## CHAPTER 4

# THE LAW OF ARMED CONFLICT ACROSS THE CONFLICT SPECTRUM

### REFERENCES


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## I. INTRODUCTION

The law of armed conflict (LOAC) consists of that body of law, found in treaties as well as customary international law (CIL), which governs the conduct of hostilities among the parties to a conflict. As noted elsewhere in this volume and its appendices, international and non-international armed conflicts are different categories within the LOAC framework. Accordingly, different treaties and legal norms will apply depending on the characterization of the conflict as international or non-international. The threshold for an international (or inter-State) armed conflict is codified in Common Article 2 of the Geneva Conventions, which provides, in relevant part, that "the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties[.]" Non-international (or intra-State) armed conflicts, in turn, are regulated by a separate regime of law which is expressed in Common Article 3 of the Geneva Conventions and Additional Protocol II of 1977.

Not all conflicts, however, are sufficient to trigger the relevant set or subset of LOAC as they fail to meet the threshold requirements for that law to be applicable – such as limited border skirmishes, isolated acts of violence, riots, or banditry. Military operations, in this regard, are increasingly difficult to categorize[1] or are conducted in conditions not amounting to armed conflict, whether international or non-international. Conflicts which are neither international armed conflicts nor non-international armed conflicts not regulated by LOAC but are, instead, be regulated by the more restrictive rules governing law enforcement activity, international human rights law, and the international law governing the exercise of extraterritorial enforcement jurisdiction.[2] Characterization of a conflict will generally be determined at the national level; however, Judge Advocates must understand the applicable legal framework and what law governs the conduct of military operations regardless of the conflict categorization.

## II. DOCTRINAL TYPES OF OPERATIONS

A. Military operations are divided into three major categories: 1) Major Operations and Campaigns; 2) Crisis Response and Limited Contingency Operations; and 3) Military Engagement, Security Cooperation, and Deterrence.[3] Joint Publication 3-0 further lists the following types of operations: Stability Operations; Civil Support, Foreign Humanitarian Assistance; Recovery; Noncombatant Evacuation; Peace Operations; Combating Weapons of Mass Destruction; Chemical, Biological, Radiological, and Nuclear Consequence Management; Foreign Internal Defense; Counterdrug Operations; Combating Terrorism; Counterinsurgency; and Homeland Defense.

B. Major Operations and Campaigns will frequently involve the triggering of Common Article 2 of the Geneva Conventions. Other types of operations, however, may not, even if those operations involved large numbers of military forces. The category of "Peace Operations" may be particularly perplexing and these operations, typically under an United Nations mandate, encompass a number of sub-categories, can span the range of the major operational categories listed above, and may evolve over time. Peace operations are discussed in detail in the sections that follow.

## III. PEACE OPERATIONS

According to Joint Publication 3-07.3 (Peace Operations), the range of military operations called "Peace Operations" are "crisis response and limited contingency operations, and normally include international efforts and military missions to contain conflict, redress the peace, and shape the environment to support reconciliation and rebuilding and to facilitate the transition to legitimate governance." Such operations fall within four principal subsets: peacekeeping operations (PKO), peace building (PB) post-conflict actions, peacemaking (PM) processes, conflict prevention, and military peace enforcement operations (PEO). Any of these may be conducted under the sponsorship of the United Nations (UN), another intergovernmental organization (IGO), or within the framework of a coalition of agreeing nations. Such operations may also take place unilaterally.[4]

The fundamental concepts of peace operations are: consent, impartiality, transparency, credibility, freedom of movement, flexibility and adaptability, civil-military harmonization and cooperation, restraint and minimum force, objective/end state, perseverance, unity of effort, legitimacy, security, mutual respect and cultural awareness, and current and sufficient intelligence.[5] These concepts affect every facet of operations and remain fluid throughout any mission. While not a doctrinal source, the Joint Task Force Commander's Handbook for Peace Operations (16 June 1997) is a widely disseminated source of lessons learned and operational issues. Chapters V, Section D of Joint Publication 3-0 contains an excellent summary of the operational considerations and principles that apply directly to

[1] Difficulty in categorizing armed conflicts is due in large part to the emergence of non-state actors in contemporary warfare. These conflicts between state actors and non-state actors are defined as "irregular warfare." S*ee* U.S. DEP'T OF DEFENSE DIR. 3000.07, IRREGULAR WARFARE (1 Dec. 2008) (defining irregular warfare as "[a] violent struggle among state and non-state actors for legitimacy and influence over the relevant populations(s)").

[2] For further reading on the limits of extraterritorial activity outside the LOAC framework, *see* Dan E. Stigall, *Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law*, 3 Notre Dame J. Int'l & Comp. L. 1 (2013).

[3] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS (11 Aug. 2011) [hereinafter JOINT PUB. 3-0]. Joint Publication 3-0 is quoted or cited extensively in this outline. For brevity's sake, citations to Joint Publication 3-0 will be omitted. Military operations were previously described as War or Military Operations Other Than War (MOOTW). The term and acronym MOOTW was discontinued by Joint Publication 3-0, Joint Operations (17 Sept. 2006).

[4] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.3, PEACE OPERATIONS pg. vii-viii (1 Aug. 2012) [hereinafter JOINT PUB. 3-07.3].

[5] *Id.*

Peace Operations. The principles for joint operations, in addition to the nine principles of war,[6] are restraint, perseverance, and legitimacy. The Judge Advocate and paralegal can play a significant role in establishing and maintaining these principles.

## A. **Peacekeeping**

1. Joint Publication 3-07.3 defines peacekeeping operations as "[m]ilitary operations undertaken with the **consent** of all major parties to a dispute, designed to monitor and facilitate implementation of an **agreement** (cease fire, truce, or other such agreement) and support diplomatic efforts to reach a long-term political settlement."[7]

2. Peacekeeping is conducted under the authority of Chapter VI, UN Charter, and, just as the name implies, there must be a peace to keep. It is intended to maintain calm while providing time to negotiate a permanent settlement to the underlying dispute and/or assist in carrying out the terms of a negotiated settlement. Therefore, there must be some degree of stability within the area of operations. Peacekeeping efforts support diplomatic endeavors to achieve or to maintain peace in areas of potential or actual conflict and often involve ambiguous situations requiring the peacekeeping force to deal with extreme tension and violence without becoming a participant.

3. Peacekeeping requires an invitation or, at a minimum, the consent of all the parties to the conflict. Peacekeepers must remain completely impartial towards all the parties involved. Peacekeeping forces may include unarmed observers, lightly armed units, police, and civilian technicians. Typical peacekeeping operations may include: observe, record, supervise, monitor, and occupy a buffer or neutral zone, and report on the implementation of the truce and any violations thereof. Typical peacekeeping missions include:

a. Observing and reporting any alleged violation of the peace agreement.

b. Handling alleged cease-fire violations and/or alleged border incidents.

c. Conducting regular liaison visits to units within their AO.

d. Continuously checking forces within their AO and reporting any changes thereto.

e. Maintaining up-to-date information on the disposition of forces within their AO.

f. Periodically visiting forward positions; report on the disposition of forces.

g. Assisting civil authorities in supervision of elections, transfer of authority, partition of territory, and administration of civil functions.

4. Force may only be used in self-defense. Peacekeepers should not prevent violations of a truce or cease-fire agreement by the active use of force. Their presence is intended to be sufficient to maintain the peace.

5. United Nations Security Council Resolution 690 (1991)[8] concerning the Western Sahara is a good example of the implementation of a peacekeeping force and demonstrates how a mission may evolve over time. The original mandate for the United Nations Mission for the Referendum in Western Sahara (MINURSO) was to monitor the ceasefire between Morocco and the Frente POLISARIO; ensure release of political prisoners and detainees; implement the repatriation program; and identify and register voters and take other steps to organize and ensure a free and fair referendum and proclaim the results. Over a decade later, the referendum has yet to occur, and the MINURSO mission is now focused on monitoring the ceasefire, reducing unexploded ordnances, and supporting confidence-building measures.

6. Brahimi Report: Peacekeeping is a 50-year plus enterprise that has evolved rapidly from a traditional, primarily military model of observing ceasefires and force separations after inter-state wars to one that incorporates a complex model of many elements, military and civilian, working together to build peace in the dangerous aftermath of civil wars. The Brahimi definition of peacekeeping, as well as that of many in the UN and international community, describes both traditional peacekeeping and peace enforcement operations.

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[6] The Nine Principles of War are: objective, offensive, mass, economy of force, maneuver, unity of command, security, surprise, and simplicity. For a detailed definition of each principle see Joint Publication 3-0 App. A.
[7] JOINT PUB. 3-07.3, *supra* note 5, at x (emphasis added).
[8] *See* S.C. Res. 690 U.N. Doc. S/RES/690 *available at* http://www.un.org/Docs/scres/1991/scres91.htm.

