

INTEROPERABILITY OF UNITED STATES AND CANADIAN ARMED FORCES

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I. INTRODUCTION

When the soldiers of the First Special Service Force (FSSF) scaled the sheer cliffs of Mount de la Difensa in Italy during the evening of December 2, 1943, they surprised the German defenders and seized key terrain that had resisted such capture for months.¹ The complexity of this operation would have challenged the elite infantry forces of either Canada or the United States. Nevertheless, this unit, composed of soldiers wearing the uniforms of both nations and led by both Canadian and United States officers and noncommissioned officers, accomplished this and other equally difficult missions during the latter part of WWII.²

Since WWII, Canada and the United States (U.S.) have built on this legacy, forging a remarkable military partnership, performing combined³ or multinational⁴ military operations. Perhaps the most

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1. Scott R. McMichael, *Historical Perspective on Light Infantry*, Combat Studies Inst. Res. Surv. No. 6, U.S. Army Command & Staff College 177-81 (1987), available at http://www-cgsc.army.mil/carl/download/csipubs/historic/hist_c4_pt1.pdf (last visited Feb. 28, 2005). See also Lieutenant Colonel Gary L. Bounds, *Notes on Military Elite Units*, Combat Studies Inst. Rep. No. 4, U.S. Army Command & General Staff College 4 (1984), available at <http://www-cgsc.army.mil/carl/download/csipubs/bounds2.pdf> (last visited Feb. 28, 2005) (offering further discussion of the First Special Service Force).

2. McMichael, *supra* note 2, at 186-92, available at http://www-cgsc.army.mil/carl/download/csipubs/historic/hist_c4_pt2.pdf (last visited Feb. 28, 2005).

3. U.S. DEP'T OF DEFENSE, JOINT PUBLICATION 1-02, DEP'T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 100 (2004), available at <http://www.dtic.mil/doctrine/jel/doddict/> (last visited Feb. 28, 2005) [hereinafter DOD DICTIONARY], defines a combined operation as one "conducted by forces of two or more Allied nations acting together for the accomplishment of a single mission."

visible and well-known partnership is embodied in the NORAD Agreement⁵, which created the North American Aerospace Defense Command (NORAD) located in Colorado Springs, Colorado. This Cold War-era partnership retains its relevance and vitality during the evolving transnational or terrorist threat to the two nations. In an Exchange of Notes in December 2002, the U.S. and Canada “affirmed the merits of broadening bi-national defence arrangements in order to:

1. prevent or mitigate threats or attacks by terrorists or others on Canada or the United States; and
2. ensure a cooperative and well-coordinated response to national requests for military assistance in relation to terrorist, or other, threats or attacks, natural disasters, or other major emergencies in Canada or the United States.”⁶

Another, more recent, example of military cooperation is Operation APOLLO, in which U.S. and Canadian infantry units conducted combat operations in Afghanistan against Taliban and Al Qaeda forces.⁷

Unity of effort in a combined or multinational operation is a fundamental principle of operation.⁸ The objectives of the operation must be clearly defined by the leader of the operation and supported by each member nation. The planning and conduct of such combined operations must take into account the national and international legal obligations of the respective nations. Differing obligations may result

4. DOD DICTIONARY defines a multinational operation as a “collective term to describe military actions conducted by forces of two or more nations, usually undertaken within the structure of a coalition or alliance.” *Id.* at 351.

5. North American Aerospace Defense Command (NORAD), Mar. 11, 1981, U.S.-Can., 33 U.S.T. 1277 [hereinafter NORAD Agreement]. This Agreement was extended until May 12, 2006 by an Exchange of Notes signed at Washington June 16, 2000. Negotiations will begin in 2005 for the renewal of the Agreement.

6. Agreement regarding Canada-United States Cooperation in Broadening Bi-National Defence Arrangements for North American Security, Exchange of Notes, Dec. 9 2002, U.S.-Can. The text of this agreement is available at <http://www.canadianembassy.org/defence/text-en.asp> (last visited Feb. 28, 2005).

7. Canadian Prime Minister Jean Chrétien provided Canadian Forces to support the United States operation in Afghanistan (Operation ENDURING FREEDOM) in response to the invocation of Article 5 of the North Atlantic Treaty by NATO Secretary General Lord Robertson. *The Canadian Forces' Contribution to the International Campaign Against Terrorism*, CANADIAN NAT'L DEF. (Mar. 7, 2002), at http://www.forces.gc.ca/site/Newsroom/view_news_e.asp?id=388 (last visited Feb. 28, 2004). [hereinafter *Canadian Forces' Contribution*].

8. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUB. 3.0, DOCTRINE FOR JOINT OPERATIONS VI-3 (2001).

in an inability to operate smoothly as a combined force, pursuing a common goal. These challenges to the “interoperability”⁹ of Canadian and U.S. Forces are not insurmountable.

Military attorneys are essential to the process of achieving this interoperability. They assist in identifying the potential points of friction, such as critical differences in rules for use of force or employment of certain weapons, so that the differences can be resolved during the planning of the operation. This article will address the role that attorneys and the law play in promoting unity of effort in combined U.S. and Canadian operations. It will (1) provide an overview of the process by which attorneys in each nation’s armed forces provide legal advice on operations, (2) identify the key differences in international legal obligations of each nation, and (3) discuss how national differences can be resolved, as illustrated by the issues of land mines and use of deadly force.

II. LEGAL REVIEW OF MILITARY OPERATIONS

A. U.S. Approach

The Department of Defense has established a comprehensive program to ensure the law of war¹⁰ is understood and complied with by all members of the armed forces. One of the central requirements of this program is that qualified legal advisers review all plans, policies, and rules of engagement to ensure their consistency with the law of war obligations of the United States.¹¹ The discipline of “operational law”¹² provides the framework for legal advisers to fulfill this responsibility.

9. DOD DICTIONARY, *supra* note 3, at 270, defines interoperability as the “ability of systems, units, or forces to provide services to and accept services from other systems, units, or forces and to use the services so exchanged to enable them to operate effectively together.”

10. U.S. DEP’T OF DEFENSE, DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM 4.1 (Dec. 9, 1998) [hereinafter LAW OF WAR PROGRAM]. The law of war is described as “[t]hat part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.” *Id.* at 3.1.

11. *Id.* at 4.1. Paragraphs 5.3.3, 5.7.3, and 5.8.6 extend this requirement to the components of Department of Defense, the Chairman of the Joint Chiefs of Staff, and the Commanders of Combatant Commands.

12. Operational Law is defined as the “body of domestic, foreign, and international law that impacts specifically upon the activities of U.S. Forces in war and operations other than war. . . . It includes military justice, administrative and civil law, legal assistance, claims, pro-

1. *Emergence of Operational Law.* Attorneys in the U.S. military trace their lineage to 1775, when George Washington appointed Colonel William Tudor as the first Judge Advocate of the Continental Army.¹³ Since the beginning, these attorneys, more commonly referred to as Judge Advocates, have provided advice to commanders in every major conflict, including the Civil War, World Wars I and II, and the Korean War. The practice during the pre-Vietnam era consisted of the traditional legal disciplines of military criminal law, contracts, claims, and administrative law. Judge Advocates also played a key role in prosecuting war crimes cases in Germany and Japan.

The Vietnam War marked the beginning of the expansion of the practice of Judge Advocates in combat. Colonel Frederic L. Borch III notes in his excellent historical account of Army Lawyers in Military Operations that individual Judge Advocates began to push the boundaries of traditional practice out by engaging in such issues as “. . .the investigation and documentation of war crimes, the classification of detainees and treatment of prisoners of war, Law of War instruction, and the provision of advice to host nation authorities on a wide range of subjects.”¹⁴ Nevertheless, in the years following Vietnam, Judge Advocates in the Army and other services concentrated primarily on the familiar areas of military criminal law and administrative law. They taught the Law of War to officers and enlisted, as required by the Department of Defense Law of War Program,¹⁵ but rarely became involved in the planning and conduct of military operations. The U.S. intervention on the island of Grenada in October 1983 served to refocus attention on the complex legal dimension of modern combat.

The U.S. mission in Grenada, called Operation URGENT FURY, was relatively straightforward – rescue American citizens endangered by the spiraling violence and assist the Caribbean Peace-keeping Force in restoring order.¹⁶ Yet, the brief engagement produced a host of legal issues which had not been anticipated by the

curement law, national security law, fiscal law, and international law.” INT’L AND OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK A-1 (1994) [hereinafter OPERATIONAL LAW HANDBOOK].

13. JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, *available at* <http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (last visited Feb. 28, 2005).

14. FREDERIC L. BORCH III, JUDGE ADVOCATES IN COMBAT 51 (2001).

15. LAW OF WAR PROGRAM, *supra* note 11, at 5.5.1.

16. *See* BORCH, *supra* note 14, at 61–62.

Judge Advocates accompanying the U.S. Forces. Among the more pressing concerns were:

- Developing rules of engagement for the combat and peace-keeping phases of the operation¹⁷
- determining the status of detainees, including a number of Cuban nationals
- safeguarding and transporting to safety several diplomatic personnel from the former Soviet Union, North Korea, and Cuba
- investigating alleged violations of the law of war¹⁸

These issues were resolved, although not without some missteps and false starts. Following an after-action review of the legal issues in URGENT FURY, the Judge Advocate General's School of the Army, in 1986, recommended that the new discipline of operational law be developed.¹⁹ Since that time, the Army and the other services have designed concepts of organization, operation, and training to ensure that military attorneys are well equipped and available to advise commanders on the legal dimensions of military operations. The approach that the Army has taken is representative of the other services.

2. *Organization.* Judge Advocates go where the work is. They are positioned with commands in such a manner that they can operate as an integral member of the staff. The senior Judge Advocate (or Staff Judge Advocate) responsible for providing legal support to a unit conducting operations will tailor the support for each specific operation by detailing judge advocates to the appropriate command or staff elements. The detailed Judge Advocates will deploy with the unit and will be normally be under the technical supervision of the Staff Judge Advocate, receiving guidance, direction and assistance.²⁰ In fact, Judge Advocates have been so close to the action that they

17. Judge Advocates were not involved in the development of rules of engagement for the combat phase of URGENT FURY, but helped draft the rules for the peacekeeping phase. *Id.* at 72-73.

18. *Id.* at 71-72.

19. David E. Graham, *Operational Law-A Concept Comes of Age*, ARMY LAW. 9, 10 (July 1987).

20. DEP'T OF THE ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS, para. 2.4.2 (2000) [hereinafter FIELD MANUAL 27-100].

have occasionally been drawn into the conflict, with at least one Judge Advocate being decorated for heroism in Iraq.²¹

3. *Operating Concept.* The Army's concept for providing legal support to military operations is detailed in Field Manual Number 27-100. The mission statement succinctly describes how Judge Advocates will provide timely and relevant legal advice to commanders in challenging, and sometimes ambiguous, circumstances:

"Pursuing the mission in the 21st Century will challenge judge advocates in three distinct ways. First, judge advocates must become increasingly refined as soldiers and lawyers. Judge advocates must understand how the Army will accomplish its various missions, and how to identify and resolve legal issues arising during these missions. . . . They must be thoroughly grounded in all core legal disciplines to be effective in a fluid operational environment. They must be increasingly knowledgeable in international law as the Army cooperates with other nations' forces to secure United States interests world-wide.

Second, judge advocates must become more involved in the military decision-making process in critical planning cells, and at lower levels of command. As information technology increases the speed of decision-making and allows fusion of information in distinct cells, it becomes critical for judge advocates to be located where the relevant picture of the battlefield is received, evaluated, resolved, and affected. Otherwise, legal advice will not be timely or effective. To be proactive, the judge advocate must be present. As information technology empowers decision-makers at lower levels of command, judge advocates must be present there.

Third, judge advocates must be capable of expanding the level of legal support to meet the mission demands of a force projection army. . . . Judge advocates, in both the active and reserve components, must plan for the legal resources to meet these demands, and must be prepared to provide services with the deploying unit, the power projection platform, or home station."²²

21. THE REGIMENTAL REP. (JAG Legal Center and Sch. Alumni Ass'n), Fall 2003, at 1, available at <http://www.tjagsaalumni.org/rpdf/2003fall.pdf> (last visited Feb. 28, 2005). Four members of a legal team were on patrol in Baghdad on August 7, 2003, when another nearby patrol was ambushed and several of its soldiers wounded. The team immediately went to the assistance of the other soldiers, returned fire, and helped evacuate the wounded. Captain Keith Bracey, Warrant Officer One Donnell McIntosh, Master Sergeant Brian Quarm, and Specialist Benjamin Prutz were each subsequently awarded the Bronze Star Medal with "V" device for heroism. Captain Bracey was also awarded the Purple Heart for a wound he suffered during the action.

