

## CHAPTER 16

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# *The Legal Way Ahead Between War and Peace*

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We know that we're going to have fewer "wars" but a lot more conflicts. There's a real blurring between the definitions of "war" and "peace," "domestic" and "nondomestic," "economic," and "military." All of this means that we need to be able to thrive in uncertainty. Our role is to support U.S. foreign policy. Increasingly, that means trying to keep large conflicts from breaking out—while also maintaining the ability to transition quickly to combat operations and, if necessary, to spearhead a decisive victory.

General Peter J. Schoomaker, former U.S. Army Chief of Staff, speaking in 1999<sup>1</sup>

Military professionals have discovered that the post-Cold War world is rife with persistent, low-level violence, much like its predecessor. Many regions are experiencing a rise in the amount of conflict in the absence of restraints previously imposed by the superpowers. Frustration in many developing or "Third World" nations is increasing for economic or political reasons, and insurgency—the use of low-level, protracted violence to overthrow a political system or force fundamental change in the political and economic status quo—looks to be an enduring security problem. This generic description fits current conditions in Iraq and Afghanistan too, but can be applied far more broadly.<sup>2</sup>

This chapter is written from the perspective of the military operational lawyer in an attempt to explain where he fits in this world, from both the top-down and bottom-up perspectives in linking military operations to U.S. foreign policy. There are three issues hidden in this perspective. The first is tied to ideas about the changing nature of armed conflict. The operational lawyer currently functions most of the time in low-intensity armed conflicts like insurgencies or peacekeeping, precisely because that is the business his battlefield commander "clients" now do most of the time. So his professional world may be focused more often on civil affairs than traditional targeting law as such. The second is that his legal capacity is an advisory one (e.g., is not often devoted to running courts-martial or military commissions). And most of this advisory capacity is dedicated to planning military operations rather than their execution as such. Finally, combining advisory capacity with the point that "small wars" predominate, this version of armed conflict law is an amalgam of domestic and international law focusing currently on non-traditional questions like protection of NGO (nongovernmental organization) personnel

providing humanitarian assistance, or how best to support civil authorities trying to reconstitute local courts and government in the face of targeted assassinations in the course of an insurgency. So the border seems porous between traditional military operations and something akin to law enforcement, and in any case involves a high degree of contact and often cooperation with nonmilitary bodies (i.e., foreign governments, the U.S. government interagency process, and NGOs).

For the balance of this chapter, I look first at the current taxonomy of armed conflict and the concept that it may be an uneasy fit with traditional ideas about “war.” Thereafter, we examine how this affects military doctrine in supporting U.S. foreign policy generally, with consequent effects on the military operational lawyer. Finally, we look at the activities of military operational lawyers at the practical level in terms of planning operations. The hope is to provide some insight into what and how military operational lawyers actually make decisions touching upon the LOAC (law of armed conflict) in their workaday world.

### DEFINING WHAT LIES BETWEEN WAR AND PEACE

From 1945–1994, the world saw sixty major armed conflicts. Some twenty million people were killed, fifty million people were injured, 17.5 million people became war refugees, and twenty-four million became internally displaced persons. Some 85 percent of these conflicts were intrastate, and 95 percent of these conflicts were outside Europe (to include thirty-five in Africa alone).<sup>3</sup> By 2003–2004, the number of ongoing conflicts had escalated to forty-one.<sup>4</sup>

During that 50+ years of strife, a multitude of new terms have emerged to describe such armed conflicts, including but not limited to those in the table below.

Not all of these terms/acronyms will be discussed, given overlap of some, or the favor in which others may be held in the international legal community. But this begs the most important question for any military professional: just exactly what is war? Elements of what traditionally constitutes a war may include: (1) contention, (2) between at least two nation states, (3) wherein armed force is employed, (4) with an intent to overwhelm.<sup>6</sup> But even this ignores the idea that many modern armed conflict situations may involve nonstate actors (e.g., al Qaeda). Political, economic, social welfare, military, and cultural

**Table 16.1** Range of Military Operations (JP 3-0, 2006)<sup>5</sup>

|  |   |   |
|--|---|---|
| Brush fire wars                            | Complex emergencies   | Complex humanitarian operations                           |
| Complex contingency operations             | Contingency operations                                      | Crises  |
| Dirty little wars                          | Disaster operations   | Guerilla war  |
| Humanitarian operations                    | Insurgencies and counterinsurgencies                        | Internal war/armed conflict                               |
| Irregular warfare                          | LIC (low intensity conflict)                                | LRC (localized regional conflicts);                       |
| MOOTW (military operations other than war) | OMO (other military operations)                             | OO (other operations)                                     |
| OOTW (operations other than war)           | Partisan war  | Peace operations  |
| Peace support operations                   | People’s war  | Revolutionary warfare                                     |
| Rebellion                                  | SASO/SOSO (stability and support operations) and small wars | SSTR (stability, support, transition, and reconstruction) |
| UW (Unconventional warfare)                | Wars of national liberation                                 | ... and many other terms!                                 |

institutions must plan for, or proscriptively cope with the consequences of such conflicts' first, second, and third-order effects. For instance:

- Unrest in Haiti leading to refugees fleeing to Florida;
- The *Zapatista* insurgency having economic effects on Mexico's industry and trade with other North American Free Trade Agreement nations;
- Serb repression of Kosovar Albanian nationalists leading to international peace enforcement presence with an unintended consequence of fostering regional crime syndicates; and
- Coalition-led combat operations in Afghanistan and Iraq, with follow-on stabilization and reconstruction efforts attacked by armed insurgents.

There are a variety of internationally recognized legal bases for use of force in relations between states, found in both customary and treaty law. Generally speaking, however, modern *jus ad bellum* (the law of resort to war) is reflected in the UN Charter. The Charter provides two bases for the resort to force in international relations: Chapter VII enforcement actions under the auspices of the Security Council, and self defense pursuant to Article 51 (governing acts of both individual and collective self defense). Insurgencies or similar intrastate armed conflicts typically involve nonstate actors, but may involve foreign military contingents deployed in support of a local government, as in Iraq and Afghanistan currently. International law concepts like intervention may lurk in the background, but technically foreign armed forces are typically present with the consent of the local government. Under those circumstances, *jus ad bellum* principles limiting the use of armed force between states are hardly applicable as a practical matter. Meanwhile, the consent concept raises its own tensions as witnessed by issues as currently in Iraq and Afghanistan concerning who commands joint foreign and local military operations, the effectiveness of local troops and collateral civilian casualties producing local political reaction (which feeds on itself in potentially narrowing consent's scope). Some form of *jus in bello* applies, which issues are discussed more fully in accompanying chapters, but for the moment, I turn to the broader hierarchy of applicable U.S. military principles in terms of the higher civilian level of command in terms of national security strategy, before reaching into the current taxonomy of military operations.

### **CIVILIAN–MILITARY PLANNING INTERFACE, OR THE TOP-DOWN VIEW**

Joint Publication (JP) 3-0, *Joint Operations*, notes that the U.S. approach to national strategic guidance and responsibilities starts with the President and SecDef (Secretary of Defense). They, through the CJCS (Chairman of the Joint Chiefs of Staff), direct the national effort that supports combatant (regional theater) and subordinate commanders to ensure: (1) national strategic objectives and joint operation termination criteria are clearly defined, understood, and achievable; (2) forces are ready for combat or mobilization; (3) intelligence assets are focused on the operational environment; (4) the strategic direction is current and timely; (5) the DOD (Department of Defense), allies, coalition partners, and/or OGAs (other government agencies) are fully integrated for planning and operations; (6) all required support assets are ready; and (7) forces and associated sustaining capabilities deploy ready to support the concept of operations. The products of such planning are the NSS (National Security Strategy), NDS (National Defense Strategy), NSHS (National Strategy for Homeland Security), and NMS (national military

strategy), shaped by and oriented on national security policies, to provide strategic direction for U.S. combatant commanders (CCDRs) focused on regions and theaters of potential operations. In the words of JP 3-0, these strategies “integrate national and military objectives (ends), national policies and military plans (ways), and national resources and military forces and supplies (means)”.<sup>7</sup>

JP 3-0 also highlights how U.S. military planning consists of joint strategic planning with its three subsets: (1) security cooperation planning, (2) force planning, and (3) joint operation planning. Specific to this chapter and the studied operations “between war and peace,” the President and SecDef “direct joint operation planning to prepare and employ American military power in response to actual and potential contingencies,” that is, emergencies “involving military forces caused by natural disasters, terrorists, subversives, or by required military operations.”<sup>8</sup> Joint operation planning “is directed toward the employment of military power within the context of a military strategy to attain objectives by shaping events, meeting foreseen contingencies, and responding to unforeseen crises,” whether planning for prospective and theoretical threats in the context of “contingency planning,” or the reaction to developing or ongoing events through “crisis action planning.”<sup>9</sup> While service-peculiar variants exist in conducting the planning process (e.g., the U.S. army service variant to be discussed later), the “joint” (multiservice) approach to the “joint operation planning process” consists of: (1) initiation; (2) mission analysis; (3) COA (course of action) development; (4) COA analysis and “wargaming” (predictive, simulation of a military operation); (5) COA comparison; (6) COA approval; and (7) plan or order development.

