LAW AND ETHICS

LEGAL FACTORS IN MILITARY PLANNING FOR COALITION WARFARE AND MILITARY INTEROPERABILITY

SOME IMPLICATIONS FOR THE AUSTRALIAN DEFENCE FORCE

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Among the most significant factors in conducting coalition operations are the national legal considerations that govern the deployment of military forces and the way in which they are employed. Legal factors have a bearing on everything in alliance and coalition operations—from determining basic 'troop-to-task' considerations to decisions regarding the targets to be engaged—and the types of ordinance that may be used. It is often believed that, in the heat of battle or in the pressure cooker of operations, legal considerations can be quickly resolved. Experience has shown the opposite to be true, with legal factors in military planning in a coalition environment often proving to be difficult to resolve.

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While there has been considerable effort expended over recent years in formal alliances, such as the North Atlantic Treaty Organisation (NATO), to work towards standardisation issues, legal planning has generally lagged behind. This situation has been exacerbated by differences between Western states in relation to major features of international law, beginning with the Hague Cultural Property Convention in the Event of Armed Conflict of 1954.[1] In particular, the advent of Additional Protocol I of 1977 to the Geneva Conventions of 1949 has led to differences in interpretation of laws relating to armed conflict and the use of force.[2]

Protocol I of the Geneva Conventions merged the traditions of victim protection law (known as 'Geneva' law) with the law regulating the actual conduct of hostilities (known as 'Hague' law). This protocol contains much detail concerning military targeting and the actual planning and conduct of military operations. Problems have continued with the introduction of international legislation, such as the Conventional Weapons Convention of 1980 and its four Protocols,[3] the Ottawa Anti-Personnel Mines Treaty of 1997 (Ottawa Treaty)[4] and the Rome Statute for the International Criminal Court (ICC) of 1998.[5] In particular, the difficulty posed by the Rome Statute relates not only to the development of the law of armed conflict, but to operations in which the jurisdiction of the ICC may come into play. Since the United States remains firmly opposed to the ICC, the Rome Statute has caused procedural problems for signatory states working with the Americans in military operations.

This article examines the implications for the Australian Defence Force (ADF) of legal factors in coalition operations. It examines how legal issues have affected multinational operations in Kosovo, East Timor and Iraq. The article analyses how Australia has sought to deal with Protocol I of the Geneva Conventions and with the Ottawa Treaty on anti-personnel mines in the context of coalition missions. Finally, a number of recommendations are made regarding the need for improved management of legal factors in military planning through the American, British, Canadian and Australian (ABCA) agreement.

LEGAL ISSUES IN MILITARY PLANNING IN RECENT OPERATIONS: KOSOVO, EAST TIMOR AND IRAQ

Legal factors in military planning played an important role in coalition operations in Kosovo and East Timor in 1999 and in Iraq in 2003 and 2004.

KOSOVO

The first occasion on which legal factors in military planning affected interoperability was during the Kosovo war of March to June 1999. Operation *Allied Force*, the NATO air campaign conducted against the Serbian Government of Slobodan Milosevic, was designed to halt Serbian ethnic cleansing of the Albanian community

in Kosovo. In 1999 NATO possessed nineteen member states. Of these, the United States, France and Turkey were not signatories to Protocol I of the 1949 Geneva Conventions. While NATO, as a body, had asserted that its members would respect Protocol I, tension quickly emerged. The United States conducted some 80 per cent of the air strikes against the Serbs and the Americans increasingly chafed at the legal restrictions that other members considered applicable under Protocol I. The situation was compounded by the fact that NATO had no mechanism designed to enforce common legal standards.