B. **Peace Building**

1. Joint Publication 3-07.3: Stability actions, predominately diplomatic and economic, that strengthen and rebuild governmental infrastructure and institutions in order to avoid a relapse into conflict.

2. Brahimi Report: Peace building is a term of more recent origin that, as used in the present report, defines activities undertaken on the far side of conflict to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war. Thus, peace building includes but is not limited to: reintegrating former combatants into civilian society, strengthening the rule of law (for example, through training and restructuring of local police, and judicial and penal reform); improving respect for human rights through the monitoring, education and investigation of past and existing abuses; providing technical assistance for democratic development (including electoral assistance and support for free media); and promoting conflict solution and reconciliation techniques.

3. Peace building activities may generate additional tasks for units earlier engaged in peacekeeping or peace enforcement. You will typically find post conflict peace building taking place to some degree in all Peace Operations.

C. **Peace Making**

1. In contrast to other peace operations, Peace making is strictly diplomacy. Confusion may still exist in this area because at one time the U.S. definition of peacemaking was synonymous with the definition of peace enforcement.

2. Joint Publication 3-07.3: Peace making is now defined as a process of diplomacy, mediation, negotiation, or other forms of peaceful settlement that arranges an end to a dispute and resolves issues that led to it.

3. Brahimi Report: Peace making addresses conflicts in progress, attempting to bring them to a halt, using the tools of diplomacy and mediation. Peacemakers may be envoys of governments, groups of states, regional organizations or the United Nations, or they may be unofficial and non-governmental groups. Peacemaking may even be the work of a prominent personality, working independently.

D. **Peace Enforcement**

1. Unlike peacekeeping and peace building, peace enforcement is conducted under the authority of Chapter VII, UN Charter, and could include combat, armed intervention, or the physical threat of armed intervention. Joint Publication 3-07.3 discusses peace enforcement in terms of the application of military force, or the threat of its use, normally pursuant to international authorization, to compel compliance with resolutions or sanctions designed to maintain or restore peace and order.[9]

2. In contrast to peacekeeping, peace enforcement forces do not require consent of the parties to the conflict, and the forces may not be neutral or impartial. Typical missions include:

   a. Protection of humanitarian assistance.

   b. Restoration and maintenance of order and stability.

   c. Enforcement of sanctions.

   d. Guarantee or denial of movement.

   e. Establishment and supervision of protected zones.

   f. Forcible separation of belligerents.

3. UNSCR 1031 concerning Bosnia is a good example of the Security Council using Chapter VII to enforce the peace, even when based on an agreement.[10]

[9] JOINT PUB. 3-07.3, *supra* note 5, at x.
[10] *See generally* S.C. Res. 1031, U.N. Doc. S/RES/1031 *available at* http://www.un.org/Docs/scres/1995/scres95.htm.

E. **Conflict Prevention**

1. Joint Publication 3-07.3: A peace operation employing complementary diplomatic, civil, and, when necessary, military means, to monitor and identify the causes of conflict, and take timely action to prevent the occurrence, escalation, or resumption of hostilities.

2. Conflict prevention is generally of a short-term focus designed to avert an immediate crisis. It includes confidence building measures and could involve a preventive deployment as a show of force.

3. Whereas peacekeeping and conflict prevention have many of the same characteristics (i.e., similar rules of engagement and no or very limited enforcement powers), conflict prevention usually will not have the consent of all the parties to the conflict.

F. **Other Terms.** The reality of modern Peace Operations is that a mission will almost never fit neatly into one doctrinal category. The Judge Advocate should use the doctrinal categories only as a guide to reaching the legal issues that affect each piece of the operation. Most operations are fluid situations, made up of multifaceted and interrelated missions. Doctrine is currently evolving is this area, and various terms may be used to label missions and operations that do not fall neatly into one of the above definitions.

1. "Second generation" peacekeeping[11]
2. Protective/humanitarian engagement[12]
3. Stability Operations and/or Support Operations (SOSO or SASO)
4. Stability and Reconstruction Operations (S&RO)
5. Stability Operations[13] (NOTE: S&RO is captured under the broader concept of Stability Operations)

## IV. LEGAL AUTHORITY & U.S. ROLES IN PEACE OPERATIONS

A. As stated above, peacekeeping evolved essentially as a compromise out of a necessity to control conflicts without formally presenting the issue to the UN Security Council for Chapter VII action. The UN Charter does not directly provide for peacekeeping. Due to the limited authority of traditional "peacekeeping" operations (i.e., no enforcement powers), it is accepted that Chapter VI, Pacific Settlement of Disputes, provides the legal authority for UN peacekeeping.

B. Enforcement actions are authorized under Chapter VII of the UN Charter. The authorizing Security Council resolution will typically refer to Chapter VII in the text and authorize **"**all necessary means/measures" (allowing for the force) to accomplish the mission. The UN must be acting to maintain or restore international peace and security before it may undertake or authorize an enforcement action. Although the Charter recognizes the sovereignty of member nations and specifically precludes UN involvement in matters "essentially within the domestic jurisdiction" of states, this general legal norm "does not prejudice the application of enforcement measures under Chapter VII."[14]

C. As a permanent member of the Security Council, the U.S. has an important political role in the genesis of Peace Operations under a UN mandate. The Judge Advocate serves an important function in assisting leaders in the translation of vague UN mandates into the specified and implied military tasks on the ground. The mission (and hence the authorized tasks) must be linked to authorized political objectives.

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[11] Second generation peacekeeping is a term being used within the UN as a way to characterize peacekeeping efforts designed to respond to international life in the post-cold war era. This includes difficulties being experienced by some regimes in coping with the withdrawal of super-power support, weak institutions, collapsing economies, natural disasters, and ethnic strife. As new conflicts take place within nations rather than between them, the UN has become involved with civil wars, secession, partitions, ethnic clashes, tribal struggles, and in some cases, rescuing failed states. The traditional peacekeeping military tasks are being complemented by measures to strengthen institutions, encourage political participation, protect human rights, organize elections, and promote economic and social development. *United Nations Peace-keeping*, United Nations Department of Public Information DPI/1399-93527-August 1993-35M.

[12] Protective/Humanitarian engagement involves the use of military to protect "safe havens" or to effect humanitarian operations. These measures could be authorized under either Chapter VI or VII of the UN Charter. Bosnia and Somalia are possible examples.

[13] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-07, STABILITY OPERATIONS (29 September 2011)

[14] U.N. Charter art. 2, para. 7.

D. As a corollary to normal UN authorization for an operation, international agreements provide legal authorization for some Peace Operations. As a general rule of international law, states cannot procure treaties through coercion or the threat of force.[15] However, the established UN Charter mechanisms for authorizing the use of force by UN Member states define the lawful parameters. In other words, even if parties reach agreement following the use of force (or the threat thereof) or other means of inducement authorized under Chapter VII, the treaty is binding.[16]

E. U.S. participation in Peace Operations falls into these discrete categories:

1. Participation **in** United Nations Chapter VI Operations. This type of operation must comply with the restraints of the United Nations Participation Act (UNPA).[17] Section 7 of the UNPA (22 U.S.C. § 287d-1) allows the President to detail armed forces personnel to the United Nations to serve as observers, guards, or in any other noncombat capacity. Section 628 of the Foreign Assistance Act (22 U.S.C. § 2388) is another authority which allows the head of any agency of the U.S. government to detail, assign, or otherwise make available any officer to serve with the staff of any international organization or to render any technical, scientific, or professional advice or service to or in cooperation with such organization.[18] This authority cannot be exercised by direct coordination from the organization to the unit. Personnel may only be tasked following DoD approval channels. No more than 1,000 personnel worldwide may be assigned under the authority of § 7 at any one time, while § 628 is not similarly limited.

2. Participation **in support of** United Nations Peace Operations: These operations are linked to underlying United Nations authority. Examples are the assignment of personnel to serve with the UN Headquarters in New York under § 628 or the provision of DoD personnel or equipment to support International War Crimes Tribunals.

3. Operations **supporting enforcement of** UN Security Council Resolutions: These operations are generally pursuant to Chapter VII mandates, and are rooted in the President's constitutional authority as the Commander in Chief.

