



Ministry of Defence

# ***ILMO: The 'Flux Capacitor' of Contemporary Military Operations***

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Good afternoon , ladies and gentlemen, friends and colleagues. The clip you just saw was from the classic cult movie “Back to the Future” released in 1985 by Universal Pictures, directed by Robert Zemeckis and starring *i.a.* Michael J. Fox and Christopher Lloyd, about the hilarious adventures of a teenager named Marty Mc Fly from the 1980’s who goes back in time to the 1950’s in a time machine built by his friend, the eccentric inventor “Doc” Emmet Brown. The flux capacitor is what made time travel possible in the movie and is portrayed as Doc Brown’s greatest invention as you just saw. I would like to talk to you about the International Law of Military Operations (or ILMO for short) as the proverbial flux capacitor in contemporary military operations: to wit in the work of the persons who teach it, conduct research in it and apply it on a daily basis, not least in the actual conduct of military operations of all types. I do not by any stretch of the imagination claim to be the inventor of this law, but my colleagues in the NLDA ( and elsewhere) and I can claim some credit for developing the concept of ILMO as a distinct sub-discipline within public international law and disseminating it ,both within the armed forces, to policy makers and to a broader public. In the coming thirty-five minutes or so I will try and give an impression of what the role and function of ILMO is, some current and emerging challenges it faces and the contribution that has been and is being made here at the NLDA to its further development.

### **Legitimacy, the law and their place in foreign policy**

The statement that international law of military operations is the ‘flux capacitor’ of contemporary military operations may seem a tad overblown and is in truth not meant to be taken literally. Military operations which are conducted outside national borders or which involve international actors, both friendly or hostile, as partners or adversaries are always instruments of national and in some cases of international policy and hence are essentially politically driven. They are, in short, part of a State’s foreign and security policy and are subject to the political decision making process in force in a given State. A military operation is as the term implies, an activity carried out by one or more State’s armed forces for a military purpose, at the behest and under the direction of the political leadership of a given State, or under the direction of a group of States working together, often through an international organization to achieve (a set of) policy objectives. The military goals will be subsumed within these overarching policy objectives and the application of the military instrument is a means chosen to further those objectives. So there is no question of the law being the driving force behind the decision to conduct a particular military operation, be it against an adversary State, or increasingly against a hostile armed group operating across international borders , or to contribute to an international effort to protect community values, such as maintaining the peace, protecting fundamental human rights or the suppression of international crimes, such as piracy.

Nevertheless, it is no exaggeration to say that international law plays a significant and often even a crucial role, alongside other considerations, in determining under which circumstances military forces may operate abroad and the modalities of applying force and exercising authority over persons or territory. While ignoring the law may sometimes appear to be an option, it is not often one which is the most sensible and doing so generally comes at a significant cost in terms of legitimacy and support for the operation, both internationally and domestically. For a democratic State founded on the rule of law, it will be in some cases a political as well as a legal imperative to comply with the law or come up with overriding reasons for not doing so in order to maintain the necessary political support to conduct the operation.

It is almost a truism to state that legitimacy is an essential component of an effective (foreign) policy. Legitimacy here is defined as done by Mark Suchman in his influential publication on the forms and functions of legitimacy published in 1995<sup>1</sup> as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.”<sup>2</sup> Law is, of course, one component or manifestation of legitimacy as a “socially constructed system of norms and values”. To the extent a policy is seen as conforming to such norms and values it will, generally speaking, have a higher degree of acceptance and potentially will even garner active support and will inevitably engender less friction, opposition and obstruction than a policy which is seen to lack such legitimacy. While law and legitimacy do not always necessarily exactly coincide (legitimacy is a broader notion than legality or conformity with the law), they do so more often than not and a policy which is clearly perceived as being in clear and serious violation of the law will not easily be seen as legitimate, except perhaps in certain very exceptional situations.<sup>3</sup>

A few admittedly somewhat anecdotal examples will have to suffice to illustrate the place of compliance with the law and legitimacy as an influential factor in the foreign policy of States. I will, I assure you, keep these brief in the interest of time and not wishing to unduly tax the audience's patience. My first example is the difference in perception of the two operations usually referred to as the “Gulf Wars”. The contrast between the broad support for the operation named Operation *Desert Shield/Storm* in 1990-91 which had a clear legal basis in both Security Council resolutions and the right of collective self-defence and the much more controversial and contentious invasion of Iraq in 2003, which lacked any clear basis

