Practicing Law on a Different Battelfied

Jacob Reimers
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"Apart from the graceful foresight of God the Almighty, the strength, wealth and security of the Kingdom rest on the navy."
—Christian IV, King of Denmark 1588-1648

I. INTRODUCTION

I am pleased to have this chance to write about the function of legal adviser to the Danish armed forces. I will focus on the navy, which is my branch, and on peace support operations, which are the primary function of the modern Danish military. The contents of this Article are my private views. I do not go into specific details, because I aim to provide a broad impression of some aspects of the role of military legal adviser in a time when conceptions of conflict are rapidly changing.

The position of legal adviser to the Danish Armed Forces is relatively new. Created in 1997, the office consists of one legal adviser for the Joint Staff, one for each branch of the armed forces (army, navy, air force), and one for the Danish reaction forces, five in all. We do not possess a large staff—or any staff for that matter—so our responsibilities include legal research and the production of legal guidelines, as well as day-to-day necessities, such as drawing up military contracts. There are, however, thirty-seven reservist legal advisers who can be called upon to serve the entire military in wartime. That number should satisfy the need to give proper counseling to military commanders in times of heightened conflict.

The primary function of the legal adviser is to counsel force commanders in the permissible use of force. Our recommendations are based on the various sources of international humanitarian law, the mandate for the specific mission, and any applicable domestic legislation. The latter requirement can be particularly troublesome, because numerous countries' domestic law may apply when a multinational force is assembled. These limitations are combined into a set of regulations called the “Rules of Engagement.” These Rules spell out, in plain language,

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the rights and duties of the individual commander or soldier in various wartime situations.

The need for these rules of engagement stems from the fact that modern hostilities are most often low-intensity conflicts which require commanders to be able to regulate his use of force according to the appropriate level of conflict intensity and, especially, to the political situation. Previously, hostilities tended to take the form of formal wars, where the rights and duties of the involved parties were laid out in the various conventions and customs making up humanitarian law, such as the Geneva Conventions and Protocols and the Hague Conventions. Most armed forces are still organized and trained for this type of fighting. The process of restructuring the military to address the need of modern conflicts is an enormous task, not made easier by the constant demands of politicians.

An example of this predicament occurred during the Cold War. The Danish navy had prepared to defend the Danish straits thereby blocking the Soviet fleet’s exit from the Baltic Sea. This kind of fighting could be prepared well in advance and to a very high degree of detail. The enemy was well-known, and thus the battle plans had been scrutinized well before any actual combat. The scene of the clash would be very close to home, giving us such logistical advantages as alleviating any need to have an immense support network available as the military had ready access to supplies. In those days there was less need for a legal adviser close at hand because the scenarios that we operated under did not include the complications inherent to modern military operations within the political and legal limits of peacetime. At that time, all of the military’s extended authority was expected to be used in support of the operation. Any legal issues were discussed at a very early stage, and changes in the scenario were highly unlikely.

Today, the military is often employed far from Danish territory; Danish soil is mostly unthreatened. Instead, the expected role for the navy is to be the backbone of internationally ordered deployments around the world. This role requires a radically changed view of military operations. As a result, a much finer balance has to be achieved between peacetime restrictions and the need to fight effectively. This makes the battlefield, or the mission, much more complex for the military commander.

This complexity is not so much the fault of the legal adviser, as that of the political restraints put on the mission he must advise. Politicians are notoriously reluctant to define conflict situations as exactly that, conflict; and thus their reticence restraints military operations unnecessarily. In these situations, counseling the military not only requires a firm knowledge of various legal disciplines and of world politics, but also an ability to convince military commanders about the limitations imposed on him by law. At the same time, the advisor must recognize the commander’s military needs and give him the necessary freedom to carry out an often thankless assignment. In my experience, military personnel tend to focus primarily on getting the mission accomplished, while legal advisers focus on ensuring that it is accomplished, but not at
any cost. In other words, the advisor must ensure that military convenience does not take the place of military necessity.

