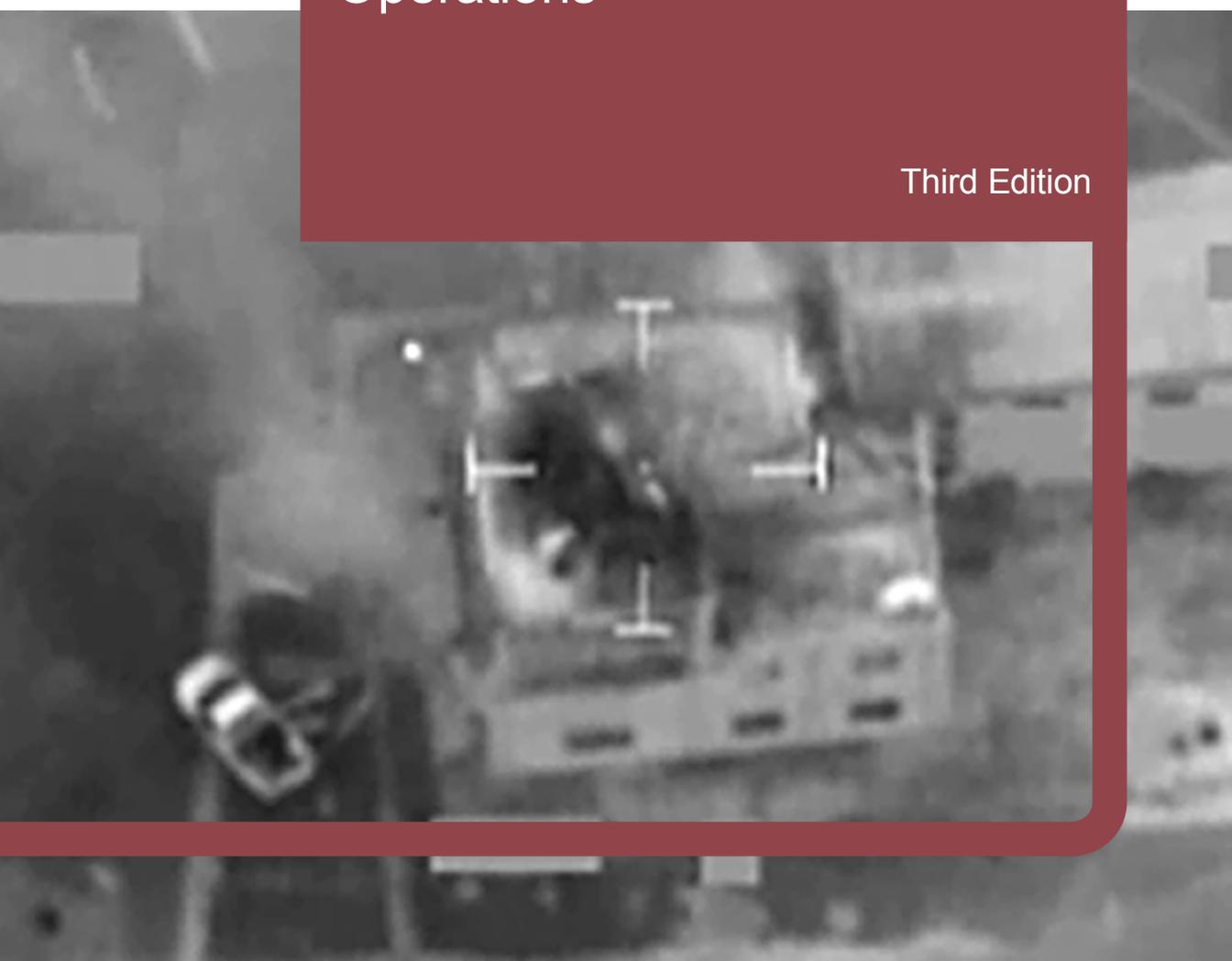




Ministry
of Defence

Joint Doctrine Publication 3-46
Legal Support to Joint
Operations

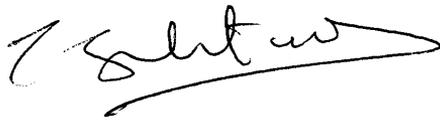
Third Edition



Joint Doctrine Publication 3-46 Legal Support to Joint Operations

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is promulgated
as directed by the Chiefs of Staff



Director Concepts and Doctrine

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Preface

Purpose

1. The purpose of Joint Doctrine Publication (JDP) 3-46, *Legal Support to Joint Operations* is to provide guidance for the operational commander and their legal adviser. It informs the commander on what can be expected of the legal adviser, and the legal adviser on what the commander expects of them.

Context

2. All operations have a legal dimension. Legal advice is essential, not only in the strategic decision to commit UK Armed Forces, but also in the interpretation of that decision and its application at the operational and tactical levels. Legal advisers have an important support role in joint operations. Having a stand-alone publication reflects that significance.

Scope

3. The focus of this publication is at the operational level and more specifically for a joint task force headquarters. The publication is not a national manual of the Law of Armed Conflict, nor is it a handbook of operational law. It is an introductory guide to the role of law and the role of the legal adviser in planning and conducting operations. It provides joint doctrine to plan, prepare and execute legal support to joint operations.

Audience

4. The primary audiences for JDP 3-46 are commanders and lawyers at the joint operational level. It is also directly relevant to commanders and lawyers outside of the joint environment and those below the operational level, for example, those involved in Defence Engagement. Other government departments and non-governmental organisations will also find JDP 3-46 of benefit to understand how legal advisers support operations.

Structure

5. JDP 3-46 is divided into five chapters.

- a. **Chapter 1 – Operations and the law.** Chapter 1 focuses on the legal framework of a campaign. It also describes legal organisations, missions and functions across Defence.
- b. **Chapter 2 – Applicable law.** Chapter 2 explains how legal advisers help ensure that operational commanders and staff adhere to the Law of Armed Conflict during planning and the execution of military operations. The chapter also highlights how legal advisers ensure that operational commanders and staff are aware of all other law and policy that is relevant in both armed conflict and other operations, such as peace support. The chapter concludes by looking at accountability.
- c. **Chapter 3 – Legal support to operational planning.** Chapter 3 explains legal support to joint operational planning. Legal advisers actively participate in the entire planning process from joint intelligence preparation of the battlespace, through mission analysis, to course of action development and recommendation through to execution.
- d. **Chapter 4 – Legal support to executing operations.** Chapter 4 examines the essential role a legal adviser plays in providing advice to operational commanders on the myriad of legal issues associated with combat and non-combat operations. The intent of this chapter is not to address all possible issues, rather it is to provide the commander and legal adviser with an overview of the legal landscape and what legal support the legal adviser provides during key aspects of mission execution.
- e. **Chapter 5 – The operational legal adviser.** Chapter 5 examines the role of the legal adviser in operations. It first looks at the relationship between the legal adviser and the commander and sets out their key responsibilities. The chapter goes on to discuss legal risk and policy, the position of the legal adviser in the headquarters and the support required for the operational legal adviser.

Linkages

6. JDP 3-46 is a supporting doctrine publication sitting below JDP 0-01, *UK Defence Doctrine* with linkages across the UK Joint Doctrine Architecture and legal policy documents.

- Allied Joint Publication (AJP)-01, *Allied Joint Doctrine*
- AJP-3, *Allied Joint Doctrine for the Conduct of Operations*
- AJP-3.4.9, *Allied Joint Doctrine for Civil-Military Cooperation*, (with UK national elements)
- AJP-3.9.2, *Allied Joint Doctrine for Land Targeting*
- AJP-5, *Allied Joint Doctrine for Operational-level Planning* (with UK national elements)
- JDP 01, *UK Joint Operations Doctrine*
- JDP 02, *UK Operations: the Defence Contribution to Resilience and Security*
- JDP 0-50, *UK Cyber Doctrine* (SECRET)
- JDP 3-00, *Campaign Execution*
- JDP 1-10, *Captured Persons*
- JDP 3-51, *Non-combatant Evacuation Operations*
- JDP 3-52, *Disaster Relief Operations Overseas: the Military Contribution*
- Joint Doctrine Note (JDN) 1/15, *Defence Engagement*
- JDN 2/14, *Materiel and Personnel Exploitation* (OFFICIAL SENSITIVE)
- Joint Service Publication (JSP) 381, *Aide Memoire on the Law of Armed Conflict*
- JSP 383, *Joint Service Manual of the Law of Armed Conflict*
- JSP 398, *UK Manual of National Rules of Engagement*
- JSP 567, *Contractor Support to Operations*
- JSP 822, *Defence Direction and Guidance for Training and Education*
- JSP 830, *Manual of Service Law*
- JSP 900, *UK Targeting Policy*
- Military Committee (MC) 362/1, *NATO Rules of Engagement*



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Chapter 1

Chapter 1 focuses on the legal framework of a campaign. It also describes legal organisations, missions and functions across Defence.

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Decisions were impacted by legal considerations at every level. **Lawyers proved invaluable in the decision-making process.**



General Colin Powell

Speaking as chairman of the US Joint Chiefs of Staff during
Operation DESERT STORM

Chapter 1 – Operations and the law

Section 1 – Introduction

1

1.1. All operations have a legal dimension. There must be a legal basis for the operation and it must be conducted in a lawful manner. Adherence to the law is crucial in underpinning the legitimacy and campaign authority of any operation.¹ Legal advice is essential, not only in the strategic decision to commit UK Armed Forces, but also in the interpretation of that decision and its application at the operational and tactical levels.² Legal advisers (LEGADs) have an important support role in joint operations.³

1.2. As set out in Joint Doctrine Publication (JDP) 01, *UK Joint Operations Doctrine*,⁴ failure (or even perceived failure) to comply with the law can significantly undermine campaign authority. Commanders should ensure that:

- they, and those under their command, understand their legal responsibilities and obligations and are trained on the relevant rules of engagement;
- they, and subordinate commanders, comply with the law and observe rules of engagement, by exercising command authority over their subordinates;
- in a multinational context, they consider the differing national policy positions and legal obligations of respective national contingents;
- any suspected unlawful activity is reported immediately and thoroughly investigated; and
- they, and subordinate commanders, have access to specialist legal advice.

1 'Observing the rule of law is fundamental to our war fighting ethos and maintaining campaign authority.' Joint Doctrine Publication (JDP) 0-01, *UK Defence Doctrine*, 5th Edition, paragraph 2.71.

2 The levels of warfare – strategic, operational and tactical – are explained in JDP 0-01, *UK Defence Doctrine*, 5th Edition and in JDP 01, *UK Joint Operations Doctrine*.

3 The legal adviser is listed as a principal staff officer of the commander, who is 'pivotal to all aspects of planning and execution.' JDP 3-00, *Campaign Execution*, 3rd Edition, paragraph 122.

4 JDP 01, *UK Joint Operations Doctrine*, paragraph 3.17.

'Character, as Aristotle taught, is a habit, the daily choice of right and wrong: it is a moral quality which grows to maturity in peace and is not suddenly developed on the outbreak of war. For war, in spite of what we have heard to the contrary, has no power to transform, it merely exaggerates the good and evil that are in use, till it is plain for all to read; it cannot change; it exposes.'

Lord Moran⁵

Section 2 – Legal organisations, missions and functions

1.3. Legal advice informs the decision to commit the UK Armed Forces and features in the dissemination and implementation of that decision. This section describes the functions, duties and responsibilities of the legal organisations across Defence that directly support joint operations.



The importance of obtaining timely, consistent and clear legal advice cannot be overstated

⁵ Lord Moran, *The Anatomy of Courage*, 1945.

1.4. The importance of obtaining timely, consistent and clear legal advice cannot be overstated. This is summed up in *The Report of the Iraq Inquiry: Executive Summary*, paragraph 432 which states:

‘The circumstances in which it was ultimately decided that there was a legal basis for UK participation were far from satisfactory.’⁶

Attorney General

1.5. The Attorney General is the Government’s principal legal adviser and a member of the Cabinet. The Attorney General and the Solicitor General are known as the Government’s Law Officers. The Attorney General advises the Prime Minister at the strategic level on the legal basis for committing UK Armed Forces. The Attorney General also provides advice to the Ministry of Defence (MOD) and other government departments on legal issues impacting on operations that are underway. An example is the advice the Attorney General provided to the Government on the use of armed force in Iraq against Daesh on the basis of the consent of the Iraqi government⁷ (although it should be noted that disclosure of the Attorney General’s advice is the exception rather than the norm).⁸

Ministry of Defence Legal Advisers

1.6. Director MOD Legal Advisers (MODLA) is the primary source of legal advice to the MOD and ministers on the MOD’s business as a department of state. MOD Legal Advisers represent Defence legal interests with other government departments in Whitehall, and internationally with counterparts in other states. The areas they provide advice on range from commercial law, legislation, employment law, general law,⁹ and most importantly in the context of this publication, operational and international humanitarian law. For the latter, MOD Legal Advisers provide strategic legal advice to MOD Head Office as well as operational legal advice to the Permanent Joint Headquarters (PJHQ) and single Services. MOD Legal Advisers liaise as required with Service lawyers and the legal staffs of other government

6 UK Cabinet Office, *The Report of the Iraq Inquiry: Executive Summary*, 2016, available at <http://www.iraqinquiry.org.uk/the-report/>

7 Further information is available at <https://publications.parliament.uk/pa/cm201415/cmhansrd/cm140926/debtext/140926-0001.htm>

8 ‘The long-standing Law Officers’ Convention makes clear that the Government does not disclose the content or even the fact of Law Officers’ advice without consent of the Law Officers. This is to ensure Government has access to full and frank legal advice, and also to reflect collective Cabinet responsibility in decision making.’ Attorney General’s speech at the International Institute for Strategic Studies, ‘The modern law of self-defence’, 11 January 2017, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/583171/170111_Imminence_Speech_.pdf

9 For example, Ministry of Defence (MOD) Police, by-laws, devolution, data protection, freedom of information, health and safety, Defence estates, judicial review, human rights, pensions, trusts, charities and criminal.

“ The Attorney General is the Government’s **principal legal adviser** and a member of the Cabinet. ”

departments, such as the Foreign and Commonwealth Office, the Home Office and the Attorney General's Office.



One of Director MOD Legal Advisers' primary objectives, which falls within the responsibility of their Operational and International Humanitarian Law Division, is to provide support in achieving success in current operations, including in defending legal challenges and in helping enhance MOD's reputation.

Armed Forces' legal services

1.7. All three Services have uniformed lawyers who provide operational- and tactical-level commanders and their staffs with single-Service specialist legal advice, including the legal aspects of operations. The availability of appropriately trained Service lawyers to support operations is the responsibility of each of the three heads of the legal services. They are:

- Captain Naval Legal Services (CNLS);
- Director Army Legal Services (DALs); and
- Director Legal Services (Royal Air Force) (DLS (RAF)).

Operational headquarters

1.8. There are three joint operational-level headquarters – PJHQ, Headquarters Standing Joint Command (UK) (HQ SJC (UK)) and Standing Joint Force Headquarters (SJFHQ).¹⁰ All have their own dedicated legal support provided by the single-Service heads of legal services. When deployed the joint force headquarters (JFHQ) receives legal advice from the SJFHQ or the Defence Augmentation Cell; and when not deployed from PJHQ. Should PJHQ or HQ SJC (UK) require augmentation, legal advisers are held at readiness by the single Services.¹¹ Where a legal adviser joins the staff as an individual augmentee, the Defence Augmentation Cell approaches the appropriate Service to arrange the nomination of a suitably trained and experienced candidate. Augmentation may come from any of the three Services and assumes the availability of a number of lawyers trained for joint operations. In preparing for an operational deployment, all commanders should review their access to appropriate legal advice and, if necessary, request

.....
¹⁰ In addition to this, the Royal Navy and Royal Air Force have their own permanent operational headquarters.

¹¹ The Armed Forces' legal services are directed by the MOD to assign Service lawyers to the augmentation manning list who would augment Permanent Joint Headquarters (PJHQ) and Headquarters Standing Joint Command (UK) (HQ SJC (UK)) if required.

augmentation. They should never be placed, or allow themselves to be placed, in a position of having to deploy without their legal adviser or access to legal advice.¹²

1.9. Legal support is provided across Defence from the strategic through to the tactical level. Figure 1.1 represents the sources of legal advice to the operational chains of command.