22. FIELD MANUAL 27-100, *supra* note 20.

4. *Training.* The evolving discipline of operational law is a key element in the curriculum of The Judge Advocate General's School of the Army (the JAG School). Both the Basic Course, designed to educate attorneys just entering the Judge Advocate General's Corps, and the Graduate Course, an LL.M. program for career attorneys, include extensive study of international and operational law issues.²³ The materials and seminars reflect the lessons learned from the past twenty years of military operations. The JAG School also conducts one-week courses for those attorneys entering positions that require knowledge of operational law.

B. Canadian Approach

The legal branch of the Canadian Forces traces its distinguished history back to 1911, with Judge Advocates serving in theaters of operation during World Wars I and II, as well as in the Korean Conflict.²⁴ The Canadian Judge Advocates, much as their U.S. counterparts, practiced traditional law during these conflicts, primarily engaging in military criminal law, personal legal assistance to soldiers, and claims against the government.²⁵

1. *Emergence of Operational Law.* The Canadian Forces Legal Branch expanded its focus to include operational law in the 1990's.²⁶ Just as the U.S. military had in Grenada, the Canadian Forces experienced a watershed event that reinforced the need for increased emphasis on Judge Advocate participation in military operations. The Canadian Airborne Regiment deployed to support the United Nations Operations in Somalia (UNSO-SOM) in 1993. While the overall performance of the unit was excellent, the torture and death of a Somali detainee at the hands of a small number of paratroopers over-

23. See JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, *supra* note 14 (offering a history of the JAG School and a description of the Basic and Graduate Courses available).

24. ARTHUR R. McDONALD, CANADA'S MILITARY LAWYERS 16, 21-23, 45-60, & 77-83 (2002).

25. *Id.* at 45-70, 79.

26. Kenneth W. Watkin, *The Operational Lawyer: An Essential Resource for the Modern Commander* 13, available at http://www.forces.gc.ca/jag/operational_law/TheOperationalLawyer_e.pdf (last visited Feb. 28, 2005). The working definition of operational law for the Directorate of Law/Operations is "[t]hat body of law, both domestic and international, impacting specifically upon legal issues associated with the planning for and deployment of Canadian Forces in both peacetime and combat environments." *Id.* at 1.

shadowed the entire mission.²⁷ The resulting Board of Inquiry recommended, among other actions, that legal officers deploy with units on training and actual missions to advise commanders and soldiers on all legal aspects of the operations.²⁸

Throughout the 1990's, Canadian Judge Advocates deployed with and provided crucial legal support to Canadian Forces during the Persian Gulf War (1990-1991), and peace keeping or peace enforcement operations in Bosnia, Croatia, Kosovo, Italy, East Timor, Rwanda and Ethiopia.²⁹ The advice provided by these attorneys ranged from the legitimacy of objectives in the bombing campaign in Bosnia³⁰ to the crafting of rules of engagement for Canadian units in Rwanda.³¹ When Canadian naval, air, land and special forces deployed to Afghanistan in Operation APOLLO³² following the terrorist attacks on September 11, several Judge Advocates accompanied the forces.³³

2. *Organization.* The demonstrated need for legal advisers in these increasingly complex military operations drove a restructuring of the Legal Branch of the Canadian Forces. Commanders began requesting lawyers to accompany them on operations, and the Legal Branch accommodated them by assigning Judge Advocates to nineteen field offices, all under the supervision of the Deputy Judge Advocate General for Operations.³⁴ This Deputy also assigns Judge Advocates to support the units that deploy on missions. This differs somewhat from the U.S. approach, in that the deployed Canadian Judge Advocates are directly responsible to the Judge Advocate General, rather than to the commander of the unit to which they are detailed. The rationale for the Canadian approach is that it “enhances the provision of independent legal advice.”³⁵ This is in slight contrast to the U.S. practice, which allows the Judge Advocate to be under the command of the commander of the supported unit.

27. McDONALD, *supra* note 23, at 154–63.

28. Watkin, *supra* note 25, at 13.

29. *Id.* at 5–6.

30. McDONALD, *supra* note 23, at 172.

31. *Id.* at 175.

32. *Canadian Forces' Contribution*, *supra* note 8.