## V. JUDGE ADVOCATE LEGAL CONSIDERATIONS:

### A. Legal Authority and Mandate

1. It is critical that Judge Advocates understand the relationship between the mandate and the mission. The first concern for the Judge Advocate is to determine the type of operation (peacekeeping, enforcement, etc.), and the general concept of legal authority for the operation (if UN, Chapter VI or VII). In the context of OPERATION RESTORE HOPE (1993 humanitarian assistance mission in Somalia), one commander commented that the lawyer is the "High Priest of the mission statement." This will define the parameters of the operation, force composition, ROE, status, governing fiscal authorities, etc. The first place to start is to assemble the various Security Council resolutions that authorize the establishment of the peace operation and form the mandate for the Force. The mandate, by nature, is political and often imprecise, resulting from diplomatic negotiation and compromise. A mandate of "maintain a secure and stable environment" can often pose difficulties when defining tasks and measuring success. The mandate should describe the mission of the Force and the manner in which the

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[15] Vienna Convention on the Law of Treaties, arts. 51-53 UN Doc. A/Conf. 39/27, *reprinted in* 8 I.L.M. 679 (1969).
[16] *Id*. at art. 52; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter RESTATEMENT] § 331 cmt. d (1986).
[17] 22 U.S.C. § 287.
[18] 22 U.S.C. §§ 2389 and 2390 contain the requirements for status of personnel assigned under § 628 FAA as well as the terms governing such assignments. E.O. 1213 delegates to the SECDEF, in consultation with SECSTATE, determination authority. Approval of initial detail to UN operation under this authority resides with SECDEF. The same arrangements with the UN as outlined above for Section 7 UNPA details apply here. Reimbursements for section 628 details are governed by section 630 of the FAA. Section 630 provides four possibilities: (1) waiver of reimbursement; (2) direct reimbursement to the service concerned with moneys flowing back to relevant accounts that are then available to expend for the same purposes; (3) advance of funds for costs associated with the detail; and (4) receipt of a credit against the U.S. fair share of the operating expenses of the international organization in lieu of direct reimbursement. Current policy is that DoD will be reimbursed the incremental costs associated with a detail of U.S. military to a UN operation under this authority (i.e., hostile fire pay; family separation allowance) and that State will credit the remainder against the U.S. peacekeeping assessment (currently paid at 27% of the overall UN PKO budget).

Force will operate. The CJCS Execute Order for the Operation is the primary source for defining the mission, but it will usually reflect the underlying UN mandate. The mandate may also:

a. Include the tasks of functions to be performed.

b. Nominate the force CDR and ask for the Council's approval.

c. State the size and organization of the Force.

d. List those States that may provide contingents.

e. Outline proposals for the movement and maintenance of the Force, including States that might provide transport aircraft, shipping, and logistical units.

f. Set the initial time limit for the operation.

g. Set arrangements for financing the operations.

2. Aside from helping commanders define the specified and implied tasks, the mandate outlines the parameters of the authorized mission. Thus, the mandate helps the Judge Advocate and comptroller define the lawful uses of U.S. military O&M funds in accomplishing the mission. In today's complex contingencies, the UN action may often be supplemented by subsequent agreements between the parties which affect the legal rights and duties of the military forces.

3. **Presidential Decision Directive (PDD) 25 (May 1994).**[19] A former Secretary of State declared that while the UN performs many important functions, "its most conspicuous role—and the primary reason for which it was established—is to help nations preserve the peace."[20] The Clinton Administration defined its policy towards supporting Peace Operations in Presidential Decision Directive 25, "The Clinton Administration's Policy on Reforming Multilateral Peace Operations (May 1994)." Presumably, this policy remains in effect for the Obama Administration unless revoked or superseded by a subsequent directive.[21] PDD-25 is a classified document; the information in this summary is based upon the unclassified public extract. The document reiterated that Multilateral Peace Operations are an important component of the U.S. national military strategy and that U.S. forces will be used in pursuit of U.S. national interests. PDD-25 promulgated six major issues of reform and improvement. Many of the same areas are the subjects of active debate, with Congress discussing methods of placing stricter controls on how the U.S. will support peace operations and how much the U.S. will pay for peace operations. The PDD-25 factors are an aid to the decision-maker. For the Judge Advocate, they help define the applicable body of law, the scope of the mission statement, and the permissible degree of coalition command and control over U.S. forces. There will seldom be a single document that describes the process of applying the PDD-25 criteria. Nevertheless, the PDD-25 considerations surface in such areas as ROE, the media plan, command and control arrangements, the overall legal arguments for the legitimacy of the operation, and the extent of U.S. support for other nations, to name a few. The six areas highlighted by PDD-25 follow:

a. *Making disciplined and coherent choices about which peace operations to support.* In making these decisions, a three-phase analysis is conducted:

(1) The Administration will consider the following factors when deciding whether to vote for a proposed Peace Operation (either Chapter VI or VII):

(a) UN involvement advances U.S. interests, and there is a community of interests for dealing with the problem on a multilateral basis (NOTE: may entail multinational chain of command and help define the scope of permissible support to other nations);

(b) There is a threat to or breach of international peace and security, defined as one or a combination of the following: international aggression, urgent humanitarian disaster coupled with violence, or sudden interruption of established democracy or gross violation of human rights along with violence or the threat thereof;

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[19] BUREAU OF INT'L ORG. AFFAIRS, U.S. DEP'T OF STATE, PUB. No. 10161, The Clinton Administration's Policy on Reforming Multilateral Peace Operations (1994), *reprinted in* 33 I.L.M. 795 (1994). *See also* James P. Terry, *The Criteria for Intervention: An Evaluation of U.S. Military Policy in U.N. Operations*, 31 TEX. INT. L. REV. 101 (1996).

[20] Madeleine K. Albright, The UN, The U.S. and the World, 7 Dep't of State Dispatch 474 (1996).

[21] See Marjorie Ann Browne, CONG. RESEARCH SERV., RL 33700, UNITED NATIONS PEACEKEEPING: ISSUES FOR CONGRESS (Feb. 11, 2011).

(c) There are clear objectives and an understanding of whether the mission is defined as neutral peacekeeping or peace enforcement;

(d) Whether a working cease-fire exist between the parties prior to Chapter VI missions;

(e) Whether there is a significant threat to international peace and security for Chapter VII missions;

(f) There are sufficient forces, financing, and mandate to accomplish the mission (NOTE: helps define the funding mechanism, supporting forces, and expected contributions of combined partners);

(g) The political, humanitarian, or economic consequences are unacceptable;

(h) The operation is linked to clear objectives and a realistic end state (NOTE: helps the commander define the specified and implied tasks along with the priority of tasks).

(2) If the first phase of inquiry results in a U.S. vote for approving the operation, a second set of criteria will determine whether to commit U.S. troops to the UN operation:

(a) Participation advances U.S. interests (NOTE: helps the commander and lawyer sort out the relative priorities among competing facets of the mission, helps guide the promulgation of ROE which comply with the national interest, and helps weight the best allocation of scarce fiscal resources);

(b) Personnel, funds, and other resources are available (NOTE: may assist DoD obtain funding from other executive agencies in the interagency planning process);

(c) U.S. participation is necessary for the success of the mission;

(d) Whether the endstate is definable (NOTE: the political nature of the objective should be as clearly articulated as possible to guide the commander);

(e) Domestic and Congressional support for the operation exists; and

(f) Command and control arrangements are acceptable (NOTE: within defined legal boundaries).

(3) The last phase of the analysis applies when there is a significant possibility that the operation will commit U.S. forces to combat:

(a) There is a clear determination to commit sufficient forces to achieve the clearly defined objective;

(b) The leaders of the operation possess clear intention to achieve the stated objectives; and

(c) There is a commitment to reassess and continually adjust the objectives and composition of the force to meet changing security and operational requirements.

b. *Reducing U.S. costs for UN peace operations*. This is the area of greatest Congressional power regarding control of military operations.[22] Funding limitations have helped to check the Security Council's ability to intervene in every conflict. In normal Chapter VI operations, member states pay obligatory contributions based on a standard assessment. In Chapter VII peace operations, participating States normally pay their own costs of participation.

c. *Policy regarding the command and control of U.S. forces*.

(1) Command and control of U.S. forces sometimes causes more debate than the questions surrounding U.S. participation. The policy reinforces the fact that U.S. authorities will relinquish only "operational control" of U.S. forces when doing so serves U.S. security interests. The greater the U.S. military role, the less likely we will give control of U.S. forces to UN or foreign command. Any large-scale participation of U.S. forces likely to involve combat should ordinarily be conducted under U.S. command and operational control or through competent regional organizations such as North Atlantic Treaty Organization (NATO) or ad hoc coalitions.