As a result, NATO policy permitted member states to refuse bombing assignments if they regarded a particular target as being illegitimate. In theory, if a NATO member refused to strike a particular target, the mission could not be reassigned to another alliance member. In practice, however, most of the Serbian targets that were rejected by various NATO members were subsequently attacked by the Americans. A good example was the bombing of the RTS television studio in Belgrade; this incident resulted in the deaths of sixteen civilians. On sensitive targeting issues, opposing member states attempted to prevent US aircraft based on their territory from using their airspace. Lieutenant General Michael Short, the US and NATO air commander, later commented that this approach often resulted in missions being either cancelled on the ground or even turned around when American aircraft were in flight. Lieutenant General Short concluded:

> We (the US) need to understand going in [*sic*] the limitations that our coalition partners will place upon themselves and upon us. There are nations that will not attack targets that my nation will attack. There are nations that do not share with us a definition of what is a valid military target, and we need to know that up front … You and I need to know that all aircraft based in the UK are subject to the rulings of the UK Government about whether we are about to strike a valid target or not.[6]

The air campaign placed a severe strain on NATO and at times there was a danger of irreparable political rifts being caused. Tensions became particularly acute after all the strictly military targets had been exhausted and the United States sought to expand the air campaign to include political and economic pressure on Milosevic by attacking various non-military targets.

In the final analysis, the NATO bombing campaign lost its effectiveness largely because it broadened its targeting regime. The consequent targeting errors included the bombing of Albanian civilian refugees and an attack on the Chinese Embassy in Belgrade. It was the political pressure brought to bear by the withdrawal of Russian support for Milosevic that eventually forced the Serbs to agree to a political solution, so saving NATO from undergoing further tension and disagreement.

EAST TIMOR

There were also legal problems among members of the International Force East Timor (INTERFET) led by Australia. Australian planners confronted the dilemma of putting together rules of engagement that would meet with the approval of all INTERFET participants. One of the most contentious aspects of the mission concerned legal provisions for using lethal force in operations designed to defend property. Australia and the United States accepted such provisions, but Britain, New Zealand and Canada did not support the use of lethal force to defend property because of domestic legal considerations.

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The three countries argued that the use of lethal force in order to defend property could only be countenanced in circumstances where a direct association with the protection of human life could be established. The British, New Zealand and Canadian positions had direct implications for the 'troop-to-task' analysis being carried out by INTERFET planners. For example, troops from a country under legal limitations with respect to using lethal force in defending property could not be assigned to airfield defence.

IRAQ 2003–04

Any analysis of recent operations in Iraq must be considered in terms of two different phases: one of warfighting and one of pacification. The warfighting phase in Iraq, which lasted from March to April 2003, raised issues from the conventional conduct of operations under the Law of Armed Conflict (LOAC). The pacification phase, which ensued from May 2003 until 30 June 2004, raised issues associated not only with LOAC but also with human rights conventions and domestic legal considerations under the law of occupation.

The warfighting phase of Operation *Iraqi Freedom* demonstrated that significant progress in legal considerations had been made since the Kosovo air campaign of 1999. This situation was undoubtedly helped by American concern to minimise unnecessary casualties and damage in targeting Iraq's infrastructure prior to the country's occupation. For the ADF, the Iraq campaign marked the first time that ordinance was delivered by RAAF aircraft in anger under the changed legal environment created by Protocol I of the Geneva Conventions in 1977.

During the warfighting phase Australia had to come to grips with a targeting process used by the United States. The American targeting system was shaped by precautions that related to the lawfulness of striking individual targets and by a general need to minimise casualties and damage to vital installations. The system involved a 'tiered' process of approval in which various levels of authority were required in order to 'weaponeer' a target and to minimise damage or eliminate assessed risk. As a consequence, Australian military personnel were forced into the unenviable position of having to develop doctrine, practice and ultimately rules of engagement during actual military operations.

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Iraq proved to be a lesson for the ADF in terms of the need both to appreciate the importance of legal requirements in contemporary combat and to keep abreast of the way in which legal theory and military practice interacted among its close allies. During Operation *Iraqi Freedom*, legal differences in assessing legitimate targets created by Protocol I tended to be resolved by the use of the 'red card'. This card involved coalition partners being able to indicate disapproval of their involvement in targeting or tactics in any mission that ran contrary to their legal obligations. The United States generally accepted these decisions by its allies. The red card system assisted in the management of both international and domestic perceptions of the legitimacy of operations in Iraq—perceptions that were important given the brisk debate over the decision to use force in the first place.

