THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH[1]

REVIEWED BY DAN E. STIGALL[*]

I. Introduction

Recent years have seen a distinct rise in the academic attention paid to all aspects of what is frequently termed, in the collective, national security law,[2] and various subcategories of international and domestic law which relate to national security.[3] This increased academic interest, spurred by world events such as the U.S. conflicts in Iraq and Afghanistan and the increased focus on counterterrorism, has resulted in such heightened attention that many U.S. law schools now publish journals which focus exclusively on national security law[4] and even offer LL.M. programs specializing in this distinct academic area.[5] Courses on the law of armed conflict have also burgeoned.[6] Concomitantly, since

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[*] Trial Attorney, U.S. Department of Justice, Office of International Affairs. He also serves as an Adjunct Professor of International Law at The Judge Advocate General's Legal Center and School (U.S. Army). Prior to joining the Department of Justice, he served on active duty in the U.S. Army Judge Advocate General's Corps from 2001–2009, serving in Europe, the Middle East, and the United States. LL.M., 2009, George Washington University School of Law; J.D., 2000, Louisiana State University Paul M. Hebert Law Center; B.A., 1996, Louisiana State University. Any opinion expressed in this book review is solely that of the author and not necessarily that of the Department of Defense or the Department of Justice. The author would like to thank Madeleine for her assistance.

[1] GEOFFREY S. CORN, VICTOR HANSEN, M. CHRISTOPHER JENKS, RICHARD JACKSON, ERIC TALBOT JENSEN & JAMES A. SCHOETTLER, THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH (2012).

[2] Scott L. Silliman, *Teaching National Security Law*, 1 J. NAT'L. SECURITY L. & POL'Y 161, 162 (2005) ("Although the study of national security law has always built upon a foundation of constitutional law, in recent years it has necessarily grown in scope to include coverage of fundamental principles of public international law, international criminal law, international humanitarian law, and numerous domestic statutes.").

[3] *Id.*

[4] *See, e.g.*, J. NAT'L SECURITY L. & POL'Y, http://jnslp.com (last visited Dec. 21, 2012).

[5] For instance, both The George Washington University School of Law and Georgetown Law School now offer LL.M. programs in National Security Law. *See, e.g.*, Georgetown Law School, http://www.law.georgetown.edu/academics/academic-programs/graduate-programs/degree-programs/national-security/index.cfm (last visited Dec. 21, 2012) (describing its National Security Law LL.M.) ("The National Security Law LL.M. degree is a highly competitive one-year advanced degree program, created to give students the opportunity to engage in critical thinking about national security law.").

[6] AM. BAR ASS'N, CAREERS IN NATIONAL SECURITY LAW, at xi (1st ed. 2008), *available at* http://www.americanbar.org/content/dam/aba/migrated/natsecurity/nsl_text.authcheckda

2001, the number of textbooks designed to function as instructional tools to teach the law of armed conflict has burgeoned.[7]

Notable among those contributing to the literature in this recently fecund field are scholars who are current or former military lawyers, some of whom have entered academia after serving with distinction in the U.S. military for many years. The addition of these voices to the academic discussion has deepened the discourse, lent to the literature needed practical insight, and enriched the discussion with viewpoints informed by years of military experience, training, and indoctrination.[8] While the contribution by military legal scholars to international law is certainly not a new phenomenon—after all, some of the earliest writers on international law and armed conflict were military lawyers[9]—commentators have noted the impact of recent writing by military lawyers and their marked inclination to approach issues through an "operational" lens.[10]

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m.pdf ("The number of accredited law schools offering courses on national security law has increased from one in 1974 to seven in 1984 to eighty-three in 1994. Today over 130 schools offer such courses.).

[7] *See* Françoise J. Hampson, *Teaching the Law of Armed Conflict*, 5 ESSEX HUM. RTS. REV. No. 1, July 2008, at 6 ("Since 2001, particularly in the United States, a large number of academics have begun to address LOAC issues, some of whom appear to be uninhibited by ignorance. The role of an academic drawing up a reading list has changed dramatically. It was once a matter of identifying the isolated examples of relevant material. It is now a matter of identifying what is worth reading amongst the mass of material produced."). Notably, some textbooks have addressed facets of the law of armed conflict for decades. *See, e.g.*, THOMAS EHRLICH & MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE (1993).