<sup>1</sup> M. C. Suchman, “Managing Legitimacy: Strategic and Institutional Approaches” *Academy of Management Review* Vol. 20 (3), 571-610

<sup>2</sup> *Id.*, 574

<sup>3</sup> Such exceptional situations might include existential threats to a State's security (e.g. the Cuban missile crisis) or large scale egregious violations of fundamental human rights where military action has a reasonable chance of halting the violations and would not endanger international peace, but because of political factors a mandate from the UN Security Council is not feasible. On the former, see G.T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis*, Little Brown, Boston (1971). For a legal perspective see A. Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law*, ASIL/Oxford University Press (1974). On the legitimacy of humanitarian intervention in the absence of a mandate from the UN Security Council see *i.a.* T.M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks*, Cambridge University Press (2002), Ch. 9-10, pp.135-191

in international law and was opposed by a large segment of the international community, including some of the U.S.'s closest allies is one example.<sup>4</sup> Another is the significant damage that was done to US prestige and its public image by the widely condemned violations of clear norms on detention in the context of an armed conflict, resulting in the demonstrably inhumane treatment of detainees in the Guantanamo and Abu Ghraib facilities.<sup>5</sup> More recently, the widespread violations and even wholesale rejection of fundamental norms, along with its nihilistic war against virtually everyone by the so-called ISIS, was a major factor leading to the formation of an international coalition which ended its territorial ambitions in the Levant and Iraq.<sup>6</sup> And finally, the perception of Russian aggressive behaviour since the invasion and annexation of the Crimea has had a major impact on East-West relations and has led to significant diplomatic and economic costs for the Russian government (albeit not serious enough to induce it to change its behaviour until now) and triggered a rise in military tensions to a level not seen since the end of the Cold War.<sup>7</sup>

What this means is not that international law is never violated; it is and sometimes very deliberately and seriously. This is not unique to international law; virtually every rule of law ever promulgated has been violated at some time or another. Nor does it mean that violations of the law are always adequately addressed or even given the importance they deserve. But it does show that violations of international law leading to a lack or loss of legitimacy can have significant repercussions and often makes it that much harder to achieve the longer term policy objectives one was seeking in the first place. As such it makes utilitarian sense to observe the law as a matter of self interest in addition to it being usually the morally correct thing to do.

<sup>4</sup> For discussion of these two operations see E. de Wet, “The Gulf War 1990-91” in T. Ruys, O. Corten & A. Hofer (eds.) *The Use of Force in International Law: A Case Based Approach*, Oxford University Press (2018), 456 ff. For the invasion of Iraq in 2003, see M. Weller, “The Iraq War 2003” in *id.* 639ff

<sup>5</sup> On the controversies relating to treatment of detained persons in the context of the Afghanistan and Iraq conflicts, see e.g. H. Duffy, *The War on Terror and the Framework of International Law*, Cambridge University Press (2005), 266-273 and T.D. Gill & E. van Sliedregt, “Guantanamo Bay: A Reflection on the Legal Status and Rights of ‘Unlawful Enemy Combatants’” in *Utrecht Law Review*, Vol.1 (1) 28-54, available online at <https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.2/>

<sup>6</sup> ISIS was confronted by a large international coalition after its advance from eastern Syria deep into Iraq in the summer of 2014 and its widespread violations of international human rights and humanitarian norms which included genocidal violence against the Yazidi community in northern Iraq. See *i.a.* “Report of the International Commission of Inquiry on the Syrian Arab Republic: Rule of Terror, Living under ISIS in Syria, UN, November 2014. For an overview of the international coalition ranged against ISIS see, <https://www.inherentresolve.mil/>

<sup>7</sup> T.D. Grant, “Annexation of Crimea” in 109 *Am. J. Intl. Law*, Issue 1 (Jan. 2015), pp.68-95.

