

# LEGAL ISSUES OF THE OPLAN DRAFTING IN MULTINATIONAL OPERATIONS

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## **Abstract**

*Among the most significant factors in the management of multinational operations are the legal considerations governing the force deployment and how they are used. Legal considerations have a bearing on any aspect of a multinational operation, whether it is an alliance operation or a coalition operation, starting from basic considerations, such as mission authorization and requests for contributions with troops, up to the decision regarding targets and the means to be employed. Often in the heat of battle it is estimated that legal considerations can be quickly resolved. Experience shows that in contrast to legal issues, military planning in a multinational environment are proved to be very difficult to solve.*

Multinational operations are conducted by forces of two or more nations, which may not be allies, acting together for the accomplishment of a single mission. Multinational operations cross the spectrum of conflict from major combat operations to peacetime military engagement. These operations can also include various nonmilitary organizations and other services. Conducting military operations with foreign military partners, like operations with civilian partners, is uncommon to many soldiers, so a clear understanding of this different environment is necessary.

Multinational operations may be driven by common agreement among the participating multinational force partners or through a mandate provided by the United Nations (UN). Either way, their multinational character merits particular attention because national interests and organizational influence may compete with doctrine and efficiency. Consensus is painstakingly difficult, and solutions are often national in character. Commanders can expect contributing nations to adhere

to national policies and priorities, which at times complicates the multinational force effort.

Command jurisdiction is the legal position of command by one national commander over the soldiers of another nation. Each nation participating in a multinational force has its own national authority for the conduct of operations. Each nation will view the conflict based on its own national interests. Where those interests coincide, coalition commanders will have their greatest latitude, and where those interests vary, they will have the least. They will be dealing not only with the national force commander, but also with the national authorities of that nation. Multinational force commanders always operate within constraints of one sort or another. Therefore, commanders must understand not only what has been agreed to, but also what national caveats have been made so they can account for them in plans. Commanders should be prepared to spend time working political and military issues and, as a consequences legal issues, rather than purely military matters <sup>226</sup>.

## **1. OPLAN CONCEPT**

An Operation Plan is a formal plan for military armed forces, their military organizations and units to conduct operations, as drawn up by commanders within the combat operations process in achieving objectives before or during a conflict. Military plans are generally produced in accordance with the military doctrine of the troops involved. Operation plans are prepared in either complete or concept format.

An Operation Plan in Complete Format (OPLAN) is a complete and detailed operation plan containing full description of the concept of operations and all required annexes with associated appendixes. It identifies the specific forces and functional support for the conduct of joint operations that can be used as a basis for development sequence and resources to execute the plan. An OPLAN can be used as the basis of a campaign plan (if required) and then developed into an OPORD. An Operation Plan in Concept Format (CONPLAN) is an operation plan in an abbreviated format that would require considerable expansion or alteration to convert it into an OPLAN or OPORD.

The general criteria for approval of an operation plan are adequacy, feasibility, acceptability, and consistency with joint doctrine. Combining the criteria of feasibility and acceptability, the review ensures the mission can be accomplished with available resources and without incurring excessive losses in personnel, equipment, material, time or position.

The review for adequacy determines whether the scope and concept of planned operations satisfy the tasking and will accomplish the mission. The review assesses the validity of assumptions and compliance with the doctrine.

The review for feasibility determines whether the assigned tasks can be accomplished using available resources within the time frames contemplated by

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<sup>226</sup> COALITION OPERATIONS HANDBOOK, <http://www.abca-armies.org/Planning.aspx>

the plan. The primary considerations are whether the resources made available for planning by the planning documents are used effectively or are insufficient to satisfy plan requirements.

The review for acceptability ensures the plans are proportional and worth the expected costs. Additionally, this criteria ensures plans are consistent with domestic and international law, including the law of war, and are militarily and politically supportable.

An OPLAN represents the full development of the concept of operations of the commander. It specifies the forces and support needed to execute the plan and the transportation schedule required to move those resources. In developing a plan, the commander and staffs develop a detailed flow of resources into the theater to support the approved OPLAN concept. After forces are selected, time-phased support requirements are determined, and transportation feasibility is established, the detailed planning information is generated and stored as a “time-phased force and deployment data” (TPFDD) file. The TPFDDs only establish the initial movement requirements in the theater, e.g., PODs to initial staging areas. Consequently, not all-subsequent phases of theater campaign plans that require additional movement of equipment, supplies and personnel can be calculated from the TPFDD database.<sup>227</sup>

## **2. THE RESPONSIBILITIES OF THE LEGAL ADVISORS IN OPERATIONS PLANNING**

The legal advisors participate in deliberate, crisis action and joint operations planning to identify legal considerations and to recommend legally acceptable courses of action to the commander. They are responsible for providing legal advice to decision makers on the myriad of laws, policies, treaties, and agreements that influence or impact operations. They translate national policy decisions into legally acceptable plans and orders that support national security objectives.

