

X

Legal Issues in Coalition Warfare: A US Perspective

Charles Dunlap*

With increasing frequency, a growing number of nations find themselves engaged in operations with US forces. I hope to give you some perspective on how the United States views the legal obligations and challenges of operations within coalitions.

A nation's participation as a member of a coalition is more than just a synchronization of military plans and objectives; it is also a synchronization of legal issues. Interpreting and applying the law are rarely easy tasks with coalitions comprised of nations with widely differing political, cultural, and historical influences on their legal systems. The precise legal context is becoming increasingly technical, yet vitally important—and hardly intuitive. Indeed, legal issues and the differing approaches amongst coalition partners make the legal aspects of conflict a strategic issue that must be addressed. As General James L. Jones observes:

It used to be a simple thing to fight a battle. . . . In a perfect world, a general would get up and say, "Follow me, men," and everybody would say, "Aye, sir" and run off. But that's not the world anymore. . . . [Now] you have to have a lawyer or a dozen. It's become very legalistic and very complex.¹

* Brigadier General, US Air Force. The views and opinions expressed by the author are his alone and do not necessarily reflect those of the US Government or any of its components.

Legal Issues in Coalition Warfare: A US Perspective

Of course, even when lawyers are there to advise, a variety of legal challenges will still affect coalition operations. Each one will be discussed in more detail, but here are the big issues: interpreting and applying international law in coalition warfare; domestic law and policy limitations on the different coalition partners (including the United States); and how coalition partners provide legal support within the operational area. I will close with a challenge that faces military forces of every democratic nation: the enemy's abuse of law as a tool of asymmetrical warfare.

With all of these issues, often the biggest question is "which law governs?" On one hand, national commanders in the field and leaders back at home ask, "How does my nation's interpretation and application of law affect my ability to conduct operations with coalition partners?" On the other hand, the coalition commander must overcome these same legal issues to effectively employ national forces in coalition operations.

International Law: The Challenge of Applying the Law of Armed Conflict in Coalition Warfare

International law in coalition operations may appear, at first glance, to be a matter of interpreting and applying established rules to the coalition as a whole. Much of international law related to coalition operations is fairly settled, for example, law of the sea and diplomatic relations law. However, difficulties arise as to whether a particular international law is recognized by each nation participating in the coalition and as to widely different interpretations of seemingly fundamental rules. In the end, a nation's domestic law and policy will shape its application of international law.

The law of armed conflict (LOAC) is international law that everyone agrees covers coalition warfare.² Yet, the interpretation and application of armed conflict laws differ, sometimes significantly, between coalition partners. Which law governs? To illustrate this thorny question from a US point of view, we'll look at examples from customary international law and international agreements.

Some LOAC is based in customary international law. These are rules that nations have historically followed because of a sense of legal obligation to do so. However, how each nation views them can vary widely. For example, depleted uranium (DU) is a common element used in making armor piercing rounds for a variety of ammunition, including the A-10's 30 mm cannon.³ The United States views DU as a legal weapon that can be used. However, some other nations consider it unlawful because of the potential dangers of exposure from the resulting debris.⁴

International agreements, or treaties, are arguably more robust international law than customary law because nations agree to be bound by the terms of treaties to which they are parties. The bulk of LOAC has been established and defined by

widely accepted international agreements.⁵ Treaties that most individuals associate with LOAC are the Geneva Conventions and its Protocols.⁶ However, not all coalition partners are parties to the same treaties. For instance, the United States has not ratified Protocol I, yet it still follows the principles as part of customary law.⁷ Another example is the Ottawa Convention on anti-personnel mines.⁸ The United States is not a party to this while most coalition partners are.

Even if coalition partners are all parties to the same treaties, various domestic implementation laws affect how and when each nation follows the treaties. This can be seen in the different interpretation and application of the Geneva Conventions in the war on terror by long-time allies and coalition partners.