(2) PDD-25 forcefully states that the President will never relinquish command of U.S. forces. However, the President retains the authority to release designated U.S. forces to the Operational Control (OPCON)

[22] U.S. CONST. art. 1, § 8.

of a foreign commander for designated missions. When U.S. forces are under the operational control of a UN commander, they will always maintain the capability to report separately to higher U.S. military authorities. This particular provision is in direct contravention to UN policy. Under UN policy, Soldiers and units under UN control will only report to and seek orders and guidance through the UN command channels. The policy also provides that commanders of U.S. units participating in UN operations will refer to higher U.S. authority if given an order construed as illegal under U.S. or international law, if the order is outside the mandate of the mission to which the U.S. agreed with the UN, or if the U.S. commander is unable to resolve the matter with the UN commander. As a practical matter, this means that deployed units are restricted to the mission limits prescribed in the CJCS Execute Order for the mission. The U.S. reserves the right to terminate participation at any time and/or take whatever actions necessary to protect U.S. forces.

(3) The Judge Advocate must understand the precise definitions of the various degrees of command in order to help ensure that U.S. commanders do not exceed the lawful authority conveyed by the command and control arrangements of the CJCS execute order.[23] NOTE: NATO has its own doctrinal definitions of command relationships which are similar to the U.S. definitions. Field Manual 100-8 summarizes the NATO doctrine as it relates to U.S. doctrinal terms.[24] The Command and Control lines between foreign commanders and U.S. forces represent legal boundaries that the lawyer should monitor.

(a) **COCOM** is the command authority over assigned forces vested only in the commanders of Combatant Commands by 10 U.S.C. § 164, or as directed by the President in the Unified Command Plan (UCP), and cannot be delegated or transferred. COCOM is the authority of a Combatant Commander to perform those functions of command over assigned forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction over all aspects of military operations, joint training (or in the case of USSOCOM, training of assigned forces), and logistics necessary to accomplish the missions assigned to the command.

(b) **OPCON** is inherent in COCOM and is the authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission. OPCON includes authoritative direction over all aspects of military operations and joint training necessary to accomplish missions assigned to the command. NATO OPCON is more limited than the U.S. doctrinal definition in that it includes only the authority to control the unit in the exact specified task for the limited time, function, and location.

(c) **TACON** is the command authority over assigned or attached forces or commands, or military capability made available for tasking that is limited to the detailed and usually local direction and control of movements or maneuvers necessary to accomplish assigned missions or tasks. TACON may be delegated to and exercised by commanders at any echelon at or below the level of combatant command. TACON is inherent in OPCON and allows the direction and control of movements or maneuvers necessary to accomplish assigned missions or tasks.

(d) **Support is a command authority**. A support relationship is established by a superior commander between subordinate commanders when one organization should aid, protect, complement, or sustain another force. Support may be exercised by commanders at any echelon at or below the level of Combatant Command. Several categories of support have been defined for use within a Combatant Command as appropriate to better characterize the support that should be given.

d. *Reforming and Improving the UN Capability to Manage Peace Operations*. The policy recommends eleven steps to strengthen UN management of peace operations.

e. *Improving the U.S. Government Management and Funding of Peace Operations*. The policy assigns responsibilities for the managing and funding of UN peace operations within the U.S. Government to DoD. DoD has the lead management and funding responsibility for those UN operations that involve U.S. combat units and those that are likely to involve combat, whether or not U.S. troops are involved. DoS will retain lead management and funding responsibility for traditional peacekeeping that does not involve U.S. combat units. Regardless of who has the lead, DoS remains responsible for the conduct of diplomacy and instructions to embassies and our UN Mission.

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[23] The precise definitions of the degrees of command authority are contained in CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS (11 Aug. 2011).
[24] DEP'T OF ARMY, FIELD MANUAL 100-8, THE ARMY IN MULTINATIONAL OPERATIONS (24 Nov. 1997).

f. *Creating better forms of cooperation between the Executive, the Congress, and the American public on peace operations*. This directive looks to increase the flow between the Executive branch and Congress, expressing the President's belief that U.S. support for participation in UN peace operations can only succeed over the long term with the bipartisan support of Congress and the American people.

B. **Chain of Command Issues**

1. U.S. Commanders may never take oaths of loyalty to the UN or other organization.[25]

2. Force Protection is an inherent aspect of command that is nowhere prescribed in Title 10.

3. Limitations under PDD-25: A foreign commander cannot change a mission or deploy U.S. forces outside the area designated in the CJCS deployment order, separate units, administer discipline, or modify the internal organization of U.S. forces.

4. In a Chapter VI Peacekeeping Operation, command originates from the authority of the Security Council to the Secretary-General, and down to the Force Commander. The Secretary-General is responsible to the Security Council for the organization, conduct, and direction of the force, and he alone reports to the Security Council about it. The Secretary-General decides the force's tasks and is charged with keeping the Security Council fully informed of developments relating to the force. The Secretary-General appoints the Force Commander, who conducts the day to day operations, all policy matters are referred back to the Secretary-General. In many operations the Secretary-General may also appoint a civilian Special Representative to the Secretary General (SRSG) to coordinate policy matters and may also serve as the Head of Mission. The relationship between the SRSG and the military Force Commander depends on the operation, and the Force Commander may be subordinate to the SRSG. In some cases the military Force Commander may be dual-hatted and also serve as the Head of Mission.

5. In most Chapter VII enforcement operations, the Security Council will authorize member states or a regional organization to conduct the enforcement operation. The authorizing Security Council Resolution provides policy direction, but military command and control remains with member states or a regional organization.

C. **Mission Creep**

1. Ensure that the mission, ROE, and fiscal authority are meshed properly. Often, new or shifting guidance will require different military operations than those initially planned. This kind of mission creep comes from above; the Judge Advocate cannot prevent it but can identify associate legal issues to help help control its impact. For example, in moving from peacekeeping (monitoring a cease-fire) to peace enforcement(enforcing a cease-fire), does the ROE need to be modified to match the changed mission (i.e., a changed or increased threat level)? Are there any status or SOFA concerns?

2. Another potential issue occurs when the unit attempts to do more than what is allowed in the current mandate and mission. This usually comes from a commander wanting to do good things in his Area of Operations (AO): rebuilding structures, training local nationals, and other activities which may be good for the local population, but outside the mission. Acting outside the mission raises a myriad of concerns ranging from possible Anti-Deficiency Act violations to implicitly violating required neutrality.

D. **Status of Forces/Status of Mission Agreements**

1. Know the status of U.S. Forces in the AO and train them accordingly.

2. The Judge Advocate **MUST** notify the Combatant Commander and State Department before negotiating or beginning discussions with a foreign government as required by State Department Circular 175.[26]

3. Because the SOFA governs both status and, in many cases, conduct of U.S. forces, the Judge Advocate must make sure U.S. forces understand and are trained on the parameters of the SOFA that impact them. The Judge Advocate must also understand distinctions in status for supporting units on the periphery of the AO.

4. In addition to the common elements noted above, the SOFA is also the likely source for determining who is responsible for paying claims and may permit certain types of payments (e.g., solatia payments in the Republic of Korea).

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[25] *See* 22 U.S.C. § 2387.
[26] *Available at* http://www.state.gov/s/l/treaty/c175/.

5. The necessity for a Status of Forces Agreement (SOFA) [termed a Statue of Mission Agreement (SOMA) in Chapter VI operations commanded by the UN] depends on the type of operation. Enforcement operations do not depend on, and may not have the consent of the host authorities, and therefore will not normally have a SOFA. Most other operations **should** have a SOFA/diplomatic note/or other international agreement to gain some protection for military forces from host nation jurisdiction. Agreements should include language which protects civilians who are employed by or accompany U.S. forces.

6. In most instances, the SOFA will be a bilateral international agreement between the UN (if UN commanded) or the U.S. and the host nation(s). In UN operations the SOFA will usually be based on the Model Status of Forces Agreement. The SOFA should include the right of a contingent to exercise exclusive criminal jurisdiction over its military personnel; excusal from paying various fees, taxes, and customs levies; and the provision of installations and other required facilities to the Force by the host nation.

7. The SOFA/SOMA may also include:

a. The international status of the UN Force and its members.

b. Entry and departure permits to and from the HN.

c. Required identity documents (e.g., driver's license).

d. The right to carry arms as well as the authorized type(s) of weapons.

e. Freedom of movement in the performance of UN service.

f. Freedom of movement of individual members of the force in the HN.

g. The utilization of airports, harbors, and road networks in the HN.

h. The right to operate its own communications system across the radio spectrum.

i. Postal regulations.

j. The flying of UN and national flags.

k. Uniform, regulations.

l. Permissions to operate UN vehicles without special registration.

m. General supply and maintenance matters (imports of equipment, commodities, local procurement of provisions, and POL).

n. Matters of compensation (in respect of the HN's property).

8. The UN (and the U.S.) entry into a host nation may precede the negotiation and conclusion of a SOFA. Sometimes there may be an exchange of Diplomatic Notes, a verbal agreement by the host authorities to comply with the terms of the model SOFA, even though not signed, or just nothing at all.