## TAXONOMY OF MODERN ARMED CONFLICTS, OR THE BOTTOM-UP VIEW

Far below the NSS level, the military operational lawyer works typically in military operations formally occupying the legal space between war and peace. His operational categories are his commander’s, which themselves come from civilian political leadership in the U.S. government insofar as the military operations in question invariably are in support of American foreign policy. The point to register here is that the operational character of armed conflicts is the framework for his advisory role.

### It’s A Small War After All

The term “Small War” is often a vague name for any one of a great variety of military operations. As applied to the United States, small wars are operations undertaken under executive authority, wherein military force is combined with diplomatic pressure in the internal or external affairs of another state whose government is unstable, inadequate, or unsatisfactory for the preservation of life and of such interests are determined by the foreign policy of our Nation . . . The essence of a small war is its purpose and the circumstances surrounding its inception and conduct, the character of either one or all of the opposing forces, and the nature of the operations themselves.

United States Marine Corps, Small Wars Manual (1940)

To the military professional, there is a certain *déjà vu* quality about post-Cold War armed conflict situations. They are increasingly compared in professional circles to the so-called “Banana Wars” which engaged the USMC (United States Marine Corps) before World War II. Thus, the USMC long ago wrestled with the practical as well as theoretical

ramifications of these armed conflicts “between war and peace.” Its role in Small Wars has a long and complex history. During the early years of the twentieth century, the USMC was widely viewed as the nation’s overseas police and initial response force. Moreover, the actual execution of these de facto roles were a natural adjunct of the USMC’s officially directed mission of “sea-based power projection” (military force from the sea) in turn buttressed by its fundamental “expeditionary operational character;” i.e., the availability for “sudden and immediate call.” As a result of this “natural fit” and the experience of a series of guerilla wars and military interventions, the Marine Corps began systematically to analyze the character and requirements of operations short of war proper, or “Small Wars” in familiar terminology.

As a result, the USMC developed and published as part of its doctrine the 1940 SWM (Small Wars Manual, a “how to” manual in effect). Still cited as valid military doctrine today, the USMC CETO (Center for Emerging Threats and Opportunities) initiated an effort to rewrite the SWM in 2001–2004, but retained the original’s wisdom while adding contemporary vignettes. The SWM defined the core of such operations with unusual prescience:

[S]mall wars are operations undertaken under executive authority, wherein military force is combined with diplomatic pressure in the internal or external affairs of another state whose government is unstable, inadequate, or unsatisfactory for the preservation of life and of such interests as are determined by the foreign policy of our Nation.<sup>10</sup>

The SWM further noted that such operations are defined by their purpose, and not by their scope and scale. Purposes range from “assistance in governmental operations on one hand to full assumption of governmental responsibilities supported by an active combat force on the other: [b]etween these extremes may be found an infinite number of forms of friendly assistance or intervention which it is almost impossible to classify under a limited number of individual types of operations”.<sup>11</sup>

Colored by the perspective of a military force organized and equipped to carry out the military aspects of America’s foreign policy, the SWM noted that “according to international law, as recognized by the leading nations of the world, a nation may protect, or demand protection for, its citizens and their property wherever situated.”<sup>12</sup> As for whether such intervention constituted “war,” the SWM further noted that:

The use of the forces of the United States in foreign countries to protect the lives and property of American citizens resident in those countries does not necessarily constitute an act of war, and is, therefore, not equivalent to a declaration of war. The President, as chief executive of the nation, charged with the responsibility of the lives and property of the United States citizens abroad, has the authority to use the forces of the United States to secure such protection in foreign countries.<sup>13</sup>

As equal parts historical review, and prescient prediction of future policy, the SWM also stated that:

The history of the United States shows that in spite of the varying trend of the foreign policy of succeeding administrations, this Government has interposed or intervened in the affairs of other states with remarkable regularity, and it may be anticipated that the same general procedure will be followed in the future. It is well that the United States may be prepared for any emergency which may occur whether it is the result of either financial or physical disaster, or social revolution at home or abroad. Insofar as these conditions can be predicted, and as these plans and preparations can be undertaken, the United States should be ready for either

of these emergencies with strategical [sic] and tactical plans, preliminary preparations, organization, equipment, education, and training.<sup>14</sup>

In summarizing their broad character, the ongoing revised draft of the SWM notes that:

Small Wars demand the highest type of leadership directed by intelligence, resourcefulness, and ingenuity. Small Wars are conceived in uncertainty, are conducted often with precarious responsibility and doubtful authority, under indeterminate orders lacking specific instructions. Additionally, the key actors involved in these types of operations are highly eclectic, embracing the UN, the local village leader, and many intervening governmental, nongovernmental organization (NGO), military, and ad hoc organizations. Thus, cooperation, collaboration, and communication are absolutely essential for success.<sup>15</sup>

### Military Operations Other Than War (MOOTW)

MOOTW as concept finds its origins in the 1950s–1960s.<sup>16</sup> The U.S. policy of COIN (counterinsurgency), IDAD (Internal Defense and Development), LIC in the 1970s–1980s, and OOTW of the 1980s–1990s had helped shape MOOTW. That definition includes:

Operations that encompass the use of military capabilities across the range of military operations short of war. These military actions can be applied to complement any combination of the other instruments of national power and occur before, during, and after war.<sup>17</sup>

Generally, the role of military forces in MOOTW can or will be in support of other agencies. Military forces may be constrained by more restrictive ROE (rules of engagement) than in other deployments (e.g., small-scale contingencies and MTWs [major theater wars]—both discussed later). MOOTW will likely involve joint, combined, and interagency coordination and/or task organization, and likely include NGOs. Finally, MOOTW are generally conducted outside a military force provider’s sovereign territory. MOOTW operations may include those in the table below.

Political objectives drive MOOTW at every level, from strategic to tactical. A distinguishing characteristic of MOOTW is the degree to which political objectives influence operations and tactics. Two important factors about political primacy stand out. First, actions at the “lowest” level can potentially have national or international impact (e.g., in peacekeeping and dealing with feuding ethnic factions). Second, those studying or looking to influence events should remain aware of changes not only in the state of affairs in the nation(s) in question, but also in political objectives of the nation(s) intending to effect status quo or change.<sup>18</sup>

**Table 16.2** Military Operations Other Than War (MOOTW) Categories (JP 3-07, 1995)

|  |  |
|--|--|
| Arms control                             | Nation assistance/support to counterinsurgency |
| Combating terrorism                      | NEO (noncombatant evacuation operations)       |
| Counterdrug operations                   | Peace operations                               |
| Sanctions enforcement                    | Protection of shipping                         |
| Enforcing exclusion zones                | Recovery operations                            |
| Ensuring freedom of navigation           | Show of force operations                       |
| Humanitarian assistance                  | Strikes and raids                              |
| Military support to civilian authorities | Support to insurgency/counterinsurgency        |

The concept of MOOTW lends itself to contrasting the differences between “peacetime” and “conflict.” Peacetime is a state in which diplomatic, economic, informational, and military powers of the nation are employed to achieve national objectives. Since peacetime is the preferred state of affairs (as opposed to conflict or war), how well a government promotes and preserves peace will be vital to its own interests as well as other nations.<sup>19</sup> So-called “conflict” is a unique environment in which governmental and non-governmental leaders may work closely to control hostilities, with the goal of returning to peacetime conditions. In conflict, the military, as an element of national power, takes on a more prominent role than in peacetime. Military and police forces may participate in conflict as a component of a combined (multinational), joint (one nation, multforce), or interagency (one nation, military and nonmilitary) organization that is usually an element of a multinational structure. Other government agencies, NGOs, PVOs (private volunteer organizations), and IOs (international organizations) often participate.<sup>20</sup>

### Insurgencies and Counterinsurgencies

The much-heralded U.S. Army FM (Field Manual) 3-24, COIN (December 2006), the first doctrinal publication by the U.S. Army or Marine Corps in 20 years dedicated to counterinsurgency, expressed in its introduction the truism that “all insurgencies are different; however, broad historical trends underlie the factors motivating insurgents. Most insurgencies follow a similar course of development.”<sup>21</sup> Insurgencies are organized movements aimed at the overthrow of a constituted government through use of subversion and armed conflict.<sup>22</sup> They may include protracted, organized violence which threatens security and requires a government response, whether revolutionary or nonrevolutionary, political or nonpolitical, and open or clandestine.<sup>23</sup> An example of support to an insurgency would be the U.S. support to the *Mujahadeen*<sup>24</sup> during the Soviet Union’s invasion and occupation of Afghanistan. In contrast, counterinsurgency is support provided to a government in the military, paramilitary, political, economic, psychological, and civic actions it undertakes to defeat insurgency. An example of counterinsurgency (as well as FID [foreign internal defense] and nation assistance at various junctures) would be the invited U.S. support to the Endara government to unseat the Noriega regime during Operation JUST CAUSE and PROMOTE LIBERTY in 1989–90.<sup>25</sup>

Closely related to that concept is the notion of FID: participation by civilian and military agencies of a government in any of the action programs taken by another government to free and protect its society from subversion, lawlessness, and insurgency.<sup>26</sup> Terrorism, in contrast, is defined by 22 U.S.C. § 2656f(d)(2) as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”<sup>27</sup> The DOD definition is similar, but does not limit attacks to noncombatant targets and notes that the goals of terrorists are usually political, religious, or ideological in nature.<sup>28</sup>