One area that created a legal debate and a flurry of press coverage is the International Criminal Court (ICC).⁹ Although the United States was an original signer of the treaty that created the ICC, it was never ratified by the Senate. Thus, the United States is not a party to the treaty. Among other things, the US government has concerns about politicized prosecutions by individuals or entities who seek to use the process not to redress legitimately made allegations, but merely to disrupt US operations. In fact, the United States routinely asks other nations to sign “Article 98” agreements¹⁰ which would operate to protect US service members from being sent to the ICC for trial. This has not stopped other individuals from filing suit in other nations’ courts alleging that US leaders were committing war crimes.¹¹ In any event, as a matter of policy the United States prefers to handle allegations of misconduct in American courts, and seeks to avoid subjecting its military personnel to the jurisdiction of foreign courts.

Even when nations agree on the law, the application to individual cases can vary widely. For example, radio and television stations are seen by the United States as potential military targets. During the Kosovo operations, US aircraft participating in a NATO operation bombed a Serb radio and television facility. Many considered this an unlawful attack on a civilian target, despite the military use of the airwaves.¹² This also very nearly became an issue during Operation Iraqi Freedom (OIF) when the United States, as part of coalition operations, considered attacking Iraqi television and radio stations. In this case, the Iraqis themselves made it clear that these were valid military targets under LOAC. Even though the television is traditionally thought of as a civilian medium, the Iraqis used it to rally troops and provide military direction. The news reports were even read by individuals wearing uniforms of the Iraqi army. Nevertheless, this is an area where there will be controversy in future conflicts. Coalition commanders will have to address this on a case-by-case basis.

Domestic Law, Policy, and Regulation: Limits on National Commanders

As we have seen, international law affecting coalition warfare is viewed through the lenses of nations taking part in a coalition. Domestic law further shapes, and often limits, nations' ability to work as coalition partners. National commanders and their forces must comply with their domestic laws, policies, and regulations, further complicating the legal aspects of coalition operations.

US domestic law, policies, and regulations have the potential to significantly impact US forces' conduct in coalitions. For US forces, domestic law is another aspect of LOAC. Our policy is to apply LOAC principles to any conflict, no matter how characterized.¹³ Going even further, US forces normally operate within rules of engagement (ROE) for a particular operation. Using LOAC as a foundation, civilian and military leadership develops ROE based on domestic law and policy considerations, in addition to LOAC. Common ROE for coalition forces is highly desirable. However, even ROE for coalition forces can be different as a result of each partner's own domestic laws and policy. The United States works with coalition partners to develop and abide by common ROE in coalition operations; however, US forces always retain the right to "use necessary and proportional force for unit and individual self-defense."¹⁴

As with other aspects of law, ROE are not immune from differing interpretations. US ROE typically permit units and individuals to use force in self-defense in situations where someone or some group displays hostile intent and capability. This is the "threat of imminent use of force against . . . US forces" or the use of the threat of force to "impede the mission and/or duties of US forces."¹⁵ Each coalition partner defines hostile intent differently and may even limit the ability of their forces to engage in self-defense in these types of situations. This becomes an even more interesting determination when dealing with air operations. What represents "hostile intent" to an aircraft?

Domestic law can create challenges for US commanders in areas other than LOAC. Commanders must abide by those international agreements to which the United States is a party, which may limit their authority. Furthermore, under US law American commanders usually cannot provide logistic support to coalition partners without some type of government-to-government agreement covering the exchange of goods and services—and often having a reimbursement requirement.¹⁶

Command and control issues are also very important. The US Constitution and domestic law place limits on the ability of US forces to serve under foreign command. Typically, operational control or tactical control is not a problem as long as there is ultimately a US commander who exercises actual command.