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Another legal issue that proved difficult in the context of coalition operations was Australian and British adherence to the Ottawa Treaty prohibiting the use of anti-personnel mines. The Ottawa Treaty will be considered in further detail later in this article, but for the moment it is important to note that Australia was unable to refuel any US aircraft that was fitted with air-delivered anti-personnel mines such as the scatter-based and mixed munition GATORS system.

During the pacification stage of the war in Iraq after April 2003, there were unanticipated legal differences between coalition members. The pacification phase was characterised by the application of the laws of occupation, a situation not experienced by the various coalition partners since the end of World War II.[7] Legal issues of concern to the British involved using lethal force in defence of property and their adherence to the European Convention on Human Rights (ECHR). In terms of the former, once the Coalition Provisional Authority created the Iraqi Civil Defence Corps (ICDC), the latter organisation was given the power to use lethal force to protect certain critical properties.[8] The British refused to accept this situation in their area of occupation in southern Iraq. Eventually, coalition and Iraqi authorities reached a compromise that involved ICDC elements in the British area of operations being governed by rules of engagement determined by the British military command.

The implications of British adherence to the European Convention on Human Rights were also problematic. The relationship between the European convention and the law of armed conflict in the context of an occupation remains unclear, and there is litigation currently before the UK courts on this subject. Confronted with legal uncertainty, Britain acted cautiously on a number of legal issues. For instance, Britain was unable to support the use of the death penalty by Iraqi courts during the occupation. Moreover, the question of whether British forces could hand over prisoners directly to the Iraqi criminal authorities was also contentious, given the reimposition of the death penalty.

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Another serious point of contention between the coalition partners was the extent to which the occupation authorities could pursue reform agendas in Iraq under the law. The debate centred initially on the Hague Regulations of 1907 and whether these applied to the situation in Iraq. In certain quarters of the US legal establishment there was a view that the regulations did not apply in Iraq. However, such a view was unacceptable to both Australia and Britain. As matters transpired, the application of the Hague Regulations was in fact reinforced in the relevant United Nations (UN) Security Council Resolutions and ultimately the United States pursued policies commensurate with the UN decisions. However, discussion continued to occur regarding the extent of the authority possessed by the occupying powers in matters such as economic reform. Considerable cooperation was required in order to achieve unity in such matters among the key Coalition partners.

The sphere of detention management in Iraq was not an area that seemed to be contentious in terms of legal theory. However, the practical implementation of detention proved difficult during the occupation. For example, once the legal termination of the occupation occurred on 1 July 2004, the source of authority became the Chapter VII mandate contained in UN Security Council Resolution 1546. As a result, Britain indicated its intention to institute a process of detention that was independent of that employed by the Americans. The British approach was characterised by efforts to ensure that legal advice—but not legal representation—was available to security detainees. This approach may have been less than ideal, but since it concerned only security detainees and had no bearing on criminal processes, it could be legally sustained. Given the highly publicised problems and failings of prison conditions for detainees in Iraq, it is clear that much work needs to be done in order to standardise different approaches towards interrogation, command and control, and reporting requirements.

PROTOCOL I OF THE GENEVA CONVENTIONS, THE OTTAWA TREATY AND COALITION OPERATIONS

The examples cited above highlight the practical importance of legal factors in contemporary coalition military operations. While it is impossible in a single article to deal with all the legal issues that might cause friction in coalitions, two particular conventions are immediately relevant. The first is Protocol I of the Geneva Conventions where, for the United States, there appear to be areas that have now moved ahead of customary law.