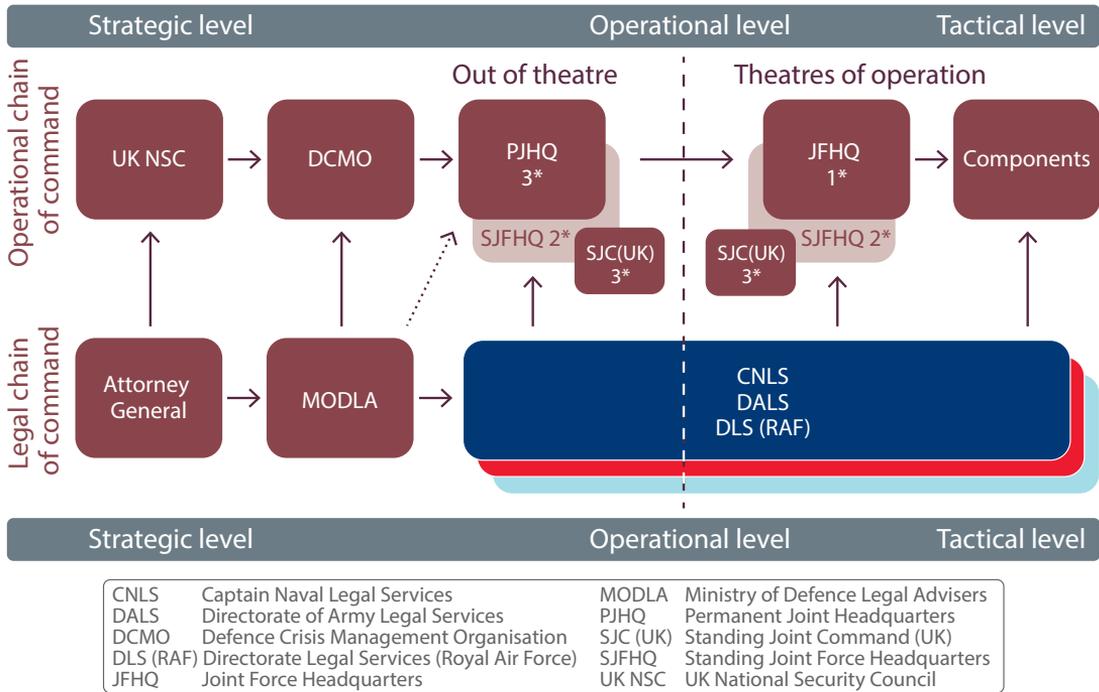


Figure 1.1 – Legal support to the operational chain of command

‘The High Contracting Parties at all times shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the law of armed conflict and on the appropriate instruction to be given to the Armed Forces.’

Additional Protocol 1, Article 82

¹² ‘Joint force commanders should ensure that commanders have access to specialist legal advice.’ JDP 01, *UK Joint Operations Doctrine*, paragraph 3.17.

Section 3 – The legal basis for joint operations

1

1.10. This section focuses on the legal bases of operations, including the overarching legal mandate or justification for operations. A clear understanding by the commander of the legal mandate of a campaign is crucial to defining and accomplishing the mission. Without it, the commander cannot establish and maintain legitimacy and campaign authority.¹³ The legal basis for a military operation could be:

- state self-defence (whether individual or collective);
- a United Nations (UN) Security Council Resolution;
- exceptionally, a humanitarian intervention;
- consent of the recognised government of the host nation;
- other international law permitting the particular activity;¹⁴ or
- domestic law.¹⁵

1.11. MOD Legal Advisers will have advised the Department on the legal basis for operations. The operational legal adviser can explain this to the commander if required.

Specific types of military operations and their legal basis

1.12. **United Nations peace support operations.** Peace support operations¹⁶ have no express basis in the UN Charter; however, they have been core activities of the UN for over 50 years and are considered to derive their legal mandate from the UN Charter. The two main types of operation recognised by the UK are peacekeeping and peace enforcement.

a. **Peacekeeping.** Peacekeeping is rooted in Chapter VI of the UN Charter. The basic principles of peacekeeping derived over many years are:

- the consent of the host nation or of the parties involved in the earlier conflict;
- the impartiality of the peacekeeping force;

¹³ For more on campaign authority, see JDP 0-01, *UK Defence Doctrine*, 5th Edition.

¹⁴ For example, counter piracy operations under the United Nations Convention on the Law of the Sea.

¹⁵ Such as the Emergency Powers Act 1964 and the Criminal Justice (International Cooperation) Act 1990.

¹⁶ For further details on peace support operations see Allied Joint Publication (AJP)-3.4.1, *Allied Joint Doctrine for the Military Contribution to Peace Support*, Edition A.

- the use of force by peacekeepers being limited to self-defence;
- the clear existence of a peace or ceasefire to supervise; and
- consensual, non-offensive operations do not breach the ban on the use of force contained in Article 2(4) of the UN Charter, nor are they actions that require authorisation by the Security Council under Article 42.

Examples of peacekeeping missions include the UN peacekeeping force in Cyprus and UN missions in East Timor and the Sudan.

b. **Peace enforcement.** Peace enforcement, by contrast, does not require the consent of the host nation or the parties involved in conflict, and UN forces may use such force as is consistent with the mandate of the Security Council Resolution. Peace enforcement operations will usually make an explicit reference to Chapter VII and generally include the phrase ‘all necessary measures’.¹⁷ Conventionally, this has been the form of words adopted to authorise Article 42 measures which allow the UN Security Council to ‘take such action by air, sea and land forces as may be necessary to maintain or restore international peace and security’.

1.13. **Non-combatant evacuation of UK citizens overseas.** The MOD is mandated to support the Foreign and Commonwealth Office in conducting a non-combatant evacuation operation (NEO) to relocate UK entitled personnel (UK nationals and other nationals for whom the UK Government has accepted responsibility) threatened in a foreign country to a place of safety.¹⁸ While the host nation has a general obligation to protect foreign nationals within its territory, circumstances may preclude the host nation from doing so. The legal basis for a NEO will be either:

- self-defence and the consent of the host nation; or
- the inherent right of self-defence if the host nation is unable or unwilling to protect UK entitled persons or grant consent.¹⁹

1.14. **Disaster relief operations overseas.** At the request of the Foreign and Commonwealth Office, the Department for International Development or the Stabilisation Unit, the MOD may become involved in a disaster relief operation

17 What is ‘necessary’ will depend on the situation, and might not include offensive force. Such measures must always be in accordance with international law.

18 JDP 3-51, *Non-Combatant Evacuation Operations*, 2nd Edition.

19 *Ibid.*, paragraphs 104, 325 and Annex 3B.

“ While the host nation has a general obligation to **protect** foreign nationals within its territory, circumstances may preclude the host nation from doing so. ”

overseas.²⁰ When UK Armed Forces provide support to a humanitarian mission, there is no combat role. The legal basis for the presence of UK Armed Forces on the territory of the state concerned is normally host nation consent.²¹ Disaster relief operations can be distinguished from humanitarian intervention, which may involve combat activities. They can further be distinguished from humanitarian assistance, which involves the military providing assistance as a secondary task within a wider mission.²²



Operation RUMAN, 2017

1

In September 2017 Hurricanes Irma and Maria caused extreme and life-threatening damage to large parts of the Caribbean. Operation RUMAN was the UK's humanitarian assistance and disaster relief response. All three Services participated in this operation, providing food, shelter, transportation, medical and engineering assistance. As a Foreign and Commonwealth Office led activity with Home Office and Ministry of Defence (MOD) support the legal team worked alongside lawyers in other government departments to determine legal risk. MOD specific legal issues were closely coordinated within the legal team throughout the chain of command from MOD Legal Advisers, through the Permanent Joint Headquarters to the tactical headquarters.

Areas of focus included:

- establishing the jurisdictional position for UK Armed Forces across different countries and British Overseas Territories, including negotiating a memorandum of understanding with the United States;
- advising on legal requirements and risks for using UK Armed Forces for law enforcement activities; and
- assessing the support to be provided by the military following the destruction of the British Virgin Islands' prison.

20 For further details on disaster relief operations overseas, see JDP 3-52, *Disaster Relief Operations Overseas: the Military Contribution*, 3rd Edition.

21 *Ibid.*, paragraphs 2.30 to 2.34.

22 Although not a formally recognised doctrinal term, humanitarian assistance and disaster relief (HADR) is increasingly used by the military and is recognised by a variety of other actors. HADR can be considered as an overarching 'label' that encompasses both humanitarian assistance and disaster relief.



UK Armed Forces providing support as part of Operation RUMAN

1.15. **Military operations in the UK.** National legislation permits UK Armed Forces to be deployed to support the civil authorities.²³ Such support by the MOD and UK Armed Forces – military aid to the civil authorities (MACA) – should always be at the request of those authorities and requires the authorisation of the Defence Council and Defence ministers. Support to the civil authorities does not usually require additional powers under legislation dealing with emergencies. The conduct of Service personnel is routinely governed by domestic law permitting the use of force in self-defence, to prevent crime or enable the arrest of others in certain circumstances.

1.16. **Defence Engagement.** UK Armed Forces also support delivering the MOD's contribution to stability, conflict prevention, and building partner capacity, usually by providing short-term training teams. In addition to receiving the consent of the host nation to provide the legal basis for these types of military missions, the MOD will comply with any requirements identified in the Government's *Overseas Security and Justice Assistance (OSJA) Human Rights Guidance*.²⁴ An overseas security and justice assessment is always required²⁵ prior to any MOD activity involving such assistance. It provides a framework for considering the human rights implications of the MOD providing such assistance and associated legal and political risks to our Government.

23 See JDP 02, *UK Operations: the Defence Contribution to Resilience and Security*, 3rd Edition.

24 Available at <https://www.gov.uk/government/publications/overseas-security-and-justice-assistance-osja-guidance>

25 The guidance sets out which human rights and international humanitarian law risks must be considered prior to providing justice or security sector assistance. It specifies that an assessment must be made of the potential impact of any proposed assistance on those risks, as well as on reputational or political risk, prior to the provision of any assistance.

Section 4 – International arrangements

1

1.17. States will often make arrangements with each other which are applicable to the military forces of the sending state while they are deployed on foreign territory, namely that of the host nation. They may include provisions such as the exercise of jurisdiction, liability and payment of claims, tax exemptions, contracting, the wearing of uniform and the carriage of weapons. These arrangements are recorded in documents such as an exchange of letters, a 'note verbale', a memorandum of understanding, technical arrangement, a treaty, or status of forces agreement (SOFA).

1.18. These documents have differing legal implications. For example, a treaty is legally binding in international law; it will need to be agreed by the Foreign and Commonwealth Office, published and would normally be laid before Parliament. The UK considers a memorandum of understanding to be politically, but not legally, binding. Some other nations take a different view.

1.19. The legal adviser will provide detailed advice on the interpretation and practical application of these arrangements, referring to the higher headquarters' legal adviser for guidance as required. In the event of a dispute arising in relation to the application of, or obligations under, the instrument, the legal adviser is pivotal to providing advice to the commander, and may be called upon to assist the commander in negotiations with the host nation to resolve the problem.



Legal status of Operation TELIC captured persons transfer agreement

The Supreme Court confirmed that a memorandum of understanding between the United States, the UK and Australia, regarding the transfer of those captured in the fighting in Iraq was not legally binding, it was a diplomatic arrangement between the countries concerned. However, the Court noted that the fact that the memorandum of understanding was not legally binding did not reduce its significance as it was the UK's way of ensuring the Geneva Conventions would be complied with.

Secretary of State for Foreign and Commonwealth Affairs
and another v Yunus Rahmatullah [2012] UKSC 48

Section 5 – Jurisdiction

1.20. The question of jurisdiction over military forces deployed to a foreign territory is an important consideration. It should be an integral part of a status of forces agreement. The precise jurisdictional arrangements will vary from country to country and indeed may evolve over time.

1.21. The jurisdictional provisions will establish the requisite authority to exercise discipline or civil and criminal jurisdiction over a Service person who commits an offence while deployed. The provisions will determine who can arrest, detain, investigate, prosecute and sentence the Service person. They aim to ensure that any accused will be given a minimum standard of the appropriate rights and protections. The commander and legal adviser must know what jurisdictional arrangements are in place and all deploying personnel should be briefed on the jurisdictional position, including those provisions of host-nation law that are culturally different and which could accordingly lead to personnel committing breaches of local law through ignorance. In the absence of such an instrument or the conferring of any special status, personnel enter a country at legal risk as they will be subject to both host-nation law and jurisdiction.

a. **Exclusive jurisdiction.** This is where only one state (sending or receiving) has the right to exercise jurisdiction over an individual.

b. **Concurrent jurisdiction.** This is where both the sending state and the receiving state have a right to exercise jurisdiction over the individual. Which state will exercise jurisdiction and in what circumstances will need to be detailed in an arrangement establishing the primary right to exercise jurisdiction.

1.22. There is a potential issue in countries that criminalise behaviour which is not considered criminal in the UK, such as homosexuality or displays of intimacy in public. This may be dealt with either by exclusive jurisdiction or by an appropriate briefing to personnel warning of risks.



The North Atlantic Treaty Organization Status of Forces Agreement

The North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA) 1951 is representative of the jurisdictional arrangements applied in the context of military cooperation among allies and coalition partners. It gives the sending state exclusive jurisdiction in relation to offences which breach its law but not that of the receiving state. Conversely, the receiving state has exclusive jurisdiction in relation to offences which breach its law but not that of the sending state. Where offences breach the law of both states, jurisdiction is concurrent so the SOFA defines the circumstances in which each state has the primary right to exercise jurisdiction. The sending state has the primary right to exercise jurisdiction over a member of its force or civilian component in relation to: offences against its property or security; offences against the person or property of a member of its force or civilian component or of a dependant; and offences committed in the performance of official duty. In all other cases the receiving state has the primary right to exercise jurisdiction. The NATO SOFA also makes detailed provision for the exercise of civil jurisdiction, including the settlement of claims arising out of acts for which a foreign force is responsible, such as traffic accidents occurring in the performance of official duty. By contrast, the United Nations Model Status of Forces Agreement 1991 is representative of the jurisdictional arrangements typically applied between sending states and receiving states in the context of deployed operations. Such agreements, which include the International Security Assistance Force (ISAF) Military Technical Arrangement of 2002, provide foreign forces with far more extensive immunities from host-nation jurisdiction, often allocating the right to exercise criminal jurisdiction exclusively to sending states.

“

Contractors on operations are deployed under a **formal legislative and policy framework.**

”

1.23. Military personnel may on occasion be granted administrative and technical status,²⁶ or the host nation may agree to afford military personnel the same immunities as those with administrative and technical status. These immunities are set out in the 1961 Vienna Convention on Diplomatic Relations. This type of immunity provides for complete exemption from local criminal jurisdiction and exemption from the civil and administrative jurisdiction of the host nation for acts performed during the course of official duties. Irrespective of what jurisdictional arrangements are in place with the host nation, Service personnel remain subject to the Armed Forces Act 2006 and thus the law of England and Wales.

.....
 26 The members of the administrative and technical staff are the members of the staff of the diplomatic mission employed in the administrative and technical service of the mission. Administrative and technical status is granted by embassies and must be agreed to by the receiving state.

Section 6 – Status of individuals

Contractors on operations

1.24. Recent operations have witnessed increased contracted support to the deployed force. Contractors on operations are deployed under a formal legislative and policy framework. The commander and legal adviser should be aware of the status of contractors and whether they are subject to Service discipline as provided for under the Armed Forces Act 2006.

Civilians accompanying the force

1.25. Article 4(A)(4) Third Geneva Convention also provides for civilians who are authorised to accompany members of the armed forces, such as supply contractors, members of military aircraft crews, war correspondents or those who provide for the welfare of the armed forces. These civilians will require authorisation from the armed force they accompany who shall also provide them with an identity card. This will entitle these individuals to prisoner of war status if captured during an international armed conflict.

