



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

J.F.R. Boddens Hosang

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.