9. Two Default Sources of Legal Status.

a. The Convention on the Safety of United Nations and Associated Personnel.[27] The treaty entered into force on 15 January 1999. The convention requires States to release captured personnel, to treat them in accordance with the 1949 Geneva Convention of Prisoners of War (GC IV while in custody), and imposes criminal liability on those who attack peacekeepers or other personnel acting in support of UN authorized operations. The Convention will apply in UN operations authorized under Chapter VI or VII. The Convention will not apply in enforcement operations under Chapter VII **in which** any of the UN personnel are engaged as combatants against organized armed forces **and to which** the law of international armed conflict applies.

b. The Convention on the Privileges and Immunities of the United Nations[28], 1946. Article VI § 22 defines and explains the legal rights of United Nations personnel as "Experts on Mission." In particular, Experts on Mission are NOT prisoners of war and therefore cannot lawfully be detained or have their mission interfered with by any party.

[27] *Available at* http://www.un.org/law/cod/safety.htm.
[28] *Available at* http://www.un.org/en/ethics/pdf/convention.pdf.

E. **Laws of Armed Conflict**

1. It is the UN and U.S. position that Chapter VI operations are not international armed conflict (requiring the application of the Geneva Conventions) as between the peacekeepers and any of the belligerent parties. The Geneva Conventions may of course apply between the belligerent parties. In Chapter VII operations, the applicability of the Geneva Conventions will depend on the situation. Are the UN personnel engaged as combatants against organized armed forces? If the answer is No, then the Geneva Conventions do **not** apply as between the UN Forces and the belligerent parties. Whether the Geneva Conventions do or do apply as a matter of law, as a matter of policy the minimum humanitarian protections contained within Common Article 3 of the Geneva Conventions will apply.

2. As a matter of U.S. policy (DoDD 2311.01E), U.S. forces will comply with LOAC during all armed conflicts, however such conflicts are characterized, and in all other military operations.

F. **Rules of Engagement**

1. **Chapter VI missions (Peace Keeping)**. The two principal tenets are the use of force for self-defense and total impartiality. The use of deadly force is justified only under situations of extreme necessity (typically in self-defense), and as a last resort when all lesser means have failed to curtail the use of violence by the parties involved. The use of unnecessary or illegal force undermines the credibility and acceptability of a peacekeeping force to the host nations, the participants in the dispute, and within the international community. It may escalate the level of violence in the area and create a situation in which the peacekeeping force becomes part of the local problem. The use of force must be carefully controlled and restricted in its application. Peacekeeping forces normally have no mandate to prevent violations of an agreement by the active use of force. The passive use of force employs physical means that are not intended to harm individuals, installations, or equipment. Examples are the use of vehicles to block the passage of persons or vehicles and the removal of unauthorized persons from peacekeeping force positions. The active use of force employs means that result in physical harm to individuals, installations, or equipment. Examples are the use of batons, rifle butts, and weapons fire.

2. **Chapter VII missions (Peace Enforcement).** Peace enforcement operations, on the other hand, may have varying degrees of expanded ROE and may allow for the use of force to accomplish the mission (i.e. the use of force beyond that of self-defense). In peace enforcement, active force may be allowed to accomplish all or portions of the mission. For more information, see the chapter on Rules of Engagement for tips in drafting ROE, training ROE, and sample peace operations ROE.

3. If participating in UN operations, Judge Advocate s should be aware of "the UN ROE." Any "UN ROE" must be read in light of limitations on multinational ROE contained in the U.S. SROE.

G. **Funding Considerations**

1. It is critical that Judge Advocates find positive authority for each fiscal obligation and appropriate funds to allocate against the statutory authority. All the same rules that apply to the funding of military operations continue to apply.

2. During a Chapter VI mission, the Judge Advocate must be familiar with UN purchasing procedures and what support should be supplied by the UN or host nation. The Judge Advocate should review the Aide-Memoire/Terms of Reference. Aide-Memoire sets out the Mission force structure and requirements in terms of manpower and equipment. It provides the terms of reimbursement from the UN to the Contingents for the provision of personnel and equipment. Exceeding the Aide-Memoire in terms of either manpower or equipment could result in the UN's refusal to reimburse for the excess. Not following proper procedure or purchasing materials that should be provided from other sources may result in the U.S. not being reimbursed by the UN. The UN Field Administration Manual will provide guidance. In general, the unit must receive a formal Letter of Assist (LOA) in order to receive reimbursement under § 7 of the UNPA. The unit can lawfully expend its own O&M funds for mission essential goods or services which the UN refuses to allow (no LOA issued).

H. **The Law Enforcement Paradigm**

As noted, if an operation occurring outside the territory of the United States does not meet the criteria, or occur within a context which would allow for the applicability of LOAC, then the applicable legal framework is the ordinary legal regime regulating extraterritorial enforcement jurisdiction, including the domestic law of the host

nation and relevant provisions of international human rights law. LOAC may not operate as a *lex specialis* outside armed conflict to offer State actors greater latitude.

Outside of the LOAC framework, international law greatly restricts the extraterritorial activity of State actors. In 1927, the Permanent Court of International Justice (PCIJ) noted that "the first and foremost restriction imposed by international law on a State is that – failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another State."[29] Article 2(7) of the United Nations Charter provides that, aside from the application of enforcement measures under Chapter VII, nothing in the Charter "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state[.]'"[30] Similarly, the International Court of Justice, in *Nicaragua v. United States*, noted that "the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States.[31] Likewise, the UN General Assembly's Declaration on Principles of International Law Concerning Friendly Relations and Cooperation states that "[n]o state or Group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state[.]"[32] Contemporary international law, therefore, tightly constrains the exercise of extraterritorial enforcement jurisdiction in most contexts.[33]

## VI. STRUCTURE FOR ANALYSIS

These diverse operations do not always trigger the application of the traditional LOAC regimes because they may occur outside the context of the legally requisite armed conflict needed to trigger such regimes.[34] Accordingly, Judge Advocates must look to other sources of law for the resolution of issues during operations not amounting to armed conflict. These sources start with binding CIL-based human rights which must be respected by United States Forces at all times. Other sources include host nation law, conventional law, and law drawn by analogy from various applicable sources. The sources of law that can be relied on in these various types of military operations depend on the nature of the operation.

A. The process of analyzing legal issues and applying various sources of law during a military operation entails four essential steps:

1. Define the nature of the issue;
2. Ascertain what binding legal obligations, if any, apply;
3. Identify any "gaps" remaining in the resolution of the issue after application of binding authority;
4. Consider filling these "gaps" by application of non-binding sources of law as a matter of policy.[35]

B. When attempting to determine what laws apply to U.S. conduct in an area of operations, a specific knowledge of the exact nature of the operation becomes immediately necessary.[36]

C. In the absence of well-defined mission statements, Judge Advocates must gain insight into the nature of the mission by turning to other sources of information.

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[29] PCIJ, *SS Lotus* (France v. Turkey), PCIJ Reports, Series A, No. 10, p. 18-19 (1927).
[30] UN Charter 2(7).
[31] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).
[32] General Assembly RES/20/2131 , Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 21 December 1965
[33] *See* Stigall, *supra* note 3.
[34] The "trigger" for the law of armed conflict to apply is a conflict "between two or more of the High Contracting Parties [to the Geneva Conventions], even if the state of war is not recognized between them" or in "all cases of partial or total occupation of the territory of a High Contracting Party." *See* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 2 *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 373, 376 (3d ed. 1988).
[35] It must be remembered that the so-called "gaps," denounced by some, may be the result of intentional omission by the drafters of binding authorities.
[36] The importance of clear mandates and missions was pointed out as a critical lesson learned from the Somalia operations. "A clear mandate shapes not only the mission (the what) that we perform, but the way we carry it out (the how). See Kenneth Allard, Institute for National Strategic Studies - Somalia Operations: Lessons Learned (1995), at 22. Determining the authorizing source of the mission is also crucial when determining who is fiscally responsible for different aspects of the mission.

D. This information might become available by answering several important questions that shed light on the United States' intent regarding any specific operation. These include: (1) what has the President (or his representative) said to the American People regarding the operation;[37] (2) if the operation is to be executed pursuant to a United Nations mandate, what does this mandate authorize; and (3) if the operation is based upon use of regional organization forces,[38] what statement or directives have been made by that organization?

E. After gaining the best possible understanding of the mission's objective, it is important to determine what bodies of law should be relied upon to respond to various issues. The Judge Advocate should look to the foregoing considerations and the operational environment and determine what law establishes legally mandated obligations, and then utilize the "law by analogy." Thereafter, he should move to succeeding tiers and determine their applicability. Finally, after considering the application of the regimes found within each of the four tiers, Judge Advcoates must realize that as the operation changes, the potential application of the regulation within each of the four tiers must be constantly reassessed.