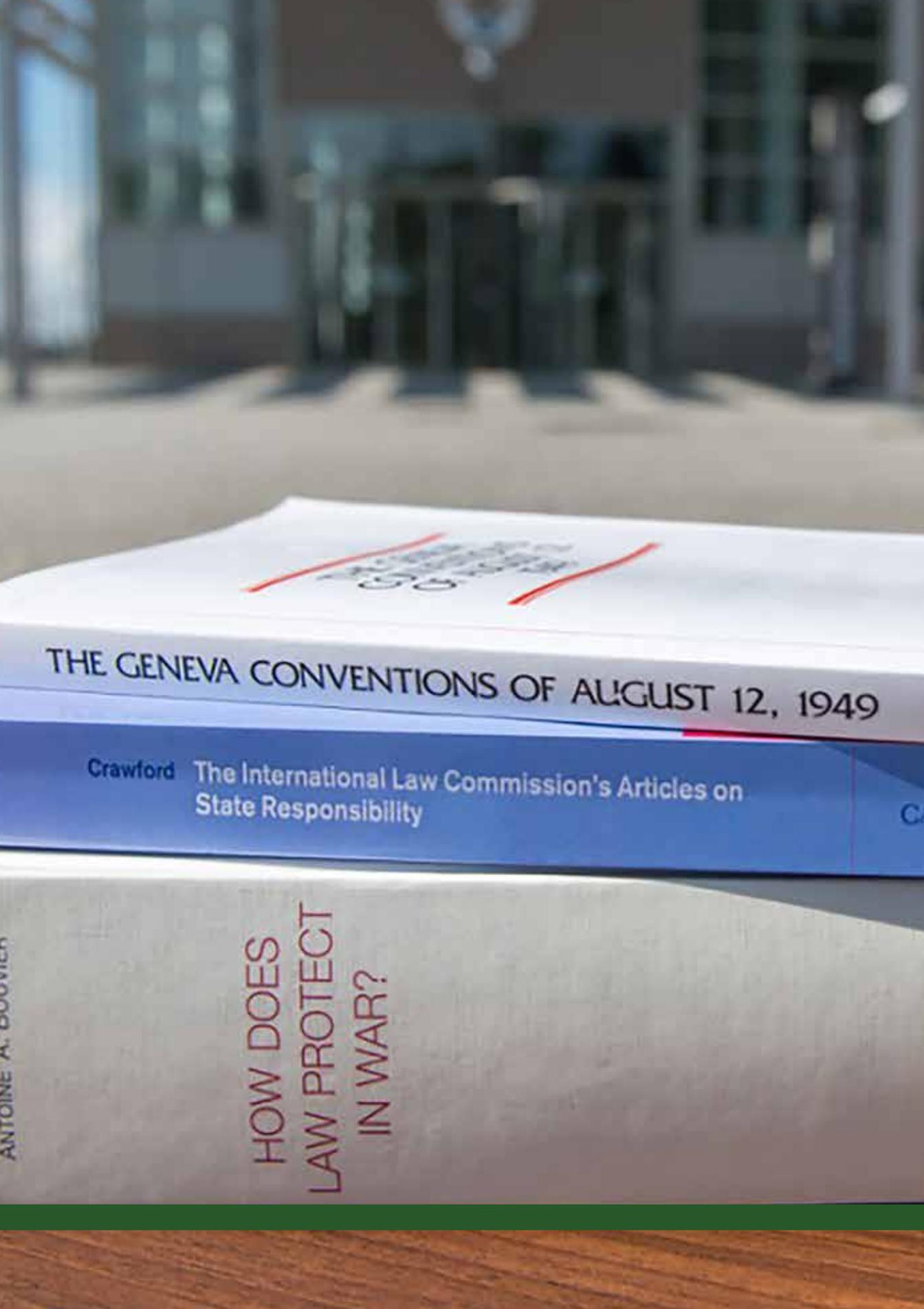
Private military and security companies

1.26. Increasing reliance on private military and security companies adds complexity in relation to command, control and issues of state and individual responsibility. Such companies may be directly contracted by the MOD or other government departments or act in support of logistic contractors working for UK or coalition formations. The nature of the contractual relationship will influence the division of general and specific responsibilities held by the contracting state, the host state, and the state where the private military and security company is registered. The legal adviser will be expected to provide advice on such issues if the commander holds responsibility for the regulation or investigation of conduct of such companies within their area or supporting their formation.

Key points

- Adherence to the law is crucial in underpinning the legitimacy and campaign authority of any operation.
- Legal advice informs the decision to commit UK Armed Forces and features in the dissemination and implementation of that decision.
- The importance of obtaining timely, consistent and clear legal advice cannot be understated.
- In preparing for an operational deployment, all commanders should review their access to appropriate legal advice and, if necessary, request augmentation.
- A clear understanding by the commander of the legal mandate of a campaign is crucial to defining and accomplishing the mission.
- States will often make arrangements with each other that are applicable to the military forces of the sending state while they are deployed on foreign territory, namely that of the host nation.
- The legal adviser will provide detailed advice on the interpretation and practical application of these arrangements.
- The question of jurisdiction is critical for military forces deployed to a foreign territory.





THE GENEVA CONVENTIONS OF AUGUST 12, 1949

Crawford The International Law Commission's Articles on
State Responsibility

HOW DOES
LAW PROTECT
IN WAR?

ANTOINE A. BOUVIER

Chapter 2

Chapter 2 explains how legal advisers help ensure that operational commanders and staff adhere to the Law of Armed Conflict during planning and the execution of military operations. The chapter also highlights how legal advisers ensure that operational commanders and staff are aware of all other law and policy that is relevant in both armed conflict and other operations, such as peace support. The chapter concludes by looking at accountability.

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The **safety** of the **people** shall be the
highest **law**.

”

Marcus Tullius Cicero

Chapter 2 – Applicable law

2.1. The legal framework that governs military operations will vary widely depending on the legal basis and the nature of the operation. As depicted in Figure 2.1, the applicable law may be a combination of international and domestic (national) laws and will include any applicable human rights law. If the operation amounts to an armed conflict, the legal categorisation of that conflict will also affect the rules relating to the use of force and status of captured persons. Further or stand-alone rights and obligations may be added under United Nations (UN) Security Council Resolutions or bilateral/multilateral agreements, such as status of forces agreements, technical arrangements or memoranda of understanding. The character of conflict and/or mandate may change as the campaign evolves, and this may alter the applicable laws.

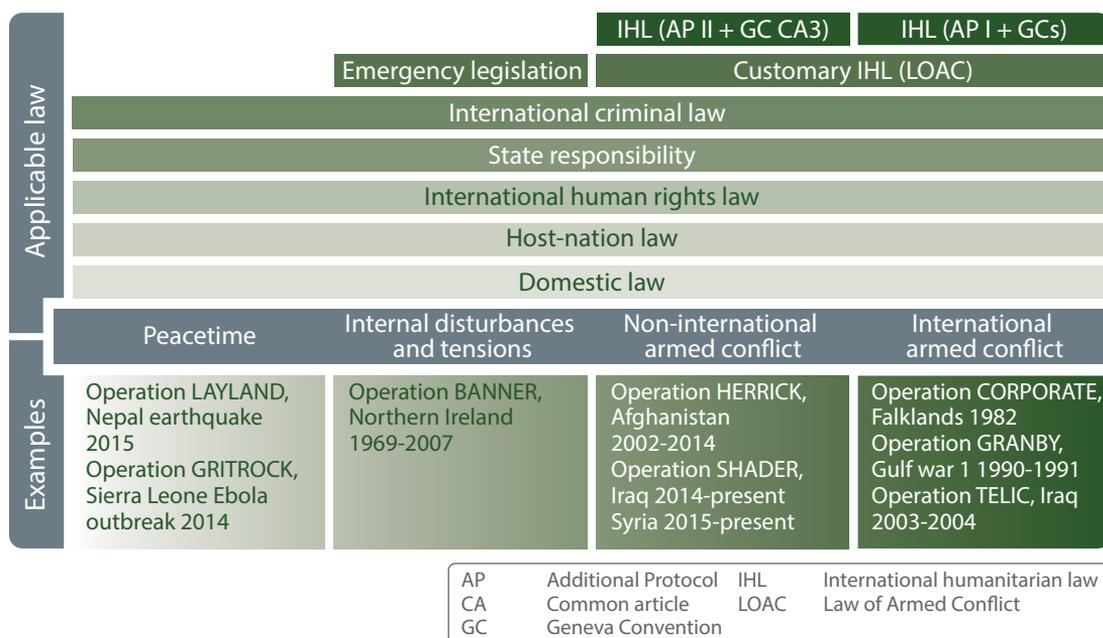


Figure 2.1 – Applicable law



Afghanistan, 2001 to 2014

There is some complexity to operations in Afghanistan, but essentially the campaign started life as an international armed conflict between the United States-led coalition and Afghanistan (governed by the Taliban). Once the Taliban were removed from power, the conflict became a non-international armed conflict between the North Atlantic Treaty Organization (NATO)/Afghanistan and the Taliban (who were then a non-state actor). A non-international armed conflict with al-Qaeda developed. Later the NATO mission developed into a training mission for the Afghan forces.

Section 1 – Armed conflict

Law of Armed Conflict

2.2. In an armed conflict, the existence of which will be a matter for the UK Government to determine on the advice of the Attorney General, the Law of Armed Conflict (LOAC)²⁷ applies. For UK Armed Forces, Law of Armed Conflict is defined as: those treaties, conventions, rules, regulations and customary international law that govern the conduct of hostilities and the protection of persons in enemy hands during an armed conflict and/or during a military occupation.²⁸

2.3. There are significant legal consequences depending on the classification of an armed conflict. An armed conflict is categorised either as an international armed conflict or a non-international armed conflict.

2.4. An international armed conflict is an inter-state conflict. A non-international armed conflict is an internal conflict between the armed forces of a state (including the armed forces of one or more other states who have been asked to assist) and one or more armed factions in that state, or internal armed conflict between such armed factions. It does not include internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature. An international armed conflict is governed by the Geneva Conventions of 1949, Additional Protocol I 1977 and other treaties and rules of customary international law that are applicable. A non-international armed conflict is governed, as a minimum, by Common Article 3 of the Geneva Conventions 1949; and where additional

²⁷ Law of Armed Conflict (LOAC) is increasingly also called international humanitarian law (IHL) but this publication will refer to LOAC.

²⁸ Joint Doctrine Publication (JDP) 1-10, *Captured Persons*, 4th Edition (due to be published in 2018). This definition is amended from that in the previous edition and will be included in JDP 0-01.1, *UK Supplement to NATOTerm*.

criteria are met, by Additional Protocol II 1977 as well as by the applicable rules of customary international law.²⁹ UK Armed Forces are directed, as a matter of policy, to apply broadly the same rules to a non-international armed conflict that they are legally bound to apply during an international armed conflict.

2.5. Operations entailing the use of force in an armed conflict must conform to the basic legal principles³⁰ of **military necessity, humanity, distinction and proportionality**. The legal adviser will play a key role in ensuring that the chain of command is aware of the circumstances in which force can be used lawfully, and how these principles are to be applied. The key elements of the LOAC are based on customary international law and international agreements that set limits to the way that force may be used, for instance, by prohibiting certain weapons, by insisting that attacks are only directed against military objectives, and by protecting those who are not, or are no longer, participating in the hostilities. The LOAC applies to all operational domains (sea, land, air, space, and cyber); the basic principles, taken from Joint Service Publication (JSP) 398, *UK Manual of National Rules of Engagement*, and JSP 383, *Joint Service Manual of the Law of Armed Conflict*, are detailed below.

- a. **Military necessity.** Military necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the LOAC, that is required to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.
- b. **Humanity.** The concept of humanity forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.
- c. **Distinction.** Military operations are to be conducted only against an enemy's armed forces and military objectives. Therefore, there must be a clear distinction between the armed forces and civilians, or between combatants and non-combatants, and between objects that might legitimately be attacked and those that are protected from attack.
- d. **Proportionality.** The principle of proportionality requires that the losses resulting from a military action should not be excessive in relation to the expected military advantage.

²⁹ Additional Protocol (AP) II only applies to armed conflicts which take place in the territory of a 'high contracting party' between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement AP II.

³⁰ The principles are paraphrased here for convenience. For a detailed statement of the principles see Joint Service Publication (JSP) 383, *The Joint Service Manual of the Law of Armed Conflict*, Chapter 2.

“
The legal adviser will play a key role in ensuring that the chain of command is aware of the circumstances in which force can be used lawfully...
”



© Shutterstock

Indiscriminate attacks are those that strike military objectives and civilians, or civilian objects, without distinction

Human rights law

2.6. The UK is party to a number of international agreements which guarantee fundamental human rights and freedoms, including, but not limited to the:

- European Convention on Human Rights;³¹
- UN Convention on the Rights of the Child;
- International Covenant on Civil and Political Rights; and
- UN Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

2.7. Recent UK case law has made it clear that the safeguards provided for under human rights law, in particular the European Convention on Human Rights, will continue to apply in exceptional circumstances in armed conflicts, albeit interpreted against the background of the provisions of the LOAC. The legal and policy

.....
³¹ The Human Rights Act 1998 confers powers on UK courts to find violations of the European Convention on Human Rights, through declarations of incompatibility (Section 4) and to award compensation (Section 8).

branches of Permanent Joint Headquarters (PJHQ) and the MOD will provide further guidance on how human rights law applies for each operation.

2.8. A violation of human rights law can have grave consequences, and not only for the victim. Such consequences could have strategic implications, impact upon the mission and cause reputational damage to our Armed Forces and the UK, leading to reduced support from the public and our coalition partners. Under the Human Rights Act 1998 the MOD can be sued in the UK civil courts and can be required to pay compensation if found to be liable. Certain violations of human rights law may lead to individual criminal responsibility. At the international level, if the victim of a human rights violation does not get an effective remedy through the UK courts, they can lodge an application with the European Court of Human Rights. This Court has the power to find that the UK has violated a person's human rights and can order the UK Government to pay compensation to the victim. Compliance with human rights is a basic component of the rule of law, the promotion of which is always an objective of UK activity.

Other law applicable during an armed conflict

2.9. For Service personnel and certain civilians working with the UK Armed Forces, elements of the criminal and civil law of the UK will apply. Depending on circumstances other laws may apply, such as host-nation law.

Section 2 – Operations not constituting an armed conflict

2.10. During all other types of operations, such as peace support operations, humanitarian assistance and disaster relief, or maritime interdiction operations, UK Armed Forces must comply with a variety of types of law. These include UK domestic law, human rights law, and applicable international and host-nation law.

Use of force

2.11. During operations not constituting an armed conflict the LOAC does not apply, so force may only be used in accordance with the ordinary law of England and Wales (the common law and section 3(1) of the Criminal Law Act 1967). This law applies to Service personnel throughout the world due to the operation of the Armed Forces Act 2006, and provides that a person may use such force as

is reasonable in the circumstances for self-defence, the defence of others, the prevention of crime or the lawful arrest of offenders. What is 'reasonable' will depend on the circumstances but could, in extreme situations, include lethal force.

2.12. This is a complex area of law, of which a detailed explanation is beyond the scope of this publication. The legal adviser has the crucial role of explaining it to the commander and their force so that they are instinctively comfortable with and confident in it. Rules of engagement are not law but should be consistent with it, and may provide useful guidance on the lawful use of force (as does JSP 398, *United Kingdom Manual of National Rules of Engagement*).

Section 3 – Accountability

2.13. Law imposes responsibilities and accountability. The UK is legally bound to investigate and prosecute those who violate the LOAC.³² Individual members of our Armed Forces are accountable for their own actions on operations. Commanders on operations have additional accountability under command responsibility.

2.14. The legitimacy of individual and collective behaviour will be influenced by strong leadership. The commander's expression of intent and an instilled ethos of individual and collective responsibility, backed up by firm discipline, can deter unacceptable and illegal behaviour.



A commander can delegate, but never abrogate, responsibility: failure to properly control subordinates risks seriously undermining campaign authority and ultimately increase risk to both personnel and the mission.

2.15. Parties to a conflict have an obligation under international law to charge, prosecute and sentence their own nationals, whether members of the armed forces or civilians, who commit war crimes. International law also provides that belligerents have the right to charge, prosecute and sentence enemy armed forces personnel and enemy civilians who fall under their control for such offences.

.....
³² The precise obligations and details are contained in Hague Convention IV Article 3; Geneva Convention (GC) I: 49, GC II: 50, GC III: 129, GC IV: 29, 146; AP I: 91, and the Armed Forces Act 2006, Sections 113-115. Geneva Conventions Act 1957. Geneva Conventions (Amendment) Act 1995. See also the International Criminal Courts Act 2001.