Discipline is at the core of every successful military operation, including coalition operations. Historically, each coalition partner is responsible for disciplining its troops in accordance with domestic military and criminal law. This authority does not rest with the coalition commander, but with the national commanders of the coalition partners. However, every coalition commander has a strong interest in unit welfare and discipline, and should make sure that discipline is carried out to avoid adverse operational effects. As General Sanchez learned during the Abu Ghraib abuse scandal, a failure of discipline can be just as bad as a defeat on the battlefield.¹⁷

Applying domestic law to disciplinary matters creates challenges for all coalition commanders, especially with respect to situations that arise during specific operations. Since Operation Desert Shield in 1990, US forces deployed for a contingency operation generally operate with some form of “General Order #1” applicable to all components of the American contingent.¹⁸ Such orders are typically issued at the beginning of an operation and may limit the actions of troops for policy reasons. They limit, for example, the ability of troops to consume alcohol in certain locations. While US troops often are prohibited from drinking alcohol, other troops may be free to do so. A US soldier is likely to be punished for drinking, while her British friend might not. It is just another area where coalition partners may differ and may present complications for US commanders.

The US illustrations, above, highlight some of the international and domestic law challenges faced by coalition commanders and their legal teams when tackling the question of “which law governs?” We now move to the individuals who can assist commanders to effectively accomplish the coalition mission within the compass of the law.

Legal Support to Commanders: The Role of Lawyers in the Coalition

The types of legal support commanders receive vary greatly between the coalition members. Although General Jones would not go to war without a dozen or so lawyers, many coalition partners do not have judge advocates (JAG)¹⁹ or do not train them on the various aspects of operational law. In many cases, their legal advisors are not even deployed forward with the troops they service. For operations law, many coalition partners have to rely on civilian attorneys back in their nation’s capital for advice on complex and ever-changing operational issues. However, when coalition JAGs do deploy together, great things can happen.

Bright Star 99/00—a biannual exercise held in Egypt²⁰—was a perfect example of coalition JAGs working together. The 1999/2000 exercise brought together military lawyers from the United States and Britain into a coalition warfare setting. The

coalition JAGs bring their knowledge of their nations' domestic law and policy to the table and help educate other JAGs on why they cannot engage in certain operations or use certain weapons. This is a reason we like to see robust, international JAG participation in coalition operations.

In the United States, and for coalition partners as well, JAGs must have more and more knowledge about areas beside the law. JAGs need to know the weapon systems that are being used, how they are being used, and the overall strategy for a particular operation. They also need to understand the complex and intricate command and control environment in which they operate.

How do US JAGs cope with the issues they face in operations, especially serving in Coalition Air Operations Centers (CAOC)? All JAGs that deploy to CAOC positions are required to attend a six-week-long training program on the computer systems and methodologies used to run a CAOC. This is not a JAG-specific course, but one attended by all specialties who serve in the CAOC. It enables them to learn how things are done and what attributes each career field brings to the fight.

In contrast to the increased training and resources available for US JAGs, many coalition partners do not have the access to high-tech systems found in the CAOC to enable them to provide effective oversight to operations. Nor do all coalition lawyers receive training in the complex and fast-paced conduct of modern warfare. Unfortunately, this may be leading to a tech and training gap between US JAGs and our coalition partners that will need to be addressed.

What about friendly fire cases? As the United States saw with the Tarnak Farms "friendly fire" case, this can cause both political and operational problems. Tarnak Farms was an incident in Afghanistan where US aircraft mistakenly bombed Canadian ground forces. Canadian and US military lawyers were deeply involved in investigating and advising commanders after this unfortunate incident. Legal issues ranged from LOAC to discipline to release of information. These are difficult questions that still need more thoughtful study.

Another challenge facing the United States is how to respond to allegations of LOAC violations. Unfortunately, in conflicts innocent civilians will be harmed. The United States must maintain a transparent approach to its targeting especially in the media-intense world. US targeting philosophies and the lengths we go to in order to avoid unnecessary casualties need to be highlighted and available to the media. When incidents occur, reports should be made available for the media and the general public so nothing is hidden. In addition to being an integral part of the targeting process, JAGs must be prepared to advise commanders and military spokespersons on alleged LOAC violations.