[8] *See* Kenneth Anderson, *Readings: The Rise of Operational Law of Armed Conflict as an Academic Specialization*, LAWFARE (Apr. 29, 2012, 5:37 PM), http://www/awfareblog.com/2012/04/readings-the-rise-of-operational-law-of-armed-conflict-as-an-academic-specialization ("This new writing is genuinely academic in the sense that it is more than just operational manuals for JAG officers, limited in their audience to military practitioners. These practitioners-turned-academics are developing theoretical accounts of operational law issues. And although these writers do not always share the same views among themselves, there is a core orientation that at least partly defines "operational law" in an academic sense.").

[9] *See, e.g.*, ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 73 (1947) (noting that one of the earliest commentators in this field, Balthasar Ayala, a Spaniard writing in the Sixteenth Century, "served in the high position of Auditor General (which may be likened to that of the American Judge Advocate General) in the army sent out by Phillip II against the Netherlands").

[10] Anderson, *supra* note 8 (noting, "although these writers do not always share the same views among themselves, there is a core orientation that at least partly defines "operational law" in an academic sense").

The Law of Armed Conflict: An Operational Approach, written by a phalanx of six authors with extensive military backgrounds, is a product of this academic approach. As its title implies, the book seeks to provide "operational context"[11] to an academic discussion of the law of armed conflict which is informed by the authors' collective experiences serving as military advisors in the U.S. armed forces. All of the authors have independently made their respective marks in the field of international law, especially as it pertains to the law of armed conflict[12]—and five of the same six authors previously collaborated on a book which "focused on the operational resolution of issues related to the application of military power by the United States . . . ."[13] This book, however, is distinct in that it is not an academic treatise but a textbook designed for classroom instruction and which seeks to provide the first real manual for broader classroom instruction on this subject from an "operational" perspective.[14]

II. The Operational Approach to International Law & the Law of Armed Conflict

The operational approach to international law is one with deep origins and which has cohered over the past two decades within the military legal community.[15] With the advent of military-specific publications for legal scholarship and centralized military institutions for legal education,[16] military attorneys in the United States have focused,

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[11] *See* CORN, HANSEN, JENKS, JACKSON, JENSEN & SCHOETTLER, *supra* note 1, at xxvii.
[12] *See, e.g.*, Geoffrey S. Corn, Hamdan*, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295 (2007); Eric Talbot Jensen & Chris Jenks, *All Human Rights Are Equal, But Some Are More Equal Than Others: The Extraordinary Rendition of a Terror Suspect in Italy, the NATO SOFA, and Human Rights*, 1 HARV. NAT'L SECURITY J. 171 (2010).
[13] MICHAEL LEWIS, ERIC JENSEN, GEOFFREY CORN, VICTOR HANSEN, RICHARD JACKSON, JAMES SCHOETTLER, THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE (2009).
[14] CORN ET AL., *supra* note 1, at xxvii.
[15] *See* Lieutenant Colonel Marc L. Warren, *Operational Law—A Concept Matures* 152 MIL. L. REV. 33, 36 (1996) (citing Lieutenant Colonel David E. Graham, *Operational Law (OPLAW)—A Concept Comes of Age*, ARMY LAW., July 1987, at 9).
[16] *See* THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, THE JUDGE ADVOCATE GENERAL'S SCHOOL, 1951–1961, at 1 (1961) (noting that "The Judge Advocate General's School, U. S. Army, located on the Grounds of the University of Virginia opposite the Law School, is the United States Army's military law center. It is an approved law school rated by American Bar Association inspectors as offering the highest quality specialized graduate program in law to be found in America, and provides a graduate law school atmosphere

with increasing frequency and acumen, on exploring and explicating the legal universe that surrounds and undergirds armed conflict. Military lawyers, thus, have propelled the ascendance of the concept of "operational law"—an area of law typically defined as the "body of foreign, domestic, and international law which impacts specifically" on the activities of military forces.[17] As the U.S. Army Field Manual on Legal Support to Military Operations notes, "Operational law encompasses the law of war but goes beyond the traditional international law concerns to incorporate all relevant aspects of military law that affect the conduct of operations."[18]

In elaborating on the concept of operational law, Marc L. Warren, a retired judge advocate and a luminary in the field of military law, has noted that "[operational law] is not a specialty, nor is it a discrete area of substantive law. It is a discipline, a collection of all of the traditional areas of the military legal practice focused on military operations."[19] Moreover, Warren stresses that "[i]f the essence of the Army is its operations in the field, then operational law is the essence of the military legal practice." This legal approach reflects the professional role of a military legal advisor. As the 2012 *Law of Armed Conflict Deskbook* notes:

> Military operations involve complex questions related to international law. International law provides the framework for informed operational decisions, establishes certain limitations on the scope and nature of command options, and imposes affirmative obligations related to the conduct of U.S. forces. Commanders, rely on Judge Advocates to understand fundamental principles of international law, translate those principles

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where the modern Army lawyer is professionally trained in the many aspects of military law. The School's function is to orient the Army lawyer in the fundamentals of military law, to keep his training current, and to give him specialized legal training on an advanced level. As a military law center it attaches considerable importance to its research and publications, including texts and case books, as well as several legal periodicals.").

[17] *See* Warren, *supra* note 15, at 36 (citing THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 1-1 (1996)).

[18] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 5-20 (26 Jan. 2012).

[19] Warren, *supra* note 15, at 37.

> into an operational product, and articulate the essence of the principles when required.[20]

Given the fact that so many military attorneys are steeped in a legal culture that emphasizes an operational approach to law, it is unsurprising that an operational approach to legal scholarship—especially as it involves the law of armed conflict—would eventually emerge. Predictably, the scholarship on international law that emerges from this operational mindset bears the distinct markings of its military upbringing, such as its keen focus on the practicalities and routine problems confronted by military lawyers advising on issues related to armed conflict. But one must take care to avoid conflating an academic style with a military discipline and to distinguish the idea of "operational law" from any specific approach to legal scholarship. Likewise, it would be incorrect to imply that one particular approach to international law and its subcategories necessarily carries more "operational" legitimacy than others—especially in a field as laden with indeterminacy, competing theories, and competing practices as international law.[21] A word such as "operational" can, therefore, be one of treacherous and evasive meaning. It suffices to say that, in the context of legal scholarship, "operational" has become a descriptive term used to indicate a practitioner-based approach—and, in the specific context of the law of armed conflict, one which has been championed by military scholars.[22]

III. The Text: A Practical, Straightforward Discussion of the Law of Armed Conflict

Given his distinguished place in the pantheon of military attorneys and his influential writing on the maturation of the concept of "operational law," it is appropriate that Marc L. Warren also writes the

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[20] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., LAW OF ARMED CONFLICT DESKBOOK 1 (2012) [hereinafter DESKBOOK].

[21] *See* Martti Koskenniemi, *International Law in the World of Ideas*, THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 48–49 (James Crawford & Marti Koskenniemi eds., 2012).

[22] Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1435 (2008) ("Those who criticize the extent of judge advocate involvement during military operations thereby reveal their lack of operational experience. The law of war is complicated. Applying it in a progressively complex combat environment requires specialized training, practical experience, and in-depth knowledge of the operational art. Most civilians typically fall short in these regards.").

foreword for this book, emphasizing its aim of both elucidating its subject matter but also demonstrating how the law of armed conflict is applied in practice.[23] In that regard, one of the notable characteristics of this book is the breadth of the subject matter it seeks to address. The book is logically organized and, within its 599 pages, walks the reader through the major topics that comprise the corpus of the law of armed conflict—*jus ad bellum*, *jus in bello*, and *jus post bellum*. These include the legal bases for the use of force; the history of the law of armed conflict; the legal "triggers" for the law of armed conflict; and the principal subjects of concern to this area of the law (conflict classification, distinction, targeting, means and methods of warfare, etc.).

IV. The Pros: A Strong Emphasis on the Practical

The authors of *The Law of Armed Conflict: An Operational Approach* have placed much emphasis on practicality and constructed a discussion of the law of armed conflict from a decidedly U.S.-centric perspective. On that score, to facilitate the practical and operational approach of the book, the authors have designed the text around an operational scenario which is carefully interwoven into the discussion and which serves to provide an interlinking theme and operational focus—so that students are provided with theoretical discussion but also challenged by practical problems. The reader is, thus, asked to approach each chapter through the lens of a junior judge advocate advising commanders in the context of the 1989 U.S. invasion of Panama (Operation Just Cause).[24] The brief summary of the scenario at the beginning of each chapter serves as a sort of vignette to focus the reader and provide situational context—giving an idea of the sort of situation in which the material to be discussed might be needed. Each chapter then contains the relevant substantive material pertaining to the topic and concludes with questions designed to encourage the reader to use the material to resolve practical legal problems that arise during the course of military operations.[25] This scenario-based aspect of the book immediately serves to separate it from other competing texts which lack such practical emphasis.