Individual responsibility

2.16. All members of the UK Armed Forces are to comply with domestic law³³ and the LOAC at all times. The fact that a subordinate was ordered to carry out an act or make an omission which was illegal does not, of itself, absolve the subordinate from criminal responsibility. An individual shall be criminally responsible and liable for punishment for a crime under Service law, including a war crime, if they:

- commit the crime themselves, either on their own or jointly with others;
- order, solicit, fail to report or induce a crime which is committed or attempted;
- aid, abet or otherwise assist in the commission or attempt of the crime, including providing the means for its commission or attempted commission; or
- intentionally contribute to the commission or attempted commission of the crime by a group of persons acting within a common purpose.³⁴

Collective responsibility and accountability

2.17. All members of our Armed Forces are, to the utmost of their ability and authority, to prevent violations of the LOAC and the commission of criminal offences and promptly report any violations they suspect or become aware of to the Service police and the chain of command. Where an individual reports an alleged violation by another member of our Armed Forces, the chain of command is to ensure that every effort is made (so far as the law allows) to protect the anonymity and well-being of the reporting individual. Any allegation is to be treated, so far as is possible, in confidence. While allegations must be reported through the chain of command and to the Service police, there may be occasions where this is exceptionally difficult. In such cases, the allegations may be reported to another appropriate person, such as the padre, detention officer, legal adviser or medical officer.

.....
33 The law of England and Wales.

34 Article 25, paragraph 3 of the Rome Statute of the International Criminal Court and Sections 43-48 of the Armed Forces Act 2006.

“
The UK is **legally bound** to investigate and **prosecute** those who violate the **Law of Armed Conflict**.
”

Command responsibility³⁵

2.18. A commander is to comply at all times with, and requires those under their command to comply with, international and domestic law.³⁶ They are responsible for preventing violations of the LOAC and for taking the necessary disciplinary action. While a commander may delegate some or all of their authority, they cannot delegate responsibility for the conduct of the forces that they command.

2.19. The fact that a commander did not order, authorise or knowingly acquiesce in a violation of the law by a subordinate will not relieve them of criminal responsibility for its occurrence if it is established that:

- they knew, or owing to the circumstances at the time, should have known, that forces under their command were committing or about to commit crimes; and
- they failed to take all necessary and reasonable measures within their power to prevent or suppress their commission or to submit the matter to the competent authorities for investigation or prosecution.³⁷

2.20. Any violation of the LOAC committed by our Armed Forces is likely to amount to a criminal offence contrary to either the Geneva Conventions Act 1957, the International Criminal Court Act 2001, local/host-nation law or the domestic criminal laws applicable in the UK. As soon as they become aware of such an allegation or circumstances, commanding officers must ensure that the Service police are informed.³⁸ The Service police must then deal directly with the Director of Service Prosecutions in relation to the matter.³⁹ All alleged violations must also be reported immediately through their operational command chain and to the Service police. In particular, commanders must take legal advice through the chain of command about their legal responsibilities.

.....
 35 The concept of command responsibility was first enunciated by the military commission that tried Japanese General Yamashita at the end of World War II. Yamashita was said to have failed to exercise 'effective control' of his troops who had carried out widespread atrocities in the Philippines.

36 See GC I: 43, GC II: 50, GC III: 129, GC IV: 29,146 and AP I: 91.

37 Section 65, International Criminal Court Act 2001 which implements the Rome Statute of the International Criminal Court, Article 28; see also AP I: 86(2).

38 Section 113(1), Armed Forces Act 2006.

39 *Ibid.*, Sections 116(2) and 116(4).



Central African Republic conflict, 2002

In 2002, Jean-Pierre Bemba Gombo was President of the Democratic Republic of Congo, when armed conflict broke out in the Central African Republic. Following a request by the Central African Republic, he deployed three of his Mouvement de Libération du Congo battalions totalling around 1,500 men to counter a rebellion. Within weeks of their arrival, attacks against civilians began. On 21 December 2004, the Central African Republic asked the International Criminal Court to investigate the atrocities committed during the armed conflict, which led to Bemba being arrested. The Court received an abundance of evidence on the widespread act of rape, pillaging and murder perpetrated by his soldiers. Although subject to an appeal, in a landmark ruling it was the first at the International Criminal Court where an accused was convicted for the crimes committed by his subordinates and of using sexual violence as a weapon of war. The Court outlined actions Bemba could have undertaken to prevent and eliminate the violations taking place, including:

- ensuring the soldiers were properly trained in the rules of international humanitarian law, and adequately supervised;
- initiating genuine and full investigations into the commission of crimes, and properly trying and punishing any soldiers alleged of having committed crimes;
- issuing further and clear orders to the commanders to prevent the commission of crimes;
- altering the deployment, to minimise contact with civilian populations;
- removing, replacing, or dismissing officers and soldiers found to have committed or condoned any crimes; and
- sharing relevant information with the authorities or others and supporting them in any efforts to investigate criminal allegations.





Orders must be obeyed – unless manifestly unlawful

Superior orders

2.21. Our Armed Forces must obey all lawful orders. However, they are under a legal duty **not** to obey any manifestly unlawful order.⁴⁰ A Service person who obeys a manifestly unlawful order may commit an offence.⁴¹ Where an order is ambiguous, a subordinate must seek clarification. Where an order permits such degree of latitude to a subordinate that it is capable of being carried out lawfully or unlawfully, the subordinate should only carry it out lawfully. Particular attention must be paid on multinational operations where the UK will retain responsibility for the actions of UK Armed Forces national matters.

Embedded personnel

2.22. UK personnel deployed under the command and control of other nations and coalition organisations as embedded or exchange staff are still bound by, and individually responsible for complying with, UK law and the UK's interpretation of international law. In all cases, UK personnel are personally bound by the terms of the UK regulatory framework contained in the Chief of the Defence Staff's (CDS')

.....
⁴⁰ JSP 383, *The Joint Service Manual of the Law of Armed Conflict*, paragraph 16.47.3.

⁴¹ JSP 830, *Manual of Service Law*, Chapter 12, paragraph 28.

Directive (and specifically the rules of engagement profile and operation-specific targeting directive). In particular, while embedded, personnel will operate under the rules of engagement of the headquarters' host nation, and if applicable the nationality of headquarters/unit, they must abide by the UK law of self-defence and may only take part in the use of offensive force which complies with the principles of the LOAC, and which is directed against target sets as authorised by the UK. Individual staff should make the UK operational chain of command aware of any concerns they may have in this regard. Further direction is provided through CDS' Directive for embedded personnel.⁴² All embedded personnel are required to have a legal brief prior to deployment.

Violations of international and domestic law

2.23. The Geneva Conventions Act 1957 criminalises grave breaches of the four Geneva Conventions of 1949 and of the First Protocol to the Conventions. The International Criminal Court Act 2001 criminalises the crimes of genocide,⁴³ crimes against humanity⁴⁴ and war crimes;⁴⁵ it divides war crimes into grave breaches and other serious violations of the LOAC.⁴⁶

2.24. **Grave breaches.** The term 'grave breaches' encompasses the most serious types of war crimes and these can only be committed in an international armed conflict. They are:

- wilful killing;
- torture or inhuman treatment, including biological experiments;
- wilfully causing great suffering;
- extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;

.....
42 For further guidance see CDS 02/16 CDS Operational Directive (Category 2) to UK personnel embedded within other nations' forces or multinational organisations engaged in operations and UK units in receipt of foreign national embedded personnel, dated 15 January 2016.

43 Article 6 of the Rome Statute defines the crime of genocide as: 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'

44 Article 7 of the Rome Statute defines crimes against humanity as: acts 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.'

45 Article 8 of the Rome Statute defines war crimes depending on whether an armed conflict is either international or non-international. There are 74 war crimes listed in Article 8. The most serious crimes, are those that constitute either grave breaches of the Geneva Conventions of 1949 (international armed conflict) and serious violations of Article 3 common to the Geneva Conventions of 1949 (non-international armed conflict).

46 Schedule 8 of the International Criminal Court Act 2001.

“
All embedded personnel are required to have a legal brief prior to deployment.
”

- compelling a prisoner of war or other protected person to serve in hostile forces;
- wilfully depriving a prisoner of war or other protected person of a fair trial;
- unlawful deportation or transfer or unlawful confinement; and
- taking hostages.

2.25. **Serious violations.** Serious violations of Article 3 common to the Geneva Conventions are applicable only to non-international armed conflicts and can only be committed against persons taking no active part in hostilities, including detainees. The offences are:

- violence to life and person, including murder, mutilation, cruel treatment and torture;
- outrages upon personal dignity;
- taking hostages; and
- sentencing and executing without due process.

2.26. A number of additional crimes apply to international armed conflicts, some of which also apply to non-international armed conflicts. For example, directing attacks against civilians or civilian objects, causing excessive civilian incidental death or damage, denying quarter, rape and other forms of sexual violence.

2.27. The International Criminal Court Act 2001 incorporates into English law the Rome Statute of the International Criminal Court (ICC). It incorporates into domestic law the offences contained in the Rome Statute (genocide, war crimes and crimes against humanity). It also:

- fulfils the UK's obligations under the Statute, particularly in relation to the arrest and surrender of persons wanted by the ICC and the provision of assistance with respect to ICC investigations; and
- creates a legal framework so that persons convicted by the ICC can serve prison sentences in the UK.



Prosecution for a war crime in Iraq, 2003

Inhuman treatment is a war crime under the International Criminal Court Act 2001. In 2005, three British soldiers were charged with inhuman treatment in connection with the death of Baha Mousa in British custody in Iraq in 2003. One of the three soldiers became the first British person to be convicted of a war crime under this Act.

Service investigations

2.28. The commander is at the heart of the potentially complex legal framework. Their own actions must comply with the applicable laws, and they must also fulfil their wider command responsibilities, including their central role in the Service disciplinary system. A commander's acts and omissions may well be investigated administratively or subjected to domestic and international legal proceedings in criminal or civil tribunals.

2.29. All personnel must be confident to use lethal force within the relevant legal framework and, where applicable, rules of engagement. However, the need to investigate matters where either the law or our standards of conduct may have been breached is fundamental. The nature, extent, breadth and consequences of each incident will dictate what type of investigation is necessary, as a matter of law and/or policy. There may be a need for more than one type of investigation. Investigations by non-Service authorities may be necessary. The decision on the most appropriate investigation will be made following policy, police and legal advice.

2.30. Under Section 42 of the Armed Forces Act 2006, it is an offence for a member of our Armed Forces, or a civilian subject to Service discipline, to carry out an act which is punishable under the law of England and Wales. Any criminal offence so committed will be liable to trial by court martial, in the Service Civilian Court or in the UK civilian courts under domestic law, even when committed overseas. Additionally, Service personnel subject to Service law, and civilians subject to Service discipline, may be liable for the commission of Service offences, for example, contravention of standing orders. Some contractors, sub-contractors and locally employed civilians may be subject to host-nation criminal law and any criminal actions are also likely to be in breach of the express or implied contractual terms.

2.31. Where there is evidence of a breach of the law or a significant breach of rules of engagement a Service Police investigation will normally be required.



Commanders should be reminded that any notes they make, or any documents retained, may be disclosable to a court or other investigation.



Section 113 and 114 of the Armed Forces Act 2006 make it clear that if a commanding officer becomes aware of any allegation or circumstances which would indicate to a reasonable person that a Schedule 2 offence⁴⁷ has or may have been committed, or that the circumstances are of a prescribed description,⁴⁸ they must, as soon as is reasonably practicable, ensure that the Service police are made aware of the matter. Where there has been a use of force incident, an in-theatre use of force review will be carried out in accordance with the extant policy.⁴⁹ Other types of investigation include a Service Inquiry, administrative investigation, sea/land/air accident investigations or after action review.

2.32. **Legal support to Service personnel subject to an investigation.** MOD policy exists⁵⁰ and outlines the support available for Service personnel in cases where they are alleged to have acted wrongfully or negligently in the course of their duties leading to death, personal injury or serious damage. They also set out the circumstances in which the MOD will make provision for legal assistance and representation in court proceedings, whether civilian or Service. Queen's Regulations⁵¹ for the Royal Navy, British Army and Royal Air Force and JSP 838, *The Armed Force Legal Aid Scheme* set out the criteria for when legal representation will be provided to Service personnel facing criminal charges.

2.33. **Record keeping.** An operational record must be maintained. Detailed instructions for maintaining operational records are contained in standing operating procedures. A key component of this is recording not only what decisions are made but also the basis for making the decision. Commanders should be reminded that any notes they make, or any documents retained, may be disclosable to a court or other investigation. Any disclosure must be cleared by the military chain of command to ensure that military issues such as protection of operations security are dealt with appropriately. Legal advice is subject to legal professional privilege between lawyer and client. Service personnel may also be required to give written or oral evidence in investigations, enquiries and other legal proceedings because of their involvement in operations.

47 Further detail of Schedule 2 offences is in JSP 830, *The Manual of Service Law*, Volume 1, Chapter 6, Annex D.

48 Further detail of circumstances of a prescribed description is in JSP 830, *The Manual of Service Law*, Volume 1, Chapter 6, Annex E.

49 PJHQ Standard Operating Procedure 3004, defines a use of force incident as: an incident where shots or munitions employed* or controlled by UK forces are known or believed to have resulted in the death or injury of any person. This includes all types of munitions: sea-based, land-based, air delivered, direct or indirect. *Including buddy-lasing for coalition forces.

50 2017DIN01-042, *Support Available for Staff Facing Legal Proceedings*, dated March 2017, 2016DIN01-092, *Support Available For Staff Giving Evidence in Legal Proceedings* dated July 2016 and 2014DIN01-017, *The Armed Forces Legal Aid Scheme 2011* (AFLAS 11), dated February 2014.

51 Queen's Regulations for the Royal Navy, Army, Royal Air Force, paragraphs J7.026-040.

Key points

- The legal framework that governs military operations will vary widely depending on the legal basis and the nature of the operation.
- The legal adviser will play a key role in ensuring that the chain of command is aware of the circumstances in which force can be used lawfully, and how these principles are to be applied.
- Humans rights law will continue to apply in exceptional circumstances in armed conflicts, elements of the criminal and civil law of the UK will apply and depending on circumstances other laws may apply, such as host-nation law.
- During all other types of operations UK Armed Forces must comply with a variety of types of law. These include UK domestic law, human rights law, and applicable international and host-nation law.
- During operations not constituting an armed conflict, force may only be used in accordance with the law of England and Wales.
- Individual members of our Armed Forces are accountable for their own actions on operations. Commanders on operations have additional accountability under the doctrine of command responsibility.
- Our Armed Forces must obey all lawful orders, but must refuse to obey any manifestly unlawful order.



Chapter 3

Chapter 3 explains legal support to joint operational planning. Legal advisers actively participate in the entire planning process from joint intelligence preparation of the battlespace, through mission analysis, to course of action development and recommendation through to execution.

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“

Lawful and settled authority is very seldom resisted when it is **well employed.**

”

Samuel Johnson

Chapter 3 – Legal support to operational planning

Commanders will be aware that the legal framework is as much an operational enabler as a constraint; it provides a regulatory basis for achieving military objectives in a lawful way. Their legal advisers are mission enablers.



3.1. Legal advisers perform a wide variety of planning tasks at the strategic, operational and tactical levels of warfare. They support their organisations in carrying out their planning responsibilities by providing legal advice on the myriad of regulations, laws, policies, treaties and agreements that apply to joint military operations. Operational legal advisers support the military decision-making process by: participating in mission analyses, estimates and wargaming; designing the legal support architecture; writing legal annexes; helping to develop the rules of engagement and delivering training on them; and reviewing plans and orders. Legal advisers actively participate across the entire planning process.⁵²

3

Section 1 – Process

3.2. What follows outlines the process by which the decision to commit UK Armed Forces becomes a campaign plan.⁵³ Operational legal advisers at all levels need to have an awareness of this process to understand what role they play.

- a. **Political decision to commit the UK Armed Forces.** National strategy is the responsibility of the Government, the implementation of which is often coordinated by the Cabinet Office. The decision to commit the UK Armed Forces to achieve a national objective is a strategic and political one. Under the Royal Prerogative the Prime Minister can unilaterally commit our Armed Forces but will normally act in agreement with Cabinet colleagues and sometimes following a debate in Parliament.

52 This chapter considers the joint environment only. Single-Service operational headquarters will have their own planning processes.