### **a) Deliberate Planning**

Commanders should seek legal advice during each phase of the deliberate planning process to ensure legal considerations are addressed. The legal advisors have the following responsibilities during the deliberate planning process:

- Prepare appropriate appendices and legal annexes and ensure plans comply with relevant multilateral and bilateral international agreements, governmental directives and policy, the law pertaining to the use of force, and domestic and international law.
- Review the entire plan with a particular focus on areas with legal significance (e.g., legal authorities, targeting, fiscal considerations, host-nation support agreements, air navigation, use of force, and status of forces).

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<sup>227</sup> Operation Plans [OPLAN], <http://www.globalsecurity.org/military/ops/oplan.htm>

- Review relevant supporting plans to ensure appropriate appendices and legal annexes are complete and provide the necessary guidance to perform their various functions.
- Ensure the amount and type of legal support staff have been identified to deploy in support of combat or contingency operations, or to support operations in-place.

The legal advisors should be familiar with the deliberate planning phases and be able to address the appropriate issues that may arise during each phase. The role of legal support during the deliberate planning process could be outline as follows:

*Phase I - Initiation*

- Contact counterparts and establish the basis for concurrent planning.
- Review previous plans.
- Research applicable laws, policies, treaties, and international agreements.
- Summarize relevant legal considerations (authorities, restraints, and constraints) and
- provide them to the planning team.

*Phase II – Concept Development*

- Refine legal analyses.
- Review applicable laws, policies, treaties, and international agreements

The product: A concept of operations.

*Phase III – Plan Development*

- Incorporate legal considerations and instructions for developing rules of engagement in the combatant commander's planning guidance.
- Review the combatant commander's estimate for compliance with law and policy and make appropriate recommendations.
- Coordinate legal issues and support requirements with counterparts.

The product: A complete OPLAN.

*Phase IV – Plan Review*

- Review plan for compliance with law and policy.
- Ensure plan complies with ministerial directives, law, and policy.

The product: An approved OPLAN.

*Phase V – Supporting Plans*

- Review and advise on compliance with higher headquarters and ministerial guidance.

**b) Crisis Action Planning (CAP)**

The responsibilities of the legal advisors during crisis action planning are similar to those during deliberate planning, however, the time available for legal advisors is compressed. The legal advisors should be familiar with the CAP process and be able to address legal considerations in each phase of the process as outlined below:

*Phase I – Situation Development*

- Contact counterparts and establish the basis for concurrent planning.
- Review planning documents.
- Research applicable laws, policies, treaties, and agreements.

- Summarize relevant legal considerations (authorities, restraints, and constraints) and provide them to the crisis action team, combatant commander, and counterparts.

*Phase II – Crisis Assessment*

- Refine legal analyses
- Assess legal implications of developments.

*Phase III – Course of Action Development*

- Incorporate legal considerations and instructions for developing rules of engagement in the combatant commander's planning guidance.
- Review the combatant commander's estimate for compliance with law and policy and make appropriate recommendations.
- Discuss rules of engagement needs with commander and counterparts.
- Coordinate legal issues and support requirements with counterparts.
- Brief commanders and forces on legal environment.

*Phase IV – Course of Action Selection*

- Advise decision maker on lawful options; participate in execution planning.
- Advise decision maker on lawful options; participate in execution planning.

*Phase V – Execution Planning*

- Advise on legal issues arising during execution planning.
- Ensure compliance with law.

*Phase VI – Execution*

- Advise on legal issues during execution phase<sup>228</sup>.

### **3. LEGAL ISSUES TO BE ADDRESSED DURING OPLAN DRAFTING**

Legal issues to be addressed during OPLAN drafting tend to be infinite in accordance with the multitude of specifics for each operations. Bellow is an attempt to identify, as examples, the main areas together with possible questions where legal advisers are called to clarify and to provide that the answers like those to the following questions are continuously observed in OPLAN drafting process.