## The dual function of ILMO

Observance of the law in the context of a military operation, is the *raison d'être* of the international law of military operations. ILMO has a dual function in the planning and conduct of military operations. It identifies and demarcates the legal basis for any given operation which broadly corresponds to the *jus ad bellum* contained in the UN Charter and customary law. This body of law determines under which conditions a State may resort to the use of force at the international level and under which conditions a State may deploy armed forces on the territory of another State.<sup>8</sup> Alongside the legal basis, the relevant legal regimes will regulate how force must be applied and how authority over persons or territory must be exercised. These legal regimes consist of two separate bodies of law, the law of armed conflict also known as international humanitarian law and international human rights law.<sup>9</sup> These two legal regimes complement each other and to the extent a particular rule from one body overlaps or clashes with one from another, the precedence of rules and indeed the general interpretation of obligations will be determined by applying well established principles of legal methodology (that's right, we lawyers also have a methodology contrary to popular belief among some non-lawyers, some of which dates all the way back to Roman law).<sup>10</sup> Alongside these two core regimes, several other ones also play an important role in setting out the rules of the road at sea, in the air, in relation to the exercise of jurisdiction and immunities (SOFAs), etc.<sup>11</sup> So ILMO's first function is to set out the applicable law and harmonize obligations which arise from the different regimes. This is what I refer to as its horizontal function.

But the identification and interpretation of the applicable law is only part of the picture. Any military operation will have an underlying concept of operations (CONOPS) and operational plan (OPLAN) in which the mandate, mission objectives and available resources have been factored in. This serves as the basis, alongside policy considerations and in accordance with the applicable law, for drawing up the operational directives for a given operation in the form of rules of engagement (ROE) and derivative instruments such as targeting instructions, commander's guidance, soldier's cards etc. These instruments translate the rather abstract legal obligations contained in treaties and customary international law into concrete rules which govern the use of force and other forms of coercive action in the context of an operation. Law, as stated, one component of these rules alongside operational and policy considerations and in the final analysis forms the bottom line, in that while ROE are

<sup>8</sup> T.D. Gill and D. Fleck (eds.) *The Handbook of the International Law of Military Operations*, Oxford University Press, Chapters 5-14.

<sup>9</sup> Id., chapters 3-4

<sup>10</sup> On legal methodology in international law in general see e.g. M. Bos, *A Methodology of International Law*, Elsevier (1984) 357 pp., C. Domincé, J. Belhumeur and L. Condorelli (eds.), *L'ordre juridique international entre tradition et innovation*, Graduate Institute Publications, Geneva (1997, Open Publication edition September 2014) available online at <https://books.openedition.org/iheid/1320>. For authoritative treatment of it in the context of norm reconciliation and harmonization see Report finalized by M. Koskenniemi to the International Law Commission *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L682, 13 April 2006.

<sup>11</sup> Handbook ILMO, chapters 5.2, 6.2 and 19-21

not legal rules themselves, they reflect the law and ROE must conform to the law, even if significant additional restraints are sometimes put in place for a given operation for policy reasons beyond what is strictly required by the law.<sup>12</sup> Hence this function of operational law brings the law into the headquarters of an operation (where the LEGAD usually sits next to the commander while an engagement is underway), onto the bridge of a warship, into the cockpit of a military aircraft, or even to the platoon leader in the field. This is what I refer to as the vertical function of ILMO. I have attempted to illustrate both of these functions in the image of our 'flux capacitor' now up on the screen.

In contemporary military operations, ILMO has become part of the targeting cycle in targeting decisions, as well as playing a substantial role in a wide range of other activities and the role of the legal advisor as interpreter and advisor to commanders and operators in the field has grown exponentially in the past thirty years, alongside the increasing complexity and awareness of the law by those who have to apply it in practice. General Anthony Zinni, former commander of CENTCOM, recognized this as long ago as 1996, when he predicted that "operational and international law are the future".<sup>13</sup> At the present, that prediction is fully borne out in the way legal support and guidance to operations has become integrated into military doctrine and is now part of standard operational procedure for most armed forces.<sup>14</sup>

## Some emerging challenges to the role of international law in the international system

While the role that international law plays in international affairs, including military operations, is significant and in many respects is arguably more important now than ever before, this is no reason for complacency. There are a number of challenges to its continued influence in shaping and regulating State conduct which arise from a number of factors. These include in particular, the shifting balance of power and challenges arising from that to the "rule based international system", increasing pressure on the system due to factors such as climate change and mass migration, emerging technologies and methods of social interaction, including methods of warfare and other threats and challenges. There is no time to delve in depth into all or even any of these, but a few observations on some of them are called for.