33. Watkin, *supra* note 25, at 6.

34. *Id.* at 182–84.

35. Jerry S.T. Pitzul, *Operational Law and the Legal Professional: A Canadian Perspective*, 51 A.F. L. REV. 311, 312 (2001).

3. *Operating Concept.* The Canadian Judge Advocates supporting deployed units perform essentially the same tasks as their U.S. counterparts. The Judge Advocate General of the Canadian Forces, Brigadier General Jerry S.T. Pitzul, in an address at the U.S. Air Force Judge Advocate General's School, provided just a sample of the legal issues in which Judge Advocates are engaged:

- Legal basis or mandate for the operation
- Use of force guidelines
- Targeting
- Review of Operations Plans
- Legality of weapons
- Investigation of alleged war crimes
- Treatment of civilians and refugees
- Instruction in Law of Armed Conflict
- Negotiation of Status of Forces Agreements³⁶

As mentioned earlier, the ability of the Judge Advocates to provide this operational legal advice while deployed with Canadian Forces is an essential component of the Legal Branch's mission. This presence with the deployed unit gives a greater understanding of the operating environment and challenges facing the commander and soldiers. It also enables the Judge Advocate to provide more timely advice during fast-paced operations.³⁷ Superb training of the Judge Advocates in the relevant law and operations planning process is also a critical requirement.

4. *Training.* Spurred by recent experience and certainty of future deployments, the Legal Branch has generated an excellent program of instruction in Operational Law.³⁸ This two-week course integrates the academic with the practical and sharply hones the skills of Judge Advocates who advise and deploy with Canadian Forces. The curriculum comprises the international legal basis for military intervention, the process for determining the propriety of selecting targets for attack, and the development of rules of engagement. The faculty speaks from the experience of several recent assignments to areas of conflict, such as Afghanistan and Haiti. Because most Canadian military operations are conducted in coalition with the forces of other na-

36. *Id.* at 311–21.

37. Watkin, *supra* note 25, at 15.

38. See OFFICE OF THE JUDGE ADVOCATE GENERAL, available at http://www.forces.gc.ca/jag/main_e.asp (last visited Feb. 28, 2005).

tions, including the U.S., a significant portion of the instruction addresses the intricacies of operating with allies that may be bound by differing international legal obligations.

III. DIFFERING TREATY OBLIGATIONS

The law that binds the Canadian and U.S. Forces affects the ability of the armed forces of each nation to operate with a combined effect. This law includes not only the treaties to which they are a party, but also the national or domestic law of each nation. As an example, U.S. Forces are restricted in their ability to operate within the U.S. by the Posse Comitatus Act.³⁹ Canadian Forces have greater statutory authority for providing assistance to law enforcement agencies and other Canadian Government agencies.⁴⁰ For purposes of considering combined operations outside the national borders, though, the points of departure are primarily in the following areas:

A. Protocols Additional to the Geneva Convention

The Government of Canada is a party to both Additional Protocols I⁴¹ and II.⁴² The U.S. has not has not ratified either Protocol, but considers most of the provisions to be applicable as customary international law.⁴³ The U.S. does object to many of the provisions of Protocol I that would expand the definitions of international armed conflicts and combatants, so Judge Advocates should alert operation planners to these areas of disagreement.

39. See 18 U.S.C. § 1385 (2000).

40. See Watkin, *supra* note 25, at 7 (describing Canada's use of armed forces to assist governmental agencies).

41. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391.

42. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442.

43. INT'L AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK 11 (2003), available at <http://www.jagcnet.army.mil/jagcnetinternet/homepages/ac/tjagsaweb.nsf> (last visited Feb. 28, 2005).

B. Anti-Personnel Mine Convention (APM)⁴⁴

The Government of Canada not only signed and ratified the APM, but also was a major proponent of this development in international humanitarian law. The U.S., on the other hand, has not ratified the convention. It has, however, embraced a policy that advances the intent behind the treaty. This still leaves a situation in which U.S. Forces may employ anti-personnel mines during a combined operation while Canadian Forces would be prohibited from employing the same method of warfare.