#### **a) Generic Questions**

Strategic planning begins with the mandate of a legitimizing authority, such as the UN or other multinational political organizations. The mandate is usually expanded by terms of reference (TORs) that establish for the military the limits of the mission, operational parameters, and specified authorities to conduct operations—for example, the right to search civilians and seize property. Nations often supplement the TORs with national guidance for their own military forces. Whether in TORs or another form, the guidance must be secured since it is the starting point for the military appreciation, analysis, and estimate process. This process—which precedes or is the first step in campaign planning—establishes a

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<sup>228</sup> [http://www.dtic.mil/doctrine/jel/service\\_pubs/afd2\\_4\\_5.pdf](http://www.dtic.mil/doctrine/jel/service_pubs/afd2_4_5.pdf)

common understanding of the mandate among multinational force partners. Without a common understanding, agreement on such factors as the role of the military, required forces, acceptable risk, and rules of engagement cannot be formed. As a consequence questions like the following have to be clarified:

1. What is the source (United Nations or others international organizations like North Atlantic Treaty Organization) of the mission tasking?
2. What relationship exists between the military force and the source of the mission tasking? If the source is not the political authority sponsoring the multinational force operation, has clarification and support from national military chains of command been requested?
3. Does a government agency have the lead?
4. What does the mandate specify as the role of multinational forces in:
  - General war?
  - Peace enforcement and peacekeeping?
  - Security and civil law and order?
  - Civil administration?
  - Economic and infrastructure?
  - Humanitarian responsibilities?
5. What constraints are imposed on multinational forces by their national authorities? Do political leaders fully understand the capabilities and limitations of multinational forces and the time required to successfully plan and prepare for an operation?
6. Is there a clear means to resolve disputes over use of forces?
7. Do commanders clearly understand the latitude given the commanders by their respective nations?
8. To facilitate known force employment options of troop contributing nation's units, is there a mapping of common multinational force constraints and a limitation?
9. What political motivations are responsible for each nation's participation in the operation? What potential conflicts may arise?
10. Have the national sensitivities as well as differing norms of behavior among national militaries and civilian agencies been considered?
11. Do multinational force members understand their partners' national views and work to minimize friction within the multinational force?
12. Do commanders clearly understand the political objectives of all parties, to include third parties and neighboring states?
13. Are military planners receiving advice from their command authorities at the early stages of multinational force planning when the political leadership is determining the strategic end state, objectives, and composition of the multinational force?
14. Have status-of-forces agreements been agreed to? If not, who should conduct negotiations?
15. Do multinational force members fully know what treaty and international agreements have been signed by which country?

16. Which civilian chief do the commanders report to and which civilian agencies provide resources?
17. What is the operational environment, to include the threat, consent of disputants, and disputants' view of multinational forces, and national and regional culture? What are their implications? Have the effects of these on contemplated multinational force operations been assessed?
18. Do all levels of the chain of command understand the military-civilian relationship? This understanding prevents unnecessary and counterproductive friction during peace operations where activities are often conducted at the small-unit level?
19. Do any multinational forces require direct communication to their national leadership?
20. How is the military role coordinated with the roles of other government agencies, nongovernmental organizations, and international and regional organizations?

#### **b) Command relationships**

Normally the troop contributing nation (TCN) national commands providing forces to the multinational force assign national forces under operational control (OPCON) of the multinational force commander. Smaller nations may place their forces' OPCON to a larger force, and the larger force is placed under OPCON to the multinational force commander. The respective nations—in accordance with their national policies—may limit the assignment of these national forces under OPCON. Further assignment to Service component commanders in an OPCON status by the multinational force commander is approved by the respective national commands. Command less OPCON of the national forces is retained by the parent national commander and is exercised through the designated national commander of the respective nations within the multinational force. The multinational force commander and national commanders discuss and clarify their mutual understandings of the command authorities that have been transferred to the multinational force commander. This clarification ensures a common understanding of those authorities and precludes potential misunderstandings. As a consequence questions like the following have to be clarified:

Does the multinational force commander have the following:

- Authority to relieve troop contributing nation commanders?
- Ability to task-organize or cross-attach within national or transnational contingents?
- Ability to employ assets outside agreed sector?
- Restrictions on assigning missions?
- To modify the rules of engagement for TCN?
- Authority to impose more restrictive rules of engagement?
- To modify force protection, to include dress in the area of operation ?
- To impose movement restrictions?
- To limit TCN use of host-nation facilities and resources?

- Ability to conduct training with TCN?
- To influence or direct predeployment activities?
- Authority over civilian support for TCN, such as TCN government employees or civilian contractors?