Today, military operations have come more directly into the public eye. This public awareness brings with it some new demands and expectations. As a result, the legitimacy of the military has changed radically—at least from a European point of view. How can a legal adviser facilitate this development? Should he follow the evolution from one step behind with the traditional caution of lawyers, or should he participate in developing new ideas for solving ever-increasing demands?

II. MARITIME PROBLEMS

I will start with a short story that describes the problems modern armies confront in their deployments around the world. While returning from its mission in Kosovo this summer, the Canadian military became an unwilling participant in a contractual dispute. The situation arose because Canada did not possess the necessary logistic resources to transport its armed forces to Europe. (Many countries have recently faced the same difficulties. Even the United States encountered this problem during its mobilization in the Persian Gulf prior to Desert Storm.) Because transportation plans were based on the existence of a state of war, the military assumed the ability of states to commandeer the necessary equipment. These powers do not exist, however, without a formal declaration of war.

Canadians thus turned to the most natural solution—they chartered civilian transport capacity. Unfortunately for the Canadian government, the contractor had to engage a subcontractor in order to deliver capacity sufficient to fulfill the contract. During the transport itself, the contractor and the subcontractor got into a dispute about payment.

In accord with usual business practice, the subcontractor threatened to keep the ship anchored at sea until his demands were met. For the Canadian military, which had 10 percent of its armored vehicles on board the ship, this was not a satisfactory situation. Thus, the Canadian government dispatched two warships and authorized an armed boarding to seize the transport ship and bring it to port.

Needless to say, there were not many kind words regarding the contractual negotiations at the root of the problem, and there was a great deal of dismay within the military regarding these events. After bringing the ship home, the Canadian military was still left with the problem of ensuring that the situation did not recur in future deployments.

As a result of this new world order, the Danish armed forces face similar challenges in the near future. Hopefully the Canadian experience will guide us when entering into contracts with private companies. Obviously, using methods bordering on piracy does not facilitate contractual negotiations.

Military contracts differ from ordinary charter contracts because of the nature, and necessity, of the cargo. In commercial matters, economic remedies for breach of
contract are expected to suffice. As the Canadian example illustrates, economic remedies may be insufficient for military cargo. The military simply must have timely delivery of the materiel, since an entire combat operation depends upon it. The Canadians were lucky that the incident happened on the return voyage. Unlike in commercial contracts, where the stakes are “only” financial, the military deals with matters of life and death. These high stakes set equivalently elevated requirements for the contracting partner, and require a great degree of detail in the contract as well as constant supervision of the transport.

Despite the fact that Denmark has several large shipping companies, and thus has access to a large number of ships, transporting a single brigade—about five thousand men and their equipment—will fill Danish capacity. Thus, transport decisions carry momentous weight for the world’s shipping markets. Other countries deploy much larger units, and the overall effect on the world market is tremendous. Unfortunately, politicians often overlook this issue when deciding to deploy a peacekeeping operation.

The mere job of deployment, however, is nothing compared to the military’s constant need for daily resupply. This task demands a smooth flow of supplies over very long distances, requiring more ships than the deployment itself. Some countries have resolved this problem by attempting to construct special troop transports which possess the necessary capacity and mobility to address modern conflicts around the world. In doing so, maritime transport has proven very attractive because it is relatively cheap and flexible—although not particularly fast. The downside to owning the necessary maritime transport capacity is that it is expensive to acquire. Before acquiring transport ships, a country must expect that they be used frequently enough to make the cost outlay worthwhile. For small countries like Denmark, it is difficult to foresee sufficiently frequent usage to justify such an immense investment. The limited size of the Danish military puts a cap on the expenses that can be justified.