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[23] CORN ET AL., *supra* note 1, at xxii.
[24] *Id.* at xxviii.
[25] *Id.*

Additionally, *The Law of Armed Conflict: An Operational Approach* contains a great deal of important background information that serves to allow an uninitiated reader to grasp basic concepts that are critical to an understanding of the law of armed conflict and its application. The authors take great pains to walk the reader through the basic history, key players, fundamental government structures, and the relevant international framework. For instance, the introduction is notably helpful in that it contains an overview of the national security organization of the United States Government. The various roles of the Secretary of Defense, Chairman of the Joint Chiefs of Staff, Service Secretaries, and Combatant Commanders are clearly explained.[26] Such basic information is helpful as the complex chains of command which characterize the U.S. national security structure are not always clear or intuitive for the non-military or inexperienced reader. Many casual observers of world events would not fully appreciate, for instance, that the Chairman of the Joint Chiefs of Staff—who appears regularly alongside high-level national leaders at widely televised press conferences and serves as the principal military advisor to the President of the United States[27]—is not actually in command of military operations when they are carried out.[28] Instead, it is the Combatant Commanders (four-star generals and admirals who, with rare exceptions, are generally less visible to the public) who are directly in command of forces conducting military operations.[29] Similarly, the roles of the various U.S. armed forces are expressly defined as are key concepts such as an "operational chain of command" and a "joint task force."[30]

This sort of introduction gives important background and also serves to provide some context at the outset so that the reader understands, albeit from an exclusively U.S. perspective, the institutional framework in which questions pertaining to the law of armed conflict are generally considered and the organizations to which this field of law most directly pertains. The subsequent discussions and study questions are, therefore, grounded in this basic understanding of the organizational context in which the U.S. military lawyer must operate. While such information is not legal in nature, it is imminently practical information and necessary for a complete understanding of the operational context in which most

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[26] *Id.* at xxix–xxx.
[27] *Id.* at xxix.
[28] *Id.*
[29] *Id.* at xxx.
[30] *Id.* at xxx–xxxi.

decisions relevant to the law of armed conflict are made. No comparable textbook exists which explains this institutional framework in such detail.

In a similar vein, the first chapter of the book begins with a concise, basic discussion of the legal framework governing the use of force by states. The chapter briefly discusses the history of *jus ad bellum* and recounts the most prominent theories on the law governing the resort to war, tracing the intellectual and legal development to the current framework which is governed by the United Nations (UN) Charter.[31] Importantly, however, the chapter takes time to first explicate the UN system, its various organs, and the key aspects of the UN Charter which bear upon the legal authority of states vis-à-vis the use of force. The authors then go on to address the authorities granted under Chapter VI of the UN Charter for the pacific settlement of disputes as well as the more expansive authorities for the use of armed force granted under Chapter VII. Attention is given to the legal authority under the UN for peacekeeping,[32] the establishment of ad hoc tribunals,[33] and the development of the International Criminal Court.[34] This discussion is comprehensive and explains not only the textual language of the UN Charter but also the various Security Council resolutions and General Assembly resolutions which have shaped the international approach to UN operations.

Among the other unique practitioner-oriented aspects of this book is its section on weapons and tactics, which discusses the process of conducting a legal review of weapons systems.[35] This section gives detailed guidance on numerous specific weapons systems such as shotguns; small arms and small arms ammunition; edged weapons (such

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[31] *Id.* at 2–4.
[32] *Id.* at 7–8. It should be noted, however, that this section somewhat inaccurately states that the Uniting For Peace Resolution, passed by the UN General Assembly at the urging of the United States, "hasn't been applied to any particular international situation." *Id.* at 6. In fact, the Uniting For Peace Resolution was used in 1956 to authorize and deploy an international emergency force (UNEF) which was tasked with maintaining peace between Israel and Egypt in the aftermath of the 1956 Suez Crisis. *See* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ATTACKS 35–36 (2005). Thereafter, in 1960, the Uniting For Peace Resolution was again used to authorize the initial deployment of a UN force to Congo (ONUC) that eventually conducted military operations against a secessionist group in Katanga Province. *Id.* at 37–38.
[33] CORN ET AL., *supra* note 1, at 10–11.
[34] *Id.* at 12.
[35] *Id.* at 199.