### Small-Scale Conflicts or SSCs

Yet another concept closely allied, but not synonymous with these conflicts other than war had been “small-scale contingencies” or “small-scale conflicts.” Also known as “SSCs,” these include a wide range of combined and joint operations beyond peacetime engagement and short of war.<sup>29</sup> These SSCs may, in light of national or coalition strategic objectives, give rise to protecting designated citizens abroad, the support of political initiatives, the facilitation of diplomacy, promotion of fundamental ideals, or disruption of specified illegal activities.<sup>30</sup> Operations related to SSCs may vary in size and duration

(e.g., 100 to 30,000 personnel and from a few weeks engagement to several years), and are often coalition operations that involve “core states” and other foreign forces as well as governmental organizations and NGOs.<sup>31</sup>

The United States Department of Defense’s QDR (Quadrennial Defense Review) report<sup>32</sup> no longer explicitly identifies SSCs as a mission for military operational requirements or a major consideration in deciding on force structure. In general, though, the United States, along with others in the international community, will seek to prevent and contain localized conflicts and crises before they require a military response. If, however, such efforts do not succeed, swift intervention by military forces may be the best way to contain, resolve, or mitigate the consequences of a conflict that could otherwise become far more costly and deadly. The National Defense University has noted that governments must maintain military forces prepared to conduct successfully multiple concurrent smaller-scale contingency operations worldwide, and it must be able to do so in any environment, including one in which an adversary uses “asymmetric means,” such as nuclear, biological, or chemical weapons. Importantly, military forces must also be able to withdraw from smaller-scale contingency operations, reconstitute, and then deploy to a MTW in accordance with required timelines.<sup>33</sup>

The frequency of SSCs and their demands on military forces within the past decade have led to rethinking national security strategies, and, consequently, military doctrine, force structure, and training. In the view of the United States, SSC plans have helped to shape the international security environment, as well as the U.S. response to crises. Military activity, combined with political and diplomatic activity, can yield positive results, whereas alone, all activities are liable to fail. Failure allows a crisis to continue, risking the danger of expansion, and may damage the United States’ ability to influence those countries directly concerned.<sup>34</sup>

As a general rule, participation in SSCs by other countries is seen as a distinct benefit, improving common military capabilities and engendering closer military-to-military relations with the United States. In operations supporting large-scale civilian efforts, international and NGO relief organizations (e.g., UNHCR [UN High Commission for Refugees], WFP [World Food Program], ICRC [International Committee of the Red Cross], CARE, Doctors without Borders, Oxfam, and IRC [International Rescue Committee]) were present before, during, and after military intervention. Considerable liaison and coordination are required. Much coordination is ad hoc, since there are evolving requirements for conducting combined military–civilian operations, but few internationally codified procedures. The American public has often voiced strong opinion in favor of multinational rather than unilateral efforts. The numerous exercises and training programs that the U.S. conducts with European, Asian, Latin American, African, and other military establishments to prepare for such contingencies (e.g., peace or humanitarian operations) are examples of positive effects on the international security environment.<sup>35</sup>

## PLANNING AND APPROACHES TO CONFLICT

To varying degrees along the continuum “between war and peace,” conflict and conflict resolution, various degrees of economic, political, and military influences can lead to de-escalation from disputes, political accommodations, and achievement of desired end states of unilateral or multilateral benefit. In spite of post–Cold War employment and deployment of troops for missions such as disaster relief and SASO (stability and security operations), with few exceptions such as dedicated peacekeeping forces, military forces

still organize, train, and equip to fight and win their nations' wars in accordance with doctrine and national law and policy. The prescriptions and proscriptions of customary international law, and those based upon treaties and agreements, vary with the stage(s) of conflict and conflict resolution, and will be explored subsequently.

### METT-T-C (And Other Military Approaches)

Military forces are particularly adept at anticipating and planning for operations. Functions performed by military commanders and staff members include providing information, making estimates, making recommendations, preparing plans and orders, and supervising the execution of decisions. Mission analysis is critical to the overall planning process and to the preparation of a military legal support plan. For instance, U.S. commanders and staff consider METT-T-C (mission, enemy, troops, terrain (and weather), time available, and civilian considerations) with respect to their operational planning as part of the overall MDMP (military decision-making process).<sup>36</sup> The MDMP's seven-step process includes: (1) receipt of mission; (2) mission analysis; (3) COA development; (4) COA analysis; (5) COA comparison; (6) COA approval; and (7) operational orders production.<sup>37</sup>

U.S. armed forces judge advocates, uniformed military staff attorneys serving in all the branches of the armed forces (Army, Navy Air Force, Marine Corps and Coast Guard), employ essentially the same six MDMP factors. Even though the legal issues confronted by a judge advocate in operations are varied, they are, to a great extent, predictable. One method of predicting legal issues is to read after action reports and lessons learned materials gathered by service "schoolhouses" and agencies with expertise in international and "operational law."<sup>38</sup> Another, proactive method of predicting legal issues is to conduct LPB (Legal Preparation of the Battlefield). LPB is a methodology, or a planning tool, derived from the Intelligence community's IPB (Intelligence Preparation of the Battlefield), to chart commonly encountered legal issues during operations.<sup>39</sup>

### "POISED"—A Multidisciplinary Approach

While METT-T-C and IPB/LPB have proved themselves highly useful during U.S. and coalition military operations of the past 20+ years, an alternative approach at the military operational lawyer's level may help define preconflict, conflict, and postconflict states by embracing sociological, economic, political, as well as military factors—I propose the "POISED" method of analysis. It stands for:

- *Power structures* will include the *de jure* and *de facto* social, political, and cultural hierarchical entities which will have influence to stabilize or destabilize a region or a nation.
- *Others—Direct Parties to the Conflict, Actors, and Affected Third Parties* will include natural (human) persons, as well as other "legal" but also "artificial" persons such as corporate entities that have a stake in the outcome of stability or instability.
- *Issues and Causes of the Crisis or Conflict* will include behavioral influences as well as the other economic, political, and military influences which come into play (e.g., international involvement, inequitable distribution of resources, political exclusion, human rights abuses, and identity).
- *Stage in the Cycle of Crisis or Conflict* will include the aforementioned four crisis stages: dispute situations of submerged tensions, prehostility situations of rising tensions, hostile eruption phases of open confrontation and violent conflict, and posthostility and fragile transitional dispute settlement situations.

- *External factors and Influences* which are important but not key “triggering event” issues and causes of the crisis or conflict, (e.g., climactic changes, the discovery, exploitation, pollution, or exhaustion of natural resources).
- *Dynamics of the Crisis or Conflict Over Time* will include observable trends or anomalous events which chronicle the history of the crisis or conflict and help predict future developments.

Why should this analysis matter? Mastery of events, and the legal principles which should shape and guide individuals, organizations, and societies, will depend upon recognizing the genesis and evolution of conflict and conflict resolution, and the implementation, enhancement, amelioration, minimization, or avoidance of certain key factors and influences. The next section will discuss how the military employs a decision-making cycle towards those ends.

### Origins and Applications of “OODA” or Observe, Orient, Decide and Act

Although roots of the concept go back over 2500 years, the idea of operating at a faster decision cycle than one’s opponent was first codified in the 1980s. The theory is that “operating inside your opponent’s OODA (observe, orient decide, and act) loop, you can cause uncertainty, doubt, mistrust, confusion, disorder, fear, panic, and chaos “within that opponent’s thoughts and actions.” An adversary so “shaped” would be easy to defeat, should physical combat still be necessary.<sup>40</sup>

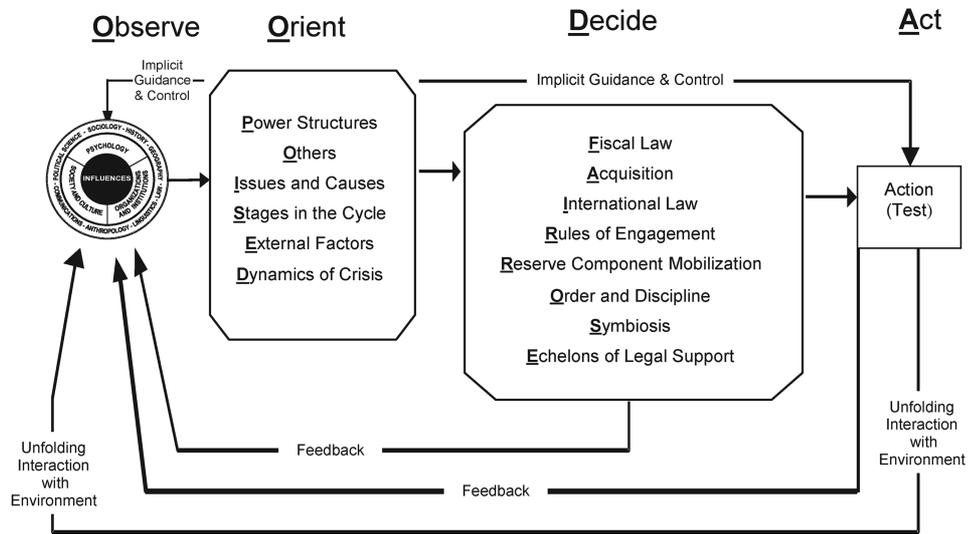
How, then, might this four-phase decision cycle known as the OODA loop be applied to the law of armed conflict, international humanitarian law, or the other international and municipal (national) laws applying to armed conflict? The strategist, scholar, statesman, or aid provider, amongst others, who employs such a methodology to anticipate threats and challenges more quickly than the threats and challenges arise, will have a major influence on shaping perception as well as the reality of desired outcomes.