PROTOCOL I OF THE GENEVA CONVENTIONS

While the United States has accepted that large parts of Protocol I are expressions of the current state of LOAC, it has also made it clear which provisions it regards as not having reached that standard.[9] These provisions include the extension of the applicability of Protocol I to 'wars of national liberation';[10] the prohibition on causing widespread, long-term and severe damage to the environment;[11] the prohibition on the use of enemy emblems and uniforms during military operations;[12] the definition of combatant;[13] the prohibition on the use of mercenaries;[14] the prohibition on reprisals;[15] the definition of military objective;[16] and the protection of dams and dykes.[17]

Some of the concerns that emerge from these conventions can be dealt with in special Declarations of Understanding, and Australia has adopted this approach to Protocol I and in the Ottawa Treaty. Among Australian Declarations for Protocol I is a tighter definition of the combatant criteria. This declaration involves confining the definition of a combatant to those persons engaged in fighting, as set out in Article 1 (4),

including those struggling against 'colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'. In order for persons to qualify as lawful combatants under Protocol I, they are required to visibly carry weapons while deploying for an attack. Australia requires that armed deployment include any movement towards the point from which an attack is to be launched. The phrase 'visible to the adversary' while engaging in a military deployment is interpreted by Australia to include not only binocular range but also ranges determined by the use of infra-red and image intensification devices.

In addition, in order to ensure that targeting restrictions are realistic in character, Australian military commanders and others responsible for planning, deciding on or executing attacks necessarily have to reach their decisions on the basis of their assessment of the information from all sources available to them at the relevant time. More importantly, in relation to the definition of a military objective, the 'military advantage' element of the definition is intended to describe an attack considered as a whole. The 'concrete and direct military advantage anticipated' must exist in order to justify an attack. Finally, Australia has argued that the limitation of attacks to military objectives in Article 52 (2) does not deal with the issue of collateral damage.

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While these declarations have made it easier to manage contending approaches in targeting between the United States and Australia, differences continue to exist. The United States has adopted a broad application of the use of kinetic means in military targeting. However, recent military practice has suggested that, when working in a coalition environment, the United States is prepared to modify this approach in the interest of harmony with its military partners. Frequently, the management of legal factors for interoperability has involved determining the lowest common denominator that is acceptable to all parties and then proceeding on that basis.

THE OTTAWA TREATY ON ANTI-PERSONNEL MINES

The Ottawa Treaty poses even greater difficulties for managing the practical implications of coalition operations, especially with the United States.[18] The treaty bans the use of anti-personnel mines, either directly or indirectly, and raises questions as to whether Australia can be associated with coalition partners—such as the United States—that continue to use these weapons. This association may include the activities of embedded personnel from the ADF working in a US headquarters,

de-mining actions and the involvement of ADF personnel in refuelling allied aircraft armed with anti-personnel mines. Other situations include the problem of ADF occupation of a territory that may be protected by coalition anti-personnel mines and the issue of requests from Australian personnel for fire support from a coalition partner that might use mines.

Given the potential criminal liability for ADF members involved in the above scenarios, resolving these issues is more than an academic exercise. In general, Australia has sought to manage such legal problems through Declarations of Understanding. The most important of these declarations states:

> It is the understanding of Australia that, in the context of operations, exercises or other military activity authorised by the United Nations or otherwise conducted in accordance with international law, the participation by the Australian Defence Force, individual Australian citizens or residents in such operations, exercises or activities in combination with the armed forces of States not party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be in violation of the Convention.

In further declarations on use, assistance, encouragement and inducement, Australia has refined its approach. Australia believes that in the context of the Ottawa Treaty, 'use' means the physical emplacement of anti-personnel mines and does not include any indirect or incidental benefit derived from these weapons when they are laid by another state. Furthermore, in the context of the Treaty, Australia interprets 'assist' to mean direct physical participation in prohibited activity with respect to anti-personnel mines, but not indirect support (such as the provision of security for personnel engaging in those activities).

Australia considers 'encouragement' to mean a request for the commission of prohibited activity and 'inducement' to imply active engagement in the offering of incentives to obtain the commission of a prohibited activity. Finally, in dealing with the need to de-mine territory under ADF jurisdiction or control, Australia has asserted that any interpretation should not include the temporary occupation of, or presence on, foreign territory where mines may have been laid.