as knives and bayonets); .50 caliber rounds; explosive munitions; depleted uranium; silencers; certain non-lethal weapons (such as rubber bullets and sponge batons); and "cyber weapons."[36] The section even contains a sample memorandum from the actual office within the U.S. Army bureaucracy responsible for conducting such legal reviews.[37] Although such weapons reviews are a critical aspect of military legal practice and a central subject of many treaties relevant to the law of armed conflict, no other comparable textbook addresses this subject in such a concrete fashion and in such detail. This makes the text unique as it goes beyond a mere theoretical discussion of the law of armed conflict and gives the reader a practical understanding of how the United States implements the treaty obligations being discussed.

The chapter on targeting, however, provides what is perhaps the best example of the difference between an "operational" approach to the law of armed conflict and more conventional academic approaches. Many textbooks on the law of armed conflict cover the way in which targeting is regulated by international law, the rules governing the targeting of combatants, protected persons and places, etc.[38] This text, however, is distinguishable in that is also discusses the targeting process and how U.S. forces go about the business of targeting enemy personnel or materiel within the framework of the law of armed conflict.[39] The chapter opens with a discussion of the targeting process, using graphics taken directly from the U.S. Army field manual on targeting and joint publications from which the U.S. military derives its targeting doctrine.[40] It is only after that process is thoroughly described that the chapter begins to elucidate the general principles of targeting, distinction, etc., so that the entire academic discussion is framed within an operational discussion that gives the reader an idea of who is responsible for targeting decisions and how they go about their work.[41] Thus, the practitioner-based approach of this book provides readers rare insight into how the rules governing modern warfare are applied and the institutional framework in which its practitioners operate.

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[36] *Id.* at 214–21.
[37] *Id.* at 228.
[38] *Id.* at 164–89.
[39] *Id.* at 161–64.
[40] U.S. DEP'T OF ARMY, FIELD MANUAL 3-60, THE TARGETING PROCESS 2-1 (26 NOV. 2010).
[41] CORN ET AL., *supra* note 1, at 159.

V. The Cons: An Occasional Emphasis on Policy and Practice over Legal Analysis

The book does, however, have its peculiarities. A notable characteristic of *The Law of Armed Conflict: An Operational Approach* is its expansive view of permissible military action. For instance, the second half of the first chapter details the basic legal framework for the use of force found in Articles 2(3), 2(4), and 51 of the UN Charter.[42] Articles 2(3) and 2(4) form the legal bulwark designed to outlaw the use of force by states. The language of this chapter indicates a degree of indeterminacy in the meaning of Article 2(4):

> Article 2(4) has become the accepted norm restricting the use of force among States. However, universal acceptance does not mean universal understanding. Although the international community as a whole accepts Article 2(4) to be binding, nations have very different views on what the language actually means. For example, the prohibition refers to the "threat or use of force," as opposed to words such as "war" or "aggression." The Charter contains no definitions section, leaving each nation to determine what constitutes a use of force.[43]

By noting the existence of contention but not exploring the validity of competing claims, such language might leave the reader with the impression that Article 2(4) is the subject of greater controversy or disagreement in the international community than is the case. As Dinstein notes, "When Governments charge each other with infringements of Article 2(4), as happens all too frequently, such accusations are always contested."[44] But, in noting the existence of such disputes, it is equally important to evaluate the strength of competing claims and take into account the extensive treatment of Article 2(4) by noted commentators and authoritative international bodies. The weight of such authorities indicates that "[t]he correct interpretation of Article 2(4) . . . is that any use of inter-State force by Member States for whatever

[42] *Id.* at 14.
[43] *Id.*
[44] *See* YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 97 (Cambridge Univ. Press 5th ed. 2011).

reason is banned, unless explicitly allowed by the Charter."[45] The authors, however, never discuss these authorities and only note the fact of disagreement—never explaining or probing the quality of the dissenting or contradictory arguments. Accordingly, any extant disagreement in the international community vis-a-vis Article 2(4) of the UN Charter is overemphasized in a way that inures to the benefit of an argument for more expansive military action.