The following is an example of how the “OODA” loop could be so employed:

The legal application of the “OODA” loop requires a prioritization of effort and focus. Saying that “everything is equally important,” compounded by a failure to provide implicit guidance, necessary feedback, and coordinating control will result in unfocused efforts that spread time, effort, and resources woefully thin. Acting in an advisory role to a decision-maker, the military operational lawyer’s role in the “OODA” process may be integrated in a synergistic manner with other subject matter experts (e.g., “fusion cell” with intelligence analysts, logisticians, comptrollers/budget analysts, etc.). In the “observe” and “orient” phases, advice would be given to commanders, strategists, directors, supervisors, or other leaders to make informed decisions that are legal, moral, ethical, and operationally sound in the “decide” phase. As the cycle continues, the attorney’s role (along with other experts) will be to seek and provide feedback towards the refinement and issuance of implicit guidance and control.

### Law and Policy Applied Between War and Peace

Here I discuss a methodology from the military operational lawyer’s perspective of applying the law to all cases of declared war or any other armed conflicts that arise between and within nations, states, and regions, even if the “state of war” is not recognized by one of them. The military approach to operational legal issues could be rearranged into any number of other acronyms, but my “*FAIR ROSE*” method proposed here includes examination of: *F*–*Fiscal Law*; *A*–*Acquisition and Support*; *I*–*International*



**Figure 16.1** “POISED” and “FAIR ROSE” Methodology under the “OODA” Loop

*Law; R—Rules of Engagement and other Use of Force Considerations; R—Reserve Component Mobilization; O—Order and Discipline; S—Symbiosis of Operational and Interagency Elements, and E—Echelons of Legal Support to Operations.*

*F—Fiscal Law*

The counselor considering the impact of fiscal law on operations “between war and peace” will make a threshold realization that money is the root cause of, or contributing factor to, crisis avoidance, precipitation, length, and remediation. The admonition to “follow the money” may be beyond the time or abilities of those in immediate positions of responsibility and decision-making. But counselors designated to “find the money” will be well-advised to proactively plan for and advise on the basic principles of fiscal law. Such operations and initiatives may span the spectrum of military operations discussed earlier, and involve military and developmental assistance, cooperative programs, (re) building and (re)construction, and transfer of articles or services to another nation or IO. That is one of the hidden challenges currently in Iraq and Afghanistan, what the military views traditionally as civil affairs and other U.S. government agencies (chiefly the State Department and USAID [United States Agency for International Development]) see normally as development work. These are not part of the LOAC as such, but represent the building blocks of medium term policy implementation for the military operational lawyer in the current operational environment of an Iraq or an Afghanistan, regardless whether he or she is serving in a civil affairs capacity, or is simply advising a unit commander with responsibility for a geographic area.

In the instance of government-funded operations, national legislatures or parliaments often provide “appropriations” or “allocations” for military, social welfare, diplomatic, and other initiatives. Such apportioned moneys then are reapportioned downwards to executive departments (e.g., Department of State, Department of Defense, etc.), with further apportionment and limitation. The NGOs and IOs may similarly apportion budgets, regardless of the sources of their money (e.g., donations, fundraising, government grants, loans, etc.).

Typically encountered fiscal law issues may include, but are not limited to the following:

- Developing judge advocate/attorney expertise in fiscal law and contract law;
- Determining, deconflicting, and accessing multiple sources of funding during operations;
- Conducting operations with already purchased supplies, equipment and services;
- Special authorities (e.g., Presidential Drawdown Authority—22 U.S.C. § 2318(a)(2);
- Donation of excess nonlethal supplies—10 U.S.C. § 2547;
- Conflict of laws and changing of laws and policies with phases of the operation;
- Space available transportation of relief supplies (Denton Amendment)—10 U.S.C. § 402);
- Use of cash for local purchasing;
- Unauthorized commitments;
- Contracting issues (e.g., the contracting process; use of the simplified acquisition threshold, etc.);
- Use of funds for gifts, awards, and morale, welfare, and recreation activities;
- Requests for support to non-DOD/foreign organizations, non-governmental organizations/receiving state or host nation military;
- Construction and improvements; and,
- Support to receiving state/host nation populace<sup>41</sup>

The repercussions of ignoring fiscal limitations (and spending money that does not exist or should not be so spent) can be severe: organizational sanction, violation of national law (e.g., federal statutes), and the jeopardizing of valuable ongoing and future operations and cooperative effort. Those studying the ramifications of fiscal law should consider the applicable sources that define fund obligation and expenditure authority, and apply those sources' prescriptions and proscriptions scrupulously, or finding that expenditure which would be "necessary and incident" to an existing authority.<sup>42</sup> Subsequent "FAIR ROSE" element discussions will delve into greater detail as to fiscal considerations and limitations which may be applicable.

#### *A—Acquisition and Support*

Under U.S. contract and fiscal law, forces are guided and authorized to expend congressionally appropriated funds under the Armed Services Procurement Act of 1947 (as amended in 10 U.S.C. §§ 2301–31), FAR (Federal Acquisition Regulation) and Agency/Command Supplements, Directives and Regulations (e.g., SOFAR (Special Operations Forces FAR), and Title 31, U.S. Code, and Executive Orders and Declarations. Congressional declarations of war or national emergency, and similar resolutions may result in subsequent legislation authorizing the President and heads of military departments to expend appropriated funds to prosecute the war or other operation. Some of these authorities have become quite broad. For instance, the Congress has authorized the President and his delegees to initiate contracts that facilitate national defense notwithstanding any other provision of law. Although these are broad powers, Congress still must provide the money to pay for obligations incurred under this authority.

The need to build new structures upon one's own national territory, in a receiving state, or elsewhere, may well require special authority, and consideration of international and receiving state/coalition laws which may apply, and careful supervision and control of contract administration during the "life" of the contract. So-called "policing the contract

battlefield,” in other words, fiscal stewardship, in this and other areas of contracting has recently surfaced in the public’s consciousness of Iraq.

Along with the necessity for purchasing items, military operations usually give rise to necessity to compensate or fix what has been broken, borrowed, used, or otherwise altered from its original state and ownership. Less often, claims arise for death or injury of individuals and animals. Claims for damages to real and personal property, both public and private, almost always follow deployments of United States and other coalition forces. Unless there is an agreement to the contrary (or a “combat claims” exclusion), the United States and other nations under international and municipal (national) law *will* be obligated to pay for damages caused by its forces. To avoid wholesale liability, state parties may agree under SOFAs (Status of Forces Agreements) or other arrangements to waive claims against each other, or for a receiving state to indemnify third party claims caused by visiting forces in the performance of official duty and release soldiers from any form of civil liability resulting from such acts. Claims will also arise “amongst the ranks” of service members and “civilians accompanying the force” serving on military operations for acts within and outside the scope of their duties. Establishing who will investigate and adjudicate, and settle (pay) claims at what locations is equally important to the calculus of claims.<sup>43</sup>

### *I—International Law*

Customary international law, binding upon all nations, is derived from repetition and is generalized. Once a principle attains customary international law status, it basically binds all nations, not just states actively involved as with treaty signatories. The lawyer’s task is to discern what is a valid customary law rule, which has gained force over time. On the other hand, treaty or conventional international law is only binding upon those nations that have ratified/signed a treaty (unless the treaty provisions become customary law). This category of international law refers to codified rules binding on nations based on express consent, whether by treaty, convention, protocol, annexed regulations, or other instrument. With respect to “international armed conflict,” this threshold is codified in common article 2 of the Geneva Conventions of 1949. These conventions include:

- The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug 12, 1949 (Wounded Convention);
- The Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked; Members at Sea, Aug 12, 1949 (Wounded Convention Sea);
- The Geneva Convention Relative to the Treatment of Prisoners of War, Aug 12, 1949 (POW Convention); and
- The Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug 12, 1949 T.I.A.S. 3365. (Civilians Convention) (collectively Geneva Conventions, 1949, or GC)

The key is the term “international armed conflict” set forth in common Article 2 of the Conventions. Common Article 2 states: “[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” This is a true *de facto* standard, where the subjective intent of the belligerents is not relevant. Armed conflicts such as the 1982 Malvinas (Argentina)/Falklands (UK) War, the Iran–Iraq War of the 1980s, and the first (1991) and second (2003–04) United States-led Coalition wars against Iraq could be considered “international armed conflicts”

to which the law of war applied.<sup>44</sup> The 1977 Protocol I Additional to the 1949 Geneva Conventions (not accepted by the United States, but regarded in the interim as customary law by most other states) has expanded this scope of application to include certain wars of “national liberation” for states parties to that convention. According to a leading commentator, the law of war applies to: “any difference arising between two States and leading to the intervention of armed forces.”<sup>45</sup>

Article 2 effectively requires that the law be applied broadly and automatically from the inception of the conflict. The following two facts result in application of the entire body of the law of war: (1) a dispute between states and (2) armed conflict.<sup>46</sup> An exception to the “dispute between states” requirement arises where there is a conflict between a state and a rebel movement recognized as belligerency. This concept arose as the result of the need to apply the laws of war to situations in which rebel forces had the *de facto* ability to wage war. The law of war ceases to apply under Article 5, Wounded Convention, and POW Convention; Article 6, GC upon: (1) final repatriation (Wounded Convention, POW Convention); (2) general close of military operations (GC); or (3) occupation (GC)—applies for 1 year after the general close of military operations. In situations where the occupying power still exercises governmental functions, however, that Power is bound to apply for the duration of the occupation certain key provisions of the GC.<sup>47</sup> For military operations under circumstances other than armed conflict (e.g., peacekeeping and peace enforcement in Somalia, Haiti, and Bosnia), the law of war, in general, will also apply, but the applicability of particular treaties is open to interpretation.