## VIII. SOURCES OF LAW

### A. Fundamental Human Rights

1. Fundamental human rights are CIL-based rights, obligatory in nature, and therefore binding on the conduct of State actors at all times. These protections represent the evolution of natural or universal law recognized and commented upon by leaders and scholars.[39] The principle behind this body of law is that these laws are so fundamental in nature that all human beings are entitled to receive recognition and respect of them when in the hands of State actors.

2. Besides applying to all people, the most critical aspect of these rights is that they are said to be non-derogable, that is, they cannot be suspended under any circumstances. As the "minimum yardstick"[40] of protections to which all persons are entitled, this baseline tier of protections never changes. For an extensive discussion of the United States position on the scope and nature of fundamental human rights obligations, see the Human Rights Chapter of this Handbook.

### B. Host Nation Law

1. After considering the type of baseline protections represented by fundamental human rights law, the military leader must be advised in regard to the other bodies of law that he should integrate into his planning and execution phases. This leads to consideration of host nation law. Because of the nature of most non-armed conflict missions, Judge Advocates must understand the technical and pragmatic significance of host nation law within the area of operations. Although in theory understanding the application of host nation law during military operations is perhaps the simplest component, in practice it is perhaps the most difficult.

2. Judge Advocates must recognize the difference between understanding the technical applicability of host nation law, and the application of that law to control the conduct of U.S. forces during the course of operations. In short, the significance of this law declines in proportion to the movement of the operation toward the characterization of "conflict." Judge Advocates should understand that U.S. forces enter other nations with a legal status that exists anywhere along a notional legal spectrum. The right end of that spectrum is represented by invasion followed by occupation. The left end of the spectrum is represented by the utter lack of any legal protection.[41]

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[37] Similar sources are (1) the justifications that the President or his cabinet members provide to Congress for the use of force or deployment of troops and (2) the communications made between the United States and the countries involved in the operation (to include the state where the operation is to occur).

[38] Regional organizations such as North Atlantic Treaty Organization (NATO), Organization of American States (OAS), and the African Union (AU).

[39] *See* RESTATEMENT, *supra* note 15 at § 701, cmt.

[40] The International Court of Justice chose this language when explaining its view of the expanded application of the type of protections afforded by article 3, common to the four Geneva Conventions. *See* Nicar. v. U.S., 1986 I.C.J. 14 (June 27), *reprinted in* 25 I.L.M. 1023, 1073.

[41] In essence, stability operations frequently place our military forces in a law enforcement-type role. Yet, they must execute this role without the immunity from local law that traditional armed conflict grants. In fact, in many cases, their authority may be analogous to the authority of United States law enforcement officers in the territory of another state. "When operating within another state's territory, it is well settled that law enforcement officers of the United States may exercise their functions only (a)

3. When the entrance can be described as invasion, the legal obligations and privileges of the invading force are based upon the list of straightforward rules found within LOAC. As the analysis moves to the left end of the spectrum and the entrance begins to look more like tourism, host nation law becomes increasingly important, and applies absolutely at the far end of the spectrum. Accordingly, early decisions regarding the type of things that could be done to maintain order[42] had to be analyzed in terms of the coalition force's legal right to intervene in the matters of a sovereign state, based in part on host nation law.

4. Weapons search and confiscation policy are examples of this type of deference to host nation law.

5. It is important to note that Public International Law assumes a default setting.[43] The classical rule provides that "it is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of that place."[44] However, the modern rule, is that in the absence of some type of immunity, forces that find themselves in another nation's territory must comply with that nation's law.[45] This makes the circumstances that move military forces away from this default setting of extreme importance. Historically, military commentators have stated that U.S. forces are immune from host nation laws in any one of three possible scenarios:[46]

a. Immunity is granted in whole or part by international agreement;

b. United States forces engage in combat with national forces; or

c. United States forces enter under the auspices of a United Nations-sanctioned security enforcement mission.

6. The exception represented by the first scenario is well recognized and the least problematic form of immunity. Yet, most status of forces and stationing agreements deal with granting *members of the force* immunity from host nation criminal and civil jurisdiction. Although this type of immunity is important, it is not the variety of immunity that is the subject of this section. Our discussion revolves around the grant of immunity to the intervention (or sending) force nation itself. This form of immunity benefits the nation directly,[47] providing it with immunity from laws that protect host nation civilians.

7. Although not as common as a status of forces agreement, the United States has entered into other forms of jurisdictional arrangements. The Carter-Jonassaint Agreement[48] is an example of such an agreement. The agreement demonstrated deference for the Haitian government by conditioning its acceptance upon the government's approval. It further demonstrated deference by providing that all multi-national force activities would be coordinated with the "Haitian military high command." This required a number of additional agreements, arrangements, and understandings to define the extent of host nation law application in regard to specific events and activities.

8. The exception represented by the second scenario is probably the most obvious. When engaged in traditional armed conflict with another national power, military forces may, to an extent, disregard the domestic law of that nation. For example, during the initial phase of OPERATION IRAQI FREEDOM, the coalition invasion

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with the consent of the other state ... and (b) if in compliance with the laws of the other state...." *See* RESTATEMENT, *supra* note 15, at §§ 433 and 441.

[42] United Nations Security Council Resolution 940 mandated the use of "all necessary means" to "establish a secure and stable environment." Yet even this frequently cited source of authority is balanced with host nation law.

[43] *See* U.S. DEP'T OF ARMY, PAM. 27-161-1, LAW OF PEACE, VOL. I, para. 8-23 (1 Sept. 1979) at 11-1, [hereinafter DA PAM 27-161-1] for a good explanation of an armed forces' legal status while in a foreign nation.

[44] Coleman v. Tennessee, 97 U.S. 509, 515 (1878).

[45] Classical commentaries describe the international immunity of armed forces abroad "as recognized by all civilized nations." GERHARD VON GLAHN, LAW AMONG NATIONS 238 (1992) at 225-6 [hereinafter von Glahn]. *See also* WILLIAM W. BISHOP, JR. INTERNATIONAL LAW CASES AND MATERIALS 659-61 (3d ed. 1962) [hereinafter Bishop]. This doctrine was referred to as the Law of the Flag, meaning that the entering force took its law with its flag and claimed immunity from host nation law. Contemporary commentators, including military scholars, recognize the jurisdictional friction between an armed force that enters the territory of another state and the host state. This friction is present even where the entry occurs with the tacit approval of the host state. Accordingly, the United States and most modern powers no longer rely upon the Law of the Flag, except as to armed conflict. DA PAM 27-161-1, *supra* note 42, at 11-1.

[46] Richard M. Whitaker, *Environmental Aspects of Overseas Operations*, ARMY LAW., Apr. 1995, at 31 [hereinafter Whitaker].

[47] As opposed to the indirect benefit a sending nation gains from shielding the members of its force from host nation criminal and civil jurisdiction.

[48] The entry agreement for OPERATION UPHOLD DEMOCRACY.

force did not bother to stop at Iraqi traffic lights. The domestic law of Iraq did not bind the invasion force in that regard.[49] This exception is based on the classical application of the Law of the Flag theory.

9. The Law of the Flag has two prongs. The first prong is referred to as the combat exception, described above, and is exemplified by the lawful disregard for host nation law exercised during such military operations as OPERATION IRAQI FREEDOM. This prong is still in favor and represents the state of the law.[50] The second prong is referred to as the consent exception, described by the excerpt from the United States Supreme Court in *Coleman v. Tennessee*[51] quoted above, and is exemplified by situations that range from the consensual stationing of North Atlantic Treaty Organization (NATO) forces in Germany to the permissive entry of multi-national forces in Haiti. The entire range of operations within the consent prong no longer enjoys universal recognition.

10. To understand the contemporary status of the Law of the Flag's consent prong, it is helpful to look at the various types of operations that fall within its traditional range. At the far end of this range are those operations that no longer benefit from the theory's grant of immunity. For instance, in nations where military forces have entered based upon true invitations, and it is clear that the relationship between nations is both mature and normal;[52] there is no automatic immunity based upon the permissive nature of the entrance and continued presence. It is to this extent that the consent prong of the Law of the Flag theory is in disfavor. In these types of situations, the host nation gives up the right to have its laws complied with only to the extent that it does so in an international agreement (some type of SOFA).

11. On the other end of this range are operations that enjoy, at a minimum, a healthy argument for immunity. A number of operational entrances into foreign states have been predicated upon invitations, but of a different type and quality than discussed above. This type of entrance involves an absence of complete free choice on the part of the host nation (or least the *de facto* government of the host nation). These scenarios are more reminiscent of the Law of the Flag's combat prong, as the legitimate use or threat of military force is critical to the characterization of the entrance. In these types of operations, the application of host nation law will be closely tied to the mission mandate and specific operational setting. The importance and discussion of these elements takes us to the third type of exception.