53 Further detail on this can be found in Joint Doctrine Publication (JDP) 01, *UK Joint Operations Doctrine*.

b. **Defence Crisis Management Organisation.** The Defence Crisis Management Organisation (DCMO) acts as the conduit for all briefings up to ministers and for the dissemination of strategic direction through the Permanent Joint Headquarters (PJHQ) to the Joint Task Force Commander (JTFC) and component commanders where applicable. DCMO is managed by the Deputy Chief of the Defence Staff (Military Strategy and Operations) who plays a central role in assisting the Chief of the Defence Staff (CDS) and the Service Chiefs of Staff in crisis resolution.

c. **Chief of the Defence Staff's Directive.** The political decision to commit UK Armed Forces is translated into military orders through a CDS Directive to the joint commander.⁵⁴ CDS (as the military strategic commander) is responsible for the planning, direction and conduct of military operations. The CDS Directive sets out, among other things, the desired strategic and military end-states, the legal position and whether there are rules of engagement (ROE) as well as command and control direction. The CDS Directive is developed by the MOD's Current Commitments Team, who coordinate their efforts with the PJHQ Contingency Planning Team or, for operations in the UK, Headquarters Standing Joint Command (UK).

3



The decision to commit the UK Armed Forces to achieve a national objective is a strategic and political one

⁵⁴ For UK operations this will be the Joint Commander Standing Joint Command (UK). For operations overseas this will be Chief of Joint Operations (CJO) within the Permanent Joint Headquarters (PJHQ).

d. **Joint commander’s mission directive.** For operations overseas, the CDS Directive is translated by the Contingency Planning Team – which includes PJHQ Legal Cell – into the Joint Commander’s (Chief of Joint Operations PJHQ) mission directive to the JTFC. This empowers the JTFC to deploy, sustain and recover.

Section 2 – Legal adviser’s role in joint operational planning

3.3. Once the JTFC receives the joint commander’s mission directive the joint force headquarters will go through a planning cycle. Within the estimate process⁵⁵ the joint command group, of which the legal adviser is a core member,⁵⁶ develops overall understanding, conducts mission analysis, and assists the JTFC by providing direction on formulating potential course of action options. During the joint operational-level planning process, the legal adviser prepares the legal estimate, plans legal support for the joint force (including what augmentation is required), and contributes to the overall planning effort.

3.4. Although the focus of this section is on the contribution the legal adviser makes to joint force headquarters planning, the principles and guidance are equally relevant to legal advisers at PJHQ, Standing Joint Force Headquarters, component commands and those involved in UK operations.

Operational estimate

3.5. The operational estimate⁵⁷ is a problem-solving process central to formulating the commander’s plan. It is a practical, flexible tool designed to enable the development of a coherent plan for action. The process is applied to often ill-defined problems in uncertain and dynamic environments, in high-risk and time-pressured situations. The legal adviser is a key staff member who supports the JTFC’s decision-making.

.....
55 Allied Joint Publication (AJP)-5, *Allied Joint Doctrine for Operational-Level Planning*.

56 Core membership of the joint command group is the joint task force commander, chief of staff, deputy chief of staff, policy adviser and legal adviser. JDP 3-00, *Campaign Execution*, 3rd Edition.

57 Approaches on how an operational estimate can be conducted are described in paragraphs 0214 to 0219 of AJP-5, *Allied Joint Doctrine for Operational-Level Planning*.

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One of the
fundamental
building blocks
of **campaign
planning**
is clearly
identifying the
end-state.
”

3

3.6. The operational-level planning process consists of the eight steps needed to support a JTFC and their staff to develop the operational-level plan, including conducting the operational estimate process. The steps are listed below.

- Step 1 – Initiation of the operational-level planning process.
- Step 2 – Problem and mission analysis.
- Step 3 – Course of action development.
- Step 4 – Course of action analysis.
- Step 5 – Course of action validation and comparison.
- Step 6 – Commander’s course of action decision.
- Step 7 – Concept of operations (CONOPS) and plan development.
- Step 8 – Campaign assessment and plan review/revision.

Mission analysis

3.7. The problem is of prime importance and is composed of two parts:

- the assigned mission; and
- the objectives of that mission.

Detailed analysis of the mission, object and environment, early in the planning process, is vitally important as it places the problem in context. The legal adviser’s primary responsibility is to identify legal considerations (authorities, restraints and constraints,⁵⁸ but also opportunities and freedoms) and provide them to the commander and other planners to shape initial planning guidance. Failure to identify legal considerations early in the planning process may waste precious time as the staff develop courses of action that may not be legally feasible. A checklist of a legal adviser’s considerations during mission analysis can be found at Annex 3A. The legal adviser is an important participant in the mission analysis brief to the commander.⁵⁹

3.8. One of the fundamental building blocks of campaign planning is clearly identifying the end-state. Although the decision to undertake a military operation will not usually involve Service legal advisers,⁶⁰ there is a clear correlation between the legal basis for an operation and the use of force at the tactical level.

.....
58 ‘Constraints will be context-specific and key factors at the operational level are likely to include legitimacy, sustainability and force protection.’ JDP 3-00, *Campaign Execution*, 3rd Edition, paragraph 325.

59 A template for a mission analysis briefing format is in Annex D, Appendix 3 to Allied Command Operations (ACO) Comprehensive Operations Planning Directive (COPD), version 2.0.

60 MOD Legal Advisers provide legal advice to the MOD in relation to the decision to undertake a military operation.



A United Nations (UN) Security Council Resolution authorising the use of force will require interpretation to ensure that the force used to accomplish the mission does not exceed that authorised. The legal adviser in the planning process has a key responsibility to guide planners on the relevant legal principles concerning the use of force. For example, in the case of armed conflict, the principles of military necessity, humanity, distinction and proportionality in the use of force and the means and methods of warfare adopted to achieve the declared end-state will need to be considered. This can only be done with an understanding of the legal basis of the operation.

Course of action

3.9. **Development.** During the development process, courses of action are proposed and evaluated, including to ensure they comply with the applicable law and policy. The legal adviser must consider the second and third order effects of each recommendation and provide an assessment of the legal risk pertaining to each. The legal adviser will consider all the domains as well as kinetic and non-kinetic effects.

3.10. **Analysis and selection.** During the analysis process, the legal adviser:

- participates in wargaming the course of action;
- identifies and recommends legal authorities or requirements necessary to achieve objectives at each phase of the operation;
- identifies the legal advantages and disadvantages of each course of action; and
- identifies any legal considerations that have significant impact on any aspect of the recommended course of action.

Operation order

3.11. The legal adviser must read the operation order to ensure it is consistent with applicable law and policy. For multinational operations, there should be close coordination with multinational force legal advisers. During this step, the legal adviser prepares the legal considerations paragraph of the 'plan' and the legal annex. The legal adviser also assists other planning staff sections with annexes

that have significant legal components, for example, captured persons. The legal adviser should also be prepared to assist the J3 operations and joint effects staff in preparing rules of engagement requests and authorisation messages.

3.12. The legal considerations paragraph of the operation order contains a summary of the legal basis and any legal considerations that may affect implementation of the plan or order (for example, status of forces agreements, rules of engagement, international agreements, the law applicable to the use of force, detention operations, and UN Security Council Resolutions).

3.13. The legal annex reflects the legal estimate developed during the planning process and outlines the plan for legal support. The legal adviser uses the legal annex to describe the legal considerations in detail citing applicable references and defining key terms. Representative legal annexes for an overseas operation and a UK operation can be found at Annex 3B and 3C respectively.

3.14. **Rehearsal.** The legal adviser attends the operations order rehearsal. This is the legal adviser's opportunity to assess and advise on each commander's plan and brief accordingly.

Section 3 – General considerations

Legal adviser liaison

3.15. The planning phase of the operation will generate a number of actions and issues and it will be necessary for deployed operational legal advisers to seek clarification on legal issues from the chain of command. If the legal consequences of action might have important repercussions, the Government's Law Officers may need to be approached by MOD Legal Advisers. The legal adviser will certainly work closely with the policy adviser in relation to interpreting policy. Deployed operational legal advisers should also coordinate with single-Service legal advisers to ensure that military discipline matters are appropriately handled.

Training

3.16. The legal adviser should ensure, as a minimum, that focused operational law refresher briefs are offered and, if relevant, a Law of Armed Conflict (LOAC) *aide-mémoire* (to complement pre-deployment training) is provided to deployed Service personnel. The bulk of the training and education will already have been

delivered by the single Services as a matter of new entry and career courses, pre-deployment training, and with appropriate continuation training.

Legal support

3.17. During the planning process, the legal adviser will determine what is required in terms of legal support. Operational legal advisers are normally deployed to support at component headquarters and at each higher level of command, including joint and multinational headquarters. Some operations may require legal advisers for specialist units or roles including exploitation, captured persons and detention oversight. In some cases these specialists will require a level of independence from the overall command structure and therefore should not be dual roled with the relevant commander's legal adviser. As a general rule, where a UK officer is authorised to act as a 'target engagement authority' or 'detention authority', independent legal support will be deployed with each. In other circumstances, legal support via reachback to PJHQ may be appropriate. When considering what legal support is required, the legal adviser may wish to consider the following questions.

- a. Will communications present a difficulty? Enemy forces may have the ability to jam or otherwise negate communications systems and thus a forward deployed legal adviser able to operate without support may be the only option.
- b. Is 24/7 legal support required? This would necessitate more than one legal adviser. The headquarters battle rhythm will be a primary factor that drives legal support requirements.
- c. What legal support and expertise is required for the specific staff branches?
- d. What experience and rank is required so as to provide the best possible legal support?
- e. What type of a military operation is it – for example, armed conflict, training, counter-piracy?
- f. What authorities are in place – for example, detention, targeting, intelligence operations?
- g. What, if any, are the ongoing training requirements for the force?

3

“ During the **planning process**, the legal adviser will determine **what is required** in terms of **legal support**. ”

- h. What impact will the force laydown have on the provision of legal advice?
- i. Will the headquarters be mobile or static? A headquarters that expects to be moving is likely to require greater legal support than a static headquarters to ensure continuous access to legal advice.
- j. Will rest and recuperation cover be required?
- k. How quickly could a legal battlefield casualty replacement be generated and be in place?

Irrespective of 'how' the legal support is provided, all members of the force should have access to operational-legal advice through the chain of command.

Human rights implications

3.18. In December 2011, the Foreign and Commonwealth Office published Her Majesty's Government (HMG), *Overseas Security and Justice Assistance Human Rights Guidance*. The Guidance provides a framework for considering the human rights implications arising from the provision of all HMG security or justice assistance overseas. The Guidance applies to all overseas security and justice assistance, for example, capacity building through training and mentoring or case specific assistance (such as helping to investigate a particular incident). The Guidance allows HMG to positively demonstrate what action has been taken to consider and mitigate the risk of human rights violations through security and justice assistance. It is designed to provide HMG officials with a framework to consider and mitigate risk, not to prevent activities from being carried out.

3.19. Legal advisers and commanders must consider whether Cabinet Office Consolidated Guidance⁶¹ and *Overseas Security and Justice Assistance Human Rights Guidance* is engaged by a particular activity or operation and, if necessary, provide advice and assistance to the MOD. Legal advisers are also pivotal in providing means and methods to mitigate risks in this area, for example, they can provide operational law training to foreign forces or help them put in place systems for investigating allegations of LOAC violations.

.....
⁶¹ Cabinet Office, *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees*. For further details see Annex 3B, paragraph 3B.1i.



Training provided by UK, Australia and New Zealand troops deployed as part of Operation OKRA includes Law of Armed Conflict, weapons handling and explosive hazard awareness

Multinational operations

3.20. The UK recognises that military success relies on joint efforts and that multinationality is the prevalent and expected reality at the operational level when conducting military operations. As such, to be effective, the legal adviser must be conversant with the basic principles of operational planning and execution in deployed multinational and national joint operations.⁶²



Legal support to multinational operations, Libya 2011

Operation ELLAMY was the UK’s participation in the 2011 operations in Libya. The operation was part of a large international coalition aimed at enforcing a Libyan no-fly zone and taking ‘all necessary measures’ to protect civilians in accordance with the United Nations Security Council Resolution 1973. The coalition operation was designated by NATO as Operation UNIFIED PROTECTOR. The Royal Navy and Royal Air Force contributed significantly to this operation. All three Services deployed legal advisers.

3.21. When the UK is providing support to a larger coalition or multinational organisation, it must be remembered at all times that UK support to joint operations remains within the UK interpretation of international law. If not, the UK may be held responsible under the doctrine of state responsibility for internationally wrongful acts.

⁶² JDP 3-00, *Campaign Execution*, 3rd Edition, describes the integration, coordination, synchronisation and prioritisation of deployed multinational and national joint operations.

Key points

- Legal advisers actively participate across the entire planning process.
- Failure to identify legal considerations early in the planning process may waste precious time as the staff develop courses of action that may not be legally feasible.
- Courses of action are proposed and evaluated, including to ensure they comply with the applicable law and policy.
- For multinational operations, there should be close coordination with multinational force legal advisers.
- The legal adviser will work closely with the policy adviser in relation to interpreting policy.
- Operational legal advisers are normally deployed to support at component headquarters and at each higher level of command, including joint and multinational headquarters.
- When the UK is providing support to a larger coalition or multinational organisation, it must be remembered at all times that UK support to joint operations remains within the UK interpretation of international law.

Annex 3A – Outline considerations for legal advisers during mission analysis

Applicable law

- Legal framework, including international mandate/legal basis.
- Applicable domestic, international and host-nation law.
- Human rights law.
- The Law of Armed Conflict.
- The law applicable to the use of force.

Opposing forces

- Identification of opposing forces and related issues such as their own legal obligations and compliance.
- Identification of opposing forces' intent and ability to exploit their own or friendly forces' legal obligations for operational and other advantage.

Host-nation issues

- Arrangements with the host nation, including exchange of letters, status of forces agreements, memoranda of understanding and relevant local law.
- Claims process and agreements.
- Host nation's legal obligations and interpretations thereof.
- Locally employed civilians/contractors.

Authorities

- Rules of engagement (when and where, and in what circumstances).
- Targeting directive (who and with what).
- Target engagement authorities, national asset approval authority, casualty threshold authorities.

Captured persons

- Prisoners of war, detainees, internees (noting coalition partners differing national approaches).
- Minimum standards and Geneva Convention III.

Intelligence operations

- Tactical questioning and interrogation.
- Intelligence sharing.
- Materiel and personnel exploitation.
- Human intelligence and surveillance.
- Cyber.

Civil-military cooperation

- Cooperation with, for example, the International Committee of the Red Cross, United Nations, non-governmental organisations, the Foreign and Commonwealth Office, Department for International Development and the Stabilisation Unit.

Own force

- Force capabilities, resources and constraints.
- Command and control arrangements.
- Legal training.
- Reports and returns.
- Accountability/investigations.
- Coalition allies and partners legal constraints and freedoms.

Liaison

- Contact legal counterparts at higher, lower and adjacent headquarters (national and multinational) and establish the basis for concurrent planning.

Multinational elements

- National caveats, legal basis, rules of engagement, self-defence interpretations and legal obligations.

Other areas to consider

- Internally displaced persons.
- Refugees.
- Children.
- Women peace and security, and sexual violence in armed conflict.
- Environmental law issues.

Output

- Determine own specified, implied and essential tasks.
- Review all planning documents.
- Identify legal support requirements.
- Confirm limitations on operational freedom of action.
- Outline the opportunities and freedoms.

3A

Annex 3B – Representative legal annex to an overseas operation order

This annex is an example, for guidance, of the content of a legal annex for an overseas operation.

Legal annex to Operation [****]

References

- Joint Doctrine Publication (JDP) 3-46, *Legal Support to Operations*.
- Joint Service Publication (JSP) 398, *UK Manual of National Rules of Engagement*.
- JSP 383, *Joint Service Manual on the Law of Armed Conflict*.
- JSP 900, *UK Targeting Policy*.
- JDP 1-10, *Captured Persons*.
- Applicable United Nations Security Council Resolutions.
- Applicable status of forces agreements (SOFA)/memorandum of understanding.
- 2015DIN03-021, *Implementation of the Cabinet Office's Consolidated Guidance-OS*.
- Operation [****] rules of engagement (ROE) authority.
- Operation [****] targeting directive.
- Applicable embedded personnel directive.

3B.1. **Legal advice.** There will be circumstances encountered which are not provided for in the legal annex, so early engagement with the deployed legal adviser, or via reachback is essential. Deployed personnel must know where and how they can get legal advice not only in relation to operational matters, but also in relation to disciplinary and administrative matters.

- a. **Legal basis.** Explains the legal basis for the operation.
- b. **Jurisdiction.** Explains the jurisdictional arrangements in relation to criminal and civil liability for the presence of deploying Service personnel

as well as contractors and those accompanying the force in a foreign country.