Conflicts which are not of an international character “occurring in the territory of one of the High Contracting Parties” will fall under Common Article 3, and make up the majority of the ongoing conflicts. International regulation over such conflicts is more attenuated than under international armed conflicts, and domestic law may control the application and use of force or other economic, political, or military applications of state authority.

“Internal armed conflict” presents its own challenges. A leading commentator listed several suggested criteria for distinguishing events like a simple civil disturbance from an insurgency: (1) the rebel group has an organized military force under responsible command, operates within a determinate territory, and has the means to respect the Geneva Conventions; and (2) the legal government is obliged to have recourse to the regular military forces against the rebels, who are organized and in control of a portion of the national territory.<sup>48</sup> Protocol II of The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977 (not accepted by the United States, but regarded in the interim as customary law by most other states), was intended to supplement the substantive provisions of Common Article 3. It formalized the criteria for the application of that convention to a noninternational armed conflict that rebel groups are: (1) under responsible command and (2) exercise control over a part of a nation so as to enable them to carry out sustained and concerted military operations and to implement the requirements of Protocol II.

The legal justification for intervention into another state’s affairs, or intervention against internal insurgencies/belligerencies/armed opposition groups, how such operations are authorized, how they should it be conducted, and how to mobilize sufficient political will have all been extensively analyzed under the rubric of intervention, an area of the law marked by controversy since traditional legal rules were flouted in the Spanish Civil War in the 1930s and further strained by proxy wars of the Cold War period. The legal justifications for such operations will lead to first- and subsequent-order effects including but not limited to: populations’ rights to assistance and protection; whether an

operation remains within its authorized limits or exceeds them; the right of affected populations and nations to call for intervention or protection; and the right of national and supranational bodies to shape, influence, and direct such operations and their follow-on requirements.<sup>49</sup>

The UN Charter, specifically Chapter VI, Pacific Settlement of Disputes (Articles 33–38), and Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Articles 39–51), envisioned a Security Council role in assisting parties to “any dispute likely to endanger the maintenance of international peace and security” as they strive to resolve conflicts through “peaceful means of their own choice” (UN Charter, 1945). Chapter VI does not specifically envision or authorize the deployment of military forces under UN authority to interpose themselves between hostile parties. The frequent use of military forces as peacekeepers, however, evolved as an extension of the UN desire to facilitate the “adjustment or settlement of international disputes or situations which might lead to a breach of the peace.” Peacekeeping is an internationally accepted mode of managing conflicts, giving states a buffer to seek long term, peaceful resolutions, and has become an inherent part of the UN strategy for resolving international disputes in the absence of more comprehensive and lethal collective security operations. UN Charter Chapter VII gives the Security Council authority to maintain international peace and security by taking “such action by air, sea, or land forces as may be necessary;” UN member states are obligated to “accept and carry” out decisions of the Security Council as reviewed in a parallel essay.

The IHRL (international human rights law) obligates states to recognize and respect basic rights of the individual generally. The IHL (international humanitarian law) obligates states to recognize and respect certain rights in times of armed conflict. Precepts of IHRL should be respected in all circumstances but may be abrogated in emergencies, whereas IHL precepts may not be abrogated under any circumstances. In application:

- IHRL is applied to all persons in all circumstances;
- IHRL covers rights that are outside the scope of IHL (e.g. political rights);
- IHL is a specialized body of law for times of armed conflict; and,
- IHL rules may not have equivalencies in IHRL (e.g., rules for conduct of hostilities/use of weapons)

**Table 16.3** Recent UN Authorizations for Peacekeeping

| Country                 | Chapter VII authorization and UN mission | Chapter VII authorization delegated | No initial security council authorization |
|-------------------------|--|-------------------------------------|---|
| Liberia 1990–1997       |  |                                     | ECOMOG                                    |
| Northern Iraq 1991–     |  | Coalition                           | Coalition                                 |
| Former Yugoslavia 1992– | UNPROFOR                                 | IFOR and SFOR                       |   |
| Somalia 1992–1993       | UNOSOM II                                | UNITAF                              |   |
| Rwanda 1994–1996        | UNAMIR II                                | Opération Turquoise                 |   |
| Haiti 1994–1997         | UNMH                                     | MNF                                 |   |
| Sierra Leone 1997–      | UNAMSIL                                  |                                     | ECOMOG                                    |
| Kosovo 1999–            |  | KFOR                                | NATO                                      |
| East Timor 1999–        | UNAMET                                   | INTERFET                            |   |

The U.S. military employs an additional generic category for humanitarian law, that being “Civilian Protection Law” (CPL). Useful as a model for comparison or contrast to other national or supranational legal perspectives, this “analytical template” describes the process for establishing protection for civilians across the operational spectrum, based on four “tiers” of legal authority:

- Tier 1: Fundamental Human Rights Recognized as Binding International Law by the United States;
- Tier 2: HN (Host Nation) Law Providing Specific Rights to an Indigenous Population;
- Tier 3: Conventional Law (“Hard Law”—imposed by treaties or functional equivalents); and,
- Tier 4: US Domestic Law and Policy (Including Law by Analogy/Extension)<sup>50</sup>

Humanitarian law refers to those conventions from the law of war that protect the victims of war (primarily the Geneva Conventions). Human rights law refers to a small core of basic individual rights embraced by the international community during the past forty years as reflected in various declarations, treaties, and other international provisions beginning with the UN Charter and Universal Declaration of Human Rights. The IHL regulates the conduct of state vis-à-vis state, whereas human rights law regulates the conduct of state vis-à-vis individual. The right to protection under humanitarian law is vested not in the individual, but in the state. Under human rights law, the protection flows to the individual directly, and theoretically protects individuals from their own state, which was a radical transition of international law.

#### *R—Rules of Engagement and Other Use of Force Considerations*

ROE are directives issued by competent superior authority that delineate the circumstances and limitations under which military forces will initiate and continue engagement with other forces.<sup>51</sup> ROE are drafted in consideration of the law of war, national policy, public opinion, and military operational constraints. ROE are often more restrictive than what the law of war would allow. ROE will normally determine the legally justified uses of force during international military operations; domestic operations may employ rules termed otherwise (e.g., RUF (Rules for Use of Force)). During other peace operations, for example, UN peacekeeping operations, the UN position is that its forces will comply with the “principles and spirit” of IHL (law of war). This is reflected in the model UN Status of Mission Agreement (SOMA), which essentially utilizes this same law by analogy approach to regulating the conduct of the military forces executing UN missions.

ROE help ensure that national policy and objectives are reflected in the action of commanders in the field, particularly under circumstances in which communication with higher authority is not possible (e.g., the influence of international public opinion, particularly how it is affected by media coverage of a specific operation, the effect of host country law, and the SOFAs with the United States). ROE also provide parameters within which the commander must operate in order to accomplish his assigned mission; e.g., a “ceiling” (and potentially a “floor”) on how far operations can and should go and ensure that military actions do not trigger undesired escalation, like forcing a potential opponent into a “self defense” response. ROE may regulate a commander’s capability to influence a military action by granting or withholding the authority to use particular weapons systems by vesting or restricting authority to use certain types of weapons or tactics.

ROE may also reemphasize the scope of a mission. Units deployed overseas for training exercises may be limited to use of force only in self defense, reinforcing the training rather

than combat nature of the mission. Finally, ROE provide restraints on a commander's action consistent with both domestic and international law and may, under certain circumstances, impose greater restrictions on action than those required by the law. For many contemporary missions, particularly peace operations, the mission is stated in a document such as a UN Security Council Resolution (e.g., UNSCR 940 in Haiti or UNSCR 1031 in Bosnia). These Security Council Resolutions also detail the scope of force authorized to accomplish the purpose stated therein. Commanders must therefore be intimately familiar with the legal bases for their mission. The commander may issue ROE to reinforce principles of the law of war, such as prohibitions on the destruction of religious or cultural property, and minimization of injury to civilians and civilian property.

An effective intervention force should have the authority to do what it needs to do, and be perceived as being credible in the nation or region where it operates. The credibility of operations, in turn, has depended on the belligerents' assessment of a force's capability to accomplish the mission. Military missions are prone to being hamstrung or condemned to failure where there are contradictory instructions for intervening forces dealing with belligerents, confusion regarding coalition command and control at the operational and tactical levels, and lack of consistent commitment within the coalition fully to employ war-fighting capacities. On the operational level, ROE determine authority and so shape perceptions.