Do TCNs have:

- Restrictions to command authority that are cultural or religious based for employment of forces?
- Time and date related restrictions such as religious and national holidays or practices?
- Restrictions on participation in certain types of operations, to include:
  - War crimes criminal's apprehension?
  - Mass graves investigation or control?
  - Cross boundary or forward line of own troops operations?
  - Crowd control?
  - Psychological operations?
  - Disinformation and propaganda?
  - Movement of displaced persons?
- Restrictions on use of TCN military assets for support to:
  - Humanitarian assistance and civil-military operations?
  - Nongovernmental organizations or international and regional organizations?
- Restrictions on use of military for civil law enforcement or civil administration?
- Restrictions on working with other nations in the multinational force ?

### c) Logistics

Unity of effort is essential to multinational force logistic operations. All nations must work together to identify requirements, prioritize them, and share capacity to provide the most effective and efficient support possible. This requires coordination not only between contributing nations, but also with civilian agencies in the area of operations.

When possible, mutual logistic support should be developed for economy of effort. Multinational force logistics should be flexible, responsive, predictive, and provide timely sustainment throughout the entire multinational force. Multinational force planning must recognize varying logistic requirement by specific phase at the predeployment planning phase. Planning continues through reception, staging, onward movement, and integration; steady state; and redeployment operations.

Multinational operations can complicate logistic support and reduce the degree of flexibility inherent in a national logistic system. Although responsible for logistic support of its national forces, not all nations have deployable logistic capabilities. Such nations then depend on other nations for all or part of their support.

The responsibility for providing logistic support to national forces ultimately resides with their nations; some nations may not relinquish authority over their

logistic assets. However, requiring each nation to perform all logistic functions separately is inefficient and would hinder the multinational force's ability to influence operations logistically. Varying degrees of mutual logistic support among multinational force partners should be planned to complement partners' capabilities and minimize weaknesses.

The multinational force commander should be given the responsibility to coordinate the overall logistic effort in all phases. In some cases, the multinational force may exercise control over the national logistic units, in other cases it will act only as the coordinating authority. The degree of authority will depend on existing agreements and arrangements negotiated with contributing nations.

Support from the host nation will be extremely valuable to the multinational force. Therefore, the multinational force command must analyze the physical infrastructure in the host nation. This analysis reveals what facilities and services are available to support the command and how they can reduce the logistic footprint. The multinational force may establish a multinational force contracting center to facilitate multinational force procurement of scarce resources.

Participating nations have the option of developing support agreements, bilaterally and multilaterally, with other nations for providing logistic support to their forces. The multinational force headquarters must be given an overview of these arrangements to understand their implications on the coordination of the overall support plan. These agreements are done at national government level.

As a consequence questions like the following have to be clarified:

1. Have lead nations been designated where appropriate?
2. Which nations are responsible for what support to other nations?
3. What assistance is required for multinational forces to deploy and operate?
4. What is the division of responsibilities among multinational force, national, and host nation logistic support?
5. What is the logistic support structure? How will it identify capabilities and responsibilities of troop contributing nations?
6. Has the command coordinated diplomatic efforts to arrange for country and diplomatic clearances, overflight rights, and basing for forces transiting from one locality to another in the area of operations?
7. How will the multinational force prioritize, allocate, and use common infrastructure capabilities (ports, airfields, roads) to support military and civil operations?
8. What legal restrictions do national laws impose on logistic support?
9. Do national legal authorities permit the provision of logistic support among multinational force nations?
10. Are multinational force legal representatives available to provide counsel on international law and legal agreements?
11. Are mutual logistic support agreements in place and in accordance with existing legal authorities?
12. What are the mutual logistic support agreement procedures to account for and reimburse nations for services and supplies exchanged between nations?

13. Does the multinational force have acquisition and cross-serving agreements among multinational force partners?

14. What current agreements exist with other participating nations that provide logistic support? Does this include agreements governing logistic support with representatives of other nations?

15. What specific technical agreements—such as environmental clean up; customs duties and taxes; and hazardous material and waste storage, transit, and disposal—must be developed to augment agreements that may have been concluded with host-nation support?

16. Has an assessment of current environmental conditions—such as water and soil contamination—epidemiological surveys, and disease risk been completed? Has that data been recorded for future remediation?

17. Does the multinational force have the authority to conclude host-nation support arrangements on behalf of participating nations, or is prior national approval required?)

#### **d) Prisoners of War, Internees, and Detainees**

The capture, internment, or detention of persons can be a key part of many types of operations. In time of conflict, it may include the capture of prisoners of war (POWs) or the internment of civilians. During armed conflict, the taking of POWs brings many practical advantages: it reduces the enemy's numerical strength and fighting capacity, lowers the enemy's morale, and may constrain the tactics of enemy commanders. POWs also are an important potential source of intelligence. Peace support or counterinsurgency operations may include the arrest and detention of criminal suspects or internment of those who pose an imperative threat to security. The internment or arrest of criminal suspects contributes to stabilizing the situation on the ground and enhancing force protection.