- c. **Use of force in self-defence.** Explains the provisions for use of force in self-defence, including use of lethal force in self-defence, individual self-defence, defence of others and use of force in defence of property and in the prevention of crime.
- d. **Classification of conflict.** Where there is an international armed conflict or non-international armed conflict, explain the key elements of the Law of Armed Conflict. Where operations fall short of conflict, explain the key elements of the particular operation, such as peacekeeping, peace support operations or non-combatant evacuation operations.
- e. **Rules of engagement and targeting directive.** All operations by UK forces and from UK Overseas Territory are to be conducted in accordance with the UK's obligations under international and UK domestic law. As appropriate, respect should also be shown for local laws. The legal and policy permissions and constraints as they apply to specific military actions are articulated in the Operation [****] ROE authority. In an operation in which force outside of self defence and defence of others is authorised there will also be a targeting directive which should be read in conjunction with the ROE.
- f. **Training.** Sets out the requirement for additional legal training.
- g. **Detention.** This paragraph will confirm whether detention of captured persons is authorised and, if so, in what circumstances and under what legal regime.
- h. **Materiel and personnel exploitation.** Confirms whether materiel and personnel exploitation (MPE) has been authorised and, if so, in what circumstances.
- i. **Cabinet Office Consolidated Guidance.** The Cabinet Office Consolidated Guidance relates to the passing and receipt of intelligence relating to detainees and potential detainees. This includes the passing of intelligence that may lead to detention operations being conducted by another state.

j. **Embedded personnel.** Personnel embedded with other nations or in multinational headquarters are to comply with orders which are compatible with UK law and policy. This will be explained in their pre-deployment training. Any questions or concerns should be raised with the relevant UK legal adviser.

k. **Reports and returns.** Details reports and returns requirements, particularly use of force incidents and criminal and disciplinary matters.

l. **Claims.** UK claims are to be referred to the UK Civil Secretary either in theatre or at the Permanent Joint Headquarters. There may be North Atlantic Treaty Organization or coalition procedures initiated.

Annex 3C – Representative legal annex to a UK operation order

This annex is an example, for guidance, of the content of a legal annex for a UK operation.

Legal annex to Operation [****]

References

- Joint Doctrine Publication (JDP) 02, *Operations in the UK: The Defence Contribution to Resilience*.
- Joint Service Publication (JSP) 398, *UK Manual of National Rules of Engagement*.
- Deputy Chief of the Defence Staff (Military Strategy and Operations) Arming Directive 2012 for the carriage of firearms by Service personnel on general duties in non-operational environments.
- Headquarters Standing Joint Command (UK) Standing Operating Procedures 311, dated 1 July 16.

3C.1. **Introduction.** This explains the legal framework for the deployment of Service personnel deployed on the UK operation. While it is not practicable to give precise direction applicable to all circumstances, compliance with the general principles in this guidance will ensure military commanders act within the law.

a. **Chain of command.** Explains the chain of command for the operation. For example, within the UK the civilian police have primacy for the protection of life and property, and the prevention and detection of crime. The Ministry of Defence (MOD) may agree that Service personnel can act under police supervision or direction to perform particular agreed tasks, but they remain under military command at all times.

b. **Legal basis.** The civil authorities have the constitutional and statutory responsibility for the maintenance of law, order and public safety. There are three possible legal bases for providing military assistance to the civil

authorities in situations beyond their capability. They are:

- o the Royal Prerogative for military tasks where support is supplied in addition to civil authorities' capabilities;
 - o a Defence Council Order under the Emergency Powers Act 1964 for civilian tasks where support is supplied instead of civil authorities' capabilities; or
 - o emergency regulations made under Part 2 of the Civil Contingencies Act 2004.
- c. **Authorisation.** Details how the operation will be authorised.
- d. **Forces.** Guidance on the use of reserves, under 18s and trainees.
- e. **Legal powers.** Service personnel are required to act within the law, both military and civilian, and will have no special powers beyond those of the ordinary citizen.
- f. **Use of force.** Details the provisions for use of force in self-defence, including use of lethal force, individual self-defence, defence of others and use of force in defence of property and in the prevention of crime.
- g. **Rules of engagement.** Rules of engagement are not routinely issued for UK operations. Service personnel authorised to carry arms operate under the guidance provided in Card ALPHA.⁶³ Card BRAVO⁶⁴ provides guidance to Service personnel dealing with trespassers on MOD property and their powers of arrest and search.
- h. **Training.** Commanders must consider, and keep under review, whether the task given to their forces is suitable and whether any specific training, including legal training, is required to undertake the role. Individual personnel also have a responsibility to ensure that they are operating within their capability and to raise any concerns through their chain of command.

.....
63 Joint Service Publication (JSP) 398, *UK Manual of National Rules of Engagement* (2017), Annex D, Card ALPHA guidance on opening fire in self-defence for Service personnel authorised to carry arms and ammunition on duty.

64 *Ibid.*, JSP 398, Annex D, Card BRAVO guidance for Service personnel relating to trespass and their powers of arrest and search.

- i. **Accountability.** Service personnel remain accountable under the law for their actions and will be required to demonstrate compliance with the law in the event of a weapon being fired or any incident which results in death or serious injury. If force is used by Service personnel, particularly lethal force, it will be investigated.
- j. **Legal support to Service personnel.** Confirms the legal support arrangements for Service personnel involved in incidents resulting in criminal investigations and other types of inquiry.
- k. **Indemnities and claims.** The issue of indemnities and liability for activities will be dealt with in agreements made between the MOD and other relevant bodies. The MOD will seek an agreement that the civil power will indemnify the MOD in the event that any civilian claim is brought against the MOD or the Secretary of State for Defence arising out of the activities of Service personnel during a UK operation.
- l. **Record keeping.** Confirms the procedures for record keeping.
- m. **Reports and returns.** Details reports and returns requirements, particularly use of force incidents and criminal and disciplinary matters.
- n. **Legal support.** Legal advice will be provided in accordance with Headquarters Standing Joint Command (UK)'s standing operating procedures and any specific plan for the particular operation.

For example, in the event of Operation [****], 24 hour operational legal advice will be available from the Headquarters Standing Joint Command (UK) legal adviser who can be reached via the Headquarters Standing Joint Command (UK) operations room. In addition, each regional point of command will be provided with a legal adviser to support their 1* headquarters.



Chapter 4

Chapter 4 examines the essential role a legal adviser plays in providing advice to operational commanders on the myriad of legal issues associated with combat and non-combat operations. The intent of this chapter is not to address all possible issues, rather it is to provide the commander and legal adviser with an overview of the legal landscape and what legal support the legal adviser provides during key aspects of mission execution.

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“

At his best, man is the noblest of all animals; separated from **law** and **justice** he is the worst.

”

Aristotle

Chapter 4 – Legal support to executing operations

Section 1 – Introduction

4.1. Doctrine for conducting operations is covered in Joint Doctrine Publication (JDP) 3-00, *Campaign Execution* and Allied Joint Publication (AJP)-3, *Allied Joint Doctrine for the Conduct of Operations*.⁶⁵ These publications make clear that legitimacy directly impacts the use of force, conferring a freedom (and sometimes even an obligation) to act, as well as a constraint on military activity at the operational level. Legitimacy encompasses the legal, moral, political, diplomatic and ethical propriety of the conduct of military forces. It provides the justification for any use of force and affects how it is applied. Therefore, complying with the underpinning principles of the Law of Armed Conflict (LOAC) in military operations ensures that due account is taken of the wider ethical considerations from which the law is derived. A combination of domestic (both the UK and the host nation) and international legal considerations also regulate the manner in which overseas military operations are conducted.

4.2. Operational law is wider than the LOAC. It encompasses legal aspects for all operations, not simply those constituting an armed conflict, from routine Service discipline to the use of force. As every operation is different, the legal issues will differ from one operation to the next. The intent of this chapter, however, is not to address all possible issues, rather it is to provide the commander and legal adviser with an overview of the legal landscape and what legal support the legal adviser provides during key aspects of mission execution. While these issues belong to the execution phase of an operation, they should also be considered at the planning stage. Should complex issues arise, it is essential that the deployed legal adviser coordinates with the higher headquarters for direction.

.....
65 Joint Doctrine Publication (JDP) 3-00, *Campaign Execution* will be replaced by the next edition of Allied Joint Publication (AJP)-3, *Allied Joint Doctrine for the Conduct of Operations* (with UK national elements).

'Law, both domestic and international, plays an increasingly important part in Defence activities these days. When undertaking operations, commanders must take into account a broad and increasingly complex body of operational law.'

Chief of the Defence Staff and the Permanent under Secretary⁶⁶

Section 2 – Operational legal issues

The Law of Armed Conflict

4.3. The LOAC has implications for planning and conducting military operations in international armed conflicts and non-international armed conflicts. For a full articulation of the UK's approach to the LOAC, see Joint Service Publication (JSP) 383, *Joint Service Manual of the Law of Armed Conflict*.

Rules of engagement and use of force

4.4. Rules of engagement⁶⁷ are one of the key means by which political control is exercised over the use of force and of ensuring that action taken by UK Armed Forces is lawful. The use of offensive force will always be governed by an operation-specific rules of engagement profile; providing a set of parameters to inform operational commanders of the constraints imposed, or freedoms permitted, in carrying out their assigned missions and tasks. When a rules of engagement profile is issued for a particular operation it may be included as an annex to the Chief of the Defence Staff's Operational Directive or issued separately through Head Military Strategic Effects. Rules of engagement profiles will include permissions for creating offensive effects as well as permissions for creating effects defensively.

- a. **Permissions for creating offensive effects.** In this case, an operation-specific targeting directive will be issued to supplement the rules of engagement profile. In all circumstances, those authorising, coordinating or conducting attacks will be responsible for ensuring that the relevant legal requirements are fulfilled.

⁶⁶ Taken from the foreword in Joint Service Publication (JSP) 383, *The Joint Service Manual of the Law of Armed Conflict*, 2004 Edition.

⁶⁷ JSP 398, *UK Manual of National Rules of Engagement* and Military Committee 362/1, *NATO Rules of Engagement*.

b. **Permissions for creating non-offensive effects.** Potential creation of both lethal and non-lethal effects by UK assets will need to be assessed against the self-defence principles of necessity and reasonableness for individual self-defence as well as rules of engagement profile so far as the defence of others is concerned. In the maritime domain for example, non-offensive effects can extend to such things as disabling fire to enforce a lawful boarding.

4.5. **Use of offensive force.** Applying offensive force is governed by: the legal basis for the use of force in any particular operation; the LOAC; the rules of engagement profile; and the targeting directive. Figure 4.1 illustrates how these elements link together.

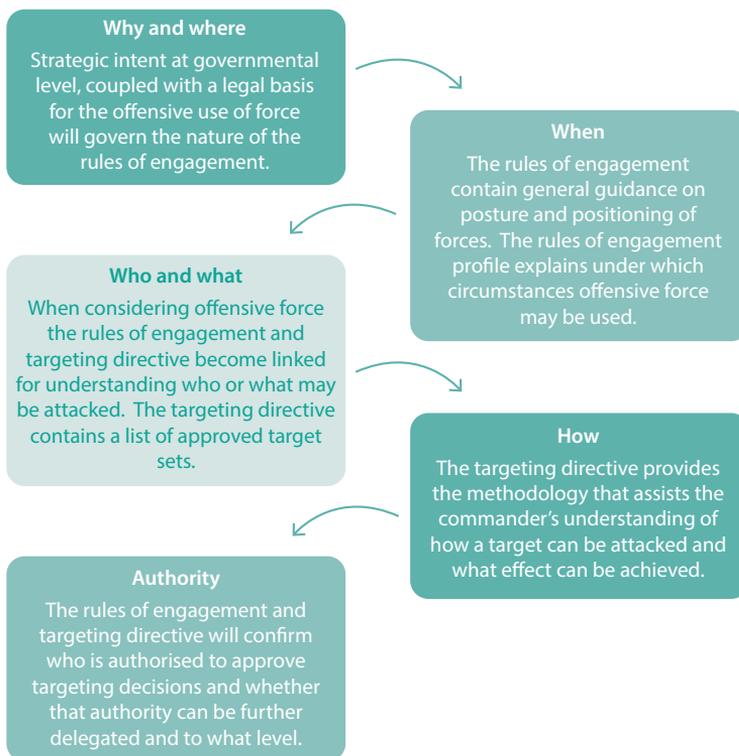


Figure 4.1 – The law, rules of engagement and targeting directive linkage

The rules of engagement are a command responsibility and a joint effects staff lead. The legal adviser helps to ensure all within the chain of command understand the applicable law and rules of engagement. Changes in the mandate or evolution of the mission may require a change of existing rules of engagement.

Targeting

4.6. At every stage in the targeting process, commanders and targeting staff must ensure that their actions are lawful. Legal advisers must be available to operational commanders and their targeting staff at all levels of command to provide guidance to ensure that any action is consistent with international and domestic law.⁶⁸ The targeting process is designed to subject targeting operations to careful scrutiny to ensure that they are necessary to achieve the objectives of the campaign, and that they meet the requirements of international law governing the conduct of military operations. In an international armed conflict the UK is legally bound to apply Additional Protocol I to the Geneva Conventions in targeting, while in a non-international armed conflict, the core targeting provisions in Additional Protocol I are regarded as customary international law.

4.7. JSP 900, *UK Joint Targeting Policy* contains the policy and direction on targeting including guidance on the processes involved and best practice to apply. As the targeting process may account for a substantial amount of staff time, an understanding of the joint action targeting process is essential. The legal adviser must therefore be fully conversant with the UK's targeting process.⁶⁹

4.8. Whenever possible, targets should be engaged using pre-planned or accelerated targeting procedures. Consideration by a targeting clearance board and formal collateral damage estimation are not required when conducting combat engagements. However, they must still consider the duty to take adequate precautions in attack, such as target verification and minimisation of collateral damage.

 At a target clearance board, as a minimum, a qualified UK targeteer should be present to give targeting advice along with a legal adviser and policy adviser (either in person (preferred) or exceptionally through reachback).⁶⁸

4.9. The law recognises that the environment in which commanders apply the rules of targeting requires a certain degree of flexibility and as such commanders must exercise their military judgement⁷¹ when applying the rules. They are to make decisions in 'good faith'.⁷²

68 JSP 900, *UK Joint Targeting Policy*, Edition 2, Part 1, paragraph 13.

69 Joint Doctrine Publication (JDP) 3-00, *Campaign Execution*, 3rd Edition, Annex 3B – Joint Action Targeting Policy and Annex 3C – Joint Task Force Headquarters Groups, Boards and Meetings.

70 JSP 900, *UK Joint Targeting Policy*, Edition 2, Part 1, Annex B, paragraph 8a.

71 Prosecutor v. Kupreškić et al., Case No. IT-95-16-T T.Ch.II, Judgment, par. 525 (International Criminal Tribunal for the former Yugoslavia January 14, 2000).

72 Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva: International Committee of the Red Cross, 1987), page 681, paragraph 2198.

4.10. With increasing quality and quantities of information being available, the targeting procedures will have to continue to evolve to process that information, often leading to more complexity and options being available to the commander. The legal adviser can advise on the best process to ensure compliance with the law and they will be aware of the legal complexities of coalition operations and different states' legal objections and political controls. At the conclusion of any targeting serial, where there are allegations of civilian casualties, legal advisers will be key advisers in civilian casualty report tracking, credibility assessments, investigations and reporting.

4.11. **Novel or new weapons.** Particularly when operating in a coalition, commanders should seek legal and policy advice if they become aware of new weapons or new use of existing weapons. The employment of these may fall outside the bounds of UK rules of engagement or the operation-specific targeting directive. New weapons, means or methods of warfare are subject to legal reviews⁷³ in accordance with the UK's international legal obligations.⁷⁴ These legal reviews are normally carried out by Service lawyers based at the Development, Concepts and Doctrine Centre, Shrivenham.



Brimstone and Paveway IV on Operation SHADER

73 Article 36 of the Additional Protocol (AP) I to the Geneva Conventions states that each state party is required to determine whether the employment of a new weapon, means or method of warfare that it studies, develops, acquires or adopts would, in some or all circumstances, be prohibited by international law. This can be undertaken as an urgent capability requirement.

74 Details of how the UK gives effect to Article 36 can be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/507319/20160308-UK_weapon_reviews.pdf

Detention operations

“
The Geneva Conventions and their Additional Protocols are the primary framework for captured persons activities in an armed conflict.”