What roles to JAGs play in modern conflict? Michael Sirak in *Jane's Defence Weekly* suggests that JAGs are the ones who determine what weapons are built, the

bombs, and their targets.²¹ The reality for US forces is that JAGs are *advisors*—*commanders* make the decisions about weapons and targets.²² Effective legal support to coalition forces is critical in this age of complex legal challenges, but lawyers should not and cannot displace commanders as decision-makers.

Lawfare: An Asymmetrical Threat to Coalitions

Besides being a foundation for how we operate, the law is being used as a weapon by our adversaries. As Rivken and Casey said in 2001, “international law may become one of the most potent weapons ever deployed against the United States.”²³ Our enemies, as William Eckhardt said, are now attacking our military plans as being illegal and immoral. Our laws have become a new Clausewitzian “center of gravity.”²⁴

This is a new form of asymmetrical warfare I call “lawfare.”²⁵ As more and more adversaries learn they cannot go up against our coalition forces on the battlefield, they have moved to attack us through the law to achieve their operational objectives. However, not all lawfare is “bad” and the United States applies it when necessary, like controlling the cameras on commercial satellites with coverage areas over Operation Iraqi Freedom/Operation Enduring Freedom bases. Such control is achieved through the use of law, not the use of force. Lawfare, as I use this term, is an operational methodology that can be used for “good” or “bad” purposes.

Our adversaries often employ an abusive form of lawfare aimed at undermining the kind of public support democracies need to conduct military operations. It very much has a Clausewitzian basis. When we talk about Clausewitz, we are talking about the “remarkable trinity” that coalesces to create warfighting potential: the government, the people, and the military. America’s typical approach to conflict is to focus its energy and effort against the military capability of the enemy. Using lawfare, adversaries are not trying to defeat the United States militarily; they seek to separate the people from the trinity and erode their will for the conflict. How do they erode the will of the people?

One way is to use actual or perceived LOAC violations. By repeatedly characterizing military actions as illegal and immoral, for example declaring LOAC violations, the enemy’s objective is to cause the people to grow weary of war and begin to question the military and government’s conduct. Increasingly, organizations and forums are facilitating these messages so the enemy has a variety of ways to spread the word. As technology continues to develop in the 21st century, so too do new means of spreading information. Our adversaries have been quick to utilize the Internet and the power of the globalized media to spread their message.

Legal Issues in Coalition Warfare: A US Perspective

Another strategy that we have seen is actually goading coalition forces into committing LOAC incidents that would have strategic impact on our operations. For example, bin Laden has attempted to exploit the fact that women and children were victims of collateral damage in an effort to ensnare the United States into a larger East-West conflict, further inflaming Muslim opinion against the United States and other friendly nations, including those in the Persian Gulf.²⁶ Our enemies know that the secret to any democratic society is to get their message to the people and the people will respond.

We have also seen Iraqi forces that feigned surrender and then turned to attack.²⁷ These incidents occurred frequently, causing coalition and civilian casualties. The enemy's perfidy created an environment in which US troops have been known to shoot first and ask questions later when they encounter surrendering individuals. However, the television-viewing public sees only the US conduct. The more we see incidents like this, the more people believe the war is being wrongly fought. Professors W. Michael Reisman and Chris T. Antoniou explain:

In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people *believe* that the war is being conducted in an unfair, inhumane, or iniquitous way.²⁸

However, this does not mean that democracies are at a disadvantage in future wars. In fact, history proves that those nations that comply with the accepted norms of behavior in warfare are more successful than those nations that wage war against civilians.