**Table 16.4** U.S. Reserve Component Mobilization/Deployment/Employment

|   |   |   |
|---|---|---|
| 10 U.S.C. 12301(a)<br>Full mobilization               | Require a Congressional declaration of war or national emergency  | All reservists including members in an inactive statute and retired members |
|   | Require a Congress in Session   | No number limitation stated   |
|   |   | Duration of war or emergency + 6 months                                     |
| 10 U.S.C. 12302<br>Partial Mobilization               | Requires declaration of national emergency by President   | Ready Reserve   |
|   | Report to Congress every 6 months   | Not more than 1,000,000   |
|   |   | 2-year duration   |
| 10 U.S.C. 12304 presidential selected reserve call-up | Requires presidential notification of Congress  | Selected reserve, with up to 30,000 IRR                                     |
|   | No Declaration of National emergency  | Not more than 200,000   |
|   |   | 270 days  |
|   |   | Now includes WMD incidents  |
| 10 U.S.C. 12301(b)<br>15-day statute                  | Service Secretaries may call Ready Reserve up to 15 days/year   | Annual training   |
|   |   | Operational missions  |
|   |   | Involuntary   |
| 10 U.S.C. 12301(d)<br>RC volunteers                   | Requires consent of reservist   | All reservists  |
|   | Governors must consent to guard activation  | No number limitation stated   |
|   |   | No duration stated  |
|   | ...and consider unique Military Justice, civilian employment, and benefit considerations, amongst other matters |   |

*R—Reserve Mobilization and Draw of Secondary Support*

Mobilization is the process by which the armed forces or a part thereof are expanded and brought to a state of readiness for war or other national emergency.<sup>52</sup> These forces provide critical skills and assets to wartime missions as well as those lying “between war and peace,” especially in supply, logistics, transportation, civil–military operations, military police, and a variety of other military specialties and capabilities. Mobilization includes calling all or part of the reserve components to active duty and assembling and organizing personnel supplies and material. While reserve component service members will likely share the same status under international law and receiving state law while deployed, their status under municipal (domestic) law may vary. The call-up of reserve component units to active duty may include a number of different types of mobilization that effect the length of their active duty, how many forces may be mobilized, how they may be employed, and potential legal assistance problems. Operational demands placed on the U.S. military by Iraq and Afghanistan mean that the mobilization and deployment authority above for the reserve component of the armed forces is no longer just a theoretical matter. There are now a significant number of National Guard or reserve units which have been deployed to Iraq or Afghanistan more than once, and the reality of conducting operations between war and peace puts a premium on certain skills now concentrated in the reserve component, such as civil affairs and military police units.

The legal support required by reserve soldiers leaving families, businesses, and other commitments on short notice for an indeterminate period will give rise to substantial need for legal assistance (e.g., family law) support, especially since many reserve units are mobilizing at home station and going directly to a POE (Port of Embarkation), without going to a MS (Mobilization Station). Legal concerns common to both military and civilian agencies will be the requirements to, and consequences of, drawing other secondary support: contracting for or otherwise directing the deployment of key and essential civilians accompanying the force; determining their status under municipal (national), receiving state, and international law; their protection; pay; health care; order and discipline; redeployment; and veteran’s/disability/reemployment rights and benefits.

*O—Order and Discipline*

The maintenance of order and discipline, not just among service members, but also in the area of military operations, is a fundamental aspect of successful military operations. In contemporary military operations, where restraint and legitimacy are often important to mission success, the misconduct and misdirected efforts of untrained or undisciplined forces will lead to adverse world opinion and, more seriously, friendly forces sustaining heavy casualties rather than inflicting them upon hostile opposing forces. How military forces fight marks them for what they are and what they stand for. The laws of war are only effective in reducing casualties and enhancing fair treatment of combatants and noncombatants alike as long as trained leaders ensure that those laws are obeyed. Commanders and civilian leaders must ensure the proper treatment of prisoners, noncombatants, and civilians by building good training programs and issuing orders that reinforce the practice of respecting those laws.

Such considerations include, but are not limited to the following:

- Predeployment/mobilization concerns (in addition to mobilization matters discussed above, criminal jurisdiction over offenses committed by deploying forces, new joint, combined, and interagency forces, and “rear detachment” forces).

- Deployment-unique considerations (e.g., “General Order #1” prescriptive policies with respect to conduct, contraband, etc.) and “time of war” unique considerations regarding offenses.
- Redeployment/demobilization considerations.
- Force protection and detention of civilians committing offenses against other civilians in assistance to/ the absence of civilian law enforcement authorities.
- Detention of PIFWCs (persons indicted for war crimes);
- Criminal jurisdiction over U.S. citizen civilians abroad and deploying with the force under the “Military Extraterritorial Jurisdiction Act of 2000” and domestically the USA “Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001.”
- Military Tribunals and the Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (Oct. 17, 2006).
- Impact of the International Criminal Court and jurisdiction over U.S. and coalition/interagency forces.

For instance, proactive efforts to resolve Uniform Code of Military Justice jurisdictions immediately (predeployment) will prove beneficial in the long run. This must be accomplished early in the process through meetings amongst decision makers and advisors (e.g., commanding general and staff, interagency heads, etc.), to explain options and to choose courses of action. Thorough research into the history of past similar operations will help in anticipating future issues which will arise with regard to order and discipline or military justice, and careful drafting, dissemination, training, and enforcement of pertinent documents (e.g., “General Order #1”) will help with respect to prescriptive or preventative law. Forces remaining in the rear may decrease as others deploy forwards; the relative workload of “front” and “rear” may well increase inversely to size of force remaining due to a smaller workforce to resolve problems or execute missions, etc. Commanders should ensure that the right mix of personnel, equipment, and transportation are available and used for “front” and “rear,” to include skilled personnel (e.g., criminal prosecution [“trial counsel”] and defense [“trial defense”]), information technology systems, and mission-capable vehicles), and that those who should or must deploy are trained and “deployable.”

#### *S—Symbiosis of Operational and Interagency Elements*

United States, coalition, and interagency forces will continue to accomplish missions “between war and peace” in the future as “specified” (named) and “implied” (inherent) missions, and may have to stretch assets to cover essential, “specified” missions. Extensive force deployment, overall force drawdown, and slowed modernization/new systems acquisition will be countered, in part, with better knowledge (and ample funding) about how to do such missions. Commanders and troops have many “lessons learned” from recent combat and noncombat missions. Those “lessons learned” are finding their way into doctrine. Continued peace operations training at the United States National Training Center (NTC), Ft. Irwin, California, and the CMTC (Combat Maneuver Training Center) in Hohenfels, Germany, and during joint, combined and interagency training exercises will keep troops ready for those operations yet to come.

In addition to national governmental agencies, and nongovernmental business or private sector entities, missions “between war and peace” will require close coordination with other organizations as well, such as the UN and other IOs to include NGOs and PVOs. The UN, various other governmental organizations and NGOs will not contribute

direct monetary support to United States or coalition humanitarian and civil assistance or other missions; however, they may be funding recipients or partnered with military forces through international policy, planning, or simply the circumstances of necessity. This odd-couple relationship finds expression in the idea that military presence is often necessary to provide sufficient security for (civilian) NGOs to carry out humanitarian relief operations.

The UN itself created a number of supranational organizations, including, but not limited to, the UNHCR, the WFP, and UNICEF. The UN Charter mentions the term NGO in Article 71; when the Charter was written, though, such organizations were, relatively few and far between and not the major players they are today. They include a wide range of primarily nonprofit organizations motivated by humanitarian and religious values, usually independent of government, UN and commercial sectors. Within the U.S. military, the terms PVO and VOLAG (voluntary agency) are sometimes used to describe the same spectrum of organizations. NGOs are legally different from UN agencies, the ICRC, and national Red Cross/Crescent Societies. NGOs form themselves and write their own charter and mission; the UN and Red Cross agencies formed and operate under international or national government mandates, conventions, and legislation. International/governmental aid agencies can be “multilateral”, like the UN or the World Bank, or “bilateral” like the USAID (or Great Britain’s Department for International Development). Funded by taxpayers to the tune of billions of dollars per year, these agencies are major players for aid, assistance, and relief worldwide, and have seen a dramatic upsurge in demands for their talents and challenges to their capabilities during the latter half of the twentieth century.<sup>53</sup>

Worldwide there are now over 1500 international NGOs registered as “observers” with the UN. Nonetheless, of the hundreds in existence there remains a first order of NGOs through which perhaps 75 percent of all emergency aid flows. Commentators have noted that the most effective NGOs have principled, knowledgeable, committed, and diverse organizations. Nevertheless, like any organization, they are dependent upon several key factors. They require sufficient resources, generally private donations as well as governmental grants and collections. Their organizational hierarchy, from top to bottom, must remain “mission focused,” and not lose sight of the reason why they are constituted and funded. They must effectively deal with “the competition,” as well, minimizing rivalry with other NGOs, and working towards a symbiosis with, rather than competition against, military forces. Finally, NGOs must cope with tangible “hostile forces,” to include armed threats to security, disease, adverse terrain and weather, and limited time in which to accomplish missions. NGOs are a powerful force in the world, in many cases, providing the dynamics for positive change where despair and hopelessness might otherwise reign supreme. The revolution in communications technology, in networking and collaboration, and successful fund-raising appeals, has strengthened NGOs further, especially in the last 10 years.<sup>54</sup>

Some countries pursue humanitarian activities overseas through government-created agencies. Examples of these are the British Overseas Development Administration (ODA), the CIDA (Canadian International Development Agency), the SRB (Swedish Rescue Board), or the SDR (Swiss Disaster Relief) (akin to the United States Office for Foreign Disaster Assistance [OFDA]). Other countries offer assistance in times of emergencies through their Ministries of Foreign Affairs, according to their own priorities. Most of this kind of assistance will be offered on an ad hoc basis, as few governments have established agencies of the kind described above with standing mandates for foreign humanitarian emergency assistance. These governmental organizations operate with, and sometimes in lieu of, a wide range of governmental and international aid and relief agencies.