12. The third exception, although based upon the United Nations Charter, is a variation of the Law of the Flag's combat exception. Operations that place a United Nations force into a hostile environment, with a mission that places it at odds with the *de facto* government, may trigger this exception. The key to this exception is the mission mandate. If the mandate requires the force to perform mission tasks that are entirely inconsistent with compliance with host nation law, then, to the extent of the inconsistency, the force would seem immunized from that law. This immunity is obvious when the intervention forces contemplate the combat use of air, sea, or land forces under the provisions of the United Nations Charter,[53] but the same immunity is available to the extent it is necessary when combat is not contemplated.

13. The bottom line is that Judge Advocates should understand what events impact the immunity (or lack thereof) of their force from host nation laws. In addition, military practitioners should contact the unified or major command to determine the Department of Defense's position regarding the application of host nation law. They must be sensitive to the fact that the decisions which impact these issues are made at the interagency or service level. Moreover, in order to competently advise a commander, Judge Advocates must gain a basic understanding of host nation legal systems in order to avoid running afoul of host nation law when it does apply. A primer on comparative law systems is available in the Comparative Law chapter of the Law of Armed Conflict Deskbook.

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[49] This rule is modified to a small degree once the invasion phase ends and formal occupation begins. An occupant does have an obligation to apply the laws of the occupied territory to the extent that they do not constitute a threat to its security. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516, arts. 64-78.

[50] *See* L. OPPENHEIM, INTERNATIONAL LAW, VOL. II, DISPUTES, WAR AND NEUTRALITY 520 (7th ed., H. Lauterpacht, 1955) [hereinafter Oppenheim]. "In carrying out [the administration of occupied territory], the occupant is totally independent of the constitution and the laws of the territory, since occupation is an aim of warfare and the maintenance and safety of his forces and the purpose of the war, stand in the foreground of his interests...."

[51] Coleman v. Tennessee 97 U.S. 509, 515 (1878).

[52] Normal in the sense that some internal problem has not necessitated the entrance of the second nation's military forces.

[53] UN Charter, art. 42.

C. **Conventional Law**

This group of protections is perhaps the most familiar to practitioners and contains the protections that are bestowed by virtue of international law conventions. This source of law may be characterized as the "hard law" that must be triggered by some event, circumstance, or status in order to bestow protection upon any particular class of persons. Examples include LOAC treaties (triggered by armed conflict), the Refugee Convention and its Protocol, weapons/arms treaties, and bi-lateral or multi-lateral treaties with the host nation. Judge Advocates must determine what conventions, if any, are triggered by the current operation. Often when treaties have not been legally "triggered," they can still provide very useful guidance when fashioning law by analogy.

D. **Law By Analogy**[54]

1. If the primary body of law intended to guide during military operations (LOAC) is not triggered, the Judge Advocate must turn to other sources of law to craft resolutions to issues during such operations.[55] This absence of regulation creates a vacuum that is not easily filled. As indicated earlier, fundamental human rights law serves as the foundation for some resolutions. However, because of the ill-defined nature of imperatives that can persist in certain situations, Judge Advocates need a mechanism to employ to provide the command with "specific" legal guidance in the absence of controlling "specifics."

2. The license and mandate for utilizing non-binding sources of authority to fill this legal vacuum is established by the Department of Defense's Law of War Program Directive (DoD Directive 2311.01E). This authority directs the armed forces of the United States to apply LOAC during all armed conflicts, no matter how characterized, and in all other military operations. Because of the nature of non-armed conflict operations, sources of law relied upon to resolve various issues extend beyond LOAC. These sources include, but are not limited to, tenants and principles from LOAC, United States statutory and regulatory law, and peacetime treaties. The fit is not always exact, but more often than not, a disciplined review of the international conventional and customary law or any number of bodies of domestic law will provide rules that, with moderate adjustment, serve well.

3. Among the most important rules of applying law by analogy is the enduring importance of the mission statement. Because these rules are crafted to assist the military leader in the accomplishment of his mission, their application and revision must be executed with the mission statement in mind. Judge Advocates must not permit rules, promulgated to lend order to mission accomplishment, become missions in and of themselves. There are many ways to comply with domestic, international, and moral laws, while not depriving the leader of the tools he must have to accomplish his mission.

4. The logical start point for this law by analogy process is LOAC. For example, when dealing with treatment of civilians, a logical starting point is the LOAC treaty devoted exclusively to the protection of civilians: the fourth Geneva Convention. This treaty provides many detailed rules for the treatment of civilians during periods of occupation, rules that can be relied upon, with necessary modification, by Judge Advocate s to develop treatment policies and procedures. Protocol I, with its definition of when civilians lose protected status (by taking active part in hostilities), may be useful in developing classification of hostile versus non-hostile civilians. If civilians who pose a threat to the force must be detained, it is equally logical to look to the Prisoner of War Convention as a source for analogy. With regard to procedures for ensuring no detention is considered arbitrary, the Manual for Courts-Martial is an excellent source of analogy for basic due process type procedures. Finally, Judge Advocates should be prepared to draw upon relevant principles from the host nation legal system where appropriate.

5. Obviously, the listing of sources is not exclusive. Judge Advocates should turn to any logical source of authority that resolves the issue, keeps the command in constant compliance with basic human rights obligations, and makes good common sense. These sources may often include not only LOAC and domestic law, but also non-binding human rights treaty provisions, and the laws of legal systems similar to the host nation. The imperative is that Judge Advocate s ensure that any policy- based application of non-binding authority is clearly understood by the command, and properly articulated to those questioning U.S. policies. Both Judge Advocate s and those benefiting from legal advice must always remember that "law by analogy" is not binding law.

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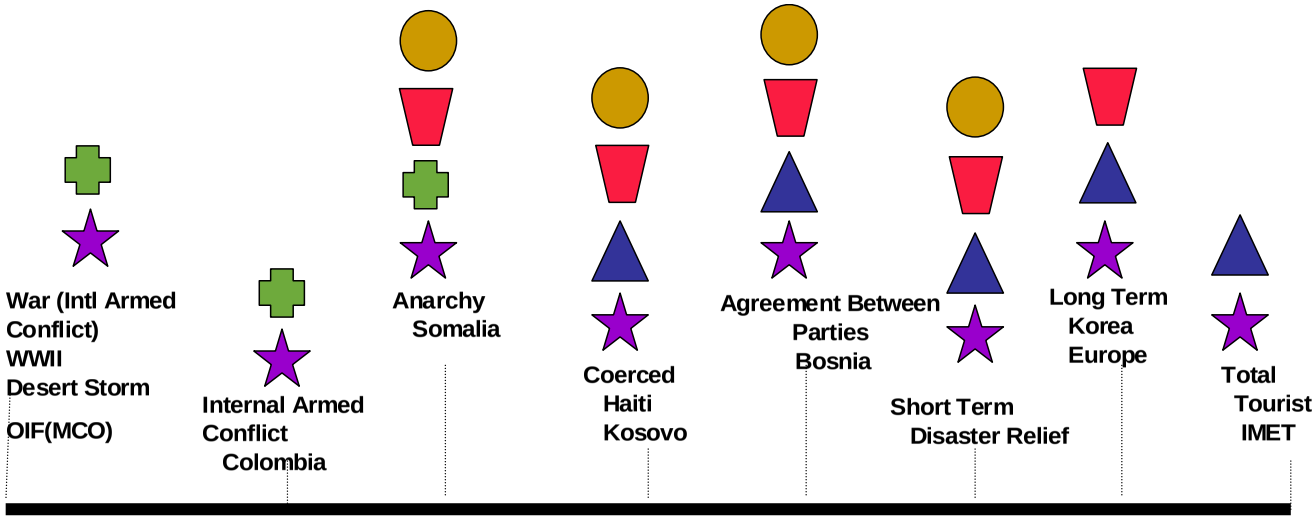
[54] Some might argue that due to potential changes in how U.S. forces apply the law of armed conflict as a result of DoDD 2311.01E, that this section is duplicative and/or confusing. This chapter, and particularly this section, must be read in light of DoDD 2311.01E.

[55] It must also be remembered that relevant DoD directives, manuals, and joint publications will offer specific guidance that may apply across the spectrum of military operations. For example, DoD Directive 2310.01E, DoD Detainee Program (August 19, 2014), establishes certain rules regarding detainees that apply regardless of how the conflict is characterized.