Conversely, the abuse or ill-treatment of captured individuals can benefit an enemy or adversary in many ways. Even allegations of abuse may form the basis of powerful propaganda and undermine the credibility of multinational forces. Actual abuse, when made known publicly, leads to deterioration of domestic support and invites international condemnation. Deterioration in domestic support is equally likely. The abuse of POWs, internees, and detainees is unlawful. It is a misdirection of military effort that may indicate a breakdown in the internal discipline of a unit or formation.

Multinational forces are responsible for the safety and protection of all persons captured or detained by them until their release. This is the fundamental principle of the Geneva Conventions.

The management of captured persons, being of international concern, is monitored not only by multinational forces but also by the International Committee of the Red Cross (ICRC) as custodian of the Geneva Conventions. The multinational force headquarters should identify differences in the adoption, application, or adherence to all aspects of the Geneva Conventions and their additional protocols by troop contributing nations and take measures to ensure consistency within the multinational force.

Coalition members must promptly report all alleged violations of the law committed by multinational force personnel through the multinational force chain of command. All alleged violations must be thoroughly investigated. Where appropriate, disciplinary action should be taken and corrective action should follow in order to prevent future occurrences.

As a consequence questions like the following have to be clarified:

1. Is there a lead nation for the provision of POW and civilian detainee facilities?
2. Are contributing nations managing their own captured personnel?
3. What legal provisions does the mandate provide for the capture, internment, or detention of persons by the multinational force?
4. Does the legal staff understand the range of circumstances in which persons are likely to be captured?
5. Are there enough custodial specialists available to offer advice to commanders and planning staffs?
6. Have status-of-forces agreements (SOFAs) been negotiated with the host nation regarding the capture, internment, or detention of persons by the multinational force, and are there any significant differences between SOFAs across the multinational force?
7. Are host nation criminal justice systems operating effectively, and could detainees be transferred to that system following capture?
8. What is the legal position of each nation regarding whether the conflict has crossed the threshold into international armed conflict?
9. What is the status of the nations forming multinational force in relation to adoption of the Geneva Conventions and their additional protocols?
10. What are the multinational force's mechanisms for inspecting multinational force POW and internee or detainee facilities?
11. When are the multinational force expected to report detainees to the United Nations?
12. Is there a multinational force policy on mandatory qualifications for interrogation of personnel?
13. Will the troop contributing nations allow questioning of their captured personnel by other nations?
14. What are the multinational force system arrangements for moving captured persons to POW, internee, or detainee facilities?
15. What are the liaison arrangements between those force elements responsible for interrogation and those responsible for internment and detention?
16. If an international police force has been deployed, can captured persons be transferred into the custody of that force?
17. What procedures are in place to protect the rights of captured persons, including inspections of internment and detention facilities by the multinational force commander, the ICRC, or other humanitarian organizations?
18. How does the multinational force intend to handle the transfer of captured personnel to the host nation if host-nation laws are in some cases contrary

to fundamental human rights principles (such as the application of certain punishments)?

19. What will be the policy for the capture, detention and transfer of captured personnel within the multinational force, to the host nation or to other nations?

20. Who will have the authority to approve transfer of captured personnel?

21. What arrangements have been made to determine the status of captured persons whose status is not clear?

22. What arrangements have been made to ensure common treatment standards across the multinational force if possible?

23. Have orders been produced and promulgated concerning procedures to be followed regarding captured persons, and do all multinational force troops understand them?

24. What procedures are in place for the repatriation or release of internees and detainees?

25. What procedures are in place for the transfer of internees or detainees from one multinational force nation to another or to the host nation, and have written agreements been concluded between the relevant parties?

26. What procedures are in place to handle suspected war criminals?

#### **e) Rules of Engagement**

Rules of engagement (ROE) are directives to military forces and individuals that define the circumstances and limitations under which forces will initiate and/or continue combat with other forces. Often participants have similar political mandates. However, each nation likely comes to the multinational force with different national ROE reflecting that nation's reason for entering the multinational force. Some national ROE will be relatively free of constraint while others may be severely constrained. In many cases, commanders of deployed forces may lack the authority to speak for their nation in the process to develop rules of engagement. Commanders seek complete consensus or standardization of ROE but may not achieve it. Commanders need to reconcile differences as much as possible to develop and implement simple ROE. Member forces can tailor these rules to their national policies. For the individual soldier to understand and implement ROE, they must be clear and simple. Trying to obtain concurrence for ROE from national authorities is a time-consuming process that commanders should address early in the planning process.

