under the sponsorship of the International Society for Military Law and the Law of War in Brussels. This project will involve experts from a number of international universities and organizations and aims to provide comprehensive legal guidance to senior policy officials, military officers and academics regarding the law governing peace operations. The project is due for completion (if funding is forthcoming) in 2016.

Additional publication can also be expected in the form of journal articles, symposia, conferences and presentations and post-academic courses aimed at military lawyers, diplomats and other professionals active in this field.

4) Arms control, nuclear non-proliferation and nuclear security in an uncertain environment

In the context of an agreement concluded between the University of Amsterdam and Utrecht University in September 2012, research in the area of conflict and security law, specifically in the field of arms control law and the related field of chemical, biological, radiological and nuclear (CBRN) security has been brought within this programme. Both the non-proliferation of nuclear weapons and nuclear security are current and urgent topics with potentially significant impacts on international security and stability, as well as on international law. The control of nuclear weapons and the protection of all radioactive materials and related facilities is of great importance to the Netherlands, with the third Nuclear Security Summit in the Hague coming up in 2014, followed by the 2015 Review Conference of the Nuclear Non-Proliferation Treaty (NPT). In this context, this research theme consists of two PhD projects that are due to be completed in 2014-5. Tom Coppen analyses the international legal aspects of the nuclear non-proliferation regime, focusing on the role of the NPT, the IAEA, and that of international trade and export controls. Jonathan Herbach examines the international law framework for nuclear security, which covers nuclear and other radioactive materials and related facilities that are used for peaceful purposes and aims at preventing terrorist, criminal or other unauthorized activities involving these materials and/or facilities. The nuclear security research focuses on international legal approaches to physical protection, criminalization, combatting illicit trafficking, and export controls that comprise the core of the nuclear security regime. Both research projects are being conducted with the financial support of the Netherlands Ministry of Foreign Affairs.

Another project within this theme is a PhD dissertation which will look into the question of the exercise of extraterritorial jurisdiction by the United States in the context of its foreign policy in relation to arms and strategic material exports to such States as Iran, North Korea and other States which it has subjected to unilateral arms controls and their effect upon non-US companies and States located in Europe. This project was started in 2012 and is due for completion in 2015-16.

Other international publications and presentations are planned for the same period, such as a legal commentary on the Chemical Weapons Convention (to be published in 2014 by OUP), a

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seminar for the Joint Research Centre of the European Commission, and participation in the IAEA's International Conference on Nuclear Security.

Annex 01 – Research Group (as per 1 September 2013)

	<i>research fte</i>
Programme Leader	
• Terry Gill	0,26
Senior Researchers	
1. Paul Ducheine	0,40
2. Christophe Paulussen	
3. Eric Myjer	0,10
4. Maria Nybondas	0,00
5. Kinga Tibori Szabo	0,00
6. Joop Voetelink	0,40
Junior Researchers	
1. Rogier Bartels	0,20
2. Hans Boddens Hosang	0,20
3. Bart van de Bosch	
4. Jeroen van den Boogaard	0,30
5. Tom Coppen	1,00
6. Jessica Dorsey	1,00
7. Jonathan Herbach	0,30
8. Martin Fink	0,00
9. Katharine Fortin	0,00
10. Maurits Gorlee	0,20
11. Eric Pouw	0,80