<sup>12</sup> For an in depth analysis of the role of Rules of Engagement in the context of ILMO see, J.F.R. Boddens Hosang,, *Rules of Engagement: Rules on the Use of Force as Linchpin for the International Law of Military Operations*, doctoral dissertation, University of Amsterdam, 8/2/17, available online at <https://dare.uva.nl/search?identifier=691ccb62-371e-4e09-94d3-3793f4b3a54d>

<sup>13</sup> Elizabeth Grimm Arsenault, *How the Gloves Came Off: Lawyers, Policy Makers and Norms on the Debate on Torture*, Columbia University Press (2017), quoting Anthony Zinni at 94.

<sup>14</sup> See e.g. U.S. Joint Chiefs Publication *Legal Support to Military Operations* Joint Publication 1-04 2 August 2016 available online at [https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp1\\_04.pdf](https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp1_04.pdf) This publication is US doctrine, but this is mirrored in the armed forces of most other States to at least some extent, in particular those States members of the NATO alliance. It is also standard practice in operations conducted by the UN Department of Peace Operations (formerly DPKO).

The manner in which China is asserting its territorial claims, interests and military potential in the South China Sea, the resurgence of Russia as a military power and interested player in areas which formerly were part of the sphere of influence of the Soviet Union and the weakening of trans Atlantic ties are all indications of a shifting balance of power. Both China and Russia, as well as a number of other emerging powers, do not have the same perception of international law on a number of crucial issues, as its traditional Western sponsors and supporters do and it is also probably true to say that the attitude of some Western States towards international law in recent years has had a negative impact on its legitimacy.

In a recent study done at Chatham House, three major challenges were identified as being of crucial importance to the continued relevance of the “rule based international system”. These were in the view of the participating experts: the importance of legitimacy, of equity and perceived fairness of the system and the danger of overconfidence and of complacency.<sup>15</sup> The first factor, the threat to legitimacy, was seen primarily in terms of lack of consistency; namely some of the issues pointed to earlier, such as the invasion of Iraq and violations of human rights in mistreating and torturing detainees as undermining the legitimacy of the system. The challenge to the equity or fairness of the system was defined in the study as the necessity of the rule based system being perceived as being to the advantage of the majority of its members and not just some of them and many financial and trade frictions, to take one example, are partially due to a perception on the part of some States of being disadvantaged by the system. Complacency and overconfidence resulted in the view of the experts, from an assumption by some actors within the system that the rules had always worked and needed little attention or adaptation to new situations.<sup>16</sup> While one might quibble about some of these assumptions and definitions, I for one am in broad agreement with the diagnosis. If one violates the rules of the system regularly and seriously as was the case in the examples given earlier, this is bound to have an impact on the legitimacy of some of its rules, if not necessarily of the system as a whole. At the same time, a rule system which is not perceived to be fair and in the interest of most of its members is hardly likely to maintain such legitimacy, and finally it is clear that the law must remain responsive, hence technological developments and fundamental challenges to the stability of the system, such as climate change, mass migration and equitable use and distribution of wealth and resources need to be adequately addressed for the ‘rules based system’ to remain relevant and resilient.

These and other factors mean that certain international norms and rules may come under increasing pressure, but at the same time, most if not all of these challenges are only capable of being adequately addressed through international cooperation that is worked out in rules, which will to a considerable extent be based on those which are currently in place and are perceived by all to be useful, even crucial to the security and prosperity of all of its members.

<sup>15</sup> “Challenges to the Rule Based International Order” Royal Institute of International Affairs, London (2015) available online at <https://www.chathamhouse.org/london-conference-2015/background-papers/challenges-to-rules-based-international-order#>

<sup>16</sup> ibid

This makes it at least more likely that rather than the system as a whole being abandoned or falling into irrelevance, it will be modified and adapted to changing circumstances as has consistently been the case in the past. International law has always mirrored the prevailing realities within the international system at any given period in history: its power distribution, rules to manage conflict and provide for some degree of cooperation between its members and even its aspirations are reflected in the rules in force at a particular period (the international law of today is not that of 1900 or that of the early modern era, so there is no reason to suppose the present system is immutable). Hence the rules, while maintaining a large degree of continuity, are likely to be adapted on particular issues to reflect the changing international realities and to at least attempt to address the major challenges which face society in the 21<sup>st</sup> century. Whether they will succeed in doing so satisfactorily and in a timely fashion is another matter, but for the purposes of this discussion that is less relevant than the question of whether a ‘rules based international order’ is likely to continue. The answer is yes, although it may not be the same rule based order that we have had over the past 70 odd years since World War II.<sup>17</sup>