All nations in the multinational force will receive ROE from their respective chains of command. The force headquarters develops multinational force ROE during the planning process. Subsequently, subordinate formations, from nations other than that of the force headquarters, develop supporting ROE. Often, some subordinate ROE will vary from the lead nation's ROE. They will differ in compliance with national legal requirements and the parameters of national ROE provided by national chains of command. Subordinate ROE for any given national contingent also clarify national guidance on other multinational force nations' weapons usage that would be prohibited by law or restricted for that contingent.

Commanders recognize potential risks. Using another nation's capability prohibited by the command's national ROE may place the command at risk of national prosecution.

As a consequence questions like the following have to be clarified:

#### **GENERAL**

1. Does the multinational force have a common definition for self-defense?
2. Are levels of self-defense defined such as necessary, proportional, or imminent?
3. Have rules been established concerning permission to attack based on hostile intent and hostile act?
4. Have rules of engagement been established for air operations?
5. Have rules of engagement been established for air defense operations?
6. Have rules of engagement been established for maritime operations?
7. Does the multinational force have a common amplifying guidance and definitions relative to the rules of engagement?
8. What is the effect of national rules of engagement and objectives on force composition and mission assignment?

#### **SPECIFIC**

1. Have rules of engagement been agreed upon by national authorities or by national military commanders?
2. How will national rules of engagement affect other multinational force organizations and operations?
3. What are the procedures for commanders to request a change to the rules of engagement?
4. Are there generic rules of engagement that all nations have agreed to?
5. What is the impact on each participating nation of the rules of engagement?
6. How does each nation disseminate rules of engagement to its soldiers?
7. Have the rules of engagement been distributed to the soldiers and training conducted before deployment?
8. What are the key differences in rules of engagement across the multinational force?
9. Are there national "red cards" or points of contention concerning rules of engagement that the commander must know?
10. Are there rules of engagement on the use of indirect fire? What are the rules and do they impact on the engagement of targets?
11. Is there a dichotomy between force rules of engagement on the use of indirect fire and national force protection?
12. Does each nation have a common or clear understanding of the terms used in the rules of engagement?
13. Has the use of certain systems or equipment—such as defoliants, riot control agents—been evaluated for its impact regarding the rules of engagement?
14. What will be the multinational force rules of engagement before hostilities and after committing the first hostile act?

15. Will the policy on pre-emptive air strikes be contained within the multinational force rules of engagement?

16. Who will define weapon control statuses such as weapons free, weapons tight, and weapons hold?

17. What mechanism will exist to update rules of engagement during the operation?

18. Does the nation's rules of engagement include electronic attack, jamming, electronic, and deception?

19. Are forces authorized to use electronic countermeasures? What levels of electronic countermeasures can be applied and to what systems?

20. What are the guidelines on using indirect fire to demonstrate intent?

21. Do these guidelines vary among the nations?

22. What are the troop contributing nation's understandings of use of lethal force in self-defense, to protect property, and for mission accomplishment? Do any of the troop contributing nations assert a right of pre-emptive self-defense or do they assert a right of anticipatory self-defense?

23. What are the requirements for rules of engagement governing intelligence aspects of the operation like wiretaps, human intelligence activities, or reporting?

24. What are the requirements and limitations for implementing tactical questioning and higher order human exploitation?

25. What are the rules of engagement for different multinational force countries?

## **DEVELOPING RULES OF ENGAGEMENT**

1. What actions are authorized to prevent the boarding, detention, or seizure of designated aircraft, vessels, vehicles, personnel, or property? What levels and types of force can be applied?

2. Are forces authorized to intervene in nonmilitary activities? What nonmilitary activities are authorized for intervention? What level and types of force can be applied?

3. Will boarding operations be authorized? What levels and types of force can be applied?

4. Will detention or seizure operations be authorized? What is the defined scope of those operations? What levels and types of force can be applied?

5. Will infrared or visual illuminants be authorized? How will they be controlled?

6. Has the criteria to identify potential targets been defined? What specific requirements must be met before engaging a potential target?

7. Are forces authorized to exercise in the presence of a potential enemy?

8. Are forces authorized to conduct overt simulated attacks? What are the restrictions related to those actions?

9. Are forces authorized to designate targets?

10. Are forces authorized to respond to harassment operations? What levels and types of force can forces use in conducting counterharassment and harassment operations?

11. Are riot control agents authorized? What are the restrictions on using riot control agents and under what circumstances?