This is where I as the legal adviser come in. The legal adviser has a counselor’s hand in concluding charter contracts with civilian shipping companies. If this duty is handled correctly, the military will have access to an extremely flexible system of transportation at a very low cost. The mere question of resupply alone justifies this operating procedure. For example, the Allied forces in post-conflict Kosovo daily consume approximately 20,000 tons of supplies. Due to the location of the Balkans, the only feasible way to deliver these supplies is by sea. A military capacity delivery of this amount on a daily basis would require enormous outlays that would only be sensible should the proprietary ships be in constant use in the future. But as the future is unpredictable, the chartering approach offers the advantages of flexibility. A good logistical plan, coupled with good contractual agreements, allows us to exploit the existing shipping capacity of the world market.
III. WAR AND PEACE

As I mentioned earlier, the classical conception of war is not very relevant to the modern international scene. Today, wars are mostly fought on a local scale, with the surrounding countries formally at peace. This causes some confusion about which rules apply, and all too often, military commanders get it wrong. This problem has been observed with great frequency in the Balkans (I dare say anywhere where peacekeepers are present). Even the lawyers often lack a full grasp of the countless conventions, regulations, and resolutions that apply to a conflict. Because of this confusion, as well as the military commander’s frustration and desire to “get the job done,” situations are often handled “as we always do it” without regard to the legal requirements.

For example, the North Atlantic Treaty Organization (“NATO”) bombing campaign in Kosovo in 1999 was not declared to be a “war” within the formal meaning of that term. Nevertheless, certain human rights were suspended during the hostilities out of necessity, and now NATO has been charged with violating the human rights of some Serbians. This is paradoxical, as the campaign’s primary purpose was to protect human rights. Nevertheless, because of a formality, NATO has been accused of being the violator of human rights. Thus, a formalistic view of this case ignores the fact that an actual state of war existed—even if one was not declared—which allowed for certain specific deviations from human rights conventions.

Sometimes a legal adviser has been seen as the warmonger, since actually declaring a state of war is often the only way to trigger the protections of humanitarian law. Ironically, escalation of a conflict is sometimes the best protection for civilians, as there are few rules applicable to the gray area between “war” and “military enforcement operations.” International law still needs to be developed in such a way that it can provide feasible guidelines for the hostilities that arise in modern conflict and peacekeeping situations.

IV. PEACE SUPPORT OPERATIONS

As I describe above, modern conflicts are not the type of all-out conflicts that the world prepared for during the Cold War or had experienced in the two World Wars. Leaving aside the 1991 Gulf War, today’s conflicts are most often internal struggles or local wars. The conflict in the former Yugoslavia is a good example of this type of mixed conflict with some of the military’s new roles. The evolution of the various peacekeeping mandates clearly showed that the world was not prepared for a “Yugoslavian” style of conflict. The first peacekeepers in Yugoslavia—the United Nations Protection Force (“UNPROFOR”)—had an extremely limited set of rules of engagement. This meant that they had little power to enforce their mandate, a role which was well in line with the United Nation’s traditional approach to peacekeeping. Previous peacekeeping operations were almost always based on Chapter VI of the UN Charter, which states that a peacekeeping force must respect the limits dictated
by the parties to the conflict. UN tactics did not begin to change until the failures of the mission in the former Yugoslavia became obvious. The United Nation's existing Stabilization Force ("SFOR") mission has a different set of rules of engagement that are decidedly more robust than the UNPROFOR rules. They are based on Chapter VII of the UN Charter, which empowers SFOR to impose its will on the conflicting parties.

From a legal point of view, it was evident that the basis for handling the conflicts in the Balkans was not found in the standard laws of armed conflict. Even though the situation was by Geneva Conventions all definitions to be regarded as an armed conflict,¹ it was instead classified as a "local" conflict. Pursuant to UN resolutions and agreements, the surrounding states sent peacekeeping troops. Because the contributing states were formally at peace with the countries that they were policing, a number of agreements had to be concluded with the "hosting" countries, such as Bosnia and Croatia. Needless to say, those agreements could not be adequately disseminated down through the system in the countries of the former Yugoslavia. That made it necessary for the peacekeepers, bound by UN resolutions, to engage the local warlords, not so bound, in an uphill battle. UN forces had to maintain a precarious balance between respecting the sovereignty of the host countries and enforcing the peace treaties.