FUTURE LEGAL COOPERATION IN COALITION OPERATIONS

Over the past two years, a legal Information Exchange Group (IEG) has begun to operate under the umbrella of the ABCA standardisation agreement. While progress has been slow, the IEG has agreed on terms of reference, on a definition of key issues and on the identification of points of contact. Further steps must involve dedicated project research into legal issues and the production of a series of position papers designed to obtain either consolidated interpretations or a documentation of varying interpretations.

Coalition handbooks and sub-pamphlets dealing with national legal doctrine, with risk management, with 'troops-to-task' issues and with the intricacies of 'weaponeering' are also required by armies.

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A recent development that makes legal cooperation easier has been the establishment of exchange postings between the US Center for Law and Military Operations (CLAMO) and the ADF Military Law Centre (MLC). In addition, a British officer is also about to join the CLAMO, and American military officers will reciprocate with both Britain and Canada. The CLAMO–MLC relationship has been developed as an engine for generating progress in the IEG. In this process, the ADF officer at CLAMO has played a significant role in distilling lessons learnt from the war in Iraq, and the first volume of the results has been published. The development of national doctrine is continuing but there is much that still needs to be done in relation to incorporating legal lessons into military training and exercises. In the near future, Australia and its closest military partners must aim for command and planning staff to include legal officers, who are well versed in the nuances of Coalition operations.

CONCLUSION

This article has examined how legal factors in military planning may impinge on both coalition operations and interoperability. Since there are limitations to the workings of the multilateral international system, Australia depends heavily for its security on bilateral defence relationships, particularly the ANZUS Treaty. However, because the United States has chosen not to adhere to a number of international conventions to which Australia is a signatory, legal factors pose a significant planning challenge in future Australian–US military operations.

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Over the next decade, coalition standardisation in the crucial legal area must be dramatically improved through the use of existing frameworks such as the ABCA forum. Legal planning for military operations remains an important area for the ADF to understand and to develop. In order to sustain successful military operations, Australia must uphold its moral authority and legitimacy in international and domestic spheres and, not least, in the actual area of operations.

ENDNOTES

1. Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, entered into force for Australia on 19 Deccember 1984 [1984] ATS 21. Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (The Hague, 26 March 1999); Australia is not yet a party to this Protocol.
2. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [Protocol I] (Geneva, 8 June 1977), entered into force for Australia on 21 December 1991 [1991] ATS 29.
3. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, and Protocols I, II, III and IV [Protocol I on Non-Detectable Fragments; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices; Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons; Protocol IV on Blinding Laser Weapons] (Geneva, 10 October 1980, Protocol IV on 13 October 1995), entered into force for Australia on 29 March 1984 [1984] ATS 6 (Protocol IV on 30 July 1998 [1998] ATS 8).
4. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997), entered into force for Australia on 1 July 1999 [1999] ATS 3.
5. Rome Statute of the International Criminal Court (Rome, 17 July 1998), entered into force for Australia on 1 September 2002 [2002] ATS 15.
6. Remarks to an Air Warfare Symposium, 25 February 2000.
7. Added to this was the fact that the Fourth Geneva Convention Relative to the Protection of Civilians in Time of War came into effect in August 1949 and neither the US nor the UK had had experience with the regime that this Convention establishes in occupation situations. Australia had this experience through applying the Conventions to its operations in Somalia in 1993 during the UNITAF period, and in East Timor as guidance for the management of the operation during the INTERFET period.
8. Establishment of the Iraqi Civil Defense Corps, CPA Order No 28 (CPA/ORD/3 September 2003/28), Section 3(4).
9. M. Matheson (US Department of State, Deputy Legal Adviser), 'Comments to the Sixth Annual American Red Cross Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions', reported in the *American University Journal of International Law and Policy* 428 (1988).
10. Article 1(4).
11. Article 35.

12 Article 39.
13 Article 43, Article 44 & Article 45.
14 Article 47.
15 Article 51(6).
16 Article 52 (2). This article has emerged in US practice as opposed to official statements in this respect.
17 Article 56.
18 The Treaty came into effect for Australia on 1 July 1999 and was implemented by the *Anti-Personnel Mines Convention Act 1998*. The Act creates individual criminal liability for members of up to 10 years in prison and a fine.

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