12. Is the use of force authorized? Under what circumstances and in what types of designated operations is it authorized? (This is related primarily to peace support, evacuation, humanitarian aid and other similar operations.) What levels and types of force can be applied?

13. Is the use of specific weapons prohibited or restricted in designated circumstances?

14. Are forces authorized to conduct information operations? What types of information operations can be applied? What levels of response can be applied? What nonlethal technology is available, how is the force trained to use it, and do the rules of engagement authorize its employment?

15. Are forces authorized to use land or maritime mines? What are the restrictions on the use of land or maritime mines?

16. Are forces authorized to conduct attacks (not related to self-defense)? What types of attacks are authorized and under what circumstances? What levels and types of force can be applied?

17. Are there any designated or specially protected persons, sites, or materials that need to be considered?<sup>229</sup>

#### **f) International Law Considerations**

The legal advisor is also responsible for supporting the commander in helping ensure that law of armed conflict (LOAC) and other international law affecting potential operations are appropriately observed and considered in OPLAN drafting process. It should be kept in mind that LOAC was developed and continues to bear legitimacy because it serves higher purposes. Those purposes have traditionally included the goal of reducing unnecessary suffering, protection of the victims of armed conflict - both combatants & non-combatants and, through these two purposes, the higher purpose of facilitating an earlier restoration of peace than might otherwise be the case.

Militaries have, over the years, found a number of reasons to obey LOAC. These include the principled reasons of Professionalism, Chivalry, and Conscience. Aside from these principled reasons, though, there are very pragmatic ones as well. Criminal Liability, both individual and command, is one reason but, quite honestly, not considered the predominate reason. Reciprocity is often cited as a pragmatic reason and, though not without some criticism, is believed to still be significant. From a strict military perspective, there is the goal of Operational Effectiveness. Any use of force which does not translate into clear military advantage is a potential waste of ammunition and other resources. Finally, and especially in the current climate of global information, is the reason of maintaining public support – Foreign as well as Domestic. Alleged violations of LOAC severely threaten the

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<sup>229</sup> [https://www.jagcnet.army.mil/85256DB7005CECA3/\(JAGCNetDocID\)/D00006E8A?Open](https://www.jagcnet.army.mil/85256DB7005CECA3/(JAGCNetDocID)/D00006E8A?Open)

perceived legitimacy of a nation's or coalition's efforts and with the erosion of public support comes a reduction of political and economic support as well.

As a consequence questions like the following have to be clarified:

1. Have the various elements of plan been reviewed for LOAC and Human Rights considerations by the appropriate staff sections and members of the executive and special staffs?

2. Does the concept of operations contain any limitations on the operational freedom of action of the force which are erroneously attributed to LOAC and Human Rights requirements? If so, they should be promptly identified to the issuing authority.

3. Do any of the ROE restrict the operational freedom of action of the force because of an erroneous interpretation of the requirements of the LOAC and Human Rights? If so, they should be promptly identified to the issuing authority.

4. Do any of the ROE erroneously make avoidance of collateral civilian casualties and/or damage to civilian objects a primary concern? Only intentional attacks of civilians and employment of weapons and tactics that cause excessive collateral civilian casualties are prohibited by LOAC, although more restrictive rules may be imposed as a matter of policy. Any actions taken to avoid collateral civilian casualties and damage must be consistent with mission accomplishment and force security.

5. Do ROE recognize the inherent right of self-defense of all persons?

6. Have the requirements for any special LOAC and/or Human Rights law training, planning and equipment been met?

7. Are civilians or other nonmilitary personnel accompanying the force equipped with the proper identification provided for such individuals (see, e.g., art. 40 of CG I<sup>230</sup>, art. 4(A) (4) and Annex IV(A) of CG III<sup>231</sup>), and have they been instructed in their Law of war (LOW) rights, duties and obligations?

8. Does the force include personnel of any voluntary aid societies assigned exclusively to medical and medical support duties (arts. 24 and 26 of CG I)? If so:

- Are they subject to national military laws and regulations?
- Has their intended assistance been notified to the enemy?
- Have they been instructed in their LOW rights/duties/obligations?
- Have they been furnished the ID cards required by art. 40 of CG I?
- Does the force include personnel of a recognized national Red Cross society or other voluntary aid societies of a neutral country (art. 27 of CG I)?

If so:

- Are they present with NATO authorization and the previous consent of their own government?