IV. SPECIFIC ISSUES AFFECTING INTEROPERABILITY

Past and current operations in which Canadian and U.S. Forces operate together are characterized by a high degree of compatibility in techniques, tactics, and procedures. Yet, there are a few differences in law and policy that affect interoperability of the forces. Two such issues are:

- Use of land mines
- Use of deadly force to protect property

A. Use of Land Mines

Land mines, designed for use against enemy combatants (anti-personnel mines) and against armored vehicles (anti-tank mines), are very effective in defending friendly forces against enemy attack and denying the enemy the use of key terrain. Nevertheless, the indiscriminate use of land mines by groups who fail to comply with the Amended Protocol II (Mines Protocol) of the 1980 Conventional Weapons Treaty⁴⁵ has created a humanitarian problem in countries around the world.⁴⁶ The types of mines used and the manner of employment are at the heart of the problem.

Persistent land mines are those that do not self-destruct or self-deactivate within a relatively short, pre-determined time. These

44. Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines (APL) and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211, 36 I.L.M. 1507 [hereinafter APM Convention].

45. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices (Protocol II) of the Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Apr. 10, 1981, 1342 U.N.T.S. 137, 19 I.L.M. 1523 [hereinafter Mine Protocol].

46. U.S. DEPT OF STATE, *Landmine Policy White Paper*, (Feb. 27, 2004), available at <http://www.state.gov/t/pm/rls/fs/30047.htm> (last visited Feb. 28, 2005) [hereinafter *Landmine Policy White Paper*].

mines remain lethal for years, even decades. Land mines that cannot be detected using available technology also present a long-term threat to non-combatants. The Mine Protocol addressed these and other aspects of anti-personnel mine use, including a requirement that the party laying mines assume the responsibility to prevent their irresponsible or indiscriminate use.⁴⁷

The international community built upon the foundation of the Mine Protocol in an effort to further reduce the impact of anti-personnel mines on non-combatants. The Government of Canada championed this effort, resulting in the 1997 Anti-Personnel Mines Convention;⁴⁸ Canada and 144 other nations have ratified the treaty.⁴⁹

The Canadian Forces, in compliance with the APM Convention, cannot:

- use anti-personnel mines;⁵⁰
- develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines; or
- assist, encourage or induce activities prohibited by the APM Convention.⁵¹

The U.S. continues to use anti-personnel mines in a manner consistent with the Mine Protocol. In fact, the current U.S. policy on land mines exceeds the requirements for use of anti-personnel mines under the Mine Protocol and addresses the use of anti-tank mines, which are not covered under the APM Convention.⁵²

47. Mine Protocol, *supra* note 45, at Art. 3.

48. See THE ACRONYM INST. FOR DISARMAMENT DIPLOMACY, Disarmament Documentation, available at <http://www.acronym.org.uk/docs/0212/doc01.htm> (last visited Feb. 28, 2005) (discussing Canada's role in the ratification of the Anti-Personnel Mines Convention).

49. See APM Convention, *supra* note 44. For an up-to-date list of the countries who have signed the APM Convention, see INT'L COMM. OF THE RED CROSS, Anti-Personnel Landmines, available at <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Focus:Landmines?OpenDocument> (last visited Feb. 28, 2005).

50. "Anti-personnel Mine" is defined as "a mine designed to be exploded by the presence, proximity, or contact of a person and that will incapacitate, injure or kill one or more persons," while "mine" is defined as "a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle." APM Convention, *supra* note 44, 2056 U.N.T.S. at 242, art. 2.

51. OFF. OF THE JUDGE ADVOCATE GENERAL, CANADIAN NAT'L DEF. JOINT DOCTRINE MANUAL, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS [B-GJ-005-104/FP-021] para. A001, at 5A-1 (Aug. 18, 2001), available at http://www.dcds.forces.ca/jointDoc/docs/LOAC_e.pdf (last visited Feb. 28, 2005) [hereinafter LAW OF ARMED CONFLICT].

52. *Landmine Policy White Paper*, *supra* note 46. To reduce humanitarian hazards posed by mines, the U.S. will, among other actions:

The APM Convention does not prohibit the use of anti-personnel mines that are command-detonated. The Canadian Forces are authorized to use anti-personnel mines, such as the Claymore Mine, if they are detonated by mechanical or electronic means.⁵³ In this respect, the Canadian and U.S. Forces are fully interoperable. The use by U.S. Forces of any other type of anti-personnel mine poses a challenge for Canadian Forces, however. Imagine, for instance, a combined Canadian and United States military operation in which the forces are co-located. The U.S., under its current policy, may employ anti-personnel landmines as part of the defensive perimeter around the combined force. These mines may or may not be command-detonated. How does this use of landmines prohibited by the APM Convention affect the operations of the Canadian Forces?