*E—Echelons of Legal Support to Operations*

So where do the military operational lawyers fit? National, coalition, and interagency forces will require trained, versatile legal assets where the missions are planned and executed. Legal staffs supporting military operations will succeed in their role not just because they have good lawyers, but also because the staff is competent in military skills and understands the military unit and the mission they are supporting. They will need “the training and experience to be first-class soldiers, outstanding lawyers, and polished diplomats.”<sup>55</sup> Given the desirability of joint, combined and interagency interoperability, training proficiency and flexible capability, the following four basic tenets will be key to training and deploying/locating personnel and equipment to provide legal support to operations.

*Train as You Fight—or Keep the Peace—and Locate Personnel Where They Will Be Needed*

It is critical to have assigned legal staffs at as many locations as possible where senior leaders/commanders, and planning/coordinating staffs make critical decisions, while preserving appropriate access to legal support for other personnel. This arrangement ensures that legal assets will be available where needed and when needed. These staffs should be adequately staffed with those skilled lawyers, office/legal administrators, and paralegals/legal specialists (by whatever title of office) to provide specialized and general legal support to operations. Those staffs should provide a continuous presence throughout the operations at each location for the variety of issues which may arise, to include but not limited to: targeting, ROE, claims, fiscal, contract law, and other issues within the traditional concept of legal support to operations. Those staffs will also be relied upon common/shared expertise, and consistent, coordinated advice on operational planning and execution matters (e.g., where such staffs have played an integral role in the decision-making process like MDMP discussed earlier).

*Train and Use Multiechelon Techniques—and Exploit Knowledge Management Systems and Practices*

Forward deployments in the military often occur in underdeveloped areas or conflict zones which present significant infrastructure challenges unknown to most civilian attorneys. Legal staffs should understand, have access to, and use wherever possible the best and most reliable means of Internet and (where available/accessible) SIPRNET (secret intranet protocol router network) web-based applications to consolidate information coming from various sources and levels of command, and disseminate information out as operationally required. In so doing, legal, and other staff members can foster what the U.S. military calls a COP (common operational picture). Still, where electronically based applications fail, the “analog” methods of pen and paper, typed documents and forms, acetate sheets, and oral briefings must be created as back-up to those matters retained or disseminated electronically. No matter what, information technology (IT)-based KM technologies and databases are no substitute for the professional judgment and expertise.

*Train to (Build and) Sustain Proficiency—Make a Self-Fulfilling Prophecy*

Success in any operation, whether giving a briefing or conducting a campaign in a conflict, cannot be based upon serendipity, coincidence, and fortuitous accidents. Lessons experienced during preparation for successful operations must be captured in writing, taught to those who will apply those lessons, and then implemented with adjustment to changing conditions (for instance, applying the “OODA” methodology). To memorialize

observations and lessons learned from exercises and operations, staffs should create an AAR (after-action report) shell before the start of operations, and collect AAR comments from all echelons of legal staffs throughout train-up and conduct of operations. Throughout all operations, AAR comments should be collected and posted, then discussed to lead to necessary changes to operating procedures and future training events. Formalized self-criticism of the AAR variety would seem to be a rarity in the (nonmilitary) legal world.

*Use Performance-oriented Training—and Review and Rehearse Support Requirements Before Deployment*

Legal staffs can successfully plan and execute the large and small details of getting people, equipment, and work product where and when needed, when they prepare in identifying where they will be needed as well as where their needs are met—such as what “life support” will be provided by parent units, attached units, agencies, or organizations, and what the legal staffs will be responsible themselves to supply. Legal staffs must actively integrated themselves into operations, plan, and demonstrate what they would “pack outs” for their missions, and conduct performance-oriented training to help set and maintain common standards, anticipate the operational environment, prevent problems before they arise, and to take what will be needed where it will be needed to get the job done. If not otherwise provided for by leaders outside legal staffs, the legal staffs themselves should create and conduct themselves consistent with an overall “vision,” such that standards of training and operations will help the staffs anticipate and fulfill requirements with the highest levels of professional competence, personal integrity, and dedication to duty.

Legal staffs can use such structured, guided efforts to prepare for and conduct their operations to develop future sustainment training, combining theoretical/classroom instruction with practical application and first-hand observation. The ultimate value of such training and guided operations lies in enhanced deployment readiness and peak performance during future missions.<sup>56</sup>

## CONCLUSIONS

This chapter has examined policy, principles, and law which apply to declared and undeclared international and internal armed conflicts from the perspective of the military operational lawyer. His or her professional competencies now extend far beyond the traditional law of war. An orderly approach using multidisciplinary methodologies, supported by applicable law, policy, and operational principles, can help bring a confusingly divergent flow of information and ideas to a manageable confluence actionable “between war and peace.” What is distinctive about the world of the military operational lawyer, however, is twofold. Since current U.S. military operations in a technical sense typically involve operations other than “war” in support of U.S. foreign policy, the military operational lawyer now tends to work in the gray area between war and peace. In practical terms, he or she is heavily involved in planning and advisory work, only portions of which involve the law of war in a classical sense. To the extent legal training may also have a role in military areas like civil affairs, the military operational lawyer may also interface in particular with the local government, foreign, and U.S. government agencies as well as the NGO community involved in reconstruction or humanitarian relief taking place in the geographic area of military operations. This is the workaday world of the military operational lawyer.

## NOTES

1. Eli Cohen and Noel Tichy, "Operation—Leadership," *Fast Company*, no. 27 (September 1999): 278, <http://www.fastcompany.com/magazine/27/operation.html>.

2. Unfortunately, much of existing doctrine and strategy for dealing with insurgency is based on old forms of the phenomenon, especially rural, protracted, "peoples' wars," or is not "synchronized" between joint, combined, or interagency capabilities and efforts. As some forms of insurgency become obsolete, new forms of insurgencies will emerge, leaving strategists to speculate on these future forms, as they assist in the evolution of support to insurgency and COIN (counterinsurgency) strategy and doctrine. Ronald S. Mangum, "Linking Conventional and Special Operations Forces," *Joint Force Quarterly* 35 (Summer 2003): 58.

3. See, e.g., M. Adams and M. Bradbury, *SIPRI Theme Paper* (Birmingham NGO Workshop on Conflict, November 1994). Rudolf Rummel calculated that during the twentieth century, such wars, conflicts, and tyrannical regimes caused some 170 million deaths, as compared to 33 million persons killed in international military conflicts. See Rudolph J. Rummel, *Death by Government* (Birmingham NGO Workshop on Conflict, November 1994), 9. Another report estimated that from World War II through 1996, at least 220 noninternational conflicts involving civil war or oppressive regimes had caused some 86 million deaths. See Jennifer Balint, "An Empirical Study of Conflict, Conflict Victimization, and Legal Redress," in *Reigning in Impunity for International Crimes and Serious Violations of Human Rights: Proceedings of the Siracusa Conference 17–21 September 1997* (Christopher C. Joyner, Special Editor, Nouvelles Etudes Pénales (Pau, FR: Association Internationale De Droit Pénal, 1998), at 107.

4. Data obtained from Arbeitsgemeinschaft Kriegsursachenforschung/Universität Hamburg (AKUF), <http://www.sozialwiss.uni-hamburg.de/publish/Ipw/Akuf/index.htm>, cited in G. Domiet and K. Heidebreck, "Kriegsgebiete—Über die Jahreswende kämpfen und sterben Menschen in 41 Konflikten" [War Zones—over the years people have fought and died in 41 conflicts], *Focus*, no. 52 (December 20, 2003): 174–75 (available at [www.focus.de](http://www.focus.de)). For a current list of active UN peacekeeping missions with personnel, budget, and fatality statistics see United Nations, "United Nations Peacekeeping," <http://www.un.org/Depts/dpko/dpko/home.shtml>. For a contemporary work on the 100-plus "small wars," "low intensity conflicts," and "military operations other than war" that involved the United States from 1801 through 2002, see Max Boot, *The Savage Wars of Peace: Small Wars and the Rise of American Power* (New York: Basic Books, 2002).

5. Joint Chiefs of Staff, *Joint Publication (JP) 3-0, Joint Operations* (Joint Electronic Library, September 17, 2006), I-13, [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp3\\_0.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp3_0.pdf) (hereinafter cited as "JP 3-0").