Coalitions must develop strategies to counter lawfare; just as they must be prepared to fight any asymmetrical attack. Foremost, every coalition partner must be committed to complying with the law. Participating nations should strive to harmonize their interpretation and application of LOAC, despite the legal and political challenges of doing so. Many of these issues are for the civilian leadership to tackle. Yet, commanders, with their lawyers, can emphasize common ground among coalition forces and be ready to respond to lawfare through transparency and prompt public response.

Coalition Warfare: A Synchronization of Legal Issues

Nations with a stunningly broad range of operational capabilities and legal systems have joined the United States in a number of military operations. Integrating these diverse forces into an effective coalition requires more than coordination of

military plans, objectives, and logistics. It requires orchestration of each nation's interpretation and application of law.

I have tried to present a US perspective on some of the legal challenges faced by modern coalitions. Far from being secondary, domestic law and policy are at the heart of different legal perspectives, from LOAC to the legal services provided by a nation to its commanders. The United States views its legal obligations and challenges through this lens, which neither discounts nor minimizes the importance of international law. In addition to confronting legal issues between coalition partners, the coalition must be prepared to counter the enemy's lawfare. In the highly complex environment of coalition warfare, synchronization of legal issues is critical to operational success.

Notes

1. Lyric Wallwork Winik, *A Marine's Toughest Mission (Gen. James L. Jones)*, PARADE MAGAZINE, Jan. 19, 2003. General Jones is the Supreme Allied Commander, Europe.
2. Compliance with the Law of Armed Conflict, Air Force Policy Directive 51-4 (Apr. 26, 1993). Paragraph 6.4, defines LOAC as "All international law which concerns the conduct of hostilities during armed conflict and is binding on the United States or US citizens. It includes international treaties and agreements to which the United States is a party as well as customary international law. These treaties include the 1949 Geneva Conventions and the 1907 Hague Conventions and Regulations, among others."
3. For information about the A-10 aircraft, see <http://www.af.mil/factsheets/factsheet.asp?fsID=70>.
4. See generally, Depleted Uranium Education Project, <http://www.iacenter.org/depleted/du.htm> (last visited July 14, 2006); *contra*, see Jim Garamone, *Study Finds Little Risk From Depleted-Uranium Particles*, Armed Forces Information Service, Oct. 19, 2004, available at http://www.defenselink.mil/news/Oct2004/n10192004_2004101903.html (last visited July 14, 2006).
5. At least 15 significant LOAC treaties have come into force since 1948. See DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
6. The four Geneva Conventions of August 12, 1949, are the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 75 U.N.T.S. 287. All reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 197, 222, 244 and 301, respectively. The two Protocols Additional to the Geneva Conventions of 1949 are the 1977 Additional Protocol to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), June 8, 1977, 1125 U.N.T.S. 3, reprinted in *id.* at 422; and the 1977 Additional Protocol to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), June 8, 1977, 1125 U.N.T.S. 609, reprinted in *id.* at 483.