The Government of Canada became a party to the APM Convention with the Statement of Understanding that the mere participation in combined operations with a non-party State would not be a violation of the Convention.⁵⁴ However, the Canadian Forces may not use anti-personnel mines other than those that are command-detonated and may not request the non-party State, such as the U.S., to use anti-personnel mines in the defense of the Canadian Forces.⁵⁵ In the example above, if the combined force is under the command and control of a U.S. commander, the Canadian Force would recognize the right of the U.S. Force to defend itself through the use of anti-personnel mines, although the Canadian Force could not be actively involved in the planning or emplacement of the mines.⁵⁶ If the

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- After the year 2010 no longer use persistent landmines of any type;
 - Develop alternatives to current persistent landmines that incorporate enhanced self-destructing/self-deactivating technologies; and
 - Employ only those landmines that exceed the detectability specifications of the Mine Protocol.

53. LAW OF ARMED CONFLICT, *supra* note 51, at para. A002, at 5A-2.

54. *Id.* at para. A001, 5A-1 (“It is the understanding of the Government of Canada that, in the context of operations, exercises or other military activity sanctioned by the United Nations or otherwise conducted in accordance with international law, the mere participation by the Canadian Forces, or individual Canadians, in operations, exercise, or other military activity conducted in combination with the armed forces of States not a party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be assistance, encouragement or inducement in accordance with the meaning of those terms in article 1, paragraph 1 (c).”).

55. *Id.* at para. A002, 5A-2.

56. *See id.* (“The right of states which are not signatories or parties to the APM Convention to use anti-personnel mines in self-defence is not precluded by the Convention.”).

combined force is under the command of a Canadian officer, than anti-personnel mines could not be used under any circumstances.⁵⁷

The Canadian approach to use of anti-personnel mines reconciles that nation's legal obligation under the APM Convention with the practical concerns of operating with the U.S. and other states not parties to the Convention. The combined forces commander and planning staff must recognize the legal and policy limitations on Canada's use of landmines and construct the operations plan in a way that will provide for protection of the combined force without jeopardizing Canada's status under the APM.

B. Use of Deadly Force to Protect Property

Both Canada and U.S. Forces regulate the use of force in operations through rules of engagement (ROE).⁵⁸ Each nation bases these rules on national and international law, national policy, and operational requirements. Each nation also distinguishes between rules for armed conflict and rules for peacetime operations short of armed conflict.⁵⁹

The law and policy upon which Canadian and U.S. ROE are based are generally very similar. As a result, there are usually few differences that must be resolved in developing ROE for combined U.S.-Canadian operations. Limitations on use of weapons, such as those on anti-personnel mines previously discussed, present one area of difference. Another area is the use of force to protect property in operations short of armed conflict.

The Canadian approach to ROE in peacetime operations and those short of armed conflict recognizes that Canadian Forces have

57. *Id.* ("The use of anti-personnel mines by the combined force *will not be authorized in cases where Canada is in command of a combined force.*")

58. The Department of Defense defines ROE for U.S. Forces as the "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which the United States forces will initiate and/or continue combat engagement with other forces encountered." DOD DICTIONARY, *supra* note 4, at 461. The Canadian definition is similar: "ROE are orders issued by military authority that define the circumstances, conditions, degree, manner, and limitations within which force, or actions which might be construed as provocative, may be applied to achieve military objectives in accordance with national policy and the law." CANADIAN NAT'L DEF., USE OF FORCE IN CF OPERATIONS, at 5-5 (Nov. 5, 2004), *available at* http://www.dcds.forces.gc.ca/jointDoc/docs/B-GJ-005-300_e.pdf (last visited Feb. 28, 2005) [hereinafter USE OF FORCE IN CF OPERATIONS].