6. See, e.g., Brian J. Bill, *Law of War Workshop Deskbook* (Charlottesville, VA: International and Operational Law Dept., The Judge Advocate General's School, U.S. Army, June 2000), 1 (hereinafter cited as *Law of War*).

7. JP 3-0, I-3.

8. *Ibid.*, IV-1.

9. *Ibid.*

10. *Small Wars Manual, US Marine Corps* (Washington, DC: U.S. Government Printing Office, 1940), 1 (note: this reference was reprinted as *FMFRP 12-15, Small Wars Manual*—April 1, 1987, and is available as NAVMC 2890) (hereinafter cited as *Small Wars Manual*).

11. *Small Wars Manual*, 1–2.

12. *Ibid.*, 2.

13. *Ibid.*, 3.

14. *Ibid.*, 1–2.

15. *Ibid.*

16. This term appeared in the *JP 1-02, Department of Defense Dictionary of Military and Associated Terms* (June 1998), 334, but by the 2001 iteration, it was incorporated by reference in two definitions but no longer defined. See, e.g., Joint Chiefs of Staff, *JP 1-02, Department of*

*Defense Dictionary of Military and Associated Terms* (Washington, DC: Office of the Joint Chiefs of Staff, April 12, 2001, as amended through March 22, 2007), 96, 100, [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf) (hereinafter cited as “JP 1-02”).

17. JP 1-02, 334.

18. *Ibid.*, 334.

19. See, e.g., Joint Chiefs of Staff, *JP 3-07, Joint Doctrine for Military Operations Other Than War* (Washington, DC: Office of Joint Chiefs of Staff, June 1995, [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp3\\_07.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp3_07.pdf) (hereinafter cited as “JP 3-07”).

20. JP 3-07.

21. *US Army Field Manual (FM) 3-24, Counterinsurgency* (Washington, DC: Headquarters, Department of the Army, December 15, 2006), ix, <http://www.usgcoin.org/library/doctrine/COIN-FM3-24.pdf>.

22. Steven Metz and Raymond Millen, “Insurgency and Counterinsurgency in the 21st Century Reconceptualizing Threat and Response,” *Special Warfare* 17 (February 2005): 6

23. See, e.g., Steven Metz, *Counterinsurgency: Strategy and the Phoenix of American Capability* (US Army Strategic Studies Institute, February 18, 1995), <http://carlisle-www.army.mil/usassi/ssipubs/pubs95/cntrinsr/cntrinsr.pdf>.

24. The term “mujahadeen,” also sometimes spelled “mujahideen,” “mujahedeen,” “mujahedin,” “mujahidin,” and “mujaheddin,” refers to a military force of Muslim guerilla fighters engaged in a “holy war” or “jihad.”

25. John E. Parkerson, Jr., “United States Compliance with Humanitarian Law Respecting Civilians During Operation JUST CAUSE,” *Military Law Review* 111 (1991): 31, at 33. The State Department also cited article I, III, and IV(2) of the “Panama Canal Treaty” in support of U.S. actions, regarding U.S. rights to regulate transit of ships through the Panama Canal, and primary responsibility to protect and defend the Canal (September 7, 1977).

26. JP 1-02, 212.

27. 22 U.S.C. § 2656f(d)(2) (2000), [http://www.law.cornell.edu/uscode/22/usc\\_sec\\_22\\_00002656-f000-.html](http://www.law.cornell.edu/uscode/22/usc_sec_22_00002656-f000-.html).

28. JP 1-02, 540.

29. This term first appeared in the Department of Defense QDR (Quadrennial Defense Review Report) (May 6, 1997). (Department of Defense, “QDR,” <http://www.fas.org/man/docs/qdr/>) (hereinafter cited as “QDR”). By 2006 the term was no longer to be found in the QDR, with focus instead upon “the long war” (which term by 2007 also fell into disfavor with the Combatant Commander of U.S. Central Command (USCENTCOM)—see Simon Jenkins, “They See It Here, They See It There, They See Al-Qaeda Everywhere,” *The Sunday Times Online*, April 29, 2007, <http://www.foxnews.com/story/0,2933,270098,00.html>).

30. QDR. SSCs may include: strikes and other limited interventions; NEOs (noncombatant evacuation operations); counterdrug operations; shows of force; maritime sanctions and “no fly” enforcement; peace accord implementation and other forms of peacekeeping, and; support for humanitarian operations and disaster relief (e.g., preventative deployment of forces or aid assets).

31. QDR.

32. Department of Defense, “Quadrennial Defense Review Report (QDR)” (February 6, 2006), [http://www.g8.army.mil/g8sitewm/Organization/QDR/docs/qdr\\_2006.pdf](http://www.g8.army.mil/g8sitewm/Organization/QDR/docs/qdr_2006.pdf).

33. David C. Gompert et al., *Strategic Assessment 1998: Engaging Power for Peace* (Washington, DC: Institute for National Strategic Studies (INSS), National Defense University 1998), <http://www.ndu.edu/inss/Strategic%20Assessments/sa98/sa98cont.html> (hereinafter cited as Gompert et al.).

34. Gompert et al.

35. *Ibid.*

36. Department of Army, *Field Manual (FM) 101-5, Staff Organization and Operations* (Washington, DC: Headquarters, Department of the Army, May 31, 1997), 5-1, [http://www.au.af.mil/au/awc/awcgate/army/fm101-5\\_mdmp.pdf](http://www.au.af.mil/au/awc/awcgate/army/fm101-5_mdmp.pdf) (hereinafter cited as “FM 101-5”).

37. FM 101-5, 5-2.

38. See, generally, Lieutenant Colonel Marc L. Warren, "Operational Law: A Concept Matures," *Military Law Review* 152 (1996): 33. While different nations' armed forces vary in their approach to legal support to military operations, the U.S. Army's JA 422, *Operational Law Handbook* (Charlottesville, VA: International and Operational Law Dept., The Judge Advocate General's School, 2006), 504, [http://www.au.af.mil/au/awc/awcgate/law/oplaw\\_hdbk.pdf](http://www.au.af.mil/au/awc/awcgate/law/oplaw_hdbk.pdf) (hereinafter cited as "JA 422"), states "[t]he Operational Law Attorney must be capable of delivering legal support in the six traditional *core legal disciplines*: administrative and civil law; claims; contract and fiscal law; international law; legal assistance; and military justice. He or she must also be proficient in command and control functions to include interpreting, drafting, disseminating and training commanders, staffs and soldiers on ROE; participating in targeting cells; participating in the MDMP; participating in information operations; and dealing with the Law of Armed Conflict."

39. International and Operational Law Note, "A Problem Solving Model for Developing Operational Law Proficiency: An Analytical Tool for Managing the Complex," *Army Lawyer*, September 1998: 36.

40. See, e.g., Defense and the National Interest, "The OODA Loop," <http://www.d-n-i.net/>.

41. JA 422, 243 et seq.

42. *Ibid.*, 245.

43. *Ibid.*, 151 et seq.

44. *Ibid.*, 14.

45. Jean Pictet, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, (*The Geneva Conventions of 12 August; Commentary*), (Geneva: International Committee of the Red Cross, 1958), 20; see also Emanuela-Chiara Gillard, *Humanitarian Law, Human Rights and Refugee Law—Three Pillars* (Geneva: International Committee of the Red Cross, 2005), <http://www.icrc.org/Web/eng/siteeng0.nsf/html/6T7G86>.

46. See, e.g., Howard S. Levie, *The Code of International Armed Conflict* (London, New York: Oceana Publications, 1986), 11. See also Richard R. Baxter, "The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)," in *International Dimensions of Humanitarian Law* (Geneva: Henry Dunant Institute, 1988), 97; *Law of War*, 29 et seq. According to Pictet, this article was intended to be broadly defined in order to expand the reach of the Conventions to as many conflicts as possible.

47. *Law of War*, 31.

48. *Ibid.*

49. At the United Nations (UN) Millennium Assembly in September 2000, Canadian Prime Minister Jean Chrétien announced that an independent International Commission on Intervention and State Sovereignty (ICISS) would be established as a response to Secretary-General Kofi Annan's challenge to the international community to endeavor to build a new international consensus on how to respond in the face of massive violations of human rights and humanitarian law. See, e.g., "International Commission on Intervention and State Sovereignty Turns to The CUNY Graduate Center to Orchestrate Research," November 6, 2000, [http://www.gc.cuny.edu/press\\_information/archived\\_releases/nov\\_6\\_international.htm](http://www.gc.cuny.edu/press_information/archived_releases/nov_6_international.htm).

50. JA 422, 72.

51. JP 1-02, 72.

52. *Ibid.*, 352

53. See, e.g., David Rieff, *A Bed for the Night. Humanitarianism in Crisis* (New York: Simon & Schuster, 2002), at 21.

54. *Ibid.*

55. Colonel Frederic L. Borch, *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti* (Charlottesville, VA: Office of the Judge Advocate General and Center of Military History, 2001), 327.

56. See, e.g., Kevin Govern, "Paving the Road to the Warfighter, Preparing to Provide Legal Support on the Battlefield," *The Army Lawyer*, March 2002, DA PAM 27-50-350.