In the realm of our topic, the international law relating to the use of force and conduct of military operations, there have been some positive developments alongside many well publicized and sometime egregious violations of the law. The law relating to the use of force has not been repudiated by any major power as was the case in the 1930’s and the widespread accession of States from all regions to the conventions regulating warfare and the treatment of its victims shows that the system as a whole still wields considerable legitimacy. The law of armed conflict is adapting itself to the fact that most armed conflicts involve one or more non-State actors, and new technologies and means of warfare such as cyber warfare, unmanned and autonomous systems and other non-traditional forms of warfare or interference with other international actors are all the subject of adaptation of rules to address them as a response to these rapid technological developments. The challenge is and will remain to make these adaptations in such a way that they are seen to be effective as well as legitimate. Some of the research engaged in here at the NLDA and its partners attempts to do just that.

### Research in the field of international law relevant to military operations at the NLDA

Here at the NLDA, a significant amount of research has been and is being devoted to analyzing how international law is applied to military operations and how it needs to be adapted to changes and challenges in order to remain relevant. This includes completed and ongoing PhD research, books, articles and other contributions and other types of measurable research output, such as conference papers and policy recommendations.

<sup>17</sup> For an authoritative study of how international law functioned in a previous era see, M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press (2001).

Starting as far back as 2007-8, dissertations by successive PhD researchers in international law relating to military operations have appeared on a wide range of topics from narcotics interdiction at sea, to the role of the armed forces in combatting terrorism, to the law of jurisdiction and immunities of members of the armed forces deployed abroad, to the interplay of human rights and humanitarian law in counterinsurgency operations, to maritime interception operations, and to proportionality as a fundamental principle of the law of armed conflict. New technologies are being addressed in completed and ongoing studies on cyber warfare above and below the threshold of traditional armed conflict, in remotely controlled and unmanned weapons systems and other new technologies, such as artificial intelligence and autonomous weapons and bio- enhancement. The important topic of oversight and accountability in military operations conducted by the Netherlands armed forces is receiving attention in another new ongoing PhD project. Major publications like the *Tallinn Manuals on Cyber Warfare*, the *Leuven Manual on Peace Operations* and the *Handbook of the International Law of Military Operations* have been in some cases initiated and contributed to by researchers here. These publications are not only scientifically relevant, but are of real use to the armed forces and its legal service and have had an influence on policy formulation, such as in the realm of how the Netherlands positions itself in debates on applying international law to cyber operations and warfare. They also play an invaluable role in carrying out our other primary task; teaching the law to the cadets and midshipmen at both locations in Breda and Den Helder and to graduate students in the master program on military strategic studies, all of which the members of the military law section participate in and make a substantial contribution to. The researchers engaged in these projects cooperate closely with other researchers in the FMW, particularly within the Department of War Studies, with other universities, in particular with the Amsterdam Center for International Law at the University of Amsterdam and its research project Law of Armed Conflict and Military Operations (LACMO) which they form part of, and with a whole network of international partners of which the Department of War Studies is one of the founding members.<sup>18</sup>

These are solid achievements which I am proud to have contributed to, alongside a team of first class researchers who have made a mark nationally and internationally in this important field and whom it has been an unmitigated pleasure and privilege to work with. I have no doubt that this good work will be continued by them and by my successor, Marten Zwanenburg, whom I wish every bit as much pleasure as I have had in working here and all success in coordinating this team.

I would like to thank all here at the NLDA who have been so welcoming and supportive over the years; in particular the successive deans of the faculty who have consistently been behind our work, Frans Osinga who has provided inspirational leadership to the Department, Paul Ducheine who is an invaluable partner here and at the ACIL in Amsterdam, Joop Voetelink who has been a really outstanding 'first officer' and a real pleasure to work with and all the members of the Military Law Section over the years whom I have so enjoyed working with and will continue to work with in the future. Last, but not least, my endless thanks and boundless affection go out to my other half, Annelies, without whom it would scarcely have been possible and not nearly as much fun. Ik heb gezegd.

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18 For a complete overview of completed and ongoing research see the research reports by the FMW and the ACIL over the years 2007-18. For the international research network which the Department of War Studies is one of the founding members see <https://www.lacmonet.org/>



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