4

4.12. JDP 1-10, *Captured Persons* is the capstone doctrine publication for all detention-related activities. During the course of military operations, the permissions granted to UK Armed Forces may include capturing and detaining individuals, whether they are prisoners of war, internees or detainees. UK Armed Forces may be permitted to capture and detain individuals during an international armed conflict or a non-international armed conflict. They may also have the power to detain or intern individuals in other circumstances, including in accordance with a United Nations (UN) Security Council Resolution or host-nation law in conjunction with the consent of that nation.

4.13. The Geneva Conventions and their Additional Protocols are the primary framework for captured persons activities in an armed conflict. Prisoners of war, detainees and internees will as a matter of policy be treated to the same minimum standard. Other legal obligations may be applicable, the details of which are set out in JDP 1-10, *Captured Persons*.

4.14. Irrespective of the category, all captured persons⁷⁵ are legally entitled to be treated humanely. International and domestic law stipulate basic standards of treatment that are applicable to captured persons as a minimum in all circumstances and at all times. The treatment of these individuals is of critical importance, not only from a legal and policy perspective, but also in terms of the legitimacy of the operation. It is therefore essential that all UK Armed Forces personnel, and those accompanying the force, understand and apply these basic standards of treatment.

4.15. Torture and cruel, inhuman or degrading treatment are prohibited at all times. It is UK policy that the following five techniques are prohibited and must never be used as an aid to tactical questioning or interrogation, a form of punishment, discriminatory conduct, intimidation, coercion or as deliberate mistreatment. They are:

- stress positions;
- hooding;
- subjection to noise;
- deprivation of sleep and rest; and
- deprivation of food and water.

.....
⁷⁵ Captured persons are defined as: the generic term given to all individuals who are captured and held by UK Armed Forces on operations overseas, whether they are prisoners of war, protected persons as defined in Geneva Convention IV, or detainees or security internees, whether or not the Geneva Conventions apply. Ministry of Defence (MOD) Defence Instructions and Notices (DIN) 2016DIN03-011, *MOD Strategic Detention Policy*.

4.16. In addition to the law, there are two key policy documents that provide the governance for detention operations, these are:

- the Cabinet Office Consolidated Guidance;⁷⁶ and
- Ministry of Defence (MOD) Strategic Detention Policy.⁷⁷

4.17. **The Cabinet Office Consolidated Guidance.** This document contains guidance for intelligence officers, as well as our Armed Forces, regarding the sharing and receiving of intelligence relating to detainees being held overseas.⁷⁸ In addition, Her Majesty's Government (HMG), *Overseas Security and Justice Assessment Human Rights Guidance*⁷⁹ provides guidance in relation to the UK's human rights obligations in the context of security or justice assistance overseas.

4.18. **The MOD Strategic Detention Policy.** This document sets out the minimum standards to be applied during all captured persons activities. It requires our Armed Forces to comply with a number of strategic principles to ensure all captured persons are treated humanely. It also establishes the system of governance.

Legal advisers play an important role in all aspects of captured persons activity.

- Planning and training for detention operations.
- Handling and treatment.
- Legally compliant operation of captured persons facilities.⁸⁰
- Advising on complaints of mistreatment.
- Advising on detention review procedures and participating in reviews.⁸¹
- Providing training on detention operations.
- Engaging with the International Committee of the Red Cross, appropriate states and the Permanent Joint Headquarters (PJHQ).
- Advising on standing orders for captured persons facilities.
- Advising on transfers to other states.
- Participating in a detention oversight team (legal advisers independent of the chain of command only).

76 *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing of Intelligence Related to Detainees*, July 2010.

77 Currently this policy is in 2016DIN03-011, *MOD Strategic Detention Policy*.

78 MOD departmental guidance is contained within 2015DIN03-021, *Implementation of the Cabinet Office's Consolidated Guidance*. This DIN is protectively marked OFFICIAL-SENSITIVE.

79 <https://www.gov.uk/government/publications/overseas-security-and-justice-assistance-osja-guidance>

80 This is done in conjunction with specialists of the Military Provost Service.

81 Captured persons must not be held on an arbitrary basis.

Intelligence operations

4.19. Many operations will rely on exploiting human, forensic, biometric, signal and other intelligence to counter threats and support other lines of operation. This is referred to as ‘materiel and personnel exploitation’ (MPE),⁸² and includes the following:

- site exploitation;
- technical exploitation;
- weapons exploitation;
- financial exploitation;
- chemical exploitation;
- document and media exploitation;
- captured persons exploitation,⁸³ and
- forensic and biometric exploitation.

4.20. Some UK legislation applies overseas as a matter of law. Where it does not, policy may apply it. This will ensure appropriate control and supervision of the activity. Host-nation law and international human rights law may also be factors in identifying the freedoms and constraints of exploitation activities. UK legislation with particular relevance to materiel and personnel exploitation includes:

- Data Protection Act 1998;
- Regulation of Investigatory Powers Act 2000;
- Bribery Act 2010;
- Protection of Freedoms Act 2012; and
- Investigatory Powers Act 2016.

4.21. Each time materiel and personnel exploitation is used operationally, commanders must be given clear guidance, so that they are aware of which capabilities may be used, by whom, and under what circumstances. This must include any legal constraints regarding collection, storage and sharing of exploited materiel.

4.22. **Information sharing.** Given the sensitivities associated with materiel and personnel exploitation-related data, there are likely be particular procedures to be observed with regards to the storage, sharing of, and access to these types of

82 Materiel and personnel exploitation is described in more detail in Joint Doctrine Note (JDN) 2/14, *Materiel and Personnel Exploitation*.

83 JDP 1-10, *Captured persons* details the legal framework governing captured persons and reflects our national direction resulting from recent operations. It gives enduring principles and best practice to follow. In particular, there must always be separate and distinct governance and command structures for questioning and holding activities when the questioning is for intelligence purposes.

intelligence. The Cabinet Office Consolidated Guidance covers transmitting and receiving intelligence relating to captured persons, but also relates to the passing of intelligence which may result in an individual being detained. Commanders and legal advisers must have regard to the doctrine of state responsibility for internationally wrongful acts when considering whether intelligence can be shared with coalition and partner forces. The sharing of intelligence is a matter for specific legal advice.

4.23. **Surveillance and covert human intelligence.** Covert human intelligence and surveillance operations conducted by UK Armed Forces are planned, authorised, executed and recorded in a manner consistent with UK legislation, principally the Regulation of Investigatory Powers Act 2000. Although that Act does not apply to overseas operations as a matter of law, it is applied as a matter of policy. The Regulation of Investigatory Powers Act requires, in particular, those authorising the use of covert techniques to give proper consideration to whether their use is necessary and proportionate. It strictly limits the people who can lawfully use covert techniques, the purposes for, and conditions in which they can be used, and how the material obtained must be handled.

Legal advisers have a clear role to play within the authorisation and regulatory framework, providing advice to the commander and their staff, including J2 intelligence and J2X intelligence exploitation staff.

For example, the in-theatre management board meets regularly to review all human intelligence matters. It comprises the national component commander, the legal adviser, policy adviser and J2X intelligence exploitation staffs and required specialists.

Women peace and security

4.24. UN Security Council Resolution 1325 (2000) was the first to address the disproportionate and unique impact of armed conflict on women. It stresses the importance of women's equal and full participation as active agents in the prevention and resolution of conflicts. It calls on member states to ensure women's equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and urges all actors to increase the participation of women and incorporate gender perspective in all areas of peace building.

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...UK Armed Forces may be confronted with locals who claim refugee status or ask for asylum.

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4.25. Recognising the impact that sexual violence in conflict has on the maintenance of peace and security, the Security Council adopted Resolution 1820 which explicitly links sexual violence as a tactic of war with women peace and security issues. Security Council Resolution 1820⁸⁴ reinforces Resolution 1325, highlighting that sexual violence in conflict constitutes a war crime and demands that parties to armed conflicts immediately take appropriate measures to protect civilians from sexual violence, including training troops and enforcing disciplinary measures.

4.26. UK Armed Forces have a unique role in providing security and stability and therefore preventing and responding to sexual violence in regions experiencing crisis and conflict. Under the leadership of the Minister of State for the Armed Forces, the MOD is committed to implementing the Preventing Sexual Violence in Conflict Initiative⁸⁵ and the broader Women, Peace and Security agenda throughout its work.⁸⁶

4.27. The legal and gender advisers will advise the commander during the planning and execution of operations to ensure that:

- more women are involved in decision-making at every level;
- adequate account is taken of the interests of women and girls, and other vulnerable people (particularly in post-conflict or peace support operations);
- investigations and documentation of sexual violence in conflict are improved; and
- greater support and assistance is provided to survivors, particularly children.



By 2017 the British Peace Support Team (East Africa) had trained 17,000 military and police personnel in preventing sexual violence, including ending the use of rape as a weapon of war, which in turn directly supports security and stability in the region.

84 United Nations Security Council Resolution 1820 available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1820\(2008\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1820(2008))

85 The primary objective of the Preventing Sexual Violence in Conflict Initiative is to overcome the culture of impunity for sexual violence in conflict by strengthening the prosecution of sexual violence in conflicts, thus increasing the prospects for successful convictions.

86 Further information is available at <https://www.parliament.uk/documents/lords-committees/sexual-violence-in-conflict/SVC-committee-Gov-Response-CM-9277.pdf>



Dealing with refugees and asylum seekers will likely present the commander with an operational challenge

Refugees and internally displaced persons

4.28. At sea and on land, UK Armed Forces may be confronted with locals who claim refugee status or ask for asylum. Formation or divisional headquarters or warships at sea are not legally empowered to grant asylum. Only the Home Office can do this, and by coming under the control of UK Armed Forces, refugees and asylum seekers do not gain a right to be taken to the UK to have their claim heard. There is an obligation upon the UK Armed Forces to take them to a safe place or not to return them to the place they say they are fleeing from under the doctrine of non-refoulement. Dealing with refugees and asylum seekers will likely present the commander with an operational challenge. The legal adviser plays a central role in advising what, if any, legal obligations apply, and how practical problems may lawfully be solved.

Civil-military cooperation

4.29. The capstone doctrine for civil-military cooperation is AJP-3.4.9, *Allied Joint Doctrine for Civil-military Cooperation*.⁸⁷ It has to be clearly understood that military forces will remain within the framework of their mandate and their rights and

⁸⁷ 'The coordination and cooperation, in support of the mission, between the NATO Commander and civil actors, including national population and local authorities, as well as international, national and non-governmental organizations and agencies.' AJP-3.4.9, *Allied Joint Doctrine for Civil-Military Cooperation*, Edition A (with UK national elements), 2013, paragraph 0201.

obligations. Any military activity carried out in the civil environment should use the minimum resources necessary to achieve the task and the military must not take the lead in this area. This approach will assist the commander in guarding against the inadvertent creation of long-term dependency and mission creep.

4.30. The legal adviser may be asked to provide planning assistance and guidance to the civil-military staff section of any headquarters in the following ways.

a. **Security sector reform.** Security sector reform involves reforming security institutions so that, under the control of a legitimate authority, they can play an effective and accountable role in providing internal and external security. It can apply to any security institution, including the police. It encompasses: host-nation defence ministry reform; training and development; education; and support for the enhancement of judicial and law enforcement institutions.

b. **Capacity building.** Capacity building involves enhancing national and regional institutions to reinforce their credibility among, and authority over, an indigenous population. The aim is to cultivate sufficient authority within local, regional and national institutions so that their governance becomes self-sustaining.

c. **Interim governance.** Long-term governance must be indigenous. Where instability develops in ungoverned space, or an existing government has insufficient authority, then an intervention force may be needed to underpin some form of interim governance. The key will be to build authority, restore order, encourage respect for due political process, and then hand over to the indigenous authority as soon as reasonably practicable.

d. **Restoring essential services.** In the immediate aftermath of a conflict, catastrophic incident or natural disaster when appropriate civil agencies may be unable to act quickly or operate with sufficient safety, the reconstitution of critical infrastructure and restoration of essential services may fall to the military within the means available. The aim is likely to be two-fold, to provide support to those in need and to cement the support of the civilian population. Services deemed essential will depend on the situation and the needs of the people. They may include protecting and/or restoring medical care, re-establishing transportation systems, and providing potable water, electrical power and other utilities.

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Multinational
operations
create
additional
complexity for
UK personnel.
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4.31. **Civil-military liaison.** Experience has shown that the context of missions can vary markedly. A common feature, however, is the complex assortment of actors engaged in the area of operations and beyond. The Armed Forces may need to work with local civilians, government authorities, international organisations, non-governmental organisations and (former) belligerents to resolve, not only immediate, but also long-term problems. There is a role for the legal adviser when dealing with such actors.

United Nations. The United Nations (UN) provides aid for humanitarian relief and for rehabilitation; protects and supports victims of disaster; and prevents and resolves conflict.

The International Committee of the Red Cross. The International Committee of the Red Cross works to protect and assist victims of armed conflict and civil strife, including captured persons and political detainees in conflict zones. They will ask to view detention facilities.

The International Red Cross and Red Crescent Movement. This is an international humanitarian movement of national societies which was founded to: protect human life and health; ensure respect for all human beings, and prevent and alleviate human suffering.

Non-governmental organisations. These vary in size, expertise and funding. They also vary in motivation and independence. They range from large international organisations such as Save the Children through to small, local community-based groups. Non-governmental organisations have become increasingly important because of their resources and can have a quick impact.

Multinational operations

4.32. Multinational operations create additional complexity for UK personnel. Other coalition partners may have differing legal obligations, and interpretations of the legal basis for the use of force. Multinational rules of engagement, targeting directives and tactical directions must be applied in addition to their UK equivalents. The terminology used in multinational publications may make translation to the UK regulatory framework difficult. However, where possible, additional caveats, clarifications and amplifications will be provided within UK documentation. Where there is contradiction or confusion the most restrictive criteria are to be applied.

4.33. To ensure the UK is fully involved in multinational targeting decisions and that a cohesive and coordinated policy is pursued, it is essential that effective liaison is established at all levels of command. UK targeting staffs will remain responsible for ensuring that targets assigned to UK assets accord with UK political, legal and military requirements. Deployed UK staffs are responsible for drawing

PJHQ's attention to any target which does not accord with UK strategic objectives or legal obligations. The UK is liable for, and must formally approve, pre-planned missions through a UK targeting board when coalition partner missions originate from UK sovereign territory or involve direct UK support.⁸⁸ Involvement in the target development process and transmission of information to the MOD does not in itself imply any UK approval or intention to be involved in any potential operation.



UK personnel embedded in multinational headquarters remain subject to the law of England and Wales and must operate in accordance with the UK's interpretation of international law and self-defence.

Cyber

4.34. JDP 0-50, *UK Cyber Doctrine* provides authoritative direction to Defence personnel charged with delivering UK military cyber capabilities. It explains cyber to those who use, or are influenced by, UK military cyber capability, and articulates cyber activities and how they relate to other environments. Pervasive and fast-developing, cyber can present practical difficulties in attributing responsibility for attacks. Cyber activities may impact third parties not involved in the crisis and those outside the joint operations area. Cyber activities may commence before UK Armed Forces deploy. Careful scrutiny of cyber activities is required to ensure compliance with all applicable law, both international and domestic.

Training

4.35. Defence Training and Education Leaflet 1.6, *Defence Direction on Operational Law Training*, Annex A sets out the Armed Forces LOAC training policy.⁸⁹ In accordance with that policy and single-Service procedures, the bulk of the training and education of deployed personnel will already have been delivered during new entry and career courses, with appropriate continuation and pre-deployment training. A requirement for deployed legal advisers to provide mission-specific legal briefings can be expected. A change of mandate or rules of engagement may necessitate additional training. Joint Forces Command is responsible for determining the training requirement for individual pre-deployment training.

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⁸⁸ Direct support can be described as the use of UK personnel or assets without which it would not be possible to conduct the mission. For example, the provision of air-refuelling aircraft or target designation during an engagement. Indirect support is the use of UK personnel or assets without which the mission could be conducted, albeit at greater risk.

⁸⁹ Defence training and education leaflets are stand-alone documents that sit in support of JSP 822, *Defence Direction and Guidance for Training and Education*.

The Geneva Conventions place an obligation on parties to the Conventions to teach the Law of Armed Conflict.⁹⁰



‘The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.’