**Fundamental Human Rights**

**Conventional Law**

**Host Nation Law**

**Authorizing Document**

**Law by Analogy**

## APPENDIX

## DISPLACED PERSONS

### I. TREATMENT OF DISPLACED PERSONS.

A. If a displaced person qualifies for "refugee status" under U.S. interpretation of international law, the U.S. generally must provide such refugees with same treatment provided to aliens and in many instances to a nation's own nationals. The most basic of these protections is the right to be shielded from danger.

1. Refugee Defined. Any Person:

a. who has a well-founded fear of being persecuted for reasons of race, religion, nationality, social group, religion, or political association;

b. who is outside the nation of his nationality, and, according to United States interpretation of international law (United States v. Haitian Centers Council, Inc., 113 S. Ct. 2549 (1993)) presents him or herself at the borders of United States territory, and

c. is without the protection of his own nation, either because:

(1) that nation is unable to provide protection, or

(2) the person is unable to seek the protection, due to the well-founded fear described above.

d. Harsh conditions, general strife, or adverse economic conditions are not considered "persecution." Individuals fleeing such conditions do not fall within the category of refugee.

B. **Main Sources Of Law**:

1. 1951 Convention Relating to the Status of Refugees (RC). The RC bestows refugee status/protection on pre-1951 refugees.

2. 1967 Protocol Relating to the Status of Refugees (RP). The RP bestows refugee status/protections on post-1951 refugees.

a. Adopts same language as 1951 Convention.

b. U.S. is a party (110 ratifying nations).

3. 1980 Refugee Act (8 USC §1101). Because the RP was not self-executing, this legislation was intended to conform U.S. law to the 1967 RP.

a. Applies only to displaced persons who present themselves at U.S. borders

b. This interpretation was challenged by advocates for Haitian refugees interdicted on the high seas pursuant to Executive Order. They asserted that the international principle of "non-refoulment" (non-return) applied to refugees once they crossed an international border, and not only after they entered the territory of the U.S.

c. The U.S. Supreme Court ratified the government interpretation of "non-refoulment" in *United States v. Sale.* This case held that the RP does not prohibit the practice of rejection of refugees at our borders. (This holding is inconsistent with the position of the UNHCR, which considers the RP to prohibit "refoulment" once a refugee crosses any international border).

4. Immigration and Nationality Act (8 USC §1253).

a. Prohibits Attorney General from deporting or returning aliens to countries that would pose a threat to them based upon race, religion, nationality, membership in a particular social group, or because of a particular political opinion held.

b. Does not limit U.S. authority outside of the U.S. (Foley Doctrine on Extraterritoriality of U.S. law).

5. Migration and Refugee Assistance Act of 1962 (22 § USC §2601).

a. Qualifies refugees for U.S. assistance.

b. Application conditioned upon positive contribution to the foreign policy interests of U.S.

C. **Return/Expulsion Rule**. These rules apply only to individuals who qualify as refugees:

1. No Return Rule (RP art. 33). Parties may not return a refugee to a territory where his life or freedom would be threatened on account of his race, religion, nationality, social group, or political opinion.

2. No Expulsion Rule (RP arts. 32 & 33). Parties may not expel a refugee in absence of proper grounds and without due process of law.

3. According to the Supreme Court, these prohibitions are triggered only after an individual crosses a U.S. border. This is the critical distinction between the U.S. and UNHCR interpretation of the RP which creates the imperative that refugees be intercepted on the high seas and detained outside the U.S.

D. **Freedoms and Rights**. Generally, these rights bestow (1) better treatment than aliens receive, and (2) attach upon the entry of the refugee into the territory of the party.

1. Freedom of Religion (equal to nationals).

2. Freedom to Acquire, Own, and Convey Property (equal to aliens).

3. Freedom of Association (equal to nationals).

4. Freedom of Movement (equal to aliens).

5. Access to Courts (equal to nationals).

6. Right to Employment (equal to nationals with limitations).

7. Right to Housing (equal to aliens).

8. Public Education (equal to nationals for elementary education).

9. Right to Social Security Benefits (equal to nationals).

10. Right to Expedited Naturalization.

E. **Detainment**.

1. U.S. policy relative to Cuban and Haitian Displaced Persons was to divert and detain.

2. General Principles of International Law forbid "prolonged & arbitrary" detention (detention that preserves national security is not arbitrary).

3. No statutory limit to the length of time for detention (4 years held not an abuse of discretion).

4. Basic Human Rights apply to detained or "rescued" displaced persons.

F. **Political Asylum**. Protection and sanctuary granted by a nation within its borders or on the seas, because of persecution or fear of persecution as a result of race, religion, nationality, social group, or political opinion.

G. **Temporary Refuge**. Protection given for humanitarian reasons to a national of any country under conditions of urgency in order to secure life or safety of the requester against imminent danger. NEITHER POLITICAL ASYLUM NOR TEMPORARY REFUGE IS A CUSTOMARY LAW RIGHT. A number of plaintiffs have attempted to assert the right to enjoy international temporary refuge has become an absolute right under CIL. The federal courts have routinely disagreed. Consistent with this view, Congress intentionally left this type of relief out of the 1980 Refugee Act.

1. *U.S. Policy*.

a. Political Asylum.

(1) The U.S. shall give foreign nationals full opportunity to have their requests considered on their merits.

(2) Those seeking asylum shall not be surrendered to a foreign jurisdiction except as directed by the Service Secretary.

(3) These rules apply whether the requester is a national of the country wherein the request was made or from a third nation.

(4) The request must be coordinated with the host nation, through the appropriate American Embassy or Consulate.

(5) This means that U.S. military personnel are never authorized to grant asylum.

b. *Temporary Refuge*. The U.S., in appropriate cases, shall grant refuge in foreign countries or on the high seas of any country. This is the most the U.S. military should ever bestow.

H. **Impact Of Where Candidate Is Located**.

1. *In Territories Under Exclusive U.S. Control and On High Seas*:

a. Applicants will be received in U.S. facilities or on aboard U.S. vessels.

b. Applicants will be afforded every reasonable protection.

c. Refuge will end only if directed by higher authority (i.e., the Service Secretary).

d. Military personnel may <u>not</u> grant asylum.

e. Arrangements should be made to transfer the applicant to the Immigration and Naturalization Service ASAP. Transfers don't require Service approval (local approval).

f. All requests must be forwarded in accordance with paragraph 7, AR 550-1, Processing Requests for Political Asylum and Temporary Refuge (21 June 2004) [hereinafter AR 550-1].

g. Inquiries from foreign authorities will be met by the senior Army official present with the response that the case has been referred to higher authorities.

h. No information relative to an asylum issue will be released to public, without HQDA approval.

(1) IAW AR 550-1, immediately report all requests for political asylum/temporary refuge" to the Army Operations Center (AOC) at armywtch@hqda-aoc.army.pentagon.mil (NIPR) or armywtch@hqda.army.smil.mil (SIPR).

(2) The report will contain the information contained in AR 550-1.

(3) The report will not be delayed while gathering additional information

(4) Contact International and Operational Law Division, Army OTJAG (or service equivalent). The AOC immediately turns around and contacts the service TJAG for legal advice.

2. *In Foreign Territories*:

a. All requests for either political asylum or temporary refuge will be treated as requests for temporary refuge.

b. The senior Army officer may grant refuge if he feels the elements are met: If individual is being pursued or is in imminent danger of death or serious bodily injury.

c. If possible, applicants will be directed to apply in person at U.S. Embassy.

d. IAW AR 550-1, reporting requirements also apply.

DURING THE APPLICATION PROCESS AND REFUGE PERIOD THE REFUGEE WILL BE PROTECTED. REFUGE WILL END ONLY WHEN DIRECTED BY HIGHER AUTHORITY.

I. International Legal Developments and Other Considerations

As there is no comprehensive treaty setting forth all the rights and obligations owed by states vis-à-vis displaced persons, legal advisors must look to numerous other instruments such as relevant human rights instruments and the Geneva Conventions for a fulsome understanding of legal rights and obligations in this regard. Two nonbinding

instruments, however, have been promulgated to assist international actors in identifying rights and duties regarding displaced persons: the Guiding Principles on Internal Displacement (Guiding Principles) and the Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles).[1] Judge Advocates should familiarize themselves with these documents when faced with issues related to displaced persons. In addition, host nation property law may also become relevant in addressing issues relating to displacement. Accordingly, Judge Advocates should also familiarize themselves with the host nation legal system to avoid unnecessary violations of domestic law when advising on such issues.

[1] For further reading on these instruments and the legal regime governing displaced persons in a post-conflict setting, *see* Dan E. Stigall, *Refugees and Legal Reform in Iraq: The Iraqi Civil Code, International Standards for the Treatment of Displaced Persons, and the Art of Attainable Solutions*, 34 Rutgers L. Rec. 1, 1 (2009).