59. *Id.* at 5-6. For the unclassified policy on U.S. ROE, *see* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, (Jan. 15, 2000), *available at* http://www.fas.org/man/dod-101/dod/docs/cjcs_sroe.pdf (last visited Feb. 28, 2005) [hereinafter SROE].

no authority to use force (except for self-defense) unless authorized through ROE.⁶⁰ The defense of Canadian military or non-military property is not included in the right of self-defense, so ROE must specifically authorize the use of force for that purpose.⁶¹ This is similar to the U.S. approach to the defense of property. The authority to use force in the defense against the attempted theft, damage or destruction of specific property is addressed in ROE. For example, the U.S. Forces operating in the peace enforcement operation in Kosovo in 1999 received the following authority to defend property:

“You may also fire against an individual who attempts to take possession of friendly force weapons, ammunition, or property with designated special status, and there is no way of avoiding this.”⁶²

The authority for Canadian Forces to use deadly force to protect property may not be as extensive as the authority exercised by U.S. Forces. The Chief of Defence Staff of the Canadian Forces has stated that such authority “will not be all-inclusive and will generally be restricted to property with designated special status. . . .”⁶³ The U.S. Forces are frequently authorized to use deadly force to protect a broad category of military property (arms, ammunition, shoulder-fired rockets, etc.) as distinct from other property that has been designated with a special status.

Both nations address this potential difference in authority in their doctrine and ROE. The Canadian publication on ROE acknowledges that “diplomatic considerations may ultimately limit legitimate uses of force, or they may permit a greater latitude in the use of force than would be permitted in a purely Canadian operation. . . .”⁶⁴ Both Canada and the U.S. take the position that their respective forces may operate under combined or multi-national ROE only after the rules are approved by the Chief of Defence Staff for the Canadian Forces⁶⁵ or by the President or Secretary of Defense for U.S. Forces.⁶⁶ Clearly, the optimal solution is to craft a single set of ROE for the combined force, taking into consideration the legal obligations and restraints of each nation’s armed force.

60. USE OF FORCE IN CF OPERATIONS, *supra* note 58, at 5-6.

61. *Id.*

62. OPERATIONAL LAW HANDBOOK, *supra* note 43, at 99.

63. USE OF FORCE IN CF OPERATIONS, *supra* note 58, at 5-3.

64. *Id.* at 5-7.

65. *Id.* at 5-7.

66. SROE, *supra* note 59, at para. 1c(1), at Enclosure A.

If there is a difference in authority, such as using force in the defense of property, that cannot be resolved, each nation has a “default” position. The U.S. Forces will operate under the Standing Rules of Engagement⁶⁷ after first notifying the other participating forces of this action. The Canadian Chief of Defense Staff may choose one of the following alternatives:

- caveat the combined or multi-national ROE for Canadian Forces personnel, that is, clearly identify in the ROE which rules will not apply to the CF;
- issue-specific ROE for Canadian Forces
- withdraw Canadian contingent from the mission.⁶⁸

An incident during the UN peace-keeping mission in Haiti in 1995 (Operation Pivot) illustrates the occasional conflict in self-defense authority between Canadian and U.S. Forces and how this conflict may be resolved. As recorded in Canada’s Military Lawyers:

One of the initial legal problems was the difference between the Rules of Engagement applicable to the Canadians and those followed by the Americans and other UN contingents. Canada had stricter limitations on the use of deadly force than these others. In one example, an American Captain who was in charge of four or five Canadian military engineers saw a theft take place and tried to catch the thief. When he could not, he ordered the Canadians to shoot the culprit. The Canadians declined, citing the limitations in their Rules of Engagement that prohibited shooting someone who was running away and of no immediate danger to the Canadians or those under their protection.⁶⁹

In this instance, the differing authority for the use of deadly force in self-defense and defense of property was resolved with the issuance of ROE specific to the Canadian contingent.

V. CONCLUSION

There may be sound policy or political reasons for the leaders of our respective nations not to participate in a combined or multi-national operation. National interests and international relations differ. Nevertheless, the differing legal obligations with respect to use of force and weapons should not be an obstacle to a combined military effort. The differences are few and the doctrine and practice of each

67. *Id.* at para. 1c(2), at Enclosure A.

68. See USE OF FORCE IN CF OPERATIONS, *supra* note 58, at para. 507, at 5-6 (“The CDS is the sole authority for the authorization of ROE or changes to the ROE.”).

69. McDONALD, *supra* note 23, at 176.

nation provides sufficient flexibility to achieve unity of effort while honoring the obligations of each nation. Judge Advocates in both Canadian and U.S. Forces continue to be instrumental in weaving the fabric of that combined effort.