4.36. Commanders must consider, and keep under review, whether the task given to their forces is suitable and whether any specific training is required to undertake the role. Individual personnel also have a responsibility to ensure that they are operating within their capability and to raise any concerns through their chain of command. The legal principles and guidance contained in any legal annex provide commanders with the minimum legal guidance required, but legal training is still a requirement. Commanders are responsible for ensuring that deployed Service personnel receive a full legal brief prior to commitment.

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Commanders are **responsible** for ensuring that deployed Service personnel receive a full **legal brief...**

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⁹⁰ See, for example, the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 47.

Key points

- Operational law is wider than the Law of Armed Conflict (LOAC). It encompasses legal aspects for all operations, not simply those constituting an armed conflict, from routine Service discipline to the use of force. As every operation is different, the legal issues will differ from one operation to the next.
- Rules of engagement are a command responsibility and a joint effects staff lead. The legal adviser helps to ensure all within the chain of command understand the applicable law and rules of engagement.
- At every stage in the targeting process, commanders and targeting staff must ensure that their actions are lawful. Legal advisers must be available to operational commanders and their targeting staff at all levels of command to provide guidance to ensure that any action is consistent with international and domestic law.
- All captured persons are legally entitled to be treated humanely. The treatment of these individuals is of critical importance, not only from a legal and policy perspective, but also in terms of the legitimacy of the operation.
- Each time materiel and personnel exploitation is used operationally, commanders must be given clear guidance, so that they are aware of which capabilities may be used, by whom, and under what circumstances. This must include any legal constraints regarding collection, storage and sharing of exploited materiel.
- At sea and on land, UK Armed Forces may be confronted with locals who claim refugee status or seek asylum. The legal adviser plays a central role in advising what, if any, legal obligations apply, and how practical problems may lawfully be solved.
- Multinational operations create additional complexity for UK personnel. Other coalition partners may have differing legal obligations and interpretations of the legal basis for the use of force.





Chapter 5

Chapter 5 examines the role of the legal adviser in operations. It first looks at the relationship between the legal adviser and the commander and sets out their key responsibilities. The chapter goes on to discuss legal risk and policy, the position of the legal adviser in the headquarters and the support required for the operational legal adviser.

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Modern Generals need to have in their back pockets not the sapper and gunner of tradition, but a media man and **a lawyer**. If you haven't got those cards **in your deck**, you're lost.

”

General Sir David Richards,
Taking Command

Chapter 5 – The operational legal adviser

Section 1 – The commander-legal adviser relationship

5.1. The legal adviser's overriding duty is to provide the commander with timely, accurate, relevant, succinct and robust legal advice. Legal advice must be proactive as well as reactive if the commander is to exploit legitimate operational options. The legal advice should ideally be recorded in an appropriate format as an important part of any audit trail.

5.2. The legal adviser's role is defined as: supporting the Commander by identifying and recommending courses of action that strive to meet the Commander's intent while minimizing legal risk, promoting the rule of law, protecting human rights, and adhering to the highest standards of legitimacy for NATO actions.⁹¹

5.3. The legal adviser's relationship with the commander and other staff officers rests on their ability to:

- identify the key legal issues in a given situation;
- be sensitive to policy issues that bear upon legal advice, and *vice versa*; and
- provide practical, workable legal advice that the commander understands and can readily use.

5.4. An effective legal adviser must have an appreciation of the operational environment and tactical activity as well as a sound understanding of the realities and uncertainties confronting force elements. The legal adviser must be able to explain the consequences of proposed courses of action, and have the moral courage to provide and justify possibly unwelcome advice. While understanding

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 91 North Atlantic Treaty Organization (NATO) Bi-Strategic Command Directive 15-23, *Policy on Legal Support*, dated 23 July 2009.

that they are there to advise, the legal adviser must, when necessary, both speak out and be encouraged to speak out. However, decisions are a matter for the commander. Likewise, the commander should respect the advice of the legal adviser as the subject matter expert. The commander-legal adviser relationship and the respective responsibilities and authorities should be well understood. The commander and legal adviser should strive quickly to achieve a sound working relationship.

5.5. The legal adviser needs to provide robust advice against potentially illegal options and state the existence of any lawful alternatives in the form of operational suggestions to the commander. If they do this they should be seen as a positive contributor rather than a negative influence; someone who enables operations to proceed legitimately, rather than someone who stifles tactical endeavour. To do this the legal adviser needs to be aware of the commander's campaign plan.

5.6. The commander will get the best out of their legal adviser by taking them into their confidence, sharing their intent in detail, and allowing the legal adviser to get inside their mind. This will enable the legal adviser to see and hear what the commander sees and hears. The commander-legal adviser relationship can flourish or flounder like an outer office relationship. As professionally qualified officers, legal advisers have other skills that the commander may wish to use, provided of course, that their core legal function is not affected. It should be noted, however, that legal advice is provided to the commander to carry out their operational role and the legal adviser should not be asked to advise on matters of a personal or private capacity.⁹²



A commander's experience

'Military lawyers were true combat multipliers in Iraq. They were not only invaluable in dealing with a host of operational law issues, they also made enormous contributions in helping resolve a host of issues that were more than a bit out of normal legal lanes. In essence, we 'threw' lawyers at very difficult problems, and they produced solutions in virtually every case, often under very challenging circumstances and in an uncertain security environment. The qualities that make a great military lawyer – an individual who is smart, hard-working, logical in thought, a good writer and an adjudicator – were precisely the qualities most in demand in the environment in which we found ourselves in Iraq, where we were both fighting and rebuilding. I tried to get all the lawyers we could get our hands on – and then sought more.'

Major General David H. Petraeus
Commander 101st Airborne Division (Air Assault) 2003-2004

.....
⁹² Questions of legal professional privilege accruing to advice provided on operations are likely to be complex but it should generally be assumed that the 'client' in relation to questions will be the Ministry of Defence (MOD) rather than the commander personally.

Section 2 – Advising on legal risk and policy

5.7. The law applicable to a military operation may change as the operation develops and each operation will have unique features. Different potential courses of action will often exist and these may have varying degrees of legal risk (which may only become clear years later). In some scenarios the commander, legal adviser and policy adviser can make the judgement whether the Permanent Joint Headquarters (PJHQ) and Ministry of Defence (MOD) Legal Adviser should be consulted.

5.8. In some situations, the MOD, as a matter of policy, may impose higher constraints upon the UK Armed Forces than is legally necessary. It must be understood that policy is distinct from law. A commander may, for example, seek policy changes, but legal obligations remain mandatory.

Section 3 – Position of the legal adviser in the headquarters

5.9. The operational legal adviser is part of the command group, whether on the staff of the joint task force commander (JTFC), or of a component commander or contingent commander. This ensures the legal adviser's ready availability to the commander and their accessibility to the commander's key staff officers. The legal adviser's responsibilities are likely to cut across the staff divisions. The formality of their placement in a particular division is less important than the reality of their influence as a member of the commander's immediate staff.⁹³ The commander should ensure that the legal adviser is empowered to act effectively in carrying out their pivotal role. The legal adviser will need to have access to information commensurate with their responsibilities as command legal adviser – without it, legal advice is likely to be wrong.

5.10. The legal adviser's most important link is to the commander. The commander needs legal advice to ensure that their operational decisions are in accordance with the law. It is for that reason that the operational legal adviser is deployed. Other than the commander, the legal adviser needs to develop their closest working links with the chief of staff, deputy chief of staff, policy adviser, J3 joint effects and J5 planning staff. Legal and political aspects of operations

⁹³ In the Permanent Joint Headquarters (PJHQ) the legal advisers are in the J9 policy and legal branch.

are often intertwined. The commander will expect the policy adviser and legal adviser to work in harmony both to interpret high level political and legal direction, and to present information outside the headquarters in a coherent way. The legal adviser must expect to assist the policy adviser with preparing briefings that have a legal dimension. The legal adviser's strong link with joint effects and planning staff is founded on the requirement to ensure that all operations are undertaken in accordance with international law and applicable UK domestic law.

The requirements for a NATO legal adviser.

'Because of the foundational requirement that all operations be undertaken in accordance with international law, the strongest possible working relationship must exist between the Legal Adviser and the Commander's Operations Officer (e.g., DCOM OPS, J3, G3, etc.). The Legal Adviser and the Operations Officer will typically be in close coordination regarding Targeting, Rules of Engagement/ Use of Force, Information Operations, and detention issues, as examples. The Legal Adviser must ensure that s/he is present (or has representation from the legal staff) at every planning cell and working group.⁹⁵ So that legal issues are identified and addressed early in the planning cycle, the legal adviser should maintain close coordination with the other staff divisions supporting Operations: J2 (Intel), J4 (Logistics), J5 (Plans) J8 (Budget and Finance), and J9 (CIMIC). Finally, a very close link with the Joint Operations Centre is vital for successful and speedy response/action, especially during Crisis Response Operations. For maximum efficiency and effectiveness, the legal adviser should have a specifically dedicated workspace with computer support in the Joint Operations Centre. The Commander, normally through the Chief of Staff, shall ensure the legal adviser is provided all necessary and relevant operational information.'

NATO Bi-Strategic Command Directive 15-23,
Policy on Legal Support, dated 23 July 2009

5.11. The legal adviser, joint effects and planning staff will typically be in regular discussion about targeting, rules of engagement and influence activities so that the legal adviser is aware of all ongoing issues which require legal input. Legal problems should ideally be resolved by the close cooperation of staff officers and before they reach the commander. The legal adviser must also be proactive, ensuring that they are present at key meetings,⁹⁴ that they make themselves available to the intelligence and operations support teams and always remain

.....
⁹⁴ For example, where appropriate, meetings of the joint command group, joint force planning group, joint coordination board and joint effects.

approachable. The legal adviser also needs to be aware of the legal implications associated with longer range planning and should liaise early with logistics and planning staff to identify and resolve such issues.

5.12. **Recording of legal advice.** The legal adviser makes appropriate records of advice provided on operations and operates a suitable system to maintain that record – this could include a notebook. Legal advice is often a key consideration in the commander’s decision-making process and accordingly is an important part of the audit trail.



Appropriate records of legal advice should be kept for audit purposes

Section 4 – Support for the operational legal adviser

UK legal chain of command links

5.13. Legal advisers within the chain of command are in close and regular contact with each other throughout an operation. The joint task force headquarters (JTFHQ) legal adviser has a pivotal role in a joint operation, feeding information up and down the legal hierarchy at the various levels of command and coordinating the

.....
95 Commanders will wish to ensure that this is complied with to the extent that operational circumstances and legal resources permit. This is a UK added footnote, not part of the NATO Directive.

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The single-Service legal branches **must ensure that legal advisers have the requisite training and experience.**

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discussion, management and resolution of legal issues within the battlespace. Legal advisers work in support of their commander and are integral members of the command team; but, whilst they are not directly accountable to their single-Service legal heads when on operations, they should be free to engage with their head of single-Service legal branches if they have any questions or concerns about legal issues in the operation.

5.14. Legal advisers at every level need to be aware of the UK national position on a given issue, whether that is dictated by the law, by Government policy or by a combination of both. It is important that the legal adviser ensures that their advice to the commander takes due account of the UK position. This applies not only for UK-led operations but also for operations where the UK is a participating nation. The linkages between the PJHQ, the national component headquarters (NCHQ) and the various UK contingents within the multinational components are just as important as the lines of communication from PJHQ to the JTFHQ and the component commands for a UK-led operation. Component and contingent commanders' legal advisers should highlight important legal issues for the JTFHQ/NCHQ legal adviser, even if they are full command issues that are strictly outside the legal jurisdiction of the Joint Force Commander, who exercises operational command only. This enables a clear picture to be compiled in the joint operations area and to improve communications back to the higher headquarters.

5.15. Where operational circumstances permit, reachback arrangements may be put in place. This gives the commander access to legal advice or additional legal support.

Alliance and coalition legal advisers

5.16. Each deployed nation's order of battle (ORBAT) will include lawyers. The lawyers must establish close links with each other from the outset to achieve a common understanding, to resolve ambiguities and to highlight legitimate differences that need to be taken into account. Embedded UK legal advisers in coalition headquarters may work to non-UK rules and procedures where there is no conflict with UK domestic law or policy.

Links to humanitarian advisers and non-governmental organisations

5.17. The legal adviser is well placed to understand the interests and objectives of non-governmental organisations and to liaise with the commander's humanitarian adviser. The International Committee of the Red Cross (ICRC) is an important actor

in many operations, ranging from peace support operations to armed conflict. The UK values a good working relationship with the ICRC, and the legal adviser should be one of a number of principal points of contact on the joint staff.

Training

5.18. The single-Service legal branches must ensure that legal advisers have the requisite training and experience. Each Service provides Service-specific operational law training that focuses on the primary activities of that Service. Such training may need to be supplemented where legal issues relating to other operational domains outside the single Service focus arise at the operational level. Before deploying, the legal adviser should attend other relevant single-Service operational law courses, and potentially courses provided by our international partners.

Key points

- The legal adviser's overriding duty is to provide the commander with timely, accurate, relevant, succinct and robust legal advice.
- The commander will get the best out of their legal adviser by taking them into their confidence, sharing their intent in detail, and allowing the legal adviser to get inside their mind.
- The law applicable to a military operation may change as the operation develops and each operation will have unique features.
- The commander needs legal advice to ensure that their operational decisions are in accordance with the law. Other than the commander, the legal adviser needs to develop their closest working links with the chief of staff, deputy chief of staff, policy adviser, J3 joint effects and J5 planning staff.
- Legal advisers within the chain of command are in close and regular contact with each other throughout an operation.
- Legal advisers at every level need to be aware of the UK national position on a given issue, whether that is dictated by the law, by Government policy or by a combination of both.



Lexicon

Part 1 – Acronyms and abbreviations

AP	Additional Protocol
AJP	Allied joint publication
CDS	Chief of the Defence Staff
CNLS	Captain Naval Legal Services
CONOPS	concept of operations
CPERS	captured persons
DALS	Director Army Legal Services
DCDC	Development, Concepts and Doctrine Centre
DCMO	Defence Crisis Management Organisation
DIN	Defence Instructions and Notices
DLS (RAF)	Director Legal Services (Royal Air Force)
GC	Geneva Convention
HADR	humanitarian assistance and disaster relief
HMG	Her Majesty's Government
HQ SJC (UK)	Headquarters Standing Joint Command (UK)
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
IHL	international humanitarian law
ISAF	International Security Assistance Force
JDN	joint doctrine note
JDP	joint doctrine publication
JFHQ	joint force headquarters
JSP	joint Service publication
JTFC	joint task force commander
LEGAD	legal adviser
LOAC	Law of Armed Conflict

Lexicon

MACA	military aid to the civil authorities
MC	military committee
MOD	Ministry of Defence
MODLA	MOD Legal Adviser
MPE	materiel and personnel exploitation
NATO	North Atlantic Treaty Organization
NCHQ	national component headquarters
NEO	non-combatant evacuation operation
ORBAT	order of battle
OSJA	overseas security and justice assistance
PJHQ	Permanent Joint Headquarters
ROE	rules of engagement
SJFHQ	Standing Joint Force Headquarters
SOFA	status of forces agreement
UKNSC	UK National Security Council
UN	United Nations
VCP	vehicle checkpoint

Part 2 – Terms and definitions

This section lists the terms and definitions used in this publication.

Law of Armed Conflict

Those treaties, conventions, rules, regulations and customary international law that govern the conduct of hostilities and the protection of persons in enemy hands during an armed conflict and/or during a military occupation. (JDP 1-10, 4th Edition)

use of force incident

An incident where shots or munitions employed⁹⁶ or controlled by UK forces are known or believed to have resulted in the death or injury of any person. This includes all types of munitions: sea-based, land-based, air-delivered, direct or indirect. (PJHQ Standard Operating Procedure 3004, *Incident Reporting*)

captured persons

The generic term given to all individuals who are captured and held by UK Armed Forces on operations overseas, whether they are prisoners of war, protected persons as defined in Geneva Convention IV, or detainees or security internees, whether or not the Geneva Conventions apply. (2016DIN03-011, *MOD Strategic Detention Policy*)

legal adviser's role

Supporting the Commander by identifying and recommending courses of action that strive to meet the Commander's intent while minimizing legal risk, promoting the rule of law, protecting human rights, and adhering to the highest standards of legitimacy for NATO actions. (NATO Bi-Strategic Command Directive 15-23, *Policy on Legal Support*, dated 23 July 2009)

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96 Including buddy-lasing for coalition forces.



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