In contrast, when discussing the concepts of anticipatory and preventive self-defense, the authors tend to minimize the controversy surrounding the legitimacy of these bases for the use of force and, instead, present these concepts as being more accepted than a review of the literature would warrant.[46] For instance, while the authors do note that such attacks were considered "beyond the scope of appropriate self-defense" twenty years ago, the text states that preventive self-defense has "only recently begun to receive acceptance."[47] Similarly, though noting that the international community is "dramatically split on this notion of self-defense," the authors conclude by noting that "it is clear that some States have already justified the use of armed force against another State under this theory."[48] But the authors do not note the relative rarity of attempts by states to justify their actions based on arguments of preventive self-defense.[49] Moreover, the authors sidestep discussion of

[45] *Id.* at 90–91; *see also* NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 77 (2010) ("The more persuasive opinion is that Article 2(4) prohibits any use of force on foreign territory, other than in accordance with the exceptions to the Charter."). *See also* FRANCK, *supra* note 32, at 12 (noting the inclination of some to read Article 2(4) as permitting more limited uses of force and stating, "Such a reading of Article 2(4) is utterly incongruent, however, with the evident intent of sponsors of this amendment.").
[46] CORN ET AL., *supra* note 1, at 22–24.
[47] *Id.* at 23.
[48] *Id.* at 24.
[49] James Mulcahy & Charles O. Mahony, *Anticipatory Self-Defence: A Discussion of the International Law*, 2 HANSE L. REV. 231, 242 (2006).

> Israel did not seek to rely on anticipatory self-defence when it launched what appeared to be a pre-emptive strike on Egypt, Syria and Jordan in 1967. Israel argued that the actions were taken in response to a prior armed attack. In the Security Council debates on the action Israel claimed that Egypt' s blocking of the Straits of Tiran to passage by Israeli ships was an act of war. This, according to Israel, was the armed attack justifying self-defence under the Article 51 regime. Additionally, when the USA forcibly intercepted nuclear weapons in transit from USSR to Cuba during the Cuban Missile Crisis of 1962, the aggressor did not rely on the doctrine of

the wide condemnation of such state action[50] and the weight of existing authority which states that such preemptive action is illegal under international law.[51] Dinstein, for example, notes that "[t]he idea that one can go beyond the text of Article 51 and find support for a broad concept of anticipatory or preemptive self defense in customary international law . . . is counterfactual"[52] and that "the option of a preventive use of force is excluded by Article 51."[53] This position is echoed by the UN High-level Panel on Threats, Challenges and Change which concluded that the use of force based on an anticipated threat could only be lawful if authorized by the UN Security Council.[54]

> [I]n a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from

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> anticipatory self-defence, relying instead on regional peacekeeping under Chapter VIII of the UN Charter.

Id.

[50] *Id*. at 244, noting that, when Israel attacked an Iraqi nuclear reactor in 1981 and asserted a right to use pre-emptive force,

> Some states rejected anticipatory self-defence generally, while others held the view that the facts of the incident did not justify the use of pre-emptive force, because Israel failed to prove that Iraq had plans to attack them. Even the USA condemned the actions of Israel, however this was on the grounds that Israel had not exhausted peaceful means for the conclusion of the dispute. What is important is the fact that none of the states sitting in the Security Council agreed with the anticipatory self-defence justification employed by Israel.

Id.

[51] *See generally* TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER (2010).

[52] *See* DINSTEIN, *supra* note 44, at 197.

[53] *Id*. at 200; *see also* Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, *in* AM. SOC'Y OF INT'L LAW TASK FORCE PAPERS 1, 2–3 (2002), *available at* http://www.asil.org/taskforce/oconnell.pdf ("Preemptive self-defense, however, is clearly unlawful under international law. Armed action in self-defense is permitted only against armed attack.").

[54] U.N. High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change*, *transmitted by Note of the Secretary-General*, ¶ 190, U.N. Doc. A/59/565 (Dec. 2, 2004), *available at* http://www.un.org/secureworld/report.pdf.

> collectively endorsed action, to be accepted. Allowing one to so act is to allow all.[55]

The omission of such discordant views serves to create an unnecessary imbalance in the discussion—an imbalance which is maintained throughout the discussion of this particular topic. For instance, the authors also include a brief discussion of Dinstein's theory of "interceptive self-defense,"[56] which holds that states may be able to respond in self-defense when a hostile state has irrevocably committed to an attack in such a way that the state has "embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon."[57] The authors do not, however, note the fact that this very theory posited by Dinstein emanates from his utter rejection of anticipatory or preventive self-defense and is articulated as a curative to the problem faced by the restrictions of Article 51.[58] It is a middle ground proposed by Dinstein which permits lawful self-defense before the impact of an attack (albeit an attack which must be underway) is felt—but, importantly, it is a theory offered in contradistinction to preemptive actions which Dinstein holds to be in violation of international law.[59] This aspect of the rationale undergirding Dinstein's theory of interceptive self-defense, however, finds no mention in the discussion. Accordingly, the considerable authority rejecting notions of anticipatory and preventive self-defense are minimized in a way that inures to the benefit of an argument for more expansive military action.