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<sup>230</sup> Convenția de la Geneva pentru îmbunătățirea sortii răniților și bolnavilor din forțele armate în campanie, încheiată la Geneva la 12 august 1949  
<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3>

<sup>231</sup> Convenția (III) cu privire la tratamentul prizonierilor de război, încheiată la Geneva la 12 august 1949  
<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>

- Are they under official NATO control?
  - Has their intended assistance been notified to the enemy?
  - Have they been instructed in their LOW rights/duties/obligations?
  - Have they been furnished the ID cards required by art. 40 of CG I?
9. Does the force include personnel of the American Red Cross Society whose duties are not exclusively medical? If so, are they aware of the restrictions on their use of the Red Cross emblem contained in art. 44 of CG I?
10. Are the medical and religious personnel of the force equipped with the protective identification provided for such individuals (art. 40 and Annex II of CG I and art. 42 and the Annex to CG I(Sea)), and have they been trained in their special rights, duties and obligations under the LOW?
11. Has a model of the protective ID card for such personnel been communicated to the enemy as required by art. 40 of CG I?
12. Are there any theater-specific LOW training requirements or ROE for the area into which the force is to be deployed?
13. Should the plan call for:
- the collection of information about the enemy's policies, attitudes and practices concerning compliance with the LOW?
  - the collection of information about allied policies, attitudes and practices concerning compliance with the LOW?
  - the collection of information about enemy and allied protective emblems and insignia?
14. Does plan include procedures for ascertaining whether various persons who fall into the hands of NATO forces are entitled to treatment as PWs or retained personnel, or to be released IAW arts. 4 and 5 of CG III, arts. 24-32 of CG I, and arts. 36- 37 of CG I (Sea))?
15. Is plan consistent with the requirement that where there is any doubt as to the status of a person who has committed a belligerent act and is in the hands of NATO forces such person shall be treated as a PW until such time as his status is determined by a competent tribunal (art. 5 of CG III)?
16. Does the plan provide procedures for setting up and operating an art. 5 (CG III) tribunal?
17. Does plan include appropriate procedures for reporting alleged war crimes and related misconduct committed by the enemy, and alleged misconduct by NATO and allied PWs, and assign responsibility for the collection and preservation of evidence of all such matters (see, e.g., common art. 49/50/129/146 of the GCs)?
18. Is plan consistent with the serious incident reporting requirements of higher headquarters as they pertain to alleged war crimes and related misconduct?
19. If plan contemplates an occupation, is it consistent with the obligation of an occupier to restore and preserve public order and safety while respecting, in accordance with art. 43 of Hague IV, the laws in force in that country?

20. If plan includes draft proclamations, laws, or ordinances for use in an occupied territory, do those documents conform to the requirements of IL as set forth in arts. 42-56 of Hague IV and arts. 64-78 of the GC?

## CONCLUSION

Legal advisors provide professional legal support at all echelons of command throughout the range of military operations. This includes support in the disciplines of operational law, international law, contract and fiscal law, civilian and limited military personnel law, and environmental law. Legal advisors must provide their clients sound legal advice based upon a thorough understanding of the situation, an analysis of lawful alternatives, and their individual professional judgment. In order to accomplish this, legal advisors should participate in key decision-making processes, becoming involved early to identify and resolve legal issues, and in some cases non-legal issues, early before these issues become command problems. Finally, legal advisors must help their commanders to conduct operations in ways that will respect international law and preserve international public support, integrating the international community's values into the command or headquarters programs, operations, and decision-making processes.

Legal advisors tend to fulfill several functional roles, which can be expressed as Subject Matter Expert, as Advocate, as Ethical Advisor, and as Counselor. These roles are just as important in the operational context as in any other. Commanders and staffs should use the legal advisor in each of these roles to take best advantage of the legal advisor's skills and training. Similarly, legal advisors must cultivate their capabilities in all areas. When a legal advisor acts in any of these roles, they identify issues, formulate courses of action, and evaluate the relative strengths, weaknesses, and legal consequences. Legal advisors must acquire an intuitive and reasoned grasp of the command's interests and objectives.

In assisting the Commander and Command Group during the operational planning process, the legal advisor must ensure he/she thoroughly understands the contingency, any existing contingency plans or concepts of operation and the applicable international law, international body's policy, and national laws that may affect the situation. The legal advisor must be a part of any Operational Planning Group or other planning and coordination cells. Effectiveness includes informing the commander and staff of the legal obligations on the force, minimizing legal obligations or the effects on the force, ensuring that plans comply with law of armed conflict (LOAC), protecting the legal status of the force, and contributing to the provision of responsive and economical host nation support.<sup>232</sup>

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<sup>232</sup> *Draft NATO LEGAL DESKBOOK, September 2008*

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