Legal Issues in Coalition Warfare: A US Perspective

7. The United States is not a party to the Additional Protocols; however, to the extent that certain provisions of the Protocols reflect customary international law or existing law under the Geneva Conventions of 1949, the United States adheres to those provisions. For a discussion on the US views concerning the Additional Protocols, see Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 419 (1987).
8. The technical title of the Ottawa Convention is the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, Sept. 18, 1997, 36 INTERNATIONAL LEGAL MATERIALS 1507, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 648, *available at* <http://www.icrc.org/ihl> (last visited Mar. 1, 2006).
9. For information about the ICC, see <http://www.icc-cpi.int/about.html> (last visited Mar. 1, 2006).
10. For information about Article 98, see <http://www.state.gov/t/pm/art98/> (last visited July 14, 2006).
11. *See e.g., Rumsfeld Sued for War Crimes in Germany*, DEUTSCHE WELLE, Nov. 30, 2004, *available at* <http://www.globalresearch.ca/index.php?context=viewArticle&code=20041130&articleId=269> (last visited Mar. 1, 2006).
12. Human Rights Watch, *Civilian Deaths in the NATO Air Campaign* (Feb. 2000), *available at* <http://www.hrw.org/reports/2000/nato/index.htm#TopOfPage> (last visited Jul. 5, 2006).
13. Office of the General Counsel, Department of Defense, DoD Law of War Program, DoD Directive 5100.77 (Dec. 9, 1998). Paragraph 4.1 states “The law of war obligations of the United States are observed and enforced by the DoD Components.”
14. Chairman of the Joint Chiefs of Staff Instruction 3121.01A, *Standing Rules of Engagement for U.S. Forces*, Encl. A, para. 1.c(1) at A-1 (Jan. 15, 2000), *available at* http://www.fas.org/man/dod-101/dod/docs/cjcs_sroe.pdf (last visited July 14, 2006).
15. *Id.*, para. 5.h, at A-5.
16. For a brief discussion of sale, disposal, and transfer of defense articles and services, see US Air Force Judge Advocate General’s Department, *Air Force Operations & the Law: A Guide for Air & Space Forces*, Ch. 48 (2002), *available at* <http://www.au.af.mil/au/cpd/jagschool/press/iodb/index.htm> (last visited July 14, 2006).
17. Tom Brokaw, *National Broadcasting Corporation Nightly News*, June 30, 2004, *available at* <http://www.msnbc.msn.com/id/5333895> (last visited March 3, 2006).
18. For an example of a General Order #1, see US Central Command, *General Order Number 1A, Prohibited Activities for U.S. Department of Defense Personnel Present Within the United States Central Command (USCENTCOM) AOR*, December 19, 2000, *available at* <http://www.mnf-iraq.com/archive/regulations/go1a.pdf> (last visited July 14, 2006).
19. In US usage, the term “judge advocate” refers to a legal advisor on the staff of a military commander. The United States designates the senior uniformed lawyer of each military Service as “Judge Advocate General,” thus the common use of “JAG” to identify military lawyers. *See* BLACK’S LAW DICTIONARY 976 (4th ed. 1968).
20. *See* US Department of Defense, *Memorandum for Correspondents*, No. 143-M, Sept. 14, 1999, *available at* http://www.defenselink.mil/news/Sep1999/m09141999_m143-99.html (last visited July 14, 2006).
21. Michael Sirak, *Fighting by the Rules: Debating the Laws of War on the Unconventional Battlefield*, JANE’S DEFENCE WEEKLY, Jan. 14, 2004.

Charles Dunlap

22. This has been codified in Chairman of the Joint Chiefs of Staff Instruction 5810.1B, Implementation of the DOD Law of War Program (Mar. 22, 2002), *available at* http://www.dtic.mil/cjcs_directives/cdata/unlimit/5810_01.pdf, which mandates that JAGs provide advice to commanders at all operational levels.
23. David Rivkin & Lee Casey, *The Rocky Shoals of International Law*, THE NATIONAL INTEREST, Winter 2000/2001, at 35, extract *available at* <http://ontology.buffalo.edu/smith//courses01/rrtw/Rivkin.htm> (last visited July 14, 2006).
24. William G. Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 431 (2003).
25. See Charles J. Dunlap, Jr., *Law and Military Interventions*, Working Papers, Carr Center for Human Rights Policy, Harvard University, Nov. 29, 2001 *available at* <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> (last visited July 14, 2006).
26. Lisa Beyer, *Osama's Endgame; His aims are clear—to expel the U.S. from the Islamic world and unite Muslims in one empire*, TIME, Oct. 15, 2001, at 17.
27. Ron Harris, *Surprise attacks by Iraqis who "surrendered" turn military's mood mean*, ST. LOUIS POST-DISPATCH (Missouri), Mar. 25, 2003, at A1.
28. W. MICHAEL REISMAN & CHRIS T. ANTONIOU, THE LAWS OF WAR xxiv (1994) (emphasis added).