This is not to imply that the positions taken by the authors are not defensible or legally supportable. There is certainly an abundance of literature and logic by which one could defend the positions articulated in the text and many legal scholars, in fact, subscribe to the interpretations the authors posit—but the authors seem to mute the debate on complex legal issues in favor of articulating an identifiable rule of thumb. To achieve this, the authors eschew a comprehensive legal discussion in favor of more forceful articulation of an expansive view of these areas of the law and, in the process, posit a maximalist position on the use of force.[60]

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[55] *Id.* ¶ 191.
[56] CORN ET AL., *supra* note 1, at 23.
[57] *See* DINSTEIN, *supra* note 44, at 204.
[58] *Id.*
[59] *Id.* at 196, 203–05.
[60] *See* DESKBOOK, *supra* note 20, at 38.

This seemingly partisan approach may merely be a function of the operational approach to legal scholarship. In a text in which the authors seek to provide an intensely practice-based approach to the law, expatiation may be avoided in favor of a more concise discussion of the law as it is applied by U.S. military legal advisors. Such breviloquence, however, is—to borrow a military metaphor—a double-edged sword. Such an intense focus on legal positions and practices adopted by practitioners in a given time and place (versus a broader discussion of the legal issues) can serve to unduly narrow the scope of analysis.

VI. Conclusion

In sum, *The Law of Armed Conflict: An Operational Approach* is a valuable contribution to the field of international law as it relates to the law of armed conflict. It is an experiential guide through the law of armed conflict from a U.S. military perspective. The book's discussion of the law of armed conflict is enriched by the practical insight and knowledge of its authors, all of whom are distinguished practitioners with years of military experience. This combination of practical experience, knowledge of U.S. military practice, and scholarly acumen form what is clearly the book's principal virtue. But every virtue has a concomitant defect and, in this case, the book's keen focus on U.S. practice in a military context occasionally crowds out broader legal discussions and omits critique. As such, explanations of policy positions on certain issues can sometimes take the place of a fulsome, multidimensional explanation of the topic—leaving readers instructed on a particular policy position or insight into U.S. military practice, but left without a deeper examination of the myriad legal issues attendant to that position. Fortunately, this defect is occasional rather than recurring and does not, in the final analysis, unduly detract from the book's value as a resource and a unique educational tool.

That said, the book's approach does raise separate questions about a practitioner-based approach to the law of armed conflict. One may, at once, recognize the value of such scholarship yet question whether classroom instruction on the topic should not also include a fulsome discussion of competing theories and critical approaches to accepted practices. Warren notes in the foreword of this book, "The reader can become as knowledgeable as possible about the law of armed conflict

without having served as a legal advisor in combat."[61] The author of this review would revise this statement somewhat and posit instead that, through this book, the reader can attain a solid understanding of the law of armed conflict, learn as much as possible about U.S. positions relating to the law of armed conflict, and learn how U.S. military lawyers approach this specific subset of international law. But there is, of course, a range of knowledge and a deeper understanding of international law that exists beyond any single nation's various policy positions or what has become a standardized approach. And recent history has taught us that even the most virtuous nations—nations with luminous democratic traditions—can, even if only briefly, err and adopt policy positions of questionable legality.[62]

Critical approaches and explanations of competing views, accordingly, have their value. As Yeats noted, "there is no longer a virtuous nation and the best of us live by candlelight."[63] A curriculum that is too narrowly focused on a single approach and eschews a broader legal discussion in favor of emphasizing the standardized practices and policies of one nation's military may, therefore, be practical and effective on many levels—but it has its dangers.

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[61] CORN ET AL., *supra* note 1, at xxii.

[62] *See, e.g.*, Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct in Interrogation Under 18 U.S.C. §§ 2340–2340A, at 34 (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

[63] *See* STAN SMITH, W.B. YEATS: A CRITICAL INTRODUCTION 44 (1990).