The problems that the United Nations faced were not simplified by the fact that so many countries sent peacekeeping troops. To avoid complete organizational chaos, various countries worked together in multinational units. Denmark's contribution to SFOR, for instance, was part of a battle group which included Sweden, Finland, Poland and the Baltic States. That alone could make the mouth water for any professor of international private law. It is further complicated, however, by the facts that our battle group is subordinate to the American division,² and that because SFOR is operating in Bosnian territory, it had to respect Bosnian law, which is itself unclear in many relevant areas. Rules of engagement are drafted to set forth the legal limits on the use of force. These limits take into account the constraints of humanitarian law, relevant international law (such as human rights laws), the mandate of the specific mission at hand, and the domestic legislation of the host nation. Even after this laundry list of variables, the Rules must take into account the variations in the domestic legislation of the contributing countries. For example, the concept of self-defense is construed differently in various countries. Some states do not allow the use of deadly force to protect objects, while some do not allow the use of deadly force to help other people; but other countries take a very expansive view of self-defense.

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¹. Article Two of the Geneva Conventions states that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Geneva Conventions, Art 2 (1949).
². The American division includes the Russian and Turkish troop contingents.
The Danish interpretation, for example, allows for the use of deadly force to save mission personnel or equipment (regardless of the value). The legal adviser is therefore very important for the commander who wants to ensure that he exploits the full potential of his troops, especially in multinational units.

Fortunately, not all peace support operations are about fighting. Most military time is spent developing a peaceful society in the mission area. The military must be prepared to play a flexible role in facilitating peace-building. In this effort, the legal adviser is deeply involved with building contracts and other legal activities necessary to nation-building. Most of these contracts, however, must be concluded according to the domestic law of the mission area—law with which the foreign military and corporate legal advisors are often not familiar. Because of the difficulties that accompany our efforts to apply foreign law, we conclude most contracts in cash payment upon delivery. While this very basic form of contract had the advantage of being agreeable to most contracting parties, it requires some logistical planning to ensure the correct amounts of money and supplies meet at the specified time and place.

V. CONCLUSION

Practicing law during peace support operations requires a very down-to-earth approach. The people that a military force polices do not understand all the intricacies of legal procedure. The focus is on results, rather than exactness. This maxim holds true for both the locals in the mission area, as well as the military personnel with whom we work.

As military actions operate within a civilian society with more frequency, the need for seamless integration between the two becomes more pressing. Although it is easier for the military to operate when hostilities are sharply defined, escalating the status of a conflict is often unacceptable for political reasons. By integrating specialist advisers into the military force, we free the military commander to do what he does best, while at the same time we ensure that he bases his decisions on an accurate legal foundation.

Once the legal adviser clearly defines the military commander’s scope and limits of authority, the commander can carry out his mission within the boundaries of his mandate while simultaneously securing the legitimacy of the operation. In the example involving the bombing of Kosovo, the mandate was too narrow, due to the perceived political ramifications of declaring war. In some ways, it is regrettable that politics proceed in this manner. But the truth is that the rules regarding modern conflicts are so profuse and varied that few people have a comprehensive grasp of them, while the focus on breaches of the law in these conflicts has become quite intense.

The legal adviser has to be inventive in his approach to solving problems. To make it possible for a multinational force to function requires working around the many barriers and pitfalls of international and domestic legislation. Of course, being
too inventive can bring a legal adviser on the wrong side of the law, and in this area of work, a risky legal determination can have drastic effects. If the legal adviser is used to his full advantage, however, a military can operate seamlessly alongside a civilian society. By creating the necessary link between the different areas of law that regulate modern military situations, the legal advisor ensures that society, both at home and in the mission area, is disrupted as little as possible when resort to force is necessary.